26

English Law (Sixteenth–Eighteenth Centuries)

By the end of the Middle Ages, the body of English law was extensive and established, but it was still to evolve in important ways in every sector of both private and public law. One work on English law stands out among the doctrinal texts, characteristically limited in number in the English legal tradition, written by a jurist of the second half of the fifteenth century who at the end of his career was a judge in the Court of Common Pleas, that is, the *Treatise on Tenures* by Thomas de Littleton (d. 1481),[1] dedicated to property. The systematic structure of the three volumes in which the work is divided, the clarity of the writing, the meticulous scrutiny of the various types of property and possession and the careful distinction between substantive law and procedure are the qualities that made Littleton's text universally consulted and regarded as unsurpassed for three centuries. In the seventeenth century Judge Edward Coke would dedicate a commentary to the work, which in turn became a classic.

A 1470 work by Chief Justice Sir John Fortescue of the King's Bench, who was exiled in France after the Lancastrian defeat, *De Laudibus Legum Angliae*,[2] addressed to the young Prince Edward in exile, clarifies the peculiarities of English law in a style suitable for a non-jurist and includes an interesting description of the legal professions and the Inns of Court.

Alongside the fundamental works of Edward Coke, discussed later, a significant role in English legal doctrine of the seventeenth century was to be played by the writings of John Selden (1584–1654), a learned jurist and politician (but not judge) who, among other things wrote a work comparing English, Roman and Jewish law.[3] In the constitutional crisis of 1628 he defended the position of Parliament and the courts against

[1] T. de Littleton, *Treatise on Tenures* (New York, 1978). The first edition was issued in 1481, one of the first books published in London.

[2] J. Fortescue, *De Laudibus Legum Angliae* (New Jersey, 1999).

[3] J. Selden, *De successionibus in bona defuncti secundum leges Ebraeorum; De successione in pontificatum Ebraeorum*, 1631; *De iure naturali et gentium juxta disciplinam Ebraeorum*, 1640.

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the monarchic claim to the prerogative of arresting individual subjects [Baker, 2002, p. 474]. The historical dimension of law was taken up by William Prynne (1600–1669) but chiefly by Matthew Hale (1609–1676), who was at first judge in the Court of Common Pleas and subsequently a justice of the King's Bench; he must be considered the first great English legal historian. His most important works were *History of the Common Law* (1713)[4] and *History of the Pleas of the Crown* (1736), both published posthumously – Hale, like other scholars of the seventeenth century, was strangely reluctant to publish his work – both works having great impact among common law jurists ever since.

26.1 Justice

The importance of procedure in the evolution of English law remained an essential feature throughout the entire early modern period. Writs were now fixed in number, also because Parliament had claimed legislative powers, and this led to various forms in which the available legal instruments might be extended, some of them through legal fictions. An example is the *writ of ejectment* which, originally designed to protect real estate or land tenants from orders of expulsion, was extended to protect property and possession in general, adding to and in part replacing older writs. Over time, this writ in fact became the primary remedy for real actions, aimed at protecting the possession and ownership of real estate. For this purpose, the fictional expedient was used whereby the two litigants nominated two delegates as tenant and landlord [Plucknett, 1956, p. 374].

The nature and function of the civil and criminal jury was to evolve in significant ways. While the original role of the jury was that of witnesses to the facts or persons related to the dispute or the crime, in the course of time it gradually evolved into a different function: from being witnesses the jurors effectively became judges who, though their role was limited to deciding on the question of fact at hand, decided the case by verdict (*vere dictum*) based on witness accounts, documents and other proofs. The professional judge was then expected to apply the law to the verdict. This procedure, already consolidated at the beginning of the early modern period, did not prevent judges from playing an effective role in instructing the jury before it retired to the council chamber. Moreover, the judge had the power to question a verdict if he felt it was unjust or erroneous

[4] Sir Matthew Hale, *The History of the Common Law*, ed. Ch. M. Gray, Chicago, IL 1971.

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and ask for a second jury to be nominated. Further, there was the *writ of attaint* [Langbein et al., 2009, p. 417], a criminal procedure in case the jury's verdict was proven false.

