LEGAL DEVELOPMENT AND TRENDS OF THOUGHT IN 20TH CENTURY ENGLAND *

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I

A volume with the title "Law and Opinion in England in the 20th Century" published under the auspices of the London School of Economics and Political Science must obviously invite assessment by at least two standards, both of them exacting. The title itself invites comparison with A. V. Dicey's famous study, *The Relation between Law and Public Opinion in England in the Nineteenth Century*, published in 1905, with the notable Preface to the Second Edition in 1914. The auspices of publication invite comparison with the volume on *Modern Theories of Law*,[1] published over a quarter of a century ago.

It may be affirmed immediately, as to the latter, that this book does no less honour to the auspices of the London School than the earlier one. It is designed to explain events and trends of the English legal culture of our century, while *Modern Theories of Law* was concerned with the then major contemporary trends of theory mainly in European and American legal cultures. The two books differ also, of course, in that the present work is mostly focussed on changes in legislative policies and trends, the earlier on juristic theorising. But each of them has a timeliness of presentation, and an aptness of vision for the moment of presentation. Neither is a pioneering work in a literal sense (even if we think only of English language publications);[2] but they are both well designed to co-ordinate the results of pioneering efforts and to present them compendiously as a *point d'élan* for contemporary thinking for law teachers, students, and all who are busy with the practice and administration of the law. This is the kind of contribution to be expected from the London School; we are heavily in its debt for meeting our expectations.

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[1] With W. Ivor Jennings as Editor, published in 1933.

[2] In *Modern Theories of Law* only the chapter on Institutionalism and Petrazycki could be so described. The present work has been preceded notably by W. Friedmann, *Law and Social Change in Contemporary Britain* (1951), even if we leave aside articles and substantial treatments in general treatises such as the present writer's *The Province and Function of Law* (1946) pp. 488-786, esp. 487-669. This last work is hereinafter cited as "Stone, *Province*".

The comparison invited by the title with Dicey's well-known lectures may perhaps lead some reviewers into undue severity. It is true that the Editor gives as the purpose of this volume the "continuation of that work to take account of the developments since it was written and a widening of it so as to explore not only the field of legal changes, but the wider aspects of social policy".[3] But this presumably is all that is imported by the adoption of Dicey's title; it indicates, in short, the range of contributors' interests envisaged. No doubt, a sole author would be rash to adopt such a title; for he might be thereby understood to convey not merely the range of his task, but the claim that his performance is worthy of comparison with Dicey. Professor Ginsberg as Editor was entitled to discount the chance of such misunderstandings in the case of a book which is really a rather unintegrated symposium of no less than seventeen authors.

II

It may be that more integration would have been achieved if the plan for a historical introduction had not been frustrated by illness of Mr. H. L. Beales. As it is, of the three connecting links which run through the volume, only one achieves the prominence of a constant theme, the obvious but profoundly important one, that the twentieth century follows after the nineteenth century. A second, rather more tenuous link, is the relation between law and opinion, more tenuous because it is variously (and sometimes casually) interpreted by the contributors. Sometimes, indeed, it almost seems as if each lecturer after being assigned his subject had his attention drawn to the words "Law and Opinion" in the title, and to the desirability of making some relevant reference to Dicey's classic in relation to his assigned subject. A third theme, central in Ginsberg's opening philosophical essay, and frequently recurring, is that issues at present important in law, politics and philosophy cannot be adequately examined in terms of the antithesis between individualism and collectivism.

The treatment of the law and opinion theme ranges from important theorising in the abstract, through various degrees of concreteness. With Plamenatz's reassessment of the philosophical radicals the abstraction is quite near the urgent problems of our generation. The philosophical radicals, he recalls, believed that government ought to give men what they want, and not what they ought to want, and that the best way to assure this was to make government responsible. But they did not believe that men at large were always "good judges of what their rulers ought to do in order to enable them to get it". Despite words of scholarly caution, it is clear that J. P. Plamenatz offers this interpretation of the philosophical radicals as a major caveat on the thesis of the correlation between the growth of law and public opinion often imputed to Dicey. Insofar as such an interpretation were accepted, the thesis would indeed be drastically qualified. The correlation to be sought would then often not be between *public* opinion (that is opinion of the community at large) and law, but rather between *law-making* opinion and law. And unless we are provided with some other means of identifying "the law-makers' " opinion, we would be left in somewhat of a circuity.

On the more concrete levels perhaps the most stimulating treatments are those of Professor J. A. G. Griffith ("Law of Property (Land)"),[4] and of Dr.

[3] P. vii.

[4] Pp. 116ff., *passim*, esp. 121ff., 141-42.

Herman Mannheim ("Criminal Law and Penology").[5] The former is concerned to question somewhat bitingly the "intellectualised" notion that opinion determines law by a series of changes proceeding through books, writing and movements, leading to propagandist organisations, and then to adoption of planks into party political platforms, to the establishment of Royal Commissions, etc., to their reports, and finally to legislation. "Opinions and knowledge," he thinks, "are imperfect manifestations of human prejudices and passion and so remain but partial determinants of the struggle for power."[6] These acute observations receive much support throughout these lectures even when they are not expressly considered. The lectures on health and social security, in particular,[7] abound in illustrations.

Mannheim, on the other hand, is not concerned so much to challenge the potency of public opinion, as to show how difficult it is to know exactly what public opinion really wants.[8] More often than not, he thinks, the influence of opinion on law reform is not to support it by group convictions, but to retard it by the absence of convictions, and therefore by the inability of reformers to vouch any opinion but their own to support the demand for change. And even when citizens manifest, on an individual level, attitudes which if collectively expressed would constitute a supporting public opinion, such expression is not forthcoming. He thinks, for example, that the failure of the Wolfenden Report to produce any reform in relation to homosexuality is but one illustration of this merely negative function. Public opinion in its bearing on criminal law, even when it can be ascertained, operates (he concludes) in our day rather as a brake than a guide.[9]

It must be said, however, that most of the lecturers showed themselves far more interested in the substantive subject assigned to them than in theorising about the interplay of law and opinion in its development. References to the problem are made in particular contexts, sometimes significant but shading too often into little more than a perfunctory salute to this part of the terms of the assignment. Even Professor Gower, in the rich area of business law, seems somewhat too eager to get it over and done with, though he succeeds in raising some issues which perhaps merit a paragraph or two of comment.

III

"All we are concerned with,"[10] he says, "is whether these developments (in business law) are the results of public opinion or of a particular legal philosophy." He can see, for instance, no connection between public opinion and the growth of the corporate form in industry. "No . . . theorist . . . advocated these developments in advance of their occurrence." This surely is to fail to do justice to the issue. The modern corporate form in industry was no doubt in one sense the result of exploitation of a technical invention, namely the easily formed limited liability corporation. The issue concerning law and opinion, however, is not wholly, or even mainly, whether the corporate form somehow sprang from public opinion. It would be much better stated by asking

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[5] Pp. 264ff., *passim*, esp. 283-85.
[6] P. 142.
[7] Beginning respectively at pp. 299, 364.
[8] Pp. 264ff., *passim*.
[9] Pp. 282ff.
[10] P. 146.

how the general transformation of industrial and commercial legal relations (of which the corporate form is one incident) is to be related if at all to changes in public opinion.

Obviously, a main source of the dominance of the corporate form lies in changes in the productive process created by the industrial revolution. Yet, it would also surely be purblind not to recognise the relevance to the success of the corporate form, of the grave dissatisfaction of business men a century and a half ago with the partnership and joint stock company forms, in a period of economic growth requiring the marshalling of vast aggregates of capital. So also with the fact that self-interested groups may miscalculate what they need to further their interests, for example, when businessmen pressed for the introduction of limited partnership in the Companies Act, 1908, and then left the innovation virtually unused.[11] It is tempting to conclude that even this kind of opinion is without much influence. But a fairer conclusion would be that mercantile opinion pressing for further facilities for marshalling capital continued to be important, and was increasingly persuaded by experience after 1907 that the floating charge over the assets of limited liability companies was the most effective marshalling device.

It scarcely does justice to the problem merely to say that "circumstances rather than opinion seem to have led to the present organisation of business".[12] The interesting questions are not merely whether at a particular time, or at a particular phase of a particular problem, "circumstances" *or* "opinion" bring about a legal reform. Opinions (including political doctrine held by smaller or larger groups) are always a part of the circumstances; and it is no less clear that the mere existence of "circumstances" tends somehow to be transmuted into opinion.

