LECTURE I

I propose to begin by speaking briefly of the Forms of Action, with especial relation to those which protected the possession and ownership of land. It may—I am well aware of it—be objected that procedure is not a good theme for academic discussion. Substantive law should come first—adjective law, procedural law, afterwards. The former may perhaps be studied in a university, the latter must be studied in chambers. As to obsolete procedure, a knowledge of it can be profitable to no man, least of all to a beginner. With this opinion I cannot agree. Some time ago I wished to say a little about seisin, which still, with all our modern improvements, is one of the central ideas of Real Property Law; but to say that little I found impossible if I could not assume some knowledge of the forms of action. Let us remember one of Maine’s most striking phrases, ‘So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.’ Assuredly this is true of our real property law, it has been secreted in the interstices of the forms of action. The system of Forms of Action or the Writ System is the most important characteristic of English medieval law, and it was not abolished until its piecemeal destruction in the nineteenth century.¹

What was a form of action? Already owing to modern reforms it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question, but it is still one which must be answered if he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of action we have buried, but they still rule us from their graves. Let us then for awhile place ourselves in Blackstone’s day, or, for this matters not, some seventy years later in 1830, and let us look for a moment at English civil procedure.

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a

¹ Maine, Early Law and Custom, p. 389. ² See below, p. 6.
writ of right, an assize of novel disseisin or of mort d'ancestor, a writ of entry sur disseisin in the per and cui, a writ of besaiel, of quare impedit, an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, case. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds. Let us notice some of the many points that are implied in it.

(i) There is the competence of the court. For very many of the ordinary civil cases each of the three courts which have grown out of the king's court of early days, the King's Bench, Common Pleas and Exchequer is equally competent, though it is only by means of elaborate and curious fictions that the King's Bench and the Exchequer can entertain these matters, and the Common Pleas still retains a monopoly of those actions which are known as real.

(ii) A court chosen, one must make one's adversary appear; but what is the first step towards this end? In some actions one ought to begin by having him summoned, in others one can at once have him attached, he can be compelled to find gage and pledge for his appearance. In the assize of novel disseisin it is enough to attach his bailiff.

(iii) Suppose him contumacious, what can one do? Can one have his body seized? If he cannot be found, can one have him outlawed? This stringent procedure has been extending itself from one form of action to another. Again, can one have the thing in dispute seized? This is possible in some actions, impossible in others.

(iv) Can one obtain a judgment by default, obtain what one wants though the adversary continues in his contumacy? Yes in some forms, no in others.

(v) It comes to pleading, and here each form of action has some rules of its own. For instance the person attacked—the tenant he is called in some cases, the defendant in others—wishes to oppose the attacker—the demandant he is called in some actions, the plaintiff in others—by a mere general denial, casting upon him the burden of proving his own case, what is he to say? In other words, what is the general issue appropriate to this action? In one form it is Nihil debit, in another Non assumpsit, in another 'Not guilty', in others, Nul tort, nul disseisin.

(vi) There is to be a trial; but what mode of trial? Very generally of course a trial by jury. But it may be trial by a grand or petty assize, which is not quite the same thing as trial by jury; or in Blackstone's day it may still conceivably be a trial by battle. Again in some forms of action the defendant may betake himself to the world-old process of compurgation
or wager of law. Again there are a few issues which are tried without a jury by the judges who hear witnesses.

(vii) Judgment goes against the defendant, what is the appropriate form of execution? Can one be put into possession of the thing that has been in dispute? Can one imprison the defendant? Can one have him made an outlaw? or can he merely be distrained?

(viii) Judgment goes against the defendant. It is not enough that he should satisfy the plaintiff’s just demand; he must also be punished for his breach of the law—such at all events is the theory. What form shall this punishment take? Will an amercement suffice, or shall there be fine or imprisonment? Here also there have been differences.

(ix) Some actions are much more dilatory than others; the dilatory ones have gone out of use, but still they exist. In these oldest forms—forms invented when as yet the parties had to appear in person and could only appoint attorneys by the king’s special leave—the action may drag on for years, for the parties enjoy a power of sending essoins, that is, excuses for non-appearance. The medieval law of essoins is vast in bulk; time is allowed for almost every kind of excuse for non-appearance—a short essoin de malo veniendi, a long essoin de malo lecti. Nowadays all is regulated by general rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules. This question of essoins has been very important—in some forms, the oldest and solemnest, a party may betake himself to his bed and remain there for year and day and meanwhile the action is suspended.

These remarks may be enough to show that the differences between the several forms of action have been of very great practical importance—‘a form of action’ has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can from the hints of the
judges that another form of action might have been more successful. The plaintiff’s choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.