The early modern age saw the rise of a special criminal court established by a royal statute in 1487,[5] the Star Chamber made up of the chancellor, the treasurer and other ministers of the King's Council, as well as by judges and a bishop; in the beginning it was chaired by the king himself. The Star Chamber's prevalent activity concerned controversy over property rights, often claimed by litigants of a modest social standing [Baker in OHLE, VI, p. 197–198] and often resolved with harsh measures of a criminal law nature. The Chamber prosecuted a broad range of misdemeanours with a summary and expedited procedure, quick and effective also with regard to powerful individuals, without the intervention of a jury. Although it could not inflict capital punishment, it did have recourse to judicial torture, unlike other English courts. The Star Chamber was active for a century and a half and was accepted as a legitimate court by other courts of justice, despite other statutes forbidding special criminal jurisdictions, in line with the principle of peer justice dating back to the Magna Carta. The diminished sovereign power and the new balance of government functions that signalled the end of absolutism in England led to the abolishment of the Star Chamber in 1641.

The role of the courts, which asserted itself beginning in the twelfth century, remained central to the development of English law during the early modern period. The prestige of judges and their authority were decisive also in the genesis of modern constitutionalism. The common law judge's autonomy and independence of judgement even with regard to monarchic power, high-ranking social classes and economic interests are essential components of English law. This did not mean, however, that judges were removed from the world of politics, as is exemplified by two outstanding figures in the history of English common law, both at the highest-ranking Courts of Common Pleas and the King's Bench: Sir Edward Coke and Lord Mansfield both played important political roles in the Westminster Parliament.

26.2 Equity

An essential element of English early modern law is the breadth of the jurisdictional powers of the Court of Chancery. The chancellor, who was

[5] 3 Hen. VII, c. 1.

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keeper of the royal seal beginning in the Norman era, was endowed with judicial powers among which was emitting new writs, which constituted the basis for the royal jurisdiction. The chancellor could also decide on behalf of the king on appeals that continued to be addressed to the sovereign even after the constitutions of the central royal courts of justice, and could accept or reject the request for royal intervention in overriding the restrictive and coercive procedures of these courts. In the fifteenth century the role of the Chancery grew, gradually absorbing areas in which the common law did not offer effective legal remedies [Langbein et al., 2009, pp. 267–384; Maitland, 1969[2]].

The general criterion adopted by the chancellor was of judging 'according to conscience' (*secundum conscientiam*) with a combined examination of facts and the law and with broad discretion. In this approach the influence of canon law (and indirectly also that of Roman *ius commune*) was considerable.

One of the fields in which the Chancery was most creative was that of fiduciary relations. For example: A for personal reasons wanted to bestow his property in favour of B, with the understanding that B would hold the property on trust in the interest of A or of C nominated by A. According to common law, this was not possible, because the transfer of property to B attributed him with full rights over that property, either to keep or dispose of as he wished, without any obligation to anyone else. The fiduciary contract was enforced by the Chancery in the name of equity. It is worth remembering that the chancellor was often a member of the clergy and as such an expert in canon law as well as Roman law, and equity (*aequitas*) was one of the key components of ecclesiastical justice, as seen previously.

The king favoured the Chancery jurisdiction, and so from the fifteenth century it became complementary to the common law royal courts. It decided with rules that were at first fluid and then gradually became set by precedent [Baker, 2002, p. 107], his jurisdiction coming to be known as equity. The procedures were completely separate from those of other royal courts: among other things, Chancery trials had no jury, whereas the chancellor had the defendant swear an oath on the contested facts. The chancellor was also able to broaden his jurisdictional interventions through the *injunction*: if persuaded that the decision of a common law court led to results which were contrary to conscience and therefore contrary to equity, the Chancellor could order the litigants to appear before him to settle the dispute, even if another court had in the meanwhile intervened. Without formally contrasting with common law ('equity

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follows the law'), equity procedure was effective because it could act directly on individuals with binding orders ('equity acts *in personam*').

A number of new and effective rules were thus instituted and soon acknowledged. The value of equity compared to common law was the focus of a work written in the form of a dialogue[6] in which it was emphasised that there is no normative rule that can effectively answer the perpetually changeable needs and occurrences of life, whereas equity is flexible and well suited to apply law to cases arising in legal practice. This thesis was upheld with particular force by Cardinal Wolsey in the early sixteenth century.

Thomas More (1477–1535) was also to defend the role played by equity. He insisted that the judges of the Westminster courts should moderate the rigour of common law if they wanted to avoid the chancellor's interventions in their decisions in the name of equity [Baker, 2002, p. 107].He had been a pupil of Erasmus of Rotterdam, was a humanist, a common law jurist and the author of one of the most important political philosophy texts of the Renaissance. He was Lord High Chancellor when for religious reasons he refused to recognise the king as head of the Church of England[7] and was therefore condemned to death, which he faced with legendary courage.

