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## LAW IN ACTION IN MEDIEVAL ENGLAND

ONE reading the skeleton-like reports found in the Year Books from which so much of the common law has filtered through the great medieval abridgments down even to the jurisprudence of our own time often wonders what was the atmosphere of the court room in which these cases were argued and the judgments rendered; and what were the social, economic, and political conditions that furnished the setting for the contest and afforded the stimuli to judicial action. It is quite true, as Professor Bolland has so interestingly shown,<sup>1</sup> that one sometimes discovers in these reports touches of human interest and even incidents of historical and sociological importance; but for the most part the Year Books furnish little data for the sociologist and too often only fragmentary and unsatisfactory material for the legal historian. The apprentices, who for the most part seem to have indited the Year Book reports, were primarily interested in the rules of procedure. They desired to record and learn the correct plea and the appropriate reply, the right word which would set the crude legal machinery of the king's courts in motion. They manifested no interest in the philosophy of law, or in the social and economic effects that might be produced by the judgments they recorded.

Very often, however, these medieval scribes, these lovers of curious words and rigid legal formulas, did not even record the judgment in case it was rendered. This characteristic is strik-

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EDITOR'S NOTE.—Our usual policy of documenting each quoted passage has not been followed in this article because of the nature of the work and the constant references to the source of the quotation throughout the body of the article.

<sup>1</sup> BOLLAND, A MANUAL OF YEAR BOOK STUDIES (1925).

ingly illustrated in Pakenham's Case,<sup>2</sup> which we now learn was not even correctly entitled, for the hero of this case was really Laurence Pabenham, and not Laurence Pakenham as the Year Book scribe would have us believe. The Year Book report does not show that any judgment was entered in this famous case which has been so much discussed, explained, expounded, and followed from the time of Fitzherbert and Coke down to Halsbury and Holmes;<sup>3</sup> but it has been generally supposed that what we have in the Year Book is a report of reasons for a judgment that was in fact rendered. Through the industry and acumen of Professor Sydney K. Mitchell, who consulted the original plea rolls in the Public Record Office in London, we now know that the case was some six times continued and that apparently no judgment was ever entered.<sup>4</sup> Examination of this original record failed to disclose that there was any consideration by the court of the question whether the prior's covenant to sing three times a week (not once a week as stated in the Year Book report) in Pabenham's chapel would run with the land or not, although this is the point for which the case is so frequently cited. It would rather appear that the real question presented to the court for decision was whether the plaintiff, having in his plea alleged that he was heir to the original covenantee, could maintain his writ upon proof that he was merely special heir male of the body of the original covenantee, and so having seisin and possession of the manor which was held in tail male.

But one wonders why the court was so unwilling to decide the issue presented. Was it because of evenly balanced arguments addressed to the actual issue? Or was it because, possibly, Laurence Pabenham was a great landowner able to command such armed power that the court dare not decide against him?<sup>5</sup>

<sup>2</sup> Y. B. 42 Edw. III, f. 3, pl. 14.

<sup>3</sup> See HOLMES, *THE COMMON LAW* (1881) 395. See, also, opinion of Holmes, J., in *Norcross v. James*, 140 Mass. 188, 2 N. E. 946, 948 (1885).

<sup>4</sup> See Woodbine, *Pakenham's Case* (1929) 38 *YALE L. J.* 775, n.

<sup>5</sup> " \* \* \* What actually happened when an action was set down for hearing in the country between litigants who could bring troops of retainers into Court a report of 7 Henry VI makes plain to us. Justices went down to try an assize in Cumberland. It was promptly adjourned to Westminster, and Babington, C. J., who was one of the justices who had gone down to Cumberland, tells us why. The issue, he said, was an important one, and

Or did the already gathering storm of conflict between Church and Crown overshadow the court, threatening dismissal in case of a decision unpleasant to a favorite of the King, or the risk of excommunication if a decision should be rendered hostile to the Church?

In regard to this case we can only guess; but we do have from fragmentary records of the time some evidence of the influence of the strenuous and disconcerting political and social conditions of the fourteenth and fifteenth centuries upon judicial behavior. Thus, for example, we find in the Paston Letters a suggestion of the forces with which the courts had to contend during that period. From one of the letters we learn that a certain Lord Molyne, with a force of a thousand men, had besieged and captured a certain manor house of which John Paston was seised, while it was occupied by Paston's wife, Margaret, and twelve servants. After this violent disseisin, John Paston brought an action of trespass against Lord Molyne for the damage to his realty, and also instituted criminal proceedings against him before a court of Oyer and Terminer. Both of these proceedings were unsuccessful for a reason clearly appearing in one of the Letters: "Also the Shereffe enformed us that he hat writyng from the Kyng that he shall make such a panell to acqyte the Lord Moleynes. Also he tolde us, and as ferr as we can conceyve and feel, the Shereffe will panell gentylnen to acqyte the Lorde, and jowroures to acqyte his men."<sup>6</sup> Under such circumstances we are not surprised to find that judicial action was not always consistent or even intelligible.

