

"IN PURSUIT OF THE MERCHANT DEBTOR AND BANKRUPT: 1066-1732"

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ABSTRACT

This pursuit of the merchant debtor is divided into three Parts, the first two Parts deal with the enforcement of debt as a whole, with the emphasis on merchant transactions; the last Part being kept entirely to the development of the bankruptcy laws.

Part One is given over to a study of the law as it stood largely prior to 1285.

Chapter 1 produces a general survey of the methods of debt enforcement which had been adopted by earlier alien societies, in order to appreciate more readily the slow manner in which English law applied itself to helping the merchant creditor.

Chapter 2 deals with the emergence of the Royal Courts, and shows the pre-occupation in the first two centuries of post Conquest Law with the enforcement of Services due to a Lord, rather than with debts.

Chapter 3 pays particular attention to the relationship and transactions between the King and the Jews; together with the gradual development of the Writ of Debt and its acceptance by the Royal Courts.

Chapter 4 studies the means for enforcing attendance at court and the excuses which might be offered. Only a defaulting accountant is subject to bodily attachment. Even when the debtor attends, the modes of proof awarded to be performed at another day pay no attention to legal right.

Chapter 5, continues, on the day appointed for proof to be made with an account of the last stage of the trial and the methods of execution at the disposal of a creditor. The recording of debts on Court Rolls, the awarding of damages and costs, the place of equity

and the punishment of fraud in the early court, and the methods of debt enforcement existing in Fair and Borough Courts are all included here.

Part Two records the history of debt enforcement from 1283 to 1542.

Chapter 6 covers the various enactments which provided special machinery for the enrolment of debts with the ready methods for enforcement of such enrolled debts, and providing imprisonment for the contumacious debtor. The Statutes Merchant, the Statute Staple, the provision for Statutory Recognizances fall within this head. The granting of the Writ of Elegit is also contained here.

Chapter 7 sets out the reforms in the law which finally enable the debtor to be imprisoned on mesne process, providing outlawry for the missing debtor. This form of imprisonment is extended by Common Law to the judgment debtor. To safe-guard the debtor's freedom there are the provisions relating to Bail and the use of the Writs Corpus Cum Causa and Audita Querela.

Chapter 8 considers the use of the fraudulent conveyance made to defeat the creditor and the manner of its adoption in relation to the use of Sanctuary.

Chapter 9 surveys the many courts and varying jurisdictions of this period. Outside such jurisdictions there are the protection of the King, the Royal prerogative and the use of special privileges to be contended with.

Chapter 10 shows how the petition to the King, his Council, or his Chancellor came to be used as a means of combating fraud.

Chapter 11 describes the limited way in which the Legislature and the Common Law came to deal with the particular fraudulent actions of forgery, perjury and duress.

Chapter 12 investigates the way in which imprisonment of the debtor is regulated. This covers the special position of the sheriff and the allowance of bail. The basic need was for the debtor to be kept safely in prison. If this was not done, then the gaoler or sheriff must pay the creditor.

Chapter 13 is devoted to the position of the imprisoned debtor who must by law live or die of his own sustenance. Gaolers extorted or extracted what they could for services; charity is the only answer to a poor debtor's survival.

Chapter 14 brings this period to a close with a review of the widening mercantile horizons, the need for capital bringing with it a rebirth of usury, and the general ineffectualness of the legal machinery to deal with the increasing merchant failures.

Part Three relates solely to the development of the Bankruptcy Laws.

Chapter 15 shows the difficulties which were found in producing and enforcing the first bankruptcy enactment, 34. 35 Henry VIII, c.4.

Chapter 16 is confined to an exposition of the way in which the courts interpreted the term 'trader' for the purposes of the bankruptcy laws.

Chapter 17 discusses the various actions which, if accompanied by the intention to delay or hinder creditors, might render a debtor a bankrupt under 13 Elizabeth I, c.7.

Chapter 18 completes the list of actions specifically termed 'acts of bankruptcy' up to and including the enactment of 5 George II, c.30.

Chapter 19 outlines the position of the Lord Chancellor in the bankruptcy machine and the manner in which a creditor might

petition for a commission to issue so that commissioners of bankrupts could be appointed.

Chapter 20 follows the process from the adjudicating of the debtor a bankrupt, and takes as its subject the appointment of the assignees and their duties, and the persons who might come in under a commission as creditors in order to prove their debts. Future debts may be proved but contingent debts must stay outside. Fraud will provide a complete bar to a creditor.

Chapter 21 demonstrates the wide powers given to the commissioners so that they might obtain the appearance, and make full examination of the bankrupt. Failure to comply might mean death to the bankrupt. Similar powers are given so that witnesses might be adequately examined.

Chapter 22 reveals the completeness of the authority given in order to strip the bankrupt of all property held by him at the time of his act of bankruptcy. There are few exceptions to this rule.

Chapter 23 ends the analysis of the commission with the granting of the certificate of discharge and the rights of the various creditors to participate in the distribution of the estate after the deduction of certain allowances. The costs of the commission and the charges of the commissioners might well render any such distribution largely illusory. Also in this chapter are included details concerning the keeping of the records of the commission and the circumstances under which a commission might be superseded.

Chapter 24 illustrates the general attitude towards bankruptcy and bankrupts during this period. In a harsh, invigorating age the legislature met reality with reality and inflicted severe punishments. Although the death penalty was available to punish the fraudulent bankrupt, the provision was rarely invoked. Finally comes the era of reform and the bankrupt is redeemed, to emerge a quasi-honest citizen rather than a quasi-criminal.

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INTRODUCTION

When anyone enters the realm of debt enforcement, there enter also without bidding two spectres, fraud and good faith. This is in effect their world, their comparative dominance see-sawing with man's changing attitude towards insolvency, and perhaps nowhere are such attitudes more clearly reflected than in the laws concerning the merchant who owes, but cannot pay.

Good faith in a debtor took many years to develop as a possibility, and even when accepted, stringent tests were adopted to make certain that the creditor was not being bilked of what was rightfully his due.

The history in England of the fugitive merchant debtor and bankrupt is one of legislation against fraud and misuse of legal process. Until 1542 England knew no bankruptcy enactment and when it came, it was directed at the fraudulent bankrupt and limited to one particular section of the population, the trader. The community of the 16th and 17th centuries could only see the bankrupt as a semi-criminal. In Thomas Dekker's 'Seven Deadly Sins', written in 1606, Fraudulent Bankruptcy heads the cavalcade of sins as they enter the gates of the city bringing the plague with them.

For the bona fide debtor who must suffer under the law the state had little time. He was an anomaly. Occasionally a benevolent Parliament would pass an act to give him some relief, but usually it would be followed by an outcry against the number of fraudulent debtors dragging themselves through corruption and bribery into the framework of the law.

Today, when many are continuously in debt to the hire-purchase companies, the stigma of debt has largely been removed, it is now part of a nation's way of life. For the debtor who failed to live in this modern age the way was not so smooth. If a man was guilty of debt, then he must also have been either fraudulent, or at least grossly negligent, a state the Romans, along with others, found hardly distinguishable from dolus or intentional wrong.

For the debtor in an early society the law is harsh and immediate, the only salvation for one who cannot satisfy his creditor is flight. Communications are poor and by flight he lives to enjoy other creditors elsewhere. If 'fugitivus' is the earliest word applied to the fleeing debtor, it is hardly surprising if it is purely descriptive of his act. Flight has always been a good indication of fraud in most mens' minds, in debt especially so, yet at a time when slavery was probably the

least unpleasant thing that could happen to a debtor, flight might mean only one thing, an inability to meet a creditor's demands.

For the first century after the Conquest, traders in England, such as there were, enforced their debts as best they might within the limited aid available in the local courts. By the end of the twelfth century, however, national courts, the King's courts, are slowly defining themselves, and a process for enforcing the payment of debts is gradually evolving. This process takes its order largely from the procedure used in the recovery of land; it is a long drawn out wearisome business.

As these royal courts sort themselves out, denying jurisdiction in debt to the ecclesiastical courts, usurping each other's jurisdiction, taking away powers from the county courts, a much greater change is forcing itself on an outdated feudal society.

The lord of the twelfth century existed by virtue of those who lived within and by his authority and who owed to him the incidents of service - service based on a land economy and tied to the soil. With the thirteenth century, however, it is money which the lord requires and the incidents of lordship, the right to enforce services or to wardship, slowly transfer themselves

to a purely money consideration. It is in the practices adopted to avoid either the incidents of these feudal obligations, or payment in lieu, that we find many of the tricks later used by debtors in order to defeat their creditors.

For the early creditor it is the King who provides the best method for enforcing debt. The King's debt is one which must, of necessity, have a fairly stringent enforcement process. For a price, this machinery might be made available to lay and merchant creditor alike. But it is from the King's dealings with the Jews of England that machinery was introduced which later could be adapted to the needs of the merchant society.

The Jews, with their chances of indulging in business seriously curtailed, made their money work for them, they loaned for a consideration. But the Jews lived through the auspices of the King, they were his chattels, as a corner stone of royal economy they can be taxed and taxed again. It is from a kingly desire to know the state of all Jewish treasuries, and thereby how much can be squeezed from them, that there grows up a means of registering the Jewish transactions. For from such registers, the King can ascertain without too much trouble the present state of his chattels.

Whilst this process went on, the creditor had to make do

with the ordinary remedy now given by the Common Law for enforcing his debt. It was a long tedious process. The basic problem then, as now, was getting the debtor to attend before the court. Summons was a question of notice, distraint and distraint ad infinitum. There were legal excuses for non-attendance, which in the case of joint debtors might delay a case for years. As there was no judgment by default, getting the debtor to appear was imperative. Such distress as was levied was of little use to the creditor, for, save where borough customals or rules of Fair Courts provided otherwise, it could not be sold for the benefit of the creditor.

Even if the debtor appeared in court there was no reason for jubilation, for an action fell into two parts and justice did not figure very prominently in either of them. The creditor ought to appear with witnesses to swear to his debt or else have a deed. Against this the debtor might elect either to have the plaintiff's witnesses examined or offer to prove his denial as the court directed. At this point, the court proceeded to give its medial judgment, that is, it decided on which party was to make proof of the facts stated, and in what form. Then on a day appointed, such mode of proof as had been directed was performed, generally this came to be by wager of law or compurgation. The

Common Law slowly reduces the cases where such a form of defence might be used, but the mass of rules which grow up in its place do little to help the creditor.

Where the creditor procured judgment, the King's courts provided alternative writs of execution, one allowed for the attachment of sufficient personal chattels of the debtor to satisfy the debt, alternatively, the creditor could choose a writ permitting him to have such sum as was due levied from the produce of the debtor's land as it became available.

To avoid the above difficulties it was open to creditor and debtor to have the nature of their debt enrolled on a roll of one of the King's courts, a date of repayment was agreed upon and after such date the creditor might sue out execution in the normal way through either of the above writs and avoid the long delays prior to execution. The defect was that such debt had to be enforced within a year and a day of the entry, but a remedy was found to this difficulty in 1285.

The early non-royal court was probably more able to take care of cases involving fraud and to introduce equity to avoid hardship than anything ever exercised by the early royal court, certainly the later royal courts let equity sleep, only to really awaken on the coming of the Lord Chancellor.

Yet outside this majesty of the royal courts there existed the courts of the Boroughs and Fairs, governed by their own customs and rules and refusing to yield one inch to the giants of Westminster. In these courts, the merchant stood his best chance of obtaining a swift, if sometimes crude, justice. The niceties, which by the mid-fourteenth century were clogging the entire of the main machinery of debt enforcement, were happily missing in these courts.

In 1285 the life of leisure that had attended debtors, especially merchant debtors, died. Armed with the knowledge which it had gained from the registering of Jewish money transactions, the legislature hurled itself upon the merchant fraternity. The statute of Acton Burnell was followed two years later by the Statute Merchant, and the two read together provided a swift means of enforcement. Imprisonment, once the prerogative of the Crown in matters of debt, now becomes a part of the merchant debtor's world. The land sacrosanct may be seized and given to the creditor to hold until his debt be levied from it. For the debtor there is prison, bread and water, the latter to be provided by the creditor.

Also in 1285 a creditor is given a new writ of execution under which he may elect to receive most of the debtor's personalty

and one half of his realty, to hold the latter until his entire debt be paid off. There is, in fact, nothing specific in the Statutes Merchant which confines their use to merchants, and they were apparently used by merchant and non-merchant alike, despite a brief attempt by Edward the Second to prevent this.

In the mid-fourteenth century the Statutes Merchant were added to by virtue of the Statute Staple, intended largely to cover those merchant transactions taking place within the now appointed Staple towns. Its procedure, though slightly more stringent than the former, was basically the same. Here too, there is no attempt to prevent the non-merchant using the Statute, but in 1332 it is stated that in future, such machinery is available only to the merchants of the Staple concerning merchandise, and for the common creditor and debtor an alternative, though similar mode of debt recording and recovery, is given. This separation was a warning of the permanent separation which was to come ten years later.

The pace in this pursuit now begins to take on more of the look of a chase. In 1352 the legislature provides for the imprisonment of the debtor on mesne process, so that the contumacious debtor might be attached in order to force him to appear, and within fifteen years the common law extends this to allow for

imprisonment on execution being given and no satisfaction made. The debtor who was not to be found was likely to be outlawed. Not that this was the grim outlawry where every man might hunt down and kill the fugitive. For being proclaimed an outlaw led only to forfeiture of goods and chattels, if such could be found, to the King. Occasionally the creditor might, on petition, manage to obtain such goods and chattels for himself.

Once prison is firmly established, it is necessary to regulate the manner in which the debtor might obtain freedom. Where arrest was on mesne process, there was the possibility of bail, if he was imprisoned on execution the way out was more difficult to find. For a time a writ of habeas corpus cum causa, intended to serve the innocent, also gave the fraudulent debtor a chance of escape, but this was eventually prevented. With the force of immediate imprisonment under the statutory recognizances the possibilities of injustice are readily apparent and to deal with cases of this nature the Common Law evolved the writ of audita querela. By virtue of this writ, the parties might be called before the courts and the matter examined.

With imprisonment before judgment, imprisonment after judgment and outlawry along the way, the debtor needed to take definite

measures against his creditor. wits dulled by long inactivity now recalled the trickery used by forbears to defeat the lord. Goods were conveyed to others who would hold them safe from the grasping creditor. Prison itself could be a fairly reasonable life if one had the wherewithal to pay for the little extra pleasures.

If one feared for the honesty of one's trustee, then the Church could still provide sanctuary for a man'and at least for some of the time' his goods. The ecclesiastical courts might have lost their right to adjudicate in monetary matters, but Mother Church would not easily forego her right to provide refuge for the fugitive.

Sanctuary could be what every debtor ever dreamed of, or it might be very close to hell. For those that took their goods with them, or had someone to provide for them, it was a very pleasant, if closeted, life of ease. For he who fled with nothing, the difference between the prison and the sanctuary was probably that subtle line between chosen isolation and enforced captivity.

Against the Church, the state moved gently and carefully; in the days of the fifteenth century one did not lightly invite the Bull of Rome. Yet with the increasing need to deal with the situation, measures are taken in order to extract the debtor's

goods that they might be used for the benefit of the creditor. Only when the tie with Rome is finally severed is the problem properly resolved, and those sanctuaries that had stood for so long fell before the new Church under its new kin . It is true that certain so-called privileged places continued to harass the legislature and law enforcement officer until the reign of George the First, but they had no papal interdict to preserve them and they too were destroyed.

Whilst some debtors used the conveyance to avoid the creditors, more adept insolvents sought to delay and defraud through clever use of legal procedure. Process, after the more revolutionary allowance of imprisonment, did not make very much headway. The whole of the procedural law slowly solidified, the technicality of pleadings often confounded counsel, amidst the moves and counter-moves the merits of the case and the debt itself provided no more than an excuse for the action.

Together with all this, there was also the new strife between multitudinous courts all seeking the business of the creditor, for the action of debt, once ignored by the royal courts, was now a lucrative highly desirable commodity.

To avoid all this paper force, the merchant seeking to avoid his commitments was forced to return to the oldest escape route,

the King. Letters of protection could be obtained especially if a debt to the King was involved, or said to be involved, for the King preferred his debts to be paid first, in fact he insisted upon it. A privileged few could seek to rely on their position in order that they might avoid arrest or the debtor's prison. But as each new avenue of escape was forced, Parliament, moving slowly behind the times, tried remorselessly to block it.

With the Common Law restrictions, its severity and inflexibility, both debtor and creditor found a desperate need for some higher body to which they might appeal in order to alleviate their hardship. It is through the petition that such appeal might be made. Petition to the King, his Parliament, his Council, and slowly, but with increasing emphasis, to a new man, the Lord Chancellor. The sheer volume of petitions meant that the King could not cope, nor was it practical for his Parliament or Council to spend the greater part of its time sitting as a welfare committee. Petitions are referred to a body of justices sitting in the Exchequer Chamber, probably at the instance of the Chancellor. This august body will hear causes referred to it by the King, Parliament, the Council, the Common Law courts and the Chancellor. Through its offices, the Chancellor is able to bring about some form of order to very muddled parts of the law. But in the end it is the Lord

Chancellor who comes to represent the last hope against oppression and fraud. Eventually, almost he alone had jurisdiction to see that a just cause might succeed, where otherwise the Common Law would have left it strangled and without remedy.

For a long time it is only the Council or the Chancellor that will take any notice of the many fraudulent incidents which so naturally attached themselves to the environment of debt. Forgery, perjury and duress waited interminably before gaining entry to the Common Law courts. True, the Council's legal offspring, the Court of Star Chamber, (having apparently gobbled up the court created by the legislature) sought rigorously to deal with such matters, but only under Elizabeth the First does the legislature show particular interest. Fraud, as a defence receives no recognition at Common Law until 1854, until which time it lived in exile in equity.

During the fourteenth century there is a general sorting out of the officers concerned in the process of capturing and keeping the debtor safe. The sheriff, once the ogre of the piece, has his position firmly cast, his former wide powers are largely curtailed and his duties of serving writs, levying distress and execution and catching the debtor are regulated. True he can still cause delays over his return to writs, but delay is an integral

part of the whole fabric of debt enforcement. Perhaps the most powerful of the decisions left with him is that of the granting of bail where the debtor is arrested on mesne process. Where the debtor was arrested on execution no such consideration could arise, for that was no time for bail, and the sheriff who lost his debtor at such a time, found himself paying off the creditor. But at least this worry over possible escape could be shared, for both the wardens of large prisons and the keepers of small city gaols all faced the possibility of having to settle with creditors where their charges decided to leave too soon.

Still if the sheriff's era of extortion was largely over, that of the keeper of a gaol was only just beginning. By the end of the fifteenth century the gaoler, be he big or small, had realised the potential wealth which lay within his fold of insolvency. The world might think of debtors as persons who could not pay their debts, the gaoler preferred to think of them as persons who refused to honour their obligations, thus they could meet his demands instead.

For the lay and merchant debtor alike prison was a luxury the innocent, but impoverished, could not afford. For the rogue who had secreted his wealth successfully, prison life could be most

enjoyable, for extra payments a debtor could even continue to walk abroad and carry on his business. There were quarters to be had, beer and wines could be obtained, good food provided, one's family or other entertainment invited in. All this for downpayment, cash to the gaoler. This ability to provide for oneself in gaol was very necessary, for the laws in their haste to imprison, forgot to mention feeding the debtors.

In order to survive, it was necessary for debtors to live off their family if they could, or the charity of others if they could not - a charity solicited from small barred windows on the other side of which the fortunate moved freely. On the ability of the duty debtor to touch the hearts and pockets of those who passed depended the means of existence of his companions; companions whose turn to hawk their misery would come tomorrow or the next day, or next year.

Up through the later fourteenth and early fifteenth century the population of the debtors' prison grows, for the English merchant is spreading himself and his markets, and trade begets failure as well as wealth. Merchant traders are forming a new gentry, true the gentleman may invest rather than actually indulge, but the country must have trade to survive. Yet trade demands available money, for before the first profit, there must first be

outlay. The Jews had shown they understood the true nature of money lending far away in the twelfth century, Englishmen now relearned a lesson they previously sought to discard. Usury, the right to take back a larger sum for loaning a lesser, takes many forms, from the sporting somewhat chancy investment and dividend to the straight, tightly deeded loan for interest, all require control.

By the reign of Henry the eighth the many merchant failures have led to a situation which could not be successfully dealt with under the old laws of procedure. It was too slow, too unsure, and when the last creaking turn of the wheel had been made, too unproductive.

In this, the last part of the pursuit of the merchant, he flees alone, the lay debtor continues in his prison, where the merchant may well join him later, but first he must be completely stripped.

In 1542 Parliament took stock of the word 'bankrupt' and finally produced "An Act against such Persons as do make Bankrupt". It is the title of this Act which displays the manner in which the insolvent merchant is regarded, he does not become bankrupt, he makes himself bankrupt, he is fraudulent, in fact worse, he is in reality a criminal.

This first measure hit hard at the merchant who fled or sought to bar his door against the arrival of the sheriff, yet its form is cast rather in the manner of a more sophisticated statute against fraudulent conveyances. No specific provision limits its force solely to merchant traders, this seems to have been largely taken for granted. Yet here for the first time is a provision that enables creditors to share equally of the estate of their debtor in proportion to the debts he owes them. For the creditor, at least, the maxim of "first come first served", ceases to be important.

The powers granted under this statute were vast if interpreted properly, yet they were hardly used. If absolutely necessary it was the threat of bankruptcy, rather than an actual carrying out of the act that was waved at the erring insolvent. Perhaps in a way, the powers given were too general, too lacking in detail for the average creditor to realize what he had been given. Nevertheless it marked a beginning, it was the thin end of a swift wedge, a wedge that was to force the debtor's door, his cupboards and his strong box.

With the age of Elizabeth, any lingering hopes for leniency harboured by the failing trader fell. Now there is no longer any doubt as to those who are to be punished. It is the insolvent

merchant alone who is privileged to be pursued through the long dreary, weary procedure that becomes the commissions. It is in order to take care of the bankrupt general trader that the Lord Chancellor receives authority to appoint commissioners, so that they might carry out the administrative work necessary under the Acts.

Gentlemen who merely invest their moneys in the large stock companies are forcibly excepted out of the bankrupt enclosure, as long as this is their only contamination with trade, there is still a lingering thought that it is misfortune in a gentleman to fail, fraud in a merchant. But this does not last, for in commerce, princes or lords may flourish or may fail, and if the latter, they must be stripped with the commonalty of traders, though such stripping may be more genteelly carried out. The court faces many headaches in deciding who is and is not a trader, infants avoid the Acts; wives who fail, save where custom excepts, bring bankruptcy upon their husbands, for a husband should exercise proper control over a potentially profligate spouse; actions for slander can depend upon whether a person be a trader or not.

As Elizabeth's bankruptcy legislation swept in, the force of her father's statute largely disappeared. For here was the

administrative machinery and the details of how it might be used.

Immediately the more notable methods of avoiding paying the creditor are made acts of bankruptcy. To depart the realm when in debt invited the uncharitable thought that it was to avoid payment or just debts, just as locking and barring the front door and denying one was home showed a similar lack of respect for the waiting creditor. If the debtor did not feel he could stand the rigours of foreign climes, but nevertheless left home hurriedly a little ahead of his creditor's arrival, this might suffice. Sanctuary seeking, officially declared dead, is miraculously revived in a form which bothers the law enforcement officers for a further hundred and fifty years, but such seeking brings the seal of the commission. Yielding to prison for debt when able to pay, or procuring oneself to be wilfully outlawed are also catered for.

The Act of Elizabeth noted evasions tried and true, succeeding enactments took care of the simple devices overlooked as well as any more elaborate variations.

It becomes an act of bankruptcy to fraudulently or willingly have oneself arrested, or to procure one's goods to be attached prior to an act of bankruptcy, so that there is nothing left for

the creditors under the commission. Lying happily in prison is no longer an escape. Strangely, the fraudulent conveyances seem somewhat belatedly added, rather as though it had been considered already dealt with. To escape out of the debtor's prison showed all the intention necessary that creditors should be defrauded. Trying to make use of privileges to which such person was not entitled, or seeking an order from the Council, by virtue of which creditors might be ordered to conform to a particular plan, recognised in the fourteenth century as weapons in the debtor's anti-creditor armoury, are made acts of bankruptcy and bring the offender under the gaze of the commissioners.

Only the act of bankruptcy added in the reign of George the Second shows any originality of thought by this new class of insolvent, the bankrupt. When a creditor made petition for the issuing of a commission, failure by him in prosecuting such commission would result in it lapsing. It was this period between the issuing and the prosecution that gave a creditor a chance to force a debtor to pay or make composition with him, or the debtor the chance to force the creditor to take a composition of the debt. Such action was made an act of bankruptcy in favour of other creditors and the fraudulent creditor lost his debt.

At the head of the administration in bankruptcy stood the Lord Chancellor, his jurisdiction, a curious mixture of first instance and appellate, was largely absolute. There was no appeal from the bankruptcy decisions of the Lord Chancellor, though he might refer matters for the consideration of the Common Law courts if he so desired.

The machinery of the commission was put into motion by petition of a creditor, who made affidavit as to the debt due and of the fact that the bankrupt had committed an act of bankruptcy. The costs of suing out the commission came to be paid by the petitioning creditor, but he received such costs back from the first moneys gathered in from the bankrupt's estate. Against the possibility of a malicious creditor suing out a commission, the petitioning creditor had to give a bond for £200 against his proving the debtor a bankrupt. If he failed having acted maliciously, he would probably lose the entire bond at least, where there was no malice he might perhaps only lose a small part of the bond. Once the commission issued, commissioners were appointed and it was to these gentlemen that the overseeing of collecting in the bankrupt's estate was entrusted. They were to be men of sufficient means and good repute so that they might be free from greed or corruption. At least in respect of greed

the plan failed.

The first duties of the commissioners lay in adjudicating the debtor a bankrupt. In order that they might not be bowed down under the day to day administration of gathering up the estate, they were permitted to assign the entire of the bankrupt's estate to persons chosen by the majority in number and value of the creditors with debts of £10 and over, at a meeting called for that purpose. This assignment was, with some exceptions, of the entire of the estate over which the bankrupt had had control at the time of his act of bankruptcy. The first four months after the issuing of the commission saw to the admitting of creditors wishing to prove debts under the commission, whilst the assignees went about their business of sorting, seeking out and recovering all they could of the bankrupt's estate for the creditors, of whom they were probably the largest.

In order to force discovery of the entire of such estate as the bankrupt had owned, the commissioners were given very wide powers. Before them the bankrupt's home or business premises provided only the flimsiest protection. Their warrant razed the castle of insolvency and they carried away any treasure they found in its ruins.

Although at first the bankrupt who did not make full discovery faced only an uncomfortably long time in prison, the dawn of the

eighteenth century ushered in legislation which for a very small select band of fraudulent bankrupts provided, a meal of their own choosing, an all too quick ride to the scaffold and a not overlong rope. The penalty of death for the bankrupt who secreted property to the value of £20 or over may seem harsh, yet it is liberal if compared with an Act of 1699 which made it death by hanging for the person who stole from a shop goods to the value of 5/- or over. Strangely, due to one of those odd quirks of human nature, this provision if anything added to the difficulties of the commission, for creditors were rarely prepared to see their bankrupt die, though they would happily allow him to rot away in prison.

The commissioners might examine the bankrupt on all manner of topics save as to the act of bankruptcy, and a similar power existed over the bankrupt's wife. Bankrupts, wives and witnesses might all be committed for failing to answer fully the questions put to them, with the possibility of suffering other perils if they perjured themselves.

Once the nature of the bankrupt's estate at the time of his act of bankruptcy had been fully disclosed, the assignees might bring all the necessary actions to recover such property as might now lie in the hands of others. Some exceptions were made in respect of debts paid to the bankrupt, and in cases of goods bought and

sold by him and settlement made, prior to the issuing of a commission, provided that the innocent party had no notice of the act of bankruptcy. To this extent only could an innocent party be safeguarded, for the issuing of the commission was notice to all the world. Real property voluntarily transferred might be seized under the commission unless the bankrupt could have paid his debts at the time of transfer. Even real property transferred for value after the act of bankruptcy but before the commission issued could be seized, unless the commission issued more than five years after such an act of bankruptcy had been committed.

Only once did the power of the commissioners waver, and that was where the bankrupt transferred property in cash or kind to a creditor on the eve of his bankruptcy. But the doctrine that none shall be preferred had come too far. Lord Mansfield swept aside all technicalities and niceties of law propounded by counsel, declaring that unless such transfer or payment was made under pressure or fear of legal proceedings such transaction was a fraudulent preference of one creditor, and void against the other creditors. Where such transfer was made by deed, it was declared to be an act of bankruptcy.

To strip the bankrupt of everything he possessed, save for the clothes he wore, and then render his future property liable to

seizure and his body subject to imprisonment, could not be expected to produce in the bankrupt any overwhelming urge to conform. The legislature digested this fact and it was the Act which gave the fraudulent bankrupt his collar of rope that also gave the conforming bankrupt the possibility of certain benefits and allowances, and a sporting chance to obtain a certificate which would discharge him from all debts which might have been proved under the commission, and also save him from fear of future arrest on such debts. Unfortunately this simple act of charity, which at best enabled the bankrupt to start again a relatively clear man, was productive of much suffering and fraud.

To acquire such certificate it was necessary for the bankrupt to obtain the signed assent of four fifths in value and number of creditors proving under the commission whose debts were of the value of £20 and over. Where a malicious creditor barred the way, the bankrupt had no means of securing his release. This led to the bankrupt procuring false creditors to prove under the commission so that they might raise their voices in assent to his conformity, in such cases, however, there was machinery whereby a creditor, no matter what size his debt, might petition against the allowance of such certificate. In cases where it was discovered after the allowance of the certificate that such fraudulent

creditors had proved, the certificate was void and of no effect.

When the time came for the creditors to receive their share under the distribution of the bankrupt's estate, the various costs which bedevilled the average commission frequently made nonsense of the hard work put in by the assignees. The commissioners were regulated in the sum they might receive for each meeting they attended, but no one specified how long such meetings were to last, or how many meetings a commissioner might get through in one day.

By the nineteenth century, the entire of the bankruptcy law stood in need of revision. The first and most constantly attacked provision was that of the death penalty for the fraudulent bankrupt. This was to be an era of reform. Forces which a century before sought only to crush the bankrupt, now tried to bring back strength to the mangled form. But it took time for the voices of reform to win. In 1820 the provision of capital punishment was abolished, within the next twelve years all the old bankruptcy enactments would be repealed, the Lord Chancellor would lose his right to hear bankruptcy causes at first instance and a Court of Bankruptcy would be established.

There has never been a serious return to the old attitude that a bankrupt should suffer merely because he is a bankrupt, although the thoughts of fraud or good faith still obtain in people's minds

when they hear of such failures. Bankruptcy, insolvency, debt, they are all words which carry with them the overtones of fraud and riotous living.

Perhaps today we have in fact reached the other end of the scale and probably the right end. In 1792 a woman died in Devon Gaol having completed forty-five years of imprisonment for a debt of £19; one hundred and seventy years later a judge gave a man two hundred and ninety-seven years in which to pay off a debt of £357.

In bankruptcy, as in debt, feelings have changed. The best illustration of this can probably be found in the national newspapers and in particular in a paragraph which appeared in the Daily Express

"More people are going bankrupt. Is that a bad sign? Not at all. It is a mark of the return of an era of freedom in which the inefficient must go under and the resourceful survive and prosper. That is all to the national good."

This prompted Percy Cudlipp to compose the following lines:

"It was noonday in Carey street. Through the
grim door.

Of the Bankruptcy building there came

"A newly-made bankrupt whose countenance bore
No inkling of sorrow or shame
To the dozens of creditors milling around
In accents arresting he cried
'I can pay you but two or three pence in the pound,
But let me inform you with pride.
 Though I'm hopelessly, horribly, hugely in debt,
 It's all to the national good.
 For a failure like mine
 Is a heartening sign
 That Britain is out of the wood.
 Your personal losses I deeply regret;
 I mustn't be misunderstood -
 But the weak should go under.
 I'm one, and, by thunder,
 It's all to the national good!'
His creditors banished their scowles of ill-will,
And one voiced the thoughts of the rest:
'Though your tangible assets are next-door to nil
We need not be peeved or depressed.
The story you've told the Official Receiver
Should fill us with pleasure, not pain!'

"And then, having given three cheers for the Beaver,
They joined in this genial refrain:

'Another poor devil has taken the count:

It's all to the national good!

we have lost £. s. d.

But Britain is free,

And we dunned him as hard as we could

Let's buy him some bubbly, and any amount

Of oysters and steak and k. pud

We do love a debtor,

The bigger the better -

It's all to the national good!'"

This was in 1955 A.D., in 455 B.C. the national good was viewed very differently. Men were not easily moved to pity, and the cutting of a pound of flesh was performed live before a small select audience of grim, unsmiling men, the creditors.

P A R T I

THE EVOLUTION OF A SYSTEM

CHAPTER 1SETTING OUT ON THE ROAD

Progress is probably the only thing of which the early English debtor cannot be accused if we have regard to the way in which his continental predecessor, heir to an advanced civilisation, dealt with his problem.

No matter, in general, which growing society one examines the pattern of change relating to debt enforcement is usually the same. The early world of the debtor is one of harshness, of slow rather than sudden death. This allowing the debtor to be executed if he cannot satisfy his creditors is normally followed by a lessening in the severity of the law and the wide use of slavery. This, if it seems cruel, should be looked at from the creditor's point of view. If the debtor could not be forced to pay, through blood if necessary, then today's creditor would probably be facing a similar fate from his own creditors tomorrow. Such a system does not breed pity in men.

Knowledge, when it comes, does much for man; it does not make him humane, but it does make him realise that slavery is a better form than the corpse from which to exact recompense,

and slaves, like most things, yield a greater return with better treatment. Then slowly, very slowly, even slavery is squeezed out.

With the debtor's body went, of course, his movables; these at least could be realised, though the method of seizure and realisation is, as time goes by, regulated, even to the extent of rendering some movables free from seizure. Thereby leaving the debtor with a means of existing after the creditor has passed on.

With immovables, the situation is very different. Immovables, that is to say land, houses, etc., form the general basis of early economies; to allow its seizure tends to disrupt the structure of the community. When such seizure is permitted it is usually only when all else has failed.

Outside the tolerated state remedies, there were always a few extra-legal means of persuading a debtor to pay up. Superstition or religion both proved allies in this field, the power of an unknown force has caused more than one debtor to rediscover an ability to pay. Yet if the occasional creditor had his extra-legal remedy, the debtor was not without outside forces of his own. The Emperor's kerchief could stave off any number of questing creditors indefinitely. There were sanctuaries even in

early Rome, the Christian Church by no means founded the right to seek safety in particular places. It merely did as any complete monarch might do, it gave protection through its own authority and sanctions.

It is to these practices in newly-formed societies to which attention is given first. In this way, it is hoped to render more easy to follow the strange, uncertain perambulations of the English legislature in its fight to contain the merchant debtor.

Execution on the Debtor's Body

There are few if any technicalities in the early law, the procedure is relatively simple, first catch your debtor, then exact from him by torture or death the debt he owes, observing, if necessary, one or two procedural rules along the way.

The Romans allowed the creditor who had obtained judgment, or whose debtor had admitted the debt, to seize the body of the debtor after 30 days if the debt was still unpaid, and bring the debtor before the magistrate; if the debt was not then paid or a guarantor found the creditor may take, bind and fetter the debtor. If after 60 days and the exhibiting of the debtor on

three successive days before the magistrate in the comitium the debt being publicly declared, the creditor is not paid, he may have the debtor executed or sold beyond the Tiber.⁽¹⁾ For the debtor with more than one creditor the law allowed a share-out, each creditor could take a piece of the debtor's body and there was no need to be careful about the actual size of the piece.⁽²⁾ The interpretation of this last section has given rise to some controversy. Radin⁽³⁾ suggests that the translation of 'partis secanto: si plus minusve secuerunt, se frande esto' is 'let the sectores retail the separate parts' and thus 'if the sectores got more or less for the retailing than they had bid for the solidum that is not the basis for a claim either by them against the state or by the state against them'. Wenger⁽⁴⁾ thinks, rather more plausibly, that it would be improbable that the debtor would have any property left to

(1) Table III, ss. 1-5.

(2) Ibid. s. 6.

(3) Radin, (M.) 'Secare partis: The early Roman Law of Execution against a Debtor' - American Journal of Philology, XLIII (1922) pp. 32-48.

(4) Wenger, 'Institutes of the Roman Law of Civil Procedure' (trans. by Fisk 1955 ed.). Cf. Kohler 'Shakespeare vor dem Forum der Jurisprudence, p. 30 et seq.

him after he was said to be addictus, (after the first thirty days and failure to pay) which could be forfeited to the state and sold by it to the highest bidder, since the debtor would have already surrendered his property beforehand to avoid the addictio. This harshness of the law is to be found also in other early codes. The Gulathing Law and Frostathing Law of Norway both favoured death for the debtor who could not or would not satisfy his creditors. Under the Gulathing Law⁽⁵⁾ "If the debtor servant is stubborn and refuses to work, let (the creditor) take him to the thing⁽⁶⁾ and ask his kinsmen to release him from his debt. If the kinsmen refuse to redeem him, the man to whom the debt is owing has the right to maim him above or below, as he may prefer." The Frostathing Law⁽⁷⁾ also allows the creditor to try the kinsmen for payment if the debtor will not pay and if they refuse "he shall assess the value of the limbs for the (payment of the) debt, and the smaller the debt, the easier the penalty." A similar provision exists in the

(5) C. 71. Larson, L.M. 'The Earliest Norwegian Laws' p. 88 (1935 ed.)

(6) 'Thing is an assembly of free-born men convened to discuss the affairs of their community, .. and to take action on the cases and on the subjects that were brought before it.' Larsen, p. 429.

(7) Ibid p. 352. An old German Proverb says "He who cannot pay with his purse pays with his skin."

Salic law, under which the debtor of the 'Wergeld' i.e. the insolvent murderer, was to be presented before four successive sittings of the court; if during this period no one promised to pay for him he was to pay with his life, this meant he was to be delivered to the creditor who exacted his vengeance by putting the debtor to death.⁽⁸⁾

Slavery

But if the creditor could resort to this ultimate sanction, it did little to compensate him for his losses. Also the extreme severity of such laws drove the debtor towards fraudulent collusion since it was better to appease the harshest of his creditors and let the milder ones go without. It is not surprising therefore to find that the creditor comes to prefer the debtor to work for him as his slave and thus work off his debt by his labours. The law following slowly comes to see the debtor as a slave and to protect him from being executed. The Hammurabi code implies that the creditor is not to be too violent towards the distrained body of his debtor when it states: 'If a man

(8) T. 57, s. 3. Henderson 'Select Historical Documents' p. 188 [1892]

'has a claim upon another man for corn or silver, and seizes him for distraint, if the distrained go to his fate in the house of the distrainer (by natural death) then that case has no further claim'.⁽⁹⁾ This power of the debtor to sell himself into slavery to pay his debts seems to have suggested itself as a ready way to make money to the Roman; we find it enacted that if a Roman over the age of twenty years allowed himself to be sold in order to get a share of the price, he was to become a slave, although the sale had been fraudulent.⁽¹⁰⁾ But if the price is restored to the purchaser he was generally allowed to purchase his freedom.⁽¹¹⁾

The ways of debt are many, but where life was tied to the soil, one bad year might start a reaction from which many could never recover. They might borrow, but interest was often high and the product of their labours would serve only to pay off the interest and leave the debt untouched. It needed little to happen at such time in order for the debtor to lose out completely, and

(9) S. 115 - Edwards C. 'The World's Earliest Laws' p.26 (1921)

(10) J. 1, 3, 4.

(11) D. 40, 14, 2 pr. In Leviticus it is said that if a brother sell himself to a stranger, then his brother may redeem him, or "either his uncle, or his uncle's son, may redeem him, or any that is nigh of kin unto him or his family may redeem him; or, if he be able, he may redeem himself." Lev. c. 25, v. 49.

find himself the unwilling chattel of his creditor, if all were against him, his family also would be taken in order to pay off the debt.⁽¹²⁾

In Athens prior to Solon's Seisachtheia the liability of the debtor to become a slave does not stop short at the person of the debtor for he could also sell into slavery his minor sons, unmarried daughters and sisters also, for the law gave him the power of selling them.⁽¹³⁾ Just how long a period of slavery should be, whether only until the debt was worked out or perpetual is not well recorded. The Hammurabi code, s. 117 says that if a debtor has given his wife, son and daughter for silver or for labour they are only to remain three years under their bond-master, after which they are to return to their original condition. The Hebrews extended this period to six years and even then found this "too short a time to enable

(12) Although generally here the concern is with the far past, yet only in 1962 in Jaipur a system of serfdom still existed. The Bhils, with a population of half a million still had a system of credit known as the sagri loan. This loan carried with it not interest, but a stipulation that the debtor or one of his family would work for the creditor, in this fashion was interest paid. Obviously if the debtor worked for the creditor as a living interest, he could not work for himself in order to pay back the debt, and the debts lasted often the lifetime of the debtor and beyond. See The Times, 1962, 8 May, 'No Law will end Serfdom of the Bhils.' - p. 15.

(13) Grote, G. 'A History of Greece' vol. II, p. 469 (1872). There seems to have been a common acceptance of the right to secure a debtor's family, in II Kings, c.4, v.1, a widow appears before the prophet Elisha saying "Thy servant my husband is dead.. And the creditor is come to take unto him my two children to be bondmen." See Heaton (E. W.) 'Everyday life in Old Testament Times' (1961) p. 141. And see Matt., c.XVIII, v.25. "But forasmuch as he had nought to pay, his lord commanded him to be sold, and his wife, and children, and all that he had, and payment to be made." Actually this story had a happy ending, see *ibid*, verse 27.

"the average debtor to pay his debt. Therefore in the priests' code (Lev. XXV, 39-41) the period of servitude is extended to forty-nine years, or the year of Jubilee".⁽¹⁴⁾ The Laws of Manu had a slight class distinction as to whether or not a debtor should become a slave, a debtor of a higher caste than his creditor is not to be forced to make good what he owes by personal service, but is to pay it now and again when he has the money.⁽¹⁵⁾ Where the debtor has more than one creditor then the first creditor to seize upon the body of the debtor has his debt worked off first. Under the Visigothic code if the creditors sue together then the debtor is to serve them all as a slave, but in the share out of any property preference is to go to the largest creditor as to the proportion received. For the others the judge is to divide what remains as he thinks best.⁽¹⁶⁾ Treatment of the debtor who is a slave improves as the

Edwards, p. 120

- (14) Apparently in some East Indian countries the creditor was entitled to take the debtor and his wife and children and dispose of them as he liked. This even to the extent of violating the wife's chastity, although such action was accredited as discharge of the debt. Bl. Comm. II, 472, n.g. citing Mod. Un. Hist. VII, p. 128.
- (15) S. 177 - [Kocourek, A. & Wigmore, J.H. 'Sources of Ancient and Primitive Laws', vol. I, p. 483]
- (16) Bk. 5. Tit. 6, c.5 Scott, S.P. 'The Visigothic Code', p. 179 (1910)

law regulates the procedure for his seizure. Even the fierce Gulathing Law, c. 71 states that no one is to beat his debtor in order to make him work unless he is unable to collect his dues from him.

Public Imprisonment

The lex Poetalia Papiria (326 B.C.) had in Rome prohibited the chaining, putting to death, and sale of the debtor, but the further effects of the lex are subject to some controversy.⁽¹⁷⁾ Wenger thinks it afforded also the possibility of the debtor working out the debt after judgment.⁽¹⁸⁾ Hunter agrees with this and thinks that the freedom of the debtor from slavery after judgment is reserved for the time of Sulla.⁽¹⁹⁾ Certainly by the time of the later republic the debtor could not be taken as a slave to satisfy the judgment debt and the public prison took the place of the 'carcer privatus'.⁽²⁰⁾ There is no doubt that

(17) Attempts at reform by such means as forbidding usury were not always well received. Sempronius Asellio about 88 B.C. attempted to revive a fourth century B.C. law forbidding such and was killed by an angry mob of creditors for his pains. Heichelheim (F.M.) and Yeo (C.A.) 'A History of the Roman People' (1962). p. 195

(18) P. 225 and see fn. 10 and authorities there cited.

(19) 'Roman Law' p. 1035 (4th Edn.)

(20) C. 7. 71. 1.

public imprisonment is easier for the creditor since he may well be without a private prison of his own; also it allows a better means of compelling the debtor to alienate his possessions. Conditions for the debtor could well take a change for the better, in Rome it was an offence to prevent food and bedding being taken to an imprisoned debtor,⁽¹⁾ unfortunately the pound of bread a day which the creditor was to provide under the private imprisonment of the Twelve Tables⁽²⁾ has disappeared and it is uncertain who actually provides the debtor's food.⁽³⁾ The law seems to have paid more attention to the feeding of the debtor in his private prison, even the Irish debtor with his chains around his neck was allowed one meal a day.⁽⁴⁾ But if the enlightened era of the Romans had found

(1) D. 42. 1. 34

(2) Table III, 4

(3) In 1964 a Prison Board in Jersey recommended to the Jersey Parliament that the 1/- a day now payable by a creditor who has a person in prison for debt be raised to 10/-; the present fee having been settled in 1874. - The Guardian, 29th February, 1964, p. 3.

(4) Senus Mor I, 105.

the use of the public prison, after the invasions, and on through the feudal period, the old terrors of the private prison with all its privations returned. In Serbia we find a Canon of Stephen Dushan drawn up between 1349-54 to the effect that "Debtors could be captured and enslaved by their creditors. Imprisonment is not a punishment inflicted by the Canon, but private individuals held many in their own dungeons," and "debtors were sometimes loaded with chains, unless ransomed by their relatives, and could be forced to work."⁽⁵⁾ Brissaud cites a Statute of Toulouse of 1197 in which the Parliament allowed the citizens of Compiègne the right to arrest a debtor, and detain him in their own houses.⁽⁶⁾

Execution on the Debtor's Property

Since execution against the body of the debtor presupposes

(5) Durham, (M.E.) 'Some Tribal Origins, Laws and Customs of the Balkans' p. 95 (1928)

(6) P. 567, fn. 4. Today the right to imprison for debt is largely kept to cases of wilful refusal to pay, after the court has made an order as to how payment is to be made; a state of affairs which has led The Times to remark that "The Debtor's Path to Prison is Long and Tortuous", but without declaring it to be for good or ill. - The Times, 28th December, 1961, p.3 . As recently as 1962 the Constitutional Court of Cyprus was asked to declare the legality of imprisonment for debt, where there was wilful evasion on the part of the judgment debtor; and held that such imprisonment was legal. - In Re Makris [1962] The Times, 25 July, p.5.

he is readily accessible, it became speedily necessary to find a means of compelling a concealed debtor to reappear or to be able to seize his goods and sell them. Even if the debtor were either slave or in a public prison, unless some means existed of taking and selling his goods, the solace afforded to the creditor was small. "The dungeon causes suffering but it does not pay the debt"⁽⁷⁾ and therefore it was to the movable property of the debtor that the creditor looked.

Movables

Diodorus says that the Egyptian King Bocchoris had ordered the releasing of the persons of debtors and rendered their properties only liable.⁽⁸⁾ This is supposed to have served as

(7) See Brissaud, p. 570, fn. 1

(8) See Grote, vol. II, p. 479, fn. 1. Under the laws of Eueretes II (1st cent. B.C. Egypt) a provision forbids collectors of debts to apply, without the decision of a court of law, coercive measures (especially arrest and imprisonment) to the person of the debtor, instead of proceeding against his property. The paragraph notes that the selling into slavery of debtors of the Crown has been abolished by the King's predecessors. Rostovtzeff (M.I.) 'Social and Economic History of the Hellenistic World' (1941) II, 894.

an example for Solon, whether this is so there is no doubt that Solon in his Seisachtheia swept aside the contracts upon which the debtor had given as security either his person or his land and forbade all further loans or contracts in which the person of the debtor was pledged as security: the creditor was deprived of his power to imprison, or enslave, or force work from his debtor, instead he received an effective judgment of law authorizing the seizure of the debtor's property. Debtors who were in slavery by prior legal adjudication were liberated. Only in the case of a creditor who lent money for the express purpose of ransoming the debtor from captivity did the creditor retain power over the person of the insolvent debtor.⁽⁹⁾ "He cancelled at one stroke the entire debts of the agricultural population by proclaiming what went down to history, in Pilgrim's Progress language, as a 'Shaking Off of Burdens'."⁽¹⁰⁾ Not all debt cancellation can be seen as intended purely to benefit debtors. One of the charges levelled against Perseus, the last King of Macedon (179-168 B.C. by Roman Commissioners was that he had courted the masses by promising them cancellation of their debts.

(9) Grote, vol. II, pp. 478-80.

(10) Zimmern (Sir A.E.) 'The Greek Commonwealth' (first edn. 1911, 5th reprint 1952) pp. 133-4.

By this means it is stated he managed to effect revolutions, which are felt to be detrimental to Greek and Roman interests. This is stated after Rome had declared war on Perseus (171 B.C.) in an attempt to get Greek states to join them.⁽¹¹⁾ An Edict of Constantine abolished imprisonment for debt unless the debtor were contumacious.⁽¹²⁾

Execution against the movables of the debtor very soon became the subject of procedural rules. Although the Lombards appear to have had a right to distrain without notice to the debtor,⁽¹³⁾ most other laws do not give this licence. The Romans with the *missio in possessionem* allowed that if the debtor departs the jurisdiction without appointing an agent, or conceals himself in order to avoid process against him then he is sold up.⁽¹⁴⁾ The sale of the goods, however, is surrounded with strict rules which have to be obeyed; not lightly is a man's property to be seized and sold. This sale meant the debtor was

(11) See 'Ancient Roman Statutes' (1961) By Johnson, (A.C.), Coleman-Norton (P.R.), and Bourne (F.C.) p. 28, document No. 29(10).

(12) C. 10, 19. 2. In Sparta in 206 B.C. a programme towards enlightenment, commenced by Cleomenes, was continued by Nabis, who abolished the 'malignant plague of debt' and at the same time gave liberty to captives and slaves. Heichelheim (F.M.) and Yeo (C.A.) 'A History of the Roman People' (1962) p. 144.

(13) See Laws of Liutprand, s. 108.

(14) G. 3. 78.

released from all his past debts, but he was, after this, infamous and not allowed to defend any suit unless he could find sureties.⁽¹⁵⁾ Only in a few instances was it permissible for the creditor to reserve to himself the right to carry out execution upon the person of his debtor first.⁽¹⁶⁾ Distress here is not the narrow remedy which it became in England, it can be used for a wide variety of causes, and Brehon law appears to have employed it in practically every action.

Procedure for distraining is varied, most of the early laws call for three summonses to be delivered to the debtor before his goods may be seized. The Edict of Rothar does not allow the creditor this "process of self-compensation till he had on three successive days called upon the debtor to pay his debt, and if he made any mistake in executing it, he might have to restore eight times the value of the pledge so taken, unless he could swear he had done it inadvertently."⁽¹⁷⁾ In the Gulathing law⁽¹⁸⁾ the creditor shall summon the debtor 'to be

(15) Hunter, p. 1038.

(16) Brissaud, p. 561, fn. 1

(17) Ss. 245-57, Hodgkin, (T.) 'Italy and Her Invaders' vol. 6, p. 210 (2nd edn. 1916).

(18) C. 35. Larsen, pp. 62-3.

' at home in his highseat, ⁽¹⁹⁾ (if he is a householder) to hear the demand for payment and the statement of witnesses'. The Salic law had a long ceremonial through which the creditor had to pass; having complained to the court that his debtor would not pay, he must go to the debtor's house before sunset with witnesses and demand payment, he must wait until after sunset for payment and failure on the part of the debtor adds three shillings to the debt; this has to be carried out three times in three weeks, each demand before sunset and then waiting until after sunset to see whether he will be paid or not, each occasion adds a further three shillings to the debt. Having come thus far, the creditor now complains to the count of his district pledging himself and his property that he has carried out the necessary details of the Salic law and that the count may safely seize the debtor's property. The count, accompanied by six bailiffs goes to the debtor's house and if the debtor is present he may choose any two of the bailiffs to appraise what shall be taken for the debt. For his services the count gets one third of what the debtor owes and the creditor is left with the other two-thirds. ⁽²⁰⁾

(19) The most prominent seat in the house and occupied by the head of the family. Larsen, p. 418.

(20) C. 50, ss. 2 and 3. Kocourek, vol. I, p. 508.

Rules also grow up concerning the persons making the distraint and the goods which they may seize. In Irish law the person making the distraint had to be solvent.⁽¹⁾ The Welsh law states a surety is to convey a distress along with the creditor and distress upon a debtor is not to be taken, unless delivered by the surety.⁽²⁾ Not only did it forbid the creditor to request payment of his debt before the appointed day; but if he did so 'for so long a time is he to be without it after the stated time'.⁽³⁾ Some possessions of the debtor may not be taken. In Babylon he who distrains an ox is to pay 20 shekels, in an agricultural community the man without his ox is useless.⁽⁴⁾ The Laws of Rothar demand that the permission of the King be obtained before a mare or pig be taken under the penalty of death or 800 solidi fine, half of which goes to the King and half to the debtor.⁽⁵⁾ Welsh law does not allow a book, a harp or a sword to be taken in distress by sentence of the court of law; nor may be taken in payment of a camlwrw (fine)

(1) Sen. Mor. I, 267.

(2) D.C.II,c.6, ss. 12 & 13 (A.L.W. 209)

(3) Ibid. ss. 1 & 2. (A.L.W. 207).

(4) H.C. s. 241.

(5) Leg. Roth. 249.

'a wife; children; and argyreu: argyreu imply, dress, arms, and tools of a privileged art; because without these his just station cannot be secured to a man; and it is not right for the law to unman a man, or to deprive art of its means'.⁽⁶⁾

The Dialogue of the Exchequer sets out the order of chattels and what chattels may not be taken in forcing payment of a debt to the King.⁽⁷⁾ As Maine says "it was entailed by the very nature of the whole proceeding, since without the instruments of tillage or handicraft the debtor could never pay his debt".⁽⁸⁾ Since the creditor now has a regular procedure to follow to enable him to levy satisfaction from the goods of his debtor, the law steps in to punish the creditor who takes the goods of his own accord. The Laws of Manu give the creditor five rules to follow in order to collect his debt; he may try moral suasion, suit of law, artful management, customary proceeding and only in the last instance may he use force.⁽⁹⁾

Marcus Aurelius legislates against the realizing of rights by force and an offender lost his right to recover; a wrongful resort

(6) W.L. Bk. 13, c.2, ss. 53 & 54.

(7) II, xiv. Cf. C. 8, 17. 7

(8) p. 266

(9) S. 49.

to force when not entitled meant restoring twice the amount.⁽¹⁰⁾
In Babylon to distrain without giving the debtor notice meant
loss of what was due.⁽¹¹⁾ The Salic law states to proceed
without the authority of a judge, even through ignorance, meant
loss of the debt.⁽¹²⁾ The Visigothic code ordered a twofold
repayment where goods seized other than under legal process.⁽¹³⁾
For the creditor the way to satisfaction was thus perilous, a
failure over one part of the proceedings might well mean start-
ing all over again if he was lucky,⁽¹⁴⁾ the loss of the debt
or even restoring twice the original debt to the debtor; but
with care he will be able finally to realize at least some of
his loss. Salic law held failure of the count to carry out
distrain for the creditor or to send a deputy meant he must
answer with his life or redeem himself with a fine.⁽¹⁵⁾ This
penalty might well appeal to many creditors today who find that
the wheels of legal process grind exceedingly slowly.

(10) Dig. 4. 2. 13 - Wenger, p. 11

(11) H.C. s. 113.

(12) C. 74.

(13) Bk. 8, tit. 1, c.5 and see Sen. Mor. II, p. 71.

(14) W.L. Bk. 4, c.4, s. 17 and see D.C. II, c.6, s. 3.

(15) C.50, s. 4.

Immovables

In Germany it was said that "He who has only immovables is insolvent" and this adequately illustrates the attitude of most laws towards the seizure of the land of a debtor. In an age of Lords, serfs, and bond-men, where the land carried many services, to allow the seizure and ownership by a creditor of the land upon which his debtor lived would have meant a complete undermining of the feudal structure. Even the Romans with their advanced civilization only allowed the judgment creditor to seize the land of his debtor when the animals and movables had been exhausted.⁽¹⁶⁾ The creditor may be granted possession and enjoyment of the land until the debt is paid off, he is rarely granted ownership.

Roman law alone came upon the possibility of allowing the debtor to surrender his possessions to his creditors and even though they did not cover the debt, allow the debtor to remain free. This was accomplished by the Lex Julia de bonis cedendis, which Wenger calls a "chapter of the City Roman judicial code of Augustus."⁽¹⁷⁾ Of it he says:

(16) D. 42. 1. 15. 8.

(17) p. 235. There is some controversy as to whether this enactment is due to Julius Caesar or to Augustus. Hunter (p. 1040) thinks if the latter then it is following up a precedent set by the former.

"It freed the debtor from liability with his person, preserved to him the civil honours which would otherwise be lost in the case of property execution in consequence of *missio in bona* and *proscriptio*, gave him a chance, not limited in advance as to time, to recover himself financially before he could again be sued for payment of a balance of his old debt, ... Therefore the *cessio bonorum* is itself a legal boon for the debtor, which is enjoyed by only one who has had hard luck without malice and recklessness."⁽¹⁸⁾

Surrender in this case did not involve infamy, and if in the early stages the surrender was necessarily performed before the magistrate, in later times it appears to have been enough for the debtor merely to inform the creditors of his intention to surrender his estate to them.⁽¹⁹⁾

This *cessio bonorum* marks the commencement of the many different forms which future bankruptcy legislation was to take. In England it in some ways resembles more closely the 'Insolvency laws' which were to be passed, since the effect is to release

(18) p. 235.

(19) C. 7.71.6. pr

the person of the debtor but leave his future property open to seizure.⁽²⁰⁾

Extra-Legal Remedies

Although the law might gradually be taking upon itself the regulating of the creditors right to recover his debt, a few extra-legal remedies did exist. The Church in feudal times did not hesitate to use the power of excommunication to enforce the judgments of its own courts or against its own debtors.⁽¹⁾ Whilst excommunication itself did not force the debtor to pay the debt, it did deprive him of the right of a Christian burial and thus it became the duty of the relatives to pay the creditor that the dead debtor might be decently interred. Justinian found it necessary to legislate against the creditors who entered the houses of their debtors who are dying, or who threaten to prevent the funeral of the debtor in order to force payment from

(20) See Olmstead (J.M.) 15 H.L.R. p. 832 - This of course was the effect of the first bankruptcy enactments, only in the reign of Anne did the bankrupt have the chance of discharge from past debts.

(1) See Edict Theodoric, c.75. In the Frostathing Law (III, 23) the person excommunicated by a Bishop had three months respite in which to order and conclude his affairs, the bishop's bailiff was then to summon him before a Thing and declare him outlaw, unless he brought his case to a proper conclusion immediately. In the event of outlawry the Bishop was to have all his goods and chattels.

the relatives and heir.⁽²⁾ It was also necessary to stop the creditor from carrying out reprisals on the kinsfolk of the debtor or distrains against them.⁽³⁾ St. Ambrose raises his voice against this cruel practice of preventing the funeral of the debtor.⁽⁴⁾

Fasting on your debtor's doorstep until he pays you was a favourite method of debt collection in the East. It was also strangely enough employed in Ireland, where, in the case of the distraining on a debtor of distinction it was not necessary to serve him with notice but to fast.⁽⁵⁾ Failure on the debtor's part to provide food for his fasting creditor meant he became liable for double the food and double the debt.⁽⁶⁾ The Persian creditor having failed to recover his debt gives notice of his intention to fast by sowing seeds of barley on his debtor's doorstep. By this action he shows the debtor he will fast until payment, or the barley grows sufficiently for him to make bread to eat.⁽⁷⁾ The Hindus however, perfected this particular means

(2) Cod. Just. 9. 19. 6.

(3) Cod. Just. 11. 57. 1.

(4) De Tobia, X. 36.

(5) Sen. Mor. I, 113.

(6) Ibid. I, 117.

(7) Maine, (Sir H.) 'Historical Institutions', p. 297.

of enforcing payment by what was known as 'sitting Dhurna'.

"This curious mode of enforcing a demand is an ancient Hindu custom, held in the highest degree of veneration. If the person sitting Dhurna should determine to fast for a week or longer, the person on whom he sits is compelled to do the same - the strongest stomach of course carries the day. It is said that the Brahmins train some of their fraternity to remain an unusual length of time without food; these are sent to sit Dhurna at the door of some rich individual, who generally accedes to their demands; for if the Brahmin should die whilst sitting, the punishment would be dreadful on him at whose door he was stationed."⁽⁸⁾

A strange semi-judicial means of getting the debtor to pay his debt is found as late as 1894 in Albania. In this case the "borrower who owes money to some one must go to the head of his ward. If he does not give his head satisfaction, he must go to the Bajraktar. If he does not give the Bajraktar satisfaction he is without protection. He may be robbed and killed until he enter the way of the Bajraktar."⁽⁹⁾

(8) Quarterly Review (1814) vol. 10, p. 329

(9) Hasluck, M. 'The Unwritten Law in Albania' (1954) p. 267.

Respite and Delays

Very occasionally the debtor in early law found that the more enlightened of his age, in an attempt to prevent usury and slavery would render void the debts owing. Some of these attempts were destined to failure. Dollabella a Tribune of Rome in 47 B.C., proposed a repudiation of all debts and rents; this suggestion was followed by murders and riots. The creditors complained bitterly, and acting on these complaints and a decree from the Senate, Antonius and his troops quelled Dollabella. In the process of this quelling some 800 were left dead in the Forum, a high price to pay for debt. (10)

Short of these extreme measures however, it was occasionally possible for a debtor to gain a little time for himself before payment of a debt already due. In Rome he could apply to the Emperor that his creditors be given the right to elect whether to grant him a respite for five years (*beneficium quinquennialium*) or accept a bankruptcy. The choice went either to the biggest creditor or on the vote of a majority

(10) Heichelheim and Yeo p. 244.

in the amount of the debts held.⁽¹¹⁾

Debtors did not always find either alternative particularly to their liking, since both meant paying eventually. To avoid this they were not above manufacturing their own salvation, even to the extent of threatening their creditors, or making false accusations against them. Valerius Eudaemon, prefect of Egypt, found such goings on within his area of jurisdiction, and in 138 A.D. made proclamation of his observations as follows:⁽¹²⁾

"In availing myself of opinion.... and by my own personal observation, it has been observed that many persons, when requested to settle their debts, refuse to do what is just for their creditors and by threatening to bring serious charges attempt either to ward off their creditors completely or to delay the payment. Some of the debtors hope to intimidate those persons who possibly may dread the danger and for this reason will compound for less amount, while others think that by the threat of a lawsuit their creditors will not dare to press their claims.

(11) See Hunter, p. 1040; and Wenger, p. 317.

(12) Edict of Valerius on the Collection of Judgment Debts, 138 A.D. - Ancient Roman Statutes, p. 208, Document No. 251.

"Therefore, I issue instructions that debtors shall refrain from such pernicious conduct and either shall pay their debts or shall use persuasion on their creditors to delay a settlement. For when an action for debt is brought and the defendant does not immediately deny the debt, that is, he does not straightway claim that the document is a forgery and put in writing that he will so make accusation, but if later he tries to bring a charge of forgery or knavery or fraud, he shall have no benefit from such a trick, but he shall be compelled to pay the debt at once; or else he shall deposit the amount, that the recovery of the debt may be secured.

When the action for the recovery of the debt has ended, he then shall enter upon the more serious suit, if he has confidence that he can prove his case. Not even then shall he be immune, but he shall be subject to the prescribed penalties..."

For the debtor who sort to flee, some places of asylum did exist, sanctuary of the temple or sacred places was one of man's earliest allowances to the fugitive.⁽¹³⁾

(13) See pp. 229-237.