Another great thinker of the early modern age was also a chancellor. Francis Bacon (1561–1626) was a philosopher and jurist and author of some fundamental works on the methodology of natural and human sciences.

In the early seventeenth century the heated debate between king and Parliament which would lead to civil war and the 1649 and 1688 revolutions, and to the eradication of absolutism, had its fiercest battle in the legal sphere, specifically between common law and equity. In opposition to Edward Coke's position, the Court of Chancery was led by equally eminent intellectual and political figures such as Lord Ellesmere and Sir Francis Bacon. Against Coke they defended equity and the king's supremacy as superseding all other authorities, as well as the sovereign's role as supreme judge, a standpoint which found a solid ground in the political and legal thinking of antiquity and the Middle Ages. The supporters of common law questioned the very criterion of equity at the basis of the chancellor's jurisdiction, ironically denouncing its arbitrary nature, as

[6] *Dialogues between a Doctor of Divinity and a Student of Laws* published in 1528, written by Christopher of Saint Germain, a barrister of the Inner Temple and learned in canon law and theology.

[7] Thomas More, *Utopia*, 1516.

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changeable over time, they said, as the chancellor's height or the size of his feet. If under the Stuarts the monarchy was to support the chancellor, ultimately the victory of Parliament was to redress the balance in favour of common law.

In time the Chancery Court's jurisdiction activity slowed down and became hampered by the fact that every legal decision was taken by the chancellor, although with the help of many collaborators. This might explain why at the end of the nineteenth century, after a long period of upheaval, equity's jurisdiction was acquired by the single central court of justice, as we will see (Chapter 34.7).

However the contribution made by the Chancery court to early modern English law should not be underestimated: equity must be credited with the establishment of many important institutions and innovative rules in several sectors of law: in addition to uses and trusts, mentioned earlier, rules on fraud and error, rescission of contracts, and specific performance law (unknown to common law) and many more [Baker, 2002, p. 203].

Not only the system of equity, but also the Admiralty Court for maritime law controversies testifies to the influence of Roman and canon law not being at all marginal in English law of the early modern period. For these controversies, the requirement was to turn to Roman law, as legal treatises and writings testify [P. Stein, 2003]. An association, the Doctor's Common, created in the sixteenth century and active for three centuries [Coquillette, 1988], gathered lawyers with competence in canon and civil law. But the courts of common law were able in time to considerably circumscribe the jurisdiction of the Admiralty Court, claiming competency in everything concerning the land, also beyond the seas, as well as maritime crimes and piracy and maritime contracts among foreigners.

Ecclesiastical jurisdiction preserved an important role because of its competence in cases of ecclesiastical benefices and marriage [Helmholz, 2004]. Many rules of canon law origin were to be preserved even after the separation of the English church from that of Rome [Baker in OHLE, VI, p. 252].

26.3 Edward Coke

The separation between common law and equity was to grow and develop into open conflict in the seventeenth century. This occurrence signalled one of the most critical moments in English law, and a key

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protagonist was Edward Coke (1552–1634),[8] an outstanding figure in the history of English law. Coke had a profound mastery of common law and wrote some works destined to remain of fundamental importance in the centuries that followed: in particular his *Reports* in thirteen volumes[9] succeeded in reconstructing the entire common law system through the collections of many hundreds of cases from medieval times until the early seventeenth century. The influence and the prestige of this work was enormous; the further four-volume *Institutes*,[10] a systematic exposition of real estate law, criminal law, the principal statutes and the system of the courts of justice, was to receive equal acclaim.

Coke was the chief justice of the Court of Common Pleas as of 1606 and took a decisive position against the sovereign's request to call back a case from the jurisdiction of the common law, which had been brought forth by a physician whose claims had been acknowledged by the Court of Common Pleas [Bonham's case]. Coke argued that the justice of professional judges, that is, the justice administered by the traditional royal courts, must constitute the real foundation of English law and as such could not be substituted nor invalidated, even by the sovereign's will. His perception of common law as the 'fundamental law' of the kingdom, superseding the crown and Parliament itself, was expressed in terms which have remained memorable, as did a notion directly concerning the king, according to which in order to get a correct judgement, 'natural' equity alone does not suffice: the requirement is also for those legal techniques that are possessed only by experts and that must be based on their familiarity with past decisions: 'out of old fields must come the new corn.'[11]

Some years later, in 1611, in another case, Coke was to deny the right of a special commission nominated by the king to order the penalty of imprisonment. Again in 1615, having become the chief justice of the King's Bench, he opposed the Chancery, which was intending, as in the past, to modify a royal court decision, a decision which the litigant claimed to be fraudulent. He was opposed by the acting chancellor,

[8] A chronology of Coke's life and works is found in Sheppard, 2003, vol. I, pp. 33–65.

