be learned in the laws of the realm, all promises shall be taken in this manner: that is to say, if he to whom the promise is made have a charge by reason of the promise, which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it. And if a man say to another, heal such a poor man of his disease or make an highway, and I will give thee thus much, and if he do it, I think an action lieth at the Common Law; and, moreover, though the thing that he should do be all spiritual, yet, if he perform it, I think an action lieth at the Common Law. As if a man say to another, fast for me all the next Lent and I will give thee twenty pounds, and he performeth it; I think an action lieth at the Common Law. And likewise if a man say to another, marry my daughter and I will give thee twenty pounds; upon this promise an action lieth, if he marry his daughter.[23] And in this case he cannot discharge the promise though he thought not to be bound thereby; for it is a good contract, and he may have quid pro quo, that is to say, the preferment of his daughter for his money. But in those promises made to an university or such other as thou hast remembered before, with such causes as thou hast shewed, that is to say, to the honour of God or to the increase of learning or such other like, where the party to whom the promise was made is bound to no new charge by reason of the promise made to him, but as he was bound to before; there they think that no action lieth against him though he perform not his promise, for it is no contract, and so his own conscience must be his judge whether he intended to be bound by his promise or not. And if he intended it not, then he offended for his dissimulation only; but if he intended to be bound, then if he perform it not, untruth is in him and he proveth himself to be a liar, which is prohibited as well by the law of God as by the law of reason. And furthermore, many that be learned in the law of England hold that a man is as much bounden in conscience by a promise made to a common person, if he intended to be bound by his promise, as he is in the other cases that thou hast remembered of a promise made to the church or the clergy or such other; for they say as much untruth is in the breaking of the one as of the other, and they say that the untruth is more to be pondered than the person to whom the promises are made.

Doct. But what hold they if a promise be made for a thing past, as I promise thee forty pounds for that thou hast builded me such a house; lieth an action there?

Stud. They suppose nay; but he shall be bound in conscience to perform it after his intent, as is before said.

Doct. And if a man promise to give another forty pounds in recompence for such a trespass that he hath done him, lieth an action there?

Stud. I suppose nay; and the cause is for that such promises be no perfect contracts. For a contract is properly where a man for his money shall have by assent of the other party certain goods or some other profit at the time of the contract or after; but if the thing be promised for a cause that is past by way of recompense, then it is rather an accord than a contract; but then the law is that upon such accord the thing that is promised in recompense must be paid, or delivered in hand, for upon an accord there lieth no action. . . .

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[23] See Anon, Y.B. 37 Hen. 6, f. 8. pl. 18, [Fifoot, *History and Sources*], p. 249.

D. THE AGE OF IMPROVISATION, 1642–1789

in A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW
(London 1966, repr. Gloucester, MA 1973) 265–97 [footnotes omitted]

THE INTERREGNUM: A LOST OPPORTUNITY

IN 1641, Parliament destroyed a sizeable part of the legal system and put nothing in its place: consequently the reform which the lawyers feared became more necessary still. Moreover, the Common Law was as unpopular with the lower classes feeling their way towards political power as the conciliar courts had been unpopular with the Common Lawyers. After 1641, the lawyers were no longer the political leaders, and soon their allies, the Commons, reduced to a bigoted Rump, lost their power to the army.

Parliament could not be used to try the king, who was an essential part of the process of impeachment; so a special High Court of Justice was constituted of 150 persons, and the king was condemned to death in 1649 'as a tyrant, traitor, murderer and public enemy to the good people of this nation'. The people had become the final court of appeal, and it was logical two months later to abolish the House of Lords, found 'by too long experience' to be 'useless and dangerous to the people of England'.

The people, represented by the radical elements in the army, turned against Parliament; against the 'hotchpotch of linsey-wolsey laws, so numerous, as not be [sic] be learned or comprehended, some so differing as that they contradict and give the lie to one another, so irrational and absurd . . .'; and against the 'Grand Cheat and Abominable Idol Called the Course of ye Courts'. The army was demanding that fundamental law be written down as a constitution which would thenceforth be unchangeable by Parliament. Others wanted 'one plain, complete and methodical treatise or abridgement of the whole common and statute law', to which all judges would have to subscribe 'for settled law', so that 'every man may know his duty, and his danger'.

Though an enthusiastic committee of amateurs found the latter task too much for them, changes were made in the law. The Court of Wards, wardship and the other incidents of feudal-tenure, and tenure by knight-service itself, were abolished by an ordinance of 1646. A form of civil marriage before a J.P. was instituted. Fees for certain legal documents were done away with, and in court the pleading of the general issue was encouraged. But many fundamental reforms besides codification were frustrated. It was generally but vainly hoped that Chancery, 'a Mystery of wickedness', would go the way of Star Chamber. Twenty-three thousand cases were believed to be pending before it: yet some which had been there for 30 years and had involved 500 (contradictory) orders would be quickly enough settled 'by a reference to some gentlemen in the country' when clients' purses began to empty. The criminal law was not reformed, though Cromwell denounced the 'wicked abominable laws' which pardoned murderers and hanged men for stealing a shilling. No answer was made to the demand for the replacement of the central courts by omnicompetent county-courts, 'that the people might have right at their own doors', and for registries of deeds in every county. Proposals which got further before defeat would have created courts of law and equity at York, abolished entail, and suppressed fraudulent conveyancing, sale of offices and duels.