Irish Law granted exemptions respecting the payment of debts on the death of the King of Ireland, or on the death of the successor of St. Patrick, for one year. The death of a king of a province or of a cantred brought exemptions for three months and one month respectively. Apparently every chief had the right or privilege of giving protection during his lifetime for the same period as that which would happen at the time of his death.⁽¹⁴⁾ In Welsh law, under the influence of Christianity, the debtor gets a free week on the three religious festivals of Christmas, Easter and Whitsuntide during which no one is to ask him for his debt.⁽¹⁵⁾

These are stages through which other laws had passed before the English Merchant had reached the stage of barter. Little of it survived to aid him.

Rome, before its fall, had already reached a stage of development which English law would hardly know for another twelve hundred years. With the fall of Rome there fell also

(14) Sen. Mor. I, p. 98, fn. 1

(15) W.L. Bk. 10, c.7, s.45 (A.L.W. pp. 562-3).

the bona fide debtor, it is only his mal fide counterpart who will be able comfortably to survive the road ahead. The legislature will bend itself on one maxim, 'in debt there is fraud'. But at least in the beginning the way of the English Merchant debtor is gentle.

CHAPTER 2A GATHERING SOCIETYConquest and Settlement

Of the laws of England prior to the Norman invasion we know comparatively little, of the means of enforcing debt or the process involved we know little or nothing. The laws of Ine and Alfred⁽¹⁾ both had regulations as to the ceremonial demand of one's rights before self-help might be employed, but otherwise there is silence. The powerful creditor could no doubt collect any debts outstanding to him by force of arms, after he had made his demand in the honoured fashion. The weak creditor might well find collecting from a powerful debtor well nigh impossible.

Yet at the time most men owe only service, they hold their land, their living, their very lives by it. Money has yet to become the great force in everyday life, the King, the Lords and the Church may have varying amounts of it, the ordinary man may well be able to do without it, barter and the produce of the soil provides the needs of life and sorrow to the man who gives credit in an exchange.

(1) See p. 123.

With the Conquest, the pattern of life does not undergo an automatic change. William's heart lay in getting the royal administration sorted out; like the man who wins an assorted gift parcel he wanted to know just what he had got. With the Domesday Book the Crown finds out what it owns and its followers can settle themselves warily into their new homes.

The Norman did not bring a vast new machinery of justice, nor an hierarchy of royal courts with him, the hundred courts, already old, would serve as his local government offices for their areas and the county will also serve both for adjudication and administration.

The Anglo-Saxons had had a Chancery and also made use of writs, and it would appear that the writ system, which is to come to dominate the English judicial scene is a native product. Slowly this system will spread back to Normandy and into Europe, for we find no evidence, as yet, to suggest an earlier Norman usage or the introduction of such a system with William.⁽²⁾ Yet the Anglo-Saxon influence which may have given a platform on which to work, did not go any further, and it is left to the future kings to create a solid judicial structure.

It is not until the reign of Henry I that we come to the real beginning of royal justice. The King has around him justiciars presided over by a Chief Justiciar and they will hear only the most

(2) See the Creighton Lecture [University of London] 19 Nov. 1962 by Professor R.R. Darlington also 'Royal Writs in England from the Conquest to Glanvill' by Van Caenegem (R.C.) [S.S. vol. 77] pp. 113-120 and authorities cited there.

important causes.⁽³⁾ The Exchequer comes clearly into view and the first Pipe Roll recording the transactions of the Exchequer which will enable us to gain some idea of the workings of the King and his councillors comes into being.⁽⁴⁾ From this period we shall be able to trace the gradual development of the enforcement of debt. At first the evidence is sketchy, the records are scant, for they are concerned only with recording the day to day affairs of what to them are mainly administrative matters which deal with the King's financial affairs.

Before tracing the development of the enforcement of debt, it is necessary to look at the main courts of this period in which the ordinary man would seek redress for his grievances, and also to take a brief look at the way in which other obligations came to be enforced. For debt in the sense of money is not the only thing a man could owe, more often he held his land and position by services to another, and providing for the enforcement of these services is an important part of the legislation of the age.⁽⁵⁾

(3) P. & M. 1, 108-9. "The whole machinery of justice revolves round the justiciar, as does the machinery of finance; as it was under Henry I, so it is under Henry II and his sons. Differentiation in personnel and function proceeds slowly and is never entirely stabilised until, in 1234, the office of justiciar is abolished and the King's Bench, Common Bench and Exchequer are at last separated and their modern history begins." See Richardson (H.G.) and Sayles (G.O.) 'The Governance of Mediaeval England from the Conquest to Magna Carta' (1963) p. 215.

(4) Pipe Roll 30-31, Hen. I

(5) It was, however, a losing battle, or rather a battle which was largely lost when the legislature entered lists in order to remedy the situation. Money was in, service was only of use if it brought hard cash. Cf. Govn. Med. Eng. pp. 111, 115.

But firstly, to the growth of royal justice, which, during this period slowly emerged and usurps the powers of the local courts which have for so long ministered to the needs of the ordinary man. By the end of the thirteenth century period we find Fleta speaking of the king having his court not only in the royal courts, but also in the county and the borough.⁽⁶⁾ This may be a little presumptuous historically, but by 1290 the theory that justice emanates from the Crown is already firmly establishing itself.

Emergence of the Royal Courts

The courts of this period are in the process of sorting themselves out, the hundred and the county had their courts stretching back before the Conquest.⁽⁷⁾ Settlements have come into being

(6) Fleta, Bk. 2, c.2 (S.S. vol. 72, pp. 109-110)

(7) See Govn. Med. Eng., p. 25. "The important attributes of the shire are the sheriff and the shire-moot or county court. Sheriffs and shire courts as they were known in the eleventh century, do not go back beyond Edgar, if so far, and they are devices of royal government. Doubtless in their invention old material was used and old ideas, but they were essentially new creations. So, too, were those divisions of the shires, the hundreds of wapentakes with their courts, though in origin these courts may be older than those of the shire. What ancient materials, what ancient ideas, are represented in shire and hundred are matters of speculation rather than of evidence. The essential fact is that they were there in 1066, new and efficient instruments of government to be used and extended as the king thought fit."

and the charters of Henry II and Richard I gave courts to these new boroughs with their own many differing practices and jurisdictions. A lord may have his own court with a fairly thorough jurisdiction over the tenants within his protection.

These courts, however, do little to develop the system that is to build the common law. It is the king's court which, when it has split into its many branches, will attempt to unify the law and give the litigant a better chance of getting something approaching a fair deal.

The Exchequer

The first branch to establish itself out of the King's Court is the Exchequer. The king needs a fairly stable body to look after the finance of the realm and by 1179 we have the appearance of a treatise on the methods and workings of this Department and its concern with Crown debtors.⁽⁸⁾ Since the Exchequer dealt with the king's debts it soon evolved a quite rigorous process for collecting them, a process which we will see the king was willing to loan to others for a suitable return.⁽⁹⁾

(8) Dialogue of the Exchequer

(9) See p. 90.

From this financial house develops the Exchequer of Pleas and though the first actual roll of this court does not appear until 1236 it has been developing slowly, probably since Henry II.⁽¹⁰⁾ The king has ever been ready to aid the creditor who would return a portion of his gains to him,⁽¹¹⁾ and the Exchequer of Pleas continued a business, which, as the Exchequer, it had known well. It had authority to hold common pleas not peculiar to the Royal revenue on a number of grounds, the officials of the Exchequer and their servants may sue their own debtors in the Exchequer and if an official was impleaded elsewhere it appears in at least one case that he sued and obtained damages against his adversary.⁽¹²⁾ Merchants and friars are also to be found amongst those who wished to enjoy the common law issuing from this court and to make use of the sterner procedure for enforcement to be found there.⁽¹³⁾

(10) See Holdsworth 'History of English Law' i, pp. 231-7.

(11) See p. 96. "... men are willing, under Henry II, to pay substantial sums in order that a civil action may be adjourned or removed to the exchequer or before the justices at the exchequer." Govn. Med. Eng. 210 citing Pipe Roll 14 Henry II, p. 197. Ib. 15 Henry II, p. 66 and 17 Hen. II, p. 73.

(12) Jenkinson (H.) 'Select Cases in the Exchequer of Pleas (S.S. vol. 48) No. 141, p. 85. for persons who used this privilege see ib. p. xcix.

(13) See also Madox ii, 76 re Merchants of Friskobalds to be allowed to sue in Exchequer by Writ of Privy Seal of Edward II.

It also allowed actions against sheriffs and other officials which at this period was not an unusual occurrence.

The Dialogue said that debtors of the king's debtor could be brought before this department because the king's debtor was unable to pay the King due to their default.⁽¹⁴⁾ But where the plaintiff having made this allegation is successful the money is paid directly to the Exchequer. In the early cases the king is co-plaintiff with his own debtor against the debtor's debtor.⁽¹⁵⁾ The king also might grant leave that particular persons were to be allowed to bring their suits to the Exchequer and recover their debts there.⁽¹⁶⁾

This granting of common pleas in the Exchequer was only an extension of the way in which it had functioned when a financial department, but it was not regarded with favour by some, and one would think to see the debtor at the head of any petition to rid the Exchequer of its common pleas since its process of enforcement would not endear itself to him. Its jurisdiction stretched beyond that of

(14) II, xv.

(15) Jenkinson, p. ci.

(16) Madox ii. 76.

the Common Pleas Court, for its process reached to Wales and into the palatinates and in it wayer of law did not lie, so that a fugitive debtor might well be pressed to pay his debt rather than be hounded down.⁽¹⁷⁾

To an extent, however, the fugitive debtor won against the Exchequer. In 1270 Henry III commanded that all pleas before them (other than of Ministers of the Exchequer) are to be handed over to the Common Pleas⁽¹⁸⁾ and in 1277 Edward I says only debts to the king or his ministers should be dealt with there.⁽¹⁹⁾ This was enacted in 1282⁽²⁰⁾ and firmly driven home in 1300⁽¹⁾ when it was declared that "no Common Pleas shall be from henceforth holden in the Exchequer, contrary to the form of the Great Charter".

The provision of the 'Great Charter' referred to says:

"Common Pleas shall not follow our Court, but shall be held in some fixed place."⁽²⁾

(17) Burton 'Exchequer Practice' ii, p. 474-5; i, p. 105.

(18) Madox ii, 73.

(19) Ibid 74.

(20) 12 Edw. I, [Statute of Rutland]

(1) 28 Edw. I, c.4 Art. Supp. Car.

(2) 17 John, c. 17.

This is plainly wrong, the Great Charter's remedy had been aimed at an entirely different ill, the tying down of a court of common pleas to one place. The Exchequer did not travel the country in any case, whereas the King's Bench did. However, the words 'common pleas' were seized upon and the Exchequer stripped of its common law practice for the time being, later with the aid of fictions it was to resume its former role.⁽³⁾

A further victory against the Exchequer came at a later date, its non-use of wager of law meant one of the worst methods of procedure in the ordinary court could not be used there, but this apparently went against the finer feelings of the public, for in 1376 Parliament authorised wager of law in all cases where the king was not a party in the Exchequer the apparent reasons being that jury trial caused damage to the people, impoverished the jurors and brought about much delay.⁽⁴⁾

The Common Bench

The next court to emerge from the King's Court is the Court of Common Pleas, this court is firmly established in one place as early as 1215⁽⁶⁾ and comes to reside at Westminster. This need for

(3) See Bl. Comm. III, 45-46 for the use of the writ of Quo Minus.

(4) 2 Rot. Parl. 337, No. 92.

(5) 17 John, c. 17.

a state court was obvious since following the King's Court round the countryside in an attempt to secure justice could not be easily undertaken. It is in this court that the common pleas are held, Crown pleas and matters of great concern to the king may go on to the King's Court, the man who wished to go to royal justice for debt enforcement would look to this court or to the royal justices detached from the King's Court and travelling the country under their various commissions. (6)

The King's Bench

Later in Edward I's reign the Court of King's Bench will separate itself from the King's Council and will, over a long period, usurp for itself a jurisdiction in common pleas of first instance, but in this period the appeals from the Court of Common Pleas on writ of error and the adjudication of the more important pleas which

- (6) Regarding the position during the time of Richard I it has been said: "It was not necessary to seek out a distant king in order to commence an action or to enforce one's right. Justice was available on easy terms for the asking in one's native land and indeed almost at one's very door, if litigants were content that the action should be tried by itinerant justices. In the king's absence all the departments of government functioned without intermission, among them the chancery, if we are to give the name chancery to the lineal ancestor of the cursitors' office, where writs were regularly issued in the justiciar's name, and not confine it to the clerks of the chapel who followed the king and were responsible for charters and exceptional writs." Govn. Med. Eng. p. 168.

concerned the Crown are its functions.

Ecclesiastical Power

One court outside the common law group was the Ecclesiastical Court. This Court had perhaps a better means of debt enforcement than the King in its liberal use of excommunication. Early in our history the Crown saw this as detracting from the Royal revenues and proceeded to deal with the matter.⁽⁷⁾

"Pleas concerning debts which are due through the giving of a bond, or without the giving of a bond, shall be in the jurisdiction of the king."

The same document had stated earlier that no tenant-in-chief of the King, nor any one of his demesne was to be excommunicated nor their lands placed under interdict unless the King or his justice had first been asked and matters belonging to the King's Court dealt with there.⁽⁸⁾

The Ecclesiastical Court may continue to enforce breaches of faith; what it must not do is to award damages, although it may

(7) Constitution of Clarendon, C. 15. - 10 Hen. II

(8) Ibid. C. 7. - 10 Hen. II

award a penance. The Church did not take kindly to this and we find a plea of this time saying⁽⁹⁾ that the City of London and the Jews have special privileges in the law why not clergy. A person who found himself impleaded for debt in the Church court could obtain a writ of prohibition which forbade the ecclesiastical judge to interfere with chattels or debts except in matrimonial or testamentary causes, and it appears that a writ of prohibition on the one hand might well be met with excommunications on the other.⁽¹⁰⁾ This procedure of allowing excommunication only if a person was guilty had been fought for in France by Louis IX who refused to allow his officers to seize the goods of persons excommunicated unless proved guilty. In his absence abroad, however, the Church obtained the passing of a law which forbade an excommunicated person from appearing before lay tribunals.⁽¹¹⁾ Despite the

(9) Materials for the History of Thomas Becket (R.S. iv, p. 148 (c. 1164)

(10) See P. & M. II. 200. For an excellent account of the Court Christian and the use of Prohibition see Flahiff (G.B.) 3 Medieval Studies, p. 101 (1941); 6 *ibid.* p. 261 (1944) and 7 *ib.* p. 229, (1945)

(11) Joinville 'History of St. Louis' [Trans. Joan Evans 1938] pp. 206-7. Cf. Frostathing Law III. 21, where person excommunicated by a Bishop had three months in which to bring his case to a proper conclusion. [Larsen, p. 254]

Church being forbidden to meddle in debt they took a long time to take any notice. We find many cases in the rolls; one Hugo acknowledges he sued Ralph in court Christian touching debt and now makes a fine of one mark.⁽¹²⁾ Simon de Melwood and the Prior of Worcester both must pay 10 marks for taking a lay plea to the court Christian.⁽¹³⁾ Thomas is summoned to show why he brought William into the court Christian concerning a debt of twenty marks against a prohibition, Thomas comes and defends and wages his law, but he had no pledge and he is delivered to gaol.⁽¹⁴⁾

If a debt, however, was for money due on a promise of marriage, it was cognisable in the Ecclesiastical Court.⁽¹⁵⁾

The Denial of Jurisdiction

As the Crown had removed, at least theoretically, the Church from the competitive field in lay pleas, so too it sought to limit the jurisdiction of the local and inferior courts and raise the business of its own courts. It declared by the Great Charter

(12) S.S. vol. 59, No. 439, p. 190

(13) Madox i, p. 561.

(14) Sel. Civ. Pleas (S.S. vol. 3) No. 83, p. 37

(15) Bracton, fo. 175.

that pleas of the Crown were not to be held by sheriffs, constables, coroners or bailiffs.⁽¹⁶⁾ But the blow to the local courts, in debt jurisdiction, came in the Statute of Gloucester where it is stated that:

"... none from henceforth shall have Writs of Trespass before Justices, unless he swear by his faith, that the Goods taken away were worth Forty Shillings at least".⁽¹⁷⁾

In themselves the words appear innocent enough yet before long they are being taken to mean that no plea of trespass, debt or detinue could be brought in the county court if the plea was for more than forty shillings. How this came about is not known,⁽¹⁸⁾ yet we find fourteen years later in a case by bill before Justices in Eyre that the defendant claims that since the debt was worth more than forty shillings it could not be recovered without writ. This interpretation of the chapter is not challenged, but it is said that such justices had special powers.⁽¹⁹⁾ The county court plaintiff would not generally need a writ, nor at this period might the forty shilling

(16) 17 John, c. 24 [c. 17 in 1225 issue]

(17) 6 Edw. I, c.8

(18) See however P. & M. I, 554 re the use of 40/- level.

(19) Y.B. 20. 21 Edw, I, pp. 487-8.

level have proved too exacting, for 40/- in the thirteenth century represented a sizeable sum to the county inhabitant. But as the value of money changes this restriction of jurisdiction will largely suffocate the local courts. (20)

With appeals from the inferior courts we are not much concerned. Prior to judgment, a writ of Tolt would take a plea from the seignorial to the county court and the writ of Pone would take it on to the Common Pleas. If judgment had been reached then a plea of false judgment might be made to the King's Court and a writ issued to the sheriff commanding him to cause record to be made of the proceedings in the local court. Since all the proceedings there are oral, the record is then brought before the King's Court by four suitors of the court below or four knights from the county court. Thus we find four knights of the county of Cumberland are to make record touching a plea of debt for 5 marks between Richard and Ivo, Richard having said the judgment was falsely made in the county court; the knights say Ivo proved his debt correctly in the county court and received judgment. Richard says this is a

(20) For the use of a 'Viscontiel Writ' commanding the sheriff, by means of a special clause 'justicies', to see that justice was done in a particular case, thereby avoiding the difficulties of the 40/- rule, see Plucknett, 'Concise', pp. 91-2.

false record and offers to produce a man to prove it, however, he does not do so, nor does he produce any other record, therefore he is to pay the debt and be in mercy.⁽¹⁾

These, then were the general courts to which the creditor might go in order to obtain some redress. Other courts held in boroughs or in fairs held by merchants could also be attended by those who came within the special jurisdiction of the particular court, but these will be discussed later.⁽²⁾

Feudal Obligations

For the lord and his tenant the debts that most often lay between them were for customs and services, and it is in these services that the fertile brain of the man who would escape his liabilities took its exercise.⁽³⁾

(1) Sel. Civ. Pleas [S.S. vol. 3] no. 38, p. 17

(2) See p. 164.

(3) "A lord was entitled to various rights and dues from his tenants which contemporaries referred to compendiously as 'customs and services'. Some of these rights were the outcome of a royal grant of jurisdiction over the tenants; others were purely common-law, that is to say, customary and recognised by the courts as the essential incidents of the relationship of lord and tenant. Still others were part of the bargain made between grantor and grantee when the tenure first came into existence by subinfeudation." Plucknett [T.F.T.] 'Legislation of Edward I' (1949), p. 51.

Restraining Alienation

There was no great restriction on alienation of land by a tenant in the early thirteenth century. The tenant might "alienate the whole, or only some part of the tenement, by substituting for himself some new tenant who will hold the tenement, or the part so alienated, of his, the alienator's, lord; or again, he may desire to add a new rung to the bottom of the scale of tenure, to have a tenant who will hold the whole or part of the land of him, and in this case the services for which he stipulates may be different from those by which he himself holds of his lord;" the former method was known as substitution, the latter subinfeudation.⁽⁴⁾

To avoid difficulties caused by tenants granting away parts of their holdings until the remainder was not enough to support the service owed by the tenant, it is enacted in 1217 that:

"No freeman shall henceforth give or sell to any one more of his Land, than so that out of the residue of his Land there may be sufficiently done to the Lord of the Fee the Service due to him which belongeth to that Fee."⁽⁵⁾

(4) P. & M. I, p. 330.

(5) 1 Hen. III, c. 39(3): c. 32 of the 1225 issue. For the manner in which such substitution or subinfeudation affected the lord see P. & M. I, pp. 330-1.

These restrictions on the power to alienate the land were lifted altogether in 1290 when it was enacted that the purchaser was to hold of the chief lord and not of the feoffor.⁽⁶⁾ Further if the tenant sold part only of the land the services were to be apportioned.⁽⁷⁾

Enforcement of Services

This may have dealt satisfactorily with the problems of the tenant selling the land, but there also existed the problem of the tenant who left his land taking his goods with him so that the lord had nothing to distrain him by, or merely kept his goods elsewhere with the same result; alternately the tenant may not care very much whether the lord took most of his goods or not, as he had no intention of rendering the services due. In 1215 it had been laid down that no one was to be compelled to perform greater service for a knight's fee or for any other free tenement than was actually due from it,⁽⁸⁾ but this did little to help the lord. In 1278 the Statute of Gloucester finally came to the lord's rescue; if the land was let for rent or services equal to a quarter of the value of the land and the services had been discontinued for over two years, then, if the tenant had left

(6) 18 Edw. I (Quia Emptores) c. 1

(7) Ib. c. 2

(8) 17 John c. 16 (c.10 in 1225 issue)

nothing on the land by which he could be distrained, the lord is to have a writ out of the Chancery. If the tenant appears before judgment he may, on paying the arrears and damages and, if the court so wish, on finding security for the future in the shape of a surety, receive the land back. Failure to appear before judgment meant that the tenant was foreclosed for ever and the land returned to the lord.⁽⁹⁾ Where the lord on not receiving the services due to him from the tenant, distrained the under-tenant for the same services, then the under-tenant had a writ of mesne against the tenant of whom he held to be acquitted of the services for which the distress was made. This common law writ, which arose largely in the thirteenth century, carried with it a great deal of troublesome procedure for all concerned with the attempt to get the mesne tenant to fulfil his obligations.⁽¹⁰⁾ The statute of Westminster II set out to clear up the position.⁽¹¹⁾ It states that the Mesne has made long delays before he will come to court to answer to the writ and that, therefore, in the future, on the tenant in demesne being distrained for the debt of the mesne, the tenant in demesne is to be

(9) 6 Edw. I, c.4

(10) See Enever (F.A.) 'History of the Law of Distress' (1931), p. 129-132.

(11) 13 Edw. I, c.9

allowed to purchase the writ of mesne. After this there follows a slow but careful procedure which includes proclamations in two county courts that the mesne is to attend on a stated day to answer his tenant. If the mesne fails to appear then the mesne tenancy is completely extinguished and the tenant in demesne is to take his place. He must, if necessary, perform heavier services than previously if the mesne had to perform those services, but he may maintain an action and get judgment that the ex-mesne is to acquit him of these.

The same statute extends the action for cesser of customs and services given in 1278 to all cases of cesser of customs and services of whatever nature.⁽¹²⁾ In one sense the reforms that were given in both the case of the enforcement of services and the tenant in demesne came when the relationship of lord and tenant was weakly struggling for survival; with *Quia Emptores*⁽¹³⁾ comes the law which will in the long run mean the death of this way of life, since from that time the relationship of lord and tenant could no longer be created.

(12) 13 Edw. I, c. 21

(13) 18 Edw. I.

Mortmain

It was found that by alienating the land to a religious house and then receiving it back again either on a lease or for a rent that the lord lost many valuable incidents although the religious house might satisfactorily perform the services required. This state of affairs could hardly go unchecked, and it is not therefore surprising to find that the evil is dealt with in c. 43 of the 1217 Magna Carta.⁽¹⁴⁾ By virtue of this, land may no longer be given to a religious house in such a way as to be received back again by the donor; nor is a religious house to accept land from a donor in such a way as to lease it back to him. Any attempt in the future to do such a thing will result in the gift being completely void and the land returns to the lord.

In 1259 the Barons had managed to obtain a provision regarding mortmain but this, for some reason, did not pass into the Statute of Marlborough.⁽¹⁵⁾ In 1279, however, a statute was passed to deal thoroughly with the problem.⁽¹⁶⁾ No land is to be aliened into

(14) C. 36 of the 1225 issue - this practice was known as alienation in mortmain. The grant to the monastery was apparently by way of substitution, the re-grant to the tenant by sub-infeudation - see Plucknett Legn. Edw. I, p. 95.

(15) 43 Hen. III, c. 14.

(16) 7 Edw. I [7 Edw. I, st.2 Ruffhead] For the method of enforcement of the laws against alienation into mortmain see Wood-Legh (K) 'Studies in Church Life in England under Edward III, c.3, pp. 60-88. (1934)

mortmain upon pain of forfeiture. If land is so aliened, then the lord of whom it was held, can, within a year, enter upon the land and hold it 'in Fee and Inheritance'. Should the immediate lord of the fee fail to enter within the year, then the next lord above him may enter within six months, and so on with the lords above him if he fails to enter. The king, however, says that he may enter after one year from the gift if a lord has not claimed the land, and that he will infeoff another in the land but reserving to the lords of the fee "their Wards and Eschetes and other Services to them due and accustomed". A further law was passed in 1285 to prevent the tenant permitting land to go to the Church by his allowing them to receive the land on recovery by default in the court.⁽¹⁷⁾ It is laid down that on recovery by default at the suit of religious men, inquiry is to be made as to the title of the demandant and if he fails to show proper title then the land is to accrue to the lord of the fee if he demand it within a year or the next immediate lord within the following six months, or the king. By Quia Emptores it is stated that no feoffment shall be made to assure lands so that they fall into mortmain.⁽¹⁸⁾

(17) 13 Edw. I, c. 32

(18) 18 Edw. I, c. 3

Wardship

One of the most profitable rights exercisable by the lord was that if his tenant died he should have wardship of any infant heir, and by virtue of this the lord has custody of the land until the tenant comes of age. This custody of the land meant the lord received the profits arising from the land save that he must educate the ward in a manner comparable to the ward's estate in life. This duty owed to the lord was not accepted with good grace by many and the practice grew up of either enfeoffing the eldest son during the life-time of the tenant so that his death made little difference, or by sub-infeudation to a group of tenants (friends of the grantor) at a high rent service. A deed made between the parties acknowledged fictitiously that the rent service had been already paid up to the time of the heir coming of age. Thus, the lord finds himself entitled to the rent service which does not consist of anything and when the heir comes of age the abnormally high rent ensures prompt return to the heir.

The statute of Marlborough dealt with this situation to a limited extent.⁽¹⁹⁾ The lord is not to lose his Ward by such a

(19) 52 Hen. III, c.6

fraud, but he is not to disseise the feoffees without judgment. He is to have a writ requesting that the wardship be restored properly, and a jury, plus the witnesses to the deed, are to consider the value of the land and the quantity of the rent payable after the wardship period. Having regard to these matters, they are to decide whether the feoffment was made 'bona fide' or by collusion so that the lord would be defrauded of his wardship. However, if the decision is for the lord, he is then given the proper rights for the period of the minority, at the end of this period he is to return the land to the feoffees, if they have any term or fee left, and for this they are given an action. Malicious impleading by the lord, where the feoffments are made bona fide and lawfully, means the feoffees may have their damages and costs.⁽²⁰⁾

This enactment is important from two aspects. It marks the use of the term 'bona fide' which is to come to mean so much in the later commercial ages. It also brings to prominence the fraudulent deed made to avoid the creditor. This will be met many times when we come to consider the bankruptcy legislation commencing in the sixteenth century, and which has remained firmly established in our law to the present day.

(20) As to the full effect of wardship see Plucknett [T.F.T.] 'Civil Legislation of Edward I', pp. 79-83.

These then were some of the feudal obligations which a man of the twelfth and thirteenth centuries would almost certainly have to meet in some form or another. From the thirteenth century onwards they fall away completely, as services no longer keep pace with the growing commercial age, and the need for money rather than services is felt. Money is needed if a man is to institute litigation and it is not surprising to find the lord requiring the services of a money-lender to render ready cash. Men are frequently amerced in the courts and whether they wish it or not find themselves debtors of the king. Both of these, the king and the money-lender - at first the Jewish, later the Italian - provide the material for the growth of the action for enforcement of debt. (1)

(1) "... in the thirteenth century the emphasis was on the profits that accrued to the liege lord, who was entitled to the wardship of minors and the marriage of heiresses to the exclusion of other lords... Those who render and those who accept homage have no thought of arms, of service in the field: they think of reliefs, marriage and wardship, the profits, not the remotely ancient obligations of military tenure. This is plain from 'Glanville', from the many cases that come before the courts where homage is in question, and it is the theme of the statute *Quia Emptores* in 1290: because of sub-infeudation 'the chief lords of fees have many times lost their escheats, marriages and wardships' - there is no word of any other loss." Govn. Med. Eng. p. 111-112

CHAPTER 3A KING'S DEBTORThe High Price of Debt

The king is the principal creditor of this period, men may be amerced for failing to attend court as suitors, a whole hundred may be amerced for failing in one of the numerous duties which they had to carry out⁽¹⁾ very few can escape becoming a debtor to the king in some form or other whether directly or indirectly.⁽²⁾ And although we are concerned with the process which may be used against the ordinary debtor by his creditor, it is from the practices of the king in collecting his own debts that we find the first rules which will later spread and in a modified form to

(1) P. & M. ii, 513-5 and see Madox i, 552-4.

(2) See Poole [A.L.] 'Obligations of Society in the XII and XIII Centuries' (1960) p. 103-4. "The kings of this period would exact money from their subjects on the slightest pretence in the shape of fines and amercement; they would demand what they could for reliefs, wardships, and marriages. But there is a more pleasant aspect of the business; the appearance is more alarming than the reality. The terms of payment were usually light Whether it was because the machinery of collection was inadequate or because the officials were intentionally lenient, the fact remains that men were allowed to pay what they owed in very easy instalments."

enable the creditor to enforce his right.

On directions to the sheriff that he is to collect those debts due to the king within his jurisdiction a fairly stringent process is engaged upon. The Dialogue tells us that in distraining for the king's debt a certain order should be followed, firstly the movables of the debtor are to be taken and only when the movables are failing should the plough oxen be taken, food prepared for daily use is not to be sold, and in the case of a knight, his horse and equipment necessary in the eventuality of his having to serve the king must be left to him.⁽³⁾ Better treatment was also to be given to persons who were not citizen or burgher for they could be written on the roll as debtor for the next year on the oath of the sheriff as to their poverty, whereas the citizen or burgher is not only to be distrained by his movable goods alone, for the sheriff is to "confiscate their homes and their estates and any revenues from the cities, and place them in the hands of others; so that, even in this way, the money due to the king may be forthcoming; but if none be found who will receive them, since men of the same condition mutually spare each other, he shall fasten up their houses with bolts and shall cause their estates to be diligently cultivated".⁽⁴⁾ This, we are told, is done because

(3) Dialogue II, xiv.

(4) Dialogue of the Exchequer II, xiii.

the people who live by the soil would find it difficult to hide their wealth, whereas those who deal in wares have more opportunity to hide theirs.⁽⁵⁾

With the Great Charter of John, the order as to plough oxen and knight attire disappear:

"We or our Bailiffs shall not seise any land nor rent for any debt, as long as the chattels of the debtor forthcoming suffice to pay the debt, (and the debtor himself be ready to satisfy therefore;) neither shall the sureties of the debtor be distrained as long as the principal debtor be sufficient for the payment of the debt. And if the principal debtor fail in payment of the debt not having wherewith to pay, (or will not pay when he is able,) the sureties shall answer for the debt: and if they will, they shall have the lands and rents of the debtor, until they be satisfied of the debt which they before payed for him, unless the principal debtor can shew himself to be thereof acquitted against the said sureties."⁽⁶⁾

the provision with regard to the surety existed in many borough customals and a similar provision had been in force in Northampton about 1190.⁽⁷⁾ Other provisions of the Great Charter stated that

(5) Dialogue of the Exchequer II, xiii.

(6) 17 John, c.9 (the words in brackets do not appear in the Charter of John, but are part of the enactment in 9 Hen. III, c.8)

(7) Bateson (M.) 'Borough Customs' (S.S.) i, 98.

on the death of a crown tenant who was still indebted to the Crown, the sheriff or bailiff was to attach and catalogue chattels of the deceased found on his estate, but first they were to exhibit letters patent of the Crown stating that a debt to the Crown existed. They are only to attach the number of chattels necessary to pay the debt, and everything is to be carried out in the 'sight of lawful men' who assist at the valuing; nothing is to be taken from the estate until the debt to the Crown has been satisfied.⁽⁸⁾

Land seized by the Crown in order to satisfy its debts remained in the hands of the Crown until such times as the debt had been recovered from the rents, etc. received or the debtor had managed to come to a composition with the Crown, there was, however, no sale of the land.

Further privileges that the Crown reserved for itself were the right to proceed against the debtor of the king's debtor⁽⁹⁾ and the fact that a sheriff might take from the estates of a debtor who had not paid him, even if after he had become bound to the king in debt he had rented, pledged or transferred by sale his estate, if the possessions he now has are insufficient to pay the royal debt then the estate will be seized back into the king's hand, saving only the title of the person who has ownership of it.⁽¹⁰⁾

(8) 17 John, c.26 (c. 18 in 9 Hen. III)

(9) Dialogue II, xv.

(10)Ib. II, xvi.

The final power that the Crown possessed in respect of debts due to itself was the power to imprison, something the creditor did not have until 1283 when it was granted in a limited form⁽¹¹⁾ and which did not pass into power of the ordinary creditor until after 1352.⁽¹²⁾ It should perhaps be mentioned that in 1285 the servant or bailiff whose account was in arrears could be imprisoned if auditors stated that their accounts were in arrears.⁽¹³⁾ Prisoners for debt to the king were in the custody of the Marshal of England and this right is jealously guarded, thus we find the Marshal before the "Justicier, the Treasurer and Barons, and other great Men of the King's Council in full Exchequer", that they may determine who should have custody of one Licoricia a jewess whom it appears the Constable of the Tower of London has managed to get into his custody, "but it being found, upon due Examination, and Search of Precedents, that both Jews and Christians, who owed to the King any clear Debts enrolled at the Great Exchequer, ought to be committed to the Marshall for the same; it was adjudged, that Licoricia should be redelivered to the Marshall".⁽¹⁴⁾

(11) 11 Edw. I, see p. 176.

(12) 25 Edw. III, st. 5, c.17 - as to how this came about see p. 206.

(13) 13 Edw. I, c.11

(14) Madox ii, 288-9.

With these powers to enforce its debts, the Crown had something to sell, not actually justice but rather a means of obtaining a rather superior form of enforcement. It is not out of character, therefore, to find a crown that is always in need of money selling the powers it has at its command, and becoming a rather high class debt collector. Thus, to enable himself to obtain his right, the creditor might proffer to the Crown a sum of money (a fine), which, if the Crown accepts, means that some sort of royal aid is forthcoming. It might be a request to have justice and right; to have a writ; a plea; a judgment; or to expedite these.⁽¹⁵⁾ The fine may or may not be payable out of the debts to be recovered, either way it would probably be expensive. Thus we find a William Herlizun willing to give a fourth part of what he can recover of a debt of 30 marks so that his debtor can be summoned before the 'Justices of the Bank' to pay William his debt.⁽¹⁶⁾ A Robert de Cybecay pays a fine of half his debt so that he might have the debt he had recovered in the

(15) See Madox i, pp. 425-455. See also Poole - pp. 92-3. "For a price the king would interfere in the course of justice, would sell his mediation between two parties, or would meddle in the most intimate domestic concerns of his people."

(16) Madox i, 452.

County Court against his debtor.⁽¹⁷⁾ These are large proportions of the debt sacrificed so that the long drawn out procedure in the local court may be avoided.⁽¹⁸⁾

We have seen that during the early part of the feudal period there is only the Royal Court, and it is only during the thirteenth century that the various branches are formed.⁽¹⁹⁾ Unfortunately even with the coming to rest of the Court of Common Pleas all the time wasting procedure of the local courts is retained so that recourse to the King is still a more speedy way of obtaining some part of a debt.

To see more fully the way in which the royal power was used to aid both the creditor and debtor, and to understand how the action of debt came to develop largely from the use of the prerogative of the Crown in these matters, it is perhaps best to follow the use of this kingly power over the Jew, and between the Jew and his debtor. For the history of the Jews and the position of usury in England prior to the expulsion of the Jews in 1290 forms an important part in the early history of the enforcement of the creditor's rights, and of the abuses to which they were subject before legislation took up cudgels against the debtor.

(17) Madox i, 452.

(18) As to the way in which proceedings may be delayed see pp 122-9.

(19) pp. 63-70.

Extraction and Extortion

The Jews existed in England in a strange position, they could hold land; they had access to the courts; to a limited extent they might settle where they pleased, at least in the earlier part of their history in England, yet despite all this they were a thing apart. A 'thing' is perhaps the best way of regarding the Jew of this period. He may eat, sleep and drink but nonetheless he is a chattel, the King's chattel. "Jews and all their effects are the King's property, and if any one withhold their money from them let the King recover it as his own", a law of Edward the Confessor is reputed to have said,⁽²⁰⁾ and this is certainly true of the state of the law under Henry II.

Bracton tells us that what the Jew acquires he acquires for the King,⁽¹⁾ whilst on the other hand, the King can do as he pleases with his Jews. Henry III mortgaged his Jewry in 1255 to his brother Richard,⁽²⁾ later he assigned them to his son Edward, who assigned it for two years to two merchant brothers.⁽³⁾

(20) Select Pleas Starrs and Records of the Jewish Exchequer (S.S. vol. 15) p. x. See Thorpe, 'Ancient Laws and Institutes of England', p. 195 - Leges Regis Edwardi Confessoris. XXV.

(1) Bracton, f. 386 b.

(2) Tovey (D'B) Anglo Judaica (1788) p. 135.

(3) Ibid, pp. 157-9.

If the Jews were to make a life for themselves in England, then it was necessary for them to employ themselves in business or be employed, but the difficulties of both must soon have become apparent to them. Where their money could obtain the necessary charters for trading purposes, then all would be well, but with the growth of the gild system the trades in which they could take a part were limited.⁽⁴⁾ For the poorer Jews, trading in a small way must have been of more importance to their way of life than anything they could hope to make from moneylending.⁽⁵⁾ But for the richer Jew, with the lack of freedom to compete freely in trade, the best thing to do with his money was to lend it and charge interest for the service of lending it.

Usury was frowned on by the Church but allowed by the law of the land, which even went so far as to help the usurer recover his principal and interest and it is the interest that the Jews charged that brought many debtors to their knees and saw the seizing of the family inheritances. The rates of interest vary, but between 2d to 4d per pound per week seems to be about the more usual charges.⁽⁶⁾ Thus, one Richard of Anesty, over some five years,

(4) Cunningham [W.] 'The Growth of English Industry and Commerce' [1910] 5th Edn. p. 336.

(5) Richardson (H.G.) 'The English under Angevin Kings' (1960) p. 67.

(6) See P. & M. I, p. 452.

borrowed £92. 6s. 8d. and pays or owes for usury over £50.

In Richard's case the interest drops after the first couple of transactions, though even in his last borrowing he is charged 2d. a week per pound, which is still over 43%⁽⁷⁾

Since the Jew creditor is a chattel of the King, death of the creditor means that his possessions go to the King, and among these possessions are any bonds for debts which were still owing at the time of the death; it is worth noting that in this case, the taking into the King's hand of the possessions of the Jew usurer on his death is not a discrimination against the Jew, for on the death of a Christian usurer any possessions he may have were also forfeited to the King.⁽⁸⁾ Thus the debtor who once had a Jew creditor is now faced with the King and all his power of distraining for debts due to him. For some debtors this might in fact mark the completion of a full circle. In an age when feudal dues, fines and amercements were visited upon many, "one avenue of escape from threatened foreclosure was to borrow from the Jewish moneylenders, but as often as not one could not escape down it far. For one thing

(7) Palgrave (Sir F.C.) 'Commonwealth of England' II, pp. xxiv-xxvii.

(8) Dialogus, II, x.

paying interest to the Jews, heavy enough in itself, was an indirect way of paying a tax to the Crown..... So a man who escaped from the Exchequer to the Jews might pay heavy interest, for several years and find that, before he had even reduced the principal, his debt was then back in the King's hands" due to the death of his creditor.⁽⁹⁾ On the other hand, the death of the Jewish creditor could work in favour of the debtor. If the debt had been taken into the King's hand, then the interest on the debt stopped at that moment and only the debt specified in the document was due. In 1190 Richard I had stated this in a confirmation of a grant made to "Ysaac, son of Rabbi Joce, and his sons and their men" which he states is as was granted and confirmed to "the Jews of England and Normandy" by his father (Henry II), Richard's charter is in fact not a general charter,⁽¹⁰⁾ but in the Magna Carta of John we find a similar provision.⁽¹¹⁾

"If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond."

(9) Warren (W.L.) 'King John' (1961) p. 184.

(10) Jacobs (J.) 'The Jews of Angevin England' (1893) pp. 134-8 [Foedera i 51 - ed. 1816]

(11) 17 John c.10 McKechnie (W.S.) 'Magna Carta' (1905) p. 265.

The provision for the ceasing of interest while the heir is under age was important, for "during the nonage a ward had nothing wherewith to discharge either principal or interest, since he who had the wardship drew the revenue. At the end of a long minority an heir would have found the richest estates swallowed up by a debt which had increased automatically ten or twenty-fold".⁽¹²⁾ This provision was confirmed by the Statute of Merton but the principal sum and the interest due at the death of the ancestor remained due.⁽¹³⁾

Since the Jews were the King's chattels he could pardon debts due to him or accept a lesser amount. The accepting of a lesser amount became almost normal procedure, and the debtor who accepted a loan on which very high interest was payable "was practically betting against the life of the Jew. If he died before payment was exacted he might get off for a much smaller sum."⁽¹⁴⁾ We find Richard Basset owes £22 for a fine made for all the debts which he owed to Aaron Jew of Lincoln;⁽¹⁵⁾ another Richard owes the King 200 marks of silver for his help with debts against the Jews;⁽¹⁶⁾ on

(12)McKechnie, p. 265.

(13) 20 Hen. 3, c.5

(14) Jacobs, p. xx

(15) Pipe Roll 5 Ric. I, Norhant, p. 97.

(16) Ib. 31Hen. I. Essex, p. 53.

the death of Aaron Jew of Lincoln, "nine Cistercian Abbeys between them owed Aaron 6,400 marks"⁽¹⁷⁾ and on 16 Nov. 1189 Richard sends his writ⁽¹⁸⁾

"to the archbishops, bishops, ... and all his servants and men, French and English, through all England greeting. Know that we have condoned for the safety of our own soul and for those of all our ancestors and heirs, to the abbeys of the Cistercian Order, all the debt which they owed us of the debt of Aaron the Jew of Lincoln, the sum of which extended to 6,400 marks and more. And they for this condonation have given us 1,000 marks. Wherefore we wish and firstly order that the said house be altogether quits for ever of the whole debt which was demanded from them. And we have returned them their deeds for that debt...."

Aaron was not only concerned with large loans for among the bonds he had is one "to a Lady named True, who was in debt for a mark only".⁽¹⁹⁾ These payments to the King vary a great deal in size; one "Hugh de Fokington and Eglina, his wife, owe £200 of which he ought to pay at

(17) See Richardson, p.68

(18) Memorials of Fountains Abbey (Surtees Soc.), ii, p. 18 [Jacobs, pp. 108-9]

(19) Richardson, p. 68.

once £50 into the King's treasury for that the King may acquit them of the debts they owe to the Jews, viz. £250 principal, and that he may cause their charters to be returned to them by the Jews and also their lands which are in the hands of the Jews on account of this".⁽²⁰⁾ A debtor may also request the King's aid in summoning his creditors so that a composition may be arrived at, and in 1199 Geoffrey de Neville offered a palfrey to the King to have his aid, so that he might come to a reasonable settlement with those Jews to whom he was indebted.⁽¹⁾ But perhaps one of the strangest payments comes in 1200 under King John in;

"Letters Patent to Reginald Mauleverer. - John by the grace of God, King, &c. Know that we have quit claimed and given, and cause to have quit claimed by our Jews, the debts of Reginald Mauleverer, which we and our Jews have on the land and castle of Reginald de Castro Gunter, for marrying Emma, his sister, to Reginald son of Reginald of Chalion Gunter. But this charter shall be in the hands and custody of William de Roches, our seneschal at Anjou, till the marriage, and after it the said seneschal shall hand Reginald de Chalion

(20) Pipe Roll 5 John Sussex, p. 197 [Jacobs, p. 220]

(1) Fine and Oblate Rolls, p. xlvi, 40. See further McKechnie, p. 266 and also Richardson, p. 143.

Gunter this charter, and thus the aforesaid Reginald will be quit of the aforesaid debts of the Jews. But if by chance the marriage between them is not carried out, or if perhaps it be carried out but afterwards annulled, the aforesaid debts shall return to us without contradiction."⁽²⁾

Other less exacting ways of getting one's debts cancelled were available, "the cost of the French wars was in part defrayed by the cancelling of the debts due to the Jews by those willing to serve overseas",⁽³⁾ and the King might cause either the debt or just the interest to be cancelled during such service; in a writ to the Sheriff of York the king says "We order you to give respite to William of Belmont of the 10 marks which he owes to the Jews of York, and make him quits of usury thereon while he is beyond the sea with horses and asses in our service by our command."⁽⁴⁾ That the debtors sought to evade their Jewish creditors in every possible way we may be certain, but the Jews seem equally prepared to go and search out the debtor, for on a day when there was a large gathering in St. Paul's Church, a chance entry was made by some London Jews who mixed with the gathering in the hope of finding some of their debtors.⁽⁵⁾

(2) Rot. Chart. i, 70 [Jacobs, pp. 208-9]

(3) Roth (C.) 'History of the Jews in England' (1941) p. 33 cf. Lib. R. 1203, pp. 44, 48 sqq.

(4) Close Rolls 23 Mar., 1205. [Jacobs, p. 238]

(5) Robertson (J.C.) Mat. for Hist. of Thom. Becket, iv, 151-2

Yet if the Crown was prepared to help the debtor, it was equally prepared to help the creditor provided he would pay for such help. Two Jews, Abraham and Deuslesalt, make account of one mark of gold in order to recover their debts against Osbert de Leicester.⁽⁶⁾ If one's debtor was high on the social scale it would cost more, and help to recover debts against an earl could cost ten marks of gold.⁽⁷⁾ The Crown exacted quite a large amount for giving the Jew the right to his debt; 3 marks are to be paid for the right to six marks;⁽⁸⁾ 2 marks for the right to seven marks⁽⁹⁾ and in another case twenty shillings are to be paid for the right to £4. 8s. 8d.⁽¹⁰⁾ presumably the interest is substantial in such cases or there seems little point in collecting the debts. At least one creditor, however, having agreed to pay three marks of gold for a writ to have his debts, got his writ and left for France without bothering to pay the Crown.⁽¹¹⁾ Yet it appears that the

(6) Pipe Roll 31 Hen. I London, p. 147. [Madox i, 227]

(7) Pipe Roll 31 Hen. I, p. 149

(8) Pipe Roll 31 Hen. II, Beds., p. 140.

(9) Ib. 31 Hen. II, Lincs. p. 94.

(10) Ib. 31 Hen. II, Lincs. p. 94.

(11) Ib. 14 Hen. II Norf. & Suff., p. 18. The same entry is made two years later, but with the additional note that Sampson having left hurriedly is now in France - Pipe Roll 16 Hen. II. Norf. & Suff., p. 5 - this somewhat despairing entry is still being repeated five years later, 21 Hen. II, Norf. & Suff. p. 112.

Crown could also be of service to a creditor where his debtors were in Normandy, the King's officers apparently collecting the debts, and the creditor paying for the service.⁽¹²⁾ This buying of the right to debts is common in the heir of the creditor and entries to the effect that a Jewish son owes so many marks silver or gold to have the debts owing to his father⁽¹³⁾ appear frequently in the Pipe Rolls. Payment for the right to debts does not necessarily end the necessity for further payments by the creditor and to have the debtor distrained may well mean further payments to the Crown.⁽¹⁴⁾

Since the Crown takes possession of the charters, etc. of a Jew creditor on his death, the Crown could also sell these charters and one Benedict, a Jew, agreed to pay £100 and ten marks of silver as his fine for buying from the Chancellor the charters of Aaron.⁽¹⁵⁾ As the debt could not attract interest whilst lying in the hands of the King, this was the most sensible thing to do with such charters; for on the Jews, the Crown levied from time to time a tallage or tax which was spread generally over the whole of the Jewry. For the

(12) Pipe Roll 29 Hen. II, Lond. & Midd., p. 166.

(13) Ib. 22 Hen. II, Hantescr. p. 192.

(14) Ib. 5 Jo. Cant. et Hunt, p. 6

(15) Ib. 5 Ric. I, Lincs, p. 30.

Jewry to pay the tallage, some means of making money had to be left open to them and by purchasing the charters of deceased Jews from the King, enforcing and collecting the interest, they were thus able to pay off their own taxes.

Registering the King's Chattels

During the course of the Jews' stay in England, they were subject to much ill-treatment and savagery; the Church regarded usury as a sin, Innocent III in 1198 ordered that Jews who refused to remit usury to Christians were not to be communed with either in commerce or in other things,⁽¹⁶⁾ previously Clement III had forgiven crusaders usury on debts they had contracted for the duration of the Crusade.⁽¹⁷⁾ This excuse, that the Jews were sinful, bolstering up the desperation of their debtors whose debts rarely decreased, could only result in violence and in 1190 Jews were hunted in many parts of the country. That the hunters were not just driven by hatred of the Jews alone can be seen from the behaviour of the mob at York, for we are told that "when the slaughter was over, the conspirators immediately went to the Cathedral and caused the terrified guardians, with violent threats, to hand over the

(16) Corpus Juris Canonici [Edited by Friedberg (A.) (1879-81)] II, pp. 814-5 cap. XII

(17) Richardson, p. 140.

records of the debts placed there, by which the Christians were oppressed by the royal Jewish usurers, and thereupon destroyed these records of profane avarice in the middle of the church with the sacred fires to release both themselves and many others."⁽¹⁸⁾

This destruction, although perhaps not as complete as the debtors would have liked, could hardly be suffered by a crown dependent on the Jews for large amounts of its money. In 1194 'Archae' or Registries of Bonds are set up in London and the principal towns of Jewry, "all the debts, pledges, mortgages, lands, houses, rents, and possessions of the Jews shall be registered. The Jews who shall conceal any of these shall forfeit to the King his body and the thing concealed, and likewise all his possessions and chattels, neither shall it be lawful to the Jew to recover the thing concealed."⁽¹⁹⁾

There are to be four lawyers - two Christians and two Jews - and two copyists and the clerks of the escheats. All contracts in future are to be made in the presence of these persons, and they are to retain a correct copy of every such contract in a chest which is to have three locks and three keys, the Christians having one key, the Jews the second, and the clerks the third. "In practice bond and

(18) William of Newbury i, p. 317 et seq. (R.S.) [Jacobs, p. 129]

(19) Roger de Hoveden, iii p. 266 et seq. [Jacobs, pp. 156-7]

memorial were written on the same skin, which, being folded on the blank space, was cut in an irregular line, so the two parts corresponded as tallies."⁽²⁰⁾ The part of the indenture containing the seal of the debtor goes to the Jew, the other part remains in the chest.

In the mid-thirteenth century the original part containing the debtor's seal is kept in the chest and the creditor gets a copy as well. "Three rolls of receipt were also to be kept, one by the Christian, another by the Jewish chirographers, and a third by one of the clerks. A fourth roll, containing a record of every chirograph and of all dealings therewith, was to be kept by the clerks of the escheats."⁽¹⁾

Any alteration or dealing with the charters require the presence of all the detailed persons or the majority of them. If the charter or bond was cancelled then the debtor received a starr (Jewish record of acquittance) signed in Hebrew by the creditor and given under his seal, it might be in Latin or Hebrew or both. Failure to register the chirograph in the proper fashion meant that the creditor lost his debt, whilst a starr made secretly was invalid and

(20) Sel. Starrs, etc. (S.S. Vol. 15) p. xix.

(1) Ib.

and the debt was forfeited to the king.⁽²⁾

By half way through the thirteenth century it is the practice to have the starr enrolled on the Plea Rolls in the Exchequer. Thus, "while affording the Jews additional security this arrangement also proved of still greater advantage to the Crown. Henceforth, the murder of a Jewish creditor instead of releasing the debtor merely put him directly in the power of the King; while to destroy the record of the debt in the possession of the creditor was but a futile proceeding. Thus the King was secured against loss by the murder of his Jews."⁽³⁾

The Jewish Exchequer

The business of the Jews had always been a matter for the Exchequer, "cases of small debt were heard by the constables of the royal castles; the court of the University of Oxford claimed pleas between Jew and scholar and in London the civic court held pleas touching land between Jew and Gentile; but on the whole, the competence of the Exchequer seems to have been exclusive."⁽⁴⁾ With the founding of the 'Bond Registries' therefore, it is hardly surprising to find a section of the Exchequer going over to deal exclusively with the Jewish affairs and the coming into being of the Justices

(2) Madox (T.) 'History of the Exchequer' vol. i, pp. 245, 246.

(3) Hyamson (A.M.) 'A History of the Jews in England', p. 43.

(4) P. & M. I, p. 470, n 2.

of the Jews. At first they are 'Warden of the Jews' and four are appointed in 1198 of whom two are Jews,⁽⁵⁾ yet in 1200 we find John appointing four different persons all Christians to be 'bailiffs for the Jews of England'.⁽⁶⁾ Their duties are to look after the Jewish accounts as laid down in the Jewish Ordinances, collect the tallages, deliver up deeds and carry out the commands of the King regarding the Jewry and to decide between Jew and Christian in disputes over debts.

In 1201 John gives a charter to the Jews substantially the same as that given by Richard I⁽⁷⁾ but which is stated to confirm the liberties and customs of the Jews as granted by King Henry I. By the charter the Jews receive a number of procedural privileges; in a case between Jew and Christian, the plaintiff is to produce two witnesses, one Jew and one Christian. If the Jew is plaintiff, his writ shall be his witness. If the Christian bring a case without witness, then the Jew may make his law on his bare oath on his Book. In a dispute over a loan of money the Jew is to prove the capital, and the Christian the interest. A Jew who has kept his gage of land a year and a day may sell it. Jews are only to enter into pleas before the King or before those who have ward of his castles, in

(5) Sel. Starrs, etc. (S.S. Vol. 15) p. xx.

(6) Rot. Chart. i, 61 [Jacobs, p. 208]

(7) See p. 95.

whose bailiwicks Jews dwell.⁽⁸⁾

By virtue of this charter and the right already held, the Jew now enjoys considerable advantage over his Christian adversary. A Jew was not required to do battle;⁽⁹⁾ disputed charters could be adjudicated by a jury of twelve Jews and twelve Christians;⁽¹⁰⁾ the Christian who impleaded a Jew without testimony found the Jew could make his law by his own oath alone on the Pentateuch, whereas the Christian might have to wage his law with a large number of compurgators, in any case, the Jew never seems to be required to produce more than two compurgators, one of whom was of his own race and religion. Finally the Jew's writ was given value as evidence, something the Christian's writ did not receive. For these procedural advantages the Jew had to pay. Justice may cost the Christian half a mark in order to commence his legal process, a Jew will pay 20/-.

"Throughout the reigns of John and Henry III, the writs of seisin which they obtained at the Exchequer for the enforcement of their securities against defaulting debtors appear to have been of very little use, for they were accustomed to fortify them by letters royal, for which the Crown charged a commission of 10 per cent, one besant, in the pound on the amount claimed."⁽¹¹⁾ So although Ysaac fil Joie

(8) Rot. Chart i, 93 [Jacobs, pp. 212-4]. Cf. Sel. Starrs, etc. (S.S.) pp. 1-2

(9) P. & M. I, p. 473.

(10) Fine and Oblate Rolls, p. 92 - see Madox I, p. 245.

(11) Sel. Starrs, etc., (S.S.) p. xxxv.

has letters regarding Martin Martel and a chirograph for 25 marks and interest, yet the King should have one besant (2s.) for every pound. (12)

Squeezing the Jews.

In 1215 in John's Magna Carta, there is a further provision aimed at the Jewish creditor:

"And if anyone die indebted, to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased; and out of the residue the debts shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews." (13)

We have seen that C. 10 of this Charter had enforced the law depriving the Jews of part of their interest, ⁽¹⁴⁾ now part of their

(12) Fine and Oblate Rolls, p. 197.

(13) 17 John, c. 11. McKechnie, p. 273. See Govn. Med. Eng. p. 388, fn.2. "The new clauses concerning the Jews do not appear to embody any new principle. The courts had for long protected the widow's dower against Jewish creditors. (Curia Regis Rolls, i. 417; vii, 70-71, 339). In the 'Unknown Charter', which apparently belongs to the spring of 1215, clause 11 provides that usury shall not run against the infant heir of a tenant-in-chief. It apparently follows that this restriction had not yet been established by the courts."

(14) See p. 95.

security is taken away, after the widow's dower rights only two-thirds of the property remains as security, and out of this is first to be taken 'necessaries' for such of the debtor's children who are still under age. And almost as an afterthought these provisions are to apply to Christian as well as Jew. Unfortunately, these provisions did not appeal to the royal taste and they were omitted in the charter of 1216 and did not re-appear in future charters.

With the Crown now knowing exactly how much its Jewry has the position of the debtor is even more vulnerable. If the King decides on another tallage, it is no use the Jew absconding and taking his securities with him, for the original or a copy can be found in the 'chest'. The procedure is relatively simple for the King. A writ is sent to the 'Christian and Jewish Chirographers of Bristol' and recites that one Elias of Chippenham has been assessed to pay 6 marks to the King and has failed to do so. They are commanded to go to the Chirograph-Chest "and take out therefrom all chirographs, tallies and other instruments found in that Chest under the name of the said Elias" these are to be taken before the Justices of the Jews at Westminster. A further writ is sent to the Sheriff of Gloucestershire reciting the above procedure and commanding him to have a proclamation made through all his county in every hundred, city and town that no debtor of Elias is to pay money to him on pain of forfeiture, since the King has taken into his hand the chattels of Elias wherever they are in England. The sheriff is also "diligently

to inquire by oath of 12 good and lawful men as well Christians as Jews, by whom the truth of the matter may be better known, what land, rents and tenements the said Elias had or held on the said day, and who now holds or hold the said lands, rents and tenements, and how much the portion of each tenant be worth by the year, and for sale at the present time, saving the service of the lords fee;.... also to enquire by oath of the same 12 men what chattels the said Elias had on the said day (the day the debt was due to the king) found in all chirographs outside the Chest, and what and how much those chattels be worth for sale, and into whose hands they have come, and to take into our hand all the said lands, rents, tenements, and chattels, and to cause them to be kept safe until further command" notice of the inquest is to be sent to the Justices.⁽¹⁵⁾ In view of these methods the ordinary debtor never knew when he might acquire the king as his creditor.

The use of tallies by the Jews was apparently forbidden in 1220, but certain towns obtained licences to use them. In 1233 tallies are again prohibited, but little notice seems to have been taken of this order.⁽¹⁶⁾ At the same time a prohibition is placed on the use of a penalty clause in Jewish Bonds and on the exacting of

(15) Sel. Starrs, etc. (S.S.) pp. 30-31.

(16) Ib.

p. 82 & n. re use of blank tally.

compound interest, despite this the penalty clause still occurs.⁽¹⁷⁾

In the case of land, the Jewish creditor using his gage or 'vadium', whereby the lands of the debtor, as well as his chattels, were charged with the debt and interest; on default, the creditor could, by summary process, get possession of the lands and after a year's possession sell them or keep them for himself or demise to another until the debt was paid out of the rents and profits.⁽¹⁸⁾

To hold on to the land was of little value to the Jew for he could never be sure when the king might pardon the debt⁽¹⁹⁾ or seize it himself. Once the land was taken into the king's hand for a debt, it is released when the rent reaches the amount of the pledge, since the king as a Christian cannot claim interest and debtors can be found in the Jewish Exchequer requesting that an audit be made of the accounts to see whether the rents received have accounted for the debt so that the land may be freed.⁽²⁰⁾

A Second Exodus

From the middle of the thirteenth century the rights of the Jews are gradually whittled away; the maximum rate of interest

(17) Richardson, p. 293-4 and see 54 L.Q.R. p. 393

(18) Holdsworth H.E.L. iii, p. 131.

(19) Rot. Chart. i, 29 [Jacobs p. 204-5]

(20) Pipe Roll 10, Ric. I, 8 Roteland, p. 125. On the subject of Jewish dealings with land, see Richardson, pp. 83-108.

becomes recognised as 43%; in 1253 the Jews are forbidden to change residence without royal consent; in 1269 all rent charges upon feudal hereditaments are invalidated, and except for such already assigned to Christians, all chirographs containing such are to be cancelled and delivered to the debtors;⁽¹⁾ in 1271 it is ordered that the Jews may no longer hold free tenement, the lands and tenements so held are to remain in the ownership of the Christian who demised them, but the debt is still to be paid back to the Jews, but without interest, if necessary by demising the tenements to other Christians so as to obtain what is due to them, but without interest.⁽²⁾

In 1275 the final blow fell; usury is forbidden, distress for a debt due to the Jews is not to be so harsh, a moiety of the lands and chattels of the Christians are to be kept by him for maintenance, no distress is to be made upon the heir of a debtor named in a Jew's deed, nor upon any person holding the land that was the debtor's before the case is brought before the Court, the valuing of the lands and goods is to be by the oaths of good men. The acquittance for a debt due from a Christian to a Jew may only be given on licence by the King.⁽³⁾

(1) Sel. Starrs (S.S.) p. xxxvii-xxxviii.

(2) Tovey, pp. 187-191.

(3) 3 Edw. I, Statute of Jewry, S.R.I, p. 221. On the departure of the Jews, debts owing to them passed to the king, these debts were pardoned by 1 Edw. III, st.2, c.3 (1326-7)

In 1290 the Jews were expelled from England, they left very little behind as a permanent monument to their stay yet their influence had been felt in many quarters. Land had changed hands many times through their dealings as they took from the debtor and passed it on to another. Both the Church and the Crown had benefited, since neither was slow to make use of the Jews. The Crown held their goods on death or forfeiture, the Church can be found taking up land in exchange for paying another's debts, the Abbey of Meaux is a good example of this:

"And William de Arcyns sold us three bovates of land in Seton for 40 marks, which we gave him for clearing him of debts to the Jews And Hugh of Bolton and Cecilia his wife, daughter of Geoffrey Darill, sold us a messuage of 5 tofts and 5 bovates of land at Wartrey for 50 marks, for which that land was pledged to the Jews for the debts of the aforesaid Walter."⁽⁴⁾

On the expulsion of the Jews at least a moiety of the debts due to Jews was to be paid under penalty of owing the full amount to the Crown and this was not remitted until the first year of Edward III, yet the Prior of Bridlington did not repay any of the money owed by

(4) Chron. de Melsa ed Bond, i, 306, 315 [Jacobs, pp. 177-178]

him to Bonamy, a Jew of York, and is aided in his attempt by the Archbishop of York. (5)

At a time when services rather than debts were owing by many, the Jews gave the Crown the need to work out means of collecting debts for itself, which in turn were passed on to the ordinary creditor at a later stage when it became necessary through the growth of trade and commerce that such machinery should exist. But whilst the king was busily going about the extracting and extorting, there was slowly emerging a writ for debt. A writ which would eventually break free of dependence on royal favour.

A Right Royal Writ

The plea of debt is known in the local courts long before we find the emergence of debt as a royal plea. If the Crown was going to enforce a debt it did so as a matter of grace, and not as a matter of course, the action is executive not judicial. But the Crown, as we have seen, has had much to do with the enforcement of debt and had already forbidden the ecclesiastical courts to meddle in such matters; (6) they retain their hold where there has been a breach of

(5) Cunningham, p. 287.