By far the most graphic account available to us of the conditions, social, economic, and political, that controlled judicial action in the fourteenth and fifteenth centuries is to be found in the history recorded in the Berkeley Manuscripts<sup>7</sup> of the long

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the parties came into Court with great crowds of armed retainers, more as though they had come to fight a battle than to be present at an assize. And because if the hearing had been continued in the country the King's peace would probably have been broken, it was therefore adjourned to Westminster. \* \* \*" BOLLAND, *op. cit. supra* note 1, at 30.

<sup>6</sup> THE PASTON LETTERS (Gairdner's ed. 1910) 200. See, also, Letters numbered 156, 158, 159, and 164.

<sup>7</sup> SMYTH, THE BERKELEY MANUSCRIPTS: LIVES OF THE BERKELEYS, LORDS

and fierce litigation between the Lords of Berkeley and the House of Warwick.

#### FIFTEENTH CENTURY LITIGATION OVER THE BERKELEY LANDS

Of all the long line of the Fitzhardings, Lords of Berkeley, Thomas, twelfth in the line and the fourth of that name, was the most distinguished in station, the most successful in acquiring wealth and land, and also most given to trickery and double-dealing. It was due to this unfortunate trait that at his death a litigation sprang up, "the greatest sutes in lawe and of longest continuance that were in those times or since." John Smyth of Nibley, the author of the Berkeley Manuscripts and devoted historian of the Harding family, speaks of "the blouddy and irksome controversies of more than fower generations that fell into his [Lord Thomas'] family through his wavering and ill settlement of his estate, and other judgments of God." It is interesting to follow the course of this litigation, involving immense interests in land, between two of the greatest families in England, by means of the faithful and detailed records that were kept by the various stewards of the Manor of Berkeley as digested and woven into an historical narrative by John Smyth. This John Smyth of Nibley, himself nearly related to the ruling branch of the Harding family, was peculiarly fitted to prepare these ancient records in such a way as to bring out in high relief the legal proceedings involved in this famous litigation, and to show them vividly on the background of contemporary social and political conditions. John Smyth was trained to the law and to business, serving for the greater part of his long life as steward of the Manor of Berkeley. As steward he was not, however, merely the business manager of this great estate; he also presided over the court baron and court leet, which in this important manor possessed extensive and significant jurisdiction.

In order to get the setting of this long and distressful litigation, we must first acquaint ourselves with the state of the Berkeley properties. The first of the English Hardings, and the

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OF THE HONOUR, CASTLE AND MANOR OF BERKELEY (MacLean's ed. 1885). This work will be cited hereinafter as *SMYTH, LIVES OF THE BERKELEYS*.

John Smyth, of Nibley, was born in 1567, and died in 1641. He wrote "The Lives of the Berkeleys" between the years 1618 and 1639.

founder of the House of Berkeley, was an adventurous younger son of the King of Denmark, known as Harding,<sup>8</sup> who, learning that William, the Duke of Normandy, was organizing an expeditionary force for the invasion of England, joined himself to him. Harding seems to have fought well at the Battle of Hastings and to have deserved well of the Conqueror; while the Saxon Roger of Berchlai, who was in the opposing Saxon army, suffered confiscation of his large estates in Gloucester. These estates ultimately came by grant to Harding, and were later confirmed to his eldest son, Robert Fitzharding, who thus became the first Lord of Berkeley. The title thus violently obtained was contested by Roger the Saxon, but unsuccessfully.

During the three centuries following the first Harding's acquisition of the manor, castle, honor, and liberties of Berkeley, the prudent Lords of Berkeley had greatly increased the land holdings of the family. A long line of successors, who proved, almost without exception, to be good managers of their estates, keen business men, bold and astute politicians, and successful soldiers distinguished on the fields of Evesham, Crecy, and Poitiers, had culminated in Lord Thomas IV of Berkeley, one of the most important military and political figures of England during the reigns of Richard II, Henry IV, and Henry V. This Lord Thomas, who was most active and successful as a soldier and who, as Lord High Admiral of the fleet, won two important victories over the French, used his political influence most cleverly—and one fears, wrongfully—further to increase the family fortunes. He rode the troubled waters of his day so skillfully that he profited both from Plantagenets and Lancastrians. In the days of the prosperity of Richard II, that monarch was often royally entertained at Berkeley Castle. It was at Berkeley Castle, also, that Henry Bolinbroke, the Duke of Lancaster, secretly returning from exile, met the group of noble conspirators that rose to drive Richard II from the throne.