[9] E. Coke, *The Reports [...] in Thirteen Parts* (London, 1826), 6 vols. A selection of the *Reports* and other relevant material on Coke is in Sheppard, 2003. On the *Reports, Law, Liberty and Parliament*, 2004, pp. 357–386.

[10] E. Coke, *Institutes of the Laws of England, I–IV* (London 1628–1648), 4 vols. A large selection is in Sheppard, 2003, vol. II, pp. 577–1186.

[11] E. Coke, Bonham's Case, 1610; the text of this famous case in *English Reports*, Abington (Oxfordshire, 1979), vol. 77, pp. 638–658; Sheppard, 2003, pp. 264–283; Plucknett, 1956, p. 51; *Law, Liberty and Parliament*, 2004, pp. 150–185.

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Lord Ellesmere, who had the full support of James I in his battle in favour of the court of equity. A royal decree ordered that the chancellor could intervene with a judgement even after the case had been decided according to common law. Edward Coke was defeated, and a little later in 1616, having remained in the minority in his court on the question of the king's prerogative in ecclesiastical matters,[12] he was forced to vacate the bench.

However, in the following years he was to retain an important role on the opposition front, in the course of the political events that led to the triumph of Parliament and modern English constitutionalism: in 1628 there was bitter conflict between the King's Bench and the king's government that had five knights imprisoned who had refused to underwrite a loan imposed by the crown.[13] Coke's contention – declaring the imprisonment of a subject without reason against the Magna Carta – did not solve the question. The conflict between the king and Parliament was on the verge of breaking into civil war.

26.4 The Bill of Rights

The religious policy of the Stuart monarchy under James II was to take the conflict between the monarchy and Parliament to its conclusion. Although in the name of tolerance and religious liberty, the sovereign's claim to the royal prerogative of dispensing – in particular cases and by his own initiative – the execution of legislative rules voted by Parliament led to the king's defeat, abdication and the ascent to the throne of his daughter Mary with her husband, William III. The new order was set out in the Bill of Rights of 1689.[14] It declared 'illegal' – without prior authorisation from Parliament – orders given by the king to suspend the application of a law, to impose permanent taxes and to maintain an army in time of peace. Furthermore, the principle was established whereby Members of Parliament were freely elected, had unconditional right to free speech and were required to hold regular parliamentary sessions.

Ten years prior to this in 1679, the Act of *Habeas Corpus*[15] had introduced guarantees against government orders that would restrict personal freedom. The *habeas corpus* – which paradoxically indicated the judge's power to have custody of an illegally held individual – had

[12] Case of Commendans, 1616: Colt and Glover v. Bishop of Coventry (text in *English Reports*, vol. 80, pp. 290–313).

[13] Five Knights Case, Darnel's Case, 3 State Trials, 1 (Baker, 2002, p. 474).

[14] 1 William and Mary, sess. 2, c. 2. [15] 31 Car. II, c. 2.

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remote as well as more recent precedent, but was legally formalised only with this law to prevent illegal arrest on the part of executive power. Every English subject could acquire the writ of *habeas corpus* so as to have the right to a regular trial in the presence of a jury. To begin with, the law was limited to control irregularities in the arrest procedure; later, it was extended to ascertain the basis for the arrest itself [Baker, 2002[4], pp. 146, 474].

Judge John Holt (1642–1710) with a series of decisions was in turn to reinforce the protection of the defendant in criminal cases; furthermore, he recognised the value of commercial customs, even when they diverged from common law. And he was to declare (circa 1702) that 'as soon as a negro comes to England, he is free'; [Baker, 2002[4], p. 475], being a precursor of the future positions taken by Lord Mansfield (see later).

In 1701 the Act of Settlement formally sanctioned the guarantee of the autonomy of judges, assuring judges of a salary and a tenured position from which they could only be ousted on the vote of both Houses of Parliament.