(6) Constitutions of Clarendon (1164) c. 15.

faith.⁽⁷⁾ The growth of the writ of debt as originating an action in the royal court is somewhat sparse in material in its early stages. The Thorney Red Book contains an early example as part of other subject-matter where the Bishop of Lincoln is ordered by King Stephen to "reseise the abbot of Thorney of the land of Wing, which Robert de Montfort gave and conceded in alms to God and the church of Thorney, if he has been disseised of it unjustly and without judgment. And cause justly the part of his money, which the aforesaid Robert left to the foresaid church before his death, to be rendered to the abbot. And cause also the money, which the said abbot lent to the said Robert before his death, to be restored to him."⁽⁸⁾

Between the first records of the payments made to the king and the time of Glanvill, however, the price being paid for the

(7) Glanvill x. 12

(8) Van Caenegem (R.C.) p. 433 and pp. 455-6. For a detailed study of the development of the action and writ see pp. 254-260, *ibid.*

enforcement of a debt changes,⁽⁹⁾ slowly the fees are being reduced, and the executive action, which did not envisage court action, but merely enforcement, gives way to a more judicial element where the sheriff is directed to see that a debt is paid or that the debtor is before the King or his Justices on a certain date. The writ is in the same form as a writ of right for land which would give it the appearance of being a real action, but it has been said with some authority that "the only significance attaching to the words *praecipe quod reddat*" (which introduce real actions) "is their indication of the date of origin of the writ; it is only the oldest actions which are cast in this form".⁽¹⁰⁾ Glanvill thus gives us the writ of debt as :

(9) Poole speaking of the condition of the courts in the twelfth century says: "We are accustomed to praise the legal reform of the twelfth century and to regard it as the great legacy which Henry II contributed to our legal system. Ultimately it led to our common-law procedure of which we may be justly proud. It is, however, doubtful whether it worked well in its initial stages.The new procedure was little more than an expensive game of forfeits when the minimum stake was half a mark, 6s. 8d. It was also a compulsory game, a game at which heads I lose, tails you win... You were almost bound to come out of court poorer than you went in, whether you were there as plaintiff or defendant, pledge or juryman." pp. 88-9

(10) Plucknett (T.F.T.) 'A Concise History of the Common Law', p. 345 (1948)

"The king to the sheriff, greeting. Order N. to give back justly and without delay to R. a hundred marks which he owes him, so he says, and of which he complains that he deforces him unjustly. And if he does not do it, summon him by good summoners that he be before me or my justices at Westminster a fortnight after the octave of Easter to show (why he has not done it. And have there with you the summoners and this writ. Witness N. at M.)"(11)

The similarity to the writ of right is retained in the use of 'deforces', the creditor is deforced of his money just as the demandant is deforced of his right. We are also told that "Pleas concerning the Debts of the Laity also belong to the King's Crown and dignity".(12)

Yet at a time when the enforcement of debt seems to be settling comfortably into the jurisdiction of the courts, by the use of a Praecipe which brings the case before the royal court, we suddenly find that Justicies (which commits a case to the sheriff) being used in much the same manner as the old executive order and the sheriff is commanded to see the debt is paid. With the use of the Justicies

(11) Glanvill x.2 (Van Caenegem, p. 437)

(12) Ib. x. 1

in this way, the cost to the creditor for providing him with this extra aid also rises and returns again to about one third of the debt to be recovered. During the reign of John this form of enforcement rises in popularity⁽¹³⁾ but already the need for justice without the inflated price for kingly intervention is felt. In 1215 the first definite step is taken and the Great Charter declares:

"To no one will we sell, to no one will we refuse or delay, right or justice".⁽¹⁴⁾

This does not mean that the Crown stopped charging for its aid to the creditor immediately, this would take some time, but with the establishing of the court of Common Pleas in one place⁽¹⁵⁾ and a writ of debt which had become less expensive if not exactly cheap, the creditor had at least the choice, even if it did mean going through a long and wearisome procedure. There was no need in the county court for a writ at all, but no doubt the Justices was likely to urge the sheriff on just a little faster than might otherwise be the case.

We can, perhaps, trace the gradual falling away of the charges of the Crown to creditors by looking at a Register of Writs of about

(13) Thus we find Gilbert de Lassi paying 100s. to have a writ of Justices for a debt of 30 marks - Madox i, 438.

(14) 17 John c. 40 (c. 29 in 9 Hen. III)

(15) 17 John c. 17 (c.11 ib.)

the time of John and intended for the people of Ireland. In this register we find that in the case of a Justices for debt, the sheriff is not to take any money if the debt is less than forty shillings, whereas if it is over that sum, the sheriff is to collect one third of it for the Crown.⁽¹⁶⁾ From a register of somewhere near the end of the reign of Henry III we find this sum has been raised from the level of forty shillings to that of thirty marks, which must have gladdened the heart of the smaller creditor.⁽¹⁷⁾

Although the pleas of debt slowly increase before the Common Pleas their scope was "limited in two ways. Courts Christian had cognisance of debts arising out of marriages or testaments, and the recovery of money due for the occupation of land was assimilated to land and was subject to the same procedure. Services of money or of work were interchangeable; and the grand assize, which was not available for the defendant in pleas of chattels or debts, was the appropriate remedy in claims for rent."⁽¹⁸⁾ By mid-way through the thirteenth century, the scope of the action of debt is being set and by the time of Edward I, plea of detention of chattels is moving into its own particular place leaving the plea of debt to cover

(16) Maitland (F.W.) 'Register of Original Writs' (Collected Papers) ii 133.

(17) Maitland 'Glanvill Revised' (Collected Papers ii. 283)

(18) Flower (C.T.) 'Introduction to the Curia Regis Rolls' (S.S.) p. 289

generally money lent; the price of goods sold and delivered, arrears of rent due on a lease for years; (even though the lease is not a written one as long as the lessee is in possession)⁽¹⁹⁾ to enforce obligations arising out of suretyship and a debt which has been witnessed by a sealed document. Also "statutory penalties, forfeitures under by-laws, amercements inflicted by inferior courts, money adjudged by any court, can be recovered by it".⁽²⁰⁾

Although the plaint or oral plea was the general characteristic of the local court, it was also the manner in which proceedings took place before the itinerant justices or Justices in Eyre, those wandering groups of justices who roamed the country with increasing frequency from the reign of John, under their various commissions.⁽¹⁾ The creditor who was able to find one of these groups of justices within his area might therefore be able to bring his plea before the court without the necessity of a writ and "actions for debt are not uncommonly brought by plaint".⁽²⁾ Also the jurisdiction of

(19) Plucknett 'Concise' p. 597.

(20) P. & M. ii, 210.

(1) Richardson (H.G.) and Sayles (G.O.) 'Select Cases of Procedure Without Writ under Henry III' (S.S. vol. 60) pp. xxvii-xxxvi and see introduction generally.

(2) Sel. Cas. without Writ, p. cvi. For examples see cases Nos. 73, 105, 109, 113, 118, 134.

these justices was concurrent to that of the justices of the Bench in so far as their commissions extended, and a plea by a debtor who sought to escape under the now twisted interpretation of the forty shilling rule of the statute of Gloucester,⁽³⁾ to the effect that the court had no jurisdiction above that sum, received no acceptance by the court.⁽⁴⁾

By 1283 the writ of debt has reached a secure position. It is no longer the writ of grace that first started out, it has become a writ of course. From this time forward many courts will woo the creditor.

Since the powers of the local courts are limited by comparison to the royal courts, the creditor will more readily take his troubles to the latter. But even in the royal courts he will find procedure is slow and many pitfalls exist which are better avoided by the unwary. For from the commencement of the action against the debtor, either by writ or summons to a final judgment and attempted execution is a long hard road.

(3) 6 Edw. I, c.8 - see p. 73.

(4) Sel. Cas. without Writ, p. xlii.

CHAPTER 4SUMMONS AND EXCUSE AT COURTAccredited ContumacyThe Mode of Summons

The commencement of proceedings by originating writ - probably in the form of a justicies⁽¹⁾ - or merely by complaint in the local court marks the first of a series of difficult stages through which the creditor must pass in order to obtain judgment. In support of his complaint the plaintiff must produce two persons as pledges that he will prosecute his suit. A failure on the part of the plaintiff to appear may result in the amercement of the pledges, as time goes by, however, these pledges become merely fictitious names entered as a matter of course.⁽²⁾ To obtain the debtors presence, there must be a summons, self help without more ado appealed no more to the Norman mind than it had done to the Anglo-Saxon. The laws of Ine forbad revenge before a demand had been made to justice, failure to

(1) See pp. 74, 117.

(2) Bl. Comm. III. 274-5

comply meant returning the article taken and paying for any damage done plus compensation of thirty shillings.⁽³⁾ Cnut required three demands in the hundred and a final demand in the shire-gemot,⁽⁴⁾ after which a creditor could seize goods for himself.⁽⁵⁾ William I said there should be three demands⁽⁶⁾ and by the laws of Henry I, no man is to levy distress without judgment or permission, but the number of demands have disappeared.⁽⁷⁾ In the boroughs where there is greater licence to distrain one's debtor, a need for demanding prior to exaction is not always necessary, but different rules often apply, depending upon whether the debt is between burgesses, non-burgesses or mixed. No order can be drawn from these borough customals which differ in numerous ways from place to place until the end of the thirteenth century, when the unifying process of the common law gets under weigh; many will retain individual characteristics until long after this.

In one special case only did the right of distress without

(3) Ine 9.

(4) A county court held twice a year - Thorpe Glossary .

(5) Cnut II. 19.

(6) Leis Wil. I. 44.

(7) Leg. Hen. Prim. 51, 3.

summons or judgment arise between creditor and debtor and that is where the relationship of lord and tenant existed. From Glanvill we learn that a lord may distrain his tenants, at least if he had the judgment of his own court, by such of their chattels within his fee, providing the tenants are dealt with according to the judgment and custom of the court. From this, says Glanvill, the lord ought to be able to distrain for customs and services, but if this does not compel the tenant to render them, then the lord is to have recourse to the King or chief justiciar for a writ.⁽⁸⁾ Where the lord seizes the tenant's goods, two writs of replevin are given to the tenant so that he may secure the return of his seized goods upon his giving gage and pledge to the sheriff to ensure he will proceed with the matter in the courts.⁽⁹⁾ This right of a lord to take such distress becomes the right of a landlord and the action of replevin will develop an action which will enable a landlord to

(8) Bk. IX, c. 8

(9) Ib. XII. 12 gives a writ where customs are in dispute for the case to be heard in the county court.

Ib. XII. 15 gives a writ where services are in dispute but the case is to be heard in the King's court.

enforce rent payments from his tenant without recourse to the action of debt, although this action will remain open to him.⁽¹⁰⁾ Of the survival of this remnant of force without judgment where this relationship exists it has been said that: "primitive self help proved itself stronger than legal propriety, and this barbarianism remains, though mitigated and controlled, a living witness to the antiquity of our law."⁽¹¹⁾

With this one exception the law proceeded to work out its own dilatory procedure for the enforcement of the creditor's rights.

The summons to the debtor is to be made by two "good summoners" who at first will almost certainly be drawn from the plaintiff's witnesses and will have to testify in the court to the proper carrying out of the summons.⁽¹²⁾ These witnesses gradually give way to persons nominated by the sheriff as summoners and we hear that "there is a summons that is altogether defective, which is made fraudulently through the deceit of the claimant by false summoners, and not by the sheriff and his bailiffs."⁽¹³⁾ The need to testify to the

(10) Enever p. 232, and see P. & M. II, 578.

(11) Sel.Cas. without writ (S.S. vol. 60) p. xciii.

(12) Glan. I, 7

(13) Brac. f. 336 b.

making of the summons where the defendant does not appear is also removed.⁽¹⁴⁾ A summons ought to be served at least fifteen days before the date for appearance⁽¹⁵⁾ and if made by only one summoner or when the defendant was out of the county it was not binding.⁽¹⁶⁾

Essoin and Fourcher

If the defendant did not appear on the day of summons he may sent witnesses (essoiners) to excuse (or essoin) him. The essoin was a legally acceptable reason for the absence of the party, which pardoned the party from appearing for a certain period of time depending on the reason given.⁽¹⁷⁾ An essoin may allege the summons was unreasonable in that less than fifteen days notice was given;⁽¹⁸⁾ or essoiners may say that the defendant was taken ill on the way to court (de malo veniendi); or that he is ill in bed (de malo lecti); or that the defendant is overseas, in which case a delay of forty days

(14) Fleta, c. 65, p. 218 [see Brac. f. 439 b.]

(15) Brac. f. 334, 436

(16) Ib. f. 333 b. 336 b.

(17) For full account of 'Essoins' see Reeves, H.E.L. I, pp. 402-10

(18) Brac. f. 334 b. - In which case, if accepted a reasonable day is to be given on which the defendant is to answer.

plus one ebb and one flood of the sea is permitted, with longer periods grantable if a reason for being overseas is given;⁽¹⁹⁾ thus crusaders might have all the time necessary for the crusade⁽²⁰⁾ and a simple pilgrimage to the Holy Land brought respite of a year and a day.⁽¹⁾ There seems to have been no limit to the number of essoins permissible in the local courts, but in the king's courts the limit was three.⁽²⁾ Essoins must, however, be 'cast' in the correct order, so that the essoin of sickness on the way to the court may be followed by excuse of illness in bed, but the latter could not be followed in turn by stating 'defendant now overseas'.⁽³⁾ If the defendant decided that illness in bed was preferable to attendance in court he may well find himself being the subject of a 'view' by four knights, whose duty it was to decide whether his

(19) Brac. f. 338

(20) This practice probably arose as a result of papal decrees regarding crusades - see p.102 and also the 'Summons of Pope Eugene' (1145) Henderson, p. 336). For an example of the plea, see C.R.R. II. 196, 294 "The cross could not, however, be taken to avoid litigation that had already begun." Intro. to the Curia Regis Rolls (S.S. vol. 62) p. 350.

(1) Brac. f. 338

(2) Glan. I. 10, see also BIGLOW (M.M.) 'History of Procedure in England' pp. 237-8 (1880)

(3) Brac. f. 338 b.

illness was likely to be merely transitory or prolonged; in the former case a respite of fifteen days is given, in the latter a year and a day⁽⁴⁾ during which the defendant is to remain in bed and only emerge from it having obtained permission to do so. At the end of the year and a day the defendant is to appear either in person or by his attorney.⁽⁵⁾ Borough customals often allow for special essoins and at Leicester in 1220 we find that "these fairs are a reasonable essoin, in the portman moot, to wit the fairs of St. Ives, and Boston, and Lynn and Winchester and Stowe."⁽⁶⁾

The essoin of being on the King's business (*de servito regis*) is probably the strongest essoin of all, but evidence of such is required, and the court should exercise caution when this essoin is cast, for it should not be granted save for reasonable cause.⁽⁷⁾ A clever debtor might, therefore, with a little malice aforethought, legally avoid attendance in court for a considerable length of time.⁽⁸⁾

(4) *Ib.* f. 344 b.

(5) *Ib.* f. 359 b.

(6) Bateson, II, p. 138.

(7) *Brac.* f. 340.

(8) See Britton II, p. 350-1 (Bk. 6, c.7, s.4.)

The necessity at this time for all defendants to appear in court together gave rise to a practice known as fourcher, which is closely connected with essoins. The defendants merely took it in turn to cast essoins or to default in appearance before the court. In the latter case on the next court day the defaulting defendant would appear in order to save his attachments and another defendant defaulted. In 1345 a plaintiff in an action of debt requests aid where the action against several defendants has been going on for seven years, but the judge says he is unable to grant any remedy in the absence of a statutory provision. 'And so we see the defendants, after seven years of successful fourching, left fourching still in infinitum.'⁽⁹⁾ Such statutory provisions against fourcher as had been enacted related to real actions only and did not touch direct personal actions.⁽¹⁰⁾

Levying Distress

Where the debtor refused to appear and did not essoin himself,

(9) Y.B. 19 Edw. III (R.S. vol. 31) p. xxvi. cf. pp. xxiii-xxvi, 12.

(10) Fourcher was forbidden between parceners and joint-tenants in 1275 (3 Edw. I, c. 43); between husband and wife in 1278 (6 Edw. I, c. 10); between executors in 1335 (9 Edw. III, St. I, c.3) when it was enacted that in actions of debt, the action was to proceed against the first executor to appear.

the law took over the Anglo-Saxon and early Norman creditor's right to distrain the debtor to the amount of the debt after reasonable summons; in its place the court undertook to distrain the debtor until he appeared.

Two early foreign works prior to Glanvill had set out a procedure to be followed where the debtor did not appear on summons. The first written between 1160-70 allowed for three summonses and one edictum preremptorium, if debtor failed to appear then goods to the value of the debt are to be taken from the debtor and placed in the creditor's possession, this as a means of forcing the debtor to appear. If defaulter does not appear within one year, then creditor is definitely in possession, and only the question of ownership may be raised. The second of about 1171 follows the same procedure of summons, but if the defendant does not appear, then the plaintiff is to produce all his evidence and on judgment the verdict may go either way. If the plaintiff wins then he is placed in possession of sufficient of the debtor's goods to the value of the debt.⁽¹¹⁾

(11) Van Caenegem pp. 383-4 citing the Ulpianus de Edendo in G. Haenel, 'Incerti auctoris ordo judiciarius', 1938, p. 8 and an ordo in F. Kunstmann, 'Über den ältesten ordo judiciarius...' (Kritische Ueberschau der deutschen Gesetzgebung und Rechtswissenschaft, ii, Munich, 1855, p. 20 respectively. Judgment by default did not become possible in English law until 1832 - Uniformity of Process Act (2 Will - IV, c. 39) The necessity of a creditor retaining goods given to him for a year is to be found in a number of borough customs.

Although Glanvill sets out the procedure to be adopted by the court in a real action where the tenant fails to appear to answer the demandant,⁽¹²⁾ there is nothing directly concerning the contumacious defendant of a personal action.

In an action of dower, where the heir fails to attend after summons, we are told that in the opinion of some he may be compelled by distraining his fee. So that on the direction of the court, so much of his fee as is necessary to cause him to appear shall be taken into the King's hand.⁽¹³⁾ In dealing with debt, Glanvill says that if a party is absent or defaults, that it is not usual for the King's court to compel him to appear by distraining his chattels; but that with the judgment of the court he may be distrained by his fee or by attaching his pledges 'as is usually done in other suits'.⁽¹⁴⁾

By the time of Bracton, distress to appear in court is the remedy where a person summoned to attend on claim of debt does not appear,⁽¹⁵⁾ the sheriff or bailiff, being the persons who should carry out the distraint.⁽¹⁶⁾ The plaintiff is to appear in the court on the day on which the debtor is summoned to appear and offers to proceed;

(12) Glan. I, 7

(13) Glan. VI, c.10

(14) Glan. X, c.3

(15) Brac. 158 b.

(16) Ib. 440 b. cf. Britton I, p. 89 (Bk. I, c.22, s.8)

on default of the debtor, the plaintiff is to attend the court on the second, third and fourth days following. If on the fourth day the debtor fails to attend then he is not to be awaited, nor need summoners testify to the summons since there has been no denial.⁽¹⁷⁾ The contumacious defendant is then to suffer in succession: attachment by pledges; attachment by better pledges; a habeas corpus; a ceremonial distraint of defendant's goods and chattels; further distraint in that the defendant is prevented from interfering with the goods, etc.; and seizure proper by the sheriff who becomes responsible to the King for the issues.⁽¹⁸⁾

The appearance of habeas corpus in the midst of this procedure although adequately born out by actual cases,⁽¹⁹⁾ has been the subject of some conflict between authorities. Reeves saw it as the forerunner to the *capias ad respondendum* which will allow the sheriff to take the body of the defendant and keep it safely until the time to produce it in court.⁽²⁰⁾ Attachment by the body, however, was only permissible at common law in those actions where there was an allegation of force

(17) *Ib.* f. 439 b.

(18) *Ib.* ff. 439 b. - 440.

(19) *P. & M.* II, p. 593. citing *Bracton's Note Book*, pl. 526, 527, 1370, 1376, 1407, 1408, 1420, 1421, 1446.

(20) *Reeves, H.E.L.* II, p. 309

(e.g. trespass vi et armis and contra pacem) but not in any other action, only first by statute will the power to attach the defendant by his body be extended.⁽¹⁾ The habeas corpus of Bracton may permit the sheriff to arrest the defendant just prior to the day of summons in order to have him in court,⁽²⁾ but it did not 'command him to take the defendant and him safely keep so that he may produce him in Court on the day.'⁽³⁾ The habeas corpus disappears just after Bracton, but reappears in the writ of Distress to the sheriff, until statute removes most of the procedure between summons and final distress.⁽⁴⁾

With such lengthy procedure to be gone through before the taking of the defendant's possessions into the King's hand, the creditor might well be forgiven if he had evil thoughts about the state of the law. In 1230 we hear that persistent complaints have been made over the delays in obtaining judgments for debts, and by reason of such debtors are able to escape their obligations.⁽⁵⁾

(1) See p. 206.

(2) P. & M. II, p. 593, fn. 4

(3) Fox (J.C.) 'Process of Imprisonment at Common Law' - 39 L.Q.R. 46 at p. 58 - cf. authorities cited in this article.

(4) See pp. 134-5

(5) Liber Ordinacionem, f. 173

It has been calculated that if the full procedure described by Bracton was gone through, not taking into consideration possible essoins, a case might last over two and a half years.⁽⁶⁾ In 1267 the legislature finally came to the aid of the creditor; if after the second attachment by better pledges, the defendant failed to appear, then the great distress is to be used.⁽⁷⁾ In 1275 the period is reduced and the 'great distress' is to be levied on default of the defendant after first attachment.⁽⁸⁾ The nature of this great distress is not set out in either of the two statutes, but a Leicester customal of 1277 states that by it a defendant may be distrained

'By whatsoever may be found of his, wathin his house or without: So that if he causes his goods to be hidden or shut up in a room or el sewnere, the bailiff by view of the neighbours may enter everywhere to distrain him until justice be done."⁽⁹⁾

The position by the end of the thirteenth century is that on failure to attend court the defendant is to be attached by gage and pledge, if he then defaults on the day given to him on which to appear

(6) Reeves H.E.L. i, pp. 499-500 setting out the days upon which writs should be returned and the time taken.

(7) 52 Hen. III, c.12

(8) 3 Edw. I, c.45

(9) Bateson I, pp. 108-9

he is to be distrained by all his lands and goods within the sheriff's bailiwick if he "does not then appear, thereupon he shall lose the issues of his property to the amount for which the sheriff is responsible, in accordance with the estreats of the exchequer."⁽¹⁰⁾

Bracton in fact added a further step to the procedure already outlined as given by him.⁽¹¹⁾ As a final mode of securing the appearance of the debtor he suggests a minor form of outlawry, one that will not involve the death penalty or loss of limbs, this is to be used "when his body (debtor's) is not found and he of whom complaint is made, has no lands or chattels," for "it would be inequitable if justice should be stayed or malice unpunished."⁽¹²⁾ A century later this suggestion will be adopted to the debtor's discomfort.

Having reached the stage of taking into the hand of the King the possessions of the debtor, the law stops. The Anglo-Saxon and early Norman laws permitted the creditor to seize sufficient of the debtor's possessions to satisfy his claim⁽¹³⁾ and as long as the customary summonses

(10) Fleta, c. 65, p. 220 (f. 57 b)

(11) See pp 131-2

(12) Brac. f. 441

(13) III Edgar 7: II Cnut 19: Leis Wm. 47, 1; cf. Bigelow 'Placita', pp. 261-3.

had been observed that ended the matter. Even until the early part of the thirteenth century, some sort of judgment by default appears to have been possible, but by the middle of the century this has disappeared.⁽¹⁾ The law will distrain the debtor until he has nothing left, but it will not part with a penny to the creditor, distress infinite is the final process.⁽²⁾

Fleta remarks that 'this is an evil',⁽³⁾ Bracton was a little more constructive. In his view where there is a contumacious defendant in personal or pecuniary actions arising from contract, the court should adjudge to the plaintiff seisin of sufficient chattels to satisfy the debt and to summon the defendant to appear at a further day, if the defendant failed to appear then the plaintiff was to become owner of the chattels.⁽⁴⁾ The law with customary diligence filed this advice away, and in 1832 the legislature of William IV finally heeded Bracton's advice.⁽⁵⁾ The landlord with his extra-judicial right

(1) Brac. N. Bk. pl. 900 (1224)

(2) Brit. I, p. 132 (Bk. I, c.27, s.12)

(3) Fleta, c. 65, p. 217 (f. 57)

(4) Brac. f. 440 b.

(5) 2 Wm. IV, c.39, s.16 (Uniformity of Process Act)

of distress was luckier by some hundred and forty-two years, and received the right in certain cases to sell the chattels he had distrained for rent owing to him in 1690, until this time property in the chattels seized had remained in the tenant.⁽⁶⁾

This distraining of the debtor to appear presupposes that he has something by which he may be distrained; in the event of his deciding to appear he will be amerced for his defaults, and the action may finally begin,⁽⁷⁾ that is if the creditor has not already settled for a much smaller amount to save himself expense. But if the debtor has no lands, nothing by which he may be distrained, then the sheriff will make return to the writ to this effect, and there the matter ends, the creditor's troubles have been for nothing.⁽⁸⁾

(6) 2 Wm. & Mary Sess. 1, c.5

(7) Brit. I, p. 129 [Bk. I, c. 27, s.6]

(8) See Northumberland Assize Rolls (Sur. Soc.) pp. 179, 273, 277, 279. e.g. p. 273. "Johannes de Hirlawe optulit se versus Thoman de Echwyk de placito quod reddat ei duodesim marcas quas ei debet, et injuste delinet etc. At ipse non venit, et pluries fecit defaltam, ita quod praeceptum fuit vicecomi quod distringat eum per omnes terras, etc., ita quod de exitibus, etc. Et vicecomes testatur quod non habet terras neque tenementa in balliva sua, per quae passit distringi, et Johannes hoc idem cognosit, ideo nichil inde."

A Limited Attachment

The first steps towards adopting Bracton's suggestion of a form of minor outlawry in matters of debt⁽⁹⁾ are to be found in 1267 when it was enacted that: "If Bailiffs, which ought to make Account to their Lords, do withdraw themselves, and have no lands whereby they may be distrained; then they shall be attached by their bodies; so that the sheriff, in whose Bailiwick they be found, shall cause them to come to make their Account."⁽¹⁰⁾ Attaching of a bailiff under this provision, however, was rendered almost useless by a decision of 1310 holding that if the bailiff had land of a few pence in value, no matter what the amount of the debt, it would suffice to allow the debtor to be freed.⁽¹¹⁾ In 1285 stricter provisions are enacted to the effect that where auditors appointed to audit the account of "servants, bailiffs, chamberlains and all manner of receivers" find the accountant to be in arrears, then he is to be committed to the King's prison and to remain there at his own cost until the master is satisfied of his arrears. An accountant

(9) See p. 135

(10) 52 Hen. III, c. 23

(11) Box v. Palmer (1310) Y.B. Edw. II (S.S. vol. 20) iii, pp. 91-2.
Cf. Sel. Cas. K.B. (S.S. vol. 58) iii, p. cxix, appx. xiv (L)

who feels he has been wrongly treated, may, if he can find friends, be released on bail. He is then to appear before the Barons of the Exchequer with his accounts, etc., where the case will be gone into; if he is still found to be in arrears he is to be committed to the Fleet prison. If the accountant flees and will not give account, then he is to be distrained to appear before the justices and on appearance his accounts are to be audited, if they are in arrears he is to be committed to prison as before. Once imprisoned in this manner, the accountant is notailable and may only be released with the consent of the master otherwise the keeper of the gaol or his superior is to be liable for the arrears in an action of debt. The accountant who cannot be found is to be outlawed.⁽¹²⁾

The most surprising part of this provision is the giving of power to imprison, to private persons, without the need for them to consult a court, or for the person whom they imprisoned to be given a trial. Actual imprisoning by a lord appears to have taken place prior to this statute, for we find in 1221 one Roger 'guarding in the house of his lord, one Robert, who ought to render his account',⁽¹³⁾ but under the statute imprisonment is to be in the King's prison. This probably came as a relief to an ordinary master who lacked the necessary wherewithal to imprison his accountant, only the Church was likely

(12) 13 Edw. I, c.11

(13) Eyre Rolls of Glos. Warwicks., and Staffs (S.S. vol. 59) No. 978, p. 415 (1221)

to find private imprisonment easy "since the Church had monasteries where persons could be confined, and fed, (but not very much)".⁽¹⁴⁾

Although this action was, at first, aimed at the offending bailiff, it became extended to include the guardian in socage,⁽¹⁵⁾ and at the end of the thirteenth century and afterwards, it is used to bring account in partnerships, and where merchants engage in joint ventures.⁽¹⁶⁾

The Choice for Truth

Secta and Suit

The procedural difficulties that the plaintiff met once in the court with the defendant might well make any trouble met in obtaining his presence seem very slight. With the intricacies of the pleading we are not concerned, only with the facts of appearance and mode of proof are we interested.⁽¹⁷⁾

(14) Plucknett (T.F.T.) 'Criminal Legislation of Edward I', p. 96.

(15) 43 Hen. III, c.12 (1259 - Provisions of Westminster) & 52 Hen.III, c. 17 (1267)

(16) See Fifoot 'Sources' pp. 270-1 and P. & M. II, 221-2.

(17) For details of proof and pleadings during this period see Bigelow pp. 246-300, P. & M. ii, pp. 598-674.

The plaintiff, on appearance in court, must appear either with deeds or else with his secta or suit - a group of friends who will support that his demand is good. The plaintiff who appears with only his bare word to support his demand cannot compel the defendant to answer him⁽¹⁸⁾ and the defendant will be entitled to judgment. The suit therefore places more than the plaintiff's bare word before the court and raises "a presumptive case against the defendant."⁽¹⁹⁾ In Magna Carta it is enacted: "No bailiff shall in future put any man to his 'law' upon his own mere word of mouth, without credible witnesses brought for this purpose."⁽²⁰⁾ Controversy has arisen on two points regarding this provision.⁽¹⁾ First as to its intended sphere of action; some authorities confine 'law' to that of the ordeal, others with more reason extend it to all forms of tests appointed by the court.⁽²⁾ Secondly, as to the evil the clause was to combat. One abuse at which it seems most likely to have been aimed was that of allowing the

(18) Glan X, c. 12

(19) Bigelow, p. 251

(20) 17 John c. 38 (1215) - (c. 20 in 9 Hen. III).

(1) See McKechnie, pp. 430-36 for the various interpretations put forward.

(2) Thayer (J.B.) 'A Preliminary Treatise on Evidence at the Common Law', pp. 199-200.

plaintiff to be favoured to the detriment of the defendant in forcing the defendant to wager his law where the plaintiff produced nothing but his bare word to support his action. Thus Fleta says "No free man is to be put to his law or placed on oath on mere plaint and without trustworthy witnesses brought for the purpose."⁽³⁾ In 1701 Holt, J. held that this provision meant the defendant could not be put to his law unless the plaintiff had witnesses.⁽⁴⁾

The defendant who chose to deny the plaintiff's claim could offer to prove his denial in such manner as the court should direct or he might ask that the plaintiff's suit be examined. The choice of the one at least in the twelfth century would appear to be to the discarding of the other. In the later thirteenth century, it appears that the defendant may ask that the plaintiff's suit be examined, and if on examination they all agree, then the defendant may wage his law against them.⁽⁵⁾ Prior to this the suitors would take formal oath as to the

(3) Fleta, c. 63, p. 211 - They appear to be more witnesses than friends of the plaintiff by this time.

(4) City of London v. Wood (1701) 12 Mod. Rep. 669 at p. 678 cf. Plucknett 'Concise', p. 378. P. & M. ii, 606.

(5) Fleta, c. 63, p. 211 [See Brac. f. 315 b.]

correctness of the plaintiff's claim, and if they succeeded without error, the defendant would lose.

The members of the suit speak from their own knowledge of the facts, thus, where a suit was examined and gave only hearsay evidence, both parties put themselves on the country and the sheriff is left to enquire the truth by twelve good and lawful men.⁽⁶⁾

The need for suitors where the plaintiff has no absolute proof is illustrated by a case of 1226, where the plaintiff's suitors on examination confess they know nothing of the debt claimed and cannot agree, and since the plaintiff has no charter or tally or any other proof the defendant goes free.⁽⁷⁾ Although the production of suit by the plaintiff is almost a matter of form by the end of the thirteenth century, as late as 1324, a plaintiff fails for not being ready to produce his suit in court.⁽⁸⁾ In 1343, defence counsel requested that the plaintiff's suit be examined and rejects any other forms of defence. He is told that where debt is on simple contract without specialty, production of suit by the plaintiff is a matter of form, and it shall not be examined on the request of the defendant. The sting in this case was in the tail since the court declared that counsel could not

(6) Eyre Rolls (S.S. vol. 59) No. 1477 (1222)

(7) Brac. N. Bk. 1693 (1226) See Thayer, p. 14.

(8) Y.B. 18 Edw. II, f. 582 cited P. & M. ii, 215.

afterwards deny the debt and gave judgment for the plaintiff.⁽⁹⁾
Despite this the legal necessity to produce suit did not disappear until 1852.⁽¹⁰⁾

After the plaintiff has stated his claim, produced his suit and the pleadings have been completed, the court must decide to whom the proof shall be given and in what form it is to be performed. This 'medial judgment' as it has been called⁽¹¹⁾ has nothing to do with the final judgment in the case, which will only be given at this stage in the event of the defendant admitting to the plaintiff's claim or failing to produce a defence. When the court has decided on the party to produce proof a day will be given for such proof to be made, and pledges taken for the party's appearance.

Ordeal and Battle

The modes of proof awarded during this period vary. During Anglo-Saxon times it appears that in the absence of testimony or with the consent of the parties, the ordeal in one of its various forms might be awarded.⁽¹²⁾ From the Conquest we find that Battle

(9) Y.B. 17. 18. Edw. III. (R.S.) 72.

(10) 15. 16 Vic. c. 76, s. 55 (Common Law Procedure Act)

(11) Bigelow, p. 288

(12) Lea (C.L.) 'Superstition and Force', p. 337

may be awarded in civil cases, and the parties produce champions to fight for them. This could apparently be used in cases of debt in Glanvill's day,⁽¹³⁾ but it is rare and disappears shortly afterwards.

Wager of Law

The mode of proof in most general use after the emergence of the action of debt in this period is, however, wager of law or compurgation. The party to whom proof is awarded produces a number of persons who take an oath on his behalf, after he has sworn to his case; if it is correctly performed then judgment will be awarded in his favour. The oath must be correctly performed by each helper, any slip is fatal to his party's case; at first the oath is as to the actual truth of the party's oath, later only as to actual belief in the truth of his oath.⁽¹⁴⁾

The award of proof is generally awarded to the defendant, but if he makes an affirmative plea which the plaintiff denies, then proof may be awarded to the plaintiff.

We have already seen that if the plaintiff failed to produce suit after his claim the defendant could not be forced to his law,⁽¹⁵⁾

(13) Glan. X, c.5

(14) Pope Innocent III made decree to this effect. Lea p. 66.

(15) See pp. 141-2

but the number of oath-helpers necessary to support the defendant is at one point closely bound up with the number of suitors that the plaintiff produces and Fleta says that two oath-helpers (up to the number of twelve) should be produced for every suitor.⁽¹⁶⁾ Generally the number required seems to depend on the court. In London a resident must produce six people, if not resident then two will suffice; in the case of a foreigner who cannot produce helpers the sergeant of the court is to take him to the six nearest churches to the court and he is to make one oath in each.⁽¹⁷⁾ In 1342 two defendants produce only eight helpers and fail, and the number is settled at twelve.⁽¹⁸⁾ The courts also set out the ways in which the oath is to be performed, thus a dumb person wages his law against summons by listening to words recited to him then placing his hand outside the book and kissing it.⁽¹⁹⁾ A married woman sued for her ante-nuptial debts holds her hand over the book and her husband's under it, and he makes law in his own name and the name of his wife.⁽²⁰⁾

Compurgation in debt, however, is not a satisfactory mode of proof and already by the end of the thirteenth century a large number of other actions are settled by the parties putting themselves on the

(16) Fleta, c. 63, p. 211

(17) Bateson I, p. 177. cf. ib. p. 64, in Leicester until 1277 the defendant had to accept five helpers chosen by the plaintiff.

(18) Y.B. 16 Edw. III (R.S.) ii, p. 16.

(19) Y.B. 18, 19 Edw. III (R.S.) p. 290

(20) Y.B. 4 Edw. II (S.S. vol. 26) p. 13

country and the summoning by the sheriff of twelve good and lawful men to give verdict on the facts. The parties choose the test by jury as opposed to the test by compurgation. Already the common law is cutting away the cases in which compurgation may be used, but in so doing, it will give rise to a mass of procedural rules which will submerge the lawyer and layman alike in a morass of technical difficulties.

By slow degrees the number of occasions on which a debtor may wage his law in debt are decreased,⁽¹⁾ until the only cases left are those in which the plaintiff has produced only his word and suit against the defendant, where it seems fair that the defendant should win if he can make his law correctly. The deed is the first to be accepted as free from compurgation,⁽²⁾ and efforts are made to exclude it where the plaintiff produces a tally at least if it is sealed. Merchants obtain the right to exclude compurgation where the plaintiff produces tally to support his claim, by royal ordinance, unless the defendant produces tally of acquittance against it, when a rather ceremonial form of compurgation is set out.⁽³⁾ Thus where a merchant produces tally, and his suit on examination agree with his demand, the defendant is told to make his peace, although if the plaintiff had not been a merchant, the defendant could have defended by his law.⁽⁴⁾ Although the rules

(1) See the judgments in *City of London v. Wood* (1701) 12 Mod. 669 - as to the few cases it could be used in by this time.

(2) Y.B. 3.4. Edw. II (S.S. vol. 22) 200

(3) Fleta, c. 63, pp. 211-2.

(4) Cas. Plac. (S.S. vol. 69) p. 25.

against the use of compurgation increase the parties may still among themselves accept it as the mode of proof.⁽⁵⁾

Despite the obvious lack of justice in the result of compurgation, the right to retain it was strongly fought for. In 1364 the citizens of London obtain a statute to enable them to wage their law against the debts contained in merchants' books;⁽⁶⁾ the Commons petition in 1376 that wager of law be allowed in the Exchequer of Pleas and not jury trial, as used to that date, and wager of law ousts the jury.⁽⁷⁾

A statute of 1404 recites that mischief is being caused by persons falsely alleging that an account has been taken and bringing actions of debt on account stated, in which actions wager is not allowed, so that the party they allege the account and debt against is being found liable 'by the Neighbours of those who prosecuted such Suits'. Therefore it is enacted that the court may allow jury or wager of law in its own discretion.⁽⁸⁾

Cases of wager of law occur in 1708 where the plaintiff was non-suited because the defendant was ready to wage his law,⁽⁹⁾ in 1799

(5) Y.B. 16 Edw. III (R.S.) ii, p. 118

(6) 38 Edw. III, St. I, c.5

(7) 2 Rot. Parl. 337, No. 92

(8) 5 Hen. IV, c. 8 (1403-4)

(9) Lea p. 79

where the defendant successfully waged his law against payment claimed by the plaintiff⁽¹⁰⁾ and in 1824 the last case came before the courts.⁽¹¹⁾ Even then it was only in 1833⁽¹²⁾ that wager of law was actually abolished and until that time remained a possible way in which the debtor, sued on a simple debt without specialty, could escape his obligations.

(10) *Ib.* p. 80

(11) *King v. Cresswell* (1824) 2 Barn & Cres. 528. The Court refused to tell the defendant the number of compurgators necessary, but when he appeared with eleven the plaintiff withdrew.

(12) Civil Procedure Act, s. 13 (3 & 4 Will.IV, c. 42)

CHAPTER 5THE DISTRESS OF JUDGMENTJudgment and Execution

On the day appointed by the court⁽¹⁾ the party awarded to produce or make his proof must appear and perform his task, judgment depending solely on his success or failure in doing so.

Where the creditor is awarded judgment he will find that the law serves him only slightly better than it did in obtaining the presence of his debtor in court. Slavery for debt had existed in Anglo-Saxon times, as it had done at one time or another all over Europe,⁽²⁾ but it seems to have had no place in the post-conquest common law, the debtor may not pledge his body and wipe out his past debts by the sweat of his brow,⁽³⁾ only over the King's debt will a man go to prison. Two writs of execution come into

(1) See p. 144.

(2) P. & M. II, p. 596.

(3) See, however, 'Sel. Pl. in Manorial Courts' (S.S. vol. 2), pp. 139 et seq., where on judgment being given against one Reginald Pickard of Stamford at St. Ives Fair Court in 1275, the report reads "he is poor, pledge, his body." See also ib. pp. 150-1. There appears to be no explanation for these strange entries.

being concerning the levying of a debt from a debtor who will not pay after judgment. Their derivation is somewhat vague, but probably stems from the early executive writ which could be purchased from the King to have a debt enforced, plus the fact that distress by way of execution had always been possible where the King's debts were unpaid and the machinery for carrying it out existed in the persons of the sheriffs and bailiffs. Thus as the writ of debt moved slowly into the King's courts as a means of commencing an action of debt, it is perfectly natural that the part previously concerned with the enforcement of the order should now come into force only after judgment has been given.

Having obtained judgment in the King's court, the creditor could choose either a writ of fieri facias or of levari facias. The former authorised the sheriff to cause sufficient to be made up from the goods and chattels of the debtor in order to meet the debt. Whilst the latter authorised the sheriff to levy out of the produce of the debtor's land the amount required as it becomes available; this includes rents, crops and leases, although leases might also be sold under fieri facias. Otherwise the land remained the sacred possession of its owner, save where statute had directed that the surety who paid his principal's debt to the crown could be put in possession of his principal's land,⁽⁴⁾ and by the common

(4) 17 John, c.9 (1215) - 9 Hen. III, c.8 (1225)

law, if an heir was made specifically liable for the debts of his ancestor by that ancestor, then the heir's land may be delivered to the creditor.⁽⁵⁾

A judgment creditor in the local courts "of wapontakes, hundreds and courts of barons"⁽⁶⁾ had to rely on a series of distraints imposed by the court on the debtor to enforce payment; these distraints may peeve the debtor, but they were of little help to the creditor. A petition of 1348 that such distresses seized may be sold was rejected.⁽⁷⁾

Enforcing Distress

Distress either to enforce attendance of the contumacious litigant, or as a means of execution grows during this period from the task of the complainant to an administrative act of the sheriff and bailiff or their nominees. They take pledges, make attachments, levy distresses, collect amercements and "in those purely routine duties there possibly lurked the commonest and most tempting

(5) Fleta c. 62, p. 208. Brit. I, p. 163 - (Bk. I, c.29, s.15).

(6) Plucknett 'Concise' p. 369.

(7) Rot. Parl. II, 267, No. 21.

opportunities for oppression."⁽⁸⁾

From the middle of the thirteenth century to its close, the legislature is busy controlling the scope of the powers of these officers and settling that distress shall only be levied on award of the court.⁽⁹⁾ A provision of 1259 appointed Justices in Eyre to hear complaints of trespasses by bailiffs, whether of the King or a lord, which were capable of being determined without writ and had taken place within the last seven years.⁽¹⁰⁾ A year later, an ordinance issued giving power to the magnates of the realm to correct excesses committed by their bailiffs and serjeants and to summon and swear freemen of the vicinage so that justice may be done touching the excesses and trespasses.⁽¹¹⁾ The troubled state of the realm at this time gave these provisions little chance to prove of value and in 1266 it is recited that the sheriffs and bailiffs have been wrongful in their taking of distresses and that "the Commonalty of the Realm hath suffered great Damage." Therefore it is provided that

(8) Plucknett 'The Medieval Bailiff', p. 13.

(9) Even the extra-judicial right to distrain for services or rent of freehold or leasehold tenure was being regulated. E.g. see 52 Hen. III, cc. 2, 15. 3 Edw. I, cc. 16, 17. Cf. Enever, pp. 67-134.

(10) C.C.R. (1259) pp. 144-5.

(11) C.P.R. (1258-1266) p. 97.

where animals are taken and impounded, the owner shall be allowed to attend and feed them. Sheep and plough-cattle are not to be taken if there is sufficient property from which they may levy the debt. Distress is to be reasonable having regard to the debt and this as estimated by local people.⁽¹²⁾ Within a year of this, however, it is stated that great men and others have taken distresses without authority and refused to release such distress on the sheriff's demands; in order to prevent such outrages, no revenge or distress is to be made by anyone without the award of the King's court; those breaking this law are to be punished by fine and to make full amends to the person suffering damage.⁽¹³⁾ Distress is not to be taken outside the jurisdiction of the distrainer;⁽¹⁴⁾ anyone taking distress must allow it to be replevied by the King's officers and no one is to prevent any "Summons, Attachments or Executions of Judgments" from being carried out;⁽¹⁵⁾ distress taken is not to be driven out of the county nor to be excessive⁽¹⁶⁾ and power is given to the sheriff to

(12) 51 Hen. III, St.4 (Ruff) cf. Brit. I, p. 89 (Bk. I, c.22, s.8). The use of local people to estimate reasonable distress for a debt had been provided for as early as 1215 where debts were due to the king from deceased persons, 17 John, c.26. (S.R. vol. I, p. 179)

(13) 52 Hen. III, c.1

(14) ib. c.2

(15) ib. c.3

(16) ib. c.4 cf. 3 Edw. I, c.16 (1275)

replevy distresses wrongly taken on complaint being made to him, no writ being necessary,⁽¹⁷⁾ but "this procedure was possible before the statute, as an alternative to proceeding by writ."⁽¹⁸⁾

Also prevalent at this time was the practice of distraining a member or members of one community for debts owed by a fellow member at a town or a fair which they were attending, their goods, etc., were seized to pay the debt and they were left to recover from the debtor as best they may on return to their own town. A number of borough charters contained provisions to prevent this and it became general when it was enacted that "in no City, Borough, Town, Market, or Fair, there be no Foreign Person (which is of this Realm) distrained for any Debt wherefore he is not Debtor or Pledge; and whosoever doth it, shall be grievously punished, and without Delay the Distress shall be delivered by the Bailiffs of the Place or by the King's Bailiffs, if need be."⁽¹⁹⁾

(17) ib. c. 21

(18) Select Cases without writ (S.S. vol. 60) p. xcv, fn.3

(19) 3 Edw. I, c.23. The rule was not extended to foreigners from outside the realm until 27 Edw. III, St. 2, c.17 (1353), although some foreign merchant bodies purchased, or being the King's creditors, were given this privilege from the crown, e.g. see C.P.R. (1232-1247) p. 149 -Safe conduct for merchants who come to the ports of England with wine, the King will not take their wines, nor will he permit others to do so without their consent. See also S.C.L.M. II (S.S. vol. 46) p. 32. Merchants of Ypres, having been attached by their goods for debts owing to the plaintiff by merchants of Ypres other than themselves; for which they are not chief pledges, produce a charter from the King granting them freedom from distraint in cases other than where they are debtors or chief pledges. The case is therefore dismissed and the defendants have a writ to the bailiff holding their goods.

With all these enactments to define and limit the powers of sheriffs and bailiffs, the debtor could still find himself a victim of a well laid trap and in 1285 we hear that bailiffs (who are normally responsible for levying the actual distress) have been sending strangers to take the distresses, with the result that the person to be distrained has resisted and refused to allow such to take place. Thus, when authority is shown to have existed, the distrainees have had to make fine to the bailiffs for their behaviour, and to remedy this "no distress shall be taken, but by Bailiffs sworn and known" and persons found guilty of not following the above are liable on a writ of trespass being purchased against them, to pay damages to the injured party, and also be punished by the King.⁽²⁰⁾

By the end of the thirteenth century, the oppressive power of the bailiffs has been seriously curtailed, if only for the time being,⁽¹⁾ and the sheriff has lost a great deal of the force he had when the century opened. Distress to compel attendance in court and distress in the form of execution for debt have become regulated by law and enforced by the courts, self-help has been confined to

(20) 13 Edw. I, c. 37

(1) With imprisonment for debt the bailiff's chances for oppression and extortion are vigorously revived.

a place certain where it will remain.

Debts of Record

If the apparent aid the creditor received from the court at this period in our history appears to be grudgingly given, it is rather more because the astute creditor has tended to rely only on the execution process the court will afford him, than on the action of debt whose process is just becoming settled.

Actions of debt are brought before the debt can really be said to exist, the debtor appears and acknowledges the debt, which leaves the creditor with only the need to sue out a writ of execution for the debt, not instantly, but only if the debtor should fail to pay the now existing debt by the agreed time. All the lengthy procedure prior to judgment is cut away.

An entry of a debt in the Exchequer or on the Close Rolls of the Chancery will also serve the creditor's purpose, the debtor admits to a debt to be paid on a certain date and that on failure the sheriff shall raise the money from his possessions. Being enrolled in a court of record the creditor may apply for fieri facias or levari facias if the debt is not paid on time. Similarly entries are to be found in the plea rolls where the action has apparently been compromised. The defendant agrees that he owes the

debt, and the plaintiff then grants that it be paid by a certain date or may allow that it shall be paid by instalments, in return the debtor may pledge his land or goods, or both, to be taken by the sheriff should he fail to discharge the debt in the manner entered on the roll. Thus Hugh agrees he owes Emma ten marks of silver and says he will repay it over a period of eight years, and concedes that the sheriff may distrain him by his chattels to certain amounts should he fail to repay at the agreed dates.⁽²⁾

"John the vintner demands against Ralph the priest of Eltham thirty-six shillings and four pence; and they make a concord to the effect that Ralph shall give [John] two marks of silver [now], and shall pay him one mark within the octave of S. Edmond and another [mark] within the octave of mid-lent; and in case he shall not have paid [them], he has put in pledge to [John] all the land which he holds as of lay fee in Suffolk."⁽³⁾

These then were the debts of record, and by making the obligation in this way the creditor could ensure a fairly quick means of enforcing

(2) Sel. Civil Pleas (S.S. vol. 3) No. 102, p. 42.

(3) ib. (") No. 174, p. 70. For entry on the rolls as a means of enforcing a contract or provision for damages if not carried out see Sel.Cas. without writ (S.S. vol. 60) No. 113, pp. 116-7. It was quite usual for the plaintiff to forgive the defendant the damages claimed in consideration of his entering into the recognisance.

it.⁽⁴⁾ The one drawback lay in the need to enforce a judgment within one year and a day of entry, otherwise the creditor had to commence proceedings afresh. This difficulty was met by providing that where things are recorded before "the King's Chancellor and his Justices that have record, and as be enrolled in their Rolls" they should not have to be pleaded before the court in the manner of a matter which took place out of court and therefore if they are brought before the court within a year, then the plaintiff shall have a writ of execution; but if it is longer than a year then the plaintiff is to have a writ of scire facias from the sheriff to the defendant summoning him before the justices to show reason why the matters contained in the enrolment should not be executed. If the defendant fails to appear, or can give no satisfactory reason against the matter, then execution is to be sued out in the normal fashion.⁽⁵⁾

Damages and Costs

In view of the frequent delays and costs of travel in order to pursue an action of debt the need for the creditor to recover damages

(4) The giving of land as security for a debt was already much in use in Glanvill's day, but the growth of the rules surrounding it resulting in our present law of mortgages have their own history.

(5) 13 Edw. I, c.45 (1285)

sufficient to meet some of his expenses is reasonable but not perhaps self-evident to a modern age used to seeing the loser paying the winner's costs. Costs, as we understand them, belong to a slightly more sophisticated judicial system than can be found when debt is busily forming itself into an action.

Provision for compensation or damages can be found in Anglo-Saxon law in the form of Bot⁽⁶⁾ and it is early to be found in actions concerning the disseisin of land.⁽⁷⁾ Statutory damages are obtainable in cases concerning the obtaining of dower;⁽⁸⁾ a lord who maliciously alleges that persons have been enfeoffed to deprive him of his wardship is to pay damages to the feoffees and the costs they have sustained by reason of his plea;⁽⁹⁾ and the heir forced to bring a writ of morte d' ancestor is also given damages.⁽¹⁰⁾ The statute of Gloucester extended damages to writs of entry, cosinage, aiel and besaiel, also the demandant is to recover the cost of his writ as well as specified damages, further "all this shall hold place in all

(6) Ine 42

(7) P. & M. ii, p. 216.

(3) 20 Hen. III, c. 1.

(4) 52 Hen. III, c. 6.

(6) ib. c.16.

Cases wherein the Party is to recover Damages."⁽⁷⁾ In nearly all cases, however, the demandant is recovering actual amounts lost by virtue of the disseisin and nothing else.

In debt the plaintiff fared rather better since he complained that the debtor had unjustly detained his money to his damage, so much, the figure being one he arrived at by his own reckoning.⁽⁸⁾ Where the defendant failed to make his law, the plaintiff recovered the debt plus the arbitrary damages stated,⁽⁹⁾ this at least was the position up until 1344 when the court held the plaintiff was to recover damages in debt not as alleged in his declaration, but as assessed by the court.⁽¹⁰⁾

Equity and Fraud in the Early Court

In the local courts, the communal courts, even in the early part of its history in the royal courts we find remedies being given

(7) 6 Edw. I, c. I, cf. cc. 4, 5, 8, 14.

(8) One such creditor requests damages for his shame as well as ordinary damages: Court Baron (S.S. vol. 4), p. 47.

(9) Y.B. 33. 35 Edw. I, p. 397. (1307) also Y.B. 16 Edw. III, No. 83, p.558 (1342)

(10) Y.B. 17. 18 Edw. III, p. 622 (1344). A debtor who failed to appear until after being distrained to do so by the great distress, could not plead that he had made previous attempts to pay the debt, or offer the money on appearance, in order to avoid paying damages. - Y.B. 33. 35 Edw. I, p. 312. (1306)

or measures applied which today we would describe as equitable, but which in their own day seemed only so much common sense, they are not bothered by precedent and what is thought to be a bad decision can be safely disregarded.⁽¹¹⁾ Where a defendant pleaded that the plaintiff, who now brought trespass against him, had formerly withdrawn an assize of novel disseisin when the defendant had promised him a quarter of corn, the jury find this to be so, but, they say, the defendant never paid, therefore, although the plaintiff is amerced 'in equity it is ordered that (defendant) is to make satisfaction to him for the quarter of corn'.⁽¹²⁾ A judge in 1309 still feels able to refuse to give judgment where the plaintiff claims a sum of money stated to be payable in a deed if the deed is not delivered at the correct time, declaring that it was more of a penalty than a debt and asking by what equity the plaintiff demanded it, since he suffered no damage and the deed is now tendered to him by the defendant.⁽¹³⁾

It is only by this form of equity that the law is in fact able to deal with the fraud and forgery of the day; if the court feels that there has been some sort of fraud it will refuse to enforce it;⁽¹⁴⁾ a person producing as evidence false charters or tallies will be imprisoned,⁽¹⁵⁾ but forgery of deeds is not in itself a crime. One

(11) For the form of equity during this period see: Hazeltine (H.D.) 'Early English Equity' - Legal Essays 1913.

(12) Sel.Cas. without writ. (S.S. vol. 60) p. 129, No. 128.

(13) Y.B. 2.3. Edw. II (S.S. vol. 19) p. 58. The plaintiff is told he would have to wait at least seven years for judgments such as he requests.

(14) E.g. see Eyre Rolls (S.S. vol. 59) Nos. 474 and 1073 in the latter case the court adjudges the charter to be of no effect and orders it to be cancelled.

(15) Brac. N. Bk. pl.934 and Y.B. 20,21 Edw. I (R.S.) p. 331 respectively.

borough at least was ahead of the legislature here, and at Portsmouth in 1272 punishment is given in that "if there be any that counterfetith fals letters or fals seals or makith any fals lesynges he to be set on the pelory on the market day".⁽¹⁶⁾ A petition that persons forging private seals and attaching them to deeds, so that others lost their lands thereby, be punished by life imprisonment was rejected in 1371.⁽¹⁷⁾ Deceit in its many guises has not yet become sufficiently defined to be dealt with and "in the thirteenth century our King's court had in general no remedy for the man, who, to his damage had trusted the word of a liar."⁽¹⁸⁾

If the legislature is lagging behind, however, there is no doubt about an intention to provide an impartial judicial machine. The taking of money by circuit justices or balliffs from parties to ensure a fair, or perhaps more than fair, hearing for the parties is forbidden;⁽¹⁹⁾ so is deceit or collusion by serjeant pleaders or

(16) Bateson I, p. 81 - Portsmouth c, 5.

(17) Rot. Parl. II, p. 308, No. 45.

(18) P. & M. II, p. 535

(19) 52 Hen. III, c.11

others in the King's court on pain of imprisonment of a year and a day, and if a pleader he shall not plead again.⁽²⁰⁾ The maintaining of suits,⁽¹⁾ or the committing of extortion⁽²⁾ by the King's officers is forbidden. Pleas are to be decided in their proper order;⁽³⁾ the times for the delivery of writs to the justices in Eyre are regulated.⁽⁴⁾ Sheriffs neglecting to make return to writs or making false returns are to make reparation to the injured party according to 'the Quality and Quantity of the Action'.⁽⁵⁾

Legislation to control sheriffs and bailiffs will continue for a very long time, but the judiciary proper has been regulated and made respectable, it will give very little cause for alarm in the future.

Customal Enforcement in Borough and Fair

The granting of charters to borough communities or of the

(20) 3 Edw. I, c.29

(1) ib. cc. 25 & 33.

(2) ib. cc. 26 & 30

(3) ib. c. 46

(4) 13 Edw. I, c. 10.

(5) ib. c. 39

right to hold a fair, together with means of enforcing the privileges through the means of a court, are a normal feature of this period. In 1215⁽⁶⁾ such customs and liberties already granted were affirmed, and re-affirmed in 1225.⁽⁷⁾

Although we have spoken of the working of the common law, there is a vast sphere of jurisdiction that does not have anything to do with the common law of the King's courts. The burgess or trader who is used to travelling from town to town moves in and out of continually changing legal practices, slight in some cases, important in others. Henry I in his Coronation Charter granted the citizens of London freedom from the waging of judicial combat in their suits⁽⁸⁾ and that they should not plead without the city in a plea.⁽⁹⁾ In 1275 at the Fair Court of St. Ives William and Alice refuse to a plea on the ground they are of the commonalty of London.⁽¹⁰⁾ Also in London is to be found the privilege of 'foreign attachment' which gave the citizen creditor the right on the failure of his debtor's possessions to satisfy his debt, to have 'attached' debts which were due to his debtor from other people.⁽¹¹⁾ Thus formerly a privilege pertaining only to

(6) 17 John c. 60

(7) 9 Hen. III, c.9

(8) s. 5

(9) s. 4

(10) Sel. Pl. in Manorial Courts (S.S. vol.2) p. 155

(11) Liber Albus, pp. 207-8.

the crown⁽¹²⁾ came to be employed by the citizens of London and other towns that obtained⁽¹³⁾ privilege in their charters.

Communications between towns having large merchant communities in order to obtain payment of debts owing by a member of one to a member of another, are not unusual. At Ipswich on complaint to the bailiffs by a creditor of the town that a debt is owed to him by a foreign merchant, the bailiffs are to send a letter to the debtor's community requesting that an order be taken for payment and satisfaction. If no reply within three months then a second letter is to be sent, requesting satisfaction if the debtor is able to pay, and that justice be done upon the goods and body of the debtor 'according to law and equity'. If the debtor's goods prove insufficient it is requested that he be imprisoned by his body in satisfaction of the debt. A failure to receive reply meant that the bailiffs would issue authority that the debt may be levied from the goods, etc. of the next ship or persons arriving from that town.⁽¹⁴⁾

Thus, in 1284,

"John Gerberge caused to be arrested the men of Ostend, for a default of justice in those parts, for a debt of [£4. 1s.] in

(12) Dialogus de Scaccario II, xv, see p. 88.

(13) See Brandon (W.) 'Treatise on the Customary Law of Foreign Attachment' (1861)

(14) Blomfield (F.) Norfolk XI, p. 341.

which debt Hankyn Talard, and William his brother, and others, are bound to him, for which some of that society, and of those parts, entered into payment of the said debt, viz. Boyding Kelyng, for 3s; Bondyn Fitz Havyn for 3s; Walter Noy for 3s; John Wynkard for 3s; Willard Hawke for 3s; John Walke for 3s; Lambkin Ermund for 3s; Walter Peridan for 3s., etc." (15)

To avoid merchants having to go to such lengths as set out above, many towns provided that they could be paid from the 'communal purse' and thus avoid injuring the name and trade of the town. At Grimsby if such payments were made, the debtor was forced to repay double the original debt and in the case of his not having sufficient, his tenement would be seized and held until the value of the debt was recovered. (16)

The times and manner of taking distress and the articles which are distrainable are also regulated, many customals forbid that a merchant be distrained during the period of the market. (17) A burgess often has the right to distrain foreign debtors without first having

(15) Swindon (H.) 'Yarmouth', p. 168

(16) Bateson I, p. 120-(1259) Grimsby Charter, c.7

(17) Bateson I, p. 103 - Nottingham Charter (1155-65)

to obtain permission.⁽¹⁸⁾

The borough also offered the trader of this period something the King's court would no longer contemplate, they did not merely take distress from the contumacious debtor they would allow it to be sold.

"The borough rules of distress are especially interesting because they make perfectly clear the fact that distress was regarded as a means of satisfaction, not, like the extra-judicial distress of the common law, as a mere right of detention. The borough distress, whether extra-judicial as against a foreigner, or taken by leave of an officer of a court as against a burgess, resembled rather a seizure in execution than a distress for rent arrear. But it was not, like a seizure in execution, an immediate means of satisfaction. A year and a day had to elapse before sale and satisfaction could follow. The goods distrained did not.... become the property of the distrainer if not redeemed within a certain time. There must be sale under due formalities, and an opportunity for the distrained party to recover the surplus (if any) over the amount of his debt."⁽¹⁹⁾

(18) *Ib.* I, p. 113. "Burgesses may distrain out-dwellers both within and without their market, within and without their houses, within and without the borough, without the bailiff's leave, unless the out-dwellers are in the borough for the purpose of the county court, the King's army or castle ward." Newcastle-on-Tyne, c. 1, (1100-1135)

(19) Bateson II, p. xlvi.

The boroughs readily appreciated the difficulties which ensued from lax or wrongful behaviour of bailiffs; those who release pledges and mainpernours, who hold distrained goods, from their duties on payment of small sums of money, are dealt with.⁽²⁰⁾ In Northampton a custumal of about 1260 places a duty on a would be creditor to find out how the debtor left his last creditor on pain of fine, if he loans despite a warning by former creditor that the debt is still outstanding, he may have to pay that debt.⁽¹⁾ A further provision states that if bailiffs release attached goods on receipt of bribes then they shall pay the creditor his debt.⁽²⁾

Almost all custumals have special provisions for the trying of cases between merchants, there will be local variations, but the common factor is speed and the lack of technical procedure. This is heightened in the fair courts, where the merchant who seeks payment of a debt in the morning, may well have execution by the evening. The fair courts (or Courts of Pie Powder) had a summary jurisdiction which was not limited as to value of the claims; whilst the fair was on the court sat; its jurisdiction may or may not be limited to matters arising during the course of the fair. Where the borough has the right

(20) Ib. I, pp. 98-99 - Leicester (about 1277)

(1) Ib. p. 209 - Northampton II, c.17

(2) Ib.II, p. 27 - ib. c. 41, s.2

to hold a fair, the court may well give itself over entirely to merchants and their business whilst the fair continues.

It is not possible to generalise in respect of the customs of the boroughs and fairs, in many cases they are ahead of the common law, for they have dealt with the problem of the trader and his debts for a longer period, but their love of custom and privilege will in the long run tend to destroy this advantage; for as the common law grapples with the merchant and comes to accept a law merchant, the legislature is busily formulating a means by which he can enforce his debts, and the distinction it will seek to draw between the enforcement of the debts of the merchant trader and those of the ordinary man will last for the next seven centuries.