A less worthy scheme to restrict equity of redemption, probably in the interest of speculators in land confiscated from the royalists, also came to nothing. Generally, however, it was the retrograde and repressive measures which succeeded. Treason was redefined very widely. Incest and adultery were declared capital felonies. Anglican-inspired laws concerning church attendance were repealed, but penalties were imposed for 'dancing, profanely singing, drinking or tipling' on a Sunday, and for swearing at any time.

The destructive zeal of the Long Parliament and the failures of the Interregnum together condemned English law to years of incompleteness and improvisation, until the job of comprehensive reform was taken up again in the nineteenth century. What the Protectorate did achieve by way of legislation was erased from legal memory at the Restoration (the House of Lords therefore returned to life), but the maiming of 1641 had been properly done by king and parliament, and was not healed. (Only the inessential church-courts, and for the brief period from 1687 to 1700 the Court of Chivalry, were revived.) Perhaps the worst result of the interregnum was the justification it gave for complacency amongst the lawyers. Sir Matthew Hale, chief justice of Common Pleas and 'the last of the great record searching judges', carried into the Restoration a picture of an age-old law which had overcome a temporary adversity. The law 'knew itself to be the perfection of wisdom, and any proposal for drastic legislation would have worn the garb discredited by the tyranny of the Puritan Caesar'.

THE JUSTICES AND POLICING IN A CHANGING SOCIETY

Together, lawyers and aristocracy weathered the storm of the interregnum. The ancient aristocratic government of the country had seemed to be in jeopardy, when Parliament's system of county committees and Cromwell's major-generals ousted the justices of the peace. Political confiscation caused landed families to rise and fall more quickly than before. But the changes proved to be superficial as well as

temporary. At the Restoration, the gentry entered an age of prosperity in which the J.P.s could afford to treat popular disorder with comparative leniency. And the constant supervision of the Tudor and early Stuart privy council was one of the things not restored. The Glorious Revolution of 1689 concentrated power in the hands of an oligarchy of Whig nobles and virtually ended interference with the local justices, even by the judges. The basis of local authority was wealth. An act of 1732 disqualified from the of office of justice attorneys, solicitors and anyone not possessing an estate worth £100 a year. If he had the money, 'any booby' might be invested 'with the ensigns of magistracy'.

In fact, the few working justices amongst the 250 or so on each county's commission usually acted responsibly, administering the law informally and humanely in their own homes or in village inns. A single justice could fine a drunkard on the spot, give a gambler a month's hard labour and order a parish to relieve a pauper. At petty-sessions within each division were appointed the surveyors of highways and that 'most arbitrary sovereign on earth', the overseer to the poor, and the rate for maintaining the highways was fixed. Divisional Brewster Sessions granted alehouse licences. At quarter-sessions, the justices administered the laws for the upkeep of bridges, gaols and houses of correction, and fixed county rates for these purposes. They heard petitions of disabled soldiers for pensions, issued writs to the sheriff for the distraint of accused persons, and proclaimed new regulations. They fixed wages and prices. Most important of all, they tried indictments for individual offences, and the presentments made by the Grand Jury, by juries of the hundreds and by constables, of neglect of communal obligations. One of these might be: 'We present the highway leading from X to Y to be out of repair (and that the same ought to be repaired by the inhabitants of X).'

As justices, the gentry could afford to see the decay of the ancient private jurisdictions: the courts-leet were dying, except where they provided the government for manors which had burgeoned into industrial towns like Manchester without acquiring borough status. The Tudors had put the parish in the place of the manor as the basic unit of local government, but the parish constables, surveyors of highways and fieldmen, compelled to serve without pay, were treated by the justices much as the village reeve had been by the feudal lord. Supervising these organs of local government, the justice himself escaped supervision. The judges who came from Westminster on commissions of assize, oyer and terminer and gaol delivery were preoccupied with trying the more serious crimes with which the justices of the peace did not presume to deal. (The London Assizes or Old Bailey Sessions, taking their material from the Newgate prison, did far more of the major criminal business than any other court.) Though they might be of great political importance, as in the case of Judge Jeffrey's notorious Western Assize of 1685, the assizes were not any longer an essential part of government. The only effective restraint on the J.P. was a *mandamus* to appear in King's Bench to answer an information that he had exceeded his powers.

Social changes made the traditional justice more and more inadequate. Government by judicial forms—presentments, forfeitures, sentences—could not cope with problems like urban sanitation, even when the justices multiplied their special sessions; so there grew up a maze of independent 'ad hoc' bodies (such as the 1,100 turnpike trusts). Two new factors, party and class, undermined the old ways of government. The lord-lieutenant, who nominated the J.P.s and chose his deputy-lieutenants from amongst them, was at the centre of the party struggle and sometimes fell with the government. And this was the man who commanded the militia and should have acted against the mobs called out by both sides at election time. Economic causes underlay the politics or old-fashioned religious prejudice which brought the mobs into the streets; these were the coming industrialism and the growth of population. In 1780 (nine years before the French Revolution), London was set blazing by gin-sodden mobs urged on by Lord George Gordon against the Roman Catholic Irish inhabitants. Society was used to violence—it could be learnt very well at the public schools—but the Gordon mob has been analysed and its motives shown to contain a novel element of class hatred: the house and precious library of Lord Chief Justice Mansfield went up in the flames, along with other property not belonging to the Irish.

