

A HISTORY OF ENGLISH LAW

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A HISTORY OF ENGLISH LAW
IN SEVEN VOLUMES
For List of Volumes and Scheme of the History, see p. vii.

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

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the accused and without a jury. And, as the relations between the common law judges and the Star Chamber were intimate, it is not improbable that the procedure of the latter court had some influence on the evolution of the common law doctrine on these matters.¹ Thus, even at the beginning of the seventeenth century, the judges were taking upon themselves to punish summarily offences which in the Middle Ages would have been remedied by an indictment² or a bill of deceit.³ It is not, however, till after the abolition of the Star Chamber in 1641 that the great expansion of their jurisdiction to deal summarily with all manner of contempts takes place. In the middle of the seventeenth century they were exercising this jurisdiction in the case of contempts committed out of court.⁴ Occasionally indeed earlier sixteenth and seventeenth precedents were followed, and a procedure by way of information and trial by jury was used,⁵ but informations were often abused in many ways, and they were unpopular; "and so the summary process slipped in and the supposed delinquents were deprived of the privilege of having their cases tried by the verdict of even one jury."⁶ This jurisdiction reached its furthest limit when it was laid down in Wilmot, J.'s, undelivered judgment in *The King v. Almon* (1765), that a libel on the court, or a judge in his judicial capacity, could be punished summarily by attachment—a decision for which there was little if any authority.⁷ But, in spite of this fact, it was accepted as correct, and it forms the basis of the modern law on this subject.⁸

(2) *Offences which aim at the perversion of the machinery of justice.*

In a relatively primitive society private war is the natural and most congenial remedy of those who are or think they are

¹ As Mr. Fox says, L.Q.R. xxv 356, "When it is remembered that some of the judges were members of this committee (the Star Chamber), it will be seen that there was an intimate connexion between the common law courts and the Star Chamber, and that the procedure of the latter court might be gradually introduced into the practice of the common law courts. It is certain that the old procedure by bill for contempt followed by attachment, whereby the defendant was brought in to have the question tried by a jury, was in course of time transformed into an attachment followed by an examination of the accused by interrogatories, whereby he might be acquitted or convicted by the court."

² In *Bristowe v. Baker* (1656) 1 Rolle 315, Coke, C.J., clearly thought that he had the power (though he refused to exercise it in the case before him) of punishing summarily a person who had treated the process of the court with contempt; see L.Q.R. xxv 249.

³ *Lord v. Thornton* (1614) 2 Bulstr. 67—a person aged sixty-three who pleaded infancy to delay the proceedings was attached.

⁴ L.Q.R. xxv 366, and references to *Styde's Practical Register* there cited; for earlier cases of Charles I. & reign see *ibid.* 369.

⁵ *Ibid.* 366.

⁶ *Ibid.* 369.

⁷ *Ibid.* xxiv 184 seqq.; 266 seqq.; the judgment is reported in Wilmot's Notes 243.

⁸ See the modern cases cited, L.Q.R. xxv 238-240.

wronged; and, when the strength of the law makes a recourse to this expedient dangerous or impossible, when those who are wronged are compelled to have recourse to the law, much of the unscrupulousness and trickery which accompany the waging of a war are transferred to the conduct of litigation. The courts are besieged with angry litigants who fight their lawsuits in the same spirit as they would have fought their private or family feuds. This, as we have seen, is a phenomenon which recurs in many nations at many periods;¹ but it was specially apparent in medieval England. The victory won by royal justice in the thirteenth century was somewhat premature. The legal and political ideas held by the royal judges were too far in advance of a society which was still permeated by feudal ideas of a retrograde type.² And so, contemporaneously with the growth of the power of the royal courts, we get the growth of many various attempts to pervert their machinery; and, when the royal power weakened, these attempts were so frequently and successfully made that the law was subverted and civil war ensued.³

But naturally the struggle of the courts with these forms of lawlessness produced the growth of a body of law, both enacted and unenacted, which defined and distinguished many various offences. Both the statutes and the Year Books show that, by the end of the mediæval period, it had grown to a large bulk. Such offences as rescous, escape, and prison breach were largely illustrated in the books.⁴ But more interesting than these are certain offences which were more directly designed to pervert the machinery of justice. These are the offences of forgery, perjury, conspiracy, deceit, champerty, maintenance, and embracery. Of the first four of these I shall speak under the following head, as they all became generalized, and developed into offences which had nothing to do with the perversion of the machinery of justice. At this point I must say something of the history of the last three of these offences.

It would seem that the earliest of these offences to become differentiated was champerty.⁵ Neither Glanvil nor Bracton have anything to say of maintenance.⁶ But Bracton mentions what afterwards came to be known as champerty, that is the maintenance or support of a suit in consideration of a share of the proceeds. This it would seem was a criminal offence when Bracton wrote, as it was included among the articles of the

¹ Vol. i 506 and n. 6.

² *Stamford, P.C.* i cc. 25-33; Hale, *P.C.* i caps. lii, liii, liiv.

³ On this subject generally see Winfield, *Hist. of Conspiracy* chap. vi, the substance of which is also printed in L.Q.R. xxxv 50.

⁴ *Hist. of Conspiracy* 140.

⁵ *Ibid.*