In 1368, at the age of fourteen, the young Thomas Fitzharding, under the marriage covenants made between his father, Lord Maurice of Berkeley, and Gerrard, Lord DeLisle, one of

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<sup>8</sup> Smyth of Nibley, with commendable honesty, admits that this heroic origin of the Harding family has been seriously questioned.

the greatest landholders in Gloucester, was married to Margaret, the only daughter and soon to be, by reason of the death of her brother, the only child and heir of Lord DeLisle. Margaret was then seven years of age.<sup>9</sup> Lord Maurice died in the following year and young Thomas, at the age of fifteen, succeeded to the vast estates of the family. The prudence and charm of Thomas were indicated by the fact that the old Lord DeLisle became so much devoted to his young son-in-law that when, some years later, the bride came to her husband at Berkeley Castle, he, himself, came to live with the young people. Before his death a few years later, Lord DeLisle settled his great estates upon Thomas of Berkeley and his issue by Margaret, his wife and sole heir of her father.

In the twenty-third year of the reign of Edward III (1349) Lord Thomas III, grandfather of Thomas IV, had levied a fine by which his lands were limited to himself for life, and then to his son Maurice and the heirs male of his body. Thus it came about that in his old age Lord Thomas IV, who had no male issue, was much disturbed as to the devolution of his great landed estates, which, besides many other properties including houses and lands in Bristol and London, embraced some two score manors in fourteen different counties in England and Wales, including the manors of Yale and Wrexham. His only daughter, Elizabeth, was married to Richard Beauchamp, the Earl of Warwick, famous as traveler, warrior, and statesman, and one of the greatest and most influential noblemen in England. She, as his heir general, could inherit only lands held in fee, and those held in fee-tail general. Those lands settled in fee-tail special male, which comprised the greater part of his ancestral estates, would pass to James, the eldest son of a deceased brother, as next heir male, unless Thomas by levying a fine should bar the entail and thus constitute his daughter heir to these lands also. The over-shrewd Thomas was much troubled.

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<sup>9</sup> It seems that the marriage of heiresses at this early age was not unusual. Despite its beginning in such an early marriage, the married life of Thomas and Margaret seems to have been an unusually happy one. Smith of Nibley says that "shee was a very mild and devout lady," and that though she bore her husband no male heir "yet lived shee and her husband in a most sweet and contented society."

He evidently desired to preserve the family name, but he also desired to keep on good terms with his great son-in-law, whose influence at court was all-powerful. It is probable, also, that he had real affection for his daughter, the only child of a much beloved wife who had died at the early age of thirty.<sup>10</sup> Under these circumstances Lord Thomas brought to Berkeley Castle his nephew James, declaring to him that he was to have the family estates. He also thriftily sold his nephew's marriage not once but twice, the first child bride having soon died. In both of the marriage settlements Lord Thomas covenanted that James, his nephew and heir male, should be made heir to all of his estates. At the same time it seems that this shifty Lord represented to his daughter and the Earl of Warwick that the daughter would inherit all of his lands.

The old Lord Thomas took part gloriously in the Battle of Agincourt, in 1415, and two years later died without having taken any definite and final steps for the settlement of his estates. The stage could hardly have been better set for trouble and litigation.<sup>11</sup> It so chanced that at the time of the death of Lord Thomas, which must have been sudden, James was absent at the seat of his father-in-law, Sir Humphrey Stafford, while the daughter, Elizabeth, and her husband, the Earl of Warwick, were at Berkeley Castle where the Lord died. Warwick lost no time, but at once took possession of the castle and manor and was accepted by all of the great tenants and officers of the manor, the servants and other pursuivants, as the Lord of the Manor.

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<sup>10</sup> Of Margaret's early death, our author says: "\* \* \* The greefe of whose death soe fastened upon the affections of her lord and husband, that hee never after affected marriage, although hee was at her death, but thirty eight years of age, and of an able constitution, and then without issue male to uphold his name and barony; whereat I have not only mused, but at the cause why, in a few months after her death, hee betooke himself to a forraigne pilgrimage. \* \* \*" 2 SMYTH, *op. cit. supra* note 7, at 27.