The keynote of the form of action is struck by the original writ, the writ whereby the action is begun. From of old the rule has been that no one can bring an action in the king’s courts of common law without the king’s writ; we find this rule in Bracton—Non potest quis sine brevi agere. That rule we may indeed say has not been abolished even in our own day. The first step which a plaintiff has to take when he brings an action in the High Court of Justice is to obtain a writ. But there has been a very great change. The modern writ is in form a command by the king addressed to the defendant telling him no more than that within eight days he is to appear, or rather to cause an appearance to be entered for him, in an action at the suit of the plaintiff, and telling him that in default of his so doing the plaintiff may proceed in his action and obtain a judgment. Then on the back of this writ the plaintiff, in his own or his adviser’s words, states briefly the substance of his claim—‘The plaintiff’s claim is £1000 for money lent’, ‘The plaintiff’s claim is for damages for breach of contract to employ the plaintiff as traveller’, ‘The plaintiff’s claim is for damages for assault and false imprisonment’, ‘The plaintiff’s claim is to recover a farm called Blackacre situate in the parish of Dale in the county of Kent’. We can no longer say that English law knows a certain number of actions and no more, or that every action has a writ appropriate to itself; the writ is always the same, the number of possible endorsements is as infinite as the number of unlawful acts and defaults which can give one man an action against another. All this is new. Formerly there were a certain number of writs which differed very markedly from each other. A writ of debt was very unlike a writ of trespass, and both were very unlike a writ of mort d’ancestor or a writ of right. A writ of debt was addressed to the sheriff; the sheriff is to command the defendant to pay to the plaintiff the alleged debt, or, if he will not do so, appear in court and answer why he has not done so. A writ of trespass is addressed to the sheriff; he is to attach the defendant to answer the plaintiff why with force and arms and against the king’s peace he broke the plaintiff’s close, or carried off his goods, or assaulted and beat him. A writ of mort d’ancestor bade the sheriff empanel a jury,

1 Bract. fo. 413b.
or rather an assize, to answer a certain question formulated in the writ. A writ of right was directed not to the sheriff but to the feudal lord and bade him do right in his court between the demandant and the tenant. In each case the writ points to a substantially different procedure.

In the reign of Henry III Bracton had said *Tot erunt formulae brevium quot sunt genera actionum.* There may be as many forms of action as there are causes of action. This suggests, what may seem true enough to us, that in order of logic Right comes before Remedy. There ought to be a remedy for every wrong; if some new wrong be perpetrated then a new writ may be invented to meet it. Just in Bracton’s day it may have been possible to argue in this way; the king’s court and the king’s chancery—it was in the chancery that the writs were made—enjoyed a certain freedom which they were to lose as our parliamentary constitution became definitely established. A little later though the chancery never loses a certain power of varying the old formulas to suit new cases and this power was recognised by statute, still it is used but very cautiously. Court and chancery are conservative and Parliament is jealous of all that looks like an attempt to legislate without its concurrence. The argument from Right to Remedy is reversed and Bracton’s saying is truer if we make it run *Tot erunt actiones quot sunt formulae brevium*—the forms of action are given, the causes of action must be deduced therefrom.

Of course we must not for one moment imagine that seventy years ago or in Blackstone’s day litigation was really and truly carried on in just the same manner as that in which it was carried on in the days of Edward I. In the first place many of the forms of action had become obsolete: they were theoretically possible but were never used. In the second place the words ‘really and truly’ seem hardly applicable to any part of the procedure of the eighteenth century, so full was it of fictions contrived to get modern results out of medieval premises: writs were supposed to be issued which in fact never were issued, proceedings were supposed to be taken which in fact never were taken. Still these fictions had to be maintained, otherwise the whole system would have fallen to pieces; any one who would give a connected and rational account of the system was obliged—as Blackstone found himself obliged—to seek his starting point in a very remote age.

We will now briefly notice the main steps by which in the last century the forms of action were abolished. First we must observe that there was a well-known classification of the forms: they were (1) real, (2)  

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1 Bract. fo. 413 b. A whole group of these forms is ascribed to Bracton’s master, W. Raleigh—one might well have spoken of *actiones Raleighanae.*
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personal, (3) mixed. I shall have to remark hereafter\(^1\) that this classification had meant different things in different ages; Bracton would have called some actions personal which Blackstone would have called real or mixed. But at present it will be sufficient if we note Blackstone’s definitions.\(^2\)

Real actions, which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands, or tenements, rents, commons, or other hereditaments in fee simple, fee tail or for term of life.

Personal actions are such whereby a man claims a debt, a personal duty, or damages in lieu thereof; and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained.

