

## OVERALL CHRONOLOGY

### *1485–1603 – Tudors*

#### Henry VIII (1509–1547)

1515–1529 — ascendancy of Thomas Wolsey

1527–1532 — the “King’s Great Matter” (divorce)

1532–1540 — Thomas Cromwell; Reformation Parliament; dissolution of the monasteries

Edward VI (1547–53); radical Protestantism

Mary (Philip and Mary) (1553 [1555]–1558); Catholicism

Elizabeth I (1558–1603); perhaps a less radical Protestantism

1569 — 39 Articles

1587 — execution of Mary Queen of Scots

1588 — defeat of the Armada

### *1603–1714 — Stuarts (with a break 1649–1660)*

#### James I (1603–1625) (James VI of Scotland)

1605 — Gunpowder Plot

1616 — Dismissal of Coke

1621 — The Great Protestation

#### Charles I (1625–49)

1628 — Petition of Right

1640–1653 — The Long Parliament (called “the Rump” from 1648–1653)

1642–1646 — Civil War

1648–1650 — Civil War

1649 — execution of Charles I

Commonwealth (1649–1660) – Oliver Cromwell Protector (1653–1658)

#### Charles II (1660–85, officially from 1649)

1660 — Restoration

1667 — Impeachment of Clarendon

1678 — Popish Plot

#### James II (1685–88)

#### William & Mary (1689–1702)

1689 — Glorious Revolution; Bill of Rights

#### Anne (1702–14)

1707 — Act of Union (of England and Scotland)

1710–1714 — ascendancy of Bolingbroke

## EQUITY, FORUM SHOPPING AND REFORM

1. Sir John Fyeneux, ?1441–1525, JCP, 1494–5, CJKB, 1495–1525

Sir Edward Coke, 1552–1634, CJCP 1606–13, CJKB, 1613–16

Sir Matthew Hale, 1609–1676, CB 1660–71, CJKB, 1671–76

2. Themes to add the review of politics:

a. ancient constitution, fundamental law, divine right of kings, feudal law

- b. court vs. countryside
- 3. The common law in trouble
  - a. Struggle among the c.l. courts
    - i. c.17 of Magna Carta, The Marshall of Marshalsea, debt by bill rather than by writ, bills of Middlesex, *latitats*, fictitious bills of Middlesex (16th century)
    - ii. The expansion of case under Fyneux, *assumpsit* for non-feasance (c 1500), *assumpsit* for non-payment of debt (c 1530), *trover* and *conversion* (1530's), *ejectment* (also under Fyneux)
    - iii. The final development in the Restoration after stat. of 13 Car. 2 (sess. 2), c. 2 (1661), denies special bail where the cause of action is fictitious, KB then amends the *latitat* by using the *ac etiam* clause, which avoids the stat. Finally development Sir Francis North CJCP extends *latitat* to CP with the approval of Nottingham C
    - iv. The development of the court of the Exchequer—*quominus*—17th century
  - b. Reform of procedure
    - i. Statute of Jeofails (1540) and the rise of the requirement of formal demurrer
    - ii. Motions in banc and various ways of getting records of what happened in the county—best considered below under review
    - iii. Decline of Law French, Latin and court hand—1731
    - iv. Double pleading
    - v. Special pleading: Stephen and the pleading rules of 1834→the Common Law Procedure Act of 1852
  - c. Review of decisions—change in the nature of the trial
    - i. Proceedings in error, courts of error (CP for most local courts, KB for local courts of record and CP, Council Ch for Exch [1375] and later Ex Ch for KB [1585]), the development of the appeal (19th c)
    - ii. The rule *nisi* [‘rule absolute’ = the verdict below is entered as a judgment; ‘rule discharged’ = the verdict below is not entered], motions in arrest of judgment, judgment notwithstanding the verdict, new trial, reservation of points by judges
    - iii. Review of chancery (rise of Lords 1675), the privy council (America), the courts of appeal and the house of lords (19th c)
    - iv. The prerogative writs, prohibition, *quo warranto*, *habeas corpus*, *mandamus*, *certiorari* (largely criminal), declarations and applications (19th c), administrative law [largely a 20th c development]
  - d. Legal literature—reports and abridgements—*Spellman's Reports*, Fitzherbert's abridgement of the Year Books, Viner's abridgment of the modern reports, Blackstone
- 4. *Slade's Case* as indicating many of these developments
- 5. Summary
  - a. We end the 17th century with three jurisdictionally co-equal central royal courts and a considerably simplified procedure to get cases going

