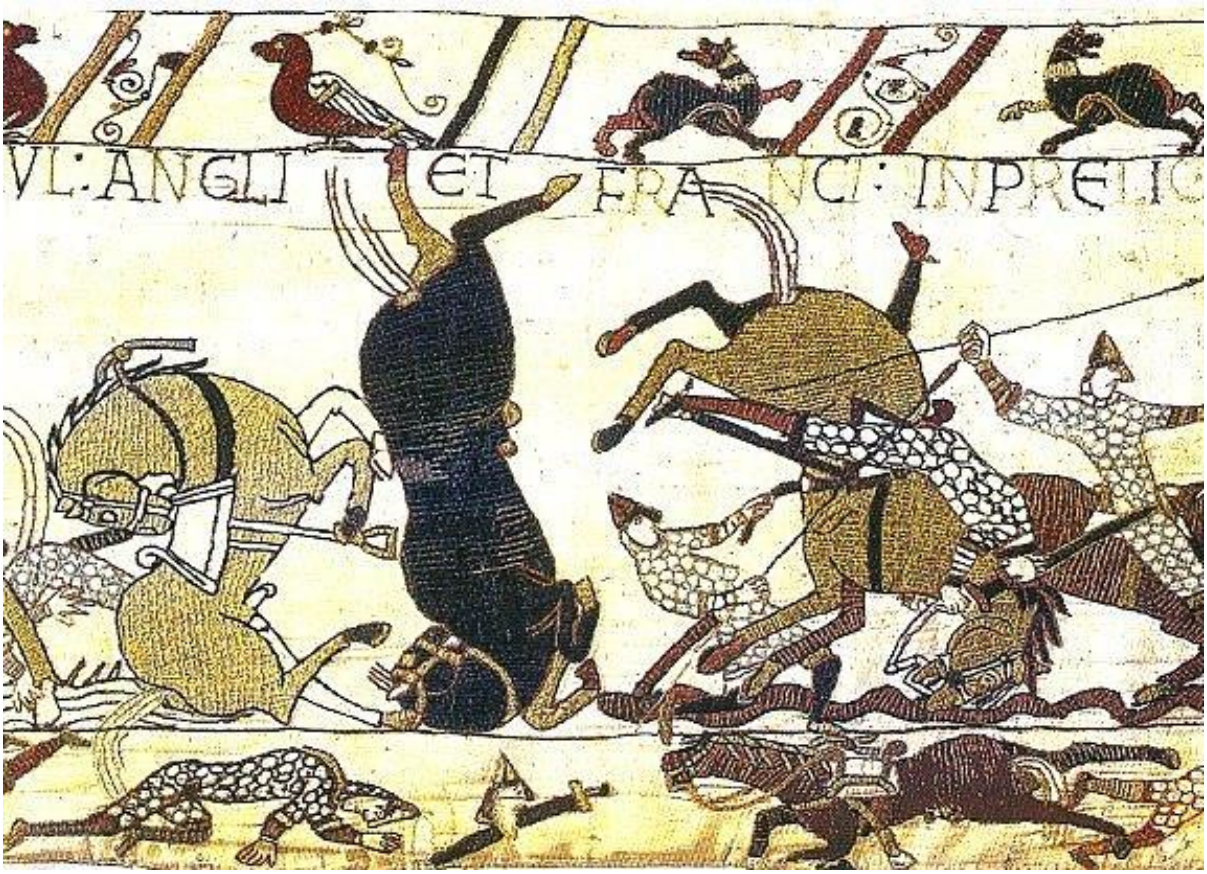
Introduction to the Common Law
(The Common Law Tradition)

Prof. Dr. Yves Mausen
University of Fribourg (Switzerland)
University of Montpellier (France)



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Starting research

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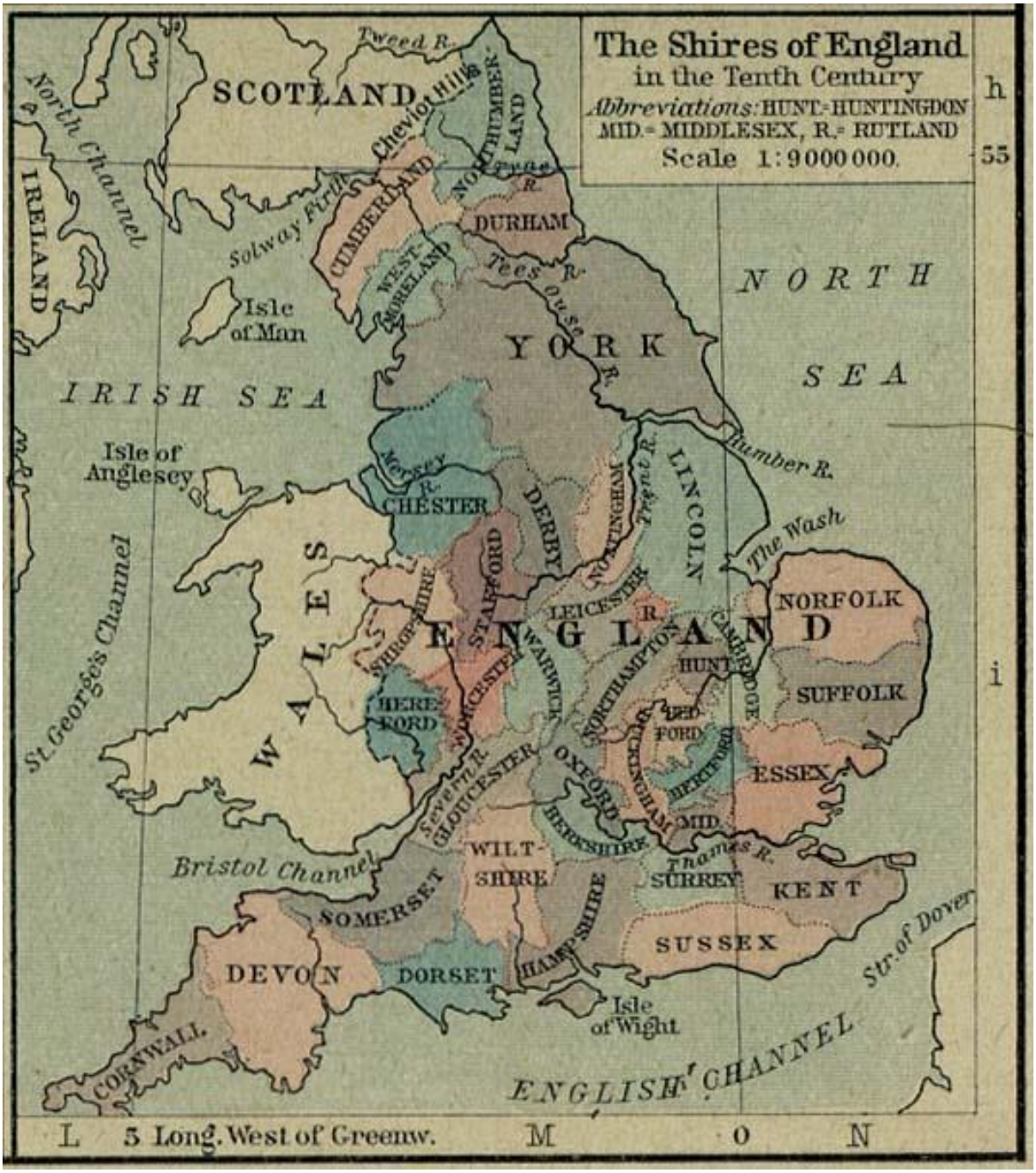
https://law.duke.edu/lib/researchguides/englishlegal/
http://library.law.yale.edu/research-guides-8