One could question, for example, whether niceties of United States judicial elaboration of the anti-trust law under the Sherman Act, 1890, and the complexities of anti-trust administration "are the results of public opinion or of a particular legal philosophy". Yet A. D. Neale is surely correct when, in his remarkable book *The Anti-Trust Laws of the United States of America* (1960), surveying the numerous forces which have lain behind the seventy years history of anti-trust law in the United States, he sees the "American distrust of all sources of unchecked power"[13] and the anti-Big Business sentiments of small traders and producers and political radicals, as well as the concurrent (and somewhat inconsistent) American admiration of the successful giant of commerce and industry, as more determinative of "the anti-trust policy than any economic belief or any radical political trend".[14] And when he considers the aptness of the American model for the British scene, he fixes as the source of the most crucial differences, the different attitudes of the two societies, both generally, and in the pressure groups involved, towards the concentration of economic power, and towards the place of judicial processes in the dispersal of concentrated power.[15]

A decade and a half ago, the present writer ventured to criticise Dicey's acceptance as a kind of unexamined datum that opinion in England, at about 1860, moved from a *laissez-faire* to a collectivist orientation, leading to the growth of "collectivist" legislation. But to treat circumstances *rather than*

[11] L. C. B. Gower at 145.
[12] P. 151.
[13] P. 422.
[14] See esp. 419-471.
[15] See pp. 475-503, esp. 475-76.

opinion as the *primum mobile* is open in substance to a similiar criticism. One really important task, as Karl Mannheim observed a long time ago, is to try to understand the kind of transmission belt on which facts (including operative law) are conveyed and transmuted into opinion. Another, on which Professor Gower and his colleagues shed a great deal of light in these chapters, is how far the "opinion" which makes itself effective is the opinion of special groups, whether of self-interested groups like businessmen in relation to commercial law, trade unions or employers' organisations in relation to labour relations, education and social welfare services, or of disinterested groups such as the Howard League and the psychiatrists in relation to criminal law and punishment.[16] Another, on which the chapters here on health, social security and education are particularly stimulating, is the snowballing growth of opinion favouring redistribution of wealth through State welfare activities, springing from party competition for the support of voters under universal suffrage. Here, as it were, the initial legislative innovation creates the law-making opinion required for its further extension by a kind of reciprocating auto-genesis. As Professor Gower well observes, the estate duty on estates worth more than £1 million was only 8% at the time that Dicey was complaining in 1914 about the excesses of collectivism, and the maximum income tax on any level of income was only one shilling in the pound.

IV

A book so wide and varied in ambit deserves to have its specific subjects sampled along with its main themes. Ginsberg's essay on "The Growth of Social Responsibility" is centred, as we have seen, on the philosophical issues underlying the trend from individualism towards collectivism as Dicey detected it, and the general relations between changes in thought and social upheaval. And he brings these issues sharply home to our own day, in the problem of controlling the power of State authorities and of other organised groups in developed democracies, now entering upon a new industrial revolution where adequate planning is vital; as well as in the problem of adapting and operating "social democracy" in undeveloped countries seeking rapid economic advance.

What legacy of these and other social problems was bequeathed us by the philosophical radicals is the concern of J. P. Plamenatz. This necessarily involves a reinterpretation of their thought in the light of later social change and contemporary social problems. Plamenatz (as we have also seen) thinks that the philosophical radicals (unlike the liberals) were committed only to accepting *the goals* that people seek, and not necessarily *the means* by which people think they can be attained. And by the same token, because they did not believe that men necessarily knew whom to choose for their rulers in order to help them get what they want, the philosophical radicals were not committed to the view that democracy was necessarily the best form of government for all peoples. It follows, in his view, that the philosophical radicals would not, at the present time, have made democratic government their universal recipe for many of the undeveloped States of Asia and Africa.[17] He thinks, too (obviously

[16] See the lectures on these respective matters.
[17] Pp. 23-26.

with his eye on modern means of mass persuasion), that though the philosophical radicals scarcely thought in these terms, they would, if alive today and still logically consistent, say that "if we can mould men's desires in such a way as to make it easier to satisfy them", we ought to do so. And this, he admits, is a thought rather horrifying to the modern liberal, for whom moulding other people to suit ourselves comes near to mortal sin.[18] He thus restresses the importance, adverted to by the present writer sixteen years ago, of recognising that the concurrence of individualism and utilitarianism in Bentham and his followers is rather a function of their historical context, than a necessary and permanent kinship of ideals. "There is a utilitarian socialism as well as a utilitarian individualism."[19] Like Ginsberg and others in this volume he thinks that the final issues can no longer be formulated in Dicey-like terms of the contrast of individualism and collectivism.

This theme becomes central in W. L. Burn's "The Conservative Tradition".[20] He shows vividly how remarkably flexible group convictions have become in our rapidly changing world, even when they are welded to the most entrenched vested interests. The failure of the British Conservatives to protect when in power what formerly they regarded as the sacred individual rights of property and liberty, goes beyond mere failure to unscramble scrambled eggs. Again and again they have proceeded rather to endorse the recipe and scramble more eggs. Even when occasionally, as with the Trades Disputes Act 1927, the Conservatives redressed the legal balance on class lines, the consequences have not in practice been great. No civil litigation, and only one criminal conviction (upset on appeal) sprang from the 1927 Act; and after it was repealed by the Labour Government in 1946, the Conservatives, when *they* were returned to power, neither restored the 1927 Act nor enacted any substitute for it. British conservatism, in short, has not shown itself inseparably wedded to any concrete policies whether social or individual, whether tied or not to property interests. What it has shown itself determined to conserve, is whatever at the particular time has happened to be the *status quo*. All this accords with Pickthorn's aphorism that a conservative is one "who believes that in politics the onus of proof is on the proposer of change".[20a] Dicey's assumption that the collectivism which he thought so menacing in 1914 was somehow tied to working class opinion, while individualism was tied to that of the middle and upper classes, has to this extent been falsified by events.

Neither have organised workers, for that matter, always been obedient to Dicey's predictions.[21] Trade unions have shifted around, in a manner which Dicey scarcely foresaw, to demanding policies of *laissez-faire*, of hands off, from the law and the Parliament, what Professor Kahn-Freund well calls "collectivist *laissez-faire*". Organised labour, after decades of demanding and obtaining legislative intervention to consolidate its bargaining strength, and to set the ground rules for collective bargaining, now prefers to haggle out its own wages and conditions of work with the strength it has thus consolidated.[22] And this has extended so far that British trade unionists have come often to show themselves reluctant (and even basically hostile) towards the implications of nationalisation, and insistent on *laissez-faire* for collectivist bargaining tech-

[18] Pp. 36-37.
[19] Pp. 11, 12-13.
[20] Pp. 42-62.
[20a] *Principles and Prejudices* (1943) 5, quoted by Burn at 62.
[21] See G. D. H. Cole's retrospect of "The Growth of Socialism".
[22] See O. Kahn-Freund, "Labour Relations" 227-244, 253-263 and B. C. Roberts, at 376-380, 385-86, 387-89.

niques even *vis-à-vis* the State-run enterprise.[23] The reasons no doubt are many and of varied moral purport, ranging from the cynical observation that trade union officials acquire a vested interest in their own jobs, to the recognition by workers that even the socialised State is likely to become a tyrannical employer, if it is the only employer, and is in a position to fix the terms and conditions of employment.