PART II

FROM BURNELL TO BANKRUPTCY

CHAPTER 6THE MERCHANT'S PLAINTThe Need For Reform

Between the writing of the Dialogue of the Exchequer⁽¹⁾ and 1283, the official view of the merchant trader had completely changed. Feudalism and its services had been met and largely overthrown by the new power of money and the merchant. The gradual extinction of the Jews left a vacancy in the position of suppliers of revenue to the Crown, a vacancy which foreign merchants very readily agreed to fill, but if they were to do so they needed some guarantee of safety, for the Anglo-Saxon-Norman now Englishman had already formed a distrust of foreigners.

As early as 1215⁽²⁾ we find provision to the effect that "All merchants shall have safe and secure exit from England, with the right to tarry there and to move about as well by land as by

(1) Bk. II, s. 13

(2) 17 John, c. 41 (c. 30 in 1225 issue)

water, ... quit from all evil tolls", in 1335 it is stated that all "Merchants, Strangers and Denizens" are to be allowed to freely buy and sell anywhere within the realm, and if they are denied justice in any "City, Borough, Town Port of the Sea, or other Place which hath Franchise" then they are to receive double the damage done to them and the franchise shall be forfeit to the King.⁽³⁾ In 1403-4 it is provided that merchant strangers are to be treated in England as denizens are treated in other countries, a fact which hardly needed the force of law to make it operable.⁽⁴⁾ These provisions however, only safeguard the persons of the merchants, for special privileges they must pay more dearly.⁽⁵⁾

Yet if the English merchant was a little slow to appear on quite the scale of his continental brother, his needs to be able to enforce his debts quickly were almost as great, neither had the time to spare to be able to hang around the king's courts, the sacred stealth of the common law was to them a grim reality.

Edward I had travelled to most of the major cities of the known

(3) 9 Edw. III, st. I, c.1. Confd. 25 Edw. III st. 3, c.2. Cf. 2 Ric. II, St.: c. 1; 11 Ric. II, c.7; 16 Ric. II, c.1.

(4) 5 Hen. IV, c.7 confirmed 4 Hen. V st. 2, c.5.

(5) The king receives 100 marks from the burgesses and merchants of Douai for the grant of certain liberties in 1260 - Charter Roll 45 Henry III, m. 4 No. 32 - cited Bland pp. 192-3. (Unfortunately the king had to allow this against £90 in which he was bound to the merchants).

world and was more aware of the growing power and force of trade than his father; he had been to Jerusalem and had seen the ways of the merchants of Italy, France and Spain.⁽⁶⁾ Both he and his Chancellor Robert Burnell had had time to watch foreign court procedure and to digest their methods of enforcing debt. Yet although some other countries already had superior methods for enforcing the payment of debts than those existing in England, it was not necessary to draw on them to create the statutes merchant. The recording of debts due to Jews had started in 1194⁽⁷⁾ and the practice of recording fines levied in the royal courts also commenced about this time.⁽⁸⁾ Land, although the very foundation of the feudal structure, could be attached to answer to the king's debt or to the surety of the king's debtor,⁽⁹⁾ and in 1275 the Jewish creditor had been allowed to take possession of one half of his debtor's land until such time as the rents and profits received should pay off the debt.⁽¹⁰⁾ Finally imprisonment for debt, always

(6) Between 1270 and 1274 Edward I visited Gascony, Spain, the African Coast, Trapani, Sicily, Cyprus, Acre Haifa, Apulia, Rome, Tuscanny, Lombardy and Paris. Dic. Nat. Bib. vol. pp. 438-440.

(7) See p. 103

(8) P. & M. I, p. 475. The tripartite indenture system was adopted a year later to record final concords used as a means of conveyance of land - Plucknett 'Concise' p. 580 cf. Hols. ii, p. 184, iii, 236-8. The system is similar to that used to have debts recorded on the court rolls, see p. 157

(9) See pp. 86-7

(10) 3 Edw. I. Statute of Jewry, S.R. 1, p. 221. see p. 112

possible in the case of the king's debtor, had in 1267 been permitted against the bailiff accountant where he did not have any land by which he might be attached to answer for arrears in his account.⁽¹¹⁾ The coming into being of legislation to control the accountant perhaps more than anything else, mirrors the changing scene from feudal services to money transactions.

All these elements can be found in the statutes merchant,⁽¹²⁾ and it fell to Robert Burnell, the English 'Tribonian', to fashion from them a debt enforcement system which it was hoped would defeat the delays, frauds, forgeries and the doubtful co-operation of the bailiffs, to ensure a speedy means by which the trader might obtain payment. One of the best illustrations of the state of affairs reached by 1283 can be found in the case of *Le Rey v. Redmere*.⁽¹³⁾ The case arose from a dispute between a Flemish and an English Merchant over partnership debts and came first before the county court at Lincoln in 1267, from thence it moved before a commission in 1274 to determine Anglo-Flemish debts. At this stage the defendant has the seal of a deed, which he claims is a release sealed by

(11) 52 Hen. III, c.23, see p. 138

(12) 11 Edw. I (1283 - Acton Burnell), 13 Edw. I, (1285 Statute Merchant)

(13) *Select Cases on the Law Merchant (S.S.)* ii, intro. xxxii-xxxiii, lx; and pp. 18-27.

the plaintiff, compared with the seal of the plaintiff on the partnership deed and the seals are held to be identical,⁽¹⁴⁾ therefore judgment for the defendant. In 1278 the plaintiff complains to the king, who 'pitying the poverty of the same merchant' orders one of his justices assisted by merchants to re-examine the case according to the law merchant. Here when the defendant asks for the seals to be examined as before he is told that such practice is contrary to the law merchant, "since in divers ways it was possible to contrive to obtain another person's seal, namely, either by loss of the seal or by means of forcible abstraction or by stealthy access in the night", the defendant, having no other evidence, is found guilty and ordered to pay the debt by instalments. From 1278-80 nothing is done and it is necessary to punish a sheriff either for gross negligence or collusion; in 1282 execution is still awaited, finally the debt is paid in 1283.

Whether this case was the indirect reason for the enactment of the Statute of Acton Burnell we do not know;⁽¹⁵⁾ but it must certainly have brought out into the light the fact that definite

(14) See P. & M. II, p. 224.

(15) See S.S. vol. 46, p. xxxiv.

action in the form of legislation was necessary, since it was painfully obvious from this case alone that the common law could not cope with the problem.

Acton Burnell

The preamble of Acton Burnell⁽¹⁶⁾ sets out some of the reasons for its being brought into force; merchants "have lent their goods to divers persons" and because there is no speedy way in which they can recover their debts at the time they should be paid, alien merchants have withdrawn from the country to the damage of both the merchant and the country. To remedy this, a creditor may bring his debtor before the Mayor and clerk of London, York and Bristol, or a mayor and clerk appointed by the king, and there enter into a recognizance which is to be written on a roll by the clerk, such recognizance is to show the acknowledgment of the debt, the date of payment and is then to be sealed with the debtor's seal and a seal provided by the king. If the debtor does not pay on the date agreed, the creditor may appear before the mayor and clerk, who will check that such a debt was acknowledged before them, and that the day for payment has expired. Once this is found to be so, the mayor may

(16) 11 Edw. I (1283) For examples of writs issued relating to the statute see Appx. pp. 708, 709.

cause the movables of the debtor and his devisable burgages⁽¹⁷⁾ to be sold. The valuation of the goods, etc. is to be made by honest men, if no buyer can be found then the mayor is to deliver goods, etc. to the value of the debt to the creditor. If the debtor does not have movables within the jurisdiction of the mayor, but has some elsewhere, then the mayor is to send the recognizance to the chancellor who is to direct a writ to the sheriff of the bailiwick where the debtors goods lie and the sheriff is to have the goods valued and sold. Valuers who set too high a price on the goods "for favour born to the debtor" may on request of the creditor be required to purchase the goods themselves at that price thus affording the creditor his debt. The debtor who thinks the goods valued at less then their worth has no remedy, he should have sold them earlier himself and paid his debt when due. A debtor with no movables, etc. at all is to be cast into prison.⁽¹⁸⁾

Although the statute allowed the attachment and imprisonment of the debtor without movables it seems to have been aimed more generally at the burgage tenement of the town trader, than at anything

(17) A customary power held by burgesses almost everywhere of being able to bequeath their burgage (borough) tenements 'like chattels' see P. & M. I, p. 645.

(18) If he cannot afford to feed himself the creditor is to provide bread and water, which costs the creditor may recover.

else, freehold land is still outside its grasp. If the thought was that the lack of having to go through the common law procedure in order to get debts paid would put an end to the evils of the time then it was wrong, for by 1285, it has become necessary to enact the Statute Merchant. (19)

The Statute Merchant

The preamble says that sheriffs have misinterpreted the king's statutes and by malice and false interpretation delayed the execution of the statute and because of this the king has caused the Statute of Acton Burnell to be rehearsed. This rehearsing of the statute of Acton Burnell is misleading since the declaration which follows alters quite radically the old procedure. The creditor is now to take his debtor before the Mayor of London or chief warden of some other city appointed by the king. Before them, or persons sworn in their stead, and a clerk appointed by the king, the debtor is to acknowledge the debt and day of payment; the recognizance is to be entered on two rolls one kept by the mayor or warden and the other by the clerk. The clerk is to write out the obligation and to this writing the seal of the debtor is to be put, together with the king's seal which is to be in two parts, the larger piece being kept by

(19) 13 Edward I, For an example of proceedings under the statute see Appx. pp. 710-11.

the mayor or warden and the smaller by the clerk. Immediately the day for payment is past, the creditor may produce the obligation to the mayor or warden and the clerk and if it is proved to be on the roll and overdue, then a revolutionary procedure commences.

The mayor or warden is to cause the body of the debtor to be taken, unless he be a member of the Church, and put him in the town prison. Where the debtor is not to be found, upon the recognizance being put before the chancellor, a writ is to issue to the sheriff in whose bailiwick the debtor is dwelling, to take and imprison him, and the debtor is to remain there at his own cost. During the first three months of his imprisonment, the debtor is to have his chattels delivered to him so that he may sell them in order to satisfy his debt. During this period he may sell his lands and tenements to the same end, and such sale "shall be good and effectual".⁽²⁰⁾ If at the end of three months the debtor has not satisfied the debt, then all his lands and goods are to be delivered to the creditor by extent⁽¹⁾ and he is to hold them until the whole of the debt has been paid off, in the meantime, the debtor is to remain in prison and the creditor is to provide him with bread and water. The estate which

(20) This was to prevent the plea that the sale of such lands, etc. was made under duress whilst in prison.

(1) This process was already used for valuing the estate of the king's debtor, see pp. 87-88

the creditor receives in the freehold property is maintainable by a writ of novel disseisin should he be dispossessed by another, and it creates what becomes known as 'tenancy by statute merchant'. Once the debt has been paid, the body of the debtor is released, and his lands are returned to him. So at last the old altar raised to the sanctity of a man's land is destroyed, and the common creditor takes possession. Where the Chancellor sends a writ to a sheriff, the sheriff is to make return of the writ to the 'Justices of the one Bench or of the other', any failures or difficulties over the return of the writ are to be dealt with as laid down in 13 Edw. I, c. 39,⁽²⁾ and on the day for the return of the writ, the creditor could appear before the justices and complain of the dilatory behaviour of the sheriff or bailiffs or that the valuation of the land had been too high, the debtor might not, however, complain of the extent being too low, nor could a purchaser of the land from

(2) See p. 164. As to the certifying to the Chancellor that the debtor has not satisfied his obligation, and requesting a writ to issue to the sheriff in whose bailiwick the debtor is thought to be. See Appx. p. 712.

the debtor.⁽³⁾ One important aspect of the statute was that the creditor was to have seisin of all the lands of which the debtor was possessed at the time of the making of the recognizance, a provision which created almost as big a difficulty as it sought to solve, since a feoffee could never be absolutely certain that a feoffor had not already entered into a statute merchant. Such sureties as may stand for the debtor are to be subject to the same process as the statute awards against the debtor. Death of the debtor or his sureties does not harm the creditor, although he may not take the body of the heir, and if the heir is under-age, then the lands revert to the heir until such time as he be of full age.

(3) See Y.B. 17 Edw. III (R.S.) (1343) pp. 478-80 where a person who purchased debtor's land pending suit on a statute merchant was not allowed to allege that the land had been delivered to the creditor at too low a valuation and have a re-extent. His attorney, on suggesting that the whole of the debt had already been levied and requesting a scire facias to account fared little better - "STONORE, you say that the recognissee has levied the money; we are apprised of the record that he has not held for so long a time that he could have levied it, and if he has improved the land, and levied more, what is that to you? And he has yet to have his costs and charges. -- The Attorney. Sir, all these matters will come by way of answer in the account. HILLARY. You are talking in vain.." All the talking was not completely in vain, however, for in 1348 there is given an explanation of the Statute Merchants so as to prevent lands of creditors being extended at an inferior value to the prejudice of the late possessor. - Rot. Parl. II, p. 210. No. 10. It does not seem to produce a great deal of effect and the practice continues. See e.g. Hawarde (J.) 'Les Reportes del Cases in Camera Stellata', p. 12 Askew v. Earl of Lincoln (1594).

Provision is made for the supplying of seals to fairs and the appointing of officers to take charge of them. Before the recognizance is enrolled it is to be read to the debtor so that he cannot say later that he did not know its provisions. The king is to receive a penny in the pound for recognizances entered into in the town and 'one penny halfpenny' in the fairs.⁽⁴⁾

The act is to apply to England and to Ireland,⁽⁵⁾ and although known as the Statute Merchant, it is not confined to use by merchants only, and may be used by all citizens except Jews who already have their own procedure.

In 1311 Edward II⁽⁶⁾ made an ordinance to the effect that "many Persons, other than known Merchants, do feel themselves much aggrieved and fined by the Statute of Merchants made at Acton Burnell", and therefore this procedure is only to take place between merchants; also twelve towns only are named in which such statutes are to be entered into.⁽⁷⁾

(4) For procedure at a fair pursuant to Statute Merchant, see S.C.L.M.(S.S. vol. 23) p. 19.

(5) See Cal. Close Rolls (1279-88) p. 367 - The statutes of Westminster I, Gloucester, Westminster II and Merchants are "to be carried to Ireland and there to be proclaimed and observed".

(6) 5 Edw. II, c. 33. Cf. Rot. Parl. i, 285.

(7) These recognizances became known as 'statutes' and the Statute of Acton Burnell and Statute Merchant were read in the alternative without regard to one in particular. E.g. in 1297 a sheriff is told to take and imprison the debtor "according to the form of the King's statute put forth at Acton Burnell and Westminster concerning recognizances of this sort..." Swarte v. Aumery S.C.L.M. (S.S.) iii, pp. 12-14, p. 12.

Quick to take advantage of the 'between merchant and merchant' clause was one John of Horsham, who, finding himself thrown into prison by reason of a statute into which he had entered and failed to observe, protests loudly that he is not a merchant, nor was the reco nizance in respect of merchandise. This the creditor states is not so, for this John is a 'notorious merchant'; therefore a jury is to be summoned to enquire into the truth, but on their arrival John decides not to proceed, and is therefore returned to the Marshal. ⁽⁸⁾

A similar attempt is made in the same year by another hopeful debtor who claims he is not a merchant, but a clerk in Holy Orders, and for that reason also should not be imprisoned, but he too is found to be a noted merchant, and joins John in Newgate. ⁽⁹⁾ His plea, however, is interesting since it was only under 13 Edward I, itself ⁽¹⁰⁾ that members of the clergy were expressly mentioned as not being subject to arrest after default on a statute, under the ⁽¹¹⁾ statute of Acton Burnell there is no such provision; the ordinance of 1311 ⁽¹²⁾ therefore gave the debtor the chance of pleading in the

(8) Conduit v. Horsham (1315) S.C.L.M. (S.S.) iii, pp. 33-36.

(9) Bolet v. Hansum (1315) S.C.L.M. (S.S.) iii, pp. 37-39.

(10) 1285

(11) 11 Edw. I (1283)

(12) 5 Edw. II, c. 33

alternative since his plea of not being a merchant is stiffened by that of being a clerk in Holy Orders.

In 1322 the ordinances of 1311 were revoked,⁽¹³⁾ but the instructions that the statute enacted at Acton Burnell should only be used by merchants was repeated in the same year,⁽¹⁴⁾ although no attention appears to have been paid to it.

By the Statute Merchant⁽¹⁵⁾ the taking of recognizances before 'the Chancellor, Justices of the one Bench and the other, the Barons of the Exchequer, and Justices Errants', may continue, but the execution process given under this statute may not be used. The keeper of the prison was responsible for the safe custody of the debtor or for the debt, similarly if the keeper of the prison refused to accept the debtor he was liable for the debt. Where the keeper did not have sufficient to pay the amount owed, then the person who entrusted the prison to him is to pay.⁽¹⁶⁾

In 1340 it is provided that the clerks who record the debts under the Statute Merchant are to be resident within their administrative

(13) 15 Edw. II (Revocation of the New Ordinances).

(14) Rot. Parl i, 457a.

(15) 13 Edw. I, (1285)

(16) Normally the person sued is the sheriff, e.g. see Y.B. 12, 13 Edw. III, (R.S.) pp. 130-132, 354. In *Servat v. Sheriffs of London* (1308) the sheriffs plead the king's writ to the effect that the debtor was a cleric. S.C.L.M. (S.S. iii, pp. 23-24) See Appx. pp. 713-5.

area and to have sufficient land in the county to answer for any damages they may be called upon to pay by virtue of misdemeanour in their office.⁽¹⁷⁾ An attempt to save time where a statute merchant had been certified into Chancery and the sheriff had made return to the writ into the Common Pleas where the statute was shown, was made in 1404. After this if the creditor discontinued his suit after the production of the statute to the court, then when he decided to recommence the action, the Justices of the Bench might, on the record already taken, award execution of the statute without having the statute brought before them again.⁽¹⁸⁾

With his debtor once in prison, the creditor could at least hope that the first three months would be sufficient to induce him to pay up, or at least realise sufficient of his possessions in order to do so. However, the fact that the creditor was to provide food, albeit only bread and water, must have helped at times to bring about a composition between debtor and creditor, especially where the debt was a small one, and the debtor possessed but little land.⁽¹⁹⁾

(17) 14 Edw. III, st. 1, c. 11

(18) 5 Hen. IV, c. 12.

(19) But "if the conusor in a statute merchant be in execution, and his land also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution and of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect." Co. Inst. I, 76a.

The Statutes At Work

The Statutes Merchant⁽²⁰⁾ gave no thought to the fact that a debtor might have been the unfortunate in his dealings, nor did it make any attempt to differentiate between the debtor who failed to meet his commitments through fraud and he would could not through inability. To expect such reasoning at this time when the law was just making provision for creditors might be a little premature, yet from this time the law comes to regard the debtor more and more as an evil to be dealt with harshly, though the ordinary debtor has still a little time left in which to flout the lack of procedure to force him to pay.

It has already been seen that the forging of deeds and seals was punished only by the court when it appeared during the proceedings,⁽¹⁾ and the advent of the making of a 'statute' provided plenty of scope for fraud and forgery.⁽²⁾ Even the king's seals do not escape the attention of the false creditor but such practice is held to be

(20) 13 Edw. I, and 11 Edw. I.

(1) See p. 162.

(2) In some cases the parties appear to have come to an amicable agreement after the forgery confessed, and in *Stiles v. Bavent* (1372), where a widow, after confessing to forged deeds, shows how the deeds and seals were forged and consents that in reparation her son should become a friar minor. - C.C.R. (1369-1374) pp. 421-2.

in sedition of the king. Between 1318-1320 Luke Gerard and his brother are tried for counterfeiting the king's seal and falsifying a statute.⁽³⁾ The brothers claim that they bought the statute⁽⁴⁾ from a person who is now dead. The statute is examined by the mayor and clerk before whom it is supposed to have been made and they state that the debtor named in the statute did not make it before them. The creditor named in the statute appears, and says that he claims nothing by the statute and it is no debt of his. Finally, a jury find the brothers guilty of falsifying the statute and counterfeiting the seal and they are returned to prison. John apparently dies in prison, but Luke, after seven years is pardoned on condition that he help the king in his fight against the Scots.⁽⁵⁾

Nothing in these enactments was really capable of fighting the various abuses which arose. A long tale of duress, force, imprisonment and seizure of acquittances so that the debt may be brought again ends in the plaintiff being in mercy for a false claim on the

(3) Chapleyn v. Gerard (1318) S.C.L.M. (S.S. iii, pp. xlv, 43-47.

(4) The practice of buying and selling statutes became quite usual. In 1594 we find a case before the Star Chamber in which one Askew brings an action against the Earl of Lincoln for maintenance, and for buying a statute merchant and prosecuting an extent thereon and "also when a jury was proceeding on the extent and execution thereof, being present and compelling the jury to appraise them again and below the value, ..." Hawarde, p. 12.

(5) S.C.L.M. (S.S. vol. 49) iii, p. 54-55.

findings of a rather dubious jury.⁽⁶⁾

Procedural difficulties and delays can make the proving of conspiracies and deceits almost impossible, even when a former clerk of the recognizances is found guilty of fraud, highly placed friends can obtain his forgiveness on making a fine to the king.⁽⁷⁾ In 1308 clever use was made of the provision for extending all the lands held by the debtor at the time of entering into a statute.⁽⁸⁾ The plaintiff alleges that a married woman stating herself to be single entered into a statute with her husband (who had no lands) and bound themselves to one X. The husband and wife then enfeoff the plaintiff's grandfather of a manor which was the inheritance of the wife. At this point X produces his statute and claims and receives execution on it, the manor passing into his hands until such time as the debt be levied according to the statute. Because of this the king, wishing to apply a remedy for such fraud, malice and deception thus done in elusion of the law and custom of the realm commands that

(6) Peter de Croppery v. Adam de Stratton (1290) S.C.L.M. (S.S.) iii, p. 95-96.

(7) Richard le Gras & ors. v. Baddlesmere & ors. (1310) Ib. pp. 26-27, 97-105, 176.

(8) Adderbury v. Limsey & or. (1308) Ib. pp. 21-2.

the Justices of the Bench enquire into the matter.

The king's seals, since they had to be attached to a statute, obviously need safe keeping, yet they manage to disappear quite often, loss is usual; ⁽⁹⁾ pirates took the greater part of a seal from Southampton, ⁽¹⁰⁾ whilst one clerk had rather unfortunately to admit that the lesser part of a seal had been 'taken craftily from him', ⁽¹¹⁾

Where the debtor has been imprisoned, delays in obtaining release are bound to occur by virtue of the slow-moving common law system. For although it provided a quick measure for putting the debtor away, there was no quick way in which the debtor might automatically secure his release. A certain Ralph Hardel spent from 9th July 1298 until 16th September, 1299 attempting to secure his release, even though he sought to produce acquittances. ⁽¹²⁾ Unfortunately, Ralph's creditors were abroad and their attorney could not identify their seals; whilst Ralph was unable to produce any mainpernours for the debt. On one of Ralph's creditors appearing

(9) Cal. Close Rolls (1341-3) p. 639 - 15 August 1342.

(10) Ib. (1337-9) p. 548 - 23 October 1338

(11) Ib. (1374-7) p. 207 - 1 March 1375.

(12) Calendar of early Mayor's Court Rolls of the City of London Edited by Thomas (A.H.) 1298-1307, pp. 26, 35, 43.

he denies that acquittances are his, the parties are therefore told to submit claim, which is in respect of a statute for £32, to arbitration; the result of this is that Ralph is to pay 5 marcs in settlement of the whole amount.

Elegit

The year 1285 brought reforms in almost every sphere of the law to the English feudal scene and the creditor did well out of it. He was aided by a writ of scire facias,⁽¹³⁾ given the Statute Merchant⁽¹⁴⁾ and granted 'Elegit',⁽¹⁵⁾ to compensate him in some part for the inadequacy of the common law procedure in execution. Under the provision granting elegit "When a debt had been recovered or acknowledged in the King's Court or damages awarded, it is from henceforth to be in the election of the person suing for such debt or damages to have a writ of fieri facias to the sheriff to levy the debt from the lands and chattels of the debtor; or, that the sheriff shall deliver to him all the chattels of the debtor (except for his oxen and plough-beasts) and one half of his land (according to a

(13) 13 Edw. I, c. 45

(14) 13 Edw. I,

(15) 13 Edw. I, c.18.

reasonable price or extent) until the debt be levied. And if the creditor be put out from the tenement let him recover by a writ of novel disseisin and after that by a writ of redisseisin if need be."⁽¹⁶⁾

By this means, the creditor could thus receive the debtor's chattels and one half of his land to hold until the debt was paid. A jury would be summoned to fix a reasonable price for the chattels and to make an extent of the land. The 'tenant by elegit' may safeguard his estate in the same manner as the 'tenant by statute merchant' by a writ of novel disseisin.⁽¹⁷⁾

The granting of land to the creditor by extent led to an interesting distinction between the means of recovery of the land by the debtor depending on whether the extent made under the Statute Merchant or by elegit. In 1303 a debtor, having defaulted on a

(16) For procedure under the writ of elegit see *Le Moyne v. Priorel* S.C.L.M. (S.S.) iii, p. 9. See Appx.pp. 716-7. Where the debtor had lands in several counties, the creditor might have a writ of elegit for the whole debt issued into each county - *Dyer* 162 b. pl. 51

(17) See pp. 179-80. The need for a writ of novel disseisin to be granted to a creditor is explained in 1317 by Bereford, C.J. who says that if the creditor "is ousted from this... he loses all that he has done, because he cannot have the scire facias, since the sheriff has answered that execution has been done." It is not until 1540 by 32 Hen. VIII, c.5 that the legislature alters this position. It is stated that lands have been taken from execution by creditors before full satisfaction has been rendered, therefore, to remedy this situation, the creditor is to have a writ of scire facias and may have a new execution against the debtor's lands. For Bereford's remarks see *Littleton v. Le Botiller* Y.B. 11 Edw. II (S.S.) p. 96 at p. 107.

recognizance entered into before the court and had execution given under a writ of elegit, brought a writ of scire facias calling upon the creditor to account. Upon account being taken, it was found that five years were still necessary to clear off the arrears, whereupon the debtor produced the arrears and asked for return of his land. The creditor's counsel protested that the land was given to the creditor to hold for the prescribed time, and received the following reply:

"Hengham: This statute was submitted to the consideration of the King and his Council, who agreed that whenever the debtor came prepared with the debt, the lands should be re-delivered to him; therefore will you take your money?

Tondeby: We pray our damages and our expences besides.

Hengham: You shall have nothing except the amount of the recognizance, &c."⁽¹⁸⁾

A debtor under a statute merchant, however, on bringing a writ of venire facias calling upon the creditor to account, showed that the greater part of the debt had been repaid and that he had made a money payment to the creditor for which he produced acquittance,

(18) Y.B. 30, 31 Edw. I (R.S.) p. 440. As yet a judge could still bend the law and introduce a little equity.

therefore since he was ready to render the remainder he sought recovery of his land and this was refused:

"Shardelowe. According to what law? The Statute" [13 Edw. I, here] "purports that the obligee shall hold the lands until he has levied his debt, costs and charges, so that he cannot be compelled to receive them in Court, when execution is made, and therefore you are labouring in vain; but it would be otherwise if the application were made up on an ordinary recognisance."⁽¹⁹⁾

Although there was no regular process by which the debtor, under the Statute Merchant, could query the extent of his lands, the debtor, on extent by elegit, could bring a scire facias claiming that the lands were extended at too low a rate, upon which a re-extent could be granted and the creditor given that which he "ought reasonably

(19) Y.B. 17 Edw. III (R.S.) pp. 582-4 (1343) - The difference in the wording is that the creditor is to hold the land: under elegit 'until the Debt be levied' whilst under Statute Merchant 'until such Time as the Debt is wholly levied'.

to have and no more."⁽²⁰⁾

The binding of the debtor's lands as at the time of entering into a statute meant that his creditor could override any other creditor by simple contract, and thus the creditor seeking *elegit*. In 1306 we find a certain William, who, being in debt to a merchant for £10, fearing that the merchant would claim his debt, bound himself to his father by statute for £1,000. William's fears were realised and the merchant brought an action for debt against William, whereupon William's father sued according to the form of the statute and received all William's lands leaving the merchant to go without his debt.⁽¹⁾

Some of the attempts to defeat the creditor show a great deal of imagination. One R.A.D. enters into a recognizance for £20 before the Barons of the Exchequer with a Geoffrey of Littleton. After the

(20) Y.B. 15 Edw. III (R.S.) pp. 242-6. As to a dispute over whether the plaintiff should have brought a writ of *venire facias* or *scire facias* see *ibid.* p. 246. Where the creditor caused the jury to find that the debtor has more land than he has in fact got, by which finding the creditor has execution of the entire of the debtor's land, the debtor's position is poor. Apparently there was "no remedy to disannul the execution by the Common Law" as the creditor had the "land by record, viz. by the verdict of the Jurie." Some form of aid might, however, be forthcoming in the Court of Star Chamber. Crompton (R.) 'The Jurisdiction of divers Courts' p. 19 (1641) But see Hudson (W) 'A Treatise of the Court of Star Chamber' pp. 111-2, where Hudson cites Crompton on this point, but says that he can find no evidence of this offence being punishable in the Star Chamber. The Star Chamber was certainly prepared to consider the question of false findings by jury in an extent under the Statute Merchant - see *Askew v. Earl of Lincoln* (1594) Hawarde, p. 12

(1) Y.B. 33, 35 Edw. I (R.S.) p. 154 (1306)

making of the debt, but before the day of payment, R.a.D. alienates his lands to William but on the express condition that William satisfy Geoffrey for the debt. The debt is not paid by the day stated in the recognizance and Geoffrey sues out elegit against William and eventually obtains seisin of half the lands. No sooner is he in seisin, however, than a certain Robert comes and ejects him and shows that in between the time of his being granted elegit and the sheriff putting him in possession of half the lands, Robert brought a writ of entry against William in respect of these lands, and recovered by default. Geoffrey now brings an assize of novel disseisin and states there has been some collusion which very soon emerges, in that it appears that William and Robert are brothers and that William's default to the writ of entry no accident. Therefore Geoffrey recovers possession of what is his and the others are in mercy but Geoffrey forgives them.⁽²⁾

(2) Y.B. 11 Edw. II (S.S.) pp. 96-110. With regard to the collusive recovery Mutford, J. said: "The recovery, in so far as one brother brought his Writ against the other, seems to have been rather by collusion than in good faith, and ... by such collusion one can defeat all the recognizances in England." *Ib.* p. 106. Had the court denied the plaintiff the right to novel disseisin he would have had no remedy - *ib.* p. 107 per Bereford, C.J.

Merchant Justice

After 1285 the procedure regarding the creditor and his means for enrolling his debts settled down, the rolls of the courts are still used to record debts entered into before them, and the more strict procedure of the Statute Merchant is available for those who wish to bind themselves by it. There is, however, a growing habit for merchants to congregate together and to produce rules and privileges which do not immediately effect the ordinary person. (3)

In 1303, in a document which was to become known as the Carta Mercatoria, (4) Edward I sent greeting to:

"Archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers and all his bailiffs and faithful, ... Touching the good estate of all merchants of the under-written realms, lands and provinces, to wit, Almain, France, Spain, Portugal, Navarre, Lombardy, Tuscany, Provence, Catalonia, our duchy of Aquitaine, Toulouse, Quercy, Flanders, Brabant,

(3) This tendency can often be helped by friendly encouragement from the king. Edward III in 1334, having taken Berwick, offered various privileges to English Merchants and others who would colonise it. - Dic. Nat. Bib. vol. 6, p. 471.

(4) Charter Roll, 2 Edw. III, m. 11, No. 39 - this charter does not appear among the enrolments of Edward I. A copy of it also appears in Munimenta Gildhallae (R.S.) II, i, pp. 206-7.

"and all other foreing lands and places, by whatsoever name they be known."

After this there follows numerous provisions designed to bring 'tranquility and security' to the minds and bodies of foreign merchants. Among them is to be found a provision that if a foreign merchant enter into a contract 'with any persons soever' in respect of any sort of merchandise, it shall be good, and once God's penny has been exchanged between merchants neither shall withdraw.⁽⁵⁾ Ministers and bailiffs of fairs, cities, boroughs and market-towns are to do speedy justice to such merchants

(5) By this, Edward I clarified the position of 'Earnest money' or 'God's Penny'. The giving of an article or a coin of low value to mark a bargain is very old. At the time of Isaiah we find "that when an Israelite borrowed money, he did not write a chit, but gave a garment in pledge. This garment had no security value and was probably used as a symbol of indebtedness by the illiterate." Heaton (E.W.) 'Everyday Life in Old Testament Times', p. 179 (1961). In Roman Law where the buyer withdraws from bargain after earnest has been given he loses that amount, if the seller withdraws he must repay double the earnest, although nothing expressly agreed in respect of the earnest. (J.3. 23 pr.; G. 3. 139.) - If the earnest was not part of the price, it was returned on completion of the bargain. (D. 19.1.11.6.; D. 18.3.8). A ring must thus be given for earnest. (D. 18. 1. 35 pr.; D. 14.3.5.15.). For the use of earnest in Continental Laws, see refs. in P. & M. II, 208, fn. 4 and Brissaud, pp. 592-5. Glanvill (X.14) mentions earnest but not the amount to be forfeited. Bracton states the Roman Law rule, (ff. 61 b. - 62); and this is followed by Fleta who also says that in bargains between merchants, where the seller withdraws he must pay five shillings for every farthing of earnest. (Bk. II, c. 58, pp. 195-6). The Roman Law rule also appears in the Regiam Majestatem (Bk. 3, c.10) but see Craig (Sir T.) 'Jus Feudale' (trans. Ld. Clyde 1934) I, p. 438, who denies that rule of repaying double the earnest was ever a part of Scottish law. The use of earnest to preserve a formal contract is found in 29 Car. II, c.3, s.17. (1677-Statute of Frauds. See further 2 Bl.Comm. 447; 56-7 Vic.c.71, s.4 (1893-Sale of Goods Act); and judgment of Fry, L.J. in *Howe v. Smith* (1884) 27 C.H.D. 89, 102, contra P. & M. II, p. 208, fn. 2. There are many examples of the use of earnest in the 13th and 14th centuries in S.S. vols. 2 and 23.

coming before them from day to day "without delay according to the Law Merchant touching all and singular plaints which can be determined by the same law; failure to do so shall result in punishment.* In pleas between foreign merchants and others, where an inquest is summoned, half of the inquest is to be of the nationality of the merchants and the other half from the place where the plea is brought.⁽⁶⁾ In London a justice for the aforesaid merchants is to be assigned, he must be a "loyal and discreet man resident there, and before him the merchants" may specially plead and speedily recover their debts, if the sheriffs and mayors do not full and speedy justice for them from day to day, and that a commission be made thereon granted out of the present charter to the merchants aforesaid, to wit, of the things which shall be tried between merchants and merchants according to the Law Merchant".⁽⁷⁾

The Statute Staple

Although we have mention of the staples or centres for the

(6) This was already the usual method in many fair courts and a jury of half Christians and half Jews for cases involving debts between the two had been provided for in 1275 - 3 Edw. I (Statute of Jewry).

(7) Mun. Gild (R.S.) II, i, pp. 206-7.

depositing of goods to enable tolls to be collected⁽⁸⁾ prior to 1353 they are not important.⁽⁹⁾ By the Statute Staple⁽¹⁰⁾ merchant strangers are put under the king's protection and speedy justice is to be done to them,⁽¹¹⁾ matters touching the staple are not to be in the cognisance of the king's justices,⁽¹²⁾ jurisdiction over contracts and trespasses within the staple shall be in the hands of the mayor and justices of the staple. The plaintiff is to have the option of suing at common law in cases of contract and covenant between merchant and merchant or others, where one party is a merchant or minister of the staple whether the contract or covenant is made within the staple or not; if the action is between stranger and denizen, then any inquest called is to be half strangers and half denizens, otherwise all strangers or all denizens.⁽¹³⁾

(8) See Cunningham i, pp. 311-317; Brodnurst (B.L.S.) 'The Merchants of the Staple'. For a general history of the Staple and the ordinances concerning it see 'The Ordinance Book of the Merchants of the Staple' edited for the Staple Company by E. E. Rich (1937)

(9) Pat. Roll. 6 Edw. II, p. 591 (1313); Pat. Roll. 19 Edw. II (text in Pat. Roll. 1 Edw. III, pp. 98-9 in which it states that 'merchant strangers shall be governed by the law merchant touching all transactions at the staple') In 1328 (2 Edw. III, c.9) it is stated that all staples shall cease and merchants be allowed to trade freely, but this was not maintained. - See Cunningham I, p. 312.

(10) 27 Edw. III, St. 2

(11) Ib. c.2

(12) Ib. c.5

(13) Ib. c.8 see further 36 Edw. III, St. 1, c. 7 re merchant aliens may appear before the Mayor or at Common Law.

A similar method of recording debts as that laid down by the Statute of Merchants was introduced for contracts made within the staple, and recognizances of debts might be entered into before the mayor and constables of the staple, which are to be sealed by a seal kept by the mayor; there is no provision for the attaching of the seal of the debtor.⁽¹⁴⁾ Immediately the debtor fails to pay the debt by the stated time he is to be seized and imprisoned until satisfaction is made to the creditor. The debtor's goods within the staple are to be taken and either handed over to the creditor by valuation or they may be sold and the money handed over to the creditor, the three months' grace under the statute merchant is done away with in this case.⁽¹⁵⁾

Where the debtor is not in the staple, or his goods are not sufficient to satisfy the debt, the mayor may certify the same into the chancery and a writ shall issue for seizure of the body of the debtor (without allowing bail) and also for the seizure of all his lands and goods, a return to the writ is to be made into

(14) 27 Edw. III, St. 2, c.9

(15) This is not quite as harsh at the time as it may seem, for we shall see that it was enacted two years previous that the debtor might be arrested on mesne process - 25 Edw. III, St. 5, c.17(1351-2). See p. 206.

chancery⁽¹⁶⁾ together with a certificate as to the value of the lands and goods. The creditor holds the debtor's estate in freehold until the debt is levied and he is protected by the writ of novel disseisin.⁽¹⁷⁾ "And in case that any Creditor will not have Letters of the said Seal, but will stand to the Faith of the Debtor, if after the Term incurred he demand the Debt, the Debtor shall be believed upon his Faith."⁽¹⁸⁾

The merchant stranger is at last granted the right of not being seized for the debt of another unless he is principal debtor, surety, or has stood pledge for another,⁽¹⁹⁾ but the 'Law of Marque' and Reprisal is reserved if Englishmen are ill-treated in 'strange lands'.⁽²⁰⁾ A mayor and two constables are to be chosen for every

(16) Under the statute merchant return to such writ was to be made into the King's Bench or Common Pleas - F.N.B. 131.

(17) See pp.179 -180, 191

(18) Practically the last occasion for a very long time when the 'faith' of the debtor received any consideration in law.

(19) 27 Edw. III, st.2, c.17. This land had been enforced by statute in the case of Englishmen since 1275 - 3 Edw. I, c. 23, but it had been incorporated in the privileges of various boroughs from a much earlier time. "The Charters to Dunwich, Marlborough, Newcastle-on-Tyne, and Winchester, contain a clause exempting the burgesses of these towns from being attached for the debt of another, unless they were pledges or the principal debtors."- Ballard (A.) 'English Boroughs in the Reign of John' 14 E.H.R. p. 95. (1899)

(20) In 1315 the King's Writ is issued to the bailiffs of the Abbot of Ramsey of the fair of St. Ives, instructing reprisals to be taken against the goods and wares of the men and merchants of the power and lordship of the Count of Flanders, excepting the goods and wares of the burgesses and merchants of Ypres, to the value of £200. This is because the Count of Flanders has not rendered satisfaction for the seizing of the goods of Alice, Countess Marshal in Flanders, to the value of £2,000. Similar instructions are sent to the bailiffs of other towns that they distrain for certain amounts. The bailiffs of Ramsey reply that there are no goods or chattels of the power and lordship of the Court of Flanders to be found in St. Ives. S.C.L.M.(S.S.) i,p.93. For a later example of Letters of Marque and Reprisals see C.P.R.(1446-1452)pp.104-5, see Appendix 21 See also Appendix 11, Maritime Trade, p. 104.

staple town, and any complaints against them are to be quickly seen to by the Chancellor and other members of the King's Council.⁽¹⁾ Two merchants alien, one from the north and one from the south, are to sit with the mayor and constables where case concerns foreign merchants, any disputes arising are to be sent before the Chancellor and some members of the Council.⁽²⁾

Any doubts as to the power of the mayor to take recognizances from other than merchants was removed in 1362, when it was enacted that the 'Mayor of the Staple have Power to take Recognisances of Debts of every Person, be he Merchant or other, in the same Manner as is contained in the said Statute of the Staple',⁽³⁾ and in 1391 a penalty of half the amount of the recognizance entered into was payable by the mayor if he received recognizances contrary to the form of the statute staple.⁽⁴⁾

Separating the Merchant Class

The superiority of the statute staple procedure over the statute

(1) 27 Edw. III, St. 2, c. 21 and see 36 Edw. III, st.1, c.7 (1362)
For Election of Mayor and Constables see Appx. p.722

(2) Ib. c. 24.

(3) 36 Edw. III, St. 1, c.7

(4) 15 Ric. II, c.9

merchant can be easily seen from the creditor's point of view. It enabled the debtor to be seized immediately the day for payment of the debt was passed and his goods and lands became available at the same moment,⁽⁵⁾ which no doubt accounts for a great deal of its popularity among persons of all sorts. It is therefore somewhat surprising to find in 1532 mayors of the staples should only take recognizances between merchants of the staples concerning merchandise, as set out in the Statute Staple, and because of their doing otherwise 'divers great and sundry Inconveniencies Damages and Deceits do daily arise and grow'.⁽⁶⁾ To remedy this, recognizances may now be entered into before the Chief Justice of the King's Bench or the Chief Justice of the Common Pleas or in their absence before the Mayor of the Staple of Westminster and the Recorder of the City of London together.⁽⁷⁾ The obligations are to be sealed with the seals of the person(s) acknowledging the obligation, together with a seal provided by the king, and the seal of one of the justices or the seals of the mayor and recorder;⁽⁸⁾

(5) F.N.B. 131 (margin)

(6) 23 Hen. VIII, c. 6, s.1.

(7) Ib.

(8) 23 Hen. VIII, c. 6, s. 1

a writer is to be appointed to make out the recognizance, entry of which is to be made on two rolls, one roll being in the possession of the justices, etc., the other with the clerk.⁽⁹⁾

Upon the request of the creditor the clerk is to make a certificate into Chancery that such an obligation has been entered into. Process and execution, etc., upon the recognizance is to be the same in all respects as the law relating to recognizances by Statute Staple.

"And that every such Person and Persons that shall be bounden, or otherwise grieved by virtue of any Obligation to be made by Authority of this Act, shall have their like Remedy by Audita Querela,⁽¹⁰⁾ and all other Remedies in the Law, that they might have had in case they had been bounden by Obligation of the Statute of the Staple."⁽¹¹⁾

Recognizances of Statute Staple are no longer to be entered into except between merchants of the same staple and in respect of merchandise,⁽¹²⁾ recognizances entered into prior to this act are declared to be valid.⁽¹³⁾ The provision for the use of three seals

(9) 23 Hen. VIII, c. 6, s. 2

(10) For Audita Querela see p. 225

(11) 23 Hen. VIII, c. 6, s. 3

(12) Ib. s. 5

(13) Ib. s. 6

and the need to keep the rolls to enable certification of the recognizance into Chancery to some extent improved on the procedure given under the Statute staple.⁽¹⁴⁾ "Its effect was the same as that of a statute staple. Since these 'statutes' were charges upon land, prudent purchasers had to search the rolls, and it must have been a convenience to have all the rolls in London instead of scattered in various towns. In 1585 it was enacted⁽¹⁵⁾ that these recognisances should be void against purchasers unless registered within six months."⁽¹⁶⁾ Not until 1721, however, was any further attempt made to ensure the security and safety of the rolls recording the obligations.⁽¹⁷⁾

(14) See S.C.L.M. (S.S. vol. 49)iii. pp. xxviii-xxix

(15) 27 Eliz. I, c. 4, ss. 5 and 6.

(16) Plucknett 'Legislation of Edward I', p. 143, fn. 1, at p. 144.

(17) 8 Geo. I, c. 25, ss. 1-3.

CHAPTER 7BINDING CONTUMACYThe Extension of ImprisonmentThe Growth of Capias

The imprisonment of the debtor by statutory recognizance when he failed to pay up can perhaps be best defended on the grounds that at least he knew what he was doing, and had agreed to the possible penalty of incarceration if he did not carry out his part of the bargain. A possible plea might also be entered that an accountant, since he was dealing with other people's money, ought to be extremely careful and that imprisonment of one who defaulted might induce care in others.⁽¹⁾ In 1352 the process of attaching the body of the defendant granted in the case of accountants was extended, and it was enacted that 'such Process shall be made in a Writ of Debt, and Detinue of Chattels, and taking of Beasts by Writ of Capias, and by Process of Exigend (by) the Sheriff's Return, as is used in a Writ of Accompt'.⁽²⁾

(1) This principle remained throughout the entire period during which the debtor might be imprisoned for debt.

(2) 25 Edw. III, st. 5, c. 17, see p. 212

By this means the law struck at the debtor who, until this time, had wilfully refused to attend the court of his creditor, yet it did not allow the debtor to be imprisoned on execution after judgment, nor in fact did the legislature ever get round to providing for this; but the common law, perhaps in some measure wishing to atone for its own dilatoriness in dealing with the contumacious defendant, developed within fifteen years of the statute, the principle that if a person could be imprisoned on mesne process, then he could also be imprisoned as a means of execution.⁽³⁾ The creditor therefore received two new weapons into his armoury, a writ of *capias ad respondendum* commanding the sheriff to take and imprison the debtor in order that he might produce him before the court on the day set down, plus a writ of *capias ad satisfaciendum* to the sheriff to take the body of the debtor upon execution, and keep it safely until such time as he satisfy the creditor of his debt.

The *capias ad satisfaciendum* became the highest form of execution granted by the common law, so that once the creditor decided to

(3) Y.B. 40 Edw. III pasch. pl. 25. This case actually concerns detinue of a bag of charters which was treated as detinue of a chattel for which 25 Edw. III, st. 5, c. 17 gave the same process as in debt. Cf. Y.B. 49 Edw. III. Hil. pl. 5 & 3 Co. Rep. 12 a., and 3 Salk. 286 (91 E.R. 828)

adopt that form of judgment, no other form was open to him.⁽⁴⁾

But a *capias* might be issued after a *fieri facias* where the sheriff returned that the debtor had no goods,⁽⁵⁾ or where goods taken were found insufficient to pay the debt,⁽⁶⁾ or if the sheriff returned that under an *elegit* the debtor had no lands or goods,⁽⁷⁾ or no lands, and goods found to be insufficient for the debt.⁽⁸⁾ If upon *elegit* some land existed, then once taken in execution, the creditor may not have a *capias*, since he should eventually receive his debt from the land.⁽⁹⁾ Until 1623 if the debtor should be so ill-bred as to die in prison without having managed to satisfy his creditor, the creditor lost all hopes of recovery of his debt, for the common law did not allow him to proceed in some alternative form of execution; in that year was passed 'An Act for the Relief of Creditors against such Persons as die in Execution' part of the preamble of which makes interesting reading:

"....forasmuch as daily Experience doth manifest, that divers Persons of Sufficiency in Real and Personal Estate, minding to

- (4) Hob. 59; Bl. Comm. III, 415. In 1343 where the defendant on a debt by obligation, denied the obligation and was imprisoned for such denial on the jury finding for the plaintiff, it was held that he should not remain in prison after execution had been sued by *Elegit* or *Fieri facias* but was to make a fine with the King. (See also 22 Ass. 43.) Y.B. 17, 18 Edw. III R.S. pp. 242-4
- (5) Y.B. 45 Edw. III. 19; Hob. 58
- (6) 1 Roll Abr. 904; Cro. Eliz. 344
- (7) Hob. 58
- (8) Hob. 58
- (9) 50 Edw. III 4 (Y.B.); Cro. Jac. 338, 9, for this purpose an acre of land would be sufficient. Bac. Abr. Execution D.

deceive others of their just Debts for which they stood charged in Execution, have obstinately and wilfully chosen rather to live and die in Prison than to make any Satisfaction according to their abilities". (10)

Thus to prevent such deceit it is enacted that the creditor whose debtor dies in prison shall have execution against the lands, goods and chattels in such manner as he might have done if he had not decided to have the debtor's body taken in execution. (11) The creditor may not have execution of any 'lands, Tenements or Hereditaments' of the debtor which he might have sold since judgment, where such selling was bona fide in order to pay creditors and the money received either paid or secured to be paid to his creditors upon their agreement and consent. (12) It will be seen that the lengths to which debtors were prepared to go in order to avoid paying their creditors made the user of *capias ad satisfaciendum* not so much a favoured

(10) 21 Jac. I, c. 24

(11) " " s. 2. Fitzherbert says that if a party dies in execution, then the party plaintiff should sue a writ of *certiorari* to remove the record into the King's Bench so that the justices may give a remedy according to law; and he thinks that an *Elegit* or *Scire facias* should be given, 'for it seemeth not reasonable, that the death of him that dieth in prison should be a satisfaction to the party'; but agrees this is in doubt. F.N.B. 246 B.

(12) 21 Jac. I, c. 24, s.3

weapon, but the creditor's only weapon in order to force the debtor to pay.

Imprisonment of the debtor although generally stemming from the year 1352, a date which might well be ringed in black in any debtor's calendar, yet some boroughs had already allowed the attaching of the body of the debtor on mesne process or even after judgment if he had no goods within the borough;⁽¹³⁾ also it was not unknown for powerful creditors or lords to indulge in a little imprisoning on their own account.⁽¹⁴⁾ In 1322 the men of Leicester complain bitterly that whereas they had never had to attend the portmanmoot for four days at Christmas, yet that Thomas (late Earl of Lancaster) through his minions by means of "extortions and distrainments.... used to compel those who owed to others any debt, upon plaint made against them, to pay their debts within the aforesaid four days, or to imprison their bodies until they should have paid."⁽¹⁵⁾

(13) Bateson, I, p. 102 - Yarmouth 1, s. 1 - "It is provided that if any resist gage and pledge, and will not be attached, his body shall be taken and brought to the prison till he shall do what justice requires." See also *ibid* Torksey 1, c. 30, where if the defendant had nothing whereby he might be attached, the hue and cry should be raised, and the defendant taken and "put in the stocks as not patient of the law."

(14) E.g. plea of Pier of Tadcastre against the Bishop of Bath, *Sel. Cas. K.C.* (S.S. vol. 35) pp. 10-11, who states he has suffered eighteen months imprisonment for arrears owed by his brother.

(15) Bland, p. 131 (citing *Inquisitions Miscellaneous*, 87, No. 46)

True these were troubled times, but at least some debtors had a foretaste of what was in store for them; once *capias* and civil outlawry had been extended to debt, *detinue* and *replevin*, the way was open for further expansion.⁽¹⁶⁾

The growth of trade has brought money to power and the debtor must go to prison if he cannot provide it. This rude awakening from the placid calm of the twelfth and thirteenth centuries to the gradual horrors of the imprisoned debtor seem strange in the realms of reform, yet "if we are to have from comparative jurisprudence any grand inductive law as to the legal treatment of debtors, it cannot possibly be that simple kind which would see everywhere a gradually diminishing severity".⁽¹⁷⁾ For the next five hundred years, the debtor, be he contumacious or attentive but impecunious, fraudulent or unfortunate will find little charity from his Christian creditor.

(16) 19 Hen. VII, c. 9 extended *capias* to actions of the case; and 23 Hen. VIII, c. 14 also allowed it in cases of unlawful or forcible entry, covenant and annuity, thus Blackstone is led to say that by virtue of statutory extension 'a *capias* might be had upon almost every species of complaint'. Bl. Comm. III, 282. See Hastings (M.), p. 170 regarding granting of *capias* by the common law in actions on the case prior to granting by statute.

(17) P. & M. II, 597, fn. 1

Outlawry

If to a grant of a writ of *capias* the sheriff returned that the debtor cannot be found and a similar return made to the writs of *alias* and *pluries* the plaintiff could proceed under 25 Edw. III, st. 5, c. 17⁽¹⁸⁾ to have his defendant outlawed.⁽¹⁹⁾ A writ of *exigent* (or *exigi facias*) issues to the sheriff that he is to have the debtor proclaimed or exacted in the county court on five successive occasions⁽²⁰⁾ during which if the debtor appeared he was to be taken as he would have been on the *capias*, on failure to appear by the fifth proclamation he is to be outlawed by the coroners of the county.⁽¹⁾

"But the ceremonies are still incomplete: the next step is to issue a writ of *capias utlagatum*, commanding the sheriff to arrest the defendant as an outlaw, and also to inquire by a jury as to his goods and lands, to extend and appraise the same, to take them into the King's hands, and to answer to the King for the value and issues thereof. If the defendant, after issuing this writ, still fails to appear, the sheriff accordingly proceeds (unless an arrest happens to be effected) by summoning

(18) 1351-2

(19) For the issuing of a writ of *capias* or *testatum* (where the defendant is supposed to be in another bailiwick from that in which the original writ issued) and the fictions introduced see Bl. Comm. III, 282-4.

(20) As to this number of exactions see Brac. f. 125 b. and P. & M. II, 581, n. 2

(1) For London the procedure differed slightly, see Liber Albus (R.S.), p. 190.

a jury to inquire of his property, real and personal, and to appraise the same, witnesses being summoned before the jury for this purpose. The inquest being taken, the sheriff seizes the property and returns the *capias utlagatum* with the inquisition so found thereon. The property is thus in the King's hands; a punishment inflicted by law on the defendant for his contempt in avoiding process...."⁽²⁾

Outlawry in the early law meant almost certain death to the person against whom it was proclaimed, no man could afford to be the friend of such a person and he might be killed wherever he was found.⁽³⁾ With the growth of the use of *capias* and outlawry in trespass *vi et armis* and its extension to account the severity of the old law fell away to a greater extent,⁽⁴⁾ leaving a less harsh form of outlawry involving only a forfeiture of goods and chattels.⁽⁵⁾

The adoption of a system once reserved for treason and felonies

- (2) Parlt. Papers (1829) [Comd. 46] p. 91 [Reports of Commissions on Courts of Justice 1825 - 1830] ii.
- (3) He 'was turned over to the tender mercies of that disproportionate part of the population who, strangers to pity, knew no shrinking at the sight of blood'. Bigelow, p. 349.
- (4) In cases of felony the outlaw could probably be put to death by anyone until 1329 - Hols. III, 605. But "when outlawry has been reduced from the level of punishment or warfare to that of a mere 'process' against the contumacious, another movement begins, for this 'process' is slowly extended from the bad crimes to the minor offences, and in England it even becomes part of the machinery of purely civil actions."- P. & M. II, 450, n.2
- (5) Brac. f. 441 a. cf. Bl. Comm. 284. For the need for the creditor to sue into the Court of Exchequer requesting the sale of the goods forfeited to the King through outlawry - see Parlt. Papers (1829) ii, pp.91-2 [Comd. 46]

led to many abuses of procedure both by creditors and debtors. Prior to the arrival of arrest and imprisonment for debt it had been enacted that no charter of pardon was to be granted to an outlaw where damages had been recovered against him, until the Chancellor had received certificate to the effect that the plaintiff had received his damages.⁽⁶⁾ A defendant outlawed by process before his appearance was not to receive a charter of pardon unless he gave himself up before the justices of the place where the writ of exigent had issued and a certificate to such effect is to be made to the Chancellor. The justices are to warn the plaintiff to appear before them on a certain day when, if the warning being duly witnessed to, the plaintiff will be allowed to proceed on the original writ as though no outlawry had been pronounced, if the plaintiff fails to appear then 'he that is outlawed shall be delivered by virtue of his Charter'.⁽⁷⁾

In the same year it is stated that people avoid outlawries pronounced against them by virtue of the fact that sheriffs and others have untruly testified that they were in prison at the time

(6) 5 Edw. III, c. 12 (1331)

(7) ib.

of such outlawry;⁽⁸⁾ in future persons claiming they were in prison in order to defeat such outlawry they are to deliver themselves to prison and the justices of the King's Bench are to warn the person at whose suit outlawry pronounced to come before them and be heard on a certain day if it is contended that the defendant's statement is untrue.⁽⁹⁾

The wrongful seizure of lands, goods or chattels by sheriffs or other ministers of the King caused by persons having the same surnames or just general confusion in identities was the subject of legislation in 1363 and a writ (Indemnitatem Nominis) was granted to enable the person concerned to recover his property.⁽¹⁰⁾ Confusion as to whether or not a person had been outlawed arose largely from the peculiarities attending the common law rules concerning venue, which left the plaintiff to choose where he brought his action,⁽¹¹⁾

(8) This is not the last time sheriffs will be guilty of this. See p.323-331

(9) 5 Edw. III, c. 13 (1331) - In 1344 there is a declaration as to cases where exigent should lie, but it must be declaratory that exigent will lie in the cases it mentions, and not taken as meaning that exigent will not lie in cases other than those mentioned since this would remove the process of exigent from a number of felonies (18 Edw. III, st.I). In the same year the process of exigent is removed from all cases of trespass where it is not against the peace. (18 Edw. III, st. II, c.2).

(10) 37 Edw. III, c. 2

(11) See Reeves II, 409-412.

Statutory amendment was provided in 1382 when it was laid down that in actions of debt and account the original writ must issue in the county where the contract was made or the cause of action arose, otherwise the writ abated.⁽¹²⁾ Difficulties arose immediately in that a debtor might well not reside in the county where the debt arose, or might easily have moved elsewhere, so that the process to have him declared an outlaw could continue without his having any knowledge of it whatsoever. In the reign of Henry IV it was prayed that no man be outlawed without his name and that of his town and county appear on the writ;⁽¹³⁾ but it took until 1413 before it became necessary for the original writ to contain details of the defendant's estate or degree, or trade and his place of abode and county in all cases where exigent was possible.⁽¹⁴⁾ By this means it was hoped that the proclamations necessary for outlawry would be made in the right county, but in fact people continued to be outlawed without any idea that it was going on.⁽¹⁵⁾

(12) 6 Ric. II, st. 1, c.2

(13) Cott. Abr. p. 422, s. 82 (Reeves II, 519). The possibilities of persons being outlawed had been realised as early as 1347 when the commons prayed that a man should not lose his chattels until found by verdict whether he had fled or not, since he might have been indicted in a foreign county and have no knowledge of action. Rot.Parl.II, 169a, no. 35

(14) 1 Hen. V, c. 5. See further Hale P.C. II, 202-3

(15) In 1456 at the Staple Court at Exeter two plaintiffs brought an action on a statute staple and the defendant claimed that one of the plaintiffs had been outlawed, whereupon the sheriff, under a writ of *capias utlagatum* arrests the one plaintiff. The defendant failed, however, in his plea that he need not answer the remaining plaintiff and is put in prison. S.C.L.M. III, 72 citing Records of City of Leicester - misc. rolls. No. 46.

The obtaining of a reversal of the outlawry, however, was not difficult, for a variety of pleas existed to achieve this purpose.⁽¹⁶⁾ By the fifteenth century of these many ways in which a person could clear himself, the best was to secure a pardon which could be obtained automatically if the defendant surrendered himself to the Warden of the Fleet (where the writ issued from the Common Pleas)⁽¹⁷⁾ Yet even if the debtor could escape the bothers of outlawry by bringing a writ of error or obtaining a pardon, there was still need to safeguard him from the malicious creditor whose sole aim was to have the debtor outlawed without giving him the chance to appear before the court. The process of exigent was reviewed in 1512 when it was enacted that whilst the first steps to having the debtor outlawed were still to be

(16) See Hale P.C. ii, p. 207-8.

(17) See Hastings (M.) 'The Court of Common Pleas', p. 180. "To secure pardon the defendant must surrender himself to the Warden of the Fleet, and get a certification from him to the Chancellor and a certificate of the record of the outlawry from the Keeper of the Treasury. On the basis of these he got a pardon, which cost 16s. 4d. paid the Clerk of the Hanaper. For the certificate of the record of the outlawry he paid 2s. 1d. to the Clerk of the Treasury; to the Warden of the Fleet he paid 2s. 4d. and 'for his favour xxd.,' and to the Clerk of the Treasury 6d. for a scire facias to warn the plaintiff to appear, and 4d. for a bill of bail. The pardon he proffered in the court.

taken in the county in which the original writ was issued and the cause of action arose;⁽¹⁸⁾ where the debtor resides in another county, proclamation is to be awarded into that county, (or if the King's writ does not run in that county, then into the county adjoining) the sheriff to whom the writ of proclamation is directed is to cause three proclamations to be made within his county on three different days, twice in the full county court and once in the "General Sessions of those parts where the Party Defendant is supposed to be dwelling, or in the parts of the County next adjoining to the County or Counties where the King's Writ runneth not, that the Party Defendant yield himself to the Sheriff of the foreign County, to whom such Exigent in any action personal is awarded."⁽¹⁹⁾ If any outlawry is had or promulgated against a person in a foreign county and no proclamation issued and return made thereto, then the outlawry is to be void and of no effect, and such outlawries may be avoided by averment without

(18) Although the statute insisted upon the need to sue out the original writ where the cause of action arose, yet a rule of the Court of Common Pleas of 15 Mich. Eliz. 1 says: "That no Attorney here, prosecute or sue any forrein processe by Original or other proces in any personal Action, other than Actions of Debt only, but in the proper Shire where the cause of Suit shall grow and arise without Licence of this Court, upon pain of forfeiture for his ffirst Offence forty shillings, and disability and explusion on his second Offence." Mich. 15, Eliz. 1, No. 15, 'Rules, Orders and Notices in the Court of Common Pleas', Cooke (Sir G.) (1747).

(19) 4 Hen. VIII, c.4 made permanent by 6 Hen. VIII, c.4 (1514-15)

the defendant suing out a writ of error.⁽²⁰⁾

Outlawry was a long and tedious process for everyone concerned, yet it did provide some sort of method whereby the creditor could attack his contumacious debtor who had nothing by which he could be distrained, or who, having been distrained to the full, still chose not to appear. Taking away a man's civil rights was a drastic thing, yet it is necessary to "take account of the fact that outlawry always reflected the difficulties encountered by private persons in obtaining their rights;.... One must also remember that the collecting of debts, and the driving in of outlaws could not happen until the debts existed and the outlaws had shown reluctance to purge themselves."⁽¹⁾

Further amendment of the law was made in 1589⁽²⁾ when it was ordered that of the three proclamations which were to be made in

(20) 6 Hen. VIII, c.4. Legislation dealing with malicious indictments had appeared in 1427 (6 Hen. VI, c. 1); 1429 (8 Hen. VI, c.10) which dealt with a problem similar to that dealt with by 4 Hen. VIII, c.4 that of malicious indictments or appeals of persons in one county when they in fact live in another; and in 1432 (10 Hen. VI, c.6) which added to 8 Hen. VI, c.10. In 1504 it is enacted that the shire court of Sussex is to be held alternately at Chichester and Lewis because formerly when held only at Chichester (which is at the extreme end of the 70 mile long county) persons have been "sometimes outlawed, and sometimes lose great Sums of Money in that Court ere they have Knowledge thereof, to their utter undoing:" [19 Hen. VII, c.24]

(1) Elton (G.R.) Hist. Journ. 1961, p. 15.