- b. Conscious reform of procedure, some of which comes about as the result of statute, of which the most important is probably the Statute of Jeofails of 1540. Major procedural reform does not take place until the 19th century.
  - c. Related to the reform of procedure is the development of a number of mechanisms that allow review of decisions. The most important of these are the motions in banc, that allow the full court to get some sense of what happened at trial and hence to develop the law.
  - d. Things were changing, slowly but they were changing. The medieval focus on what looks to us as more like procedure has become what looks to us more like substance. This is illustrated both in the change in the nature of what gets reported and, ultimately, in Blackstone's great treatise in the middle of the second half of the 18th century.
6. Competition with other courts. The danger of offering a unitary explanation of what happened, but there are some commonalities:
- a. Not all of the non-common law courts applied civil law and made use of civilians rather than common lawyers, but some of them did. Others had elements of Romano-canonical procedure in the way they operated. To the extent that the debates about law in the sixteenth and seventeenth centuries focused on the distinction between common law and civil law, the fate of these courts was bound up in that debate.
  - b. To the extent that common law vs. civil law debate can be reduced to a naked competition between two competing branches of the legal profession, that competition is also involved in the fate of these courts.
  - c. To the extent that common law vs. civil law debate can be reduced to a political debate that pitted the common law, on the one side, against extended views of the king's prerogative on the other, that debate is also involved in the fate of these courts.
  - d. Sir Edward Coke and the prohibition campaign
7. Competition with the Chancery. Until the sixteenth century there is not much indication that the common lawyers are concerned about it. The Coke-Ellesmere debate is more personalities than anything else. The real developments is the 16th century settlement started by Thomas More.
8. Competition from other courts. Other conciliar courts. (We'll run through this list twice in the lecture):
- Star Chamber (records start 1540, abolished 1641)
- Requests (records start 1493, not abolished 1641 but dies out to be replaced by urban courts of Requests)
- Council of the North, Wales (basically 16th c, go into disuse during the Interregnum, brief revival of Wales during the Restoration)
- Admiralty (?14th c., reorganized in 16th c. never abolished but was the chief butt of anti-civilianism)
- Court of the Constable and Marshall, Marshall's Court (last met 1955)
9. The Reformation and the Ecclesiastical Courts. High Commission (criminal) and the High Court of Delegates. The former died in 1640's, never revived. The latter still exists but much reduced because of the 1857 transfer of jurisdiction to Probate, Divorce and Admiralty.
10. Law making and law reform

Outline

- a. The notion of the immutable common law—Maine’s theory of fiction, equity and legislation
  - b. Case law and precedent
  - c. Fictions
  - d. Equity and legal change—uses, married women’s property, some commercial advances that antedated statute, matrimonial home
  - e. Legislation—legislation and adjudication combined, the statute rolls begin 1299, parliament rolls 1290—the work of the Reformation Parliament, the High Court idea in the 17th century
  - f. Interpretation of statutes, *Dr. Bonham’s Case* (1610), the ultimate loss even of the narrow equity of the statute
  - g. Law reform—civil war and interregnum—1641 Star Chamber—1645 military tenures—1650 Latin and Law French—the Hale Comm’n in 1652: simplification of process and pleading, small claims, abolish imprisonment for debt, civil marriage, land registration, the run of scary criminal statutes, almost all reversed in 1660. Simplification of process continues piecemeal, small claims do get established in the city courts of requests, imprisonment for debt not abolished until 19th c., land registration doesn’t come until 1925, civil marriage not until 19th c. (though Lord Hardwicke’s Act is 1753)
  - h. Codification—the Digest movement, Bacon, Bentham, etc.
11. Why did it happen?
- a. Politics.
  - b. Other explanations

“England, Sir, is a nation, which still I hope respects, and formerly adored, her freedom. The colonists emigrated from you when this part of your character was most predominant; and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles.” Edmund Burke, Speech on Conciliation with the Colonies (1775)