I. General introduction to the common law tradition and the context of its development

1. The influence of common law and the influence on common law
2. The social and political context of the development of common law
   2.1. The justice in Anglo-Saxon times
   2.2. The Conquest and the Norman rule
   2.3. The common law: from privilege to right


23.
ANGLO-SAXON BRITAIN
"THE HEPTARCHY."
English Miles
0 10 20 40 60 80
PICTS
STRATHCLYDE
GALLOWAY
BERNICIA
NORTHUMBRIA
DEIRA
Man
Lindisfarne
Tyne
Jarrow
Durham
Whitby
Derwent
Swale
Ouse
York
Manchester
Humber
LINDSEY
Lincoln
Trent
Derby
Nottingham
NORTH WALES
MIDDLE ANGLES
Tamworth
Leicester
NORTH GYRWE
MERCIA
(MIERCE)
SOUTH GYRWE
EAST ANGLES
St Edmundsbury
Warwick
Severn
SOUTH ANGLES
Gloucester
Burford
Oxford
EAST SAXONS
Witham
Hereford
MIDDLE SAXONS
London
Thames
Reading
Abingdon
Basingstoke
Chippenham
Malmsbury
Ethandun
Marton
Ockley
KENT
WESSEX
Ellendun
Winchester
Athelney
Wilton
Sherborne
SOUTH SAXONS
Wight
Wareham
WEST WALES
Bangor
FRISIA
John Bartholomew & Co. Edin.r


The Shires of England
in the Tenth Century
Abbreviations: HUNT.= HUNTINGDON
MID.= MIDDLESEX, R.= RUTLAND
Scale 1:9000000.
SCOTLAND
Tweed R.
Cheviot Hills
NORTHUMBER-LAND
Tyne R.
DURHAM
CUMBERLAND
WEST-MORELAND
Solway Firth
Tees R.
Ouse R.
YORK
NORTH SEA
IRISH SEA
Isle of Man
IRELAND
North Channel
Isle of Anglesey
Mersey R.
CHESTER
DERBY
NOTTINGHAM
Trent R.
LINCOLN
Humber R.
The Wash
NORFOLK
SUFFOLK
ESSEX
CAMBRIDGE
HUNT.
LEICESTER R.
NORTHAMPTON
STAFFORD
SHROPSHIRE
WARWICK
WORCESTER
HEREFORD
WALES
ENGLAND
St. George's Channel
Severn R.
GLOUCESTER
OXFORD
BUCKINGHAM
BEDFORD
HERTFORD
MID.
BERKSHIRE
WILT-SHIRE
Thames R.
SURREY
KENT
Bristol Channel
SOMERSET
HAMPSHIRE
SUSSEX
Str. of Dover
DEVON
DORSET
Isle of Wight
CORNWALL
ENGLISH CHANNEL
h
55
i
L 5 Long. West of Greenw. M O N

Magna Carta, 1215, cl. 39-40

(39) No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed; nor will we go upon him [condemn him] nor send upon him [commit him to prison], except by the legal judgment of his peers, or by the law of the land.
(40) To none will we sell, to none will we deny, to none will we delay right or justice.

Magna Carta, 1217, cl. 32(cf. 1225, cl. 29)-33

(32) No freeman shall be taken, or imprisoned, or disseised, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any other way destroyed; nor will we go upon him, nor will we send upon him, excepting by the legal judgment of his peers, or by the law of the land.
(33) To none will we sell, to none will we deny, to none will we delay right or justice.

Stat. 25 Edw. III (1351), sess. v, c. 4

http://www.legislation.gov.uk/aep/Edw3Stat5/25/4/section/IV

Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; It is accorded assented, and stablished, That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same neighbourhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law; nor that none be out of his Franchises, nor of his Freeholds, unless he be duly brought into answer, and forejudged of the same by the Course of the Law; and if any thing be done against the same, it shall be redresseed and holden for none.