(2) 31 Eliz. I, c.3

another county to that in which the original writ issued, one was to be made in open county court, one at the General Quarter Sessions and the third to be made at least a month before the fifth exaction at 'or near to the most usual Door of the Church or Chapel of that Town or Parish where the Defendant shall be dwelling at the Time of the said Exigent so awarded.... and upon a Sunday, immediately after Divine Service and Sermon, if any Sermon there be; and if no Sermon there be, forthwith after Divine Service'.⁽³⁾ Also before the defendant may obtain a Writ of Error or the outlawry be reversed, bail is to be put in, not only for appearance to answer the plaintiff in the original suit, but also to satisfy the judgment if found against him, that is if the plaintiff begins his suit within two terms of the writ of error allowed or outlawry being reversed.⁽⁴⁾ As towns and population grew the uselessness and the fictions surrounding the use of capias

(3) 31 Eliz. I, c. 3, s. 1

(4) Ibid. s. 3. In Trinity term 24 Eliz. I, in the Common Pleas it is directed that "if any person (which from henceforth shall be outlawed in any action personal before appearance and Judgment) doe pursue any writt of Error thereupon, the same writt of Error shall not be allowed, nor any Record removed, nor any writ de non molestando or Supersedeas granted before some manifest Error be shewed to the Court if it be in Term time; and if it is in the time of Vacation, then some of the Justices and by them allowed." Rules and Orders Trin. 24 Eliz. 1, No. 4

and outlawry increased correspondingly,⁽⁵⁾ the stupidity of outlawry was agreed upon in 1851,⁽⁶⁾ but until 1870 it still involved forfeiture of chattels.⁽⁷⁾

Means for Release

Bail

The taking of the body of the debtor on mesne process, being in effect to secure his appearance at the court, was accompanied by the right of the debtor on giving bail to be released.⁽⁸⁾ This right to release was protected by a writ of de homine replegiando which called upon the sheriff to allow the prisoner to be bailed

- (5) See Bl. Comm. III, 282-7, and First Report of the Commissioners on the Courts of Common Law, Parlt. Papers (1829) ii, 91-5 [comd. 46]
- (6) Common Law Procedure Commission, Parlt. Papers (1851) xxii, p. 567 [comd. 1389]
- (7) Forfeiture Act, 1870 (33. 34 Vic., c. 23)
- (8) The use of the terms 'bail' or 'mainprize' seem in many cases to mean the same, although the writ of mainprize was at first restricted to allowing release on pledges given, to persons concerned in felony. - F.N.B. 249 G. The writ is given later as being applicable to cases of persons arrested on mesne process for debt to secure their release on bail - F.N.B. 251 B. Mainpernours were not liable to anything worse than a fine if the defendant failed to appear - Y.B. 11 Hen. VI, fo. 31. Whereas a surety on bail would forfeit his security. As to this confusion see Co. Inst. IV, fos. 178-180, P. & M. II, 589-590.

unless imprisoned on such matter as did not admit to bail.⁽⁹⁾ Until 1444⁽¹⁰⁾ the sheriff retains a fair amount of control over the granting of bail, but always with the chance of the issuing of the above writ in order to quell his excesses, after which time the need for it in these circumstances is done away with.⁽¹¹⁾

Once the law allowed the defendant to be imprisoned in execution of judgment, the general means by which he could obtain release were: satisfaction of the judgment; by consent of the plaintiff;⁽¹²⁾ or with the connivance of the gaoler or sheriff.⁽¹³⁾ Quite early in the reign of Edward III, it had been held that if a person was taken

(9) 3 Edw. I, c. 15 (1275) gave rules for guidance of the sheriff, outlaws were not to be allowed to bail. As to the workings of this statute see Co. Inst. II 186-191. It was later provided that where a defendant obtained a reversal of his outlawry, if the debt was over £20, then he must put in special bail (i.e. bail examined before the justices). 'Rules and Orders', Mich. 17 Car. 2.

(10) 23 Hen. VI, c.9

(11) Justices of the Peace are to enquire into any failure to grant bail under the statute.

(12) Once the plaintiff agreed to the release of the debtor he could not have execution in any other fashion or have the debtor imprisoned again.

(13) This later became in fact a flourishing business which resulted in considerable privilege for the rich, and a corresponding degree of hardship for the poor.

on a *capias ad satisfaciendum*, he was not to be suffered to go at large, even if he found mainpernours,⁽¹⁴⁾ this received statutory backing in 1444-5 when persons arrested on mesne process in personal actions were to be granted bail on surety by persons having sufficient property in the county, but the act was not to apply to persons in prison on execution or outlawry.⁽¹⁵⁾

Habeas Corpus Cum Causa

Faced with this slight obstacle to his freedom, the debtor came up with a quite ingenious way out. On petition to the Chancellor complaining of some irregularity in their imprisonment, (usually to the effect that they were wickedly dealt with), writ of Habeas Corpus cum causa, usually accompanied by a writ of certiorari was issued, ordering that the body of the debtor be produced to the Chancery together with a note of the cause of the imprisonment. On receipt of such notice, it appears that the sheriff released the debtor with or without bail or mainprize being taken, and without the plaintiff's assent. The debtor then takes himself off, and his mainpernours pay a small fine. The use of this means of having the body of the debtor

(14) 22 Ass. 74.

(15) 23 Hen. VI, c.9

produced before the Chancery, follows very closely on the heels of the common law decision to allow imprisonment on execution of judgment.⁽¹⁶⁾ To defeat this mode of cheating the creditor, it is provided that in future, if the return to such writ states that the cause of imprisonment is execution of judgment, then that person is to remain in prison until satisfaction made.⁽¹⁷⁾ This Act specifically mentions debtors who were in execution from the courts of the city of London, and other large cities and franchises had been exercising this trickery; which it appears is not yet dead. The debtors imprisoned under statute staple recognizances however, refused as yet, to be parted from this gift, and still managed to use it, for nineteen years later, it is stated that persons in execution on statute staple recognizances⁽¹⁸⁾ have had themselves brought before the Chancery by corpus cum causa and by 'Shewing forth divers Indentures, and other things in defeasance of such Recognizances' they obtain writs of scire facias warning

(16) Allowing that the growth of the common law rule permitting the taking of the debtor's body in execution was between 1366-76 we can find corpus cum causa being used as early as 1383 in London - C.P.M.R. (1381-1412) p. 40. By this time, of course, the debtor, by statute merchant, already had an hundred years' experience of prison life. For an example of the petition and answer see Sel. Cas. in Chancery (S.S. vol. 10) p. 8 No. 8, given in Appx.pp.723-5. The Plea and Memoranda Rolls of the City of London reflect well the growth in use and the popularity of this writ during the fifteenth century. See C.P.M.R. (1413-37)(1437-57)

(17) 2 Hen. V, st. I, c.2 (1414)

(18) Until 23 Hen. VIII, c.6(1531-2) this form of recognizance was used by all manner of people, see p.202

creditors to attend and answer them. At this stage they are delivered out of prison upon producing a surety who enters into a bond on their behalf, payable to the King, after which the debtor may delay the creditor in his execution, or seek sanctuary,⁽¹⁹⁾ leave the country, or just simply disappear taking, if possible, any thing of value he possesses with him. The surety escapes his obligations by obtaining a pardon from the King for which he may pay a small fine. Since the bond was only between the surety and the King, the creditor had very little else to do but try and find his debtor. To prevent this, therefore, the surety is now to be bound both to the King and to the creditor.⁽²⁰⁾

Audita Querela

Whereas the debtor other than by statutory recognizance had opportunity to put his case to the court before judgment, and show acquittances or defeasances, the debtor by statutory recognizance did not. His seizure was immediate, his length of incarceration depended on his ability to satisfy his creditor from his goods or by extent. A writ or method was therefore needed in order that he

(19) See Ch.8

(20) 11 Hen. VI, c. 10 (1433)

might raise those matters which could ordinarily have been raised in the common law courts. The emergence of the writ of audita querela appears to have been authorised by Parliament about 1336⁽¹⁾ and although the word equity is frequently heard in connection with it, it appears to be more an order to enable the pleas that would otherwise have been heard at common law, to be heard, than to provide a special equitable process.⁽²⁾ The writ issues out of the Chancery and instructs either the King's Bench or the Common Pleas that it has heard complaint in a certain matter, and the court is to call the parties before it and to examine the nature of the matter so that justice may be done.⁽³⁾ If the debtor wished to point out that he was an infant both at the time of the making of the statute and on execution being sued out, he could have this writ.⁽⁴⁾ An interesting example of its use to the debtor arise in 1344,⁽⁵⁾

(1) Y.B. 18 Edw. III (R.S.) p. 309 (1344) - "Pole. 'Audita Querela was given quite recently, that is in the tenth year of the reign of Parliament.'"

(2) Y.B. 17 Edw. III (R.S.) p. 370 (1343) - "STONORE. 'I tell you plainly that Audita Querela is given rather by Equity than by Common Law, for quite recently there was no such suit.'" See further Bl.Comm. 405-6. Plucknett 'Concise', p. 373.

(3) F.N.B. 102 H.

(4) See Y.B. 17. 18 Edw. III, pp. 410 and 500 (1343-4)

(5) Y.B. 18 Edw. III (R.S.) pp. 378-380. (1344)

in this case three persons had execution sued against them on a statute merchant and one of them was imprisoned in execution. The debtors by audita querela say that one of them in fact has an acquittance given by the creditor. On the day given for appearance, one of the debtors sends his attorney, one does not turn up, whilst the third, since he is in prison, attends in the custody of the sheriff, and the court find that he is still an infant, and therefore he is ordered to be discharged; the creditor rather strangely did not appear. If the debtor declared he had an acquittance the writ would issue, at times with strange results, for where a debtor said that he had the statute itself delivered to him in lieu of an acquittance, the creditor petitions to parliament, saying that the statute is a forgery and that he has the only genuine one. The justices are told to have the statutes examined by the mayor and clerk before whom they were made and they declare for the creditor who is given execution.⁽⁶⁾ Statutes made under duress were remediable this way,⁽⁷⁾ as were cases

(6) Y.B. 17. 18 Edw. III (R.S.) pp. 80-88 (1343)

(7) Y.B. 20 Edw. III (R.S.) I, pp. 92-4 (1346) duress of prison.

of defeasances where the creditor sued execution afterwards.⁽⁸⁾

After the issuing of an audita querela the debtor could have a writ of supersedeas to the sheriff not to carry out execution.⁽⁹⁾

Statutory recognition was given to the writ in 1532 where debtors under statutes in the nature of a statute staple are specifically given the writ.⁽¹⁰⁾ In later law its use declined due to the courts dealing with these matters on motion being made to them,⁽¹¹⁾ but if the matter of application for relief was a release or the matter could not easily be ascertained without trial, then the party had the writ.⁽¹²⁾

(8) F.N.B. 103 C - creditor had debtor imprisoned and took defeasance from him.

(9) F.N.B. 240 A. but see F.N.B. 104. O. and Y.B. 20 Edw. III (R.S.) II, p. 56. The writ ought to allege that the creditor has in fact sued for execution. F.N.B. 104 P. The writ could even be used by one of two feoffees, where the debtor had enfeoffed them after making a statute and the creditor had only sued out execution against one of them, the free feoffee is to show cause why his plot should not be extended also. F.N.B. 103 B. But for the situation where the creditor accepts land from the debtor after the statute and formerly the debtor has enfeoffed another of some part of his land also after the statute see F.N.B. 104 O.

(10) 23 Hen. VIII, c.6, s.3 and see p.202

(11) See Sutton v. Bishop, 4 Burr. 2283 at 2287 [98 E.R. 191 at p. 193]

(12) See Wicket v. Creamer, 1 Salk. 264; 1 Ld. Raym. 439 [91 E.R. 232 & 1191]

CHAPTER 8IDE AND SLEKHoly Church

Sanctuary for the fugitive was very much a part of all of the ancient laws, it appears in the early chapters of the Bible,⁽¹⁾ and is almost always tied up with the religious beliefs of the community concerned. In Greece, down to the end of paganism, there existed places of asylum in which both criminals and debtors could seek sanctuary, and tradition has it that Romulus established a sanctuary on the slopes of Capitoline Hill so that if free or bond men got there then they were safe,⁽²⁾ also the right of sanctuary was expressly conferred in 42 B.C. on the temple built in honour of Julius Caesar, later temples and even the statues of the emperors became objects of safety to the fugitive.⁽³⁾

Since in the old laws most injuries inflicted on another

- (1) Genesis XIX. ver. 22. 'Zoar', a place of sanctuary or refuge. And see Deut. c. XXIII. v. 15 'Thou shall not deliver unto his master the servant which is escaped from his master unto thee:'
- (2) See 'The Geography of Strabo' Bk. 5. 3. 2. Trans. by Jones (H.L.) (1923) vol. II pp. 383-4. As to asylum in Greece see Livy, Bk. XXXV. L.I.2, Trans. by Sage (E.T.) vol. X. p. 147
- (3) Westermarck (E.) 'Encyc. of Religion and Ethics' Vol. II, p. 162. In Christian places the altar of the church was the sacred spot, whilst among the Negroes of Accra it was necessary for fugitives to seat themselves upon the fetish to obtain protection, ib. p. 101.

brought the need to make a specific payment for the harm done, often the fugitive was regarded as a debtor; in the laws of Ireland it is stated of the Church that "it refuses not shelter against death, i.e. it denies not, or it refuses not to shelter one against death, and from unlawful claims for debts so far as to offer to pay the debts when death is deserved";⁽⁴⁾ under the Visigothic Code a "debtor or criminal, Cannot be forcibly Removed from a Church, and must pay such Debts, or Penalties as are due."⁽⁵⁾

The Christian Church first started to grant asylum through Honorius in the West and Theodosius in the East.⁽⁶⁾ About 450 A.D. Theodosius the Younger extended the immunity of the Church from the inner fabric and altar to the walls of the churchyards or precincts and included the houses of Bishops and clergy, the cloisters, courts and cemeteries. Yet the possible use of this privilege by fraudulent debtors was quickly seen, and the Theodosian code sought to limit its use by excluding public debtors from sanctuary who embezzled or acted fraudulently in respect of state dues.⁽⁷⁾

(4) A.L.I. vol. iv, p. 237

(5) Bk. IX, tit. 3, c.4.

(6) Westermarck, p. 162. See Cox (J.C.) 'The Sanctuaries and Sanctuary seekers of Medieval England' (1911) p. 2 who thinks that the custom of Christian churches granting protection probably came into existence from the time of Constantine's Edict of Toleration, A.D. 303.

(7) Cox, p. 2

(8) Cox, p. 4. "Nor was the immunity of the Church to be enjoyed by Jews pretending to turn Christians to avoid their debts." Ibid.

In England, however, the use of sanctuary by fleeing to a church was kept very much to the fleeing criminal, this ecclesiastical sanctuary although it saved a murderers' life, meant that he had to abjure the realm, leaving his goods etc. behind him, and strike off for himself in a foreign land. Besides the right of the church to safeguard the fugitive criminal there was 'a certain number of important churches - some of them monastic and some secular foundations - possessed' of 'more extensive privileges, which enabled them to protect the fugitive within certain territorial limits: at least for a considerable period and at later times permanently'.⁽⁹⁾ These special sanctuaries had their rights more from an independence of royal justice than special charters and the "true basis of special sanctuary was the possession of the lord of the place of rights of jurisdiction which made his lands independent of royal justice, and the most notable of such sanctuaries were the great liberties of the north and the Marches of Wales.⁽¹⁰⁾ In them the King's writ did not run and the king's officers could not enter, and they gave a fugitive criminal the same safety within England as flight to a foreign

(9) Forster (R.H.) 'Notes on Durham and other North Country Sanctuaries' Brit. Arch. Journal (1905) p. 118.

(10) An example of such a Liberty was Chester - And see Omerod (G.) 'History of Cheshire' Vol. II, p. 752-3 citing Cowper's Chester Mss. Vol. I, . 41, which states "t t a certain large ieece of waste called overmarsh, was in antient times ordained for stran ers, of what county soever, as assi ned to s ch as c me to the peace of the earl of Chester, or to his aid, resorting there to form dwellings but without building any fixed hou e , by the means of nails or pin , save only booths and tents to live in."

country did before the development of extradition."⁽¹¹⁾

The debtor does not figure greatly in the controversies surrounding special sanctuaries until the beginning of the fourteenth century,⁽¹²⁾ which is not really hard to understand for the path of the fugitive debtor to these special sanctuaries follows very much the oppressive enactments of the legislature against him. It is also necessary for the law to work out those places which do not possess the right to give this special sanctuary; in 1347 one Roger Bavent, a fraudulent debtor takes refuge with the Friar Preachers of London having passed his property to the king, his creditors therefore request that they be allowed to recover the debts from the goods in the hands of the king, and writs of debt and account are issued.⁽¹³⁾ It would appear that the friars did not possess any special jurisdiction and therefore could not give protection. The claim of debtors to seek ecclesiastical privilege as well as special was refused in 1363 after one John de Lokynton was taken from a Franciscan church at Beverley where he had fled for a debt of £80 given against him as damages in a trespass action. Bishop Sudbury of

(11) Thornley (I.D.) 'Sanctuary in Medieval London' Journ. Brit. Arch. Soc. vol. 38 (N.S.) (1933) p. 299-300. As to the position of subject fleeing from one kingdom to another see Co. Inst. III. 180.

(12) See Priory of Nexham (Sur. Soc.) vol. 44, p. 62 re the restoration to sanctuary of two debtors or bond men taken when swimming to the sanctuary, the goods they were carrying were also restored to them, c. 1119-1140.

(13) Rot. Parl. II. 187-8 see Lazzingni (I.J. de) 'Sanctuaries', p. 44

London promptly excommunicated the removers, but the Council held that such removal is not an offence (Lokynton could not confess to any felony)⁽¹⁴⁾ and the Bishop is ordered to annul the excommunication.⁽¹⁵⁾

Fleeing to sanctuary although aiding the debtor did not safeguard his property, which even if his creditor could not obtain it, was likely to end up in the hands of the king by reason of his creditor distraining him to appear in court to answer his debt.⁽¹⁶⁾ The debtor therefore turned to a practice he had already used to defraud the lord of his wardship,⁽¹⁷⁾ that of conveying the property to someone else until such time as it be safe for him to receive it back, in the mean-time he would receive the profits of the property entrusted, if any. The long drawn out business of an action for debt favoured the debtor in that his land was only bound from the time of judgment which gave him time in which to enfeoff another between the time the creditor purchased the writ and the time judgment might be given; a petition of 1347 to the effect that a

(14) As to the use of this method of pleading a felony by a debtor in order to escape the realm see pp.460-1. See Rot.Parl. V, 106b (1444)

(15) Thornley 'Sanc. London', p. 302. see also 'Register of Bishop Sudbury' (Cant. & York Soc.) vol. 34, pp. 56-8.

(16) see p. 136

(17) see pp. 82-84.

plaintiff might have execution of the lands which the defendant had on the day of the writ purchased, received answer that a statute was necessary to bring about such a change and the king would consult with his council, nothing further is done. (18)

The use of the fraudulent conveyance, followed by the debtors fleeing, either out of the country or to sanctuary, begins to show more strongly from the time when the debtor can be arrested on mesne process although examples of it exist before this time. Thus in London a letter is read in 1345 before a congregation of the Mayor, aldermen and one of the sheriffs regarding one Giles Naas an innkeeper of Ghent who had stood surety for one Moris Turgis who without paying his debt 'had departed to the town of St. James in Galicia, having first granted all his goods and chattels to Thomas atte Mede and Andrew Turk his son in law in order to defraud those who sold him cloth, thus leaving Naas to pay'. (19)

In 1352 the first statute against the fugitive debtor was passed, although it concerned only a small section of the community. It appears that members of the Lombards company had been entering into transactions and had then suddenly fled the country when it had

(18) Reeves citing Cott. Abr. 21 Edw. III. 1 . See 8 Co. 171a sale of goods bona fide after judgment is good, but not after execution awarded. See Reeves H.E.L. II, p.435 - Rot.Parl I, p. 166b.

(19) C.F.M.R. (1323-1304) p. 214

become necessary to pay their debts, therefore in future if any member of the company enter into obligations then the company shall be liable for the debts.⁽²⁰⁾ This statute aided Coke in his belief that the behaviour of fleeing from one's creditors was a nasty foreign habit which had unfortunately been handed on to the Englishman.⁽¹⁾ This is hardly the case, for until 1352 with the granting of *caias on mesne* process the English debtor had very little need to flee, since *distrain* was his creditors ultimate weapon, but from this point, and after the extension of imprisonment as a form of execution, the English debtor can be found fleeing towards sanctuary concealing his goods as he goes in a manner that any continental debtor might envy.⁽²⁾

In 1366 we find that an apprentice has to petition for relief from his indentures because his master fled to St. Martin Le Grand twelve weeks previous leaving him without 'anyone to instruct him in

(20) 25 Edw. III. stat. 5, c.2. London has much earlier attempted to curtail the activities of persons removing their property by withdrawing certain privileges from them by stating 'that no one shall enjoy free summons to plead, according to the usage of the City, who is seen and proved to have removed and withdrawn his goods, in deceit of the demandant, and for the withholding and nullifying of the debt from him due, etc.' Lib. Alb.-Riley, pp. 107-8 temp. 33 Edw. I - 3 Edw. II.

(1) Co. Inst. VI, c.53, p. 277. 'so was the offence itself a stranger to any Englishman'. No doubt Coke's views of foreigners was aided by the wording of 8 Hen. VI, c.24 (142,) which says 'to eschew the great loss which divers Persons of this Realm have had, and also be likely to have by their loans made of their merchandises to Merchants Aliens, which have fled with the same, and daily take Sanctuaries,' to remedy this no Englishman is to allow credit to any alien merchant.

(2) For an example of this in London in 1374 see *Ap x.* pp. 726-8.

his trade, or to provide him with food, clothing or necessaries.'

After three summonses and defaults the complainant is discharged his apprentices ip.⁽³⁾ A similar case of a master who was in debt fleeing to the liberty of St. Helen's London occurs in 1377.⁽⁴⁾ The City of London's Court of Common Council in an attempt to prevent this happening had enacted that 'no freeman of the City who inhabited Sanctuaries or privileged places, i.e. places within the City but not subject to its jurisdiction, should be permitted to enrol apprentices'.⁽⁵⁾ This provision would appear to have been somewhat undermined by a decision of its own court, however, when on an application by apprentices in 1380 against their master, John Broke, who had fled to the sanctuary of Westminster for debt, the court released them on condition that they found sureties that they would return to their master if he reappeared within a year and a day and proved that he made provision for their instruction and keep during his absence,⁽⁶⁾ such making of provision

(3) C.P.M.R. (1364-81) p. 60. The case provides an interesting side light on persons other than creditors who suffered from debtor fleeing. Although the case does not state that the master fled for debt, the editor at p. xlv. cites it as such.

(4) ib. p. 240.

(5) C.P.M.R. (1304-81), p. xliv. citing 'Journals of the Court of Common Council', vol. 5, f. 198.

(6) ib. pp. 263, 264.

apparently made the fleeing to sanctuary almost respectable.

Breaching the Walls

In 1376 the practice of fleeing to sanctuary and of making conveyance of property to friends is subjected to the scrutiny of the Commons⁽⁷⁾ and a statute is passed to deal with some of these cases. The preamble states that persons having borrowed goods in money or merchandise have given their tenements and chattels to friends and by collusion between them are paid the profits, after which they flee to the 'Franchise of Westminster, or St. Martin le Grand of London, or other such privileged Places, and there do live a great Time with an high Countenance of another Man's Goods and Profits of the said Tenements and Chattels, till the said Creditors shall be bound to take a small parcel of their Debt, and release the Remnant'. Therefore to remedy this 'If it be found that such Gifts be so made by Collusion, that the said Creditors shall have execution of the said

(7) Rot. Parl. II 369 a.

Tenement and Chattels, as if no such Gift had been made'.⁽⁸⁾

whilst this enactment helped the creditor who had obtained judgment it did little for the creditor whose debtor had fled before the creditor could get him before the court. The growth of the use of sanctuary by debtors and the fact that the creation of these places of privilege struck some as of doubtful legality led to the next step to prevent the debtor defrauding the creditor. In 1378 two persons had escaped from the Tower of London to sanctuary at Westminster, one of them, Shakyl, was tricked outside the precincts of the sanctuary of Westminster and arrested, the other, Haulay, was killed actually in the Abbey.⁽⁹⁾ Bishop Sudbury immediately excommunicated the doers of the deed, for breach of sanctuary.⁽¹⁰⁾ The case was brought before the Council when it was claimed for the crown that this was in fact a case of debt and that in such a case no sanctuary

(8) 50 Edw. III, c.o. A statute against fraudulent conveyance made with intent to rebel or commit a felony had been passed in respect of Ireland in 139-10 - 3 Edw. II, c.o., this was followed in 1351-2 by a statute against giving goods and chattels in fraud and collusion in order to keep the king from his debts or to stop other parties having an action and recovery, any such conveyances are void - 25 Edw. III, c.8 (Ireland). See also 40 Edw. III, c.23 (Ireland) 130. For some reason it took much longer for parliament to pass a similar law in respect of England.

(9) Workman (d.B.) 'John Wyclif' vol. I, pp. 314-324 gives a full account of this case, Shakyl and Haulay were imprisoned in the Tower for failure to comply with an order of Parliament. See also Stanley (A.P.) 'Memorials of Westminster Abbey', p. 346-53

(10) For the sort of punishment that could be given by a Bishop as penance for a breach of sanctuary see Wykeham Register (Hants Record Soc.) II, pp. 429, 459. Failure to allow the fugitive to have food at St. Margaret's Southwark in 1377 had resulted in excommunication of those responsible - ib. pp. 271-2.

rights existed, 'and on this there came into Parliament doctors of theology and civil law, and other clerks on behalf of the king, who in the presence of the lords and all the commons made argument and proof against the prelates on the matter aforesaid by many colourable and strong reasons'.⁽¹¹⁾ It is said that in cases of debt, account and trespass immunity did not lie and neither prince nor pope had power to grant such immunity, which was only demandable where the danger involved life or limb.⁽¹²⁾ Had the King left the matter at this point on the evidence presented, sanctuary for debt might have ended there, instead there came a qualified dismissal of the right of the debtor to seek sanctuary and it is stated "That no one for the future should, by virtue of any such general privileges or others contained in the same charters" (those charters shown on behalf of the abbey to establish the privilege) "have any Immunity, or franchise within the Church, Abbey or place of westminster, in any cases before mentioned or similar ones" (i.e. cases of debt, account and trespass) "only provided always that to Holy Church should be reserved her franchise respecting felony. But nevertheless in respect of the especial affection felt by the king for the said place of westminster more than for any other place in the king-

(11) Workman, p. 321, citing Rot. Parl. III, 35-7. If the claim of the Abbey was surrounded by doubtful deeds, the claim that this was solely a case of debt was equally doubtful.

(12) see Leadam (I.S.) 'select Cases in the Star Chamber (S.S., vol. 1.)' p. 137, fn. 11.

dom, and particularly on account of his reverence for the noble body of St. Edward and the other great relics there, it is the will and intent of the King by the advice aforesaid, that those, who by fortune of sea or fire, robbers or other mischief without fraud or collusion shall have been so impoverished as to be unable to pay their debts, and shall wish to enter the said sanctuary to avoid imprisonment of their bodies, may, and shall be in such cases suffered to abide safely and freely in the said sanctuary, and therefore have personal Immunity to the intent that they may in the mean time be sufficiently raised up to enable them to satisfy their creditors."⁽¹³⁾

Quite what the test was, other than an oath as to intent or reason for seeking sanctuary by the debtor to see that he was honest, is not known, nor is it necessary to dwell on it; for in 1379 a further statute to regulate feigned conveyances of sanctuary seeking debtors was passed. By this act after creditors have brought a writ of debt and had capias awarded thereon, to which capias the sheriff has made reply that he has not taken the debtor because he is in a privileged place, then a writ is to issue to the sheriff that he cause a proclamation to be made at the gate of the privileged place where the debtor is, once a week for five weeks, to the effect that the debtor is to attend before the king's justices to answer the creditor in his demand. Upon the sheriff making

(13) Mazzinghi, p . 4,-50, citing Rot. Parl. III. 51. .b.

return that the proclamation has been properly made, if the debtor does not attend before the court, then judgment is to be given against him upon the principal by default. Judgment execution is to be made out of the debtor's goods and lands outside the privileged place, and also of any lands or goods which are found to have been given by collusion or fraud outside the sanctuary.⁽¹⁴⁾

The result of this piece of legislation was to confirm the use of the privileged places as sanctuaries for the fraudulent debtor.

In 1394 it is complained that the Abbot of St. John of Colchester, and the Abbot of Abingdon in Colneham, are enforcing the same privileges as the Church of Westminster "for all manner of men coming and flying within the precincts, for debt, detinue, trespass, and all other personal actions, so far that they suffer no Bailiff, Coroner, or other Minister of the King to perform their duties, in execution of the law therein": the Abbots are called upon to produce their charters or maintain such privileges as they could before the Council, but no more is heard of the matter.⁽¹⁵⁾ In 1403 a similar complaint is made by the Londoners against the sanctuary of St. Martin le Grand in that they have debtors who flee there with all their goods and by this method they escape execution upon their possessions; again it is ordered that the privileges claimed for the sanctuary be shown before the Council and again nothing

(14) 2 Ric. II. st. 2. c.3.

(15) *Mazzei*, p. 45, citing Rot. Parl. III. 321 b.

more is done.⁽¹⁶⁾ That the courts themselves took this as agreement of the existence of these places of privileges would seem to appear from a case of 1434 when the Chancery ordered the return to St. Martin le Grand of a debtor removed from there to prison on the application of his chief creditor;⁽¹⁷⁾ in 1402 on the removal of one John Gybon for a debt of twenty-four pounds from the sanctuary of Westminster by a certain Thomas Banes, prior of Folkestone, the Abbot's men, to whom Thomas was well known, seized him and imprisoned him in the Gatehouse and brought an action of trespass against him.⁽¹⁸⁾ Thomas subsequently sued his captors for assault but since the King's writ did not run on the sanctuary area he seems to have failed on that ground.⁽¹⁹⁾

The difficulty of discovering whether property has been given to people as a gift or as a means of security against non-payment for goods or of a debt or as a means of defrauding one's creditors is a parent,

(16) Rot. Parl. III. 503-4. See Thornley (I.D.) 'The destruction of Sanctuary' (Fodor Studies edited by R.W. Seton-Watson) p. 187

(17) Lans Ms (B.M. 170. fo. 82. Similarly in the case of Colchester, the failure of the Council to take further action seems to have acted as confirmation of the right to give special privilege for in 1454 it is said that one Thomas Fuller of Malstead, weaver, fled to the sanctuary of this abbey to avoid arrest for debt, at the plea of Henry Viscount Bouchier, for 49.10.4a; and the Colchester Bailiffs on the order of the county sheriff have the proclamation made for five successive weeks that Fuller is to appear before the Justices of Westminster. Cox, pp. 198-9 citing Colchester Red Book, pp. 50-7.

(18) Westlake (J.F.) 'Westminster Abbey' II, p. 422, citing Westminster Abbey Annals 1004.

(19) Westlake, p. 422, citing W.A.L. 9014.

and servants were certainly not free from possible complicity in such schemes.⁽²⁰⁾ In London the growth of gifts after 1400 must have led to a number of occasions when creditors were hard put to to decide whether the person to whom goods or property given received it as security for their own debts or as friends of the debtor.⁽¹⁾ Yet the old form of letting a man take oath that the goods are his prevailed for some time, in 1420 a third party appears in an action of debt in the Mayor's Court and pleads that some of the goods by which the defendant had been attached are in fact his and he 'took oath on the goods else that no one at the time of the attachment or afterwards, except himself, had any interest in the goods to the value of 4d. or more, and that his oath was not made fraudulently or collusively to exclude anyone from his right of action!⁽²⁾ Ten years later the Common Council of London enacted that in cases of debt or gift by a defaulting debtor, the person claiming could not make oath by his own hand alone.⁽³⁾

The Legislature left the business of the controlling of the debtor in sanctuary for a long time to the Council, relief is given to creditors

(20) C.P.M.R. (1381-1412), p. 297.

(1) For details of the growth of these gifts see C.P.M.R. (1413-37) p. xix-xxiii; and ib. (147-57) p. xxi-xxviii and appx. p. 159-185

(2) ib. (113-7), p. 76

(3) Cal. Ltr. to K., p. 116, for text, see appx. p. 729

whose debtors flee round the country or overseas so as not to let their creditors issue a summons against them,⁽⁴⁾ and to deal with the debtors who rather than pay their debts have themselves appealed of felony in sanctuary and then abjure the realm or claim benefit of the clergy.⁽⁵⁾

The Government Within

If the sanctuaries were to remain it was in their own interests to maintain some sort of order and to prevent their inmates from indulging in excesses which might result in the attention of the legislature being brought upon them. Oaths to be taken by the persons entering sanctuary were quite normal and we find that in Westminster the sanctuary seeker must swear to behave properly and faithfully, to submit to all corrections and judgments of the president, to observe all contracts made whilst in sanctuary and if there for debt to satisfy his creditors at the

(4) Rot. Parl. IV. 3 . see further Mazzin hi, pp. 45-6.

(5) See C.P.R. Hen. VI (1437-1441) p. 497, where the supplicant being in debt for 372 marks fled to the church of St. Margaret's, Southwark, and there confessed to felony and abjured the realm, for which felony he is now pardoned; Cox, p. 269, fn. disputes that this is a false plea by the debtor - see Levill (R.) Surrey Arch. Coll., vol. xxi, p. 206 St. Margaret's however appear to have been more ecclesiastical than special in nature of a sanctuary. Certainly in 1444 - Rot. Parl. V. 100 b. - 107 b. - we have notice of a debtor having himself falsely appealed of felony in order to obtain benefit of the clergy and be delivered to the prison of his ordinary by reason of which the petitioner says he is 'excluded and defrauded of his saide execution to his finall distruction without other remedie to him th reof be purveyed' the justices of the King's Bench are empowered by writ to remove his body to the former place of imprisonment and the ordinary to deliver up the body on pain of being liable to the debt.'

earliest possible opportunity 'without garrulous or insolent words'.⁽⁶⁾

In St. Martin le Grand ga es of chance were forbid en and these included 'the "quek", (cnequer board), "kayelles", (skittles) and "cloissh",

(prob bly bowls),' thus these and other unlawful and 'reprovable games were not to be used, supported nor cherisshed' within the sanctuary.⁽⁷⁾

On the other hand the debtor could live a fairly full life inside the enclosure, though he might well find th t he had to pay to do so.⁽⁸⁾

Without the limiting of this privilege to the honest debtors who had failed d e to no f ult of their own, it was obvious that the abuses must continue, for if the debtor did not fr udulently devise his oods

(6) V.C.H. London I. pp. 444-5; Westlake II, pp. 418-9. See San. Dun et Bev. (Sur. Soc.) vol. 5, p. 111 for the oath of the Beverley Sanctuary. At the Priory of ~~etheral~~ the sanctuary men had to say they would conduct themselves well and faithfully and they remained so long as they did not o outside the liberty - Register of the Priory of vetherall ed. by Prescott (J.E.) Ap x. c, pp. 49 -2.

(7) Cal. Ltr. Bk. K. p. xxxiv. (these g mes were made unlawful in 1477 by 17 Edw. IV, c. 3). see Strype 'stow's Survey' III, pp. 103-5. for the full text of this ordinance given on 5th Feb. 1456-7. the fugitive w o arrived with another man' goods w s to be made to give them up, if satisfactory evidence of ownership made to the sanctuary authorities, ib. p. 104. A similar example of goods being given up in such cases can be found in 'A Letter to thabbote of Westminster to delyuer nyne clothes to oone thomas Bradley, Clothyer, owner of the same, which were brought into the Sanctuary by one Geoffrye Raynem n, taking first b ndes of him to be aunswerable to all suche as shall make clayme by ordrer of the lawes to the sayde clothes'. A.P.O. (1558-1570), pp. 32-3. 9 ec. 1558.

(8) See Paston Letters edited by Gairdner vol. II, p. 333, no. 596, letter of Wm. Ebesham to Sir John Paston - 'And God knowith I ly in seint warye (sanctuary) at grete costs, an amongs right unresonable as ers'. And see further the Beverley MSS (Hist. MSS. Comm.) regarding payments and rights of sanctuary men.

to another he could always take them with him.⁽⁹⁾ In 1483 the Duke of Buckingham in a speech not aimed solely at the debtor said: "Then looke me nowe how few saintuarye menne there bee, wome any fauourable necessitie comelled to gooe thyther. And then see on the tother syde what sorte there be commonlye therein of them whome wylfull vnthriftynesse hath broughte to nought...."

Nowe unthriftynesse ryote and runne in ette, up on the boldenesse of these places: yea and riche menne runne thither with poore mennes goodes, there they builde, there they spend and bidde their creditours gooe wistle them. For if one go to saintuary with another mannes goodes, why should not the kyng leauing his bodye at libertie, satisfy the part of his goodes euen within the saintuary? For neither king nor Po e can geue any place such a riueledge, that it shall discharge a man of his dettes being able to paye.

And with that diuers of the clergy that wer present, whither they said it for his pleasure, or as they thought, agreed plainly, that by the law of god and of the church the goodes of a saintuarye man should be deliured in paiment of his detts, and stollen goodes to the owner, and onelye libertie reserued him to geat his lyuing with the labour

(9) For a good example of fraudulent devise and sanctuary see Rot. Parl. VI, pp. 110-111 (1474) text given appx. 730-734.

of his handes".⁽¹⁰⁾ whether the Pope took due note of the text of the Duke of Buckingham's speech or not, in 1480 Innocent VIII issued a Papal Bull to Henry VII to the effect that the goods of no sanctuary man were to be protected from his creditors,⁽¹¹⁾ and a year later Henry weighed in with a statute to the effect that deeds of gift made with the intent to defraud creditors and the debtor going off to sanctuary to live on his trust fund shall be void and of no effect.⁽¹²⁾ So far, however, the statutes which gave relief in these cases had been aimed at the creditor who obtained judgment and whose debtor had fled to sanctuary, they took no note of the creditor upon recognisance or by statute merchant or staple, but this too was remedied in Henry VII reign. Where the creditor obtains a right to execution whether through an action of debt or damages recovered in other actions, or by reason of a recognisance or statute merchant or staple, then the sheriff is to make execution not only of the goods and lands which he has retained but also of the goods and lands which the debtor has conveyed to another for his own use.⁽¹³⁾

(10) More (Sir T.) 'The History of Richard III' edited by Singer (S.W.) (1821) p. 44-48.

(11) See Bull of 1489-90 To John Archbishop of Canterbury - given in Appx. pp.735-6. Henry VII was quite well connected in Rome for Innocent VIII had issued a Bull confirming his marriage in 1486, this was re-issued in 1494 under Alexander VI. A further Bull was issued in 1497 confirming Henry as heir of Lancaster and dispensing the King and Queen from disabilities of affinity. See Duff (E.G.) 'Fifteenth Century English Books'

(12) 3 Hen. VII, c.4 (1487) (1917) p.63, Nos.227, 228.

(13) 19 Hen. VII, c.15 (1503-4)

The days of the debtor's right to sanctuary are now growing fewer, more and more the feeling of the time is that only for danger to life and limb was sanctuary originally granted and that too is coming to an end, as with most cases, however the debtor is still able to twist the law a little in his favour. By some strange reasoning it is said that although sanctuary for debt is against the law, yet if the debtor was in execution and then escaped to a sanctuary 'ordained for safeguard of the life of a man, he shall enjoy it, for by long imprisonment his life may be in jeopardy'.⁽¹⁴⁾ Despite these outbursts against him the debtor still claims to his privileges,⁽¹⁵⁾ and registers kept by several of these special sanctuaries show the numbers of debtors in them and in some cases their professions.⁽¹⁶⁾ Among forty-nine people present in the sanctuary of 'Holy St. Peter of Westminster' on the 24th June, 1532 for a number of offences are several debtors, one a 'William Stafferton, merchantman for debt of long continuance'.⁽¹⁷⁾

(14) Bro. N.C. 53(73 E.R. 869-870) As to complaints that only the king could create such privileges see Keilwey Reports ff. 189, b- 190.

(15) See petition of accountant in sanctuary at Durham - Sar.Dun. et Bev. (Sur.Soc.) vol. 5, p. 80, given in Ap x.p. 737

(16) At Durham between 1404-1524 the number of debtors is given as sixteen; whilst at Beverley in the period 1478-159 the number of debtors is given as 208.- Sar.Dun. et Bev. (Sur.Soc.) vol. 5.

(17) S.P. (Com. & For.) Hen.VIII, vol. 5 (1531-2) pp. 502-3. No. 1124

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Henry VIII set about these privileges in both an unconscious and conscious fashion. His dissolution of the monasteries meant that those which had held this special right could no longer afford protection to the debtor, we find in a letter to Cromwell of 3rd April, 1538 in respect of Beaulieu Abbey 'Yesterday we received the surrender of this monastery, There be 32 sanctuary men here for debt, felony and murder, who have houses and ground whereon they live with their wives and children. They declare that if sent to other sanctuaries they be undone and desire to remain here for the rest of their lives, provided no more are admitted'.⁽¹⁸⁾ On the 10th April, 1538 Thomas Stepyns late abbot of the abbey writes a letter to Thomas Wriothesley in which he 'begs him to be a good master to these poor men privileged in the Sanctuary of Bewley for debt. They have been very honest while he was their governor. It would be no profit to the town if they were to leave, for the houses will yield no rent'.⁽¹⁹⁾

In the way of statutory reform by 27 Hen. VIII, c. 19, various regulations are laid down as to the wearing of badges, the non-wearing

(18) Ltrs. P. rs. for. & Dom. Hen. VIII, vol. 13, pt. 1, p. 254, No. 668

(19) *ib.*, p. 295, No. 792. Beaulieu is in fact given by grant to Wriothesley and presumably the debtors remained. *ib.*, p. 569, No. 1519 (67).

of weapons and rules relating to internal government.⁽²⁰⁾ All this is scrapped five years later when it is enacted that all sanctuaries except churches and church yards and the places expressly reserved by the Act are abolished,⁽¹⁾ persons guilty of murder, rape, burglary, robbery, arson, sacrilege or their accessories are no longer to be protected, the places to be sanctuaries for all other offenders are: Wellis (Somerset), Westminster, Manchester, Northampton, Norwich, York, Derby and Launceston,⁽²⁾ there are to be only twenty sanctuaries in each privileged place,⁽³⁾ but the Act is not to affect persons already in sanctuary,⁽⁴⁾ Commissioners are to be appointed to ascertain the limits of the sanctuary,⁽⁵⁾ the site of the sanctuary is to be such the sanctuarymen 'whensoever they cum brode be moost in the sight and ye of honest men; to thintent they shal not make p^lvey exco^r or resorte out by back and secret wyes unseene of thinhabitaunt'.⁽⁶⁾

(20) (1535-6) ss. 1-5

(1) 32 Hen. VIII, c.12, s.1

(2) ib. s.2 - by 33 Hen. VIII, c.15. West Chester was substituted for Manchester, followed almost immediately by a proclamation (allowed for under the latter act) 'pointing the Towne of St fford to be a Sanctuary Towne and for dischargeing the Citie of Westchester'. Tudor and Stuart Proclamations (Steele) no. 223 dated 10 May, 1542, I, p.23.

(3) 32 Hen. VIII, c.12, s. 8

(4) ib. s. 9

(5) 32 Hen. VIII, c. 12, s. 5

(6) Proc. P.C. VII, 134-5. Sundry letters to Commissioners of Sanctuaries 20 Feb. 3rd Hen. VIII

The privilege is very small now, but even so debtors may still go to sanctuary, and in the reign of Elizabeth I there is a petition from one Stephen Barrow, a citizen of London, who being unable to satisfy his creditors at the moment desires privilege of sanctuary at Westminster.⁽⁷⁾ In 1569 a review of these persons in Westminster was taken probably at the instance of the Star Chamber, and their assets and liabilities given. One William Whiteacres 'returned his debts at £761 but had owing to him £300, of which he did not expect to recover more than £46'. This declaration was made in May. In the following month information was laid against him in the Star Chamber by one Leonard Ward and others that as executor of the will of John Arde he had neglected to pay legacies due to the plaintiffs.⁽⁸⁾ An action being taken against him Whiteacre fled to Westminster and claimed sanctuary. The court considered 'the effect of the said information together with the lewde practice of the said Whiteacre as things not meete to be suffered' and requested Dean Goodman to show reason that such protection should be allowed, and also to produce his charters and grants in support of the claims. 'This he accordingly did and made a learned defence. But it was to no purpose, for the court held that the franchise could not serve or extend to benefit persons in such cases,

(7) S.P. Dom. Eliz. I, vol. XXXVIII, p. 05.

(8) Westlake II, p. 428, citing v.A.M. 9592.

as being to the great prejudice of the subjects of the realm. The dean was ordered to deliver William Whiteacres up and the latter was committed to the Fleet prison until he could satisfy the just demands of his creditors'.⁽⁹⁾ Although this decision did not result in the ending of sanctuary for debt, it must have made it fairly plain that fraudulent debtors were not likely to get very much aid in the future. 'But a rigid oath against fraud and non-payment was now administered to the fugitive on his arrival, including a clause that untrue statement as to his debts or assets shall invalidate all claims to the privilege; while the archdeacon was to follow this up with a lecture on 'what a danger hit is before God to defraude any man willingly of his goods the which is agaynst his lawes... and what a rebuke hit is to any man to clayme sanctuary and a dyscredyt to his occupying for ever. And doe therefore advyse hy to remembre these premisses and to retorne before he be knowen o only'.⁽¹⁰⁾

(9) Vestlake II, 428-9. Contrast this case with Rot. Parl. IV, 321, where an executor having mis-appropriated funds fled to privileged places, although parliament ordered him to be proclaimed and on non-appearance ordered that the other two executors might act, whilst any acts by the fleeing executor were to be null and void, they did not order that the executor be delivered up to a debtor's prison. See Mazzinghi, p. 0.

(10) Thornley, p. 200, citing Lans Ms (.n.) 24, fo. 84.

In 1634 it is enacted that so much of all statutes as concerned
 abjured Persons and sanctuaries, or the ordering or governing of persons
 abjured or in sanctuary, made before the thirtieth year of Elizabeth
 I shall stand repealed and be void.⁽¹¹⁾ Some doubts seem to have existed
 as to the precise meaning of these words,⁽¹²⁾ but in 1623-4 the doubts
 are all swept away, statutes which previously took away right to sanctuary
 are revived⁽¹³⁾ and 'no sanctuarie or Privilege of Sanctuary shalbe
 hereafter admitted or allowed in any case'.⁽¹⁴⁾ This was the end of
 sanctuary as it was known to medieval England, though, as we shall see
 later, certain other places arose where debtors and bankrupts accumulated
 and claimed the right to be free from the jurisdiction of the king's writ.⁽¹⁵⁾

(11) 1 Jac. I, c.2 . s.7.

(12) In 1600 Bills are still to be found in the House of Lords for the
 abolition of sanctuary - Lords Journ. II, 25b. 40 . 1b,; and 41b,
 35a, 400b, the latter disappeared in the Commons.

(13) 21 Jac. I, c.28, s.0

(14) ib. s. 7

(15) see pp 453-7.

CHAPTER 9THE STRUGGLE FOR JURISDICTIONThe Progress of Process

Although the use of *capias* brought about a firm change in the mods of summons and attachments,⁽¹⁾ the common law had still to develop itself in order to meet the needs of a growing society in which the old delays were not merely unfortunate incidents of the system, but presented a blockage against possible advancement, with the gradual placing of the courts and their jurisdictions, the delays through old procedural rules are dealt with.

Witnesses who failed to attend after the great distress, where formerly attendance was necessary if named in a deed, and the deed denied, are no longer to hold up the inquest as to whether the deed is true or not,⁽²⁾ in 1472 it is held that process would not issue

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- (1) In London in 1356 it is allowed that if it is shown that summons has been left at a debtor's house, and proved that at the time of the summons the debtor was in the city but has 'withdrawn himself on purpose to cause delay and avoid justice' then his goods, etc. may be seized and given to the plaintiff as in cases of foreign attachment.- Cal.Ltr. Bk.G,p.73, No. 8. A fifteenth century custumal of Sandwich still states, however, that distraint is the only method of producing the debtor, since 'that action is vain which the poverty of the debtor excuses'. Bor.Cust. I, p. 94.
- (2) 12 Edw. II, c.2 (1318)-By 13 Edw. I, c.38 it was necessary for witnesses named in a deed to be before the court when the deed was denied. Delays caused by defendants who pleaded in bar of an action that they had a release or other deed made and witnessed in a franchise where the King's writ did not run, were attacked in 1335, and if such witnesses fail to attend the court where the plaintiff brings his action after the great distress then inquest by the country to continue regardless.- 9 Edw. III, St. 1, c.4

to secure the attendance of witnesses unless asked for.⁽³⁾

Despite, however, the use of attorneys to carry on the business of a creditor during his absence, delays could still arise where a deed was in question as one Ralph Hardel found to his cost. Ralph was imprisoned for failure of payment on an obligation in London in July 1298, he claimed he had acquittances and after considerable delay was brought before the court with the acquittances on 11th February, 1299, having managed to secure a writ to the sheriffs that he be produced. Unfortunately for Ralph, his creditors were abroad and their attorney does not know whether the acquittances are their deeds, therefore it is agreed that the acquittances remain with the court whilst Ralph is to be freed if he can find mainpernours. On the 22nd February he complains he is still in prison, but it appears he is unable to find mainpernours; finally on 16th September Ralph again manages to appear before the court, and on that day one of the creditors appears, but denies that the acquittances are his deeds. The parties agree that the matter be settled by arbitration and it is awarded that Ralph pay five marcs in full settlement of the £32, but of Ralph's year in gaol nothing is said.⁽⁴⁾

(3) Y.B. 13 Edw. IV, pasch. pl. 9, cited Hols. IX, p. 168.

(4) C.E.M.C.R. (1298-1307) pp. 26, 35, 43.

In the first year of the reign of Edward III it is stated that complaints have arisen of delays caused by the non-agreement of judges in the Chancery,⁽⁵⁾ the King's Bench, Common Pleas, and Exchequer,⁽⁶⁾ To remedy this therefore, commissioners are to be appointed at each Parliament to hear complaints by petition to them of grievances in these courts. The commissioners are given power to review the record of the court and to call the judges of the court before them, after which, on the advice of themselves as well as that of the Chancellor, the treasurer, the justices of both benches and such members of the King's Council as they might wish to consult, they are to 'make good judgment! Difficult cases are to be reserved for Parliament.⁽⁷⁾ Although the references of the statute seem wide, little use appears to have been made of its powers,⁽⁸⁾ and delays continue, at times even the king is hard put

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- (5) Although the Chancery is mentioned here as though a major court of the land, the Chancellor sat in the Council, for there was at this time no Court of Chancery. See further pp. 291-3
- (6) A Court of Exchequer Chamber for hearing writs of error from the Exchequer Court was set up in 1357 (31 Edw. III, St. 1, c.12) the essential elements of which were the presence of the Chancellor and the Treasurer - see Sel. Cas. in Ex. Ch. (S.S. vol. 51) p. xii, and see 31 Eliz. I, c. 1, s. 1 permitting the court to proceed in their absence, but requiring their presence when the judgment given.
- (7) 14 Edw. III, St. 1, c.5 (1340)
- (8) See Plucknett 'Concise', p. 150, fn. 6 citing Rot. Parl. II, p. 172, No. 60, p. 195, No. 82, and p. 222, No. 64, for attempts to use the provisions of the statute during 1348. As to the court in the Exchequer Chamber, comprising all the justices, which had come into being by the reign of Henry IV (c. 1399) see p. 282

to hurry matters along.⁽⁹⁾

Yet the legislature does slowly attack the more glaring abuses of court procedure; averments against the record on writs of false judgment are dealt with,⁽¹⁰⁾ the taking of inquests is regulated,⁽¹¹⁾ provision is made to prevent delays caused by the sudden movement of the Court of Common Pleas,⁽¹²⁾ attention is paid to the preventing of false entries on the rolls⁽¹³⁾ and of persons taking advantage of literal errors, etc., on the rolls in order to secure reversal or avoidance of a judgment.⁽¹⁴⁾

In 1362 the lot of both the debtor and creditor was helped by

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- (9) See for example Cal. C.R. (1343-46) p. 641, regarding the possible forgery of a statutory recognizance by reason of which certain lands have been kept from the complainant, yet although the king had ordered that, if on search of the statute rolls no debt was found enrolled, right be done to the complainant, justice is still delayed despite facts found as above, therefore it is ordered that the justices now hasten to final discussion - July 29th, 1345.
- (10) 1 Edw. III, St. 1, c.4 (1326-7)
- (11) 12 Edw. II, c.3 (1318); 14 Edw. III, st.1,c.16 (1340)
- (12) 2 Edw. III, c.11 (1328); c. 17 of Magna Carta (1215)-(c.11 1225)-stated this court to sit in "some certain place" and although for the greater part of the time the court sat at Westminster, it did occasionally move about the country. See Pound & Plucknett 'Readings', p. 88.
- (13) 8 Ric. II, c.4 (1384)
- (14) 14 Edw. III, St. 1, c.6 (1340), the statute was re-affirmed in 1421 (9 Hen. V, St. 1, c.4) and extended to allow the amending of defects in process or record after judgment as well as before, both statutes were confirmed and enlarged by 4 Hen. VI, c.3 (1425-6); in 1429 it is stated that no judgment is to be reversed on the ground of error in the record - 8 Hen. VI, c.12. Cf. 8 Hen. VI, c.15 (1429) and 27 Eliz.I c.5. (1584-5)

the order that pleas should be pleaded, shewed, defended, answered, debated and judged in the English tongue instead of as formerly in French, since as the preamble states the French tongue "is much unknown in the said Realm, so that the People which implead, or be impleaded, in the King's Courts, and in the Courts of others, have no knowledge nor Understanding of that which is said for them, or against them by their Serjeants and other Pleaders; and that reasonably the said Laws and Customs would be the more learned and known, and better understood, in the Tongue used in the said Realm."⁽¹⁵⁾

For the creditor or debtor, however, it is not only the need for procedural reform which occasions delays or unnecessary oppressions; a superfluity of courts all extending their jurisdictions into the debtor's business by various means, and the attempts made to settle such jurisdictions, are a mark of this period.

The action of debt is no longer an unwelcome visitor in the common law courts, for it has now become big business; yet the Act of 1278 stating that the royal courts should not hear claims of debt amounting to less than forty shillings and the construction placed on it that the county courts should not take pleas of debt amounting to more than forty shillings ⁽¹⁶⁾ in no way interfered

(15) 36 Edw. III, St. 1, c.15 (1362)

(16) 6 Edw. I, c.8

with many special jurisdictions⁽¹⁷⁾ of the cities and boroughs, etc., nor with the rights of other courts granted with a franchise to have cognizance of pleas.⁽¹⁸⁾ An Hereford custumal of the fifteenth century states quite baldly that a creditor shall be assisted whether "the debt doth exceed forty shillings or not" the reason given being that citizens should not have to go out of their city to recover their debts because of the misfortunes which might occur.⁽¹⁹⁾

An attempt was made to prevent delays in redressing errors which were occurring in London and the courts of other cities and boroughs in 1354 setting out procedure for the trial of such alleged defaults by inquest.⁽²⁰⁾ That a person might 'play' the

(17) As to courts of special jurisdiction see Bl.Comm. III, ch. VI

(18) That is the exclusive right to try causes arising within the jurisdiction of the court - ib. II, p. 37.

(19) Hereford, c. 78 (1478) Bor. Cust. I, p. 207. A good example of these small courts is shown by the procedure in a Water-Bailiff's Court at Dartmouth on a debt due by a deceased Dartmouth merchant under a writing obligatory. The plaintiffs claim debt and it is found that the deceased was possessed of a ship and other goods which are appraised. Judgment that the plaintiffs may claim the goods taken if, within one year and a day no other owner claims them. The debts amounted to £134. 10s. Od. S.C.L.M. (S.S.) iii, pp. 183-4 (1419).

(20) 28 Edw. III, c.10 (1354) as to the reasons for this act see Rot. Parl. II, p. 258, No. 26. The provision as to erroneous judgments in London was repealed by 17 Ric. II, c.12, and the penalty for defaults under the statute in the case of London altered by 1 Hen. IV, c.15 (1399).

courts in order to delay proceedings is well illustrated by a London case in 1389.⁽¹⁾ The plaintiff brings a bond into the Mayor's Court and requests cancellation of it, the defendants fail to appear, but a writ of supersedeas is received by the court stating that the defendants are suing the plaintiff in the Common Bench at Westminster and that the plaintiff's action is intended to hinder and defraud the defendants of their debt. The action commenced on 14th January 1389, the writ of supersedeas is dated 20th of January; on the 8th of July 1389 the plaintiff re-appears before the Mayor's Court with a writ of procedendo to the effect that the defendants made default before the justices and therefore the Mayor and Aldermen are to proceed.

The necessity of seeking permission to have a debtor distrained when he resided in another franchise⁽²⁾ or seeking permission to sue at common law from the franchise court because the debtor has left its jurisdiction⁽³⁾ all gave the debtor time to move on to somewhere new; in some places fear of the Church might

(1) C.P.M.R. (1381-1412) p. 165.

(2) C.P.M.R. (1323-04) p. 258, a merchant of the Staple of Westminster brings a bill to the Mayor and recorder of the City of London under the seal of the said Staple, praying them to do justice to him since his debtor, now within the City has no goods within the Staple by which he might be distrained, and the Mayor of the Staple wishes to observe the liberties of London. The defendant did in fact appear before the court and denied the claim, a jury is chosen, one half of whom are Lombards but they fail to appear and the case finally goes to arbitration, but no result is given.

(3) C.P.M.R. (1413-1457) p. 188 (1426) John Grisle, draper, obtains leave to prosecute William Randolph at Common Law, the latter having withdrawn from the City of London.

lose the creditor his debt.⁽⁴⁾

Special Jurisdictions

Of the major common law courts, the Exchequer, although agreeing in 1311 not to take jurisdiction by regarding parties as fictitiously the servants of the Exchequer officials,⁽⁵⁾ has, by the end of the fourteenth century, re-entered the contest for creditors by means of a writ of *Quominus* the facts stated in which will, by the sixteenth century have become nothing more than a mere fiction.⁽⁶⁾

The Admiralty Court for a time also provided some rivalry in the common law field,⁽⁷⁾ two statutes were passed under Richard

(4) *Bor. Cust. I*, p. 206, cites a Cork custom of 1339 (c.19) regarding the attachment of Clerks, Chaplains, etc. who are to be attached for debt or breach of contract in the same manner as a layman would "as far as they can be for fear of sentence (of excommunication)".

(5) 5 *Edw. II*, c. 25

(6) The creditor brings his debtor into the Exchequer stating that because he is not paid, he (the creditor) is less able to pay his own debt to the king. Thus in *Brayne v. Molyneux* (1537), the plaintiff, a farmer of land in the hand of the king, brings the debtor into the Exchequer stating that because the debt is not paid, he (the plaintiff) "is impeded in paying his rent at the king's Exchequer". Judgment for the plaintiff - *Sel. C.L.M. (S.S.) II*, p. ciii. The statute 25 *Edw. III*, st. 5, c. 19 (1351-2) probably aided the growth of this plea to a state where it became pure fiction.

(7) As to the width of the jurisdiction of this court see Marsden 'Select Pleas in the Admiralty' (S.S.) Introduction.

II⁽⁸⁾ to regulate its jurisdiction and confine its activities to matters on the sea; by 2 Hen. IV, c. 11 an action on the case for double damages is given to persons grieved by being wrongfully sued in this court.⁽⁹⁾

Of the special courts, the Court of the Marshalsea, which dealt largely with matters concerning members of the king's household, was regulated to prevent false allegations that the parties suing were members of the household.⁽¹⁰⁾

The Court of the Constable and Marshal, a court of chivalry,⁽¹¹⁾

(8) 13 Ric. II, st. 1, c.5 (1389-90) and 15 Ric. II, c.3 (1391)

(9) 1400-1. See Rot. Parl. III, 498, No. 47 (1402) giving a right of appeal from the jurisdiction of the Admiral's Court to the Council. Arguments as to the jurisdiction of this court are still raging in 1686 - see Zouch (R.) 'The Jurisdiction of the Admiralty of England Asserted' (1686) esp. 'Assert V'. Cf. Hore v. Upton (1452) Suit under statute for wrongfully suing in the Admiralty Court - Fifoot 'Sources', p. 361.

(10) 28 Edw. I, c.3 (1300) and see 5 Edw. II, c.26 (1311). By 13 Ric. II, st. 1, c.3 the jurisdiction of the court was not to extend above twelve miles around the lodging of the king - see further F.N.B. 241 B., 10 Co.Rep. ff. 68 et seq. In 1406 it was ordered that the court hold no pleas save those held at the time of Edward I - Rot. Parl. III, 588 a No. 82, and by 15 Hen. VI, c.1 (1436-7) the defendant is given the right to plead that either the plaintiff or he, or both of them are not members of the king's household; from the Act it appears that the court has been hearing pleas of debt between parties where one or both were not of the household. For an example of an action under the Act of Edward I, see Du Perch v. Phillips (1630) S.C.L.M. (S.S.) ii, p. 142.

(11) See Co. Inst. IV, 123-9.

also became the subject of regulation. In 1384 it is said that this court has heard pleas belonging to the Common Law and this "to the great Damage and Disquiet of the People" and that it is only to hear those pleas which belong to it;⁽¹²⁾ this does not seem to affect the court in any way, since within six years it is stated that the court is still hearing pleas of "Contracts, Covenants, Trespasses, Debts and Detinues", etc., but that its jurisdiction is now to only be over contracts relating to deeds of arms and war out of the realm, and of matters touching arms or war within the realm, plus those matters over which it formerly presided if they are reasonable. Any person feeling himself grieved may have a writ to stop the proceedings of the court until the Council have decided the matter of its jurisdiction.⁽¹³⁾ Unfortunately, when the time came for the Council to adjudicate one such matter, the result was not very good. Sometime after the statute 13 Ric. II, st. 1 c.2, a plaintiff sued in this court for a debt of £1,200 on an obligation bearing date at Bordeaux,⁽¹⁴⁾ the defendant obtains a writ under the privy seal to the court to surcease from hearing

(12) 8 Ric. II, c.5

(13) 13 Ric. II, st. 1, c.2. A right of appeal from the jurisdiction of the Court of the Constable and Marshal to the Council is further granted in 1402 - Rot. Parl.III, p. 498, No. 47.

(14) Sel.Cas. Ex.Ch. (S.S. vol. 51) I, pp. 21-3 case 8.

the case under the force of the above statute, but the plaintiff also sues to the Council, and a writ is issued to the court to proceed, as a result of which, judgment is given in favour of the plaintiff; all this takes place during the reign of Richard II. In the fifth year of Henry IV the defendant appeals against this judgment on a number of grounds, and a commission is appointed to hear this appeal.⁽¹⁵⁾ Unfortunately, the defendant dies somewhere before 1406 and it is left to the tenants of some of his lands to sue out a writ of supersedeas to the Constable, whereupon the question of disputed jurisdiction again returns to the Council, who promptly commit it to the justices of the Exchequer Chamber where it finally arrives in 1411; there the matter is discussed, but no decision is reported.

This need to sort out the jurisdictions of the various courts and to give rights of appeal was not only a matter in which the creditor was interested. Courts not of record⁽¹⁶⁾ had no right to take pleas of debt above forty shillings nor to imprison a man,

(15) Cal. P.R. 5 Hen. IV, p. 315

(16) "A court of record is that, where the Acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question." Bl. Comm. III, 24, cf. Co. Inst. II, 311.

so that the standing of a court could be of great concern to a debtor.

In 1459 one John West, imprisoned in the Fleet on debts found due before the Court of the Tower of London, secures his appearance before the King together with the reasons of his taking and claims that the said court is only a Court Baron and not a court of record; the plaintiff claims that it is a Court of Piepowder (a court of record) held daily before the Constable of the Tower and the Steward for hearing pleas of debt, trespass, etc., arising within the Tower and its precincts. This does not prevail, however, and it is held by the justices that the Tower Court is only a Court Baron and had only ever been so, that it was not a court of record and that John be released and his sureties be discharged. (17)

Few courts escaped some sort of controlling legislation in this period and even the once highly popular Pie Powder courts are dealt with. Grievances have arisen that the jurisdiction of these fair courts has been extended to cover matters which arose outside the time of the fairs and also that feigned actions are brought at such fairs all of which is contrary to "Equity and good Conscience",

(17) Cal. Ltr. Bk. L, pp. 1-3

for which reason many merchants no longer attend the fairs.⁽¹⁸⁾

To remedy this, the plaintiff is to make oath that the cause of action arose within the time of the fair and is within its jurisdiction; the defendant may dispute this fact after the plaintiff has taken his oath and show evidence against it, if it is found that the defendant is correct then the plaintiff is to have his suit at common law.⁽¹⁹⁾ These provisions must have played a substantial part in hastening the decay of these once very popular courts, but with the growth of trade, the trader no doubt felt he was better able to await the delays of the common law especially as his markets grew from other towns to other countries.