Crime, organized as never before, also contained an element of class warfare. Highwaymen, outrageous murders and robberies were commonplace. A thief made off with the chancellor's mace in 1677, and would have got the Great Seal had it not been under the chancellor's pillow. London and Westminster, said Henry

Fielding, were like ‘a vast wood or forest, in which a thief may harbour with as great security as wild beasts do in the deserts of Africa and Arabia’. The thronging populace of the prisons and the sanctuaries (like ‘the Mint’ in Southwark, which lasted till 1723), the robbers, murderers, receivers and informers, gaolers and executioners, Robin of Bagshot and Slippery Sam, comprised a true underworld with its own law and morality. Like the Robin Hoods of the medieval forest, the criminals of the new urban wastes were setting up in derisive opposition to polite society—the rogues in authority.

The justices of the peace were used to a rural society made up of many vertical communities, in which they paternally chastised their own and their neighbours’ tenantry. Oppressive legislation in their own interests, like the Game Laws which Sir Roger de Coverley was so good at expounding, had begun to divide the gentry even from the agrarian proletariat. In the cities the justices were soon standing helpless, over against an anonymous and degraded mass. Horizontal and nationwide class divisions had by 1700 made the *posse comitatus* unusable as a police force, since it included the very classes which were prone to riot. Increasingly the army or the militia had to be called in, but they came when the mobs were out of hand and the damage was done: it took five days of Gordon riots and the prospect of an attack on the Bank of England to turn out the London Military Association. The constables in the towns were as degraded as the populace, which they treated with great brutality.

The town justices were corrupted, too. In Middlesex a responsible squirearachy no longer existed, and the chancellor was compelled to fill the bench with tradesmen who ‘were generally the scum of the earth’—the notorious ‘basket’ or ‘trading justices’. In the country there were several justices equal to the times. In the cities a lone example was set by Henry Fielding (1707–54), the novelist, sitting at Bow Street as the self-styled ‘principal Westminster magistrate’, and his brother and successor, Sir John Fielding, ‘the Blind Beak’. Unpaid, like other magistrates, they spurned the bribes which gave ‘the trading justices’ their name and made efforts to reform the young offenders and prostitutes who came before them. They turned the eight Westminster parish constables into the effective police force later known as the Bow Street Runners, whose aid was sought far and wide, simply by encouraging a disillusioned public to come in with exact descriptions of those who robbed them and setting up a primitive criminal record office.

Meanwhile, the generality of magistrates continued, in desperation as much as inhumanity, to hunt ‘the undeserving poor’ from parish to parish. Parliament lamely backed them up by passing the Riot Act of 1715, which made it a felony for members of ‘tumults and riotous assemblies’ not to disperse within an hour of being charged to do so by a justice; and by protecting magistrates and constables in 1751 from being sued for their official activities. The industrial revolution did not get into its stride until after 1760, but the justices’ incapacity to meet its problems on their own was already evident, and the growing reliance on military forces was ominous.

CRIMINAL LIABILITY, PROCEDURE AND PUNISHMENT

[This section is omitted. The issues with which it deals are treated more fully below in Section 9F.]

LORD MANSFIELD AND THE COMMON LAW

According to Dr Johnson, ‘Much may be made of a Scotchman, if he be caught young’. The Doctor was writing of William Murray, Lord Mansfield, Chief Justice of King’s Bench from 1756 to 1788, born the younger son of a Scottish peer but educated at Westminster and Oxford. Like Lord Nottingham, Mansfield conformed his judgments to common sense and justice, as well as to strict law, in which he refused to believe that principles of equity had no place. Thus, in construing deeds, mortgages and wills he broke through the professional mystification of conveyancers’ forms, to decide from independent evidence of the grantors’ intentions: ‘the lawful intention, when clearly explained, is to control the legal sense of a term of art unwarily used by the testator’.

The assimilation of law to equity scandalized Mansfield’s colleagues; and ‘Junius’ belaboured him for corrupting the Common Law with ‘your unsettled notions of equity and substantial justice. . . . The Roman code, the law of nations and the opinion of foreign civilians, are your perpetual theme. . . . By such

treacherous arts the whole simplicity and free spirit of our Saxon laws were first corrupted.' Sir William Holdsworth judged, more soberly, that the breadth of Mansfield's learning 'prevented him from attaining that accurate knowledge of the development of Common Law rules which could only come to an English lawyer who had devoted the largest part of his time to the study of its complex technicalities'. Mansfield's justification is perhaps in his own criticism of *Shelley's Case* and of the contingent remainder rules it enshrined: the sequel to the Statute of Uses had shown, he said, that 'if courts of law will adhere to the mere letter of the law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law and temper it with equity'; and this indeed would 'render the lines of property very dubious and uncertain, by a difference in judgments in law and equity'.