<sup>11</sup> The unhappy consequences of private war and litigation are deplored by Smyth of Nibley who tells us: "\* \* \* that with the life of this lord Thomas ended all that regularity which for many ages had been observed in th'estate and household affaires of these lords, in the Accompts of their Receivors, keepers of the wardrobe, Steward of houshold, Clark of the kitchen, Reeves & Bayleys of manors and hundreds, and the like accomptants, which were by their Auditors with singular care and exactnes, yearly cast up, and preserved ingrossed in parchment. \* \* \*" 2 SMYTH, *op. cit. supra* note 7, at 37.

He also seized and carried off to his own castle all the important title deeds and other records that were found in the muniment room of Berkeley Castle.<sup>12</sup> This was not all that was done by that energetic and resourceful peer. Since the Berkeley estates were held for the most part by tenancy *in capite*, the King, as Lord Paramount, was entitled, upon the death of Lord Thomas, to possession until the escheator<sup>13</sup> should determine by *inquisi-*

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<sup>12</sup> The inconveniences and dangers incident to the English practice of leaving land titles dependent upon unrecorded muniments is strikingly shown in the following passages referring to suits brought by Maurice, Lord Berkeley (1491-1506), to recover the Berkeley estates:

"Howbeit this peace was not so soundly on each part sawdred, but that afterwards it leaked at certaine crannells, which were once againe cemented by an order in Chancery dated the 22th. of February in the 5th. year of King Henry the 8th., made between Thomas Howard then Duke of Norfolk, the said Earle of Darby and the lord Maurice this lords son; whereby two chests of Evidence remaining in the Rolls Chappell were perused and sorted touching those manors and lands which were in variance, by friends in trust appointed by each of them: which being done, the lord Chancellor and the Two cheife Justices of the kings bench, and comon pleas, did the fourth and 7th. days of March after in the starrechamber, deliver such of those evidences to each party as appertained to them; Appointing notwithstanding many still to remaine there in two canvas bags in a chest, which for ought I can find should remaine there to this day. Anno.1628. which through want of leisure I have not searched after, and only talked thereof with the Usher that keeps other huge heaps and chests there also." 2 СМУГН, *op. cit. supra* note 7, at 161.

"\* \* \* This is the Replication of Maurice lord Berkeley brother and heire of William late Marques Berkeley: And further saith, That after the death of the said Marques Berkeley his brother, one espesiall Deed of the said manor with an obligation of a great sum concerning the right title and security of the same manor to and for the Ancestors of him the said lord, and for the suerty of him the same lord and his heires in the same manor, with many other evidences belonging to him the said lord Berkeley, were (amongst others) in a chest within the Gray ffryards of London, which chest aswell for the suerty of divers evidences pertayning to the kinge, as for the evidences ptaining to him the said lord Berkeley, was sealed up by William Maryner then comon preist to the Cardinall Archbishop of Canterbury, unto the time the said Sr. Robert Poyntz, pretending title without ground or cause to the said Manor, by sinister, and corrupt meanes came to the said chest, and there with an hott knife loosed the under part of the wax of the same seale from the same chest, and opened the chest and searched all the evidences therein at his pleasure; And thereupon took away the said deed of entaile and obligation, with divers other evidences concerning the said manor, which were in the keeping of the said Marques, and put there by him safely to bee kept to the use of him and his heires, whose brother and heire hee the said lord Berkeley now is, And therefore for the said evidences hath sued a subpena against the said Robert; And that his suing of his Scire facias is but to colour his wrongfull keeping of the said evidences from him the said Lord Berkeley." *Ibid.* 163.

<sup>13</sup> The escheator was an ancient English officer who came to be appointed, under the provisions of the Statute 14 Edw. III, for each county. His duty was to hold an *inquisitio post mortem* upon the death of any tenant *in capite*,

*tio post mortem* who was heir, and that heir should sue out his livery by paying the sum due in relief, swearing allegiance, and doing homage. Warwick at once took advantage of this situation. To quote the quaint language of John Smyth of Nibley:

“And the provident Earle to make the possession of the said Castle and of the entayled manors, (which hee then also got,) the more legall and faire unto him, or at least soe to seeme, Hee the 21th of July, (the 8th day after the Lord Thomas’s death,) obtained of King Henry the fifth a grant of the custody of all the said lords lands and Castle, as longe as they should bee in the kings hands, under such a vawew as should be mentioned in the offices to bee found, by the manucaption of Thomas Berkeley Clarke become the Earles Receivor; which rent the 12th of June in the next year was remitted to the Earle; And by force of the said grant in the same year and in the two next, the said Earle received the rents, and kept Courts in all the said manors entayled to the heires males, as the rolls thereof in the names of himself and of the lady Elizabeth his wife, without any relation to the kings grant, doe shewe: whereby it appeareth that the Earle and his wife pretended right to the Barony of Berkeley and to all manors and lands thereto belonging.  
\* \* \*”

On the other hand, James was not slow to act. On the second day after his uncle’s death he sued out of chancery a writ of *diem clausit extremum*,<sup>14</sup> directed to the Escheator of the County of Gloucester to inquire of what manors, lands, and estates the Lord Thomas had died seized. What followed may be best given in the words of John Smyth:

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in order to determine of what lands he died seized, who was his heir, and the age of such heir, in order that the King might receive his rights of relief, primer-seisin, wardship, marriage, and other feudal dues to which he might, under the circumstances, be entitled. The critical character of the duties of the escheator is indicated by the fact that under the statute above referred to, he could hold office for but a single year and only for one year out of three. See 3 BL. COMM. \*244; Co. LITT. \*196.

<sup>14</sup> “The Writ of *Diem clausit extremum* properly lieth, where the King’s Tenant, who holdeth of him in Capite, as of his Crown, by Knight’s Service, or in Socage, dieth seized, his Heir within age, or of full age; then that Writ ought to issue forth, and the same ought to be at the Suit of the Heir, etc. for upon that, when the Heir cometh of full age, he ought for to sue Livery of his Lands out of the King’s hands.” FITZHERBERT’S NATURA BREVIUM. (Atkins’ ed. 1704) 558.

“\* \* \* whereupon twelve of the most worshipful gentlemen and of the best liveliode within the County of Glouc. were impannelled at Glouc. the munday before Michaelmas day then next following, And sworne to present according to the tenure of the said writ; what time through the opposition then arising upon the evidence, the jury was adjourned to a further day: But the Earle having, (as it seemeth,) tasted the purpose of the Jury to find against him, procureth the 22th of October following, a second writ out of the said Court, in the nature of a supersedeas, to countermaund the former; This lord James laboreth to have the Jury proceed, and an Inquisition to bee found, And obtaineth a third writ out of the said Court commanding the Escheator to appear in that Court in person; when all the Judges of both benches are sent for by the lord Chancellor, by whose advice an other writ dated the fifth of Novemr, is awarded, whereby the former countermandment is recalled, and the Escheator commanded to proceed upon his first writ of *diem clausit extremum*; And soe the Jury at length give up their verdict, And found this lord James heire male to his said unckle Thomas, and that hee was to inherite the said Castle of Berkeley and the twelve manors. \* \* \* But to all other manors and lands of the said lord Thomas, (Portbury in Somersetshire excepted,) they find the said Elizabeth wife to the said Earle of Warwicke to bee heire: Accordingly shee and her husband, the fifteenth of December following, sue their livery for the same manors and lands, And for five marks paid to the King have their homage respited; And in the fifth of Henry the Sixth the said Earle paid his Release according, setting over the Release of the entayled lands upon this lord James, in perticular names, accordingly to the said Inquisition; And likewise the lord James the first of the same December for the said Castle and manors intailed doth his fealty; And for ten markes paid into the Hanaper hath his homage respited.”

At this place in his history, John Smyth inserts a contemporary record of this first contest in the prolonged litigation, which his industry had found in the Castle of Berkeley and which he tells us, “age and bad keeping have made almost illegible.” This ancient document gives us a graphic picture of what actually took place with reference to the legal proceedings that were had, as follows:

“\* \* \* It'm after deces of Thomas late lord Berkeley,

uncle to James that now claymeth, upon a *diem clasuit extremum* take before one Robert Gilbert, Escheter of the Shire of Glouc., which was a sufficient learned man, and a sadde, And in his precept to the Shreve of the said County which returned twelve the worthiest Squires of the said Shire at Glouc., And the having grete deliberation of divers dayes by the space of nyne weeks, And both parties and their counsell being present, That is to say, Richard Earle of Warwick and Elizabeth his wife daughter to the said Thomas, and her counsell on the one party, and the said James and his counsell on that other party, And all matters shewed to them at that time, as is now, They found the Taill of the said James of the said lordshipp and manors, and would not in noe wise allowe the matteirs on the said Erle is perte; whereby it appereth evidently, That though that were an enquest of office, yet sin it was don openly and by gode Courts of lawe, And the perties being in travers thereof having knowledge and being thereat, and hadden their reasonable challenges to the polles by the which all such persons were avoyded and put out by the discretion of the said Escheter, And by which it was founden, that the said James had right according to his evidence shewed to them, notwithstanding the great might of the said Earle And that hee and his wife that time were in possession in the Castle of Berkeley, And in all the wholl lordship having in ward all the evidences thereof with them; upon which office the said James had livery of record.