Such considerations, of course, do not explain the inability of the great movement of English political liberalism to maintain its place in the twentieth century, nor its failure to rise again from its defeats after World War I. The tragedy of liberalism arises from both consistency and inconsistency with its own traditions. Its role in pioneering the Welfare State may be said to have sprung from party tactics rather than political principles—to have sprung from its head rather than its heart. In either case it raised to a central place in British politics principles and political forces which were bound to destroy the basis hitherto of the traditional platform of liberalism, whether at the hustings or in the polling booths. This platform had been the dependence of the public good on the exercise by each individual of his right to set his own goals and to pursue them by his own means. The new principles and slogans to which liberalism might have shifted its ground were rapidly appropriated by the other parties, with which, for other reasons, liberalism could not compete. It could not compete with the young Labour Party allied to the trade union movement, for liberalism never quite made up its mind whether trade unions were of God or the Devil. Nor could it compete with the Conservative Party for the traditional title of protector of the right of property.[24]

V

Against this historical and politico-philosophical background in Part I, the "Legal Developments" of twentieth century England are well enough framed. From the jostling host of developments which no doubt competed for attention, the editor selected eight topics in six areas of law particularly rich in their developments: Associations (D. Lloyd); Property (Land) (J. A. G. Griffith); Business (L. C. B. Gower); Monopolies and Restrictive Practices (Sir David Cairns); Administrative Law (W. A. Robson); Labour Law (O. Kahn-Freund); Criminal Law and Penology (H. Mannheim); Family Law (The Hon. Sir Seymour Karminski). It was apparently the design that Part II should provide a kind of legal retrospect terminating in the present; and that this was to be followed by a broad forward prospect in Part III, entitled "Trends of Social Policy", and comprising chapters on Health (R. M. Titmuss); Education (D. V. Glass); Social Security (B. Abel Smith), and Industrial Relations (B. C. Roberts).

Manoeuvre as he may, however, the reader will find no principle on which any of the chapters in Part III can be related to those of Part II; that is, no principle which will also explain the relation of the other chapters of Part III to those in Part II. From the chapter on Industrial Relations he might expect for a moment that Mr. Roberts' account projects into the future Kahn-Freund's earlier retrospect on "Labour Law". In fact, however, Roberts'

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[23] See B. C. Roberts at 364, 382ff.

[24] These and other tribulations of liberalism are well set out in R. B. McCallum's essay "The Liberal Outlook" at 63, esp. 66ff.

account, though interesting enough, is almost as much a retrospect as Kahn-Freund's, and not much more of a prospect. But even if the expected relation were found to exist here, it would still be lacking as between the other respective chapters of the two Parts. Mr. Titmuss's account of Trends of Social Policy in Health cannot be paired off with anything in Part II. It is, in substance, a survey of the movement of opinion, and (even more) of the operation of pressure groups, in the emergence to its present form of the British National Health Service. Why it is to be viewed as a "Trend of Social Policy" rather than a "Legal Development" is not very clear. Certainly it is presented in a manner which stimulates insights as deep and as relevant to the contemporary lawyer as most of what is dealt with under "Legal Developments". And the same comment is to be made on Abel Smith's fascinating account of how the social security laws in Britain came to look quite like they do. Indeed, it is only David Glass's contribution on "Education" to the final Part, itself a masterpiece of comprehensive brevity, which can be said in a substantial sense to provide both a retrospect and a prospect on its subject. And here, too, one is left wondering why its subject could not have been included under "Legal Developments", along with administrative law, associations, business, the family, and criminal law and penology, and the like. The truth is that the final Part on "Trends of Social Policy" simply does not represent a coherent division of the book, in the same way as does the opening Part on "Trends of Thought".

VI

These editorial matters do not, obviously, affect the inherent merits and interest of the contributions. These are mostly so great as to justify this introduction by way of sampling to their many potential readers. The following is a list of but a few of the matters which interested the present writer, sometimes (but not always) because of their relation to positions which he himself had earlier taken in the relevant chapters of *The Province and Function of Law* (1946).

1. The continuing role of trade unions and other voluntary associations in the establishment of minimum standards of individual life.[25]

2. The relation between minimal standards ("subsistence") and the development of social security law.[26]

3. The transformation in British social security law of the vested interest collectivism which Dicey feared, into a system whereby since 1958 the full cost of benefits for new entrants is more than covered by worker-employer contributions.[27]

4. The relation of publicly supported schools to the establishment of minimum standards of life.[28]

5. The continuing effort, and the continuing need for effort, to equalise educational opportunity in Britain, even after the post-World War II reforms.[29]

6. The perplexities produced by trade unionist patterns of industrial relations for Labour Party policy *vis-à-vis* both nationalised industries[30] and

[25] B. Abel Smith at 347-363 *passim*, esp. 349-355, and B. C. Roberts at 364-377. *Cf.* Stone, *Province*, cc. 22, 23.
[26] B. Abel Smith, at 347, esp. 356, 363.
[27] *Id.* at 361.
[28] D. V. Glass at 319-346, esp. 319, 328-29.
[29] *Id.* at 340-46.
[30] See *supra.*

industries publicly controlled in private hands.[31]

7. The hypothesis that the apparent judicial reconciliation after 1930 to the exercise of statutory powers of public bodies in relation to acquisition of land, manifests in part a "leaning over backward almost to the point of falling off the Bench", and "an unconscious attitude that if this were the sort of measures which presumably the electorate had asked for, then the court would show them just what they had got".[32]

8. The power to enforce good husbandry against landowners under the Agriculture Act, 1947, as the product of a compromise between the nationalisation programme of a Labour Party which "never really has known a great deal about farming", and the National Farmers' Union.[33]

9. Provocative challenges to the assumed pattern of action whereby scholarly writings are supposed to mature into legislative reform on social questions.[34]

10. Businessmen as generally conservative rather than progressive in movements for commercial law reform, objecting to disturbance of existing practice, and preferring in any case to keep to their own arbitration procedures.[35]

11. The continuing and accelerating atrophy of individual freedom of contract on both the legislative and judicial levels of activity since World War II.[36]

12. The tendency to maintain "planning controls" in Britain after World War II, as compared with their rapid demobilisation after World War I, and the tendency of opposed party programmes to meet somewhere in the middle in maintaining them.[37]

13. Though the remarkable American system of control of stock market activity, through the Securities Commission and the Securities Exchange Commission, was largely inspired by New Deal idealisation of English company law up to the early 'thirties, the fact that British countries have still not achieved a comparable degree of control.[38]

14. Lawyers, like other conservatives, come to accept and defend the *status quo*, and to forget how revolutionary even that is. It is well for them to be reminded that there were in 1900 only 29,000 companies in the United Kingdom with a total paid-up capital of £1,600 millions; in 1957 there were no less than 331,000 companies, mostly private, which paid in income tax an amount little short of the total paid-up capital of all companies of 1900. No less revolutionary is the impact of such changes on the behaviour patterns of captains of industry and commerce. While formerly, in the nice story retailed by Professor Gower, a British company executive could take his secretary to Paris saying she was his wife, he now, under pressure of the tax gatherer, takes his wife to Paris and says she is his secretary.

15. After more than half a century of doctrinal struggles against it, and a long series of public inquiries and reports, Dicey's hostile version of the French system of separate tribunals to review administrative action, the *droit administratif*, as an invasion of liberty and the rule of law, still dominates

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[31] G. D. H. Cole at 79, 87, 94-96.
[32] I. A. G. Griffith at 119-120.
[33] *Id.* at 137ff.
[34] *Passim.* and esp. J. A. G. Griffith at 140-42, H. Mannheim, at 271ff.
[35] L. C. B. Gower at 143, esp. 167-172.
[36] *Id.* at 143, esp. 161-66.
[37] *Id.* at 151-161.
[38] *Ibid.*

British law and the opinion of British lawyers. It is still in 1959 an event which rejoices Professor Robson's heart that an English judge has unequivocally recognised the realities of comparative administrative law.[39]

16. The remarkable reluctance of the British courts to say what they mean by such basic concepts of family law as refusal to consummate, adultery, cruelty and desertion, is here discreetly noted by the Hon. Sir Seymour Karminsky. It is worth pondering by all lawyers as a reflection not only of changing *mores*, economics, and medical technology (including that of artificial insemination), but also for the heavy responsibility which it throws on sociological and juristic writing.[40]

Here, too, is an area of relations in which, somehow, the "private" opinions of individuals favouring reform do not, *seen in the aggregate*, amount to any public opinion sustaining legal reform—or do so only at a great distance. The main points of A. P. Herbert's bill which became the Matrimonial Causes Act 1937, were anticipated more than a quarter of a century earlier in the Royal Commission on Divorce, 1912. And the provision of the Commonwealth of Australia Constitution Act in 1900 for federal marriage and divorce legislation will only receive its first substantial implementation in 1961.[40a] Such delays occur even as to matters on which the requisite social data are available. What the impact of new techniques of conception and contraception on the tempo and range of legal reform will be, has scarcely begun to be envisaged. Sir Seymour suggests cautiously that "public opinion" in Britain may think that legal changes have already gone "too far", and also (perhaps a little inconsistently) that "further legislation (may be) impracticable until, *if ever*, divisions of public opinion can be resolved".[41]