Yet by the eighteenth century Blackstone, remarking on the statute 19 Geo. III, c. 70⁽²⁰⁾ (which allowed writs of execution to issue from the courts at Westminster after judgment in the fair court where the defendant was not within its jurisdiction) says that the statute "may possibly occasion the revival of the practice and proceedings in these courts, which are now in a manner forgotten."⁽¹⁾

(18) See Petition Rot. Parl. VI, p. 187, No. 28

(19) 17 Edw. IV, c.2 (1477-8); the provisions of this statute are substantially repeated in 1 Ric. III, c.0 (1483-4)

(20) (1779)

(1) Bl. Comm. III, 33.

All the delays and oppressions discussed above arose from practices within the realm, yet there existed one oppression, practised mainly among traders, which caused many delays in the payments and collection of debts, that of impleading one's debtor or creditor in a foreign court, regardless of the fact that the matter might well have already been litigated on in England. In some cases the complainant was ready to pursue his quest as far as the Pope in the search for a Papal Bull in his favour, with its ever present threat of excommunication if it is not obeyed. In 1353 it is provided that any person suing in a foreign court on a matter which should properly be brought before the king's court is to appear before such body as the king shall direct within two months of notification, failure to do so is to result in outlawry.⁽²⁾

Of the common law and statutory provisions existing to aid the debtor and creditor and of the provisions for the execution of judgments we have already spoken,⁽³⁾ it falls now to look at remedies which, although not available as of right, might be obtained by

(2) 27 Edw. III, st. 1, c.1. See for example the case of Heyron v. Proute, (1450-83). This case continued for over twenty years concerning debts owed to a staple merchant which were still uncollected at his death soon after 1481. It illustrates the many delays and uncertainties which beset the creditor and shows also the use of the Papal Bull as a potential aid to debt collecting. - Sel. Cas. K.C. (S.S.) pp. cxiv-vi; 110-11⁴

(3) See pp. 150, 157, 176-205.

favour, flowing at least in name from the king's grace and being to some extent outside and above the common law.

Protection and Privilege

Letters of Protection

The king's right to grant protections to various people under the privy seal⁽⁴⁾ was well suited to an era where the king rules mainly alone with just the odd reference to his council; when the legal business is handed over to a larger extent to a system of courts, and a parliament comprising members of the three estates of the realm is brought into existence, then letters of protection become suspect as high handed acts of the king which ought to be carefully regulated. The ordinances of Edward II stated that letters under the privy seal were not to delay nor disturb the common rights.⁽⁵⁾ Under Edward III this was carried

(4) The Great Seal was regarded as the personal seal of the king, and from early times it is the Chancellor to whom it is given for safe custody. The Privy Seal on the other hand, whilst perhaps at first being used in much the same manner as the Great Seal is quickly regarded as 'official rather than personal'. The clerk to whom it is at first entrusted later becomes the Lord Keeper of the Privy Seal. See Maxwell-Lyte (Sir H.C.) 'The Great Seal of England' (1926), pp. 1, 10. It is the Privy Seal which is normally used to seal letters of protection. But see *ibid.* pp. 55-58 for some letters of protection given under Edward III, which contain no mention of the Privy Seal.

(5) 5 Edw. II, c.32 (1311) The king's intervention could prove very serious, Edward II ordered one Robert de Wight who owed money to Thomas de Wight to appear before the Mayor and Alderman of the City of London and that the money he owes "be levied without delay from the goods of the said Robert", as the money is required for ransoming Thomas.-*Cal.Ltr.Bk. E, f. xxvi, p. 38* (1314)

a step further when it was said that it shall not be commanded by the great seal or the little seal to disturb or delay common right.⁽⁶⁾ The Commons petition in 2 Henry IV that in order to enforce this statute a penalty of twenty pounds be levied on all persons suing for the king's letters in delay of judgment and this is granted.⁽⁷⁾ Legitimate protections granted to a debtor who was on the king's service to cease proceedings until such time as he return are obviously necessary,⁽⁸⁾ but it left too much scope for the delinquent debtor. Among the ordinances of Edward II is found a provision which legislates against people who pretend to go into the king's service and do so only to delay the plaintiff. In

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- (6) 2 Edw. III, c.8 (1328). Requests that the statute be enforced are made in 1347 (Rot. Parl. II, p. 107a) - when it is said the statute is to be enforced regardless of grants of protection -; and again in 1383 (Rot. Parl. III, p. 164a) - where it is said that the abuses of granting protections to the injury of creditors is to be redressed by the Chancellor. The Commons spend a lot of their time trying to enforce the common right, in 1389-90 they achieved the not inconsiderable grant on petition that every one may sue at law against any person of whatever degree. Rot. Parl. III, p. 270, No. 45.
- (7) Rot. Parl. III, 471, No. 64. The need for a letter under the privy seal to be obeyed in contravention of a litigant's rights was discussed in 4 Edw. IV, Sel. Cas. Ex.Ch. (S.S. vol. 51) I, p. xxvii citing Y.B. 4 Edw. IV pl. 28 before the justices in the Exchequer Chamber.
- (8) Many examples can be found in the court rolls, e.g. 11 December 1338 in the Mayor's Court in the City of London, Nicholas Bonere appears on summons for a sum he acknowledges to be due to others represented by Walter de Gilyngham. A king's writ of protection accorded to him during his absence abroad with Thomas de Ferariis on the king's business dated Kenyngton 21 Nov. A^o 12 Edw. III (1338) is produced and proceedings are stayed (C.P.M.R. (1323-1364) p. 184.). It became the practice to grant letters of protection for such service for a year and a day at a time, after which they might be renewed - F.N.B. 28 D.

future the plaintiff may oppose the letters of protection or seek a writ from the Chancery, if the defendant is found guilty then he is to pay damages at the discretion of the judges and go to prison for a year and a day.⁽⁹⁾

The custom of the king to grant letters of protection to his debtors so that they might not be impleaded for debt until his debt had been paid was but one more thorn in the creditor's flesh, and at a time when being in debt to the Crown was no novelty to any man, it provided much scope for the debtor. To some extent a remedy was provided by Edward III when it is allowed that the creditor may sue the king's debtor regardless of such letters of protection and the debtor is to answer him, but if the creditor be successful his right to execution is to be in abeyance until the king's debt be paid, or,

(9) 5 Edw. II, c. 37 (1311) - the ordinances of this year were all repealed by 15 Edw. II (1322) although several were resurrected later, but little attention is paid to them. Under Edward I it was granted that a defendant might aver that the letters of protection for a person supposedly in the king's service were false, if this were found to be so then the person seeking to use them was imprisoned and remained there at the king's will, Rot. Parl. I, 162a. No. 24 (1304). This failure to substantiate such letters does not seem to have been taken very seriously for in Y.B. 1 Hen. VI (S.S. vol. 50) p. 86 (1422-3) a case goes before the judges of the Exchequer Chamber where it is proved that the letters tendered are false, yet the judges merely rejected them, but there appears no trace of any fine or punishment. During the eleven years that ordinance of 1311 was in force the power to prevent interference by the king was occasionally used; see Y.B. 11 Edw. II (S.S. vol. 61) p. 315 (1317-18)

the creditor may elect to pay the debt owing to the king and take immediate execution on both debts.⁽¹⁰⁾

With the imprisoning of the debtor a practice developed of alleging indebtedness to the king "voluntarily, and by a feigned Cause, ... so to delay the Party of his Recovery" and also to obtain removal from the debtor's present prison to the Fleet.⁽¹¹⁾

A quite novel remedy is evolved to combat this;⁽¹²⁾ the debtor's recognisance of his debt to the king is to be received, but then if it appear he is not debtor to the king by record he is to remain in his present prison until satisfaction is made to his creditor, after which he is to be transferred to the Fleet prison

(10) 25 Edw. III, st. 5, c. 19 (1351-2) - under 1 Edw. III, st. 2, c.4 (1326-7) the king's debtors of £300 and under were to have the debt levied from them according to their estate "saving always their countenance," so that it might well be worth a creditor paying the king his debt and taking immediate execution for both debts rather than wait for the long drawn out payments to the king to cease. For an example of the letters of protection granted by the king to stay execution see Cal. Ltr. Bk. G. fo. xxxv, p.41-2 (1355).

(11) The Fleet offered more liberty of movement than most debtor's prisons, that is if the debtor was prepared to pay. As to the making of such payments, see Ashton (J.) 'The Fleet' (1888) pp. 279-291.

(12) 1 Ric. II, c. 12 (1377)

until he has made satisfaction to the king on his recognisance, a nicety which probably did not appeal over much to the debtor seeking delay or change of prison.

Royal Prerogative

These acts, however, did not in any way affect the prerogative of the king to step in and claim his right to be paid first whilst the debtor was in the process of being sued,⁽¹³⁾ or, after judgment but before execution,⁽¹⁴⁾ or to wait until property of the debtor, whether in the hands of the debtor or in the hands of a third party is attached and then take such property. Thus in the Mayor's Court in London in 1409 in a plea of debt of £90, the debtor, failing to appear, is attached by goods to the value of

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- (13) C.P.M.R. (1413-1437) p. 83 - Writ of supersedeas that the action against the defendant be superseded and the plaintiff is to be summoned to the Court of the exchequer to prosecute his suit in order that the king might have his prerogative of being satisfied before other creditors, See also ib. (1381-1412) p. 260. Writ of habeas corpus to the Mayor and Aldermen of London declaring that it was a royal prerogative that debts owed to the king should be paid before satisfaction was made to other creditors. Cf. 33 Hen. VIII, c. 39, ss. 50-2 regarding the right of the king to forfeitures in outlawry and that he shall be preferred in all suits and executions; and see 7 Co.Rep. 21a-21b.
- (14) C.P.M.R. (1323-1364) p. 263. writ of protection in favour of Peter Radulpi of the Society of the Bardi. Creditors are forbidden to enforce judgments against him until he has paid the king all moneys due to the Crown.

£84. 13s. Od., ... it appears, however that the debtor paid £10 when the debt first contracted and plaintiff is ordered to pay this amount back to the debtor. This money is immediately arrested by the Serjeant on behalf of a third party who has a plea in debt of £26. 19s. 4d. pending before the court. The plaintiff now appears and produces a writ of supersedeas directed to the Mayor and Aldermen reciting the king's prerogative over creditors and stating that the plaintiff had £10 in his hands belonging to the defendant, in respect of this sum the Court of Exchequer has ordered the plaintiff to pay the king's collectors of customs and subsidies 115s. 3d. due from the defendant, a merchant of Venice, as parva custuma and subsidy on goods brought into the Port of London. To that amount the Mayor is ordered to suspend all claims, accordingly the king receives £5. 15. 3d. and the third party must be satisfied for the present with £4. 4s. 9d.⁽¹⁵⁾

Privilege

The birth of a privilege is generally to be found in an

(15) C.P.M.R.(1381-1412) pp. 300-1. See ib. (1413-37) p. 84, money in hands of third party attached on behalf of creditor, a writ of supersedeas issues and the third party appears before the Court of Exchequer and acknowledges holding money belonging to defendant who is debtor to the king, therefore the money to be paid to the king in accordance with the prerogative.

immemorable custom which, through constant use has gradually hardened into a substantive right, and in certain cases, a privilege might well be called in aid by the creditor or oppressed debtor. The right of a person to remain free from arrest whilst attending the courts and returning from the same appears many times in the various court rolls. Thus, where a defendant was taken and arrested on a number of actions of debt in the city of London, for which reason he was unable to keep his day in the Court of the Exchequer in an action of account, a writ of supersedeas issues stating that this is contrary to the ancient custom that none should be hindered in going to the king's court to sue or defend or in returning thence.⁽¹⁶⁾

Similarly, where a defendant is imprisoned for debt by the Pie Powder Court of Westminster, thereby failing to keep his day in the Court of Common Pleas, the lower court is held to be guilty of contempt of the court of Common Pleas.⁽¹⁷⁾ An example of the

(16) *Ib.* (1413-37) p. 83. See *Bl. Comm.* III, 289.

(17) *The King v. Officers of the Abbot of Westminster's Court of Pie Powder* (1455) *S.C.L.M.* II, pp. 109-113, see copy of king's writ in *Appx.* pp. 738-39.

difficulties brought about by such arrests appears among the Chancery records and concerns the London Sheriff's Court and the Westminster Staple Court in 1355.⁽¹⁸⁾ The defendant is taken and imprisoned by virtue of a statute staple made between himself and the first plaintiff, but is released on bail with the assent of the first plaintiff so that an arrangement could be made for the payment of the debt, if no arrangement is made then the debtor to return to prison. All this is stated in a writ to the Sheriffs of London which goes on to say that they took the defendant whilst he was on bail and put him in Newgate Prison at the suit of several merchants who said the defendant owed them money, this says the King being "in contempt of us and the manifest enervation of the Ordinance of the Staple..."⁽¹⁹⁾ The sheriff replies that before the arrival of the king's writ the defendant had been taken at the suit of the second plaintiff and at the time when he was taken he was not in the charge of the person to whom he had been bailed or of "any other person whomsoever", therefore since defendant is indebted to the second plaintiff by letter obligatory he has been put in prison until such time as he satisfy the debt. For this reason, says the sheriff, he has not released the defendant to the first plaintiff so that he might be taken back to the staple and

(18) Forte Guerre v. Wendover and Dyose v. Wendover (S.C.L.M. III, pp. 64-5).

(19) See 27 Edw. III, st. 2, cc. 8, 9.

imprisoned until that debt be satisfied, as requested in the king's writ. Unfortunately, no further details are given. ⁽²⁰⁾

Peers of the realm may not be arrested and are free from the possibility of outlawry, for them summons and distress infinite is the only remedy in debt. To this privilege the members of the House of Commons quickly attached themselves, and it is allowed that they shall not be liable to be attached by their bodies or their goods whilst Parliament is in session, but saving the rights of their creditors after the dissolution of Parliament. ⁽¹⁾

Legislative recognition that this privilege existed can be found in a statute of 1429 ⁽²⁾ which deals with members of the clergy ⁽³⁾ who are attending Convocation, it appears that they and their servants etc., are often arrested on their journeys to and from

(20) See S.C.L.M. (S.S.) iii, p. 64, fn. 4. The editor suggests that the appearance of this record among the Chancery records may indicate some form of collusion involved in the case.

(1) See Rot. Parl. VI, p. 191, No. 35. (1477) re the securing from execution of one John Atwyll during the session of Parliament given in Appx. pp.740-42. See also Rot. Parl. V, p. 374, No. 9 (1460) re Walter Clarke, member for Chippenham, and ib. VI, p. 160, No. 55 (1475) re William Hyde also a member for Chippenham. In 1429, one William Larke, a servant to one of the Members for the City of London, was committed to the Fleet prison on judgment from the Court of Common Pleas during the sitting of Parliament; it is ordered, upon consent of the counsel for the creditor, that William should be delivered for the present, but reserving to the creditor the right of execution after the close of Parliament. - ib. IV, p. 357, No. 57.

(2) 8 Hen. VI, c. 1

(3) Freedom from civil arrest whilst taking divine service or taking the sacrament to sick persons was granted by 50 Edw. III, c.5 (1376-7) and repeated by 1 Ric. II, c. 15 (1377), but they must not stay within a church or sanctuary by collusion or fraud.

the convocation, therefore it is enacted that they "shall forever hereafter fully use and enjoy such Liberty or (Defence) in coming, tarrying, and returning, as the Great Men and Commonalty of the Realm of England, called or to be called to the King's Parliament do enjoy, and were wont to enjoy, or in Time to come ought to enjoy."

Privileges may arise from time to time for special circumstances of which two examples will suffice. In 1409 a proclamation is issued to the effect that credit for purchases should not be given to mariners in the galleys at the Port of London lest they be delayed in sailing.⁽⁴⁾ An agreement between the king and Venetian traders had already ordered much the same thing; the captains and masters of the galleys shall hear and determine all civil causes which relate to their galleys and crews, (the immunities of London being preserved), also no one in England is to supply the crews with provisions without sufficient security from other persons.⁽⁵⁾ In both cases the person disobeying shall lose his remedy at law. Among borough customs various privileges will be found, it not being unusual to regulate the right of arrest during the time of a fair or market; thus a Lancaster custom of 1562 states "that the sergeants shall arreist

(4) Cal. Ltr. Bk. I fo. lxxx, p. 73 also Riley's 'Memorials', p. 574.

(5) S.P. (Venetian) 1, pp. 40-1, No. 138 (1202-1509)

"no personne within the precincts of the fayres for no olde debte or matter, treasons and fellonies excepted, but they may arreist for bargaynes made in the same fayres and to bringe the parties before the maior or his deputie." (6)

(6) Bor. Cust. I, p. 106.

CHAPTER 10RIGHT WELL BELOVEDThe Force of the PetitionThe King's Council

Above the courts of Exchequer, Common Pleas and King's Bench we find the King, generally surrounded by his councillors and from time to time accompanied by his great council or parliament. It is mainly with the council we are concerned; that body of persons retained by the King, from whom he could obtain opinions and take advice. It had no particular jurisdiction, nor did it deal with only judicial matters; cases of every sort appear in the petitions it receives.⁽¹⁾ Yet the important point is that the council was not bound by the set limits which the common law worked out for itself, if a remedy was required and the common law had none, then the council was the body which might afford relief, whether at first instance or as a means of appeal.⁽²⁾ From the middle of the fourteenth century,

(1) See Sel. Cas. K.C. (S.S. vol. 35) pp. xxvi-xxxv for an account of its jurisdiction.

(2) The manner in which a case might circulate from beginning in the Common Pleas and then going back and forth between the King in Council, the King's Bench and the Council in Parliament is well illustrated in *Staunton v. Staunton* (1341) Y.B. 13. 14 Edw. III (R.S.) pp. xxxvii-xliv; Y.B. 14. 15 Edw. III (R.S.) pp. 288-300. An account of the case is given in KERLY (D.M.) 'History of Equity', pp. 19-20.

by which time the common law had practically destroyed its own right to give some form of equitable relief to parties⁽³⁾ and parliament was finding it had too little time to deal with the mass of petitions which gradually grew before it, the council grows in stature as the distributor of equitable remedies.⁽⁴⁾ It is from within this body that the Chancellor gradually emerges in his judicial capacity. For as parliament found it necessary to turn over to the council petitions still before it at the end of a session, so the council, observing the terms of the King's courts, found it necessary to hand over to the Chancellor petitions left outstanding at the end of a term.⁽⁵⁾

The way in which application was made to the council was by petition (generally known as a bill) and this may be addressed to the

- (3) See Plucknett 'Interpretation of Statutes', pp. 121-7 as to the manner in which the common law restricted itself. The Commons withdrew from any form of judicial control save through statute at the end of the fourteenth century when they protested against being made parties to judgments in parliament and it is agreed that such judgments shall be by the King and lords only - Rot. Parl. III, p. 427, No. 79 (1399).
- (4) See Rot. Parl. IV, p. 174, No. 21 (1422) stating that all petitions delivered to parliament and not answered there shall be committed to the council for them to determine including any petitions from the commons which have not been dealt with. See also Rot. Parl. IV, p. 301, No. 21 (1425); IV, 334, No. 45 - Lords of Council to determine petitions unanswered in parliament with the advice of the justices - (1427); IV, p. 506 No. 33 (1437) Lords of Council to determine petitions left over after dissolution of parliament, calling to them the justices and others versed in the law.
- (5) The council by custom kept the same terms as the king's courts, see Nicolas (Sir N.H.) 'Proceedings of the Privy Council' III, p. 36. As to the council generally see Baldwin (J.F.) 'The King's Council.' No attempt is made here to distinguish between petitions before the council or before the Chancellor, since the intention is only to show what measures of relief might be obtained through petitioning. The term 'equity' is also used only in the sense of obtaining relief.

King, or the King and council or parliament, or, to the Chancellor.⁽⁶⁾

If parliament is prepared, however, to allocate petitions to the council when it has not the time to deal with them, it does not mean that it does not seek to regulate those petitions received by the council,⁽⁷⁾ nor does the common law take kindly to any usurpation of its jurisdiction and it is constantly stated that common law matters shall be remitted to the common law,⁽⁸⁾ this is repeated in articles to govern the working of the council in 1429 but the whole form is rendered almost void by the last part of the article which says, "but

- (6) The petition might be a petition of grace, requiring a favour from the King, or a petition of right, requesting a judicial remedy; but there appears to have been little attempt to distinguish between them; nor was there any necessity for the petitioner to name the court in which his suit is to be heard. - See Sel.Cas. K.C., p. xxv. Attempts to seek out members of the council in order to expedite a petition led to the regulating of the taking of the petitions - Nicolas III, 149, 124.
- (7) Rot. Parl. III, 162, No. 50, that all petitions and bills in parliament to be determined in parliament where necessary that they should be, but such as can be determined by the council to be sent there. The council becomesthus largely concerned with the judicial petition or bill.
- (8) Many petitions are in fact refused on the ground that the matters could quite well be dealt with at common law. It was also the practice to submit the petition to one of the common law courts for it to adjudicate upon, the council supplying any extra jurisdiction which might be necessary to provide a remedy. See for example, Rot. Parl. II, 438, No. 73 (132) where a case is referred to the King's Bench with instructions that it is to look into the matter and do right to the petitioners.

if so be that the discretion of the Councell fele to grete myght on that o(ne) syde, and unmyght on that other, or elles other cause resonable yai shall meve hem."⁽⁹⁾

Exchequer Chamber

There is also another consultative body which comes into being during this period, probably brought about at first through the Chancellor summoning to the Exchequer Chamber all the justices to give answer on some problem.⁽¹⁰⁾

"The sole function of the assembly of justices was to advise; they deliberated on cases which were referred to them by other courts, but they never acted in any sense as a court of first instance. They sought to remedy delays of justice which arose when courts were unable or unwilling to decide cases of difficulty and importance. Cases are referred to them from every court of importance in the country; the Sovereign, Parliament, the Council, the Chancellor, all these sought advice in the Exchequer Chamber, and cases from the courts of common law were often adjourned there."⁽¹¹⁾

(9) Rot. Parl. IV, p. 343, art. 3

(10) Sel.Cas. Ex.Ch. (S.S. vol. 64) II, pp. xi-xii. Although the court is already in being at the commencement of the reign of Henry IV, extensive use is only made of it after the middle of the reign of Henry VI - *ibid.*

(11) Sel. Cas. Ex. Ch. (S.S. vol. 51) I, p. xix.

The fact that the common law judges were constantly in communication with council, since many of them sat there, together with the fact of their meeting together for discussion in Exchequer Chamber kept troubles between the common law and the council down to a fairly minor level, it is more at the methods used by the council to secure attendance, and its mode of examining witnesses that the complaints are levelled, for these were superior to those in force under the common law, also contrary to the common law principle that the writ of summons should inform the persons receiving it of the cause he was to answer. The writ of summons of the council merely called upon him to appear; where it imprisoned it did so for an indeterminate time.⁽¹²⁾

The reasons for the petitions are many, but often they have in common the fact that the petitioner is poor,⁽¹³⁾ that there is no

(12) The method of summoning came to be generally by writ of sub-poena - that the defendant appear upon pain of a large fine or imprisonment. To avoid oppressive use of the petition in 1394 the Chancellor is empowered to grant damages to a person injured by facts alleged in a petition and on examination found not to be true, (17 Ric. II, c.o). In 15 Hen. VI, c.4 (1436-7) it is stated that many people are greatly troubled by the use of the writs of subpoena which are purchased in many cases for matters which should rightly be tried at common law, therefore to remedy this no sub-poena is to issue until the petitioner has found surety to satisfy the defendant his damages and expenses if the case is not proved. As to the procedural methods in general use by the council and Chancellor, see Sel.Cas. K.C. (S.S. vol. 35) pp. xxxv-xliv.

(13) Cal.Proc. Ch.II, xii, where the petitioners must needs use a petition they being 'so pouere that thay may not apparay wyth (the defendant) in no sute ne tryall at the lawe'. The lack of expence was one of the added attractions of the petition, in 1429 it was commanded that 'the Clerik of the Counseill shal be sworn, that every day that the Conceill sittet on any Billes betwix partie and partie, that he shal, as ferre as he can loke which is poverest sutours Bille, that furst to be rad and answerd'; counsel is also to be freely given to the petitioner -Rot.Parl.IV,p.344 art. 15.

remedy at common law,⁽¹⁴⁾ or often that the person against whom he would claim is too powerful to be dealt with by the ordinary courts.⁽¹⁵⁾ In many cases the plea is that the defendant be examined and that action be taken on the examination. "This is most frequent in cases where cross-examination of the defendant is highly necessary to the plaintiff's case, as where the plaintiff complains of imprisonment on a false plea of debt."⁽¹⁶⁾

The introduction of outlawry into debt gave need of petition for relief, for where the debtor died outlawed then his goods were forfeited to the King whereby the plaintiff was 'destitute of alle maner of remedie at the comune law'.⁽¹⁷⁾ Delays for any merchant may

- (14) See Barbour (W.T.) 'The History of Contract in Early English Equity' (Oxford Studies in Social and Legal History, Vol. IV - 1914), pp. 101-110. Deeds lost or stolen provide a typical example of this, see *ib.* p. 186 citing Ch. Petition XI, 160, given in Appx. p. 743
- (15) *Sel. Cas. Ch.* (S.S. vol. 10) pp. 68-9, No. 70, petitioner states that although lands given to him in execution of a statute staple, he is prevented from collecting rents, etc. from the lands because the defendants have interfered to such effect that the tenants dare not occupy or work their lands, he therefore seeks an injunction that the defendants shall not 'intermeddle or disturb' him, his servants or farmers.
- (16) *ib.* p. xxvii. *Cal. Proc. Ch. I, iv. temp. Ric. II. Briddicole v. Forster* - Petitioner prays a remedy against the defendant by whom he had been grievously assaulted, and conveyed to the compter upon a false plea of debt. A subpoena might also be requested to issue to a witness that he be directed to appear and give evidence - *Staverne v. Bonynton* (temp. Hen. VI) *Cal. Proc. Ch. I, xix.*
- (17) *Sel. Cas. Ch.* (S.S.), pp. 131-2, No. 137. The King might well intervene and grant part of a forfeiture to a person, thus in 1398 an outlawed debtor and a person to whom he had sold lands are ordered to appear and pay over moneys they hold, as the King, through his grace has granted one Margaret £100 of the outlaw's goods. *Cal. C.R.* (1390-9), p. 338.

be serious, for a foreign merchant they may well be fatal. In 1389 the following petition is addressed to the Archbishop of York, at that time the Chancellor of England.

"Humbly beseecheth your servant Bernard Edward de Reco of your charity that if it be possible to do that which I crave of you, of your mercy let it be speedy, because six months are now elapsed since those merchants held my moneys and would not return them to me, and my ship remains unfreighted in the dock, and I cannot load her and I cannot go, nor yet stay for a long prosecution, and my creditors in London wish to be paid; Wherefore, most reverend father and Lord, you who are the mother of Justice, deign to provide right and justice, and may your holiness please to send for the said merchants that they may appear before you to pay to the said Bernard what shall seem just according to your discretion.

Writ directed to Reginald Grille, Ciprian de Maris and Benedict Lomelyn, merchants of Genoa, commanding their appearance before the King and his Council in the Chancery, on Friday next, to answer, etc., on pain of our grave indignation and the peril which will thereby ensue. Dated, 15 Feb. 1389."⁽¹⁸⁾

(18) Sel.Cas.Ch.(S.S.) p. 10, No.9. For a statement by the Chancellor regarding the treatment of alien merchants and the need for speedy justice in the law merchant, see Appx. p. 744. Although the alien merchant could sue in the common law courts and many local courts provided that half of the jury called should be foreign, yet the council or Chancellor in many cases provided the only real answer to their problems.

Enforcing Equity

The strict rules relating to the wording of pleas, etc., could be overcome when proceeding by petition; so that where a bill of debt brought in the Chancery was defective in its wording, since it omitted details generally included in such bill, and on the case being sent to the King's Bench for trial, exception was taken to the omission, the Chancellor promptly summoned the judges to the Exchequer Chamber to hear opinion as to whether the bill could be amended. Although the judges were divided on this, it appears that the bill was amended.⁽¹⁹⁾ Another procedural difficulty surmounted to some extent through the petition was the right of the debtor to wage his law where the creditor could not produce a deed; in some cases the petition is brought before attempting to bring the case at common law;⁽²⁰⁾ in others, only after the creditor has been defeated by the debtor successfully making his law.⁽¹⁾ The writ of summons or the subpoena of the council and chancellor was not limited by the boundary of a county or the rights of special franchises so that it could pursue the debtor as he trotted from county to county,⁽²⁾ unlike its common law

(19) Sel. Cas. Ex. Ch. (S.S.) II, pp. 96, 200.

(20) BARBOUR (W.T.) 'The History of Contract in Early English Equity' (Oxford Studies in Social and Legal History, vol. IV - 1914) pp. 99, 182 citing Chancery petition IX, 335 given in Appx. pp. 745-6.

(1) Barbour, p. 99, citing Ch. Petn. XVI, 386.

(2) See Kerly, p. 17.

counterpart which had to be sued into each county with its corresponding delays in awaiting returns by the sheriff. The subpoena is requested to be issued into many of these special jurisdictions and even into the sanctuaries,⁽³⁾ although what course the council or Chancellor was expected to pursue in such cases to enforce the writ or whether such petitions were attended to does not appear. Injunctions are also sought to prevent the debtor leaving the realm, and writs of ne exeat regno⁽⁴⁾ were issued to stop fraudulent debtors fleeing England happily leaving their debts safely behind them.⁽⁵⁾

(3) See Barbour, pp. 81-82, and Ch. Petn. LIX, 106 cited at p. 81 where the petition states that the debtor has fled to a 'place privileged and seyntwary where your besechers can no remedy have by (the) comune lawe'. See also Sel.Cas.Ch. pp. 4-5, No. 4 where petitioners ousted from their property in the town of Beverley and because of which the petitioners 'can have no remedy at common law because the said tenements are within the franchise of Beverley, of which the Archbishop is lord.'

(4) As to these writs see F.N.B. 85 A. By 5 Ric. II, st. 1, c.2 (1381) which forbade nationals to leave the realm without the King's licence, the only exceptions being 'Lords and other Great Men of the Realm, and true and notable Merchants, and the King's Soldiers'. cf. F.N.B. 85 F. The statute was repealed by 4 Jac. I, c.1, s.4 (1606-7)

(5) See Kerly, p. 151.

The Need For a Deed

So far the use of the petition has been illustrated only on behalf of the creditor, yet the sanctity which surrounded the deed witnessing a debt⁽⁶⁾ provided much trouble for the debtor, who, if he failed to produce an acquittance, could be compelled to pay his debt again although already paid to his unscrupulous creditor. The common law position is well illustrated by a case of the latter part of the reign of Edward I. A creditor brings an action against the sureties of a specialty debt although the principal debtor has paid the debt and obtained an acquittance, the twelve sureties sued say that the creditor brings his action through malice, yet since the principal debtor does not appear with the acquittance, and they, confessing the debt can produce no proof of payment so as to acquit

(6) Against a deed the debtor must either produce an acquittance or he might plead that it was not his deed, in a few cases he might successfully show deed made under duress. Even the City of London, who in 1364 claimed and were granted the right to wage law against debts contained on evidence of a merchant's books - 38 Edw. III, st. 1, c.5, see p.148 agreed that there could be no wager against 'a schedule of parchment or paper, written by the hand of a debtor or other person whatsoever, and sealed and delivered by the debtor himself'. - Cal. Ltr. Bk.K. f.177 b, pp. 228-229, declaration of the Mayor and Aldermen 21 March, 1439.

themselves, are ordered to pay again.⁽⁷⁾ For the debtor the safest method of obtaining acquittance and having it recorded was to have it enrolled on a court roll. In London in 1410, where four debtors were bound to a creditor and he executed a general release in favour of one of them, the three remaining debtors requested that the creditor be summoned to the court so that he might acknowledge his release before the court and this is done the same day.⁽⁸⁾

- (7) Y.B. 2. 3. Edw. II (S.S. vol. 19) p. 196. See Barbour, p. 89, citing Ch. Petn. X 459. Petition of a surety whose principal has paid the debt and obtained an acquittance for such but has gone overseas taking the acquittance with him; for which reason the petitioner seeks aid as he is now being sued for the same debt. The trusting manner in which some petitioners signed deeds granting a release before the debt was paid, or acknowledging a loan of money before it was made, must at times have sorely tried the patience of the council and Chancellor. A very good example of the latter is to be found in Savell v. Romsden (Temp. Edw. VI) Cal. Procs. Ch. I, cxxxi, and is given in Appx. pp. 747-9
- (8) C.P.M.R. (1413-1437) p. 50. This obtaining and presenting of acquittances seems to have been a constant headache of the period; among the Paston Letters is to be found a letter from the 'Flete' by Thomas Denyes to John Paston concerning a kinsman of his who is now the object of a writ of debt concerning an obligation entered into with the said Thomas and another 14 years previous, of which debt Thomas says he has many acquittances. Therefore he requests John Paston to intervene in the matter and ask the sheriff not to make return to the writ, 'for' he says, 'I had lever (rather) gif the said Robert suyche good, litell if it be, as I haf, than he wer undone for me, or ony man ellis that ever ded for me'. Gairdner (J.) 'The Paston Letters' (1910) I, p. 274, 20th March, 1454.

Delay in producing an acquittance was not always fatal to the debtor at least in the earlier common law. In 1305 a debtor became bound in debt and made default in the same year; in 1315 the creditor brings an action and the debtor's goods and tenements are seized to be handed to the plaintiff, at this point, however a third party produces an acquittance and the sheriff is ordered to restore the goods, etc., to the defendant.⁽⁹⁾ In the smaller courts of record pleas from imprisoned debtors that they have acquittances are frequent; a London debtor of 1349 complains that he is wrongly imprisoned, the jury examine his acquittances and finding them genuine commit the creditor to prison in the debtor's place.⁽¹⁰⁾ But in the common law the procedural rules tighten and the debtor who delays too long in producing evidence of his payment is forced to petition for aid.⁽¹¹⁾

(9) S.C.L.M. III, p. 36. Despenser v. Stratton.

(10) C.P.M.R. (1323-1364), p. 224.

(11) See Barbour, p. 89, fn. 5, citing Ch. Petn. IX, 459. "in which the complainant says that 'processe of the same accion (i.e. action of Debt on the obligation) is so ferre forther that for defaute that the forseide acquytauncez were not shewid nee leyd in due tyme that by the comone lawe nowe they mowe not be resseved.' "

The Emergent Chancellor

There is nothing automatic about the aid which may be given to a petitioner, he has a right to complain, but since the aid he receives is given as a matter of grace, if his petition receives no consideration, he has exhausted his remedies. Nor does the Chancellor seek to render justice solely of his own discretion,⁽¹²⁾ often he will seek advice of the other justices; such a case is found before the Exchequer Chamber in 1482, when the Chancellor seeks advice as to whether he should grant a subpoena to a petitioner, who, being a debtor by statute merchant, failed to obtain an acquittance and asks that his creditor be called and examined. The justices of both the benches consider the question and decide that where the debt is one of record no subpoena should issue for failure to obtain a release, and the Chancellor says he will abide by this decision.⁽¹³⁾

For the council and the Chancellor the ways of debtors and creditors provided them with endless petitions as they strove to

(12) See Kerly, pp. 32-33 for a case referred to the Chancellor by judges and in which he did not seek to aid the debtor.

(13) Sel. Cas. Ex. Ch. (S.S.) pp. 53-54, No. 17 given in Appx. pp.750-1 the common law approach to this problem is well illustrated here.

combat the numerous complaints of fraud,⁽¹⁴⁾ forgery,⁽¹⁵⁾ trickery,⁽¹⁶⁾ and duress⁽¹⁷⁾ which appeared before them, only slowly did the legislature and the common law courts take cognisance of some of these topics.⁽¹⁸⁾

By the end of the reign of Edward IV the Chancellor has become a judge in his own right in his own court, and takes over the granting of equitable decrees in civil matters, whilst the council continues

- (14) Cal. Ch. Proc. (R.C.) I, xcvi. Plaintiff purchased from a third party an Exchequer tally which had been previously bought from the defendant. Plaintiff alleges that whilst he was abroad the defendant went to the Exchequer and on swearing he had lost the old tally a new one was issued to him, since there was no record of the old one having been paid, this despite the fact that the plaintiff had given notice to the defendant of the sale, although he had no record of such sale. The defendant traversed the facts alleged in the bill and states that the matter should be dealt with at common law. The bill is dismissed. (1476)
- (15) Cal. Ch. Procs. (R.C.) I, xi. production of forged power of attorney and giving false acquittance by defendant, so that plaintiff forced to pay twice. See Appx. pp. 752-3 (temp. Ric. II), Bief v. Dyer
- (16) Sel. Cas. In. Ch. (S.S.) p. 2, No. 2. obtaining of acquittance from plaintiff under pretence of going to pay him the money, which money still remains unpaid. (1386)
- (17) Owen Pole v. John ap Richards and ors. Procs. in Ch. I, lxxxviii-temp. Edw. IV - Petitioner prays a writ of certiorari in order to be relieved from a plaint of debt on a bond for 200 marks which he was forced to enter into whilst held prisoner in Raglan Castle.
- (18) For the attempts of the legislature to combat forgery, etc. in this period, see pp. 296-303.

to exercise its own powers under the gradually acquired name of the Court of Star Chamber⁽¹⁹⁾ in which the more criminal aspects of the jurisdiction it once held come to be its main business.⁽²⁰⁾

Arbitration

Outside of the common law courts and the council there existed one other power which, on reference being made to it, had the ability to exercise justice and equity as it saw it, the power of arbitration. The right to arbitrate was well recognised by the courts, and the rolls of the Mayor's Court of the City of London contain many examples of the court allowing the parties to settle a difference brought before it by arbitration or even ordering the parties to abide

(19) As to the confusion arising from the Act 'Pro Camera Stellata' of 1487 (3 Hen. VII, c.1) creating a court to deal with specific offences (Maintenance; Retaining by oaths, and by giving liveries, signs and tokens; embracery; corrupt conduct in returning juries; bribe taking by juries; and riots) and that part of the council which when dealing with judicial matters sat in the star chamber and gradually acquired the name of the court of Star Chamber see 'Select Cases in the Council of Henry VII' edited by BAYNE (G.S.) and DUNHAM (W.H.) (S.S. vol. 75) pp. xlix-liv. For a case dealing with debt and failure to enforce brought before the court created by the above act see Chittok v. Copuldyke (1489) ib. pp. 61-2, given in Appx. pp.754-6

(20) As to the jurisdiction and powers of the Privy Council which came into being during the reign of Henry VIII and its enforcing of compositions between debtor and creditor, see pp. 415, 499

by such a method, and the council might well after preliminary hearing of a cause send the matter to arbitration for settlement.⁽¹⁾

The position at common law of arbitration was not strong (unless under the direction of the court), since there was no way of enforcing the award, to remedy this to some extent the practice of giving bonds or covenants to abide the result of the award grew up;⁽²⁾ but even here it is found necessary to petition for relief where the arbitrator refuses to hand over bonds or releases.⁽³⁾

The powers of the arbitrator were discussed by justices of both

- (1) Sel.Cas. K.C. (S.S.) p. xix. See also Rot. Parl. III, 564 b. where the petitioner offers to submit the subject-matter of his dispute to arbitration, whereupon it is ordered that the adverse party be invited to agree and that a copy of the petition be sent to him.
- (2) See Bl. Comm. III, 16-17. By 9 Wm. III, c.15 (1697-8) the preamble of which states "WHEREAS it hath been found by Experience That References made by Rule of Court have contributed much to the Ease of the Subject in the determining of Controversies because the Parties become thereby obliged to submit to the Award of the Arbitrators under the Penalty of Imprisonment for their Contempt in case they refuse Submission Now for promoting Trade and rendring the Awards of Arbitrators the more effectual in all Cases for the final Determination of Controversies referred to them (by) Merchants and Traders or others concerning Matters of Account or Trade or other Matters" it is enacted that 'Merchants Traders and others' may agree that agreement to submit to arbitration be made a rule of any of the King's courts of record and insert words to this effect in deed witnessing the arbitration. If a party then fails to stand by such award, application may be made to the court named, and the party treated as in contempt of court. *ibid.* s.1.
- (3) Gefferey Blower v. Richard Luke (Temp. Edw. IV) Cal. Ch. Proc. II, 11 given in Appx. pp.757-59.

benches in the Exchequer Chamber in 1484, in a case where an arbitrator had been appointed by three men and another to make award regarding all debts and demands between them. It was held that the arbitrator had power to make awards between all or any of the parties and that as such the powers were wider than when a case came before the courts by way of plea, when a definite issue had to be decided.⁽⁴⁾

(4) Sel. Cas. Ex. Ch. (S.S.) II, pp. 101, 200. As to the manner in which Arbitrator should make the award see 5 Co. Rep. fos. 77 b - 78 a. As to the use of arbitration in the City of London, see C.P.M.R. 1381-1412, pp. xxix-xxx.

CHAPTER 11INSOLVENCY AND FRAUDFabrication and Forgery

Although it was generally necessary for the party involved in some sort of fraud to seek aid by petition,⁽¹⁾ this does not mean that the common law did not take cognisance of fraud in any guise at all. Where statute gave a remedy against some form of fraudulent practice then the common law courts would both recognise and deliberate on the fraud involved,⁽²⁾ and Coke tells us that "it was resolved..... by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress fraud."⁽³⁾ Yet fraud as a defence to an action is only admitted to the common law court in 1854,⁽⁴⁾ and had otherwise to keep its place in equity. Some incidents of fraud did however receive the attention of the King's courts and the legislature during the latter part of

(1) See pp. 291-293 The Court of Star Chamber retained a hold on the criminal aspects of fraud which had been exercised by the council, although they to some extent shared the jurisdiction over fraud with the Chancellor.

(2) See for example the statutes against concealment of goods and seeking sanctuary to defraud one's creditors pp. 237-244 and see Dyer 294 b. (11), (12) & (13). In such cases fraud must be expressly averred (Co. Rep. X. 56 a.) though the party may make a general allegation of fraud - (ib. IX, 110 a.)

(3) Co. Rep. III, 82 a.

(4) 17, 18, Vic. c. 125, s. 83.

this period.

Where a party denied that a deed produced by his adversary was his deed,⁽⁵⁾ the matter was generally inquired of as to its truth by a jury (or inquest of witnesses), if the deed is proved false then the person relying upon it is amerced,⁽⁶⁾ that is all, thus "forgery was dealt with but incidentally and in the course of civil actions",⁽⁷⁾ against the power of the deed, denial of the deed is practically the only plea.⁽⁸⁾

Where, however, the courts of Westminster dallied with amercements, the courts of the City of London went ahead with their own ideas for punishment by introducing the forger to the pillory,⁽⁹⁾

- (5) Thus in debt on a bond the defendant could make a general plea of 'non est factum' - that is denying the deed to be his. See III Bl. Comm. 305. For cases where such general plea might not be made see 5 Co. Rep. 119 a. & b.
- (6) See C.P.M.R. (1323-64), p.97, defendants produce acquittance which plaintiff says is false, jury is summoned but one of the defendants acknowledges that acquittance is a forgery and he is committed to prison but released four days later on payment of a fine.
- (7) P. & M. II, 540.
- (8) A waterford custumal of 1300 states that if a creditor have open letters 'he who is plaintiff need do no more than show the seal if the defendant denies the debt'. Bor.Cust. I, p. 203. In London debtors might not aver against documents sealed and delivered by themselves, Cal.Ltr.Bk.K.pp. 228-9
- (9) See threat made to one Geoffrey Le Warner in 1292 (Riley 'Memorials', p. 29). The Pillory is used in London late in the fourteenth century; but appears to have come into use against forgers of bonds, etc., at the end of the reign of Edward III. Successful prosecution of a forged bond might well mean prison for the alleged debtor, see Riley 'Memorials' citing Cal. Ltr. Bk. d. fo. lxxv. given in Appx. 760-62. An Hereford custumal of 1486 states that where deed denied by debtor then twelve fellow citizens to decide, and if they find deed genuine, then the debtor to go to prison until he satisfies the bailiff and the community, if the deed be found false then the creditor is to be imprisoned likewise - Bor.Cust. I, 205.

and in 1376 a Lombard is made to stand in the pillory for two hours a day with a false bond hung round his neck.⁽¹⁰⁾ This use of the pillory for the potential creditor with a forged obligation or the reluctant debtor with his false acquittance did not, however, have the refinements which the legislature would include when they made forgery punishable by pillory.⁽¹¹⁾ The City as yet could still afford a little humanity. A woman found guilty of an allegation that she "falsely, fraudulently and deceptively fabricated a certain false and fictitious writing in the similitude of a sealed obligation" is held to be too feeble and infirm to undergo the judgment of the pillory for her deception and therefore she is to stand by the pillory with the said obligation round her neck for an hour.⁽¹²⁾

(10) Cal. Ltr. Bk. H. fo. liv. p. 54. Riley 'Memorials' pp. 404-5.

(11) 5 Eliz. I, c.14, s.3 (1562) for the details of which see pp. 302-3.

(12) C.P.M.R. (1413-1437) pp. 189-190. The Court of Star Chamber was not above taking such frailties into consideration, even if the humour of the affair passed over the defendant. For sentencing one Robinson, to imprisonment, fine of £100 and the pillory. In connection with the forging of two bonds, the Lord Treasurer says: ' "It had neede be a (hundred pound) of wool"; for the fellowe was poore.' - Hawarde, p. 61-Attorney General v. Robinson (1596).

The lengths to which a debtor might be prepared to go in order to forge an acquittance are at times surprising. One such debtor being imprisoned on a plaint of debt, claims he has an acquittance, given under the creditor's seal, which acquittance he produces and the creditor promptly denounces as false. The debtor later admits to the falsity of the acquittance and reveals the manner in which it was forged. It appears that he had requested one Roger Welles to obtain the seal of the creditor so that it could be put to an acquittance which the debtor had written on a piece of parchment. Roger, after two years of listening to this request from the debtor and his wife, finally agrees to help, and he removes an old wax seal from an acquittance of the creditor, this wax seal is promptly taken to a goldsmith, who, for 'competent reward' makes a seal from the impression. The acquittance written by the debtor is promptly sealed with the new seal, the seal being then thrown in the river, Roger receives a blue woollen dressing-gown and a chafing dish⁽¹³⁾ for his services; the debtor despite all this remains in prison.⁽¹⁴⁾

(13) 'A vessel to hold burning fuel for heating anything placed upon it.'
- O.E.D.

(14) C.P.M.R. (1437-1457) pp. 111-112.

In cases where, as a result of a forged statute the defendant was arrested then he might have a writ of deceit against the person suing out the writ and against the forger.⁽¹⁵⁾

The writ of deceit had been given as a remedy against a person who had the body of an accountant seized, when he might have been attached by lands held by him in another county.⁽¹⁶⁾ Many writs of deceit were in the same form as an audita querela.⁽¹⁷⁾

Many irritations could result from the forging of obligations even if the creditor could competently prove them false; one such example is found in the supposed creditor who enters a plaint of debt on the strength of a forged bond or obligation, and if the alleged debtor appears to contest the debt, the creditor allows the suit to lapse; this he repeats a number of times in the hope that the debtor

(15) F.N.B. 96 B. By F.N.B. 95 E. "This writ lieth properly where one man cooth any thing in the name of another, by which the other person is damnified and deceived;." The writ apparently did not lie where a person made an obligation in another's name and sued him upon it, since the defendant might plead non est factum in defence - Y.B. 19 Hen. 6. 44.

(16) F.N.B. 99 D. In Y.B. 33-35 Edw. I (R.S.) 5-6. - where this situation arises and counsel pleads the point, he is rebuked by the judge who says: "Leave off your noise and deliver yourself from this account; and afterwards go to the Chancery and purchase a writ of Deceit; and consider this henceforth as a general rule."

(17) F.N.B. 99 I, see p. 225

will eventually make default and be attached by his goods,⁽¹⁸⁾ In 1421 we find one such sufferer bringing an action in an attempt to terminate the matter once and for all.⁽¹⁹⁾ The demands on those who could write and the rewards for making out deeds and acquittances, must have been quite large at this time, and no doubt many a clerk⁽²⁰⁾ and court writer was able to supplement his income in this manner.⁽¹⁾

An attempt to deal with forgers of deeds whereby men lost their manors, lands or tenements was made in 1413,⁽²⁾ but of the forgers of

(18) In cities such as London, where such goods were handed over to the plaintiff upon surety, to return if the debtor appeared within a year and a day and showed no debt due the forger would gain possession of such goods, and no doubt his surety would be as good as his deed.

(19) C.P.M.R. (1413-1437) pp. 111-113.

(20) See S.C.L.M. III (S.S.) p. xxx. Regarding the "prevalence of forgery through the instrumentality of clerks whose literary skill provided an ever present temptation" goes on to say "it might prove to be a fact that the indebtedness of ecclesiastical persons and families was the cause of many regrettable incidents in the local history of the fourteenth and fifteenth centuries." Ibid at xxxv.

(1) See C.P.M.R. (1437-1457) p. 112. The defendant confessed to forgery of an obligation which he had had written in the plaintiff's name by a court writer, after which he hired a third party to seal the deed in the plaintiff's name and pass himself off as the plaintiff.

(2) 1 Hen. V, c.3, the process of *capias* and *exigent* for the contumacious forger was brought in by 7 Hen. V, c.2 (1419).

bonds, acquittances, etc., nothing is said.⁽³⁾ In the Exchequer Chamber nearly ten years later the production of forged letters of protection produces no other result than rejection of the said letters, not even a fine is recorded.⁽⁴⁾ Even during the reign of Henry VII in a case before the council where the defendant accused and proved the petitioner guilty of gross forgery and fraud no request is made for his punishment, merely that the defendant be dismissed from the suit with costs.⁽⁵⁾ It is at this strangely backward state that the common law remained until 1562 when it is enacted that a person who forges an obligation, acquittance, etc., shall pay the grieved party double his costs and damages and also

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- (3) For a general picture of the many uses of forgery etc. during this period see Pike (L.O.) 'A History of Crime in England' (1873) pp. 269-277. A petition requesting that life imprisonment be the punishment for persons who forged seals and placed them on deeds was refused in 1371. - Rot. Parl. II, p. 308. No. 45. It is small wonder, therefore, that the council and later the Star Chamber took it upon themselves to punish forgery in general, see p. 293 Hudson (W.) 'A Treatise on the Court of Star Chamber' (Collectanea Juridica ed. by Hargrave F. vol. II) p. 66, gives examples of the Star Chamber punishing forgery of acquittances and obligations prior to 5 Eliz. I, c.14 (1562) which gave a remedy against forgery in such cases.
- (4) *Veel v. Comelond* Y.B. 1 Hen. VI (S.S.) p. 86. (1422-3) And see ib. p. xxviii, where the editor remarks on the fact that apparently no proceedings taken regarding the treasonable offence of forging the King's seal, and that at an earlier date the removal of a royal seal from letters patent and placing it on a counterfeit protection had been grounds for an indictment, citing Lib. Assis. 40 Edw. III, pl. 33, p. 247.
- (5) *Elys v. Prior of Pritwell, Essex*. Sel. Cas. Counc. Hen. VII (S.S.) pp. clviii-clix.

that the forger be set upon a pillory and have one of his ears cut off, after which he is to be imprisoned for one year.⁽⁶⁾ A second conviction for such offence was punishable by death.⁽⁷⁾

Perjury

Perjury in the form of a witness giving evidence which he knows to be false was not a fault with which the common law or the legislature were prepared to deal during this period, and even in the council it was treated rather more by accident than design. The legislature aimed, not without cause, at the evils of the corrupt juries and false verdicts; maintenance, embracery and attainments were the things upper-most in the minds of the common law judges.⁽⁸⁾

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- (6) 5 Eliz. I, c.14, s.2. The Star Chamber had earlier in the year applied this particular punishment to one who had forged a lease. Hudson, p. 66. In respect of forgery of deeds concerning land, the legislature was much more vicious. See 5 Eliz. I, c.14, s.1. and III Co.Inst. c.75.
- (7) 5 Eliz. I, c.14, s.6. This in effect meant that second offences could not be tried in the Star Chamber since they could not by custom inflict the death penalty, see Hudson, p. 65. Forgery was not subject to any statutory definition until 1913 by 3.4. Geo. V, c.27, s.1(1), which act repealed wholly or in part some sixty-seven statutes relating to forgery and kindred offences. "Perhaps the most important among the factors which led to the enactment of so many capital statutes relating to forgery was the great economic and commercial development of eighteenth century England. Concomitant with the growth of banks and the intensification of trade came new possibilities for committing offences against property generally, and more particularly for forgeries and embezzlement! Radzinowicz (L.) 'A History of the English Criminal Law' I, p. 644.
- (8) By 34 Edw. III, c.7 (1360-1) granted that writ of attainment may be had in pleas real or personal and ib. c.8 setting out the penalties for such attainment.

Certainly the procedural system in the thirteenth, fourteenth and first half of the fifteenth century shows the reasons for this particular concern; wager of law when used was a very decisive factor, a person either made his law and won his point or case, or, he lost and was promptly amerced.⁽⁹⁾ The early jury being comprised of actual witnesses, was, of course, the right body to attack in the event of a false verdict,⁽¹⁰⁾ unfortunately, when the jury became a mixture of witnesses to deeds⁽¹¹⁾ and persons chosen to judge the facts, the

- (9) The amercement might almost be looked upon as a fine for his falsehood, in that he failed in his oath. At a much later date it is said "I have heard it often moved, whether a man swearing falsely upon a wager of law it were punishable in the Star Chamber? And although I have not judged in the point, yet I dare say it is there punishable; for in 30 Eliz. a man put in a foreign plea to an action in London to bar the prosecution of a suit (which for favouring the jurisdiction of the court is always done upon oath), and this plea was feigned: this was punished; and then much more a false oath in a wager of law, whereby a just debt is made irrecoverable." Hudson, pp. 79-80.
- (10) Even in the thirteenth century the jury did not speak only of what it had heard and seen, but since it was drawn from the surrounding countryside it would be likely to have some knowledge of events taking place, at least during the earlier part of the period. Unfortunately, it would also know the dangers which might result from an unfavourable verdict.
- (11) "They were summoned with jurors, and they did not testify openly in court, but went out with the jurors to deliberate and give information to them; so that they bore the character for a long period of half jurors half witnesses". Wigmore (J.H.) IV, 29-59 s. 2190

position became less certain⁽¹²⁾ and when by mid-fifteenth century the jury is hearing witnesses and still liable to be sued for false verdict, though they have only acted on what they thought to be the truthfulness of a witness, the need for clarification through statute is obvious. Witnesses⁽¹³⁾ also find themselves caught by this gradual transition from actual witnesses to jury proper as we know it today, for the witness who appeared out of the general wish to help one of the parties by disclosing his knowledge regarding the case, was very likely to find himself involved in an action of maintenance.⁽¹⁴⁾

- (12) It apparently became the rule that where a jury was comprised partly of jurors and partly of witnesses to deeds then the jury was free from attainder - See Y.B. 20, 21. Edw. I (R.S.) 110 (1292) cited Plucknett 'Concise', p. 126.
- (13) As has been seen on p. 254 witnesses to deeds were at first required to attend before the matter could be heard, by 12 Edw. II, c.2 it was allowed that if they failed to appear after process then the cause might continue, in 1472 it is agreed by all the judges that process will issue for such witnesses only if re uested. Y.B. 12 Edw. IV, 4,9 cited Thayer, p. 101. The general necessity of calling at least one witness of a document in order to prove it remained until the Common Law Procedure Act of 1854 [12.13 Vic .c.125] Wigmore II 1589-1590, s.1304
- (14) Although witnesses might be requested by the court or sought to be examined by the jurors, the parties had no means of compelling a witness to attend; so that where a witness merely put in an appearance, he ran the risk of the other party bringing an action of maintenance against him. This fact was sufficient in one case for a party to petition the Chancellor for a subpoena to issue to a witness that he might give evidence without falling foul of the common law - Cal.Proc.Ch.(R.C.) I, xix. To some extent the common law courts had worked out rules as to when a person might be liable to an action of maintenance by the middle of the fifteenth century. See further 'Thayer', p. 129.

This position, however, remained almost unchanged for a further century, ⁽¹⁵⁾ when the legislature roused itself against the unwilling witness and the giver of false evidence.

In the meantime, however, other bodies were prepared to recognise and punish perjury. Some of the smaller courts deal with it, ⁽¹⁶⁾ the council and Chancellor had dealt with it, ⁽¹⁷⁾ and the Court of Star Chamber carried on this jurisdiction, although the Act Pro Camera Stellata ⁽¹⁸⁾ at one time threatened to destroy its

(15) Statutes concerning attainr were passed, and by 11 Hen. VII, c.24 (1495) an action of attainr was also given against the party recovering by reason of the false judgment. See 1 Hen. VIII, c.11 (1509-10) 23 Hen. VIII, c.3 (1531-2); 13 Eliz. I, c.25 (1571) and see F.N.B. 105 G - 110 A.

(16) Cal.Ltr. Bk. G, p. 259. One John Smythe having given false evidence on behalf of a seller, acknowledged that he had been suborned by seller's wife to bear false witness on the promise of a pair of hose, he was committed to prison but released shortly afterwards. (2 Feb. 1370).

(17) See Dampart v. Sympson (Cro.Eliz. 520) per Walmsley, Beaumont and Owen, J.J. 'for at the common law there was not any course in law to punish perjury: but yet the King's Council used to assemble, and punished such perjuries at their discretion...' at 521.

(18) 3 Hen.VII, c.1 (1485) Stephen (J.F.) 'History of the Criminal Law' (1883) thought that perjury was only in fact a spiritual offence but that the Star Chamber court had power to punish the offence by virtue of this Act since it mentions the increase in perjuries as one of the evils it is to combat - p. 143. Leadam, p.cxxxv says that this Act did confer an express power on the statutory court to punish perjury, but that the council took cognizance of perjury in jurors and "the extension of jurisdiction from this to perjury in general naturally followed."

its right in this respect;⁽¹⁹⁾ otherwise it is the ecclesiastical courts which, of right, should have punished the offence, but their jurisdiction had, to some extent, become limited by their attempts to take cognizance of pleas of debt and other matters under the guise of actions of defamation and perjury.⁽²⁰⁾

It is only when witnesses have ceased to sit with the jury and production of witnesses in court is the normal mode of procedure that the law is finally altered. In 1562⁽¹⁾ it is enacted that

(19) The problem arose about the jurisdiction of the Star Chamber over the right of that court to try a witness who had committed perjury in a common law court - Onslow's case (1566) Dyer 242 b, 243 a. - and the types of perjury triable by 5 Eliz. I, c.9 (1562). All the judges met at the Serjeant's Inn to discuss the matter and decided against the Star Chamber, but no notice appears to have been taken of the decision. For details of the case, etc. see Sel.Cas. Council Hen. VII (S.S.) pp. lxvii-lxix; and also Leadam I, pp. cxxxii-cxxxv. In 1606 in a case before the Court of Star Chamber it was moved by counsel as to whether the court could hear perjury other than by 5 Eliz. I, c.9 "to wich Koke Ch. Justice del Commonplace replied bitterlye, marueylinge to heare suche grosse ignoraunce frutes of abridgemente men that neuer reade the bookes at large: for it was resolued by all the Courte, that this Courte maye determyne all periuries at the Common lawe, & that it was an aunciente Courte longe before H(enry) 7,...." Hawarde 'Les Reportes del Cases in Camera stellata' (Edited by Baildon, W.P. in 1894) pp. 300-2, at 301:- Attorney General v. Miles (1606).

(20) P. & M. II, 542.

(1) 5 Eliz. I, c.9. The Act is stated to apply to perjury or subornation of perjury in the Chancery, Star Chamber, Court of Requests, courts holding pleas of land under commission of the King, courts of record, Courts of Ancient Demesne, Courts Baron, Leet courts, Hundred Court and the Stannary courts.

the procurer of wilful perjury shall pay a fine of forty pounds, if he cannot afford this amount then he is to stand on the pillory for one hour and spend six months in prison;⁽²⁾ the witness committing perjury is to pay a fine of £20 and six months imprisonment, if he cannot pay the fine, then he is to be set on the pillory and have both his ears nailed to it.⁽³⁾ The provisions of the Act are in no way to affect jurisdiction formerly exercised by the ecclesiastical courts in cases of perjury.⁽⁴⁾ Witnesses served with notice of process out of a court of record requiring them to testify or depose concerning any cause or matter depending before that court, and being offered reasonable costs, having regard to calling and distance, who do not appear, and have no reasonable excuse, are to pay a fine of ten pounds and to make recompense to the injured party at the discretion of the judge, who is to have regard to the loss

(2) ib. s. 1

(3) ib. s. 2. In 3 Eliz. I, one Bucket, having been examined in open court in the Star Chamber, and whose oath was later disproved, was sentenced to the pillory. Hudson, pp. 72-3. Crompton (R.) 'The Authority and Jurisdiction of the Courts' (1641) p. 7 gives the following list of punishments for perjury which were given by Star Chamber: fine to the King, imprisonment, pillory, whipping, loss of an ear or ears, 'and sometimes by more of these punishments joyned together, according to the quality of the offence, or of the person:'.

(4) 5 Eliz. I, c. 9, s. 5. Since the ecclesiastical courts are not mentioned in section 1 of the Act, it appears that they will be responsible for perjury in their own courts, but not for perjury committed in other courts.

caused to the injured party by virtue of the witness failing to attend, the money is to be recoverable in any court of record by action of debt, bill, plaint or information, no wager of law, essoin or protection being permitted.⁽⁵⁾ This provision to some extent aided the party to off-set the natural reluctance of witnesses to attend and testify on oath having regard to the nature of the rest of the Act.⁽⁶⁾

Duress

The last of the fraudulent incidents of which the common law took some cognizance that we will touch upon here is that of the plea of duress, for duress might be raised against the weight given by the common law to the production by a party of a deed.⁽⁷⁾ Duress during this period is accompanied largely by the statement that the injured party entered into the acquittance or obligation by the

(5) 5 Eliz. I, c.9, s. 6

(6) Perjury continues to be dealt with in a rather piece-meal fashion, an enactment being added here and there to remedy some new trouble, until 1911 when "an Act to consolidate and simplify the Law Relating to Perjury and kindred offences" is passed and in which some 132 former Acts are repealed either wholly or in part. (1.2. Geo. V, c.6)

(7) The term duress is used here to cover generally the threat of loss of life or limb or actual unlawful imprisonment.

threat of, or actual unlawful imprisonment.⁽⁸⁾ Being in prison at the time of entering into a deed does not raise what we would call today a presumption that some form of duress existed, but that it was raised almost automatically by an injured party was a fact well known to the legislature and can be seen from the wording of the Statute Merchant of 1285, which states that sales entered into by a debtor of his property during the first three months of his imprisonment in order to satisfy his creditor "shall be good and effectual."⁽⁹⁾

The difference between a deed entered into under lawful and unlawful imprisonment is quickly distinguished between at the common law. In 1308, an action is brought to enforce a bond entered into by the defendant whilst lawfully attached and in prison to

(8) See Co. Inst. II, p. 482. "Every restraint of the liberty of a freeman is an imprisonment, although he be not within the wals of any common prison." Where the plaintiff sought to enforce a deed entered into in such circumstances, the defendant acknowledged the deed, but claimed it was only entered into through distraint of prison, after which the facts would be normally enquired into by a jury. - see for example S.C.L.M. (S.S.) II, pp. 79-80. Erneric of the Friscobaldi v. Richard le Feytur (1309) where in view of the plaintiff's nationality, the jury is comprised of half Lombard merchants and half men of Boston.