Now in 1833 the real and mixed actions were swept away at one fell swoop by the Real Property Limitation Act of that year, 3 and 4 Will. IV, c. 27, sec. 36. That section sets out the names of 60 actions and says that none of these and no other action real or mixed—except a writ of right of dower, a writ of dower, *unde nihil habet, a quare impedit*, or an ejectment—shall be brought after 31 December 1834. Practically for a very long time past the action of ejectment, which in its origin was distinctly a personal action, had been made to do duty for all or almost all the actions that were now to be abolished. The *quare impedit* had become the regular action for the trial of all disputes about advowsons, and, as ejectment was here inapplicable, this had to be spared. There were special reasons for saving the two writs of dower, since the doweress could not bring ejectment until her dower had been set out. But they were abolished in 1860 by the Common Law Procedure Act of that year (23 and 24 Vic., c. 126, sec. 26), and a new statutory action of a modern type was provided for the doweress. By the same Act, sec. 27, the old *quare impedit* was abolished and a new statutory action was put in its place.

Meanwhile in 1832 a partial assault had been made on the personal forms. The principal personal forms were these—Debt, Detinue, Covenant, Account, Trespass, Case, Trover, Assumpsit, Replevin. By 2 Will. IV, c. 39 (1832) ‘Uniformity of Process Act’—the process in these personal actions was reduced to uniformity. The old original writs were abolished and a new form of writ provided. In this writ, however,

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\(^1\) See lecture V, below.

\(^2\) Bl. Comm. III, 117, 118.
I

ABOLITION OF THE FORMS OF ACTION

the plaintiff had to insert a mention of one of the known forms of action. Another heavy blow was struck in 1852 by the Common Law Procedure Act, 15 and 16 Vic., c. 76. It was expressly provided (sec. 3) that it should not be necessary to mention any form or cause of action in any writ of summons. But still this blow was not heavy enough—the several personal forms were still considered as distinct.

The final blow was struck by the Judicature Act of 1873 and the rules made thereunder, which came into force in 1875. This did much more than finally abolish the forms of actions known to the common law for it provided that equity and law should be administered concurrently. Since that time we have had what might fairly be called a Code of Civil Procedure. Of course we cannot here speak of the details of that Code; but you will not misunderstand me if I say that the procedure which it enjoins is comparatively formless. Of course there are rules, many rules.

We cannot say that whatever be the nature of the plaintiff’s claim the action will always take the same course and pass through the same stages. For instance, when the plaintiff’s claim falls within one of certain classes he can adopt a procedure\(^1\) whereby when he has sworn positively to the truth of his claim the defendant can be shut out from defending the action at all unless he first makes oath to some good defence. So again there are cases in which either party can insist that the questions of fact, if any, shall be tried by jury; there are other cases in which there will be no trial by jury. Again, I must not allow you to think that a lawyer cannot do his client a great deal of harm by advising a bad or inappropriate course of procedure, though it is true that he cannot bring about a total shipwreck of a good cause so easily as he might have done some years ago. The great change gradually brought about and consummated by the Judicature Acts is that the whole course of procedure in an action is not determined for good and all by the first step, by the original writ. It can no longer be said, as it might have been said in 1830 that we have about 72 forms of action, or as it might have been said in 1874 that we have about 12 forms of action. This is a different thing from saying that our English law no longer attempts to classify causes of action, on the contrary a rational, modern classification of causes of action is what we are gradually obtaining—but the forms of action belong to the past.

Since the Judicature Acts there are, of course, differences of procedure arising out of the character of the various actions, whether for

\(^1\) Commonly called (from the Order which authorises this procedure) ‘Going under Order XIV’.
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divorce, probate of a will, specific performance of a contract: such differences there must be, but they can now be regarded as mere variations of one general theme—procedure in an action in the High Court of Justice. It was entirely otherwise in the Middle Ages, then lawyers say very little of the procedure in an action, very much of the procedure in some action of a particular kind, e.g. an assise of mort d’ancestor or an action of trespass. Knowledge of the procedure in the various forms of action is the core of English medieval jurisprudence. The Year Books are largely occupied by this. Glanvill plunges at once into the procedure in a writ of right. Bracton, with the Institutes scheme before him, gives about 100 folios to Persons and Things and about 350 to the law of Actions.

We can now attempt to draw some meagre outline of the general history of these forms of action, remembering, however, that a full history of them would be a full history of English private law.