Stat. 28 Edw. III (1354), c. 3

http://www.legislation.gov.uk/aep/Edw3/28/3/section/III

That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.

Stat. 42 Edw. III (1368), c. 3

http://www.legislation.gov.uk/aep/Edw3/42/3/section/III

At the Request of the Commons by their Petitions put forth in this Parliament, to eschew the Mischiefs and Damages done to divers of his Commons by false Accusers, which oftentimes have made their Accusations more for Revenge and singular Benefit, than for the Profit of the King, or of his People, which accused Persons, some have been taken, and sometime [variant reading: « others »] caused to come before the King's Council by Writ, and otherwise upon grievous Pain against the Law: It is assented and accorded, for the good Governance of the Commons, that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error.

II. The traditional court system

1. The local royal justice
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   1.2. The justices in the eyre
2. The assizes
3. The justices of the peace
4. The central royal justice
   4.1. The chief justiciars
   4.2. The common law courts
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      4.2.2. The King's Bench
      4.2.3. The Exchequer of Pleas
      4.2.4. The later evolution of the common law eourts
5. The other royal courts
6. Church courts

Appendix
The legal profession
   1. Solicitors and barristers
   2. Justices
   3. The legal training

Magna Carta, 1215, cl. 18-19

(18) Recognitions [= inquests] of novel disseisin, mort d'ancestor, and darrein presentment shall not be taken elsewhere than in their proper county court, and in this way: We, or, if we should be out of the realm, our chief justiciar, will send justices through each county four times a year, who, with four knights of the county elected by the county shall hold the said assizes in the county, on the day and in the place where the county court meets.
(19) If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.

Magna Carta, 1217, cl. 13-14 (cf. 1225, cl. 12-13)

(13) Recognitions of novel disseisin and of mort d'ancestor shall not be taken elsewhere than in their proper county court, and in this way: We, or, if we should be out of the realm, our chief justiciar, will send justices through each county ***once a year***, who, with knights of the counties shall hold the said assizes in the counties. **And those which cannot on that visit be determined in the county by the said justices sent to hold the said assizes shall be determined by them elsewhere on their circuit; and those which cannot be determined by them because of difficulty over certain articles shall be referred to our justices of the bench and determined there.**
(14) **Assizes of darrein presentment shall always be held before the justices of the bench and determined there.**

Statute of Westminster II, 1285, c. 30

Harry Rothwell, *English Historical Documents*, 1189-1327, London, Eyre & Spottiswoode, 1975, p. 445-446.

Henceforth two sworn justices shall be assigned, before whom and not others, assizes of *novel disseisin*, *mort d'ancestor*, and Attaint shall be taken, and they shall associate with them one or two of the more discreet knights of the county into which they shall come and shall take the aforesaid assizes and Attaints at most three times a year, namely once between the quindene of St John the Baptist [8. July] and the Gules of August [1. August], and again between the feast of the Exaltation of the Holy Cross [14. September] and the octave of Michaelmas [6. October], and the third time between Epiphany [6. January] and the Purification of the blessed Mary [2. February], and in every county at every taking of assizes they shall before their departure fix the day of their return, so that every one of the county may know of their coming, and they shall adjourn assizes from date to date if on one day the taking of them is delayed by vouching to warranty, by essoin, or by default of jurors. And if they see that it would be advantageous for any reason for an assize of *mort d'ancestor* which is postponed owing to an essoin or vouching to warranty to be adjourned into the bench, it shall be lawful for them to do this. And then they shall send the record with the original writ to the justices of the bench. And when the action reaches the taking of the assize, it, together with the original writ, shall be remitted by the justices of the bench to the previous justices for the assize to be taken before them. But henceforth the justices of the bench shall appoint at least four days a year for such assizes.

To save labour and expense, inquisitions in connection with trespasses pleaded before justices of either bench shall be arranged to be taken before the said justices assigned, unless the trespass is so heinous that it requires considerable examination. It shall also be arranged to take before them inquisitions of other pleas pleaded in either bench in which the examination is easy, as when entry or somebody's seisin is contradicted, or in the case of one article having to be inquired into: but inquisitions arising out of massive pleas and involving many articles, which require considerable examination, shall be taken before the justices of the benches unless both parties ask for the inquisition to be taken before some of them when they come to those parts, which henceforth shall not be done save by two justices or by one along with some knight of the county upon whom the parties agree, and inquisitions of this sort shall not be arranged to be taken before any unless a definite day and place in the county is settled on, with the parties present and day and place inserted in a judicial writ in these words: « We command you to cause twelve etc. to appear before the justices at Westminster on the octave of Michaelmas unless so-and-so and so-and-so come to those parts on such-and-such day and place. » And when such inquisitions have been taken they shall be returned in the benches and there shall judgment be given and they shall be enrolled. And if any inquisitions are taken otherwise than in the aforesaid manner, they shall be deemed invalid, except that it shall be arranged to take an assize of *darrein presentment* and inquisitions of *quare impedit* in their own county before one justice of the bench and one knight at a definite day and place decreed in the bench with or without the defendant's consent, and there judgment shall be given immediately. All justices of the bench and in eyres shall have clerks henceforth to enrol all pleas pleaded before them, as they have been used form of old to have them. [...]

III. Common law procedure I: The writ system

Introduction
  1. Civil and criminal procedure
  2. Different stages of a lawsuit

1. The evolution of writs: the writ of « Praecipe »
2. The petty assizes
3. The writ of « Ostensurus quare »: from trespass to case

Appendix
  1. The bill procedure
  2. The initiation of criminal proceedings

Praecipe in capite

Fitzherbert, *Natura Brevium*, f° 5 I, translated in: J. H. Baker, *An Introduction to English Legal History*, Oxford, 4. ed., 2007, p. 541.