“It’m after the said livery was awarded to the said James upon the said office, the Said Richard Earle and Elizabeth kept the said Castle lordship and manors with strength divers years, unto the time of our Sovereigne lord King Harry the fifth fater to our sovereigne lord that nowe is, upon a remonstrance of the right of this lord James, being greatly displeased with the said Earle, comaunded him to voyd the possession thereof; And then after decese of our said Sovereigne lord, the said Richard Earle entred agen in the said manors of Wotton and others, And laid about the said Castle of Berkeley grete multitude of people in maner of warre; In which time many persons were hurt and maymed, and some slayne. \* \* \*”<sup>15</sup>

It is evident that Warwick retained possession of the family lands, other than the Manor of Berkeley, for John Smyth tells

<sup>15</sup> 2 SMYTH, *op. cit. supra* note 7, at 43.

us that, "This lord James laboureth also to sue his livery and to pay his Barons release, and to have these his lands, (according to the ceremony of the lawe,) out of the kings hands, which through the favor of the time, and the overgreatness of the Earle, (not satisfied with Inquisition,) he could not procure."

During the lull in the legal proceedings which seems to have followed Lord James's initial success in the inquisition, Warwick set about strengthening his case in form and method that could scarcely be improved upon by the unscrupulous practitioners of our own time. He promptly set himself to secure needed testimony by subornation. He took Lionell Sebroke, late steward of the household of Lord Thomas, before the Mayor of Southington, and there procured him to make affidavit that Lord Thomas, the year before his death, had showed to him an earlier deed of entail general, which had been executed by Lord Maurice Fitzharding in the time of Henry III,<sup>16</sup> and that he, the deponent, had read it over and remembered the contents well. He further deposed that Lord Thomas upon seeing him read the deed, hastily snatched it from him. Lest the evidence of this prior deed should not be sufficient to serve his needs, the Earl induced Bone-John, the Vicar of Berkeley and one of the executors of Lord Thomas' will, to make affidavit before the Mayor of Bristol that Lord Thomas, at a certain time mentioned, had enfeoffed the deponent and others of all his lands to hold them in fee-simple absolute; that the deed was executed by livery of seisin and by attornment of the tenants; and that courts were held in the name of the feoffees. We are told that he procured other affidavits of like kind. Not content with these achievements, the Earl then procured a mandate from the Keeper of the Great Seal of England, enjoining Lord James or any other from suing him.

It is to be inferred that at this stage of the proceedings Lord James was in actual possession of Berkeley Castle, but that he had not succeeded in getting livery of seisin of his Barony and Castle of Berkeley out of the King's hands; and it would seem that the other manors belonging to the Berkeley estate were still

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<sup>16</sup> See the account of this alleged deed in 2 ΣΜΥΤΗ, *op. cit. supra* note 7, at 57.

in the possession of Warwick. Knowing that the shifty Earl was in possession of the fraudulent affidavits and that by reason of his influence at court he could get pretty much such writ as he desired from Chancery, Lord James naturally concluded that it was hopeless for him to look for relief to the courts alone. Accordingly, he resorted to a form of finesse that was apparently frequent in those times, and which explains the remarkable tenacity of the ancient common-law doctrine of maintenance and champerty. At this juncture he sought out the unscrupulous Duke Humphrey of Gloucester,<sup>17</sup> the brother of King Henry V. A secret covenant was made with the Duke whereby Lord James gave a bond to two of the Duke's henchmen in the great sum of ten thousand marks, conditioned upon his granting to the Duke certain large estates held by Lord James in Wales, if he, by the aid of the Duke, secured out of the King's hands livery of his Barony and Castle of Berkeley. John Smyth thus describes the consequences of this corrupt bargain:

"By this close compact this lord James who before was a weak hopp, havinge now got a strong pole fastly to wind about, grew up and bore the fruite of his own desires; And within a few months after in Michaelmas Terme in the ninth of the said king, (1422) upon a petition to the king seconded by the Said Duke of Glouc., had license to sue his livery of the said Castle and lordshipp of Berkeley,<sup>18</sup> And payeth, as the Release of a Baron and peere of the Realme, one hundred marks according to the Statute of magna charta for his inheritance soe intailed, and found by Inquisition fower years past as aforesaid. \* \* \*"

The aid of the powerful Duke of Gloucester evidently put a

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<sup>17</sup> Despite his bad character as politician and administrator, Humphrey of Gloucester was known as "The good Duke Humphrey," because of his interest in books and learning, and his liberal patronage of the foremost scholars of his day. His collection of books, very large for the time, was presented to Oxford University where there is still a room called "Duke Humphrey's Library."