Now I think that our first step should be to guard ourselves against the notion that from the very beginning it was the office of the king’s own court or courts to provide a remedy for every wrong. This is a notion which we may but too easily adopt. In the first place it seems natural to us moderns, especially to us Englishmen, that in every decently governed country there should be some one tribunal, or some one definitely organized hierarchy of tribunals, fully competent to administer the whole law, to do right to every man in every case. In the second place it is true that in England such a scheme of centralised justice has existed from what, having regard to other countries, we may call a very remote time; it has existed for some five hundred years. Ever since Edward I’s time, to name a date which is certainly not too recent, the law of England has to a very large extent been the law administered by the king’s own courts, and to be without remedy in those courts has commonly been to be without any remedy at all. A moment’s reflection will indeed remind us that we must use some such qualifying words as ‘to a very large extent’ when we lay down these wide propositions. Think for one moment of the copyholder, or of his predecessor the tenant in villeinage; he was not protected in his holding by the king’s court, still to regard him as without rights would be a perversion of history. And then think of the ecclesiastical courts with their wide jurisdiction over matrimonial and testamentary causes; at least until the Reformation they were not in any sense the king’s courts; their power was regarded as a spiritual power quite independent of the temporal power of the state. But in the third place we may be led into error by
good masters. So long as the forms of action were still in use, it was
difficult to tell the truth about their history. There they were, and it was
the duty of judges and text writers to make the best of them, to treat
them as though they formed a rational scheme provided all of a piece
by some all-wise legislator. It was natural that lawyers should slip into
the opinion that such had really been the case, to suppose, or to speak
as though they supposed, that some great king (it matters not whether
we call him Edward I or Edward the Confessor, Alfred or Arthur) had
said to his wise men ‘Go to now! a well ordered state should have a
central tribunal, let us then with prudent forethought analyse all
possible rights and provide a remedy for every imaginable wrong.’ It
was difficult to discover, difficult to tell, the truth, difficult to say that
these forms of action belonged to very different ages, expressed very
different and sometimes discordant theories of law, had been twisted
and tortured to inappropriate uses, were the monuments of long-
forgotten political struggles; above all it was difficult to say of them that
they had their origin and their explanation in a time when the king’s
court was but one among many courts. But now, when the forms of
action are gone, when we are no longer under any temptation to make
them more rational than they were, the truth might be discovered and
be told, and one part of the truth is assuredly this that throughout the
early history of the forms of action there is an element of struggle, of
struggle for jurisdiction. In order to understand them we must not
presuppose a centralised system of justice, an omni-competent royal
or national tribunal; rather we must think that the forms of action, the
original writs, are the means whereby justice is becoming centralised,
whereby the king’s court is drawing away business from other courts.1

1 As an example of the theory against which it is necessary to protest see
Blackstone’s account of Alfred’s exploits, Comm. IV, 411: ‘To him we owe
that masterpiece of judicial policy, the subdivision of England into tithings and
hundreds, if not into counties; all under the influence and administration of
one supreme magistrate, the king; in whom as in a general reservoir, all the
executive authority of the law was lodged, and from whom justice was dis-
pensed to every part of the nation by distinct, yet communicating ducts and
channels; which wise institution has been preserved for near a thousand years
unchanged from Alfred’s to the present time.’
LECTURE II

At the beginning of the twelfth century England was covered by an intricate network of local courts. In the first place there were the ancient courts of the shires and the hundreds, courts older than feudalism, some of them older than the English kingdom. Many of the hundred courts had fallen into private hands, had become the property of great men or great religious houses, and constant watchfulness was required on the king’s part to prevent the sheriffs, the presidents of the county courts, from converting their official duties into patrimonial rights. Then again there were the feudal courts; the principle was establishing itself that tenure implied jurisdiction, that every lord who had tenants enough to form a court might hold a court of and for his tenants. Above all these rose the king’s own court. It was destined to increase, while all the other courts were destined to decrease; but we must not yet think of it as a court of first instance for all litigants; rather it, like every other court, had its limited sphere of jurisdiction. Happily the bounds of that sphere were never very precisely formulated; it could grow and it grew. The cases which indisputably fell within it we may arrange under three heads. In the first place there were the pleas of the crown (placita coronae), matters which in one way or another especially affected the king, his crown and dignity. All infringements of the king’s own proprietary rights fell under this head, and the king was a great proprietor. But in addition to this almost all criminal justice was gradually being claimed for the king; such justice was a profitable source of revenue, of forfeitures, fines and amercements. The most potent of the ideas which operated for this result was the idea of the king’s peace. Gradually this peace—which at one time was conceived as existing only at certain times, in certain places, and in favour of certain privileged persons, covering the king’s coronation days, the king’s highways, the king’s servants and those to whom he had granted it by his hand or his seal—was extended to cover all times, the whole realm, all men. Then again when Henry II introduced the new procedure against criminals by way of presentment or indictment—placed this method of public or communal accusation by the side of the old private accusation or appeal—he very carefully kept this new procedure in the hands of his justices and his sheriffs. Subsequent changes diminished even the power of the sheriffs, and before the twelfth century was out all that could be called very serious criminal justice had become the king’s, to be exercised only...