The king to the sheriff of N., greeting. Command (« Praecipe ») A. that justly and without delay he render to B. one messuage with the appurtenances in D., which he claims to be his right and inheritance and to hold of us in chief, and whereof he complains that the aforesaid A. unjustly deforces him. And if he will not do so (« Et nisi fecerit »), and if the aforesaid B. shall give you security for pursuing his claim, then summon the aforesaid A. by good summoners that he be before our justices at Westminster (= Common Bench) [on such a day] to show why he has not done it (« ostensurus quare non fecerit »). And have there the summoners, and this writ. Witness etc.

Novel disseisin

Fitzherbert, *Natura Brevium*, f° 177 F, translated in: J. H. Baker, *An Introduction to English Legal History*, Oxford, 4. ed., 2007, p. 545.

The king to the sheriff of N., greeting. A. has complained to us that B. unjustly and without judgment disseised him of his free tenement in C. after the first passage of the lord King Henry, son of King John, into Gascony. And therefore we command you that if the aforesaid A. shall give you security for pursuing his claim, then cause the tenement to be reseised of the chattels which were taken therein and cause the same tenement with the chattels to be in peace until the first assize when our justices shall come into those parts. And in the mean time cause twelve free and lawful men of that neighbourhood to view the tenement, and cause their names to be put onto the writ, and summon them by good summoners that they be before the said justices at the said assize ready to make recognition thereon. And put by gage and safe pledges (« pone per vadium et salvos plegios ») the aforesaid B., or if he shall not be found his bailiff, that he may be there then to hear the recognition. And have there the summoners, the names of the pledges, and this writ. Witness etc.

Mort d'ancestor

Fitzherbert, *Natura Brevium*, f° 195 E, translated in: J. H. Baker, *An Introduction to English Legal History*, Oxford, 4. ed., 2007, p. 543.

The king to the sheriff of S., greeting. If A. shall give you security for pursuing his claim, then summon by good summoners twelve free and lawful men of the neighbourhood of N. that they be before our justices at the first assize when they shall come into those parts, ready to make recognition by oath whether W., father of the aforesaid A., was seised in his demesne as of fee of one messuage and one yard-land with the appurtenances in N. on the day he died, and whether he died after the coronation of the lord King Henry, and whether the same A. is his nearest heir. And in the mean time let them view the said messuage and land. And cause their names to be put on the writ. And summon by good summoners B., who now holds the aforesaid messuage and land, that he may be there to hear the recognition. And have there the summoners, and this writ. Witness etc.

Trespass vi et armis, for battery

Fitzherbert, *Natura Brevium*, f° 86 I, translated in: J. H. Baker, *An Introduction to English Legal History*, Oxford, 4. ed., 2007, p. 545.

The king to the sheriff of S., greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges (« pone per vadium et salvos plegios ») B. that he be before us on the octave of Michaelmas, wheresoever we shall then be in England (= King's Bench), to show why with force and arms (« ostensurus quare vi et armis ») he made assault on the selfsame A. at N., and beat, wounded and ill treated him so that his life was despaired of, and offered other outrages against him, to the grave damage of the selfsame A. and against our peace (« et contra pacem nostram »). And have there the names of the pledges, and this writ. Witness etc.

Trespass on the case, against a farrier

Registrum omnium brevium, f° 73, translated in: J. H. Baker, *An Introduction to English Legal History*, Oxford, 4. ed., 2007, p. 547.

The king to the sheriff of L., greeting. If J. shall give you security for pursuing his claim, then put by gage and safe pledges (« pone per vadium et salvos plegios ») R. that he be etc. to show why, whereas (« ostensurus quare, cum ») the same J. delivered a certain horse to the said R. at N. well and sufficiently to shoe: the same R. fixed a certain nail in the quick of the foot of the aforesaid horse in such a way that the horse was in many ways impaired, to the damage of the selfsame J. one hundred shillings, as he says. And have there the names of the pledges, and this writ. Witness etc.

« Latitat » with « ac etiam » clause

Instructor Clericalis, 3. ed., 1700, p. 39, translated in: J. H. Baker, *An Introduction to English Legal History*, Oxford, 4. ed., 2007, p. 549.

The king to the sheriff of S., greeting. Whereas we lately commanded our sheriff of Middlesex that he should take C., if he could be found in his bailiwick, and safely keep him so that he might be before us at Westminster at a certain day now past, to answer unto A. in a plea of trespass, **and also to a separate bill of the him said A. against the said C. for ten pounds of debt, to be exhibited before us according to the custom of our court**; and our said sheriff of Middlesex at that day returned to us that the aforesaid C. has not been found in his bailiwick; **whereupon on behalf of the aforesaid A. it has been sufficiently attested in our court before us that the aforesaid C. lurks and roams about in your county**: therefore we command you that you take him, if he can be found in your bailiwick, and safely keep him so that you may have his body before us at Westminster on the Wednesday next after three weeks of the Holy Trinity, to answer to the aforesaid A. in respect of the plea and bill aforesaid. And have there then this writ. Witness John Holt, knight, the ninth day of June in the eleventh year of our reign.

IV. Common law procedure II: The pleading system

Anon. (1610, trespass)

ECO MS. 93, f° 99 v (K.B.), translated in: J. H. Baker, S. F. C. Milsom, *Sources of English Legal History. Private law to 1750*, Oxford, 2. ed., 2010, p. 361.