<sup>18</sup> "Before the tenant of the king shall have livery, he should have a writ of the Clerk of the Rolls to the Keeper of the Privy Seal, witnessing this, etc., and a Privy Seal to the Chamberlain of the king to receive his homage. And when he has done his homage, he shall have a writ from the Chamberlain to the Chancellor, and then he shall have a writ to the escheator to have livery. And this by Skrene, in the Chancery." 2 STATHAM'S ABRIDGMENT (Klingelsmith's transl. 1920) 854.

new face upon the controversy. At the death of Henry V (in 1422), leaving as his successor to the crown his infant son, Henry VI, the tenants of divers of the manors belonging to the Berkeley family, who had previously recognized Warwick as lord, now attorned to Lord James; while Warwick, under the new political situation, consented to the arbitration of the disputes between himself and the Lord of Berkeley. The terms of this arbitration covenant show clearly that the feud between the Earl and the Lord of Berkeley had resulted in frequent armed conflicts between their adherents, on the streets of London. The Duke became Lord Protector of the realm and his friendship for Lord James of Berkeley became proportionally more valuable.

Under the provisions of this arbitration agreement it seems that the whole field of tangled litigation between the Earl of Warwick and Lord James of Berkeley was submitted to Sir John Juyn, Justice of the King's Bench, and the Bishop of Worcester. Evidently the arbitrators had difficulty in arriving at an award—which was sure to give offense to one of two powerful noblemen, or perhaps to both. We are not surprised to see that no award was made under the first reference, or under the second. But since Warwick's peaceful disposition still continued, thanks to Lord James's friendship with the Duke of Gloucester, then Lord Protector, a third reference to the same arbitrators was more successful, and a compromise award was made, evidently with little regard for the actual state of the legal title to the lands in controversy. In any event, the award was so far acquiesced in as to bring about a truce between the contestants that lasted for thirteen years, until Warwick's death in 1439.

It might have been expected that the death of the powerful and unscrupulous Earl would have left the contestants for the great Berkeley estates on a more even footing, especially since the Earl left as his sole heirs, his three daughters. But not so. These daughters of Warwick, especially Margaret, possessed all of the vigor, ambition, and vindictive cruelty of their father. Moreover, each of them was married to a nobleman possessing influence and ambition. Margaret, the eldest, was the second wife of John Talbot, the first Earl of Shrewsbury, famous as soldier and statesman. Eleanor, the second daughter, had taken as her husband, Edmund Beaufort, the Duke of

Somerset, nearly related to the royal Lancastrian family. Anne Elizabeth, the third daughter, was married to Richard Nevill, Lord Latimer, later to become the Earl of Warwick, and to be known in history as "The King Maker." Lord James of Berkeley had, himself, strengthened his position by marrying Isabel, the gifted daughter of Thomas Mowbrey, the Duke of Norfolk.

The long litigation, together with the turmoil and disorder that attended the infancy of Henry VI, had reduced the Lord of Berkeley to a low estate. With most of the Berkeley lands in the possession of Warwick, he seems to have been in great financial straits even at the end of the thirteen-year truce which intervened between the award of the arbitrators and the death of Warwick. Smyth of Nibley tells us, "\* \* \* that he became much indebted, a continuall borrower, and often of small sums, and some of those upon pawnes, yea of Church vestments and Altargoods; And recovered not himself in estate (through the worsor troubles that fell upon him after the death of the said Earle,) whilst hee lived, Soe that he lived and dyed in a farr meaner port and condition that any of his Ancestors from the dayes of Harding the Dane."