VII

Professor Kahn-Freund's lecture on "Labour Law"[42] is full of insights which often leave us wondering how they have been so long overlooked. A less summary word may perhaps be permitted both concerning it, and concerning some issues raised by Mannheim. Even when Kahn-Freund falls short of convincing, he always provokes a fruitful reassessment of the situation. Thus his interpretation of the growth of "judicial neutrality" in the conspiracy cases through to the *Harris Tweed Case*, in general agrees with the present writer's.[43] But his final result seeks to justify "judicial neutrality" as implicitly conforming to what he regards as the basic demand of workers' and employers' organisations for neutrality or "hands off", not only by the judges, but by the law as a whole. These organisations, he thinks, steadily demand, in their maturity, to be allowed to work out the terms of service by collective bargaining—their motto (as it were) is "collectivist *laissez-faire*".[44] This interpretation, rationalising as it does the extension to all conflicts with and between organised workers and traders of the attitude classically expressed towards traders' *inter*

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[39] Pp. 193ff. The reference is to Sir Patrick Devlin, "Public Policy and the Executive" (1956) 9 *Current Legal Problems* 15.

[40] P. 286ff. esp. 294-95.

[40a] See the first major commentary on the new Act in Sir Garfield Barwick, "Some Aspects of the New Matrimonial Causes Act", *supra* pp. 409-438.

[41] P. 295.

[42] Pp. 264-285.

[43] See Stone, *Province*, c. 23, esp. pp. 607-632.

[44] See pp. 215-16, 227-252, esp. 230ff.

se conflicts in the *Mogul Case*, has an attractive simplicity, and the *Harris Tweed Case* may be viewed as its full flowering.

Yet, within a few years of the *Harris Tweed Case*, the United Kingdom Parliament drastically intervened to reverse over a wide front this attitude of neutrality of the law; and it did so near the very point of traders' conflicts where judicial neutrality had first established itself. Professor Kahn-Freund may still, of course, prove to be correct in treating collectivist *laissez-faire* as a *terminus ad quem* of British industrial relations. Yet the moment to be certain of this has scarcely arrived, especially in view of the notoriously protracted time-span on which the British Parliament reacts even to some of its most imperative tasks. After all, half a century passed between the *Mogul Case* and the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948.[45] Correspondingly, one is inclined to think that Kahn-Freund may prove to be somewhat idealising the actual when he concludes[46] that the British system of collective bargaining is more like "collective administration" than "collective contracting", stressing negotiating procedure and machinery, rather than a substantive labour code.

The present volume does by good fortune take in the first decade of the Monopolies and Restrictive Practices Act, 1948, as well as the first year or two of the Restrictive Trade Practices Act of 1956. Sir David Cairns' lecture on these matters is a valuable introduction to this new experiment, though it aims more to give an outline of the Acts and of proceedings under them, than to assess the experiment in terms either of their supposed objectives or of foreign experience. The time is still far in the future when British lawyers will take anti-trust law with anything like the seriousness of American lawyers. The first major British work on the American anti-trust law by A. D. Neale appeared, significantly, only in 1960.[47] Yet the British venture obviously builds on some lessons (and some warnings) of American experience. It has recognised from the outset that the economic objectives sought[48] require the flexibility of administration, rather than the rigours of criminal trials, economic research rather than criminal investigations and procedures, registration, negotiation and adjustment of business practice rather than public obloquy and repressive penalties.[48a] Anyone who compares Sir David's account of the first hesitant ventures in the United Kingdom with Mr. Neale's full-scale analysis of seventy years of American experience, will surely regret that Mr. Neale's book was not written a dozen years before and closely studied by all concerned with the introduction of the new legislation. And countries like Australia which are still only on the brink of anti-trust adventuring ought to be correspondingly grateful.

It is usually taken for granted that, somehow, once expertise is brought to bear upon problems of socio-legal reform, results acceptable in terms of democratic processes follow. Not the least important part of what Professor Mannheim has to say of "Criminal Law and Penology"[49] is his questioning—impliedly at least—about this assumption. On some of the sharpest controversies of the day, such as homosexuality, capital punishment and penal flogging, he points out, the confident findings of experts have been, and may remain, at

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[45] 11 & 12 Geo. 6, c. 66.
[46] P. 263.
[47] Cited *supra*.
[48] *Cf.* my summation in Stone, *Province* (1946) esp. 637ff.
[48a] *Cf.* A. D. Neale, esp. 419-503.
[49] Pp. 264-65.

odds with what legislators believe that public opinion will tolerate. This list could, of course, readily be added to, for instance, by many problems of the law of marriage and divorce abovementioned. And while, sometimes, rejection at the political level of expert recommendations may be explained as proper caution in face of doubt whether the evidence is solid enough to be acted upon,[50] the problem is really independent of how reliable the expert finding may be. It may, indeed, throw our attention back finally to the question of the acceptability of the philosophical radicalist thesis that respect for what people in general want does not necessarily import acceptance of the methods by which people in general think these wants should be pursued. And even if that thesis were accepted, we would still be left with the old and basic difficulty of distinguishing between ends and means.

VIII

For the attentive reader deep connections of this kind, many of them commingled with the themes concerning the relation of law and opinion, and of individualism and collectivism, will be found throughout this series of lectures. He will find them often discussed in the interstices of substantive matters, rather than displayed as the framework of exposition; and sometimes he will find them where the lecturer himself may have been inadvertent to them. This, however, is an advantage rather than otherwise; the most coherent theme of this book is, after all, as was said in opening, that the twentieth century came after the nineteenth. The canvas here presented is so broad, and its subjects so contemporary, that any lawyer with social awareness can elaborate his own themes from it. The aliveness of the discussion of overall legislative and juristic trends of the immediate past and present will be what holds the reader, be he lawyer or not. For despite the uneven level of the various contributions, and the imperfect delimitation of their subjects, they provide together a fine conspectus of many of the major points of strain, tension and dynamic movement in the legal order which mothered the Anglo-American common law.

[50] A good instance may be the rejection by the Departmental Committee on Corporal Punishment in 1938 (*Cmd.* 568, p. 33) of psycho-analytical evidence of the sadistic drive behind agitation for its use.

THE GENESIS AND DEVELOPMENT OF EQUITABLE PROCEDURES AND REMEDIES IN THE ANGLO-SAXON LAWS AND IN THE ENGLISH LOCAL AND FAIR COURTS AND BOROUGH CUSTOMS

*DANIEL E. MURRAY**

It has been asserted that "long before the establishment of the Chancery as a court of justice older tribunals had exercised a jurisdiction both at law and in equity. The beginnings of English equity are to be sought in the history of these older courts—the common law courts themselves, the local courts, the ecclesiastical courts. . . ."[1] Other authors have traced the development of equitable procedures and remedies in the Courts of Eyre[2] and in the Royal Courts.[3] This paper will attempt to trace some of the historical antecedents of these procedures and remedies in the Anglo-Saxon laws and their utilization in the English local courts and in the borough customs at the same time that they were being further developed and applied in the Royal courts.

The remainder of this article will be divided into sections dealing with the Royal prerogative to secure justice not available in the local courts, and "equitable" remedies and procedures in actions which we would now typify as being actions for breach of covenant or contract, abatement of continuing trespasses and nuisances, restitution of wrongfully obtained or detained chattels, and actions for waste.

I. THE EXERCISE OF ROYAL PREROGATIVE TO SECURE JUSTICE NOT AVAILABLE IN THE LOCAL COURTS

As is well known, the essence of equity consisted in the petition of a suitor to the King alleging that the petitioner was unable to secure justice either because of some lack in the legal remedies then available or, occasionally, because of the wealth or power of the defendant. In short, equity was an interference with the normal process of the law.[4] It has been demonstrated that this petitionary procedure was not a sudden innovation in the development of equity, but that it was inherent in the emergent common law actions of the eleventh and twelfth centuries.[5]

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[1] H. D. Hazeltine, "The Early History of English Equity" in *Essays in Legal History* (1913) 261.

[2] Y. B. Edward II, Eyre of Kent, 6 and 7 Edward II, 1313-1314, 2 *Selden Society* xxi-xxx.