The benefits of Mansfield's procedural reforms were less controversial. He greatly reduced the volume of litigation by the encouragement of settlements out of court; he ended the haranguing of juries and bullying of witnesses by counsel; and he originated the form and decencies of the modern trial. Both the calculated delay of litigation (to increase the profits) and the unseemly competition for the ear of the bench he prevented by the institution of a calendar of the cases to be heard and by giving counsel, whatever their seniority, an equal chance to put the motions by which a case was kept on the move.

Parties had been encouraged to plead on more general points by legislation of the Interregnum, and by an act of 1705 (4 & 5 Anne, c. 3) which permitted multiple defences at the discretion of the court. Some trading companies set up by Act of Parliament were empowered to plead the general issue at all times, putting in special matter as evidence. Mansfield accepted that special pleading had an object—the production, with precision and brevity, of the decisive issue. Short shrift was given to pleading which produced the opposite result. In *Yates v. Carlisle*, the Chief Justice called for a report on the responsibility for the enormous pleadings: 'there were twenty-seven several pleas of Justification' by the defendants, which, with the Declaration, 'Replications, Traverses, Novel Assignments and other engines of Pleading, amounted at length to a Paper Book of near 2,000 sheets', and the counsel who drew the Declaration which started it all was made to pay the whole £1,000 costs in the case.

Rather than embark on this sort of thing, counsel often preferred to arrange a special verdict (acceptable to the judges in civil matters), leaving the court to give judgment on the issue of law; or to present the agreed facts straight away ('a special case') and see the judge direct the jury's verdict according to his legal opinion. Or the general issue would be pleaded—but if this was to become a general practice, the courts had to grow more expert in the handling of evidence. Before the eighteenth century, the law took very little account of anything but written evidence—deeds and the like. As solicitor-general, Mansfield had helped to get the evidence of non-Christians admitted in the courts. As Chief Justice, he worked on the principle that the credibility of a witness was more important than his formal competence in law. And credibility, he knew, defied general rules, requiring to be tested by different methods in different cases. Orders for the re-trial of civil cases after clearly unjust general verdicts had been known since the mid seventeenth century. Mansfield introduced the appeal in the more modern sense of a reconsideration of the legal basis of a judgment, when he allowed plaintiffs non-suited before a judge sitting alone to take the issue before the whole court of King's Bench.

Contract showed Mansfield at his most original. Though assumpsit had in fact unified the whole field, there was still no theory of contract. Mansfield began to provide it when he concentrated on aspects common to all agreements, and chiefly (as in his handling of deeds) on the intention of the parties. He was even loath to disallow a contract on the grounds that its objects were illegal or 'against public policy' Though disputes about wagers were a nuisance to the courts in the eighteenth century, it was too late to expel them, and Mansfield even found himself upholding an action of assumpsit upon a wager that a certain 'decree of the Court of Chancery would be reversed on appeal to the House of Lords' (remarking by the way that the wager was quite fair, since the law was so uncertain). The problem of agreements made without a plausible consideration, he tackled, first by asserting that no consideration was needed in a written contract, and then by the doctrine that in any agreement' the ties of conscience upon an upright mind are a sufficient consideration'. The duty to keep one's promises was set up as the essence of the contractual obligation.

A contractual duty was presumed by the courts in situations where A had paid B a sum of money by mistake or had been induced to do so by fraud or duress. Though simple equity demanded the return of the money—these were in fact, cases of 'unjustifiable enrichment' (cf. p. 238 above)—the only remedy at Common Law was an assumpsit, and the liability to repay was called *quasi-contract*. Mansfield's emphasis on the moral obligation in all transactions was well-fitted to extend this branch of the law to many forms of extortion and unfairness which only Chancery could have dealt with before. Thus, in *Smith v. Bromley* (1760), a woman was allowed to recover the money she paid to her bankrupt brother's creditor in the belief that it would secure her brother's discharge. 'The enthusiasm of litigants for a remedy so strangely akin to common sense,' writes Mr Fifoot, threatened the ascendancy of the older writs.' The forms of action were in solution (they began to disappear within fifty years of Mansfield's death), and valuable things were certainly threatened with them—the boundaries of jurisdictions for instance, and the protection to the defendants of narrow lines of attack, known in advance. Yet the advantages of this widely-drawn action 'for money had and received' were obvious to Mansfield's most cautious colleagues. This was the way the law was going.

LAWYERS AND EIGHTEENTH-CENTURY SOCIETY

Year books and other old law books were being printed at a great rate around 1700, but contemporary reporting (still in law-French) languished in the shadow of Coke. The modern standards of law reporting were set by Sir James Burrow, master of the crown office in reports stretching from 1756 to 1772 which first discriminated between facts, arguments and decisions. Abridgements culminated in that of Charles Viner (1678–1756), whose other great work was the endowment of the Vinerian chair at Oxford.