(9) 13 Edw. I, see p.179 . And see Britton, Bk. 1, c.12, s.8 - "And we will, that whatever contracts shall be made in prison by prisoners not taken or detained for felony shall be held valid, unless made under such distress as includes fear of death or torture of body; and in such case they shall reclaim their deed, as soon as they are at liberty, and signify the fear they were under to the nearest neighbours and to the coroner; and if they do not reclaim such deeds by plaint within a year and a day, the deeds shall be valid."

answer the plaintiff regarding alleged trespasses. Addressing the plaintiff, the defendant's counsel says:

"At your suit we were put in prison, and while therein were badly treated until we had made this bond, and when it was made we were forthwith delivered. Therefore we demand judgment whether this deed ought to bind us. Moreover, in such a case the law requires that you should take sureties for the (prisoner) until he be delivered, and when delivered - but not while he is in prison - he can bind himself."

Later counsel states that the justices before the case of trespass would come, were on the point of departure, and the defendant, fearing he "might die in prison" therefore entered into the bond. Judgment is given for the plaintiff since the defendant cannot deny that he was in prison by lawful attachment, and can show nothing against the plaintiff's plea that the bond was given by him to amend his trespasses.⁽¹⁰⁾ The safest way to take a bond or release is still before

(10) Fisher v. Newgate (1308) Y.B. 1, 2. Edw. II (S.S. vol. 17) pp. 155-7. Of the defendant's plea that the justices were departing and therefore he was likely to remain in prison for some time before the case was heard, nothing is said, although this state of affairs might well have been carefully brought about by the plaintiff. In *Eure v. Meynill* of same year, where the defendant's counsel merely stated that the defendant was in prison at the time of making the deed without stating at whose suit, the court appears to have allowed it. The plaintiff's counsel, although at first stating that the defendant must say at whose suit he was imprisoned, later abandoned the point. *ib.* pp. 34-35.

a judge so as to avoid this plea; thus we find one Hankyn Bonnovel, servant and attorney of John Bonnovel, merchant of Spynal, appearing before the Mayor of London and acknowledging that a quit-claim which he delivered to Robert Brynkelee, mercer, on the 1st May, was his own deed, willingly executed, and that he had not been in prison when he made it. ⁽¹¹⁾

Due to the many political troubles of the period and the passion for imprisoning an enemy or offending person until he, perhaps after a little persuasion, executed a bond in favour of his captor, the plea of duress appears quite often on the rolls, and tends to rank this offence quite high on the list of medieval pastimes. Richard the Second in the fifth year of his reign finds it necessary to have ordained that all 'Manumissions, Obligations, Releases, and other Bonds made by Compulsion, Duress, and Menace, in the Time of this last Rumour and Riot', ⁽¹²⁾ are to be void and of no effect, and those

(11) C.P.M.R. (1364-81) p. 287, 29 July, 1381. By the time of Coke, we are told "If a man be imprisoned by order of law, the plaintiff may take a feoffment of him or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment, for this is not by duress of imprisonment, because he was in prison by course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment or the duress that is offered in the prison, or at large is torcious and unlawfull,..." Thus a deed "made by one by duress of imprisonment is not void, but voidable." Co. Inst. II, 482.

(12) Concerns the outbreaks and riots which led up to the peasant's revolt in 1381. As to the events which led up to this revolt, see Cunningham I, pp. 396-405.

holding such are to appear before the King and his council, such deeds, etc., being yielded up.⁽¹³⁾ A further enactment allows for such persons whose obligations and releases were stolen or destroyed during the troubles to make petition to the King and council setting out the state of their loss.⁽¹⁴⁾ Just over seventy years later, it is found necessary to set up machinery to enable obligations and statutes obtained from "Ladies, Gentlewomen, and other Women sole", possessed of estate in their own right, to be questioned. For it appears that many such women have been taken into the power of unscrupulous persons who force them to execute such obligations and statutes before letting them go, where such is found to be the case, the deed is to be void.⁽¹⁵⁾

Even the recognition of such force that might be brought to bear on women by many subtle means did not lead the common law to accept the probabilities and complexities of undue influence, these are passed to the Chancellor so that he might reflect upon them.⁽¹⁶⁾

(13) 5 Ric. II, st. 1, c.6 (1381)

(14) ib. c.8

(15) 31 Hen. VI, c.9. See Leadam I, p. cxii, who says that when this Act baffled the malefactors they resorted "to the more primitive methods of forcible marriage and extortion by abduction, duress and violence."

(16) This particular plea as a means of obtaining relief from a deed (other than where a special relationship existed e.g. between guardians and wards) did not really become very apparent until the latter part of the sixteenth century. See *Herbert v. Lowms* (1627-8) 1 Ch.Rep. 22-25 (21 E.R. 495) where conveyances obtained by the defendant by reason of his dominion over the somewhat frail mind of a deceased person are set aside.

It is not surprising that it is the council and the Chancellor who deal more often than not with duress, for when powerful men are involved, it often requires the most powerful force in the kingdom to deal with them.⁽¹⁷⁾ The common law kept its own view of duress within very safe bounds, at first it would take cognizance only of duress by one of the parties involved in the suit upon the other,⁽¹⁸⁾ this it did extend to cover duress by a stranger on the one party at the procurement of the other, but further than this it refused to go.⁽¹⁹⁾

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- (17) Frequently it is only on the King's instructions that such matters are looked into at all. In 1316 the late sheriff of Yorkshire is accused of having imprisoned the plaintiff in York Castle, without any cause and then caused one X to bring a writ on a certain statute merchant against the defendant who was put "in the bottom of the gaol, in irons between robbers, next to a dead man", and by reason of this he was forced to pay the debt. The sheriff, however, on going out of office, had handed him over to the new sheriff, who detained him on the debt he had already paid.-William the Scrivener v. Gerard Salvayn (1316 S.C.L.M. (S.S.) III, pp. 40-3.
- (18) Kelw. 154 a., and see *Huscombe v. Standing* (1607) Cro.Jac. 187(79 E.R. 163), holding that where the defendant had entered jointly into bond, as surety, in order to secure the release of the principal who was unlawfully imprisoned by the plaintiff in league with another, the defendant might not plead duress against an action for the enforcement of the bond; "for none shall avoid his own bond, for the imprisonment or danger of any other than himself only; and although the bond be voidable as to the one, yet it is good quoad the other." *ibid.*
- (19) Bro.Abr. Dures pl. 20 citing Y.B. 43 Edw. 3. 6.; II Co.Rep. 9b. If a deed was entered into through duress of a stranger without procurement of the obligee, it was necessary to seek relief in Chancery: see e.g. *Jones v. Crawley & Wolston* (1674) Fin.Rep. 161. and *Att.Gen. v. Sothon et Ux.* (1705) 2 Vern. 497. *Watts v. Lock* (1628-9) Tothill 26 speaks of "Bonds cancelled which have been entered into per menaces, threats and imprisonments", in relation to the Chancellor's jurisdiction.

Within these fairly slender limits the common law was prepared to help a party who had become the victim of some fraud, otherwise 'it is his folly' and he must seek help elsewhere if he can.

CHAPTER 12A DEBTOR IN THE HANDSettling the Sheriff

The whole of this period is alive with the constant battle to settle the sheriff, and beneath him the bailiff, in a definite, well-defined position in the process for the successful bringing and enforcing of an action. Who shall be sheriffs, their estate, and how they are to be assigned is provided for;⁽¹⁾ they are to reside within their administrative area and not let it to farm;⁽²⁾ the duration of their term of office is determined, but proves to be difficult to

- (1) 9 Edw. II, st. 2 (1315) that sheriffs to be assigned by the Chancellor, Treasurer, Barons of the Exchequer, and the justices, though the others may act in the absence of the Chancellor; also the sheriff is to have sufficient land within the county to answer for wrongs to the king or to the people. The keeper of an hundred is also to be sufficient to answer for his wrongs, but the hundred may be let to farm. The statute was confirmed in 1328 (2 Edw. III, c.4) see further 4 Edw. III, c.9 (1330); 5 Edw. III, c.4 (1331); 4 Hen. IV, c.5 (1402) and 23 Hen. VI, c.9 (1444-5).
- (2) 9 Edw. II, st. 2. (1315); 4 Hen. IV, c. 5(1402); 23 Hen. VI, c. 9 (1444-5)

control;⁽³⁾ penalties for accepting bribes when making up jury panels⁽⁴⁾ and extorting extra fees by deceitful plaintiffs in the county court,⁽⁵⁾ all receive some form of attempted redress from the legislature.

The position is not, however, without its reverse side, and it is not unusual to find the sheriff's officer being set upon

- (3) 14 Edw. III, st. 1, c.7. That sheriffs to hold office for one year. In 1368 (42 Edw. III, c.9) it is repeated that sheriffs to hold office for one year as also are their under-sheriffs and clerks, by 1 Ric. II, c.11(1377) no sheriff is to hold office within three years of his last appointment, this is extended to cover under-sheriffs and bailiffs by 1 Hen. V, c.4 (1413) since it appears that extortions have arisen by alternating with the sheriff in office turn and turn about. All this is confirmed by 23 Hen. VI, c.7 (1444-5) sheriffs of London and those holding by inheritance or freehold excepted. This Act is followed by two statutes which pardon the offence and penalty for the periods of time set out within them but the force of the before-mentioned is retained; 28 Hen. VI, c.3 (1449-50) and 8 Edw. IV, c.4 (1468) respectively. Delays still arise, however, over the return to writs and two further statutes are necessary to provide for the difficulties which have arisen the first in 1472 (12 Edw. IV, c.1) the second in 1477-8 (17 Edw. IV, c.7)
- (4) 4. Hen. VI, c.3 (1425-6) gives double damages, fine and imprisonment against the sheriff who omits to administer bail correctly, to make correct return to writs and to warn jurors when they have been impanelled by him. By 18 Hen. VI, c.14 (1439) the sheriff who takes bribes when making up a panel for jury is to forfeit ten times the amount to the injured party.
- (5) It appears that the plaintiff having lodged one plaint against the defendant in the county court, the sheriffs add more and then charge the defendant 4d. per plaint for each default in attendance, they having generally failed to notify the defendant of the plaint, therefore machinery is given to remedy this, 11 Hen. VII, c.15, s.1. Sufficient precept is also to be given to the bailiffs of the hundreds so that they warn the defendant to appear, a fine of 40/- being levied on every default by the said bailiffs.

whilst attempting to enforce a distress or execution.⁽⁶⁾ In 1342 the Mayor and Burgesses of Oxford ask their fellows in London "What course ought to be taken with a man who resists or makes a rescue from an officer engaged in levying a distress upon him?" To which is replied "He ought to be attached to appear before the Mayor, and if convicted, committed to prison, to be released only on a fine at the discretion of the Mayor and Aldermen."⁽⁷⁾ Thus we find one Robert de St. John being committed to prison for having taken back by force a robe which the Mayor's sergeant had taken by way of distress; later he is released on mainprise.⁽⁸⁾ Certainly in troubled times the sheriff and his officers might feel that they

(6) The position of the sheriff and his officers is not an enviable one in a period when resistance was often made, and the number of fines for varying offences not inconsiderable. Nor does the position appear to have been always welcome and there are many cases of persons striving to avoid the honour; in London in 1416 a penalty of £100 is placed on persons using dubious means to get others elected and avoid the task themselves. - Riley 'Memorials', pp. 635-7, citing Ltr. Bk. I, fo. clxxvi. Once elected the sheriff was bound to carry out his task. See BL. Comm. I, 344, also Co. Rep. X, 76 b.

(7) C.P.M.R. (1323-1364) p. 153. At Hereford any person hindering the bailiff in making execution is to be distrained and compelled at will of the bailiff to "appear at the next court; and they shall be proceeded against as rebels, disobedient and perjured, if they are of the liberty." Bor. Cust. I, p. 195.

(8) C.P.M.R. (1323-1364), p. 155.

are not receiving the respect normally due to them, or that the nature of the position they hold is not generally appreciated.⁽⁹⁾

All this, whilst to some extent excusing their behaviour, does nothing to excuse the oppressions and corruptions of which many of them were guilty, though even in this there was no guarantee that a bribe taken would work. At least one under-sheriff found it better to accept a gift and then forget to carry out his side of the bargain. It appears that the plaintiff accused him of releasing a debtor after judgment, but says the defendant, judgment was never reached, at which a distressed plaintiff claims he gave the defendant a pair of scarlet hose to render and enter judgment on an obligation which the plaintiff states the debtor acknowledged, also that such hose was given on the defendant's suggestion.⁽¹⁰⁾ Although an action lay as

(9) See for e.g. three cases given in S.C.L.M. III, pp. 29-33, covering the years 1313-14, which the editor says may well be attributable in part to the economic troubles of the time. The Paston Letters illustrate well the manner in which the sheriff is regarded, in a letter to Sir John Paston, Dame Elizabeth Brews requests 'a dosseyne men in harness, with bowys and wepyn conveyent for them' for she says the sheriff's man has visited her and has promised to return again by which time she prays the men requested may be with her. Gairdner, Vol. 3, pp. 366-7. For the many subterfuges which might be indulged in in order to defeat the sheriff making execution, see Fenn (J.) 'Paston Letters' vol. iv, pp. 131-5, given in Appx. pp. 763-4.

(10) C.P.M.R. (1364-1381) p. 266. Against these facts the defendant offered wager of law; on a further plea by the defendant that the debtor produced letters of protection no decision is reached, and later the plaintiff quit-claimed all actions against the defendant.

well against a sheriff as any man where some form of action could be laid, the likelihood of a successor in office continuing the work begun by the last could never be overlooked.⁽¹¹⁾

Where a sheriff in a writ of debt wrongfully made a return on the debtor to the effect that he was not to be found, nor did he have any lands, etc. by which he might be distrained, so that a *capias* issued for the arrest of the debtor upon which he is arrested, if it appeared that he had sufficient lands etc.; then the debtor might maintain an action upon the case in trespass against the sheriff.⁽¹²⁾ It is not so much with the common law

(11) See C.P.M.R. (1381-1412) 1406 p. 275. Plaintiff sues two former sheriffs on a writ of Exchequer for having falsely arrested and imprisoned him under colour of their office, that they kept him until he entered into a bond for 100 marks for his delivery and took property of his valued at £100; also that now the present sheriffs at the suit of the late sheriffs have arrested him on the bond he made. A writ of corpus cum causa to the sheriffs as to the plaintiff's detention brings answer that he is in prison for certain causes pending before the Mayor; a writ of certiorari issues to the Mayor to certify the cause of the taking, etc.; to which the answer is that the plaintiff had spoken openly and rebelliously to the Mayor and Aldermen. Later it is recorded that the plaintiff has agreed the matter go to arbitration and has withdrawn the action in the Exchequer; on arbitration it is awarded that plaintiff pay former sheriffs £20, that the obligation be cancelled and that he receive £4 from the former sheriffs. - *ib.* p. 278.

(12) F.N.B. 193 B.

that the injured party could hope to bring about aid to himself, for the power of the sheriff over writs etc., might easily defeat this, which left the party very much with his right to petition to the council or to the Chancellor.⁽¹³⁾ The manner in which a sheriff might use his position to delay process and at the same time further his own interest appears well in the case of Powell v. Lloyd in 1622⁽¹⁴⁾ concerning execution on a statute staple.⁽¹⁵⁾ The

(13) In 1330 it is ordered by the king and council that all the sheriffs of England are to be removed and others appointed, commissions are to inquire the conspiracies, oppressions, etc., committed by them, under-sheriffs, bailiffs, etc. Rot. Parl. II, 60 a. No. 21. The Act 18 Hen. VI, c.14, (1439) set up summary procedure before justices for the examination of accused persons and witnesses where corrupt impanelling of juries alleged, without the necessity of a jury. Pro Camera Stellata (3 Hen. VII, c.1 (1487)) specifically mentions the misconduct of sheriffs as one of the reasons for its enactment and an evil it is to combat.

(14) S.C.L.M. (S.S.) III, pp. 123-4 the case appears first as Read v. Lloyd, ib. p. 79.

(15) 27 Edw. III, stat. 2, c.9 (1353)

plaintiff makes petition to the chancellor in which he states that one John Lloyd had been bound in statute staple to one for whom the plaintiff was now executor, such statute being entered into about ten years previous. The plaintiff has now served out a writ for execution under the statute directed to the sheriff of Radnorshire, a certain John Read, who, it appears, having bound the defendant to himself in statute staple about six years previous now delays the extent upon the writ of the defendant, serves out his own writ, procures an extent, has it executed and now intends to serve out a liberate upon his extent to gain possession of the lands, etc., of the debtor ahead of the plaintiff. For the reason that the plaintiff's extent was first in time and therefore should be first served "and for that if the Liberate be obteyned before your petitioner's extent be executed, your petitioner wilbe enforced to an unnecessary and chargeable suite at Lawe; and for that the said shrief to preserve his owne benefite delays the execucion of his Majesties writt contrary to the duty of his office" the plaintiff prays the chancellor to stay the sheriff's liberate. (16)

(16) At the end of the petition is an holograph minute by the Lord Chancellor to the effect that the matter is to be examined by two of the clerks of the Petty Bag Office and if they, the matter stated to be true, then the liberate to be stayed. There is no final decision, though an indorsement on the petition states 'Powell for staying of the Liberatt'. - S.C.L.M. III, p.124 Writs and certificates under a statute staple were returnable into the chancery, see p. 200

Bail on Mesne Process

Upon mesne process arrest of the debtor provided its own problems. Basically the process was to compel the debtor to attend on the court day, therefore if the sheriff was prepared to take surety for his appearance, he might be released until the day of his case; such release, however, was by no means certain.⁽¹⁾ On the creditor's side, if the sheriff returned to the writ to arrest the debtor on mesne process that he had taken the body, then if he failed to produce the body on the court day, he became liable to an action on the case for the debt itself, this could and did lead to a great deal of detaining of the debtor prior to execution. This difficulty was to some extent met and

(17) Where the debtor was imprisoned upon arrest on mesne process he might sue out a writ of mainprize out of the Chancery to the sheriff instructing him to take bail of the debtor that he appear on the court day and then to set him at liberty. F.N.B. 251 B. see p. 221

and faced by 23 Hen. VI, c.9,⁽¹⁸⁾ by which the sheriff is to release persons arrested on mesne process in personal actions "upon reasonable (Sureties) of sufficient Persons, having sufficient within the Counties where such Persons be so let to Bail or Mainprise, to keep their Days in such (Place) as the said Writs, Bills, or Warrants shall require;" this is not to include persons imprisoned on execution. Nothing is to be taken by the sheriff or his officers under or by colour of their office for the ease or favour of persons arrested or attached, or to be arrested or attached by them, nor are they to fail to attach or arrest a person by reason of such payments. Any possible advantage a sheriff might take of pleading the statute as to the release of a person arrested on mesne process is destroyed by the latter part of the Act which states that where return is made to the writ to the effect that the body has been taken, then the sheriff

(18) 1444-5. Coke (Rep. X. 100 a.) says of this statute "that the first branch contains the clause of the precept and commandment to Sheriffs, that they shall let prisoners to bail, who were arrested in personal actions, &c., which the Sheriff could not do before this act," This part of the act therefore did away with necessity of the debtor suing out a writ of mainprize from the Chancery.

shall be responsible for the appearance of such on the court day. (19)

The bail bond is to be made out to the sheriff in the name of his office⁽²⁰⁾ and is to contain the written condition that the debtor will appear on the day, and at the place stated in the writ. The sheriff is in no wise to take any bond in favour of himself by or under colour of his office, any such bond taken is to be completely void, also treble damages shall be payable to the party grieved and a fine of forty pounds levied on the officer for each offence.⁽¹⁾ This provision did not in any way affect the right of the sheriff to release the debtor without taking a bond for his appearance, or on receipt

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- (19) The Warden of the Fleet and Warden of the King's Palace of Westminster gaol are excepted. For an exposition on the effects of this statute see Beawfage's Case (10 Jac. I Co. Rep. X. 99 b) "And it is true before this statute, Sheriffs, Gaolers, &c. sometimes by oppression and dures, would extort from the prisoners by colour of their offices divers sums of money and other profits, and so by such pillage and extortion they were enriched, and the prisoners impoverished, and the proceedings of justice delayed." at 101b (1612)
- (20) Thus if the bond was not made to the sheriff, or not to him in the name of his office then it was void; *Thrower v. Whetstone*, (1560) Dyer 119b. 220 a.
- (1) See *Dive v. Manningham* (1551) Plow. 67 (75 E.R. p. 96) for a discussion of taking bonds by colour of office.

of a bond from only one surety,⁽²⁾ the statute merely stated that on receiving surety from sufficient persons a debtor arrested on mesne process shall be let to bail, although for some time this particular portion of the act was the subject of a number of differing opinions.⁽³⁾ The long term result of this provision was to be a complicated system of bail for arrest on mesne process⁽⁴⁾ which resulted in many debtors having no chance of being bailed once arrested, their only option was to settle down and wait out the probable long delay before their case would be heard, resigning themselves meanwhile to a possible life-time of imprisonment on

- (2) The position of the gaoler who let a person at large after arrest on mesne process was discussed in *Ely & Ors. v. Chertesey* (1470) Y.B. 10 Edw. IV (S.S. vol. 47) pp. 91-5., where it was thought that the gaoler might let the debtor go at large, and if he appear at the day set, then no action will lie against the gaoler. See Co. Rep. X. 101 a.
- (3) The non-appearance of the debtor where the sheriff failed to take a bond was treated as an escape, and an action of the case lay to recover the debt; *Bennion v. Watson & Elwicke* (1597) Cro. Eliz. 625. In *Barton v. Aldeworth* (1598) Cro. Eliz. 624, it was held that where the sheriff has taken bail pursuant to 23 Hen. VI c.9 he is not liable to the plaintiff in an action on the case, on the non-appearance of the party at the return of the writ. In this case Popham, J. said "if he takes one surety it is sufficient for he is not compellable to take two sureties."
- (4) See Bl. Comm. III, 290-292. By 12 Geo. I, c.29 (1725) the sheriff was only to take for bail the amount sworn to by the plaintiff on the back of the writ and no other amount.

execution after judgment. (5)

Escape

Among the many tasks of the sheriff, that of maintaining the local gaol loomed large on his horizon, both as a source of profit and penalties. (6) The fact that he installed a keeper, the latter often paying him a premium for the pleasure, could not always be said to 'save him harmless' of the penalties which resulted from

- (5) The procedure of taking special bail which grew up and the liability of having to pay the debtor's debt and not merely entering common bail did nothing to encourage people to go surety for a debtor. In 1697 (8 & 9 Wm. III, c.27, s. 1) debtors in the King's Bench and Fleet prisons on arrest on mesne process are not to be let at large save on a writ of habeas corpus or by a rule of the court, otherwise it will be counted an escape.
- (6) The statute of 14 Edw. III, st. 1, c.10 (1340) placed gaols usually in the sheriff's ward and annexed to their bailiwicks under the custody of the sheriff and for which they were to answer. 19 Hen. VII, c.10 (1503-4) placed all the king's common gaols, prisons and prisoners under the keeping of the sheriff, save those gaols held by person(s) or bodies corporate by inheritance or succession. Patents granting other forms of holding a gaol are rendered void except in the case of the King's Bench and Marshalsea prisons and certain Constables holding castle gaols. Disputes as to who might have custody of prisoners might still arise however; in 1561 the Constable of Hertford Castle and the Warden of the Fleet wrangle over the right to custody of prisoners committed to the Fleet from the Chancery, Star Chamber, Common Pleas and Exchequer the term having been adjourned to Hertford and the courts held within the castle. Verdict for the Warden of the Fleet but query over prisoners committed from the Duchy court. Dyer 204a. pl. 76.

the nefarious schemes of his prisoners.⁽⁷⁾

The statute merchant⁽⁸⁾ places the responsibility for the safe keeping of the prisoner on the gaoler, but if he was not sufficient then the person appointing him became liable for the debt.⁽⁹⁾ This

(7) The general practice was to install a deputy or keeper in the gaol and by extension of the provisions of 13 Edw. I, c.11, such keeper was liable for any actions of debt in respect of escapes so long as he was sufficient, otherwise his superior must answer. In the case of London, the Mayor and Citizens were apparently the superior and the sheriffs the guardians. Co. Inst. II, 382. This difficulty was surmounted, however, by the sheriff taking a bond from the person he appointed as guardian indemnifying him against any damages recovered against him by virtue of the latter's negligence; see e.g. C.P.M.R.(1381-1412) p.92, involved account of sheriff attempting to sue his janitor on being sued in debt over a debtor released by the janitor. As long as the keeper was sufficient, however, the superior had very little to fear, see Gawdy's Case (1568) Dyer 278, pl. 5.; otherwise the superior himself would have to answer for the debt and a keeper who had already allowed too many escape could be dismissed, see Sir John Arundel's Case (1580) Savile 15. See IX Co. Rep. 98 a.b.

(8) 13 Edw. I (1385). The liability which came to attach itself to the sheriff meant that he had to be very careful when taking office that he received all the prisoners which his predecessor purported to have in custody, otherwise once accepted and in office he would be liable for the non-appearance of a prisoner. Until delivered to him the prisoners remained the liability of the old sheriff; see Westby's Case (1597) Co. Rep. III 71 b. and also Mynours v. Tourke & Yorke (1549) Dyer 66. pl. 9, an attempt by the sheriffs of London then in office to lay the blame for an escape on their predecessors.

(9) See for example Y.B. 12. 13 Edw. III (R.S.) pp. 130-2, action against a sheriff for allowing a recognisor of a statute merchant to go at large without having made satisfaction. Also ib. 354. F.N.B. 93 A. states that the creditor may alternatively have a special action upon the case against the sheriff. This was the old common law remedy where escape took place, see pp. 334-335.

form of liability had also been part of the remedy granted against accountants who escaped after they had been imprisoned by the auditors;⁽¹⁰⁾ but at the common law the only action against a gaoler where a prisoner imprisoned on execution escaped either by collusion or negligence was an action on the case.⁽¹¹⁾ Until arrest on mesne process came into being in debt the position did not cause very much concern since the creditor by statute merchant was taken care of by the statute, even with arrest on mesne process, it is only when the extension to arrest and imprisonment on the judgment comes in⁽¹²⁾ that the need for definite action to protect the creditor who chose to have his debtor imprisoned arises. This does not mean that the boroughs had not already worked out their answer to the problem by normally allowing an action for the debt.⁽¹³⁾ At Ipswich in 1291 we find that if a keeper allows at large a person imprisoned due to failure to pay damages recovered against him, then the keeper is liable for those damages; and he is also to be punished for allowing such without

(10) 13 Edw. I. c. 11. (1285) see p.139

(11) Co. Inst. II. 382.

(12) This had become accepted at common law by 1376, see pp. 206-11

(13) There are many early examples in London. E.g. C.P.M.R. (1298-1307) p. 231, case of 1305, where a former sheriff protests that he did not receive the body: and ib. (1323-1364) p. 266, case of 1363 where late sheriffs of London have to pay £56 for allowing the plaintiff's debtor to escape from Newgate.

permission.⁽¹⁴⁾ A custumal of Corke of about 1339 says that if a stranger is handed over to the gaoler and he escapes through negligence or consent of the gaoler 'whether for bribe or for love', then the gaoler is to pay to the community half a marc for the offence, and if the plea is one of debt, then if the creditor has some evidence of the debt by which the court can have some knowledge of it, then the gaoler is to pay the creditor twelve pence in the pound, or if it is thought that the creditor will never see the debtor again some higher figure might be agreed upon.⁽¹⁵⁾ The king is also willing to intercede in such matters, and in 1318 we find issuing from Windsor the following:

"To J. duke of Brabant, the King's nephew. The king has received complaint from Henry de la Porte, merchant of Northampton, that although John Wylet, merchant of Malyns, bound to him in £74. 8s. 7d. for merchandise brought from him, and John was arrested at his suit for the debt in the town of Andwertz, within the duke's power, according to the liberties and customs granted

(14) Bor. Cus. II, p. 28. Ipswich, c.23

(15) Ib. p. 29. Corke, c.15. This produced a forced compromise by the creditor and must have provided an easy way out for a debtor who was prepared to pay about half of his debt to the gaoler for his release, though the power of the court to tighten upon the percentage debt recovered by the creditor might deter some keepers. These provisions appear in the borough custumals until quite late, for in 1567 in Lancaster it is stated that "If bailiffs or serjeants allow escape after arrest made, then the party guilty of such is to answer to the creditor for his debt, ib. p. 30. Lancaster, c. 25, s.2.

"and used in that town for the merchants of England, and was delivered to Gerard Ekene, schultheiss (scoutatt) and bailiff of that town, to be kept until he had satisfied Henry for the said debt, the said Gerard nevertheless allowed John to go from his custody before he had satisfied Henry; wherefore the king requests the duke to call before him the said Gerard and others who should be called before him, and to cause speedy justice to be done to Henry in the recovery of his debt, so that it may not behove the king to provide him with another remedy.⁽¹⁶⁾ He is requested to write back by the bearer an account of his proceedings herein."⁽¹⁷⁾

By 1376 when imprisonment in execution has resulted from the statutory right to imprison on mesne process, it appears that the common law has already permitted that an action of debt shall lie at the suit of the creditor, where his debtor has escaped from execution, through the equity of the statute against defaulting accountants.⁽¹⁸⁾

(16) An apparently very lightly veiled threat as to the right of reprisal being granted, see pp. 201, 718-21

(17) C.C.R. (1313-1318) p. 537. Apr. 20. Windsor 1318.

(18) Co. Inst. II. 382. re. Wes r. II. 13 Edw. I, c.11. "and before any other act of parliament by the equity of this act an action of debt did lie against the gaoler for an escape in court pipowers, and so in all other cases. This act doth extend to feme covertes and infants, that are keepers of gaoles, to charge them in an action of debt for the escape of one in execution." See F.N.B. 93.c. that an action on the case might be brought where a debtor escapes out of execution, but also it seems that an action of debt will also lie. In *Burton v. Eyre* (Cro.Jac. 288) it was held that as 13 Edw. I, c.11 and 1 Ric, II, c.12 are both affirmative statutes they do not destroy the common law remedy, therefore the creditor may choose between the action of debt and the action on the case. (1611)

The position is, however, clarified a year later when the evils of debtors in execution being let out on payment to the gaoler is revealed in the preamble to a statute which states:

"Whereas divers People, at the Suit of (the Party) commanded to the Prison of the Fleet, by Judgment given in Courts of our Lord the King, be oftentimes suffered to go at large by the Warden of the Prison, sometime by Mainprise or by Bail, and sometime without any Mainprise with a Baston of the Fleet, and to go from thence into the Country about their Merchandises and other their business, and be there long out of Prison Nights and Days, without their Assent at whose Suit they be judged, and without their Gree thereof made, whereby a Man cannot come to his Right and Recovery against such Prisoners, to the great Mischief and Undoing of many People:"⁽¹⁹⁾

to remedy this it is enacted that the Warden of the Fleet shall not let at large prisoners in execution, if he does so he is to be punished by loss of office⁽²⁰⁾ also an action of debt is permitted at the suit

(19) 1 Ric. II, c. 12 (1377)

(20) This was the normal fate of keepers who knowingly let at large debtors in execution. See Co. Rep. IX 95 a. Sir George Reynel's Case, where the Marshal of the Marshalsea prison himself was relieved of his office for permitting a number of escapes from the said prison (1612)

of the creditor against the Warden.⁽¹⁾

Between the equity of the statute against accountants and the workings of this statute thus the creditor was provided with an ordinary action of debt to compensate him for the loss of his debtor; the keepers of gaols, however, were not so easily defeated and they turned to the king for their protection. By 7 Hen. IV, c.4⁽²⁾ it is said that persons sent to the Marshalsea, King's Bench, Fleet and other prisons elsewhere are being let at large by their gaolers, who, when sued purchased letters of protection against the said suit, therefore it is ordered "That no protection be available, nor allowable, nor by any Means allowed in such Case." Generally these protections were merely attempts to avoid the consequences of fraudulent actions, but the law relating to rescues only allowed the sheriffs to plead the fact that a debtor had been snatched from them where such had taken place on the mesne process, once in execution the sheriff could not plead rescue for "it is at the sheriff's peril to see that his prison

(1) This, it was argued at one time, only referred to persons imprisoned on execution for debt; Henry Somer & Ors. v. Roger Sapurton (1428) Sel.Cas. Ex.Ch. (S.S. Vol. 51) I, p. 38 where the plaintiffs had recovered £300 damages against four persons on a bill of forgery of false deeds, the forgers were committed to the Fleet under custody of the Warden and they were allowed to go at large without satisfying the plaintiffs. The plaintiffs proceeded under 1 Ric. II, c.12 against the warden, who contended that since the defendants were committed under 1 Hen. V, c.3 their committal was only until such time as they should pay fine to the king for their contempt, and that they were not therefore committed at the suit of the plaintiffs. Unfortunately, the record of the case gives no final judgment.

(2) 1405-6; and see Rot. Parl. III, 593 a.

be strong enough to keep his prisoner, when he is once in execution; and being a mischief to one it ought rather to fall on the sheriff than on the party;"⁽³⁾

A Gaoler and His Troubles

The debtor in execution could be released on the direction of the party at whose suit he was imprisoned,⁽⁴⁾ either with or without giving security in the form of a bond or otherwise to the creditor for such release; but once released he might not be re-imprisoned on the debt by virtue of failure of his bond, etc.⁽⁵⁾ Escapes by debtors in execution left the gaoler or sheriff liable for the debt to the creditor: it did not matter to the creditor whether the escape

(3) *May v. Proby & Lumley* (1615) *Cro. Jac.* 419. The act did not stop the requests to the parliament that aid be given, and certainly on occasions aid seems warranted. In *Rot. Parl VI*, p. 49 (1472-3) No. 55 is a petition from John Duke of Norfolk which requests that an Act be passed to indemnify him from the claims of persons whose debtors etc. have been released by a mob of three hundred who attacked the King's Bench Prison; similarly in 1474 a petition is received from a Sergeant of the Sheriffs of London requesting indemnity against the rescue of one in execution for debt by a force of twenty persons, *ib.* p. 103, No. 26, see *Appx.* pp.765-9. In both cases they are to be relieved as requested.

(4) *Co.Inst.* III, 209. The mere parol consent of the creditor will do; *Plow.* 36. *Dyer* 275, pl. 46 cites the case of a gaoler who, by leave of the Chief Justice and the assent of the plaintiff, permitted one in execution to go at large for a time and that on return to the prison the debtor was in execution again so that if he was set at large again an action of escape would lie; but, says *Dyer*, this case is not law by common practice. If, however, a prisoner returns to prison after a voluntary escape, the plaintiff may admit him to be in execution so that if the prisoner be handed over to a new sheriff and then escape, an action will lie at the suit of the plaintiff against the new sheriff; *James v. Peirce* 1 *Vent.* 269 (1675).

(5) *Vigers v. Aldrich* (1769) 4 *Burr.* 2482.

was voluntary, that is through the collusion and express consent of the keeper, or negligent, which covered all other cases, either way the creditor might maintain his action, but if the debtor was recaptured in the time between a negligent escape and the creditor bringing action against the sheriff, then the sheriff is excused.⁽⁶⁾ This was also the case where the debtor escaped through negligence whilst imprisoned on mesne process, since as long as the debtor was produced on the court day the creditor suffered no injury.⁽⁷⁾ In voluntary escape the gaoler may not retake the debtor once set at large,⁽⁸⁾ nor

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- (6) F.N.B. 130, that if the gaoler is forced to satisfy the creditor he may have an action on the case against the debtor for his damages. In 1474 (Sel.Cas. Ex. Ch. (S.S.) II, p. 34, No. 13) in the Exchequer Chamber it was held that if a debtor escapes from imprisonment on execution, the gaoler may retake him at any time and the debtor shall be in execution as before; but if the creditor brings his action and recovers against the gaoler then debtor may have a scire facias to be excused from the debt. In Ridgeway's Case (1594) Co. Rep. III, 52 a. it is stated that the gaoler is excused if he recapture the debtor before the creditor bring his action on the escape; otherwise the gaoler may take the debtor and hold him until he make recompense or bring an action on the case for the escape.
- (7) This follows naturally from the fact that if the sheriff produced the debtor on the day the plaintiff had not been delayed in his suit, for it is with delay that the common law is most concerned. See Noy 72 a. where a distinction is made between the wording of the writ alleging escape on mesne process and that of escape on execution, in the former it is necessary to state that the debtor was let at large and not produced on the day, whereas in the latter it is sufficient to state the debtor was let at large. Cf. Atkinson v. Matteson (1787) 2 T.R. 172. Where the sheriff captured a debtor under a *capias utlagatum* he might not let him at large at all, so that if he did so the creditor could maintain an action on the case for an escape, Bonner v. Stokeley (1598) Cro.Eliz.652, the court held the action clearly lay "because the plaintiff hereby was delayed of his debt."
- (8) Co.Rep. III, 52 b. if retaken such debtor may have an *audita querela* for his release against the sheriff. The sheriff is also liable for an action for false imprisonment, Buxton v. Home (1691) 1 Show. 174.

by virtue of 23 Hen. VI, c.9 he may enforce any bond entered into by the debtor to save him harmless from the creditor suing for the debt;⁽⁹⁾ the creditor however may have the debtor retaken on a new *capias ad satisfaciendum*,⁽¹⁰⁾ but if he recovers in an action against the gaoler then the debtor shall not be liable to the gaoler for the damages he has paid.⁽¹¹⁾

The need to determine what constituted an escape led to as varied and intricate a set of rules as were arrived at in the case of bail.

Coke states that:

"...forasmuch as escapes are so penal to Sheriffs, Bailiffs of liberties, and Gaolers, the Judges of the law have always made as kind and favourable constructions as the law would suffer, in favour of Sheriffs, Bailiffs of liberties, and Keepers of prisons, who are officers and ministers of justice. And to the intent that

(9) *Dive v. Manningham* (1551) *Plow.* 67. In *Ligeart v. Wischam* (1573) *Dyer*, 324, pl. 32, the plaintiff, an under-marshall of the king's bench prison, took a bond of a debtor in execution and his brother jointly, that the debtor would be a good and true prisoner and to save harmless of "all manner of escapes actions and suits" etc., the plaintiff, the Marshal of the prison, Gaudy, and the Duke of Norfolk, the High Marshal; upon being give the bond the plaintiff released the debtor; having been sued for an escape the plaintiff now sought to enforce the bond against the debtor's brother. The court being clearly of the opinion that the bond is within 23 Hen. VI, c.9 and therefore void the plaintiff dropped the case.

(10) 26 *Ass.* 51; if a person taken on a *capias ad satisfaciendum* escapes then another *capias* may be had as well as an action against the gaoler. See 1 *Vent.* 4; or the plaintiff may bring an action on the judgment - *Buxton v. Home* (1691) 1 *Show.* 174.

(11) *Pitcher v. Bailey* (1807) 8 *East* 171.

every one should bear his own burthen, the Judges would never adjudge one to make an escape by any strict construction."⁽¹²⁾

A hundred years later he would have been hard pressed to find many of these 'kind and favourable constructions', in the cases which came before the courts.⁽¹³⁾

Despite all this, debtors continued to be let at large either alone or with a keeper and to carry on with their business;⁽¹⁴⁾ since

(12) Co. Rep. III, 44 a, 44 b.

(13) Thus in *Brown v. Compton* (1800) 8 T.R. 424, it was held that where a court, having no jurisdiction so to do, ordered an officer to discharge a prisoner, which he did, that the officer was liable for an action in an escape. Coke made a distinction between a court of competent jurisdiction acting erroneously and a court not having jurisdiction at all; Co. Rep. 76 a. In the former case an officer is excused action under order of the court, but not in the latter. See *Tarlton v. Fisher* (1781) 2 Dougl. 671. But the officer being bound to execute process of the court is in a difficult position, since he seems likely to be involved in an action either way.

(14) During the sixteenth century a number of attempts were made to allow important debtors out for the King's business or reasons of state; in *Thurland's Case* (Trin. 4 & 5 Ph. & M.) reported in *Dyer* 162 b. 50, it appears that one Thurland was permitted to go at large with a keeper on the Queen's business, however, in the case in which it is reported the request whether a prisoner in execution might be licensed to go with a keeper to Berwick (he being a man necessary in the defence of it) was referred to the judges of both benches, who held that this could not be done. See also *Dyer* 296 b. pl. 24 where the warden of the Fleet is found liable for an escape having let a person in execution in the Fleet, at the suit of both the king and a subject, at large with a keeper that he might go into the country and collect the king's debt.

the creditor had chosen imprisonment he could not chase the debtor's property which left the clever debtor with funds at his disposal. This meant that any enterprising gaoler would take cash payments to cover the chance of his having to pay the debt, due a keen creditor's discovery that his bird had at least partially flown.⁽¹⁵⁾ The odds against which were apparently sufficiently good to render the occasional loss something in the nature of overhead expenses.

(15) Since a debtor might well be indebted to many creditors and only imprisoned at the suit of one, he was likely to be safer in the prison than out, so that whilst he might have to pay his gaoler the amount he refused to pay his creditor, it did mean he could continue his business with occasional strolls into the country to take care of the more important matters.

CHAPTER 13ABANDONED HOPEPrisons - Private and Public

The early law had not had a very great need for prisons which could cater for the long incarceration of their inmates, important prisoners could be kept in the odd tower until executed or returned to favour, other offenders usually made fine with the king or suffered loss of life or limb. With the provision for the imprisonment of defaulting accountants⁽¹⁾ together with the statutes merchant,⁽²⁾ however, the provision of prisons and keepers takes an upward trend. Requirements of imprisonment in the king's prisons did not mean that there was a need to build a chain of special prisons, for almost all prisons were the king's prisons, whether held in special franchises or in fee.⁽³⁾

The king's courts did have their own prisons, to which persons appearing before them could be committed, and it is through these together with the gaols of the City of London that the position of the

(1) 17 Edw. I: c. 11 (1385)

(2) 11 Edw. I. (Acton Burnell (183) and 1 Edw. I (1385)

(3) Co. Inst. II 59 "Albeit divers lords of liberties have custody of the prisons, and some in fee, yet the prison it selfe is the kings pro bono publico: and therefore it is to be repaired at the common charge: for no subject can have the prison it selfe, but the king only."

imprisoned debtor can best be examined during this period. First, above all others, with its history of oppression and corruption is the Fleet Prison, a king's prison from before the twelfth century and the home of the king's debtors,⁽⁴⁾ yet by the reign of Richard II it seems to have become the natural prison for persons committed from the Commo Pleas and Exchequer, the Council, and later from the Chancery; over a period from the end of the fourteenth century until its abolition in 1842 it stood a monument to all the misery which imprisonment for debt brought with it. The court of King's Bench has its own prison in Southwark which as the court extended its jurisdiction to debt⁽⁵⁾ came naturally to be a debtor's prison. The Marshalsea Prison forms the other large debtor's prison, although at first only a prison for persons committed from the Marshalsea Court⁽⁶⁾ became later a prison for debtors and like the King's Bench Prison was located in Southwark.⁽⁷⁾

(4) Madox fo. 35, gives an instance of 1197 "Nathaniel de Leveland and his son Robert - fined lx marks. To have custody of the King's Houses at Westminster and of the Fleete Prison which had been their inheritance ever since the Conquest." In the need for a sheriff to make correct returns to the Exchequer it is not unusual to find the odd sheriff in the Fleet, e.g. Rot. Parl. II. 190 petitioning helpfully for his release is one Thomas de Bekering, sheriff of the counties of Nottingham and Derby.

(5) Co. Inst. IV, 71-2; 76.

(6) see p. 262

(7) In 1550 the Manor of Southwark was granted to the City of London under its jurisdiction "except and always reserved the house, messuage or lodging there, called the "King's Bench", and the garden or gardens to the same pertaining, with the appurtenances, so long as it shall be used for a prison for the imprisoned, as it now is; and except the messuage and lodging there, called the "Marshalsea", and the gardens to the same belonging, with the appurtenances, so long as it shall be used for a prison, as now it is." Birch, pp. 124-5.

The prisons invariably were divided up so that the 'rich' debtor might occupy one part and the poor debtor another.⁽⁸⁾ In the cities it was not unusual to find separate prisons set aside for the burgess or freeman,⁽⁹⁾ in Lincoln we find 'that no man unfranchyst schall be imprisonyd in the chambyr callyd franchist mans prison, withowte he be a prest, entylman, or a clerke within ordyrs, without fine making to the schefyffs at thare lesyr.'⁽¹⁰⁾ whilst as late as 1311 at Prestwick it is stated that "though they can put a freeman in prison they have no power to lock the door upon him, but if the prisoner comes over the free hold of the door before he is regularly liberated he loses his freedom or barons in the borough."⁽¹¹⁾ The actual conditions of the gaols during this period are not as yet those which will cause many protests in the latter part of the sixteenth century and after the health of debtors depends largely upon their keeper,⁽¹²⁾ or upon the

(8) These became known as the 'Master's Side' and the 'Common Side', where the prison catered for all classes.

(9) In London the Ludgate Prison was to be kept for freemen only of the city. Cal. Ltr. Bk. H. p. 97 n. The poor or strangers being placed generally in Newgate. The inmates of Ludgate might, however, be sent to Newgate for punishment though afterwards they were to be returned, Cal. Ltr. Bk. L., p. 250 (148)

(10) Bor. Cust. I, p. 60 Lincoln, c. 7

(11) ib. p. 07

(12) But not all were totally unconcerned with the well being of their charges, in 1441 Henry Dene, keeper of Ludgate, complained to the Mayor and Aldermen that the privy of his prison had in the past emptied into the town ditch, but that now this was prevented by one Nicholas Clement and if the privy is not emptied soon "it wol destroye the kinges prisoners to many a mannes hurt..." Cal. Ltr. Bk. K., p. 254-5.

superior.⁽¹³⁾ The welfare of the prisoners in the Fleet is looked into by the King in 1355 and in a writ to the Mayor and sheriffs of London he wrote: "whereas we have been given to understand that the Foss by which the mansion of our Prison of Flete is surrounded, and which for the safety of the said prison was lately made, is now so obstructed and choked up by filth from latrines built thereon, and divers other refuse thrown therein, that there is cause to fear for the abiding thereof of the persons therein detained, by reason of the same; and because that, by reason of the infection of the air, and the abominable stench which there revails, many of those there imprisoned are often affected with various diseases and grievous maladies, not without serious peril unto them." Upon direction an inquest is held to enquire into the natural condition of the foss as to whether filth might be thrown into it; from the reply "we learn, that the "Foss of Flete" ought to be 10 feet in breadth all round the Prison; that it ought to be so full of water, that a boat laden with one tun of wine (one ton, in tonnage ed.) might easily float round it; and that the shelving banks of the Foss were then covered with trees. Also that there were three tanneries established

(13) The Mayor and Aldermen of London agreed in 1475 to see the lead pipes carrying water to Newgate prison were properly maintained so that the prisoners might be properly refreshed thereby. C.F.I.R. (147-51) p. 2-3.

close to the margin of it; that it was quite choked up with the filth of laystalls and sewers discharging into it; and that no less than eleven necessary-houses (or 'wardrobes', as they seem very generally to have been called in the 13th and 14th centuries) had been illegally built over it, -- 'to the corruption of the water in the Foss aforesaid; and to such an extent is the flow of water obstructed and impeded thereby, that the said Foss can no longer surround the Prison with its waters, as it used to do.'"⁽¹⁴⁾

Despite these rather discouraging conditions the Fleet appears to have been regarded as the more acceptable of the debtors' prisons, in 1377 it is petitioned to the effect that no man imprisoned for debt or damages to a citizen of London should be removed to the Fleet prison to answer in the Exchequer for a debt due to the king unless such debt was due previously,⁽¹⁵⁾ relief comes in the form of statute relating to the whole kingdom by which such debtors found not to have a debt on record to the king shall be returned to their former prison until they make satisfaction with their creditors.⁽¹⁶⁾ To the political prisoner under close imprisonment in some castle the liberties

(14) Riley 'Memorials', pp. 279-280, citing Cal. Ltr. Bk. 'G' fos. xxxix,xl.

(15) Rot. Parl. III, 25.a.

(16) 1 Ric. II, c.12 (1377) the prior provision of this Act which forbade the Warden of the Fleet to allow prisoners in execution to go at large with a keeper also took away of the reason for such confessions.

of the Fleet held much appeal,⁽¹⁷⁾ and we can even find an apprentice who found imprisonment in Ludgate of more comfort than returning to a former master to work off a debt of £11. 10. Od.⁽¹⁸⁾

On Paying Your Gaoler

Since prisons, be they merely a house, an inn or a properly constructed gaol, require keepers and keepers require wages in some form or other the problem of fees is one which causes trouble throughout the entire period of imprisonment for debt. Britton says that it is forbidden for "any one to take money, or the value thereof for receiving prisoners, or to delay receiving them, or to take for the keeping of any prisoner more than four pence, on pain of ransome and fine. Of the poor let nothing be taken, and let no prisoner be longer

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- (17) See e.g. State Prs. Dom. Eliz. vol. lxxxv. No. 25 (1572) a letter of Lord Henry Howard to Lord Burghley lamenting on the renewed strictness of his imprisonment and requesting Burghley to obtain permission from the Queen that he might be freed since he would prefer an open imprisonment in the Fleet than the close keeping of the Archbishop's Palace. There is no doubt that for the prisoner with money to spend, the Fleet could be extremely pleasant.
- (18) C.P.M.R. (1381-1412), p. 221 (1394), the court offered that the apprentice give a bond for the debt and return to his former master at a weekly wage of 3. 4d. of which 20d. would be deducted weekly as a means of paying off the debt, it is quite possible that the apprentice reckoned that Master would be prepared to settle for a much smaller sum long before the almost two years eight months it would take to work off the debt were up. Conditions at Ludgate at this time, if good, certainly got better, for in 1419, the prisoners were all removed to Newgate since many of them were quite happy to spend their money within the prison than pay their creditors; within five months, however, they were returned to Ludgate. - Riley, pp. 673-4, 677., given in Appx. pp. 770-771, 772.

detained for default in payment of such fees."⁽¹⁹⁾ The latter part of this provision certainly did not pass into the general law and Marmaduke Johnson writing in 1659 remarks that such charge "to many poor Men becomes often-times as burdensome as their Debts, and are by the Keeper detained in Prison as for Debt, only for their Fees, though discharged and acquitted of what they were committed for."⁽²⁰⁾ The figure of four pence, however, seems to have been found completely acceptable; the City of London makes an Ordinance "That the Sheriffs let not the gaol of Neugate to ferm, but place a man of good character as Keeper of the gaol, who shall make oath before the Mayor and Aldermen not to take any fine or extortion from prisoners, but shall be allowed to take the sum of 4 pence from each prisoner delivered for his fee as of old accustomed."⁽¹⁾ The Marshal of the Marshalsea is only to take fourpence of every person imprisoned on judgment of the Steward,⁽²⁾ by 23 Hen. VI, c.9., it is stated that the only charges to be made of persons arrested or attached to the sheriff, 20d., to the bailiff which makes the arrest or attachment, 4d., and to the Gaoler, if the

(19) Brit. I, p. 46 (Bk. I, c.12, s.7) an Act of 1330 (4 Edw. III, c.10) forbade sheriffs or gaolers to demand or take any charge in the case of persons involved in criminal charges.

(20) Stowe's Survey vol. II, Bk. 6, appx. p. 27. See an Order of the King's Bench of Hil. 14. Car. I. 1638, "It is Ordered that every prisoner who shall be removed from the Custody of the Warden of the Fleet, to the Prison of the Marshalsea of this Court by Virtue of a Writ of Habeas Corpus shall remain in the Prison of the Marshalsea aforesaid, and shall not be set at Liberty until he hath paid the Prison Fees due to the aforesaid Warden of the Fleet." - Rules and Orders KB.

(1) Cal. Ltr. Bk. 'G', p. 75, No. 13 (1356)

(2) 2 Hen. IV, c. 23 (1400-1)

prisoner be committed to his ward, 4d.⁽³⁾ The keeping of the Fleet prison being given to a warden the practice was to let the gaol to another at a price, who in turn would have to make his investment pay through his collection of fees, quite early in the Fleet's career as a debtor's prison a prayer is made to parliament that the fees be made certain, and it is ordered that the council with the Chancellor and justices shall decide the fees to be taken by the warden.⁽⁴⁾ The regulating of fees and the making of rules for the prisons and treatment of prisoners does not seem to have occupied the king's courts very much during this period,⁽⁵⁾ although London was already taking care of this matter by the end of the fourteenth century in a very definite fashion,⁽⁶⁾ even here the use of Compters led to abuse of the charges set by the city,⁽⁷⁾ above which the Fleet had charms the Compter could not match, for the Fleet had an area comprising houses, etc., surrounding the prison within which the prisoners might

(3) 1444-5

(4) Rot. Parl. III, 469.

(5) By 2 Geo. II, c. 22. (1728-9) prisons were to exhibit in a prominent place the rules and charges pertaining to the prison.

(6) Liber Albus, pp. 447-8. (1399) gives rules for the regulating of Newgate and Ludgate, but these are more firmly established by the City on 23 Feb. 9 Hen. VI (1430-1) Cal.Ltr.Bk. 'K', pp. 124-7, given in Appx. 773.

(7) The Compters were used by the sheriffs at first to lodge their prisoner prior to his being placed in Ludgate or Newgate, but later became permanent homes for debtors; Liber Albus, p. 447 states that a sheriff might allow a debtor to remain in the compter rather than be placed in one of the other prisons on payment to the sheriff of 4d., 6d., 8d., or a shilling per week, the amount to be determined having regard to the manner of their arrest and their estate. (1399) Later it is ordained that persons who wished or ought to live by common alms given by people should not remain in the compter more than one night; Cal.Ltr.Bk. 'K', p. 125 (1430-1)

reside on payment to the Warden and still be considered within the prison confines.⁽⁸⁾ In 1708 a description of the Fleet prison states it is "situate on the East side of the Ditch, between Ludgate Hill and Fleet Lane, but the Rules extend Southward on the East side of Fleet Canal to Ludgate Hill, and thence Eastward to Cock Alley on the South side of Ludgate Hill, and to the Old Bayly on the North, and thence Northward in the Old Bayley both sides the Street, to Fleet Lane, and all that Lane, and from the West End, southward to the Prison again. It is a prison for Debtors from any part of the Kingdom, for those that act or speak any thing in contempt of the Courts of Chancery and Common Pleas; and for the pleasantness of the Prison and Gardens, and the aforesaid large extent of its Rules, it is preferred before other Prisons, many giving Money to turn themselves over to this from others."⁽⁹⁾ All this pleasantness however depended on the ability of the debtor to pay for pleasures, it did not take into its protection the debtor who was

(8) The King's Bench Prison also had its own 'Rules' within which the more affluent debtor might reside comfortably and well. In Worley v. Harrison (1566) Dyer 249 a.pl. 84, the defendant imprisoned in a city compter and finding it too 'hard and strait' procured a feigned action to be brought and judgment had against him in the Common Pleas, whereupon the false plaintiff requested that the defendant be imprisoned in the Fleet which the defendant considered to be a 'more easy and roomy confinement' and well worth the trouble taken to get there. The court, however, on being told of the deception promptly fined the defendant and returned him to the compter.

(9) Hatton (E.) 'New View of London' II, p. 745.

poor. (10)

Treatment and Torture

The treatment received by the debtor whilst in his prison depended, as did the condition of his surroundings, on the power of his purse; money would loosen a fetter far quicker than prayers to Divine Providence and justice. Bracton said that regard ought to be had to the nature of the offence and the age of the prisoner as to whether chains should be used;⁽¹¹⁾ Britton, written in a time when the imprisoned debtor on a statute merchant actually exists, says that none should be put in irons unless apprehended for felony, etc.;⁽¹²⁾ little of this reached the ears and minds of the gaolers, and in 1399 in respect of the Newgate and Ludgate prisons it is stated that, "it shall be lawful for the said gaolers to take surety reasonably from prisoners who

(10) The expecting of the Keeper to pay whatever staff he had and obtain his own living from the fees taken could only lead to extortion, yet the system continued in many cases into the nineteenth century. In the mid-eighteenth century we are told that the keeper of the New Prison Clerkenwell was expected to do so well from his post that he had to pay a rent of £50 though business gradually fell away and he was given a salary of £30 a year. - Dowdell, (E.G.) 'A Hundred Years of Quarter Sessions' (1660-1760), p. 11.

(11) Brac. 3, fo. 105.

(12) Brit. 1, p. 44 (Bk. I, c. 12, s.3)

"are in their keeping, for a sum of one hundred shillings, and above, for removing their irons, as in other gaols of his lordship the King has been heretofore reasonably practised."⁽¹³⁾ Coke, although stating by the common law that a gaoler might not lay chains upon the debtor,⁽¹⁴⁾ finds sanction in 13 Edw. I, c.11⁽¹⁵⁾ for the keeping by sheriffs of debtors in execution "in fetters and irons, to the end that they may the sooner satisfy their creditors."⁽¹⁶⁾ Chaining was more generally for the troublesome debtor who refused to pay his way, or the not unusual case in the middle ages of the person falsely imprisoned on a plea of debt for political or other reasons.⁽¹⁷⁾ The complaint of one Matthew against the Bishop of Bath illustrates this position well. Matthew being in the care of the Warden of the Fleet obtains permission

(13) Liber Albus, p. 448.

(14) Co. Inst. II, p. 381.

(15) 1385.

(16) Co. Rep. III. f. 44a. Coke seems to have had some difficulty in reconciling his dislike for debtors with his own views relating to punishment and the liberty of the subject, for in his 'Commentary upon Littleton' remarking on the fact that a prisoner could not go out of prison, he says: "By this it appeareth, that a man in prison by process of law ought to be kept in *salva et arcta custodia*, and by the lawe ought not to goe out, though it be with a keeper, and with the leave and sufferance of the gaoler: but yet imprisonment must be *custodia, et non poena*; for *carcer ad homines custodiendos, non ad puniendos dari debet.*" - Co. Inst. I, 260 a.

(17) See e.g. Rot. Parl. II, 329. Sir Henry de Medbourne accused of throwing persons into the Fleet and other places under colour of their being indebted to him in an attempt through such oppression to influence a jury to give a favourable verdict. And see H.H. Hall S.C.L.M vol. III, p. xiii. "The menace to the political offender of the debtor's prison was a recognized instrument of mediaeval government.."

to go at large, the Bishop promptly trumpets up a false charge of breaking prison against Matthew, who is imprisoned in the Tower for two years. Upon this, says Matthew, the Bishop came "to the Tower and had him stripped to his shirt, without shoes or girdle and without bed, had him.... put in the black cellar on the bare ground, where he remained for two years without any kind of fire or light, nor had he anything to drink except from the well of the Tower where the rats drown themselves". From this particular predicament the king delivered Matthew, who now seeks damages for his sufferings. (18)

One of the earliest gaol keepers to face charges of ill-treatment and extortion from his prisoners was John Bodesham, the keeper of Ludgate; yet the jury seem to have dealt lightly with him, for ill-treatment of a woman he is fined 20/-, for keeping prisoner after money paid for delivery and depriving him of alms fined 40/-; a like charge is laid by one John Horlee, that keeper detained 6s. 8d. paid over from him by friends also that he was charged 3/- for sleeping on the bare ground in his own bed and bed clothes and that a further demand for 8d. was made on him for which the keeper took a cloak as security. The jury find all this true save for taking of the cloak

(18) Sel. Cas. K.C. (SS vol. 35) pp. 15-16. this is merely one of a large number of complaints laid against the Bishop of Bath see ib. pp. 8-18. Citizens of London v. Bishop of Bath (1295).

for which charge John to be in mercy, and assess damages at 13s. 4d. thus rendering to John the actual sum of 3s. 8d. for his discomfort.⁽¹⁹⁾ Perhaps one small consolation to the debtor was the fact that the sheriff or keeper of today might well be his companion in debt tomorrow.⁽²⁰⁾

The provision of food, drink and other necessities of life in prison provided the keeper with his best chances of extracting money from the debtor.⁽¹⁾ The Statute of Acton Burnell said of the debtor, "if he have not wherewith he may sustain himself in Prison, the Creditor shall find him Bread and Water, to the end that he die not in Prison for default of Sustenance, the which Costs the Debtor shall recompense him with his Debt, before that he be let out of Prison."⁽²⁾

The Statute Merchant merely stated that the debtor shall remain in prison while the debt is levied from his lands, etc., and the

(19) C.P.M.R. (1381-1412) pp. 156, 158. See also *ib.* p. 158, the complaint of one John Walpole concerning the taking of alms delivered for the prisoners, given in Appx. pp. 777-778.

(20) C.P.M.R. (1381-1412) p. 233. (1395) the imprisonment of two sheriffs after failure to place responsibility for the escape of a debtor on their deputy, they are to remain in prison until they settle the debt with the creditor.

(1) Details concerning the charges which may be levied in Ludgate are in the Ordinance cited on p. [346] fn. [6] and given in Appx. pp. 773-6

(2) 11 Edw. I (1283)

creditor shall find him bread and water.⁽³⁾ The Statute Staple⁽⁴⁾ does not mention the provision of bread and water, nor does the Statute of Recognisances in the nature of a Statute Staple.⁽⁵⁾ Although it would appear that an equitable extension of the provisions of the Statutes Merchant could have been reasonably expected, it is in fact an extension of the provision of the act against defaulting accountants which succeeds, in which it is stated that such imprisoned accountant shall remain in prison at his own cost until he satisfies the arrears of his account.⁽⁶⁾

This left the debtor to provide for himself or have his family provide for him,⁽⁷⁾ more generally the keeper was prepared to see to

- (3) 13 Edw. I (1385) F.N.B. 133 C. gives the following example of a writ for enforcing this provision: "The King to the Mayor and Sheriffs of London, greeting, Whereas in the Statute of Merchants set forth is contained, That Merchants for whose debts it shall happen, their debtors to be arrested and imprisoned, are bound to find those debtors in prison abiding, bread and water for their sustenance, we command you that to W. of S. for the debts of E. of K. by form of our Statute foresaid, as is said arrested, and in our prison detained, if on that occasion, and no other, he be detained in the same, to be done you cause in this case what is to be done, and as in the like case to be done is accustomed, according to the form of the statute foresaid. Witness, &c."
- (4) 27 Edw. III. St.2, c.9(1353)
- (5) 23 Hen.VIII, c.6(1531-2)
- (6) 13 Edw. I, c.11 (1385) that this provision succeeded is not strange, for as the general approach to the debtor changes, harsher remedies are sought.
- (7) London found a means of providing some food for prisoners without cost to the good citizens by handing over goods forfeited by traders for breach of trading regulations. See e.g. Cal. Ltr.Bk. 'H' fo.lxii regulations forbidding hucksters buying cheese and butter from foreigners before 12 noon on pain of imprisonment and the wares being forfeited to the prisoners at Newgate or in such manner as the Lord Mayor shall decide.

such wants for suitable reward but he was likely to prefer ready cash since the statute 23 Hen. VI, c.9 rendered void a bond given by a prisoner to a gaoler to pay for his food and drink.⁽⁸⁾ This did not, however, prevent a prisoner being sued on his promise to pay for such food and drink provided, against which allegation he might not wage his law. Coke explained the reason for this while discussing the position of a prisoner for treason, in the fact that the gaoler having to keep the prisoner safely was almost compelled to provide him with food and drink and therefore the debtor could not be allowed to wage his law in such a case.⁽⁹⁾ This reason was refuted later by Holt, C.J. who said that the reason against permitting wager was not because the gaoler was obliged to find victuals for the debtor, but because the debtor is in durance, which means the keeper cannot take security for repayment in the form of a bond as it will be void and therefore he has to be content with the promise of the debtor.⁽¹⁰⁾

(8) Plow 68 a.b.; Co. Rep. X 100 b.