[3] H. D. Hazeltine, *supra* n. 1; G. B. Adams, "The Origin of English Equity" (1916) 16 *Col. L. Rev.* 87; *id.* "The Continuity of English Equity" (1917) 26 *Yale, L.J.* 550.

[4] G. W. Keeton, *An Introduction to Equity* (3 ed. 1952) 3-4; H. McClintock, *Principles of Equity* (2 ed. 1948) 3-4.

[5] G. B. Adams, *op. cit. supra* n. 3, at 91.

An examination of the Anglo-Saxon laws discloses that this petitionary procedure was not a sudden adoption of Norman laws nor a development of the common law, but that it was a continuation of an ancient procedure. AEthelstan (*ca.* 925-939) promulgated a law that:[6]

> If a lord refuses justice, by taking the part of one of his men who has done wrong, and application is made to the king (about the matter, the lord) shall pay the value of the goods (in dispute) and give 120 shillings to the king. He who applies to the king before he pleads as often as is required for justice (at home) shall pay the same fine as the other would have had (to pay) if he had refused him (the plaintiff) justice.

This law was a seeming recognition that "applications" had been made to the King in such numbers that it had become a burden which had to be alleviated by the imposition of fines upon applicants who had not exhausted their remedies in the local tribunals. Subsequent laws of AEthelstan attempted to implement the above law by providing that "if any man is so rich, or belongs to so powerful a kindred that he cannot be punished, and moreover is not willing to desist (from his wrongdoing), you shall cause him to be removed to another part of your kingdom. . . ."[7] These latter laws, while of very general application again seemed to provide for an extra-ordinary procedure when the wrongdoer was beyond the reach of the ordinary process of the law.

No further laws relating to this extra-ordinary procedure apparently were enacted until the reign of King Edgar (*ante* 962) who reiterated and amplified the law of King AEthelstan:[8]

> And no one shall apply to the king about any case, unless he cannot obtain the benefit of the law or fails to command justice at home.
>
> § 1. If the law is too oppressive, he shall apply to the king for mitigation.

Is not the above subsection a precursor of Blackstone's citing of Grotius's statement that the reason for equity is "the correction of that wherein the law (by reason of its universality) is deficient"?[9]

Unfortunately, the author has been unable to discover any writs issued by AEthelstan or Edgar enforcing their laws. It remained until *ca.* 990-992 A.D. before a subsequent regent, King AEthelred, issued a judicial writ which stated:[10]

> Then the king sent his seal to the meeting at Cuckamsley by Abbot AElfhere and greeted all the witan who were assembled there, namely Bishop AEthelsige and Bishop AEscwig and Abbot AElfric and the whole shire, and prayed and commanded them to settle the case between Wynflaed and Leofwine as justly as they could.

This equivocal writ could be interpreted to mean that the King was conferring jurisdiction to hear this case upon the *witan*, or that the *witan* was to act justly in the matter, or possibly that the *witan* was to expedite the matter. Whichever interpretation be correct, it does reflect a direct intervention by the King in the judicial process. Subsequently (*ca.* 995-1005/6), King AEthelred again issued a writ which stated:[11]

> When the claim was known to him, he sent a letter and his seal to Arch-

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[6] AEthelstan 3, Attenborough, *The Laws of the Earliest English Kings* (1922) 129. *Cf.* transl. in 1 *Eng. Hist. Documents* (1955) 382.

[7] IV AEthelstan 3, Attenborough, *op. cit. supra*, at 145.

[8] III Edgar 2, A. J. Robertson (ed.), *The Laws of the Kings of England* (1925) 25. *Cf.* transl. in 1 *Eng. Hist. Documents* (1955) 396.

[9] 1 Bl. 62.

[10] F. E. Harmer, *Anglo-Saxon Writs* (1952) 541.

[11] *Ibid.*

> bishop AElfric, and gave him orders that he and his thegns in East Kent and West Kent should settle the dispute between them justly, weighing both claim and counterclaim.

This writ fails to mention any tribunal, hence it may be interpreted as a command to settle the dispute in an extra-judicial manner. However, the words "claim and counterclaim" may indicate the pendency of litigation in the strict sense. In any event, the king was exercising his royal prerogative to effectuate justice.

Another historical hiatus of approximately twenty years occurred before King Canute, following the example of his predecessors, enacted (*ca.* 1027-1034), "And no one shall appeal to the king, unless he fails to obtain justice within his hundred". In partial implementation of this edict, the law further provided that the borough court was to be held three times a year and the shire court twice a year, "unless need arises for more frequent meetings". This same section further provided that the bishop of the diocese and the ealdorman should attend the courts and "they shall direct the administration of both ecclesiastical and secular law".[12] Although both systems of law were to be administered in the same court, this law seemed to recognize the dichotomy.

Unfortunately, no further Anglo-Saxon laws have been discovered relating to this prerogative right of the king. The so-called laws of William the Conqueror which *may*[13] have been in effect after the Conquest, copied, in almost a verbatim manner, the prior law of Canute, "And no-one shall appeal to the king until he fails (to obtain justice) in the hundred or county courts."[14] In spite of the doubtful authenticity of this "law", the Conqueror, in at least seven and perhaps sixteen cases, intervened by ordering the creation of a special court *in meo loco* to try these cases. Some of these cases involved the activities of county courts, but the addition of royal commissioners in effect made them royal rather than local courts; hence any discussion of these cases is beyond the scope of this article.[15]

II. EQUITABLE REMEDIES IN CONTRACT AND SALES CASES

Rescission and Restitution

A searching examination of the Anglo-Saxon laws discloses that the Anglo-Saxons must have had some conscious or sub-conscious feeling that money damages ordinarily would be adequate compensation for the injured party when the damage or injury occurred as the result of a breach of a contract of sale. This seems logical in that the law of "contract" and "sale" was quite rudimentary, generally dealing with the sale of livestock or articles of an easily fixed value.[16] It is therefore difficult to piece together any general pattern of law providing for the rescission of a sale with the consequent return of the article to the vendor and the restitution of the purchase price to the purchaser. However,

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[12] II Canute 17 and 18, Robertson, *op. cit. supra* n. 8, at 183. Translation not given in 1 *Eng. Hist. Documents.*

[13] See Robertson, *supra* n. 8, at 225-226.

[14] The (So-Called) Laws of William I, Cap. 43, Robertson, *supra* n. 8, at 273.

[15] G. B. Adams, "The Local King's Court in the Reign of William I" (1914) 23 *Yale L.J.* 490, 505-510. For subsequent developments after the Norman Conquest see, Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (1958-59) 77 *Selden Society.*

[16] J. Stone, "The Transaction of Sale in Saxon Times and the Origins of the Law of Sale" (1913) 29 *L.Q.R.* 323, 442. For later developments in the law of contracts, see R. L. Henry, *Contracts in the Local Courts of Medieval England* (1926).

when the "sale" involved an unusual *res*, the law seemed to be quite advanced. For example, King AEthelberht (*ca.* 616-617) declared:[17]

> If a man buys a maiden, the bargain shall stand, if there is no dishonesty. If however there is dishonesty, she shall be taken back to her home, and the money shall be returned to him.

It would be difficult to find today a clearer, more succinct statement of the rescission and restitution remedies afforded the purchaser who has been the victim of a fraudulent sale or one affected by innocent misrepresentation.

The laws of Ine (*ca.* 688-694) in regard to the sales of animals perhaps reflected a morality which has not been equalled to this day:[18]

> If anyone buys any sort of beast, and then finds any manner of blemish in it within thirty days, he shall send it back to (its former owner) . . . or (the former owner) shall swear that he knew of no blemish in it when he sold it him.

This law may have been inspired by the fact that it was too difficult to establish judicially the monetary damages for a "blemish". The value of a healthy animal could be readily determined while the damages caused by "any sort of blemish" would present a vexing problem. It is interesting to note that the Berwick Guild Statutes (1249) and the Grimsby Charter (1259)[19] indicated that this perplexing problem seemingly had been solved. The Berwick Statutes provided that if the goods were "good above and worse below, the seller of the thing ought to amend it by the view and decision of honest men appointed for this purpose".[20] It would appear that if the "worse quality" were established, the contract of sale would be rescinded; the similarity of concepts between this charter and the laws of Ine is quite striking.