The most successful of the handbooks was *Justices of the Peace* by Richard Burn, a Westmorland vicar and J.P. But textbooks of a more modern type were appearing, setting out the principles of areas of substantive law, rather than procedural rules. Sheppard's *Touchstone of Common Assurances* (1641) on conveyancing had been a forerunner, but the first really scientific study of the land-law was Charles Fearne's polemical *Essay on Contingent Remainders*, an attack on Lord Mansfield's relaxation of the ancient rules. A judge in India, Sir William Jones, wrote an Essay on the law of Bailments (1781) which combined history, analysis and a comparative approach. Jones, who was an F.R.S., President of the Asiatic Society, and an expert in Sanskrit and the Hindu laws, shows the direction in which eighteenth-century jurisprudence was advancing. Englishmen were looking to other legal traditions, first to Scotland, bound to England since 1707 by Parliament as well as Crown, where Lord Kames (1696–1782) was attempting to illuminate law by history; and then to the France of the Enlightenment, where Robert Joseph Pothier (1699– 1772) wrote on the general theory of contract, and Montesquieu's *Spirit of the Laws* (1748) engendered the idea that the virtue of the English constitution was a system of checks and balances between executive, legislature and judiciary—a 'separation of powers'.

The thing which Montesquieu sought to explain was the happy outcome of English history in the Glorious Revolution, and William Blackstone's *Commentaries on the Laws of England* (1765) were at least partly intended to justify and preserve the social order which the revolution had established. Indiscriminate as was its praise of the existing state of things—particularly in the field of real property—that 'artistic picture of the laws of England' provided the most intelligent and readable account that had ever been made of a whole legal system; and, re-edited time and time again, it for long determined the layman's picture of the law, especially in America. Blackstone showed law to have been a major factor in England's historical blessedness; but a reverence like Coke's for history was no longer a considerable influence on the law. In a century which was rationalist and anthropological in its interests, there was more willingness (Junius notwithstanding) to borrow from Roman and foreign law, and Mansfield was not alone in being glad that the change to English in the records had drawn a veil over the 'Gothick ignorance' of the Common Law's own past.

Eighteenth-century litigants struggled through crowds of lawyers who lived by watching each other at their clients' expense. The judges had attempted to control the attorneys by requiring five years' apprenticeship before admission to the roll, and even residence at an Inn of Court or Chancery, where documents could be served on them. The Inns retained their revulsion for attorneys, and a different solution

was tried in an act of 1729, inspired by the petition of the justices of the West Riding against the plague of unqualified men. This act (2 Geo. 2, c. 23) prescribed an oath to be taken by the attorney on admission and forbade him to have more than two articled apprentices at a time or to allow anyone else to act in his name in the courts; and it provided the basis for the work of the Society of Gentlemen Practisers which had come into existence by 1739. The Society aimed 'to detect and discountenance . . . unfair practice'; had dishonest attorneys removed from the rolls; acted as a pressure-group to get legal reforms through Parliament; and of course gradually established the attorneys' own monopoly against the barristers, who were prosecuted for taking on clients without the intervention of an attorney. Divided yet more absolutely from the barristers and the inns, the attorneys absorbed the similarly excluded solicitors into their organization. Solicitors had been able to work in the Court of Chancery because attorneys were a product of Common Law procedure. The act of 1729 confirmed the position of the solicitor in Chancery, and sworn solicitors were permitted in 1750 to practise as attorneys also. Since Chancery suits were lucrative and the atmosphere of the court dignified, 'solicitor' outdid 'attorney ' in social prestige and the attorneys began to assume the more reputable title.

The Commissioners of Customs and Excise employed solicitors soon after the Restoration, and from 1669 there were Treasury solicitors 'to solicit and take care of the prosecution of all debts to the King'; they also took charge of the prosecutions in Jeffreys's Bloody Assize. Some of the early Treasury solicitors were rogues employed in dubious political business; but a government legal office grew up around them, and by 1800, when the single Treasury Solicitor (at the head of the department) received a salary of £2,000 a year, the barristers had elbowed their way into it.

In the country, attorneys acted as trustees for county families, arranged their mortgages and organized their parliamentary election campaigns, costing £10,000 and upwards; and they founded the country banks which set commerce moving in the outlying areas. They were no less essential to the public enterprises—the turnpike trusts and Navigation Companies, the General Infirmaries, Carnation Shows and charity schools. They were solicitors and secretaries to these, and to the older-established authorities; for the principal firm of solicitors in the county town would provide the Deputy Clerk of the Peace, and the attorney's premises in the market town was replacing the justice's mansion as the office for petty-sessional business. In these ways, solicitors contributed especially to the development of the industrial cities. Birmingham and Manchester, with forty each, had more attorneys in 1790 than any other provincial town except the great ports of Bristol and Liverpool. In 1770, Bristol founded its own law society on the model of the London Society of Gentlemen Practisers, and it was followed in 1786 by Yorkshire, in 1800 by Sunderland, by Manchester in 1809, and Birmingham, Hull and Kent in 1818.

The law societies were like medieval craft guilds in their charitable objects, their oversight of a professional training which was based on apprenticeship, and their preservation of the law as a technical mystery which would impress clients and open their pockets. Gentlemen from all over England sent their sons to be articled to London attorneys, just as they had once sent them to the Inns of Court. Idealists began to argue that a man with so many responsibilities as an attorney must be given a 'liberal education'—like gentlemen at the Inns of Court in the old days. Several judges, including Lord Chancellors Somers, Macclesfield and Hardwicke, received their early training in attorneys' offices like Charles Salkeld's in Great Brook Street. For the Inns of Court and Chancery were more decayed even than the eighteenth-century universities. New chambers were still being built, but Clement's Inn was accommodating local brewers, periwig-makers and comedians from Drury Lane, and demanding dues from members gone abroad and unheard of 'for above fifteen years past'. The inns were used as clubs by the gentlemen of all sorts—politicians, and literary men like Aubley and Evelyn—who continued to join them. Serious law-students, such as Mansfield, made private arrangements for instruction with special pleaders and conveyancers.