These rulings substantially diminished the king's and the government's power and at the same time strengthened the role of Parliament and the independence of judicial power. The regime of monarchic absolutism was thus brought to a close and the foundations laid of the modern model of the constitutional state, based on the balance of three powers.

26.5 The Contract: *Assumpsit*

In the sphere of private law, the evolution of contract law is worthy of note, whose origins go back to the first phase of common law. A turning point was in the sixteenth century, when the remedy of the *assumpsit* began to be applied to some types of contract. This was a writ which extended to the non-fulfilment of an obligation – such as not to take appropriate care of an animal left to one's custody – the protection granted to the victim of a tort by the writ of trespass. Later a similar protection was added to debtors who had begun to pay back their loan, but hadn't finished paying the debt (*indebitatus assumpsit*); in such cases the fact required to have recourse to *assumpsit* (i.e. the beginning of the execution of the obligation) had to be proven for the protection to stand.

The *assumpsit* was founded on the premise of a unilateral commitment, not based on a *sinallagma* that incorporated equal advantage to both contracting parties (based on the element known as consideration);

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this approach, which might be defined with the formula of the theory of *voluntas*, would progressively affirm itself until the seventeenth century and was disallowed only in the eighteenth century.[16]

A conflict was to arise between the King's Bench and the Court of Common Pleas, both competent in the matter of the *assumpsit*, which was to lead to a historically relevant decision in 1602 known as the *Slade Case*. It was decided that 'That every contract executory importeth in itself an Assumpsit, for when one agreeth to pay money, or to deliver anything, thereby he promiseth to pay, or deliver it.'[17] So, if the agreement could be proven to exist, the *assumpsit* was presumed, without having to prove it [Plucknett, 1956, p. 645]. What form this agreement was to take to become enforceable, however, was for a long time a matter of debate as common law did not admit (in the same way as Roman law, but unlike canon law) the enforceability of bare pacts (*pacta nuda*): this explains why after the Slade Case English legal doctrine was to give weight to the *consideration*, that is the motivations expressed by the parties when agreeing to the contract [Milsom, 2007, pp. 314–360].

A further step was made in the second half of the eighteenth century, when Lord Mansfield (see later) declared in a number of historical decisions[18] that *consideration* should be considered a simple means of proving a contract, so it could be substituted with other means of proving the debt or the obligation, also by virtue of the recent Statute of Fraud. He declared that when the existence could be proven, even with an informal writing, of an obligation having been taken in conscience, the obligation became enforceable. The continental doctrine also played a role in this, particularly that of Robert Pothier, whose work on contracts had been published a few years earlier and was known to the great English judge.

26.6 Reports

The transcription of trial debates – in the form of Year Books which recorded the activities mainly of the Court of Common Pleas – began, as we have seen, at the end of the thirteenth century and continued until the sixteenth century. In the latter half of the fifteenth century a number

[16] On this, see Ibbetson, 1999, pp. 135–151, 236–262.
[17] Slade Case (1602), in *English Reports*, vol. 76, pp. 1074–1079, 1077; Sheppard, 2003, pp. 116–125; Simpson in *Law, Liberty and Parliament*, pp. 70–84.
[18] Among many famous cases are those of Pillans v. Van Mierop (1765) in *English Reports I*, vol. 97, pp. 1035–1041; Trueman v. Fenton (1777) in *English Reports*, vol. 98, pp. 1232–1235.

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of members of the Inns of Court edited collections of reports, which often covered many years or even decades: examples are those of Roger Townhend, John Bryt and John Spelman,[19] John Caryll[20] and John Port.[21]

With the advent of the printing press the cumulative editions of the Year Books began to appear, at first dedicated to the decisions of the two centuries between 1327 and 1535, the largest of these collections being the folio edition of 1679–1680.

From the beginning of the sixteenth century the style of the Reports began to change and the legal questions debated in the trials became more and more important. The decisions of the King's Bench increasingly attracted the attention of reporters. Even after the introduction of the printing press, manuscripts continued to be produced as an alternative. Some of the collected Reports of particular authors acquired more prestige than others, for example, those of Edmund Plowden for the years 1550 to 1570 with his own comments; of particular relevance were the eleven volumes of Reports commented on by Sir Edward Coke, published between 1600 and 1616, to which two volumes were added posthumously. Many collections written and edited by these same authors were published also in the course of the eighteenth century.[22]

At the same time, it became apparent that the material should be arranged by subject matter, making it possible for the lawyer to find his way in the immense amount of material offered in the Reports collected over several centuries. From the end of the fifteenth century indexes were put together and published indicating the Reports of single cases ordered alphabetically by subject. The most important of these Abridgements was published by Charles Viner in the mid-eighteenth century,[23] with comprehensive notes and cross-references.