The custom of the borough of Exeter (*ca.* 1282) shows an arresting change in concept from the laws of Ine in that the laws of Ine provided for a general implied warranty of fitness, while this charter allowed rescission only in the case of an express warranty:[21]

> If a man sells another a beast warranted as sound, and it is not sound, and he afterwards denies that he warranted it, then the buyer shall prove that he did so, by his suit, and the other shall then take back the beast; but the bailiffs must cause the beast to be examined to see if it is truly (sound) or not, and the plaintiff shall swear by his sole oath on the halidom that the beast was not damaged by him or in his keeping, or by his negligence, etc .

Specific Performance

As has been previously stated in this paper, the Anglo-Saxon law of contract and of sales was quite undeveloped, one result being that a breach would usually be compensated for in damages, rather than in requiring performance of the agreement. Only one law which provided for a type of specific perfor-

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[17] AEthelberht 77, Attenborough, *supra* n. 6, at 15. *Cf.* transl. in 1 *Eng. Hist. Documents* (1955) 359.

[18] Ine 56, Attenborough, *supra* n. 6, at 55. *Cf.* transl. in 1 *Eng. Hist. Documents* (1955) 370.

[19] *Borough Customs* (1906) 21 *Selden Society* 182.

[20] *Ibid.*

[21] *Ibid.*

mance has been discovered during this period. Alfred the Great (*ca.* 892) provided[22] that "we enjoin you, as a matter of supreme importance, that every man shall abide carefully by his oath and pledge". If a man pledged "himself to something which it is lawful to carry out and proves false to his pledge, he shall humbly give his weapons and possessions to his friends to keep, and remain 40 days in prison . . . and undergo there whatever (sentence) the bishop prescribes for him . . .". If the man refused to submit humbly, force was to be used to take him, and if he were killed, no *wergeld* was to be paid for his death. If he successfully escaped prison, he was to be banished and excommunicated from the Church. It would appear that the provisions of this law would include any pledge whether in an ecclesiastical or secular matter, the excommunication being added as an extra sanction rather than indicating that only religious pledges were therein encompassed.

The borough customs of the city of Romney (1498) provided that when the plaintiff prevailed in an action on a covenant, "ande upon law ydon be the defendant juget for to hold the covenant, ande the damagez taxed as it is before seyd, ande the suerte as it is before seyd, if it be challengad".[23] The twelfth century custom of Preston provided that if a burgess should buy goods and the seller should "rue the bargain", he was to pay the buyer double the amount of the earnest money, but "if the buyer fingers the goods, he must either have them or 5s. from the seller (as rue bargain)".[24] This custom seemed to reverse rather the later equitable concept that specific performance cannot be had unless there is a mutuality of remedy.[25] It is interesting to compare the Preston custom with that prevailing in the Irish city of Cork in 1614 which provided:[26]

> . . . that every person of the citizens that give in court an earnest of God's penny for performance of any bargain, shall perform it, so as the mayor etc. give full benefit unto the party giving his God's penny. It is also made a byelaw, that whoever shall refuse to make good his bargain after delivering his earnest shall be disfranchised of his councillorship and freedom within the city and shall forfeit . . . £20.

The Preston custom gave the buyer the right to elect either specific performance or damages, while the Cork custom made specific performance mandatory against the buyer.

In two cases decided in the Bishop of Ely's Court at Littleport, the court ordered that one defendant be distrained to make 400 of sedge which was the shortage in an agreement to make a thousand of sedge; in the other case the defendant was commanded distrained to perform his covenant to make a new "rother".[27] In a third case, "John Sarle was attached to answer John Tepito of a plea that he do render him 2,400 turves, whereof the said John confesses 2,200 which (the court awards), etc. . . . and as to the residue, (he says that) in nought is he bound to him, and of this he proffers his law. Afterwards this is forborne".[28] It should be noted that in two of these cases, performance was ordered; in the third it was requested and was not denied as a matter of *law*. These are clear examples that at least one local court was acting *in personam* in

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[22] Alfred I, Attenborough, *supra* n. 6, at 63. *Cf.* transl. in 1 *Eng. Hist. Documents* (1955) 373-74.

[23] *Borough Customs* (1904) 18 *Selden Society* 214.

[24] *Id.* at 217.

[25] See, e.g., W. W. Cook, "The Present Status of the Lack of Mutuality Rule" (1927) 36 *Yale L.J.* 897.

[26] *Borough Customs, supra* n. 23, at 219.

[27] *The Court Baron* (1890) 4 *Selden Society* 115.

[28] *Id.* at 135.

the ordering of specific performance. Long prior to the date of the above cases, the Manor Court of the Abbey of Bec in 1290 held that:[29]

> William Brond is convicted by six lawful men of having agreed with Maud Nicholas's daughter to demise to her a half acre of land for a term of years. Therefore it is ordered that he do keep the said covenant made between them and established by the oath of the said (six) men.

It is interesting to observe that at least one fair court in 1275 was ordering specific performance of a personal service contract. One Richard agreed to place himself in the service of one John for a period of one year for ten shillings. The service commenced, but then Richard repudiated his service and left taking some of John's spices with him. The court ordered:[30]

> Therefore, it is considered that the said (Richard) do serve the said (John) to the end of the term (of service) if he so please and that if the said John desires to recover against the said Richard the said 9s. for spices, let him attach Richard afresh and prosecute his right against him.

In another case in this same court in 1291, the plaintiff alleged that he had purchased a pair of tongs from the defendant who failed to deliver and unjustly detained them. The case was settled between the parties on the following day, hence no relief was awarded.[31] However, it is interesting to note that the plaintiff was claiming the article itself rather than damages and that initially the defendant did not attack the relief sought. Whether the defendant could have satisfied the plaintiff's claim by giving damages in lieu of the chattel, under the rule governing detinue actions,[32] is problematical. It is difficult to state that this case was a detinue action, for cases which will be discussed in the latter part of this article show that the word "detain" was used somewhat loosely in these local courts.

III. NEGATIVE AND AFFIRMATIVE INJUNCTIVE RELIEF IN TRESPASS AND NUISANCE ACTIONS AND RESTITUTION IN THE CASE OF WRONGFULLY OBTAINED CHATTELS

An examination of the Anglo-Saxon laws fails to disclose any type of remedy which could be safely characterized as being injunctive in the modern meaning of the term. Of course, the majority of the laws were prohibitory of certain acts, but no recognition seemed to be given to the problem of the relief to be granted in continuing wrongs or nuisances. Legal thought seemed to stop at the punishment of one wrong and failed to comprehend the notion of one continuous act causing a series of wrongs. A faint glimmering of our modern notion of continuing wrongs can be ascertained in the "so-called laws" of William the Conqueror. One provision forbade peasants from leaving the estate on which they were born to go to another estate. The owner of the second estate was ordered to send the peasant back to his former estate. The law further provided that "If estate-owners do not make another man's workmen return to their estate, the court shall do so."[33]

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[29] *Select Pleas in Manorial Courts* (1888) 2 *Selden Society* 36.
[30] *Fair Court of St. Ives, id.* at 157.
[31] 1 *Select Cases on the Law Merchant* (1908) 23 *Selden Society* 47.
[32] P. Bordwell, "Property in Chattels" (1916) 29 *Harv. L.R.* 374, 375-76; J. B. Ames, *Lectures on Legal History* (1913) 76.
[33] The (So-Called) Laws of William I, Cap. 30, Robertson, *op. cit. supra* n. 8, at 269.

In spite of this dearth of discovered antecedents, the concept of negative prohibitions and affirmative commands was well developed in the manor and piepowder courts of the Middle Ages. The Manor Court of the Abbey of Bec in 1246 stated, "The court has presented that Simon Combe has set up a fence on the lord's land. Therefore let it be abated."[34] This case fails to indicate who was to abate the continuing trespass. It would seem reasonable to assume that the court was directing the defendant to do so. In 1278, the Manor Court of the Abbot of Ramsey was presented with a case where the defendant had appropriated to his own use lands which belonged to another. The court ordered, "Therefore be this put right and be he in mercy for his trespass, . . . ".[35] Again, it would appear that this continuing trespass was to be abated. The same court in a later case stated:[36]

> They say as they have said before that the men of Morborne and Haddon have diverted a water-course at Billingbrook. Therefore let this be put right and a day is given for having it put right before the hundred (court) on the feast of S. Mary's Conception.