In trespass for battery, the defendant justified because he was vicar of Colbichurch in Kent, and because the plaintiff was in the said church fooling around irreverently the defendant struck him moderately with a walking stick which he had in his hand. The plaintiff demurred upon this plea, and it was adjudged in his favour without any argument.
Croke [for the defendant] said that Monkester, the schoolmaster of St Paul's, because someone came into the school and expostulated with him in some matter, said to his pupils, *Tollite* [Take him away]: whereupon they gave him three or four good lambskins [hard blows], and he brought his action of battery.
Man. [secondary to the K.B., filazer for Kent] That went against Monkester.

Gyse v Baudewyne (1310, trespass)

Y.B. 3 & 4 Edw. II (K.B.), Seldon Soc., vol. 22, p. 4, translated in: J. H. Baker, S. F. C. Milsom, *Sources of English Legal History. Private law to 1750*, Oxford, 2. ed., 2010, p. 352-353.

John de Gyse brought a writ for the abduction of his wife against [Thomas Baudewyne] and others; [and the writ demanded] why on the eve of the feast of the Conversion of St Paul [29 June 1308] with force and arms etc. they carried away and abducted Isabel his wife together with [his] goods and chattels to [such a] value etc.
Laufare denied the coming with force and arms and anything against the [king's] peace etc., and the abduction and anything the statute [1285, Statute of Westminster II, c. 34] provided for such a case, and the damages; and he said: you can not have action by this writ because this Isabel whom you call your wife is our wife, and was so years and days before you obtained your writ and on the day of which you have counted. Ready etc. And we ask judgment whether you can have such an action.
[Speach for the plaintiff may be missing.]
Claver. That Isabel was our wife and that we were seised of her as of our wife on the day of which [you] have counted, [we are] ready etc. And besides you yourself have sued a divorce, so supposing that she is not rightly your wife, which suit is still pending. [We ask] judgment whether you can say that she is your wife.
Westcote. Whereas you say that we sued a divorce and therefore that she is not our wife, you argue badly. And we ask judgment, since you acknowledge that we sued a divorce and that the suit is still pending and therefore that she is still our wife, whether you ought to be answered as to something contrary to your own admission.
Claver. What we said about the divorce is not the substance of our answer: rather do we say that she was our wife on the day of which you have counted, and years and days before then was she our wife. Ready [are we to aver] that on such a day in such a year and in such a place she was espoused to us; and she lived with us as our wife until John de Gyse abducted her

with force, so that we came to such a place and there found her clothed in the same clothing that we had given her, and she followed us [thence]. And we ask judgment, as before.
Brabazon *[C.J.]*. So you did not abduct his wife.
Passlew. That she was our wife espoused to us on such a day in such a year and in such a place, [we are] ready etc.
Brabazon. If she was your wife, she was not his. And so you can say that you did not abduct [his wife].
Passlew. Statute gives action to the husband only because of the chattels taken away with his wife. So we say that she is our espoused wife, and so etc.; [and we ask that inquiry on this be made by the jury of] the place where the espousals were made.
Brabazon. It is not for this court to inquire into the making of the espousals, nor will we send to the bishop to inquire whether she was your wife. Rather must you answer whether you abducted his wife or not.
Passlew. That [we did] not, [we are] ready etc.
And the others said the opposite.
And note that [on this issue] it is not proper to have a writ to get a jury from the neighbourhood where [the defendant said] the espousals had taken place. And [this is] hard [on him].

According to the plea roll, the defendants pleaded Not guilty, and the jury acquitted them.

Statute of Westminster II, c. 34 (Harry Rothwell, *English Historical Documents*, 1189-1327, London, Eyre & Spottiswoode, 1975, p. 448; rape, abduction etc.): « [...] As to women taken away with the husband's goods, the king shall have the suit for the goods thus carried off. [...] ».

Caunt's case (1430, trespass)

Y.B. Mich. 9 Hen. VI, translated in: J. H. Baker, S. F. C. Milsom, *Sources of English Legal History. Private law to 1750*, Oxford, 2. ed., 2010, p. 561-563.

A writ of deceit on the case, *quare cum* etc., was brought by A. Caunt against B. and C., alleging in the writ that « where the aforesaid A. bargained to buy a certain butt of rumney wine from the aforesaid B. and C., the aforesaid C., knowing it to be unwholesome and unsuitable, warranted it to be suitable (*habilem*) and wholesome, and sold it for a certain sum of money ».
Rolf. [We pray] judgment of the writ; for the writ says *habilem* (with an *h*), whereas it should be *abilem* (without an *h*), and so it is false Latin, or no Latin.
Babington *[C.J.]* Some of the Chancery clerks say it should be written with an *h*, and some say the contrary, so leave that point.
[*Rolf*. The writ does not specify the sum for which the wine was sold.
The court said that the writ went « for a certain sum of money », and the details appear in the count; so answer.]
Rolf. Still [we pray] judgment of the writ, for he has not alleged that we warranted the wine to be good, and [if it is not to his taste] it shall be adjudged his own foolishness.
Martin *[J.]* The warranty is irrelevant, for it is enacted that no one should sell unwholesome food.
Cottusmore *[J.]* That is [enforced by] *actio popularis*.