The flow of men from the inns to the attorneys' offices seemed to many to threaten the status of the law as a gentleman's profession. The real gentry were neglecting the inns for the universities and leaving 'the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties and lives)' to 'obscure and illiterate men'. These words were written by Dr William Blackstone, fellow of All Souls and recorder of Wallingford, who concluded that the universities were the places where future judges

and administrators must thenceforth be taught. In lectures on the laws of England which he gave on Mansfield's urging at Oxford in 1753, and as the first Vinerian Professor of the Laws of England there from 1759, Blackstone was providing general principles for gentlemen-beginners—law for barristers, not solicitors. He wished such instruction to become the normal entry to the legal career, and his object was advanced by the announcement of the Inns of Court in 1762 that graduates of Oxford and Cambridge might be called to the bar after three years at the inns instead of five.

By 1800 the attorneys had become respectable. In Common Pleas the 1,000 ill-qualified attorneys of 1728–9 had been greatly reduced, and new admissions dropped from 140 in 1740 to 58 in 1790. An attorney as well as a barrister could amass a fortune sufficient to start his family on the road to nobility: Viscount Melbourne, prime minister from 1834 to 1837, was descended from Peniston Lamb, a Nottingham attorney who made £100,000 in the early eighteenth century.

Law-suits were so expensive that it was not worth a man's while to sue for a £30 debt. Yet a good attorney was probably making his £2,000 a year profit more legitimately in 1800 than earlier. Attorneys were more respectable basically because they were more useful: in litigation it was quite as important to have a good attorney as a good barrister. And, however much the fastidious Blackstone might deplore it, a growing class of professional agents was the unavoidable concomitant of Whig oligarchy. Not only as estate-agents but as election-managers and political go-betweens the attorneys were essential to the aristocracy whose kaleidoscopic groupings formed the eighteenth-century administrations. Thomas Nuthall, in addition to being receiver-general for hackney coaches, a treasury solicitor and solicitor to the East India Company, was attorney to William Pitt, Earl of Chatham, who used him in 1766 as intermediary in attempts to form a government. The attorneys helped to make the image of the nineteenth-century middle class—the sober and trustworthy professional people; or, to Shelley in 1820, the exploiting class of 'attornies and excisemen and directors and government pensioners, usurers, stockjobbers, country bankers . . .' The solicitors were home.

Great advocacy without profound legal knowledge brought fame and the lord chancellorship to Thomas Erskine (1750–1823) after false starts as a midshipman and an officer in the Royal Scots. He was said to have made £150,000 at the bar and was the first to receive a fee of 300 guineas for one case. After the Restoration, as never before, legal ability on its own could lead to the highest places in the land as well as to a fortune. The gentry were not, as formally, looking to the law as a general training for administration, and there were fewer legally trained J.P.s. Furthermore, the lawyers who still made up thirteen per cent of the House of Commons were not a particularly impressive group: they were there for the most part because that was the way to the best legal offices under the Crown, for even the lord chancellorship was confined to professionals after the dismissal of Shaftesbury in 1672. But a few rare personalities were able, by sheer ability, to rise from law to the centre of government. Only his determination in standing up to Pitt brought Mansfield the Leadership of the House of Commons, and in 1756 the duke of Newcastle fought desperately against Mansfield's defection to the position of chief justice and the House of Lords. He could have become prime minister after Newcastle. As it was, he held the chancellorship of the exchequer in the 'caretaker government' of 1757; and, more remarkably, after arranging the coalition of Newcastle and Pitt, he stayed in the cabinet till 1765, having on one occasion to declare illegal in King's Bench the general warrant issued by his cabinet colleague.

The nobles, though more exclusive than ever before, were forced to recognize the great lawyers as their equals, because Parliament was the High Court of Parliament and politics were conducted in legalistic terms. And the development of advocacy—of the art of stating a case you may not believe in, which Johnson defended in a memorable conversation with Boswell—affected the House of Commons as much as the courts. In both, the eloquence of an Erskine too easily sank to mere abuse, but sheer professionalism in debating eventually carried one man, Spencer Perceval (1762–1812), up through the legal political offices to the premiership.

EIGHTEENTH-CENTURY LAW-MAKING

The real legislators of eighteenth-century England were the local gentry. Their announcements, as J.P.s in quarter-sessions, that they would punish certain conduct, amounted to legislative prohibition of that conduct; and they did not, like a modern county council making bye-laws, have to get their general orders confirmed by the Home Secretary. When parliamentary backing was desired for local regulations, this was obtained not by a general statute but by thousands of separate local acts (. . . *An Act for erecting a Workhouse in the City and County of Norwich . . . An Act for Repairing part of the road from London to Cambridge* . . .), contrived by the gentry of the neighbourhoods concerned, and discussed in Parliament by their representatives. 'In this "age of reason", as we are wont to think it,' Maitland wrote, 'the British parliament seems rarely to rise to the dignity of a general proposition.' Law-making was still far from being regarded as the main function of Parliament; and Locke advocated a separation of powers just because the executive power had to operate constantly, while legislation was an intermittent and extraordinary activity.