In each of the preceding three cases it does not clearly appear that the court was ordering the trespasser to abate the trespass, and it is possible to surmise that some official of the court was directed to correct the situation. This perplexing problem also exists in relation to the Royal Courts, which on some occasions directed the writs to the Sheriff while, on other occasions, the writs were addressed to the defendant. The author is inclined to agree with Dr. Hazeltine's view that "in cases of the interposition of the sheriff the writ of prohibition is (not) robbed of its character as the court's order *in personam*, for the sheriff acts merely as the court's officer in informing the party of the court's command",[37] and believes that this applies equally to the interpretation of these local court cases.

This belief is supported, to some extent, by a number of the cases given in the "Book of Precedents" for the *Court Baron*, for example:[38]

> And it was witnessed that the sergeant of C. deforces the lord's tenants from fishing in the Cherwell as they were wont. And it is ordered that the bailiff with the whole franchise do go to the said water and cause it to be fished and do cause it to be safely guarded throughout his bailiwick until (the deforcers) shall find pledges to amend the trespass to the lord in his court.

This "precedent" would seem to direct the bailiff to preserve the *status quo* until the defendants found pledges to amend the apparent continuing trespass. Although the bailiff was directed to act personally, the effect of the court's ruling was to act *in personam* against the defendant. In four cases[39] decided in the Court of View of Frankpledge at Weston in the year 1340, affirmative injunctive relief seems to have been awarded. In the first case, the defendant caused a purpresture by placing his dungheap on the King's highway to the nuisance of the country. "Therefore command is given that it be at once removed, and further that the said Warin (the defendant) be in mercy; . . . ". In the second, the defendant raised a wall upon the soil of, and to the nuisance of, his neighbour. "Therefore command is given that it be abated, . . . ". In

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[34] *Supra* n. 29, at 6.
[35] *Id.* at 93.
[36] *Ibid.*
[37] Hazeltine, *supra* n. 1, at 283.
[38] (1890) 4 *Selden Society* 72-73.
[39] *Id.* at 98.

the third, the defendant stopped a watercourse and a path to a mill, "Therefore command is given that the water be brought back into its old course and that for the future the paths be used." In the last, the defendant ploughed and appropriated to himself three furrows from the King's highway to the prejudice of the King and the nuisance of the country, "Therefore be he in mercy, and command is given that this be put to rights forthwith." It seems somewhat surprising that the relief awarded was not stereotyped; each command seemed to be tailored for the particular fact situation. This again would appear to be evidence, although perhaps slight, that the court was acting *in personam*.

The borough customs of the Middle Ages seemed quite cognizant of the trespasser who was a continual offender. The city of Leicester (1277) provided that where crowds committed batteries and burglary, being without property, they were not subject "to be brought to justice". Therefore, "let them have justice done upon them in their bodies, to stand to right. And if they do not amend, and are customary doers of such outrages, let them be banished from the town".[40] Whether the banishment would be enforced by the court itself or by the officials of the town is conjectural. The Ipswich custom in 1291 provided for the imprisonment of those accustomed to do wrong.

> But if it happen perchance that any one trespasses in the form aforesaid through rashness, who is not wont thus to do wrong, he shall not be punished by the penalty of the imprisonment aforesaid, but the penalty shall be mitigated in his case by the grace and decision of the court, but so nevertheless that he make satisfaction for the damages deraigned against him.[41]

The custom of Hereford (1486) provided that initially the bailiff was to punish a common trespasser and if he failed to change his ways:

> In full court before his fellow citizens let him openly lose his freedom as a perjured man and as disobedient to the bailiff and his commonalty, and let his name be blotted out of the book of the bailiff; and afterwards if he shall not be amended let him be imprisoned, and there stay until he find sufficient security at the pleasure of the bailiff in open court. . . .[42]

Although these cases are distinguishable from the ordinary case of a continuing trespass (for example the diversion of a stream, or the placing of a fence on the land of another), they do illustrate the efforts of the courts to act *in personam* in the restriction of repetitious acts of trespass.

It seems a little surprising, perhaps, that the merchants' courts also administered equitable type relief in the abatement of nuisances and the prohibition of continuing trespasses. In fact, the type of relief granted seems to be indistinguishable from that granted in the shire and seignorial courts. In the year 1291 a defendant was "distrained by a tapet" for obstructing a street on the quay in front of his house and under his sollar (a garret or upper room). Subsequently, after an inquest had been taken, the defendant was amerced and the obstruction was ordered to be opened.[43] On the same day, another defendant was distrained for erecting a "penthouse" on the quay near the sollar of another. It was ordered "that it be torn down"; the defendant was amerced and the street was ordered cleared.[44]

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[40] *Borough Customs* (1904) 18 *Selden Society* 83.
[41] *Ibid.*
[42] *Id.* at 84.
[43] *Select Cases on the Law Merchant* (1908) 23 *Selden Society* 43, 46.
[44] *Ibid.*

A few years later (1293) in the same fair court, a defendant was found guilty of selling his wares in a certain house rather than "in the frontages of the fair". An order was therefore given:

> To Simon Wallis to attach all the said goods, until he shall make satisfaction for the trespass. Afterwards he finds a pledge, to wit Peter of Tooting, that he will not hereafter sell such wares there; and the amercement is remitted by Brother Reginald of Castor because he is poor, as it is believed. And on the same suretyship let him pay 12d. to the lord-abbot that he may lawfully sell the said wares there this year.[45]

It is difficult to discover a more perfect example of equitable relief than is disclosed in this case. A pledge is secured by the defendant to make certain that he will not repeat his "trespass"; the amercement is remitted because of the poverty of the defendant and arrangements are made so that the defendant may comply with the law. The same court in 1300 was presented with three cases wherein the defendants had let their real property to the use of harlots contrary to the ordinance of the fair.[46] In each case the court ordered that the harlots be removed. In one of the cases there was also "a deficiency of water in (the defendant's) row" that was ordered to be corrected. In a fourth case, four cooks had placed a penthouse made of holly much too near the fire to the great danger of the vill. "Therefore it is ordered that this be emended, etc." Two years later, the same court was presented with a case wherein the defendant had a "muck-heap which is too high, to the nuisance of those passing by. Therefore order is given that (this be abated), and he is in mercy 6d. for the trespass".[47] Although the preceding cases failed to indicate that the court was directing the defendant to abate the nuisance or continuing trespass, it is submitted that it is logical to assume (as before stated) that the court was ordering the defendant rather than the fair officials to take action.

Restitution of Chattels

Other writers have traced the origin and development of the "appeals of robbery and larceny" which enabled victims of theft or robbery to follow goods in the hands of the thief or the possessor and recover them.[48] Any attempt to recount this development would be mere repetition and beyond the scope of this article, in that the appeal was originally founded upon a concept of self-help in regaining possession, while this article is primarily concerned with cases wherein the right of the owner to specific restitution of his chattels is recognized in cases of unlawful taking and detention which do not indicate that an appeal was involved.

In all the Anglo-Saxon laws only one law has been discovered which provided for restitution in cases other than theft or robbery. AEthelberht provided that where a freeman committed adultery with the wife of another freeman, "he shall pay (the husband) his (or her) *wergeld*, and procure a second wife with his own money, and bring her to the other man's home".[49] This law seemed to recognize that the payment of the *wergeld* would not be sufficient compensation and that the procurement of a new wife would be

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[45] *Id.* at 56.
[46] *Id.* at 74-75.
[47] *Id.* at 84.
[48] J. B. Ames, "The History of Trover" (1877) 11 *Harv. L.R.* 277ff.; 2 Pollock & Maitland, *History of English Law* (2 ed. 1903) 157.
[49] AEthelberht 31, Attenborough, *supra* n. 6, at 9. *Cf.* transl. in 1 *Eng. Hist. Documents* (1955) 358.

rudimentary restoration to the *status quo*, a sort of restitution in kind. The next example of restitution is found in the Coronation Charter of Henry I wherein he stated that if anyone took possession (after the death of his brother King William) of anything belonging to Henry I or to any other person, "it shall be restored immediately in full but without payment of compensation". If the possessor retained the thing, "he in whose possession it is found shall pay heavy compensation to me".[50] This "law" seemed to be a type of qualified amnesty granted for a wrongful taking (occuring after the death of William) conditional upon restitution of the "things" taken.