Babington. The warranty, as Martin has said, is irrelevant. If I go into a tavern to eat, and the taverner gives and sells me unwholesome drink or meat, whereby I am made extremely sick, I shall clearly have an action on my case; and yet he made no warranty to me.
Godered. It was recently adjudged in the King's Bench that where someone sold a piece of woollen cloth, knowing it to be rotten and not well fulled, this [action] was adjudged good without a warranty.
Then *Westcote* [chief prothonotary] pointed out that the writ did say « warranted », as indeed it did.
Rolf (smiling). While making protestation that the plaintiff is a wine-drawer and knows nothing about wine, we say for our plea on behalf of B. that at the time of the sale the wine was sufficient and suitable; ready etc.
The whole court. You must traverse the plaintiff.
Then *Rolf* said, « and not unwholesome »; and *the other side econtra*.
Rolf. And on behalf of C. we say that he sold the wine to the plaintiff through the aforesaid B., as his servant, without this that he sold it to him in any other manner.
Martin. Then by your own confession you have deceived him.
Rolf. If I have a servant who trades on my behalf, and he goes to a fair with a defective horse or other merchandise, and sells it, shall the other party have an action of deceit for this against me? (Implying that he would not.)
Martin. What you say is true, for you did not command [the servant] to sell the thing to him, or to any other particular person. But if your servant, with your collusion and by your command, sells some unwholesome wine, the buyer shall have an action against you; for it is your own sale. If the case is that you did not command your servant to sell the wine to this plaintiff, then you may say that you did not sell it to the plaintiff.
Rolf. It would be very dangerous to put that in the mouths of the lay people, because it is a question of law.

V. Common law procedure III: The trial (the jury and the evidence)

1. The ancient forms of trial
2. The trial by jury
3. The evidence
4. The summary trial

The Laws of King Aethelstan

https://sourcebooks.fordham.edu/source/560-975dooms.asp#The Laws of King Athelstan

Doom concerning hot iron and water.
28. And concerning the ordeal we enjoin by command of God, and of the archbishop, and of all the bishops: that no man come within the church after the fire is borne in with which the ordeal shall be heated, except the mass-priest, and him who shall go thereto: and let there be measured nine feet from the stake to the mark, by the man's feet who goes thereto. But if it be water, let it be heated till it low to boiling. And be the kettle of iron or of brass, of lead or of clay. And if it be a single accusation, let the hand dive after the stone up to the wrist, and if it be threefold, up to the elbow. And when the ordeal is ready, then let two men go in of either side; and be they agreed that it is so hot as we before have said. And let go an equal number of men of either side, and stand on both sides of the ordeal, along the church; and let these all be fasting,and abstinent from their wives on that night; and let the mass-priest sprinkle holy water over them all, and let each of them taste of the holy water, and give them all the book and the image of Christ's rood to kiss: and let no man mend the fire any longer when the hallowing is begun; but let the iron lie upon the hot embers till the last collect: after that let it be laid upon the stapela; and let there be no other speaking within, except that they earnestly pray to Almighty God that he make manifest what is truest. And let him go thereto; and let his hand be enveloped, and be it postponed till after the third day, whether it be foul or clean within the envelope. And he who shall break this law, be the ordeal with respect to him void, and let him pay to the king 120 shillings as wite. Walreaf is the nithing's deed: if any one desire to deny it, let him do so with eight and forty full-born thanes.

Special Verdict: *R. v. Dudley and Stephens* (Dec. 9, 1884)

[…] that, on July 5,1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 1 lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from

land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning, the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the three men fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment.

Opinion Evidence: *Year Books*: 23. Edw.3. 11 (1349)

Assise de no[vel] diss[eisin] fuit port vers plusieurs. Touts forspris un per baylie pled[erent] al' *Ass[ise]* et celuy en proper person emprist la tenancie, et pled[a] en bar per rel[eas] de pl[eint], en quel fur[ent] plusiers tesm[oignes] nome, et le le [*sic*] fait fuit dedit, pour que proces fuit fait vers les testm[oignes] tanque à la *Grand[e] Distr[aint]* que les testm[oignes] vindr[ent] et l'*Ass[ise]* auxy, et un des tesm[oignes] fuit nomme en le panel entre ceux d'*Ass[ise]* et fuit outre. Car dit fuit per *Thorp*, coment que ils fur[ent] xx tesm[oignes] nomme en le fait, unc[que] la *Court* prendra un *Assise* entre les tesm[oignes], et eux en ser[ont] fors ajoints a l'Assise, et tesm[oigneront] la verite; et de les tesm[oignes] un fut challenge pource que fuit cosin al' pl[eint]. *Et non allocatur*, car les tesm[oignes] ne sont pas chal[lenges], pource que le verdit ne sera resceu d'eux, mes de ceux de l'*Assise*, et les tesm[oignes] furont jur[es] simple a dire la verite sans dire a lour estient; car ils doivent rien tesm[oigner] fors ceo

qu'ils veront et oyront. Et l'*Ass[ise]* fut pris, et les tesmoign[es] aioint[s] a eux; par quel fuit trove, que cest fait que fut mis avant fut faux. *Thorp* ne voul[ut] pas enquirer oustre de la seisin, ne de la diss[eis]in vers celuy qui avoit plede le releas; car il dit que le t[enant] n'avoient fors un issue en un plea, mes il enquist si ceux qui avoient plede al'*Ass[ise]* par bailie furent a la diss[eisin] fait ou non; trove fuit, que si; et auxi fuit trove, que la diss[eis]in fuit fait a force et armes. Pourquoy fuit agi, que la pl[eint] rec[evra] sa sei[sin] et ses dam[mage]s, et que celuy qui plede le rel[eas] en bar, fuit pris pour le faux fait quel il mist avant, et auxy pour la diss[eisin] a force et armes; et les aut[re]s pris pour la diss[eisin] a force. Et *Kelby* pira que le fait fuit damne. *Thorp.* Non sera; car le tenant peut aver un *Attaint* quant le verdit est passe sur parol neg[ative] coment que les tesm[oignes] fur[ent] parties a ceo verdit; car les testm[oignes] doivent rien tesm[oigner] fors ceo que ils soient de certein, s[cilicet] ceo que ils veront ou oyront. Et pour tant en cas qu'ils ussent dit que le fait ust este vray, le pl[eint] n'avra jamais *Atteint*; car les tesm[oignes] av[erent] ajuge par certein discret[ion] ceo estre vray, mes sur le parol neg[ative] la *Ley* est auter: car coment que les tesm[oignes] disont par certein discretion c[e] fait nemy estre vray, encore il est possible que le fait est vray, et les tesm[oignes] scient rien de ceo; car ils ne fur[ent] pas al' temps de confecc[ion] present, mes le fait sera parol en parol, issint que le t[enant] n'avra jamais avantage de ceo, s'il ne soit per voy d'*Attaint*. Et auxy fut parle que en case ou tesm[oignes] sont ajoint a un Enquest, et les tesm[oignes] et l'*Enquest* ne puissent pas assenter a un verdit, le verdit sera pris de l'*Enquest* a par luy, et en tiel cas la partie (contra que il passa) peut aver l'*Attaint*, etc.