The definition of Parliament's legislative sovereignty was an eventful process. It began in the days between the opening of the civil war and Cromwell's dictatorship, when Parliament was left alone to rule. The Anglican Parliaments following the Restoration produced a stream of acts to disable Roman Catholics and dissenters from public office and hinder their worship, and it was then that the king, relying on the aid of Catholic France, asserted as part of his prerogative the right to dispense with the operation of statutes in particular cases, and even to suspend them altogether. In the case of *Godden v. Hales* (1686), King's Bench actually declared that the right to dispense with the penal laws for the benefit of Hales, a Roman Catholic army officer, was part 'of the sovereign power and prerogative of the kings of England', since 'the laws of England are the king's laws'. The logical consequences of that decision were the fall of James II and the proclamation in the Bill of Rights (1 Will. & Mar. Sess. 2, c. 2) of the illegality of the ' 'pretended power' to suspend or dispense with Parliament's laws.

At first Parliament did not understand where its sovereignty lay—namely, in legislation through statute. It was too inclined to see itself as a supreme court which could try and condemn individuals by mere resolution and without due process, especially in cases of Parliamentary privilege and elections. In the *Case of the Aylesbury Men* (1704) the right of the Commons to imprison some electors who had sued the constables of Aylesbury at Common Law for refusing their votes was courageously denied by Chief Justice Holt: the Aylesbury men were perfectly entitled to sue for their rights in an ordinary court, for there was no 'law of Parliament' apart from the Common Law, and that, Holt said, could only be altered through Act of Parliament, by Queen, Lords and Commons together. Consistently with that view, the mere resolution of the Commons that general warrants were illegal was declared by Mansfield to have no force in law.

Though impatient of the law's irrationalities, neither Nottingham nor Mansfield looked to statute for improvement. Despair of making sense from the (in any case technically secret) debates in the Commons may have caused the courts to adopt the strange rule that statutes were to be interpreted literally and without recourse to external evidence of their intention. The general rules of the Common Law were built up in the courts, and one obstinate litigant like John Wilkes made a profounder difference than many statutes. Some judges sanctimoniously weighed the precedents in a case and thought that enough. Yet, the best lawyers could not help wondering how far the cult of precedent was consonant with reason, at a time when 'arguing from authorities be exploded from every other branch of learning'. Mansfield would surrender to a long line of settled cases, and he appreciated the practical advantages of even an irrational certainty in curbing the litigious zeal of corporations. But he had only contempt for the uncritical assembling of corrupt reports, and his instinct was to emphasize basic principles. 'The law of England,' he said, 'would be a strange science indeed, if it were decided upon precedents only. Precendents only serve to illustrate principles . . .'

His jurisprudence had the pragmatic spirit of the time. To do justice between men it was necessary to see things as they really were, and he would not enforce rules established in the different social context of an earlier age. As Mr Fifoot says, 'It is impossible not to remark, alike in his choice of interests and in his approach to problems, the symptoms of a changing order. He was the first judge to speak the language of the living law.' But the shape of the law was the product of history. Most of the conciliar courts had gone, but

they had left behind the use of interrogatories, depositions, affidavits. After 1641, the Common Law courts added to their own jurisdiction over slander Star Chamber's jurisdiction in those more serious cases of defamation (known as libel) in which criminal malice was imputed to the defamer and truth was not admitted as a defence. In the civil courts 'libel' was thenceforth reserved as the term for the more obviously deliberate and malicious written defamation; and thus appeared the modern distinction between the torts of slander and libel, sealed in the case of *Sing v. Lake* (1668) by the decision that in libel special damage need not be proved.

LAW IN THE HISTORY OF EIGHTEENTH-CENTURY ENGLAND

Of the great constitutional issues, some were new, like the freedom of the press and the independence of the criminal jury (raised by the seditious libel cases), some old, like the process of impeachment (eventually killed by the unpopular prosecution of Warren Hastings) which Sir Robert Walpole lived in fear of: but law was at the heart of most of them. Sir John Holt stood up for the Englishman's rights of liberty and property, resigning the recordership of London rather than condemn a soldier to death for desertion in time of peace, and, as lord chief justice, preventing Queen Anne's Parliament from interfering with the right to vote. Judicial courage was justified in the provision of the Act of Settlement of 1701 (12 and 13 William 3, c. 2) that judges should have fixed salaries and be removable only 'upon the Address of both Houses of Parliament'. The royal prerogative to impress men for the navy received judicial confirmation; but in the remarkable *Sommersett's Case* (1772) Mansfield held that slavery, which was odious, had no standing in England, so that a writ of Habeas Corpus was good to release a negro slave from a ship on the Thames.