(9) Co. Rep. IX, 87 b. This part of the reports was used to support an argument in a petition to a member of Parliament in 1697 that a creditor ought to maintain his debtor in prison; the petitioners also sought to show that the wording of 13 Edw. I, c.11 that the debtor should live of his own estate whilst imprisoned only meant so long as the debtor had such estate, but did not mean that upon ceasing to be able to support himself he should starve to death. GL Brdsde No. 79.

(10) London (City of) v. Wood 12 Mod. 669, at p. 683 (1701). Since the debtor could or would not pay his creditor at the present, it would be fanciful of a keeper to rely on the debtor's promise to pay later, far better to demand a cash payment for victuals supplied.

These arguments were largely academic, for the position in fact was that the gaoler was not liable to supply the debtor with his victuals or almost anything else unless he received payment for his services. The position of the debtor in this period is one of gradually increasing hardship, at first the system is mild, reflecting the leisurely process which existed before imprisonment became the normal method of trying to enforce payment; during the fifteenth century the machinery for imprisoning the debtor is slowly developed, the keepers flex their muscles and prepare for three and a half centuries of oppression, the charitable approach to the debtor slowly dies away.⁽¹¹⁾ By the middle of the sixteenth century the debtor's fate has become clear, his status is, in many ways somewhat lower than that of the felon; perhaps society's view of the debtor is best illustrated in the following extract from the case of *Dive v. Maningham* in 1551:⁽¹²⁾

(11) Not at all gaolers were prepared to have their prisoners die on their hands, and in the Paston Letters is a plea from William Barnard, keeper of a gaol at Yarmouth to the effect that he had kept a prisoner for two and a half years to his 'gret cost and charge' and though he had been promised 2/- a week for providing keep etc., by the person who gave the prisoner into his charge, yet he has received nothing. Now it appears that a writ has issued under the Privy Seal for the removal of the prisoner which if obeyed will bar William of all chance of recovering his costs. - Paston Letters, vol. 3, pp. 378-9. (about 1492).

(12) 1 Plow. 62, at 68.

"For if one be in execution, he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle, and puts them in a pound, for there the owner of the cattle ought to give them meat, and not he that distrained them, no more is the party or the sheriff, who has one in execution, bound to give meat to the prisoner, but he ought to live of his own goods, ... and if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment."

"And the Greatest of these is Charity"

It is in fact to the "charity of others" that the debtor owes much of his powers of survival. The giving of money to aid such prisoners becomes common round about the middle of the fourteenth century; in 1357 the king orders that money collected in the port of London on the purchase of certain commodities be paid over to the prisoners in the Fleet prison.⁽¹³⁾ The Calendar of Wills for London

(13) Cal. P.R. (1354-8), p. 515, given in Appx. pp. 779-780.

provides much information on the money left for the welfare of prisoners;⁽¹⁴⁾ together with evidence of some of the difficulties which could arise in enforcing payments. Under the will of a John Putteney, knight, 4 marks a year is to be paid to the prisoners of Newgate,⁽¹⁵⁾ all this is carried out until the prison is rebuilt under the will of Richard Whityngtone when the payments cease and unfortunately no power of distraining for such bequests is included in the latter will,⁽¹⁶⁾ it is therefore requested of, and granted by, the king with the assent of Parliament that the Mayor and Chamberlain of the City for the time being shall have the right to distrain holders of the lands out of which such money to be paid.⁽¹⁷⁾ A subtle approach to obtain payment of at least part of a debt is found in the will of Walter de Mourdon dated 31 May 1349, who having left money for the poor prisoners of Newgate and Temple Bar prisons also leaves "to John Skryveyn ten pounds on condition that the said John be willing to swear how much he is indebted to Walter de Mourdon and his wife without any fraud, and will therefore discharge the same to the foresaid Walter or his executors."⁽¹⁸⁾

(14) One John Hammond a pepperer in a will dated 29 Sept. 1346, leaves a ld to every prisoner in Newgate and also 20 marks to be distributed among poor merchants who had traded with him.-Cal. of Wills I, pp. 115-6.

(15) Cal. of Wills I, p. 609, dated 14th Nov. 1348.

(16) Cal. Ltr. Bk. 'K', p. 119.

(17) Rot. Parl. iv 370-1 (1430-1)

(18) Cal. of Wills I, pp.653-4.The de Mourdon family were of a distinctly charitable nature; walter's son, Simon, Lord Mayor of London in 1369 (Stow's Survey ii,p.179) left all his property to his wife for life and then to charitable purposes (Cal.Wills II, p.243) and his wife on her death left the property to be sold and the proceeds devoted among other things to the educating of poor boys and the relief of debtors. (Cal.of Wills II, pp. 264-5, will dated 11 Aug. 1385.)

Among the records of the Worshipful Company of Leathersellers of London are the details of the will of Robert Ferbras dated the 4 Nov. 1470, who settles property on the Wardens of the Company and directs that the issues be distributed in the following manner:

"yearly and for ever, forty shillings of lawful money of England or bread unto the value of the same sum, among the Prisoners of the Prisons of our Lord the King's Bench, of the same King's Marshalsey, of the Convict-Prison at Westminster, of the Fleet, and Newgate, and Ludgate, in the City of London; to the said Prisoners to be paid or delivered at four terms of the year, to wit, in the eve of our Lords nativity, in the eve of Easter, in the eve of the nativity of Saint John the Baptist, and at the feast of Saint Michael the archangel; to wit, in every such eve and every such feast, among the Prisoners of each Prison of the aforesaid Prisons, twenty pence in money or in bread."⁽¹⁹⁾

For their trouble in this behalf the wardens of the company were to receive 3s. 4d. per year. It is interesting to note that in 1659 among the contributions for that year to the prison of Ludgate is the

(19) Black (W.M.) 'History and Antiquities of the Worshipful Company of Leathersellers of the City of London' (1871) p. 82.

sum of 6s. 8d. paid as its share under the will of 'R. Ferrebras.'⁽²⁰⁾

Apart from the contributions dropped in the boxes outside the prisons there might also be found standing just inside the gates or doors of the prisons debtors who had been told off to beg for alms of passers by, or as was more usual, a section of the wall of the gaol was hollowed out at one part and a small square cut, allowing an opening to the outside world, across this opening would be fitted a grill and behind this 'grate', as it was called, sat or stood the duty debtor of the day, whose task it was to solicit alms in love and charity from all who passed. In Stowe's Survey of London is to be found the following description of one such debtor who was obviously a little more lyrical than his fellows when it was his turn to plead with the passing public:

"When the Prison was in this Condition,⁽¹⁾ there happened to be a Prisoner there one Stephen Foster, who (as poor Men are at this Day), was a Crier at the Grate, to beg the benevolent Charities of pious and commiserate Benefactors that passed by. As he was doing his doleful Office, a rich Widow of London hearing his Complaint, enquired of him what would release him? To which he answered, Twenty Pound; which she in Charity

(20) Stow's Survey vol. II, Appx. 30

(1) Prior to the enlarging of the Ludgate prison.

expended; and clearing him out of Prison, entertained him in her Service; who afterwards falling into the Way of Merchandize, and increasing as well in Wealth and Courage, wooed his Mistress, Dame Agnes, and married her.

Her riches and his Industry brought him both great Wealth and Honour, being afterwards no less than Sir Stephen Foster, Lord Mayor of the Honourable City of London: Yet whilst he lived in this great Honour and Dignity, he forgot not the Place of his Captivity, but mindful of the sad and irksome Place wherein poor Men were imprisoned, bethought himself of enlarging it, to make it a little more delightful and pleasant, for those who in after Times should be imprisoned and shut up therein."⁽²⁾

By these means alone the debtors had to exist, there is as yet no intervention by the state for providing some form of relief, indeed, not until the reign of Elizabeth are any attempts made to help the

(2) Stow's Survey, Vol. II, Bk. 6, Appx. p. 26.

truly impoverished debtor who cannot afford the debtor's prison.⁽³⁾

(3) Permission for Justices of the Peace to levy rates in the counties to help the plight of prisoners in the county gaols was given in 1572 (14 Eliz. I, c.5, s.38). This provision does not appear to have been very successful and about 1578 prisoners in the King's Bench Prison petition the council praying for letters to be sent to the sheriffs of every shire commanding them to appoint bailiffs to collect subscriptions for the relief of the petitioners. (S.P. Eliz. vol.cxxvii, no. 67) A further act instructing the Justices of the Peace at General Quarter Sessions within the county to raise by rating the Parishes sufficiently "so as there be sente owte of every County yearely Twenty Shillings at leaste to the Prisoners of the Kings Benche and Marshalsey;" was made 1597-8 (39 Eliz. c.3, s. 13). However, its effect and duration were very limited.

CHAPTER 14IN PURSUIT OF FORTUNEThe Rise of the English Merchants

The gradual tightening of the laws against the debtor follow to a large extent the expansion of the English merchant and his changing fortunes. The statutes merchant⁽¹⁾ had given some security to the early trader in his collection of money, but since the merchants of the time were largely foreign it served sufficiently well to render them this assistance and no more. The expulsion of the Jews had seen the more important financial matters of the country pass into the hands of the Italian commercial houses, who in return for various concessions were prepared to finance the Crown that it might indulge in its whims and fancies.⁽²⁾

Edward III borrowed heavily from two Italian companies, the Bardi and the Peruzzi of Florence,⁽³⁾ who, refusing to take a lesson from history and the way it had dealt with creditors of previous

(1) 11 Edw. I (1283) and 13 Edw. I (1285)

(2) See Arch., vol. xxviii, pp. 207-326 Bond (E.A.) 'Extracts from the Liberate Rolls, Relative to Loans supplied by Italian Merchants to the Kings of England in 13th and 14th Centuries'.

(3) Although merchant companies they were also something more for they acted as bankers and finance houses for many people and accounted for much of the financial stability accorded to Florence at this time.

kings of England, placed their name and money at the disposal of the Crown.⁽⁴⁾ Edward III engaged in an intermittent war with France was continually in need of funds, and in no position to pay back loans when requested. At the outbreak of the war a Chronicler of the period estimated the loans to Edward by the Bardi to be 180,000 marks and those by the Peruzzi to be 135,000 marks,⁽⁵⁾ a total of 315,000 marks estimated to be approximately £210,000.⁽⁶⁾ Unfortunately the Societies being pressed by their own creditors found that they had placed their money with too few persons, the treasuries of England and France were drained through war, and in January 1345 the Societies failed.⁽⁷⁾ At the date of their failure the amounts owed by the King on an account being entered into in respect of the Bardi, is fixed at £50,493. 5. 2½d.

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- (4) The Ricardi of Lucca had been ruined by Edward I, and the Frescobaldi of Florence fell to Edward II. Russell (E.) 'The Societies of the Bardi and the Peruzzi and their Dealings with Edward III, 1327-45', p. 131 citing Rhodes (W.E.) 'Italian Bankers in England and their loans to Edward I and Edward II.' After Edward III had successfully helped to bring down the Bardi and the Peruzzi, we find Edward IV by his ban on the export of wool (3 Edw. IV, c.1 - 1463) helping in the creation of another financial crisis in Florence in 1465 whose repercussions were felt even in London where the merchant body of the Strazzi became insolvent. Ruddock (A.A.) 'Italian Merchants and Shipping in Southampton 1270-1660', p. 208.
- (5) Giovanni Villani 'Chronicles of Florence' Bk. XI, c.88 cited in Napier (H.E.) 'Florentine History', Vol. II, p. 26.
- (6) Taking the value of the mark to be 13s. 4d.
- (7) See Russell, p. 129, the indebtedness of Edward III was fixed at 1,500,000 florins which, using Villani's references, Russell estimates at roughly £138,000 to the Bardi (900,000 florins) and £92,000 to the Peruzzi (600,000 florins); the debts of the societies are reckoned at about £138,000.

for period December 1338 to July 1340,⁽⁸⁾ of which an apparent £150 was paid off.⁽⁹⁾ The matter of repayments drags on until 1392 when the accounts of the Bardi and the English Crown are finally settled.⁽¹⁰⁾

Edward III's inability to meet the needs of these two societies almost destroyed Florence and shook the entire Italian banking world;⁽¹¹⁾ much of the money of the Bardi and Peruzzi had been entrusted to them by strangers who, in the fall, became debtors overnight, some of its effects must have been felt in Britain⁽¹²⁾ although there does not

(8) C.P.R. (1343-5) pp. 467-9 cited Russell, p. 127.

(9) Cal. Lib. R. 21 Edw. III, M.3 cited Bond, p. 258.

(10) By 1349 the Crown owed the Bardi £93,947. 8s. 2d. Of this some £23,225. 17s. 9d. was paid off by Edw. III and Ric. II. In the autumn of 1391 the rolls are searched for debts of the Bardi to the Crown which are found to be £39,298. 19s. 6d. which added to the repayments makes the Crown's final debt £31,422. 10s. 11d. of which a possible further £600 may have been paid. Mutual quit-claims are entered into in respect of the debts to and from the Bardi and Richard II and his ancestors. Beardwood (A.) 'Alien Merchants and the Crown in the later 14th Century' 2 Ec.H.R. pp. 231-2. The documents relating to the settlement and the quit-claims are given in Appx. 'A' to the article pp. 246-257.

(11) The societies were not however totally destroyed for 'the extensive landed property of these houses still supported them and total bankruptcy was thus avoided: but the Florentine commercial interest of which they were considered the sustaining column, was terribly shaken'. Napier II, pp. 26-7 and see Cunningham I, pp. 289-290.

(12) The fact that the English merchant was still busily sorting himself out at home probably saved him from being greatly involved. Speaking of the disaster, Villani says, 'For the Bardi and Peruzzi had held so large a share of the commerce of Christendom, that upon their fall every other merchant was suspected and distrusted', Bk. XI, c.87, cited in Bond, p. 260.

appear to have been anything like the outcry and persecution which followed the crash in France.⁽¹³⁾ It is thus perhaps without very much justification that Coke⁽¹⁴⁾ castigates the treacherous Lombard merchant who flees the country with his goods without settling his debts a few years later,⁽¹⁵⁾ for much of his credit no doubt fell with Florence and he no longer had reserves upon which he might draw in more pressing times.

This does not mean that foreigners no longer continued to dominate in the merchant field, but the English merchant is gradually emerging, and from this time, slowly restrains outsiders from gaining dominance over English public finance. English merchants in fact began to exercise some say in the country's affairs from the reign of Edward II when gathered together in what appears to have been an

(13) On the orders of Philip de Valois, king of France the goods and property as well as the bodies of all Florentine merchants were to be seized as a means of purported reparation for the damage they had done to Frenchmen from whom they had borrowed; Bond, p. 259. Napier (II, p. 25) says that Philip trumped up charges of usury and extortion as a means of arresting the merchants, which must have delighted the many French aristocrats indebted to them; the merchants being only released on payment of large ransoms.

(14) Co. Inst. IV 277 and see pp. 234-5

(15) See Rot. Parl. II 240 and 25 Edw. III, st. 5, c.23 (1351-2)

Assembly of Merchants.⁽¹⁶⁾ These assemblies assume more importance in the reign of Edward III when the King tries to use them in order to raise money and by-pass the Commons.⁽¹⁷⁾ By 1340 these merchants who sought to gain riches for themselves by their allegiance with the Crown, are in a fairly strong position, they can now bargain for privileges in the manner that until only a short while before had been only open to the alien. When the Italian financiers tumbled there was a group of English financiers waiting to take their place,⁽¹⁸⁾ and under the title of the 'King's Merchants' they were only too ready to assume the rights formerly accorded to the now departed, unfortunately they were just as ready to extort and oppress wherever possible.⁽¹⁹⁾

- (16) Some thirty-four of these assemblies were called between 1316-1356 by the king and are analogous in form to a Parliament of Merchants, Int. Rep. Cmtee. of H. of C. Personnel and Politics (1932 Comd. 4130 p. 109).
- (17) See Unwin, G. 'The Estate of Merchants, 1336-1365' pp. 179-255. A firm of these merchants who tried financing the king fared little better than their foreign predecessors, thus Chiriton, Swanland and Wendlingburgh made loans to the king in 1346 in return for farming the revenues, in 1349 the king was forced to summon some 76 merchants in an attempt to save the firm from insolvency; a group of 32 undertook to guarantee the firm although few of these were among the summoned, and a year later they all crashed together. *ib.* pp. 216-222.
- (18) There had been an assembly of the merchants in April 1343 and already the king was leaning heavily on them; see Unwin 'Estate of Merchants', p. 213.
- (19) Law (Alice) 'The English Nouveaux-Riches in the 14th Century' *Trans R. H.S. (NS) IX*, p. 49. "The rise of the nouveaux-richtes was simply due to the fact that just when the native trader had learnt his business, and had practically cleared all rival competitors out of the field there arose on all sides of him exceptionally favourable investments for capital, and of these the paternal and closely protective policy of the third Edward enabled him to take ample advantage." *ib.* p. 73.

With the meeting of such a merchant group and its nearness to the legislative body it is not surprising to find that at the same time as Parliament is resorting to reprisal on the fleeing foreigner,⁽²⁰⁾ it is also busily imprisoning the contumacious indigenous debtor.⁽¹⁾ In July 1353 an assembly of some 71 English wool merchants and 13 of the king's Italian and German creditors met but details of what was discussed are not recorded,⁽²⁾ in September of the same year there met a body whose composition appears to have been a cross between a meeting of the Great Council and Parliament quite liberally sprinkled with merchants, from this body the Ordinances of the Staple finally emerge and in them the provision for imprisonment of the debtor by statute staple.⁽³⁾ The merchants experience in the boroughs would have presented them with little trouble in putting forward suggestions for imprisoning the debtor, many customs did not require the contumacy

(20) 25 Edw. III. st.5, c.23 (1351-2)

(1) 25 Edw. III. st.5, c.17 (1351--2)

(2) See however, Richardson (H.G.) Bull.I.H.R. (1931-2) p. 13 fn.4. where he states that 'these ordinances had been prepared complete (apparently by 6 June) before the meeting of the great council' in July, so that the July assembly in fact had already hammered out the shape of the ordinances before they were read out to the September assembly.

(3) 27 Edw. III. st. 2, c.9(1353) It had been said of this statute that it was 'the fruit of thirty-five years of bargaining, diplomacy, and compromise between king, merchants, burgesses, knights of the shire, magnates and council.' - Cam. (H) 'Law-Finders and Law-Makers in Medieval England' (1962) p. 140. For the composition, etc. of these merchant assemblies see 'The House of Lords Report on the Dignity of a Peer' vol. iv. pp. 595-601. No doubt the experience the merchants gained in these assemblies did much to help those who later served as burgesses in Parliament and also showed them that they would do better for themselves in the long run by going over to the side of the Commons, rather than take the chance of momentary gain by siding with the king.

of the debtor before his imprisonment as did the legislature, for them it was sufficient that the debtor appeared to be leaving without informing or paying his creditor.⁽⁴⁾ In Cork, if a foreigner (one not of the franchise) owing debts is seen to be leaving without paying up, then anyone of the franchise is permitted to arrest him having made complaint first to a citizen neighbour who does not have to be a city official.⁽⁵⁾ In London, by the first part of the fifteenth century, a creditor who came across his fugitive or withdrawn debtor might, if the debtor sought to escape, call upon a neighbour to help him arrest the debtor, and take him to the sheriff's office.⁽⁶⁾ A reciprocal arrangement of this nature is also to be found between the English and Flemish merchants in the later part of the fifteenth century, thus Englishmen were to be allowed to sue their debtors in the Flemish courts without any hinderance and if there was any chance of the departure of the debtor they were to be permitted to demand security of either goods or body of the debtor. In England, the Flemish merchants

(4) In theory the legislature never did depart from its policy that there should be contumacy and no property by which the debtor might be distrained, in practice, with the passing of time, less and less regard was had to this part of the law. see pp. 138, 206.

(5) Bor. Cust. I, p. 114.

(6) Bor. Cust. I, p. 134 (Lib. Alb. p. 220, c.1419)

were similarly to be permitted to proceed before the Chancellor, the Constable or the Great Council, without regard to local ordinances and customs to the contrary, for debts due in Flanders.⁽⁷⁾ By the dawn of the sixteenth century a travelling Italian gives this impression of the facility with which a person might be arrested:

"It is the easiest thing in the world to get a person thrown into prison in this country; for every officer of justice, both civil and criminal, has the power of arresting any one, at the request of a private individual, and the accused person cannot be liberated without giving security."⁽⁸⁾

Once the English native has gained some control in his country's finance, the position of the foreigner undergoes a slow deterioration; from the commencement of the reign of Henry IV with a growing awareness of the need for bullion and difficulties concerning currency⁽⁹⁾ the Crown was less able to protect them to suit itself and must take more heed of the feelings of the country.⁽¹⁰⁾

(7) Cely Papers (Camd. Soc. 3rd series vol. I), pp. xxii-xxiii; c. 1478)

(8) Relation of the Island England (Camd. Soc. vol. 37) p. 33

(9) For experiments with the currency during the reign of Edw. III, see Cunningham I, pp. 326-9; and as to the growth in trade and the need for bullion, see *ib.* pp. 409-434.

(10) See Giuseppi (M.S.) 'Alien Merchants in England in the Fifteenth Century' (Trans. R.H.S. NS. vol. IX, pp. 75-98) speaking of the varying treatment received by aliens Giuseppi says "Diplomatic relations with foreign countries, the King's indebtedness, and lastly, local jealousy were the chief factors in regulating their position." p. 94.

In 1439 the legislature re-instated the rule that foreign merchants were to report to the Mayor of the town where they intended to trade and were to be found hosts sufficient to answer for their misdeeds.⁽¹¹⁾

The reign of Henry VI provided few joys for the foreign merchant,⁽¹²⁾ despite the statutes to regulate their treatment, the boroughs could only see them as representing a potential threat to the well-being of its own citizens. The established companies show their jealousy often by force, we find a petition from a certain Henry Wakynghknyght, goldsmith, who says that the wardens of the craft of Goldsmiths in London have had him imprisoned in a compter at Bread Street, 'no cause laid against him but only that he is a stranger born, occupying his craft in London, so utterly intending to keep him still in prison for ever to his utter destruction and undoing'.⁽¹³⁾ The Paston Letters give further evidence of the disturbances which occurred just after the

(11) 18 Hen. VI, c.4. In 1403-4 it had been enacted that foreign merchants were to sell their goods within a quarter of a year and to reside only with hosts assigned to them (5 Hen. IV, c.9); this was repealed the following year on the grounds that it was hurtful to the king, his realm, and the aliens (6 Hen. IV, c.4 1404); but revived in 1416 and ordered to be kept in all points (4 Hen. V, c.5) These provisions were by no means new in 1403-4, for a charter granted to London in 1327 commanded "that all merchant strangers coming to England, shall sell their wares and merchandises within forty days after their coming thither; and shall continue and board with free hosts of the said city, and other cities and towns in England, without any households or societies by them to be kept." - Birch 'Charters' pp. 54-5; for the subsequent history of these provisions see Cunningham I, pp. 292-3.

(12) As to the anti-alien movement during this reign see Ruddock, c. VII, pp. 162-186.

(13) Early Ch. Procs. 11,455. c.1440, given in Bland, pp. 199-200.

middle of the fifteenth century,⁽¹⁴⁾ so that the chances of the foreign debtor obtaining leniency or the creditor obtaining speedy justice in the local courts at this time were slight. From Southamton in 1460 there comes a petition from Demetrio Spinola who complains that on his bringing an action of debt against John Payne, Constable of the town, the said John sat as part of the town court when the action against him was heard 'Jugge in hys Owne cause, whych ys ayenst all lawe and good conscience so to be'. John then proceeded to have Demetrio "flung into prison and kept him 'in secrete wyse by duress of imprisonment without writte or any oder auctorite' in an attempt to make him pay an alleged debt."⁽¹⁵⁾

This defrauding is not, however, one-sided; in 1478 the English merchants of the Staple complain of the trickery of Flemish merchants in their own courts whereby the English merchants are injured. Further, they accuse some Flemish merchants of quaedam astutia in that when an English merchant attempted to recover a debt in a Flemish town, the debtor would advance a small sum to one of his own debtors, this debtor then takes himself to Calais and buys wool from the agent of the English creditor, but he only pays part of the price with the money provided

(14) See letters of John Bocking to John Paston of the 8th May and 15th May, 1456; Gairdner I, pp. 385-6., and Fenn. I, p. 130, respectively.

(15) Early Ch. Procs. 29/403, 405; 32/76., given in Ruddock, p. 178.

him and obtains credit for the rest, after this the wool is brought to the place where the original parties are. At this point the original debtor seizes the wool as the property of his debtor and satisfies the English creditor with his own produce. "The Englishman was clearly swindled, but to make the transaction profitable to the Flemings the second debtor must have been a man of straw, with probably a fictitious debt and no property to distrain upon."⁽¹⁶⁾ Thus the foreigner could not always blame the borough merchant if he found himself being held responsible for the smart practices of his fellows.⁽¹⁷⁾

Usury

Amidst all the frauds and commercial gambles of these formative years of the trader, and the developments in the use of money, one further factor must be considered among the many which brought about

(16) Cely Papers, p. xxiii. Trade between countries does continue, but no merchant could be sure that his venture of today would be legal or possible by the time it came to be carried through. 'There are also very clear examples of the medieval fiscal policy inspired by suspicion of the export trade: in England taxes are heavy on the export of leather, skins, animals on the hoof, tin and above all cloth. At Dieppe, the voyagers to England in 1466 are concerned with (principally) 152 hogsheads of grain for which a special export permit had to be secured. On both sides the tendency to increase the duty on imports is apparent when the acute shortage of precious metals changed the conditions of the problem and compelled rulers to suspect imports as robbing the country of bullion and actually to encourage exports to procure more stores of precious metals.' - Mollat (M.) 'Anglo-Norman trade in the Fifteenth Century', 17 Ec.H.R. pp. 143-150 at 148, 149.

(17) It was not always the fate of the alien not to be accepted, one Cristoforo Ambruogi known better as Christopher Ambrose was Mayor of Southampton in 1486 and 1497, after having served his turn as sheriff in 1483; Ruddock, pp. 183-4.

an increase in debtors and in some measure must have helped in the increasing severity of the laws, the sin of usury.⁽¹⁸⁾ This pastime of the devil, practised by the Jews, condemned, was, on their expulsion, necessarily driven underground so that it might re-emerge in various guises; yet it had to exist if the mercantile life of the country was to be developed.⁽¹⁹⁾

"He who practiseth usury goeth to hell, and he who practiseth it not tendeth to destitution".⁽²⁰⁾ This statement by the fourteenth century commentator Benvenuto da Imola sums up the position of the trader. Loans were needed if the trader was to be able to expand, but it must be remembered that in the fourteenth century there was nothing like the demand for free capital comparable to that which marks the close of the fifteenth century. London merchants might seek to make their capital advance into other cities and towns, but this movement was strongly resisted for a long time by the local citizens.⁽¹⁾

(18) Unfortunately since usury was made illegal, many bargains, which resulted in the debtor's prison for the one party, show no outward signs of usury and it is not possible to assess the part played by usury in the position of the debtor especially in later part of the fifteenth century.

(19) For the position of the Jews and usury see pp. 93-102, 112. See also Ashley, Vol. 1, pt. 1, c.3 for the early laws against usury.

(20) 'Commentary on Dante', cited in Fifoot, 'Sources', p. 304, fn. 78.

(1) See 'Calendar of Letters from the City of London', ed. Sharpe, p. 126., letters of protest from London regarding the fact that other cities are trying to prevent influx of London capital into such cities, by the provision of heavy dues on London merchants. (Unwin 'Estate of Merchants', p. 291.)

Christendom, after a short examination of the subject, firmly opposed usury and in 1311, Pope Clement V made clear the punishments the Church would enforce against those who loaned money for interest in the following canon:

"Whereas grievous information has come to us that certain communities offending against God and their neighbour, against Divine and human laws alike, permit by their statutes usury to be demanded and paid, and compel debtors to pay the same, we therefore decree, with the approval of this sacred council (of Vienne), that whatever authorities, captains, rectors, consuls, judges, councillors, or any other presume to make in future any statutes either that debtors shall pay usury or that a usurer is not bound to restitution, shall incur excommunication."⁽²⁾

The canon was apparently aimed largely at the town authorities and more especially those of the South of France and Italy; it is further laid down that such authorities as do not abrogate their acts permitting usury within three months are to be excommunicated and any person stating that engaging in usury is not sinful is to be punished as a heretic; ordinaries and inquisitors are 'to proceed with rigour against all suspected of this heresy'.⁽³⁾

(2) Ashley I, pt. 1, pp. 150-1.

(3) ib.

In 1339 Edward III, busily laying the foundations of the Hundred Years War⁽⁴⁾ and thus more in need of money than usual, sends writs to various sheriffs stating that the collectors of taxes for their counties are to be arrested and their goods, etc., seized into the King's hand if they do not pay up the taxes due from them, since it appears that they retain the money and use it upon themselves without regard to the King's urgent need, which is evident to all because of the war, "so that he had had recourse to usury with several creditors."⁽⁵⁾

- (4) War was always a good time for usurers; as we have seen, it was necessary for the Pope to adopt special measures when money had been necessary for the crusades, see p. 102. The Bardi and Peruzzi were not very fortunate in their war-time endeavours, perhaps one of the most fortunate of all war-time money lenders was a certain WU-YEN Shih who, at the time of the revolt of the fiefs of Wu and Chu'u in 154 B.C. found himself the only money-lender prepared to loan money to leaders of the imperial expeditionary force, other money lenders considering the success or failure of the throne just a little too much in the balance. WU-YEN Shih gave one thousand catties of gold on loan and charged a mere ten times the amount of the loan for interest; within three months the revolt was settled and WU-YEN Shih recovered his stake plus ten times the amount, which made him one of the richest men in his part of the country. - Pan (K.) 'Food and Money in Ancient China' p. 397 (Translated by Nancy Lee Swann 1950).
- (5) C.C.R. (1339-1341) pp. 175, 176. In 1327 the king paid to the Bardi, £2,066. 13s. 4d. of which £500 is described as "recompense for delay in repayment of various sums of money, and promise to pay the same without delay", C.P.R. (1327-29) p. 168; in 1340 the king acknowledges he owes the Leopardi £1,386. over and above a debt to them of £9,897. 6s. for failure to pay the debt on time. The excess is computed at £346. 10s per month for four months, being a rate of something near 42% p.a., a rate which makes the earlier transactions of the Jews seem perfectly respectable. - C.C.R. (1339-41) pp. 622-3.

Whether this bald admission by the king that he was in the hands of the money-lenders was regarded as the go ahead for others to do likewise without fear of the Church, we cannot tell, in any case, two years later it is enacted that "the King and his heirs have cognisance of usurers dead, (i.e. goods, etc., forfeit to the King) and that the Ordinaries of the Holy Church have cognisance of usurers alive, as pertaineth to them, to compel them, by the censures of Holy Church upon their sin, to make restitution for usuries taken against the laws of Holy Church."⁽⁶⁾ Until 1487⁽⁷⁾ this remains the only attempted legislative action regarding usury, and it is to London

(6) 15 Edw. III, st. 1, c.5 (1341). Just prior to the statute the clergy had complained that the king's justices were assuming to themselves the power to punish perjury - Rot. Parl. II, p. 129, b. no. 24. The statute did not last long, however, for in 1343 it is repealed in its entirety on the grounds of being prejudicial and contrary to the customs and usages of the Realm and the prerogatives and rights of the king; those provisions right by law and reason are to be framed in a new statute - Rot. Parl. II, 139 b. (1343). A year later there is enacted 'A Statute for the Clergy' (18 Edw. III. st. 3 (1344)) c.5 which states that "no Prohibition shall hereafter issue out of the Chancery, but in cases where we have the Cognisance, and of Right ought have", a provision which does as much to warn the Church to keep out of actions of debt as it does to safeguard those actions belonging as of right to the Church. C. 6 of the same statute orders that "Ministers of the Church shall not answer before the King's Justices for things done touching the Jurisdiction of the Church". Neither provision satisfactorily re-stated the case for usury, though the Church by virtue of its ancient authority continues to provide the Court for the live usurer.

(7) 3 Hen. VII, c.5(6), see p.384

we must look to see the development of the attitude towards usury in the meantime.

Among the methods which came into being in order to defeat the laws against usury⁽⁸⁾ was that of 'Chevisance', by which the borrower received or stated he had received goods stated to be of a certain value, and then resold them either to the seller or his accomplice for a less figure, usually being bound by bond to pay the inflated value of the goods. In 38 Edward III upon instructions from the King⁽⁹⁾ the City of London enact an Ordinance to the effect that any bargain being usurious or a 'chevisance' could be attacked by the person suffering loss under it, if within 40 days after the day for payment he complained to the Mayor. Upon such complaint being proved true, the usurer is to be distrained by his goods, and his body detained without mainprize until he had made restitution of all the other party lost and is also to discharge him of all his obligation, etc., touching the bargain, and also until he makes amends to the Chamber of Guildhall for his contempt; such payment to be the amount he would have gained by reason of his bargain. After 40 days any other person may complain if the debtor does not, when the usurer is to make fine to the Chamber as above and also pay to the Chamber the amount he would have otherwise had to pay to the debtor. Any

(8) For the manner of avoiding usury laws see Rhodes (W.E.) 'Italian Bankers in England and their Loans to Edw. I and Edw. II', p. 140.

(9) Liber Albus, p. 318.

person attainted three times of this crime is to forswear the City forever without ransom upon pain of perpetual imprisonment.⁽¹⁰⁾ It is interesting to compare this London Ordinance with that of a similar enactment by the Great Council of Venice over a hundred years before.⁽¹¹⁾ In the mid-thirteenth century Venice was suffering from the fact that usury for high rates of interest had assumed dangerous proportions largely under the Jewish usurer; it was therefore enacted that it was to be unlawful for either Venetians or aliens to loan money to usury in any form whatsoever either in Venice or elsewhere,⁽¹²⁾ the penalty for the first offence was to be forfeiture of the whole amount loaned out and a money fine; in the case of a second offence, the same punishment stood, but in addition, a Venetian was to be branded as a money-

(10) Lib. Alb. p. 319. The time limit of 40 days within which the plaintiff was to bring his plaint touching false contracts and usury was abolished in 1382, but the Mayor and Alderman were given the power to fine the plaintiff at their discretion if his plaint proved tortious: Cal. Ltr. Bk. H. p. 200. In the same year Ric. II confirmed the usury laws of the city and stated 'that the Common Law and good usages and customs of the City sufficed to punish offenders without the interference of Holy Church, whose jurisdiction, he wished in no way to prejudice.' *ib.* p. 206. For the petition of the city requesting confirmation see Rot. Parl. III, 143.

(11) Hazlitt (W.C.) 'History of the Venetian Republic' (1860) vol. 4 pp. 298-9

(12) An interesting attempt to extend the jurisdiction of the Republic.

lender and an alien was to be expelled from the Republic.

The London Ordinance does not appear to have caused any great fright to the City moneylenders and apart from perhaps an additional surety or a more subtle approach to the problem they continue much as before.⁽¹³⁾ The means of making an usurious loan is well illustrated in a case against a Walter Southous in 1375-6 in London. One Ralph appears and complains that he has been sued by Walter for 40/- which he says is no more than an attempt to recover interest on a loan of £10 to him from Walter. It appears that Ralph, in need of a loan of twelve pounds for a period of three months approached two brokers on the matter and promised them sufficient reward for their troubles if they could solve this problem. The brokers in turn sought out Walter who agreed to the loan but Ralph and another have to enter into a bond for £24 as security. The brokers then pay Ralph only ten pounds which he returns on the day of payment, whereupon Walter sues for the

(13) A case involving chevisance is to be found in the same year as the passing of the Ordinance. John Atte Ram complains that he is being sued by Peter de Mildenhale for a debt of £40. This debt says John came about by reason of a loan made by Peter to a Philip de Walisshe of £20 who had been given ermine supposedly of that value, but when Philip came to sell the ermine, a confederate of Peter's only allowed him £14 cash. In order to get the loan, Philip had had to find two sureties, John atte Ram and John Monde, they entering into a bond for £40 as surety. J. a. R. has already been sued once on the bond by Peter, who had also caused J.M. to be attached and placed in Newgate. Peter puts himself upon a jury, who on J. a. R. failing to appear give verdict in his absence in favour of Peter. C.P.M.R. (1364), p. 279.

other two pounds. Walter is found guilty under the City Ordinance and committed to prison until he makes restitution to Ralph and forfeits to the Chamber the amount he stood to gain by reason of the bargain. (14)

At almost the same time as the Mayor's Court was dealing with this case the Commons present a petition against usury to the Parliament as follows :- (15)

"Further, the commons of the land pray that whereas the horrible vice of usury is so spread abroad and used throughout the land that the virtue of charity, without which none can be saved, is well nigh wholly perished, whereby, as is known too well, a great number of good men have been undone and brought to great poverty: (16)

(14) Lib. Alb. 339-344. There seems to be little doubt that Walter was indeed in the money-lending business for profit, for a little later he is again found guilty on a similar complaint and judgment is given as before: Cal. Ltr. Bk. H. p. 28, 25 Jan. 50 Edw. III (1375-6).

(15) Rot. Parl. II, p. 350 b. No. 158. (Given in Bland pp. 200-1). In 1382 letters patent are issued to the effect that the king having confirmed the ordinance of usury in the last parliament and declared that the 'law and good usages and customs of the City sufficed to punish offenders without the interference of Holy Church' that the king in no way wished to prejudice the jurisdiction of the Church. Cal. Ltr. Bk. H., p. 206.

(16) Money-lending seldom appears to benefit any one other than the usurer, and that they waxed rich whilst their debtors waned is illustrated throughout history; among the occupational pursuits listed of some 23 wealthy persons of the Western Han period (c. 150 B.C.) there is to be found that of a money-lender; Pan, p. 393. Yet if a city had no natural products money will be necessary for it to obtain goods, Mecca, in the 7th and 8th centuries A.D., having no natural products was forced to import all its goods, this in turn led to a great deal of money lending in order for the people to survive, and so to the eventual bankruptcy of the city traders; Dr. Lieber 'International Economy of the Middle Ages - Some reflections on Islamic Cultural History' a paper delivered at the Warburg Institute, 20th May, 1963.

"Please it, to the honour of God, to establish in this present Parliament that the ordinance made in the city of London for a remedy of the same, well considered and corrected by your wise council and likewise by the bishop of the same city, be speedily put into execution, without doing favour to any, against every person, of whatsoever condition he be, who shall be hereafter attainted as principal or receiver or broker of such false bargains. And that all the Mayors and Bailiffs of cities and boroughs throughout the realm have power to punish all those who shall be attainted of this falsity within their bailiwicks according to the form of the articles comprehended in the same ordinance. And that the same ordinance be kept throughout all the realm, within franchises and without."

The thought of applying this remedy had little appeal, perhaps the king thought that a dead usurer yielded more through his effects than he would by paying over the profit he would have made to the king, or it may be that those around him felt that it was easier to square things with the Church in such cases, or that the Church did not wish to see a source of revenue drying up; whatever the reason, the answer is:

'Let the law of old used run herein.'

All this regarding usury as the practice of hell did not help the merchant of England who needed cash for his transactions and there grows up the principle that if money is put into a venture, to

which some risk is attached, then periodic payments over the amount lent is not in fact usurious as long as no amount certain is stipulated for.⁽¹⁷⁾ In 1391 London succeeds its ordinance of 1364 with another on the grounds that the earlier is too obscure since it does not declare what usury or unlawful chevisance are, and it therefore enacts :-

"if any person shall lend or put into the hands of any person gold or silver, to receive gain thereby or a promise for certain without risk, such person shall have the punishment for usurers in the ordinance contained. And if any man, denizen or foreigner, shall sell any merchandize and retain the same in his possession, or forthwith upon such sale buy back the said merchandize, to the loss of the buyer, for the same he shall be punished."

The penalties are as those contained in the Ordinance of 1364, brokers intermeddling in usury are to pay a hundred pounds fine to the

(17) Speaking of the later part of the fourteenth century Ashley says: "In the trading centres there were, indeed, occasional opportunities for a man to take part in a commercial venture, and no obstacle was put by the Church or public opinion to a man's investing his money in this way, for no definite interest was stipulated for, but he became a bona fide partner in the risk as well as the gain." Vol. 1, pt. 1, p. 155.

Chamber. (18)

But London is almost alone in having a definite law against usury⁽¹⁹⁾ for the average person who gets entangled in the usurers web the only way out is through the Church, which may be of little use, or by making petition to the Council or Chancellor requesting aid.⁽²⁰⁾ Otherwise it is Holy Church which is left to use the weapon of excommunication against the usurer who will not turn from his evil ways and reform. Although the medieval period was not one of vast merchant trading when compared to the Elizabethan era, it has been shown that

- (18) Lib. Alb. pp. 344-5. It was ordered in 1390 that the ordinance made by the City of London when John Not was mayor ((1364) see p 376) be examined and if good and lawful it was to be put into force, - after request by the City that the late ordinance be enforced and that no spiritual lord by any jurisdiction impede the correction of that vice. Rot. Par. III. 280 b. 281 a.
- (19) In 1268 the Mayor and citizens of Dublin had in an attempt to take away some of the powers of the Church enacted that: "No prelate or ecclesiastical judge can have cognisance of usury or other crime, whatever, causes matrimonial and testamentary alone excluded". - Bor. Cust. II, 209-210. This, however, did not pass unnoticed, nor was it allowed to stand, for in the same year on complaint by the Archbishop of Ottobon, Cardinal Deacon of St. Adrian, legate apostolic, there promptly follows excommunication of the Mayor and Citizens until they make 'condign satisfaction'. Mun. Docs. Ireland (R.S. vol. 53) pp. lv-lvi, 181.
- (20) In 1480 we find William Elryngton of Durham having borrowed money at interest now trying to escape from his obligations and repay only the principal sum: Early Ch. Procs. 64. 291 given in Appx. pp. 781-2. See also C.C.R. (1500-1509) pp. 158-9 No. 396. in which William de la Downe having sub poenaed Robert Onley regarding a statute recognizance of £100 into which he (William) entered but in respect of which he stated that Robert of his "usurious mynde" delivered only £28 worth of goods "of which he could not make £14 in ready money", William now says that his allegation was untrue and that he made it only to vex Robert and agreement is reached as to the amount William still owes.

credit was both asked and given at this time by merchants,⁽¹⁾ and that there was even a small amount of dealing in credit in the sense of buying and selling of credit and financial instruments.⁽²⁾ Yet apart from the investing in a risk the chances to make money work in less hazardous causes were not obvious,⁽³⁾ and the English financiers of the later part of the reign of Edward III⁽⁴⁾ loaned largely to the king, in return for the right to farm various revenues, as a means of making their money work for them rather than invest in trade,⁽⁵⁾

- (1) See Postam (W.) 'Credit in Medieval Trade' 1 Ec. H.R. (1927-8) pp. 234-261. Postam shows that credits in the form of deferred payments for goods sold or advances for future delivery and short-time loans and investments were quite common. At p. 255 under the heading 'Credit and Cash' he gives examples of the sort of people who could afford delays before requiring payment. Cunningham had earlier doubted the existence of the allowance of such credit in any more than very minor form.
- (2) See Steel (A.) 'The Negotiation of Wardrobe Debentures in the Fourteenth Century' 44 E.H.R. pp. 439-443. At p. 439 he says that the systematic negotiation of wardrobe bills and letters patent, but not tallies, is common early in the reign of Edw. III and becomes stronger in later 14th century, so that possibly by the end of reign of Ric. II even the old-fashioned tally was being 'negotiated from hand to hand'. In which case "Cunningham (especially) and Ashley, gravely under-estimated the amount of credit business done in medieval England." See also Sayles (G.) 'A Dealer in Wardrobe Bills', 3 Ec.H.R. pp. 268-273.
- (3) For some of the methods by which usury might be avoided and the use of rent-charges as a means of investing money other than by a 'sleeping partnership' see Ashley, Vol. 1, pt. 11, p. 397 et seq.
- (4) A description of some of these men is given in Law (A.) 'The English Nouveaux-Riches in the Fourteenth Century' Trans. R.H.S. (NS) vol. IX, pp. 49-73
- (5) Thus, says Lipson, "the careers of men like William de la Pole, Thomas de Melchburn and Walter Cheriton, who lent money to Edward III, revealed the existence of a native banking body of financiers in the fourteenth century, whose banking operations were largely, if not entirely excluded from a fruitful field of investment, unless they were prepared to share in the risks of commercial speculation". Lipson I, p. 618,

though this hardly represented a secure means of investment.⁽⁶⁾

From Edward III through to the reign of Henry VII the Church and the Chancellor went their own ways in fighting usury, the former threatening the spiritual weapon of eternal damnation, the latter being more concerned with the living, had the more concrete argument of a prison with which to back his demands. From time to time public conscience may be aroused, but the treatment of usury as a moral rather than an economic matter is slowly changing, still the occasional outcry occurs and who better to blame than the alien. In 1422 the Commons say that 'several aliens under the name of brokers do use and exercise "chevance de usure" ⁽⁷⁾ and that they make many grievous, horrible and dishonest bargains.

The reign of Henry VII saw the law once again tightened up in an attempt to prevent the inevitable, and it is stated that:

"ymportable dammages losses and enpoverisshyns of this realme ys had, by dampnable bargayns graundynt in usurye, colorde by the name of newe Chevesaunce, contrarie to the lawe of naturell

- (6) Certainly the groups which sought to replace the Bardi on their departure had little success. In 1346 the Chiriton Company won the favour of financing the king, by 1349 it was necessary, in order to prevent impending insolvency, for some thirty-two merchants to undertake to be guarantees for them. "A year later they were involved in the ruin and disgrace which, sooner or later, overtook all the King's creditors..." Unwin (G.) 'The Estate of Merchants, 1336-1365', pp. 222-223.
- (7) Rot. Parl. IV, p. 193. See also Giuseppi (M.S.) 'Alien Merchants in England in the Fifteenth Century' Trans. R.H.S. (NS) vol. IX, p. 83.

"justice, to the comen hurt of this land and to the great displeur of God."

To remedy this and all corrupt and unlawful bargains it is enacted that chevisance, dry exchange and contracts merely a colour for usury are to be void, and the penalty on a person or factor making a usurious bargain is to be £100 for each offence, recoverable by an action of debt, half of which is the king's and the other half to the person bringing the action. To prevent the possibility of perjury and collusion in cities and boroughs if an action brought there, the Lord Chancellor is given official power to look into such bargains as also are the Justices of the Peace of the shire, city or borough. The jurisdiction of the Church over usurers for the 'Correccion of their Soulles' is reserved.⁽⁸⁾ The Act was little more than a dusting and presenting of the first London Ordinance,⁽⁹⁾ and in keeping with the latter it is necessary eight years later to supersede it on the grounds that it is rather difficult and obscure. The new Act⁽¹⁰⁾ states that persons lending money or selling goods, etc., and buying them back within three months at a less figure, or lending money on receiving the profit of lands, etc., shall forfeit half the money so lent, sold, etc. The king is to have half the sum recovered and the person suing the other half; but if no person sue the king to have the whole, for

(8) 3 Hen. VII, c.5(6) (1487)

(9) See p. 375

(10) 11 Hen. VII, c.8 (1495)

such suit is to lie as well at the suit of the king as the suit of another before any of the king's courts of record, process to be as in any common law action of debt, save that if the action be in the Exchequer or in the Chancery, then there is to be no wager of law, protection or essoin, which would appear to allow wager in the other courts. (11)

At this time, however, the Church itself was having some change of heart to the problem and the Lateran Council of 1515 re-defines usury:

"This is the proper interpretation of usury, when gain is sought to be acquired from the use of a thing not in itself fruitful (such as a flock or a field) without labour, expense or risk on the part of the lender." (12)

This attitude did not last and in 1586 a Bull 'Detestabilis Avaritiae' under Sixtus V condemned usury once more as "detestable to God and man, as condemned by the sacred canons, and as contrary to Christian charity." (13)

(11) Under 3 Hen. VII, c.5(6) no wager of law was permitted when a party sought to recover. The king did take advantage of his right to sue given under the later Act; for in 1498 it appears from a petition presented to the Council by one Toft, that he has six suits pending before the common law courts in which he sues for the king, and of these three are under the Usury Act of 1495, it is perhaps not surprising that he complains that he has enemies who have formed a plot to ruin him.- Sel. Cas. in the Council of Henry VII, p. lx.

(12) Ashley, Vol. I, pt. ii, p. 451. The difficulties had arisen through small loans made by the Franciscans to the poor but it became "necessary to make a small charge for the loan in order to cover working expences." ib. 450-1.

(13) Encyc. Religion and Ethics, Vol. 12, p. 552. Dow. (J.) 'Usury - Christianity'

In England by 1500 the statutes against usury no longer made sense, the only real purpose they served was to keep the rate of interest on illegal bargains high.⁽¹⁴⁾ The merchant was now in a position to deal with the problem in his own way, he had a little money, but to expand he needed to borrow and he was not averse to paying back a little extra in order that he might progress. An opinion of the English in 1500 states:

"The common people apply themselves to trade or to fishing, or else they practise navigation; and they are so diligent in mercantile pursuits, that they do not fear to make contracts on usury."⁽¹⁵⁾

The expansion of the English Trader in the sixteenth century could not allow the out-dated notions of an earlier age to contain them, helped possibly by the Church's own pronouncement of 1515 and probably by the breakdown of the Papal dominion as well, money-lending became legal. In 1545 all former statutes on usury were repealed,⁽¹⁶⁾

(14) Lipson I, p. 618, remarking on the high rates of interest says that this came about through the mistake of condemning all interest instead of just excessive interest, so that the potential leader had to exact a high rate commensurate with the risk he took; it is perhaps doubtful however that merchants could 'have been trusted to protect themselves without oppression' if restrictions removed and open competition over rates allowed. Once money became scarce, rates would naturally soar and there would be very little a merchant could do to protect himself if he needed a loan urgently.

(15) Camd. Soc. vol. 37, p. 23.

(16) 37 Hen. VIII, c.9, s.1. The final declaration of Henry VIII as head of the Church had been made some thirteen years earlier in 1532. The Usury Act itself is framed in fact in a manner denouncing usury and the evil it brought with it, but by enacting that loans at over ten per cent are void it gives automatic consent for usury at less than ten per cent.

chevissance was still not allowed,⁽¹⁷⁾ but up to 10 per cent interest may be charged for a loan or forbearance of money,⁽¹⁸⁾ and 10 per cent interest chargeable on mortgages,⁽¹⁹⁾ penalty besides providing for the recovery of treble the value of goods, etc., and treble value of the issues and profits of such bargain, also provides for imprisonment and fine at the king's pleasure.⁽²⁰⁾ The statute is not to apply to penalties in bonds, etc., nor to fines and recoveries, etc. made bona fide.⁽¹⁾

The statute of Henry VIII was repealed in 1552⁽²⁾ and until 1571 usury was once more a sin, but in 1571 the statute of Henry VIII was brought back to life,⁽³⁾ and remained though the interest rate changed

(17) 37 Hen. VIII, c. 9, s.2

(18) ib. s. 3

(19) ib. s. 4

(20) ib. s. 5

(1) ib. s. 6

(2) 5.6 Edw. VI

(3) 13 Eliz. I, c.8, s. 1. By s. 2 the rate is to be 10 per cent or less, and s. 3 recites that usury is sinful, though in fact making it permissible.

from time to time.⁽⁴⁾

Further outbursts against usury did occur, Coke seems hard put to when it comes to deciding how to classify it, he states that it is 'directly against the law of God' and supports this by stating that 'it is adjudged by authority of parliament, that all usury being forbidden by the law of God, is sinne, and detestable' which is doing no more than calling in aid the Elizabethan statute, finally he is driven to mention the rate of interest permissible.⁽⁵⁾ It is through trade and the merchant that the general method of acceptance is found, Grotius says:

"if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor natural law: but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws give it impunity, they can never make it just."⁽⁶⁾

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- (4) By 21 Jac. I, c. 17, s. 1(1623-4) Interest is only to be levied at 8 per cent, this is reduced to 6 per cent by 12 Car. II, c.13, s. 1 (1660) and to 5 per cent by 13 Anne c. 15, s. 1. (1713)
- (5) Co. Inst. III, 151. England though slightly late in her first bankruptcy statute (see p.408) seems to have been ahead of Europe generally in this field. 'In Germany early in the 16th cent. several State legislatures began to allow Interesse, when stipulated in advance, and 1654 the imperial diet did likewise. In Italy, under the shadow of Roman Catholicism, discussion did not arise till late, but in the busy commercial towns, by allowing interest to be bargained for beforehand from an early period and exploring other avenues of ingenuity the prohibition of usury was rendered ineffective. In France the power of the Church maintained the ban until the Revolution.' Dow. Encyc. R. & E. v. 12, p. 553.
- (6) Grotius 'de jure belli et pacis' bk. 2, c.12, s.22(1625)-cited Bl.Comm. II, 456.

The State of the Legal Machinery

By the reign of Henry VIII we have pamphlets and books being printed which set out what are considered to be the major ills of the age; gluttony and the frittering of money away on apparel come in for the accustomed airing, but chief among the concerns is the state of the legal machinery of the day.⁽⁷⁾ We are told of the delays caused by a party having a plea moved from the county to Westminster for no other reason than to vex his adversary "By the wych mean oft-tymys the uniust cause prevaylyth, in so much as the one party ys not peraventur so abul as the other to wage hys law, and so justyce ys oppressyd, truth ouerthrowne, and wrong takyth place."⁽⁸⁾ A suggestion that juries should be done away with is made since they are much open to bribery.⁽⁹⁾ An interesting, though slightly erroneous account of the use of a jury in an action of debt is given by our

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- (7) See Starkey (T.) 'Dialogue' (EETS), p. 95, states that ordinary men now eat as well as princes formerly did which 'ys manyfest destructyon and detrymente to the commyn weal.... many idul glotonys make vytayle dere'. Co. Inst. IV. 277, says that the Englishman has rioted into three kinds of costliness; and in Bale (J.) 'Leylande's Laboriouse Journey' (1549) lf. 39 it says "We send to other nations to have their commodities, and all it is too little to feed our filthy flesh."
- (8) Starkey, p. 117, it is perhaps a little strange to find wager of law being supported in this way, but the contention of injustice likely to occur is true enough.
- (9) More (Sir T.) 'Utopia' (Lupton, J.H. Edn. 1895) pp. 234-5. See also a slightly later work 'Discourse of the Common Weal of England' (Ed. 1893) Appx. to Intro. p. LIX. "Somme founde the meanes to have ther servuantes sworne in the juryes, to thyntent to have them hasarde ther soules to save ther gredynes."

wandering Italian who sees the procedure in the following light:

"And if any one should claim a certain sum from another and the debtor denies it, the civil judge would order that each of them should make choice of six arbitrators, and when the twelve are elected, the case they are to judge is propounded to them: after they have heard both parties they are shut up in a room, without food or fire, or means of sitting down, and there they remain until the greater number have agreed upon their common verdict. But before it is announced, each of them endeavours to defend the cause of him who named him, whether just or unjust; and those who cannot bear the discomfort, yield to the more determined, for the sake of getting out sooner. And therefore the Italian merchants are gainers by this bad custom every time that they have a dispute with the English; for although the native arbitrators chosen by the English are very anxious to support the cause of their principal, before they are shut up, yet they cannot stand out as the Italians can, who are accustomed to fasting and privations, so that the final judgment is generally given in favour of the latter."⁽¹⁰⁾

The manner in which judges and counsel receive their salaries from the fees paid for the action is attacked and it is especially

(10) *Camd. Soc.* vol. 37, pp. 32-3.

advised that pleaders should live on a stipend since lawyers only understand a matter when they have received some money; also paying a stipend to judges and lawyers might induce them to live like lawyers and not like lords.⁽¹¹⁾ Delays in the hearing of cases is blamed on lawyers delighting in the extra money this brings them so that matters are kept hanging about for two, three and four years or more,⁽¹²⁾ bribery is held to be the only way in which a person can hope to obtain a verdict in the courts as "the law is ended as a man is friended".⁽¹³⁾

For the creditor not secured by a statute there is added to all these difficulties the further difficulty that the law has no way to enforce a composition of creditors, 'first come first served' is the only rule, the creditor is wisest who takes some form of pledge of his debtor to safeguard him against non-payment and another creditor getting execution ahead of him.⁽¹⁴⁾ In 1367 in a bill of complaint that a debtor

(11) Brinklow (H.) 'The Complaynt of Roderyck Mors' (EETS Extra Series) vol. 22, pp. 22-24.

(12) Starkey, p. 118. Brinklow pp. 26-27.

(13) Brinklow, pp. 26-7., More pp. 108-9. In Starkey, p. 86 Pole says: "Jugys and mynystrys of the law, you see how lytyl regard also, they have of gud and true admynstratyon of justyce. Lucur and affectyon rulyth al therin; for (as hyt ys commynly and truly also sayd) "materys be endyd as they be frendyd." If they juge be hys frend whose cause ys intretyd, the mater lyghtly can not go amys, but ever hyt schalbe fynyschyd accordyng to hys desyre."

(14) In 1339 a loan is made to the king "payment whereof is secured by the delivery of the crown of England as a pledge". C.P.R. (1338-40), p. 371. Arrangements for a composition were known much earlier to the Italians, both the Bardi and the Peruzzi ultimately arrived at an arrangement with their creditors whereby the Bardi "paid about six solidi per lira, or about 30%, whilst the Peruzzi paid four solidi per lira, or about 20%." Russell, p. 130 (citing Villani, p. 935).

has not paid off the residue of a debt, it is ordered, since the debtor fails to appear, that goods of the defendant in the possession of B be attached. The defendant defaulting four times the plaintiff requests that the goods be valued, but at this stage B says that the attached goods are in fact pledges for money due to him. The goods are valued and found to be less than the debt owed to B, therefore the goods are returned to him and the plaintiff gets nothing. (15)

Occasionally the court might order something approaching a composition when a number of creditors enter plaints of debt against a debtor at roughly the same time, a memorandum to this effect appears in the Mayor's Court rolls of London:

"Whereas Stephen Causton, mercer, John Strode, Walter Goore, John Gatter, Isabella Hymerssh and John Parker had separately sued John Edsale, draper, for divers sums owed to them, and the defendant had been attached by goods in the hands of John Fulbourn, haberdasher, the defendant on 26th Nov. 1426 came before the mayor and aldermen and renounced all claim to the goods. On the request of the parties the goods were examined by John Higham, sheriff, who awarded that Stephen should have returned to him 70 ells of linen cloth valued at 57s. 6d.

(15) C.P.M.R. (1364-1381) p. 80.

"which he had sold to the wife of John Edsale and that John Parker should distribute the rest of the goods among the claimants."⁽¹⁶⁾

That compositions were being engaged in privately appears in an extract from one of the letters of John Paston to Sir John Paston of 5th June, 1472 which states:⁽¹⁷⁾ 'Item, Master John Smythe telleth me, that Sir T. Lyney's goods are not able to pay a quarter of his debts that he asked him, wherefore such money as is be left, it must be divided to every man a part after the quantity, which division is not yet made, but when it is made he hath promised me, that your part shall be worth three the best, ...'. There appears no reason why Sir John should in fact receive a part 'worth three the best' but it does illustrate the manner in which a debtor in such circumstances might well choose to favour one creditor above another. There is of course the fact that without some such consideration

(16) Ibid (1413-1437) p. 203.

(17) Fenn, II, pp. 93, 95. See also an indenture entered into between William Rede, goldsmith and keeper of the Ludgate Gaol, and Richard Marchall and his wife Isabel who are bound to William in 100 marks. Richard is at present in Ludgate gaol having been condemned in numerous debts which he is unable to pay, therefore "he desired licence to go about in the city, and entreat his creditors: (i.e. to make composition with them) to which desire, William being moved by pity, gave him leave to go at liberty to any place within the city daily with a keeper, provided that he is ready at all times to discharge William against all such persons by reason of any condemnation before the sheriffs and mayor against Richard, ..." provision is also made in the event of Richard escaping. C.C.R. Hen. VII (1485-1500) vol. I, p. 128, No. 449 - 30th Nov. 1489.

certain creditors might well not be prepared to enter into any such composition at all, and prefer to see the debtor imprisoned than accept a mere percentage of the debt rightly owing to them. Unfortunately the practice also had another side, for it was quite simple for a debtor to pay off his most powerful creditor and either receive back a part of the debt for such satisfaction, or pay over the rest of his money to this creditor and have money paid to him from time to time, so that whether his other creditors accepted a miserable composition or placed him in prison he would be able to live quite well in fraud of his creditors.

The existence of this problem and a suggested solution were stated by Henry Brinklow⁽¹⁸⁾ just prior to the passing of the first statute concerning bankruptcy in the following manner:

"Another thing very nedefull to be loked upon is this, that whan any marchant or other, by losse of goodes, by fortune of the see, evel servantys, evyl detters, by fyre, or other wyse, come to an after deale, and not able to pay his credyte at his due tyme, but by force of povertye is constrayned to demand longar tyme, -- than ye have a parcyall lawe in making of tachmentys, firs come, first servyd; so one or ij shall be all payd, and the rest shal have nothyng. And comonly ever the ryche shal have the

(18) Henry Brinklow was in later life a mercer and citizen of London, although prior to this he was at one time a Grey Friar, he died in 1545. See Brinklow, intro. p.v.

"foredeale therof by this tachment, to the gret dammage and oppressyon of the pore. For lyghtly the rich have the first knoulege of soch things. Wherfor, in that case it were a godly way to make it in England, as it is in dyvverse contryes, whan any such chance falleth, that than the most in number of the credytors and most in somme, shal bynde the rest to doo and gyve lyke tyme as doo the most of the credytors. And if it be duly found that the man be so farre at after deale, that he is not able to pay his whole credite in reasonable tyme, that than the lawe may bynd them that every man may have pound an(d) pound alyke, as farre as his goodys will goo, leavyng him some whan as the lawe shall thynck good. And this lawe shal be both neyhborly and godly."⁽¹⁹⁾

Brinklow's intentions were good, unfortunately he chose the wrong age in which to set them out, the law was not interested in being 'neyhborly' and was only prepared to be 'godly' if it suited the king. Henry VIII's reign was little noted for its clemency, it was an age when harsh punishments and death were part of the social order; the penalty for a felony was death, and many offences became classified

(19) Brinklow c. 17, p.41.

as felonies.⁽²⁰⁾ Benefit of the clergy, already curtailed by Henry VII,⁽¹⁾ was taken away from those not actually in Holy Orders.⁽²⁾ To speak out against the new Church was heresy with a quick invitation to yield oneself as a fuel for the stake,⁽³⁾ merely being an 'Egyptian' was to be punished.⁽⁴⁾

By the mid-sixteenth century the merchants and traders of England were consolidating themselves as a premier mercantile power, trading companies were undertaking hazardous enterprises, failures were often and debtors grew in number.

(20) Taking eggs or birds from the nests of hawks or falcons within the king's manors or lands was a felony punishable by death (31 Hen.VIII, c.12, s.1 - 1539); as was fishing in any private pond between 6 p.m. and 6 a.m. (31 Hen. VIII, c.2 (1539))

(1) 4 Hen. VII, c.13 (1488-9) - benefit of clergy only to be allowed once to persons not in Holy Orders.

(2) See 4 Hen. VIII, c.2 (1512); 23 Hen. VIII, c.1 (1531-2)

(3) See 31 Hen. VIII, c.14 (1539); 34. 35 Hen. VIII, c.1, s. 17 (1542-3); and 35 Hen. VIII, c.6 (1543-4)

(4) See 1.2 Ph. & M. c.4, ss.2, 4 (1554). By 1 Edw. VI, c.12 (1547), all Acts creating new felonies, passed since the commencement of the reign of Henry VIII, (1509) were repealed. This lull in capital provisions, like the reign of Edward VI, did not last long.

The attempt to take away from the lay-man the procedure applicable to mercantile debts first attempted by Edward II⁽⁵⁾ now returned; the fact that there already existed a distinction in the minds of the legislature between the trader and ordinary debtor had been shown in the statute of 23 Hen. VIII, c.6⁽⁶⁾, in 1542 the division was drawn more tightly and was to cause the courts a great deal of trouble in their attempts to decide just what made a man a trader.

(5) See p 182

(6) 1531-2