Opinion Evidence: William Nelson, *The Law of Evidence*

Witnesses are sworn to tell the Truth, not what they believe; for they are to swear nothing but what they have heard or seen. *Lib. Assiz. An.* 23. *Placit.* 11. *Vaugh.* 142. *Bushel's* Case. (1. ed., London, 1717, ch. 3, § 1, p. 21 sq.)

Facts and Law: *Bushell's Case* (Nov. 1670)

John Vaughan (Chief Justice of the Court of Common Pleas), *The Reports and Arguments* (2. ed. London, 1706), p. 135-158.

(Retorn of the sheriffs of London, annexed to an initial writ of Habeas Corpus, directed to them, to have the body of Edward Bushell, together with the day and cause of his caption and detention:)

That at the King's Court of a Session of *Oyer and Terminer*, held for the City of *London*, at *Justice-Hall* in the *Old-Bailey*, *London*, in the Parish of *S. Sepulchres* in *Farringdon* Ward without *London*, on *Wednesday*, 31 *die August*, 22 *Car*. 2 [August 31, 1670], before Sir *Samuel Sterling*, then Mayor of *London*, and divers other His Majesty's Justices, by virtue of His Majesty's Letters-Patents under the Great Seal of *England*, to them, any Four or more of them, directed, to enquire, hear and determine, according to the tenor of the sair Letters-Patents, the Offences therein specified; and amongst others, the Offences of unlawful Congregation and Assemblies, within the limits appointed by the said Commission within the said City, as well within Liberties as without: *Edward Bushell*, the Prisoner at the Bar, was committed to the Gaol of *Newgate*, to be there safely kept, under the Custody of *John Smith*

Knight, and *James Edwards*, then Sheriffs of the said City, by virtue of a certain Order then and there made by the said Court of Sessions, as followeth:
Ordinatum est per Curiam hic quod Finis 40 Marcarum separatim ponatur super *Edwardum Bushell*, and other Eleven persons particularly named, and upon every of them, being the Twelve Jurors then and there sworn, and charged to try several Issues, then and there joined between our Lord the King and *William Penn* and *William Meade* [*sic*], for certain Trespasses, Contempts, Unlawful Assemblies and Tumults, made and perpetrated by the said *Penn* and *Mead*, together with divers other unknown persons, to the number of Three hundred, unlawfully and tumultuously assembled in *Grace-Church-street* in *London*, to the disturbance of the Peace, whereof the said *Penn* and *Mead* were then indicted before the said Justices. Upon which Indictment the said *Penn* and *Mead* pleaded they were not guilty. For that they the said Jurors then and there the said *William Penn* and *William Mead* of the said Trespasses, Contempts, Unlawful Assemblies and Tumults, Contra Legem hujus Regni *Angliæ*, et contra plenam et manifestam Evidentiam, et contra directionem Curiae in materia Legis, hic, de et super premissis eisdem Juratoribus versus prefatos *Will. Penn* et *Will. Mead*, in Curia hic aperte datam et declaratam de premissis iis impositis in Indictamento predicto acquietaverunt, in contemptum Domini Regis nunc, Legumque suarum, et ad magnum impedimentum et obstructionem Justitiae, necnon ad malum exemplum omnium aliorum Juratorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per Curiam hic quod prefatus *Edw. Bushell* capiatur et committatur Gaolae dicti Domini Regis de *Newgate*, ibidem remansurus quousque solvat dicto Domino Regi 40 Marcas pro fine suo predicto, vel deliberatus fuerit, per debitum legis cursum. Ac eodem *Edwardo Bushell* ad tunc et ibidem capto et commisso existente ad dictam Gaolam de *Newgate*, sub custodia prefatorum *Johannis Smith* and *Jacobi Edwards*, adtunc Vic. Civitatis London predictae, et in eorum Custodia in Gaola predicta existente et remanente virtute ordinis predictae iidem *Johannes Smith* et *Jacobus Edwards*, postea in eorum exitu ab Officio Vic. Civitatis *London* predictae scilicet 28 die *Septembris*, anno 22 supradicto, eundem *Edwardum Bushell* in dicta Gaola dicti Domini Regis adtunc existentem, deliberaverunt nobis prefatis nunc Vicecomitibus Civitatis predictae in eadem Gaola, salvo custodiendum, secundum tenorem et effectum Ordinis predictae. Et quia predictus *Edwardus* nondum solvit dicto Domino Regis predictum finem 40 Marcarum, nos iidem nunc Vicecomites corpus ejusdem *Edwardi* in Gaola predicta, hucusque detinuimus, et haec est causa captionis et detentionis prefati Edwardi, cujus quidem corpus coram prefatis Justiciariis paratum habemus. [p. 135 sq.]

[...]