A later collection of Reports is that of 178 volumes of the years 1902–1932, reissued in a facsimile edition in 1979.[24]

[19] *The Reports of John Spelman* (London, 1977) (Selden Society, 99).

[20] Published in 1602; critical edition: *Report of Cases of John Caryll* (London, 1999–2000) (Selden Society, 115–116). His reports extend for forty years, from the 1480s to 1523.

[21] *The Notebook of Sir John Port* (London, 1986) (Selden Society, 102).

[22] On this, see Baker, 2002, pp. 180–184.

[23] Ch. Viner, *General Abridgement of Law and Equity* (London, 1741–1753).

[24] *The English Reports* (London, 1900–1932); facsimile edition, Abingdon (Oxfordshire, 1979). The cases are divided by court. Those of the King's Bench are in vols. 72–122 (from the year 1378); those of the Common Pleas in vols. 123–144 (from 1486); those of the Exchequer in vols. 145–160 (from 1286); those of the Chancery Court (Equity) in vols. 21–47 and 56–71 (from 1557).

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26.7 Lord Mansfield

A sector in which English law of the modern age had significant developments was that of commercial law. In the Middle Ages Italian commercial customs had reached England and commercial law was exercised by the Piepowder courts, with merchant-judges on the continental model of judges of specific courts such as those acting in fairs, markets and corporations. But at the beginning of the seventeenth century, first Coke, then, at the end of the century, mainly Holt [Plucknett, 1956, p. 669], transferred cases of commercial law to the jurisdiction of the Court of Common Pleas. A decisive contribution was that of William Murray, Lord Mansfield (1705–1793).

This key figure in eighteenth-century English law, born into Scottish nobility, was a Latinist and an effective and elegant orator. Subsequent to his classical studies at Oxford he was first a barrister in Lincoln's Inn, then Solicitor General (1742), then Attorney General (1754) in the House of Commons, where he was also politically active, notably as an adversary of William Pitt. In 1756 he opted out of a political career and became chief justice of the King's Bench and as such was for around thirty years the author of a series of common law case decisions of historical weight. His learning included Roman law and continental doctrine. In his decisions he often included rules drawn from the rich doctrinal tradition developed on the continent, skilfully grafted onto the context of customs and traditions of common law.

The decisions that shaped commercial law were to be fundamental – particularly to do with contracts, navigation, insurance, companies and bills of exchange – definitively including the commercial customs within the common law system, with the accent placed on the value of pacts and the emphasis on good faith.[25] He was in the habit of submitting controversial commercial cases to jurors chosen from among the best merchants in London and listened carefully to their opinions before examining the legal issues of the case at hand. Moreover, he was in the habit of taking copious notes in the course of hearings [Oldham, 1992] and used them to instruct the jury, willing also to intervene with observations and points on the question of fact [Baker, 2002, p. 85]. His attitude was deliberately informal in tackling legal questions: as he famously declared during

[25] As Lord Mansfield was to declare in 1765: 'Hodierni mores are such that the old notion about nudum pactum is not strictly observed as such [. . .] Fides servanda est' (Pillians v. Van Merop, in English Reports I, vol. 97, p. 1040).

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a trial, 'I never like to entangle justice in matter of form.'[26] It was characteristic of him to declare himself pleased when encountering conflict between common law and equity [Baker, 2002, p. 203].

Lord Mansfield's decisions were crucial in other matters as well. The question of slavery, for example, had already been the subject of decisions. Judge Holt had already declared that a slave became a free man on arriving in England regardless (many disagreed on this point) of his being a Christian or heathen: in England (it was said) there was service (*villeinage*), but not slavery, which transformed man into a movable thing, like an animal. Blackstone too was to affirm 'the moment a slave sets foot in England he is free'.[27]

Opinion was, however divided on the specific point of whether a slave, who enjoyed the status of free man in England, could turn back into a slave if he left the country. In another famous decision Mansfield did not deny in principle the legitimacy of slavery, although declaring it odious, but in the specific case he decided that a slave, who had become free on English soil, could not exit the country against his will. This was later used as a general argument against slavery [Baker, 2002, p. 476].