In the Court of the Bishop of Ely at Littleport (1317) the plaintiff brought an action of trespass alleging that the defendant "carried off 9 hundreds of his sedge and unjustly detains them from him". The plaintiff waged his law, but the defendant failed to do so and the court "considered that the said John of Elm (the plaintiff) do recover his sedge and that the said John Fox be in mercy (3d.); pledge, John of Elm".[51] An examination of the reports of this court indicates that this is the only one allowing specific restitution in place of the usual remedy of damages. Was this defendant a poor man? Were sedges in short supply in 1317? Or is the answer much simpler—*i.e.* the plaintiff desired the sedges and the court was not bothered with recondite doctrines to be developed at a later date? Six years before the decision in the above case, the Manor Court of King's Ripton apparently awarded restitution when it was not asked for by the plaintiff. The plaintiff complained that he had caught the defendant's ox which had trespassed upon the plaintiff's meadow and while driving it to the lord's pound, the defendant took the ox from the plaintiff and beat him "to his damage 20s.; and thereof he produces suit". The court awarded "that the said John (plaintiff) recover his damages (which are taxed) at 6d. and do have return of the ox, and let the said Henry be in mercy for his trespass; . . .".[52] It would appear that the ox was awarded to the plaintiff not so much as specific restitution (because the ox did belong to the defendant), but in order to effectuate a distraint of the ox for its trespass. If this interpretation be correct, then the lack of correlation between what was asked for and what was awarded seems comprehensible.

In the Fair Court of St. Ives in 1291, the plaintiff complained that the defendant unjustly detained "three quarters of wheat, one quarter of rye, and one quarter of malt, worth 32s., to his, William's damage 20s.; . . .". The defendant failed to make a proper denial, "And therefore it is awarded that the said William recover his chattels against the said Austin together with his damages, and he (the defendant) is in mercy for the unjust detention; . . .". Inasmuch as the damages alleged (20 shillings), were much less than the value of the chattels (32 shillings), it seems obvious that the plaintiff assumed that he would be granted restitution of them as a matter of course. It may be argued, of course, that this case involved an action of detinue, rather than trespass, and that detinue is framed upon the concept of a return of the chattel rather than damages.[53] However, the defendant was not given any right to elect to pay damages in lieu of returning the chattels; hence it would appear that restitution was made mandatory rather than in the alternative.

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[50] The Coronation Charter of Henry I, Cap. 14, Robertson, *supra* n. 8, at 283.
[51] *The Court Baron* (1890) 4 *Selden Society* 123-24.
[52] *Select Pleas in Manorial Courts* (1888) 2 *Selden Society* 113.
[53] 1 *Select Cases on the Law Merchant* (1908) 23 *Selden Society* 38.

IV. ACTIONS FOR WASTE

It has been shown elsewhere that the common law writ of prohibition which gave a remainderman the right to obtain a writ forbidding a life tenant from committing waste was equitable in character. The sheriff was directed to prevent the doing of the threatened waste and was empowered to raise *a posse comitatus* to aid him, or the writ was directed to the life tenant forbidding him to commit waste and subjecting him to imprisonment for contempt if the waste were committed.[54] This *in personam* approach in the Royal Courts in actions of waste was paralleled in the inferior tribunals. The Northampton custom (*ca.* 1260) provided that if the chief lord perceived that his tenants intended to waste or destroy the enfeoffed buildings, he was to seek the aid of the bailiffs "and the bailiffs at once shall go to the tenement and attach whatever they find, whether it be timber or anything timbered".[55] This custom differed from the later common law approach in that the actions of the bailiffs were apparently extra-judicial and the enforcement was to be had by attachment of personalty rather than by contempt proceedings. The custom of Ipswich (1291) seemed to take a large step in the direction of the common law approach. If tenants (for life, for years, in dower and freebench) committed waste, the reversioner had an action to demand the tenement before the bailiffs "by gage and pledge . . . as well as by a writ". After the third summons, the reversioner was to go to the tenement with one or two coroners and with the oath of twelve men the amount of the waste was to be ascertained. The tenant was then "warned" to appear on a certain day to find surety "to restore the waste". If the tenant failed to appear, the reversioner was entitled to recover seisin and damages.[56]

The fifteenth century custom of Dover seems very peculiar in that it would appear to limit actions of waste to situations where the act of waste deprived the reversioner of his rent, in which event, "than uppon that the mayre and the baily shall defende (*i.e.* forbid) the tenaunte of the tenements that he doo no wast ne stripement in no wyse".[57] The customs of Winchelsea (15th century), Hastings (1461-83), Hereford (1486), Kilkenny (1524), and other cities seem to be quite uniform in concept in that the tenant guilty of permissive or voluntary waste was to be ordered (usually by the bailiff) to restore the premises and if the tenant were financially unable to do so, the reversioner was entitled to take possession. The Winchelsea and Hastings customs expressly provided for judicial proceedings by stating, "the bayle and jurates at the sute of hym that claymeth the reversion shall compelle hym that so holdethe to repayre and sufficiently manteyne if he be sufficient; and if he be not sufficient, then, after the sufficiens of his facultie, it ought to be repayred, by the consyderacioun of the bayle and jurates reasonablye; . . .".[58] In short, the court was utilizing an *in personam* remedy which was limited only by the defendant's financial ability to perform.

The community of Ipswich in 1291 provided for waste *pendente lite*,[59] a problem which had been previously dealt with by the Statute of Gloucester in 1278.[60] The custom and the Statute both provided for the prohibition of waste during the pendency of the proceedings, however, the custom enabled the

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[54] Hazeltine, *supra* n. 1, at 276.
[55] 1 *Borough Customs* (1904) 18 *Selden Society* 281.
[56] *Id.* at 282.
[57] *Id.* at 284-85.
[58] *Ibid.* and see *supra* n. 1, at 286.
[59] *Ibid.*
[60] Statute of Gloucester, Cap. XIII (6 Edw. I), 1 *Pickering's Statutes* 127; 2 Coke 327.

demandant of the tenement to recover double damages for waste committed in violation of the bailiff's orders, while the Statute seemed to limit the demandant to a single recovery. In addition, in actions brought under the Statute, the defendant could be imprisoned for contempt of the order prohibiting waste,[61] while the custom seemed to limit punishment to a severe amercement. In any event, both the custom and the Statute were consistent in their basic design of preventing a threatened injury—a concept which is familiar to every modern equity practitioner. The Court held at Middleton in 1342 stated that, "Alice of B. found pledges A and B that for the future she will maintain her tenement and land like her neighbours. Therefore it is considered that she do rehave her land".[62] Again an *in personam* approach of the court was utilized through the somewhat inefficient medium of pledges for future good conduct.

CONCLUSION

It seems apparent that by the time of the Norman Conquest the Anglo-Saxon laws had developed the concept that, on occasion, justice might be denied a suitor in a local court and that royal intervention was needed. Suitors were, however, required to "exhaust their remedies" in the local courts before requesting royal intervention through the medium of the writs.

In the seventh and eighth centuries the germinal concepts of rescission and restitution in contracts and sales cases made their appearance, and the following century witnessed the beginnings of specific performance. These remedies were developed in the following centuries in the local courts, and by the fifteenth century the remedies extended were comparable with those in use today. But the awarding of negative and affirmative injunctive relief in trespass and nuisance actions and restitution of wrongfully obtained chattels seems to be a thirteenth century development, along with the action for waste which was receiving a contemporaneous development in the Royal Courts.

It is certainly interesting that the local courts as well as the Royal Courts originally exercised equitable powers, which gradually disappeared, necessitating the formation of a separate court of chancery, and that the full circle of legal development with the re-uniting of law and equity in one court (or branches of one court) had to wait until the nineteenth and twentieth centuries in England and the United States.

It is interesting to note that Ch. V of the Statute provided for a recovery of double the amount of the waste in ordinary actions for waste, while Ch. XIII merely provided for recovery of the amount of the waste in actions *pendente lite*. The London custom, in its "Double Recovery" aspect, seems to resemble Ch. V of the Statute rather than Ch. XIII.

[61] Hazeltine, *supra* n. 1, at 271-284; Coke, *op. cit. supra* n. 60, at 327.

[62] *The Court Baron* (1890) 4 *Selden Society* 104.