(Report:)

In the present Case it is returned, *That the Prisoner being a Juryman, among others, charged at the Sessions Court of the* Old-Bailey, *to try the Issue between the King and* Penn *and* Mead, *upon an Indictment for assembling unlawfully and tumultuously, did,* contra plenam et manifestam Evidentiam, *openly given in Court, acquit the Prisoners indicted, in contempt of the King, etc.*
The *Court* hath no knowledge by this *Retorn* whether the Evidence given were *full* and *manifest*, or *doubtful*, *lame* and *dark*, or indeed *Evidence at all material to the Issue*, because it is not returned *what Evidence* in particular, and as it was delivered, *was given*: for it is not possible to judge of that rightly, which is not exposed to a man's judgment. But here the Evidence given to the Jury is not exposed at all to this *Court*, but the Judgment of the *Court of Sessions* upon that Evidence is only exposed to us, who tell us it was *full* and *manifest*: but

our Judgment ought to be grounded on our own Inferences and Understandings, and not upon theirs. [p. 137]

[...]

Another fault in the *Retorn* is, That the the *Jurors* are not said to have acquitted the persons indicted, *against full and manifest Evidence, corruptly, and knowing the said Evidence to be full and manifest against the persons indicted*; for how *manifest soever* the *Evidence* was, if it were not *manifest to them*, and that they believ'd it such, it was not a *finable fault*, nor deserving Imprisonment, upon which difference the *Law* of punishing *Jurors* for *false Verdicts* principally depends. [p. 140 sq.]

[...]

I conclude therefore, That this *Retorn*, charging the *Prisoners* to have acquitted *Penn* and *Mead, against full and manifest Evidence* first; and next, without saying *that they did know and believe that Evidence to be full and manifest* against the indicted persons, is no cause of *Fine* or *Imprisonment*.
And by the way I must here note, That the *Verdict* of a *Jury* and *Evidence* of a *Witness* are very different things, in the truth or falshood of them. A *Witness* swears but to what he hath heard or seen generally, or more largely to what hath fallen under his senses: but a *Juryman* swears to what he can *infer* and *conclude* from the Testimony of such *Witnesses*, by the act and force of his Understanding, to be the *Fact* inquired after; which differs nothing in the *Reason*, tho' much in the *Punishment*, from what a *Judge*, out of various Cases consider'd by him, infers to be the *Law* in the *Question* before him. [p. 142]

[...]

We come now to the next part of the *Retorn, viz. That the Jury acquitted those indicted against the direction of the Court in matter of Law, openly given and declared to them in Court*.
The words, *That the Jury did acquit against the direction of the Court in matter of Law*, literally taken, and *de plano*, are *insignificant*, and *not intelligible*; for no *Issue* can be joined of *matter in Law*, no *Jury* can be charged with the tryal of *matter in Law* barely, no *Evidence* ever was, or can be given to a *Jury* of what is *Law* or not; nor no such *Oath* can be given to, or taken by a Jury, to try *matter in Law*, nor no *Attaint* can lie for such a *false Oath*.
Therefore we must take off this *veil* and *colour of words*, which make a *shew* of being *something* , and in truth are *nothing*.
If the meaning of these words, *finding against the direction of the Court in matter of Law*, be, that if the *Judge* having heard the *Evidence* given in *Court*, (for he knows no other) shall tell the *Jury* upon this *Evidence, The Law is for the Plaintiff, or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly*, then the *Jury* ought of duty so to do: Every man sees that the *Jury* is but a troublesome delay, great charge, and of no use in determining *Right* and *Wrong*, and therefore the Tryals by them may be better *abolish'd* than *continued*; which were a strange *new-found conclusion*, after a Tryal so celebrated for many hundreds of years.
For if the *Judge*, from the *Evidence*, shall by *his own Judgment* first resolve upon any Tryal what the *Fact* is, and so knowing the *Fact*, shall then resolve what the *Law* is, and order the *Jury* penally to find accordingly: what either necessary or convenient use can be fancied of *Juries*, or to continue Tryals by them at all?

But if the *Jury* be not obliged in all *Tryals* to follow such Directions, if given, but only in some sort of *Tryals*, (as for instance, in *Tryals* for *Criminal matters* upon *Indictments* or *Appeals*) why then the consequence will be, tho' not in *all*, yet in *Criminal Tryals*, the *Jury* (as of no material use) ought to be either omitted or obolished [*sic*], which were the greater mischief to the people, than to abolish them in *Civil Tryals*.
And how the *Jury* should in any other manner, according to the course of *Tryals* used, find against the Direction of the Court in matter of Law, is really not conceptible. [p. 143 sq.]

[...]

And the Judges were (as before) all of Opinion, That the Retorn in this latter part of it, is also insufficient, as in the former, and so wholly insufficient. [p. 145]

[...]

Sure this *latter Age* did not first discover that the *Verdicts* of *Juries* were many times not according to the *Judges* opinion and liking.
But the Reasons are, I conceive, most clear, That the *Judge* could not, nor can, fine and imprison the *Jury* in such Cases.
Without a *Fact* agreed, it is as impossible for a *Judge* or any other to know the *Law* relating to that *Fact*, or direct concerning it, as to know an *Accident* that hath no *Subject*.
Hence it follows, that the *Judge* can never direct what the *Law* is in any matter controverted, without first knowing the *Fact*; and then it follows, that without his previous knowledge of the *Fact*, the *Jury* cannot go against his Direction in *Law*, for he could not direct.
But the *Judge*, *qua Judge*, cannot know the *Fact* possibly, but from the *Evidence* which the *Jury* have, but (as will appear) he can never know what *Evidence* the *Jury* have, and consequently he cannot know the *matter of Fact*, nor punish the *Jury* for going against their *Evidence*, when he cannot know what their *Evidence* is. [p. 146 sq.]

VI. The modernization of the court system

1. The creation of new courts

2. The introduction of the appeal
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  2.2. The traditional judicial control
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