The legislative abolition of slavery, already envisioned in 1792 under the influence of the French Revolution, came into effect in 1807 for African slaves[28] and in 1833 for the English colonies of the West Indies.[29]

26.8 *Stare Decisis*: Legal Precedent

One of the cornerstones of English common law, the binding nature of legal precedent – for which Hale used a formula in the seventeenth century, which then became traditional: *stare decisis* – was consolidated slowly and in the modern age.

The large use that Bracton had made of decisions which he consulted and transcribed had been an exception, in that the records were not normally accessible and could not be consulted at that time. Bracton did not in any case always go along with cited cases and often rated good decisions from the past as superior to those of his contemporaries, whom he deemed less well instructed than their predecessors. It should also be clear that reference to precedents by advocates in a trial was not binding in itself, but rather as a custom: in fact, reference to more than one same

[26] Lord Mansfield about the Trueman v. Fenton case of 1777 (English Reports, vol. 98, p. 1233).

[27] Blackstone, *Commentaries*, vol. I, p. 123.

[28] Statute 47 George III, c. 36.

[29] Statute 3 and 4 William IV, c. 73, c. 12.

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decision demonstrated it to be customary and a new trial should therefore conform to it. There was not yet the rule whereby a single decision constituted a precedent. On the contrary, an authoritative judge at the time of Hale, Chief Justice Vaughan of the Court of Common Pleas, declared in 1670 that it would be irrational to follow a mistaken legal precedent and that though the precedent should be taken into consideration, it should not necessarily be repeated.[30] Only a consolidated and steady line of decisions was therefore considered binding [Baker, 2002, p. 199].

Between the sixteenth and the seventeenth centuries decisions made by the Exchequer Chamber began to be considered binding as this was a supreme court which gathered royal judges from the three central courts, the Court of Exchequer, the King's Bench and the Court of Common Pleas for particularly important cases. By the end of the seventeenth century the principle was settled that decisions of the Exchequer constituted a binding precedent [Plucknett, 1956, p. 348]. Similarly, pronouncements of the Equity Court began to have binding force at that time. Although the distinction between the core arguments, decisive for the case, and the collateral arguments (*obiter dicta*) to the judgement by then existed, the judge's freedom in giving weight to precedent was still considerable: it was not rare for a judge to declare as inappropriate the report of a precedent he disapproved of, producing a different legal argument that he considered to have more value: Lord Mansfield made frequent recourse to this expedient [Fifoot, 1977, pp. 198–229].

Only later in the nineteenth century would the rule whereby a single precedent – if it was clearly argued that the legal question was the same – have an absolute binding force for a lower judge: a precedent of the Court of Appeal would be binding for the Court of Justice; a precedent of the House of Lords would be binding over the Court of Appeal and the Court of Justice. Opinion was (and still is today) discordant on the binding force of a single precedent, in the same court where the decision had been made. The same can be said for holding fast to custom, the binding force of which was somewhat flexible to begin with, but ever greater as it was consolidated, so to speak, with one or more judicial decisions over time. The modern principle of *stare decisis* thus comes into play.

[30] 'If a judge conceives a judgement given in another Court to be erroneous, he being sworn according to law [. . .], in his conscience ought not to give the like judgement': Vaughan declared in the Bole v. Horton case (*English Reports*, vol. 124, pp. 1113–1129, p. 1124).

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26.9 William Blackstone

Together with Bracton and Coke, although very different from each other, one of the most widely circulated and authoritative authors in the history of English law was Sir William Blackstone (1723–1780).[31] His fame is due to the *Commentaries on the Laws of England*,[32] a treatise in four volumes conceived as a textbook for teaching at Oxford, where he held the first and at the time the only university chair of legal studies. The whole of common law was set out with reference to judicial and legislative sources: private, public, procedure and criminal law. The means by which to disregard some procedures which had been in disuse for centuries but never formally abrogated – such as the judicial dual: trial by battle – were discerningly illustrated, as were the legal expedients and fictions established for the same purpose. In fact, at this time the central courts extended their jurisdictional competencies through challenging legal fictions [Maitland, 1948, p. 79].[33] The *writ of trespass* in its various forms thus acquired more and more weight.

The systematic and updated legal framework emerging from the pages of Blackstone, written also for non-professional jurists but much respected by highly qualified ones, such as Lord Mansfield [Braun, 2006, p. 152], together with his persuasion of the 'superior reasonableness'[34] of common law compared to civil law, with which the author was also familiar, can explain the great fame of this work. In the American colonies too Blackstone's text was widely used and reissued. No other work offers such a clear and comprehensive account of English law in the latter half of the eighteenth century.