Between the sovereign king-in-parliament and the free individual, the associations of citizens which were essential to a free society were precariously placed. Thomas Hobbes and the French revolutionaries alike condemned corporations as flaws in the structure of the all-powerful state. Charles II had some theoretical backing, therefore, when by process of Quo Warranto he attacked the corporation of London for exceeding its powers and secured the forfeiture of many borough charters in order to grant new ones giving him control over town politics. In some cases, of course, King's Bench's power to interfere in the affairs of corporations by writ of Mandamus amounted to a beneficial 'administrative law': it was used in 1724 to protect Richard Bentley, Master of Trinity College, Cambridge, whose deprivation by the university was held to be 'contrary to natural justice' and to 'the rules for the removing of members of corporations, which cannot be done, without summoning the party, and giving him an opportunity of being heard'.

Transferred to the problem of the American colonies, the law's attitude to associations and the general habit of seeing politics in legal terms contributed to a disaster. 'In one county of Massachusetts the revolution was started with the grand jury indicting the British Parliament as a public nuisance.' Mansfield and Lord Chancellor Thurlow were amongst the hottest against colonial rights, and Edmund Burke had to tell the British Parliament that this was a matter of politics and statesmanship, not law: 'I do not know the method of drawing up an indictment against an whole people.

Men still talked of their constitutional rights as 'fundamental law', though their ideas of its contents differed widely. Within that way of thinking, the concept of a 'fundamental contract' became predominant, so that James II in 1689 was accused simultaneously of 'having violated the fundamental laws' and 'having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people'. It is not clear how far Locke and the other political philosophers believed in the 'original contract' as an historical fact, dimly perceived in the dark ages: most probably the Whig aristocracy who so often handled contracts saw the very ancient idea of the constitutional contract as just a useful political assumption—they implied a contractual relationship between king and people as contemporary judges would imply one between (say) an innkeeper and his guests. In the Bill of Rights of 1689 the terms of the constitutional contract began to be written down, and the constitution ceased to be entirely 'living custom'.

Equally often, the philosophers, seeking to destroy divine right and reconcile individual rights and sovereign authority, spoke of a *social contract* between the people in a state of nature to submit themselves to a sovereign as the head of a corporation, or to *entrust* him with power. Political trusteeship is, again, a

concept found in every age: but the emphasis on trusts and moral obligation in Nottingham's jurisprudence must surely have contributed to its prominence around 1700. The sovereign which emerged from the Glorious Revolution was Parliament, conceived still as a supreme court. The theoretical importance of Parliament's judicial functions led to the conflicts between the Commons and the Lords over their respective roles, and to a dangerous arrogance in the Commons which caused Defoe and others to remind them of their trusteeship and of the fundamental law which bound even them. In the Aylesbury election case of 1704 the Lords joined with Lord Chief Justice Holt to tell the Commons that the vote was the absolute right of a freeholder, and that 'the security of our English constitution' was that 'neither House of Parliament has a power separately to dispose of the liberty or property of the people'.

Law could be seen to be changing all the time, and the immemorial antiquity of English law was no longer a plausible political argument. 'Junius' appealed to Magna Carta against the innovations of the lawyer, Mansfield, but politicians generally were arguing from abstract legal concepts—contract and trust—rather than from the history of the law. Burke, framing the philosophy of conservatism, appealed once more to the past, but to the virtues of England's political tradition, not the sacred antiquity of her laws; while in the hands of the utilitarians, Helvetius and Bentham, law-making came to seem an exercise neither in moral philosophy nor in history, but in psychology, a problem of how to give the greatest happiness to the greatest number.

The main impression left by eighteenth-century law is, however, one of practical, unexciting worth, the reflected worth of the gentry who arranged the affairs of England in their county meetings, often assembled at the Assizes. Gone were the heroic attitudes of the law in the seventeenth century, when in a fit of 'legal antinomianism' Milton could argue that it was 'legal' to kill the king. The purpose of English law was not even to put down violence, but—as all the world knew—to defend the Englishman's property. Amongst that property, according to Blackstone, personal possessions, once regarded contemptuously by the law, had begun to achieve an importance equal to land and office, by reason of 'the introduction and extension of trade and commerce, which are entirely occupied in this species of property and have greatly augmented its quantity . . .'

E. USES, THE STATUTE, AND THE DUKE OF NORFOLK

AN EARLY CASE CONCERNING USES

Baker and Milsom, *Sources* p. 94

DE ST EDMUNDS v. ANON. (1371)

Y.B. Trin. 45 Edw. III, fol. 22, pl. 25.

T. de St Edmunds, knight, brought a writ of wardship against one J. and claimed the wardship of the body and the lands of John son and heir of L. de W.; and he claimed the manor of C. which was held of him for homage. And J. put forward to the court a deed by which that same L. in his lifetime had enfeoffed himself and others of that manor in fee simple; and he asked judgment whether the action lay.

Cavendish said that he did not admit the deed, but he said that the livery was made upon condition that [J. and the others] would enfeoff the infant when he came of age, and so by collusion to oust us from our wardship etc.

Belknap said that [T.] should not be received to this averment contrary to the deed which was in fee simple. But the opinion of the court was that he would be received, because if the case were so the infant when he came of age could enter.

Belknap was willing to take issue that the feoffment was not made upon condition as [T.] had alleged, ready.

And the others said the opposite, that it was by collusion.