[31] Doolittle, 2001; Halpérin, DGOJ, p. 55.

[32] W. Blackstone, *Commentaries on the Laws of England* (London 1765–1789), 4 vols. The text can also be retrieved online at: www.lonang.com/exlibris/blackstone/.

[33] E.g. the King's Bench could take on cases to do with debt (which in principle was dealt with by the Court of Common Pleas) by imprisoning the defendant who as prisoner came under the jurisdiction of the Bench, which in turn accepted to debate the plaintiff's question regarding the debt. The Court of Exchequer, which was competent for tax cases, but not for obligations or private contracts, similarly declared the plaintiff as being debtor of the king, who had defaulted on his debt by reason of being an unsatisfied creditor, and in this way the Exchequer ascertained the debit and credit of the two litigants (Maitland, 1948, p. 79).

[34] 'The superior reasonableness of the laws of England': this judgement that underlies his entire work, refers specifically to the common law rule regarding testimony as different from the continental rule 'unus testis nullus testis': Blackstone refers to the 'ingenious expedient' devised by the *ius commune* on the Continent – accompany testimony of a single witness with the supplementary oath of the party as full proof – but then defends the more flexible English law praising its 'superior reasonableness' (Blackstone, *Commentaries*, III. 23).

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26.10 Scots Law

Northern Britain, where from the Middle Ages Celts, Angles and Normans together with the Scots from Ireland formed a separate kingdom than that of England, also developed a quite distinct body of customary laws. The Church was to have great influence also in the legal sphere, and jurisdiction was exercised in accordance with continental Roman-canonical procedure. Through canon law, Roman law was grafted onto local norms acquiring great authority, although it was never directly and formally adopted [Robinson, 2000, p. 228]. The first universities in Scotland (St Andrew, 1412; Glasgow, 1451; Edinburgh, 1556) did not stop the flow of students to the continent. The University of Leiden in Holland, founded in 1575, was a particular attraction. The Edinburgh legal library (of which the philosopher David Hume was librarian) was amply supplied with the best continental law texts.

Among the authors who wrote on Scots law, a central role was played by James Dalrymple, Viscount of Stair (1619–1695). He was professor at Glasgow, advocate and from 1671 president of the principal Scottish court, the Court of Session; in 1681 he published a fundamental work,[35] in which he set out local customs – integrated and selected – and made them coherent within the framework of natural law doctrine, starting from the premise that law 'must be regarded as a rational discipline' [Robinson, 2000, p. 235]. The influence of Grotius and the Dutch school is clear, also in the frequent reference to Roman law.

With the 1707 Act of Union, Scotland became part of the United Kingdom [Levack, 1987]. Scottish representatives entered the English Parliament and the constitutional autonomy of Scotland came to an end, as it could not be on the same footing as a federal state.[36] But Scots law remained essentially distinct from common law; *inter alia*, in the Act of Union of 1707 it was stated that legal decisions of local courts could not be re-examined by common law judges. This did not prevent the use, although limited to exceptional cases, of a procedure whereby decisions taken by the Supreme Court of Scotland could be appealed to the House of Lords.

The Scottish people were proud of their local laws. Scotsman James Boswell overcame his awe of Samuel Johnson – who liked to make ironic remarks about the Scottish at the expense of his younger friend and

[35] Stair, *Institutes of the Laws of Scotland*, 1681.

[36] The Scottish Parliament, which has limited powers, was instituted only in 1998.

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future biographer – vindicating the superiority of Scottish law in the different procedure regarding debtors, who in England were imprisoned based solely on the word of their creditors, whereas in Scotland they were protected by the law.[37]

During the eighteenth century the University of Glasgow in particular was to flourish. Francis Hutcheson influenced the thinking of David Hume and was teacher of Adam Smith, one of the founders of modern economics. He was in turn professor of law at Glasgow and author of an important series of lessons in *Jurisprudence*[38] with a wealth of historical and contemporary references to family law, contracts and enforcement law.

[37] Boswell's *Life of Johnson*, 15 May 1776 (London, 1957, p. 774).

[38] Italian edition: A. Smith, *Lezioni di Glasgow* (1763–1764), edited by E. Pesciarelli (Milan, 1989); Adam Smith, *Lectures on Jurisprudence*, R. Meek, D. Raphael and P. Stein (eds.), Oxford, 1976.

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