Immediately upon the death of the Earl the litigation flamed up anew, on account of the inquisition held by the Escheator of Gloucester to determine of what lands he died seized, and by what tenure they were held. Again a jury was called upon to decide between the fine levied by Lord Thomas III of Berkeley (in 1349) fixing the entail in the male line, and the alleged prior settlement by Lord Maurice of Berkeley in tail general. In the course of this proceeding, it is clear that the influence of the coparceners' husbands was irresistible, and that it foreclosed the finding of the jury and the result of the inquisition. Smyth of Nibley tells us quaintly that, "Against this Inquisition or office and these old rusty Entailes therein found, (which begat more troubles and expence than is credible,) it may seem this lord James had roughly resisted it \* \* \*." But it was useless for him to resist it; for, as our same author puts it, "\* \* \* his adversaries had the greatest authorities and offices of honor and power the Crowne could give. And indeed were themselves the upholders of the kings regality and Crowne."

They had Lord James thrown into the Tower from which he was brought before the King in Chancery and probably enjoined from interfering in any way with the inquisition. The final result of the inquisition was, that the jury found that the fraudulently alleged deed of the Lord Maurice had been validly executed, and therefore had priority over the later fine of Lord Thomas III under which Lord James of Berkeley was claiming.

The effect of these high-handed legal proceedings may be again given in the language of Smyth of Nibley :

“Upon returne of which Inquisitions, (which past all question were very indirectly carryed,) this lord James found himself much wronged; but being over-pressed with the greatness of the three Co-heirs and their powerful husbands, and with the extraordinary favour which they had with that weake kinge, and especially with Queene Margaret who ruled and over ruled all affairs, could not avoid them; yet for three years or thereabouts after the returne of those Inquisitions hee kept the possession of the manors of Cowley, Wotton and Symondfall, (as always hee did of Came and Hinton,) but thereupon sprunge up such contentions, suites, quarrellings, bloodsheds and other mischeifes, as are irksome in their very remembrance, continuing five or six years together. \* \* \*”

Lord James's adversaries, being practically in possession of all the powers of government, seem to have harried him by every form of legal proceeding. He was subjected to orders in the Star Chamber, to mandates and injunctions in chancery, and sued in courts of law. Lord James, however, was far from submitting meekly to oppression. He seems always to have continued in possession of the great and then well-nigh impregnable castle of Berkeley, situated on a hill overlooking the Severn River, and at this particular time he was also in possession of the manor house at Wotton. Secure behind the walls of these fortresses, he did not hesitate to defy the processes of the court.

Thus says Smyth of Nibley :

“Of these stirrings take also a little further tast out of the Court of Common pleas in the 18th of the king Henry the sixth, [1440] which shews how David Wodburne with divers others of his fellow servants, by direction of their master John Talbot, viscount Lisle, (son and heire of the

said Margaret,) cominge to Wotton, served this lord James with a subpoena for his appearance in the Chancery: Instead of obeying the proces, this lord James not only beat the parties, but will hee nill hee, inforced the said David to eat the subpena, wax and parchment; for which several actions were forthwith brought against this lord James and his men, by the said lord Lisle and his man David."

In the following year (1441) we find the three daughters of Warwick, with their husbands, bringing actions of novel disseisin against Lord James and Isabel, his wife, and William, their eldest son, for certain of the Berkeley manors; while Lord James brings actions of novel disseisin against the coparceners and their husbands for yet other of the Berkeley manors retained by them. These lawsuits appear to have been attended by constant acts of violence by both parties and their retainers. It is evident that breaches of the peace occurred whenever the followers of the two contesting parties met, whether on the highways of Gloucester, or on the streets of London or Bristol. The courts before which these various suits were pending were evidently helpless in the presence of such disorderly litigants, and the situation became intolerable. In 1441, the parties agreed to submit all of their controversies to arbitration. It is interesting to note that the arbitrators selected were Hody, Chief Justice of the King's Bench, Newton, Chief Justice of the Common Pleas, and Fray, Chief Baron of the Exchequer. But even an arbitration was prosecuted with difficulty. Margaret's husband, the Earl of Shrewsbury, having been sent to France as Regent for Henry VI, secured from the King an order protecting him from any litigation for one year. Evidently this was thought to be rather high-handed assumption of authority on the part of the King, for we are told that in the following year Parliament passed an act confirming the Earl of Shrewsbury's immunity from suit, but also enjoining him from instituting any legal proceedings against the Lord of Berkeley.

No final award seems to have been made by the arbitrators until 1448, seven years after the submission. This award appears to have been in favor of the coparceners and their great husbands, as might have been expected. In any event, Lord James declined to abide by the award and shut himself up in his castle, whence

he barred all comers, including process servers. It is clear that at this stage the fortunes of the Berkeleys were at the lowest ebb. Lord James and his four sons were literally run to earth. The only member of the family still at large was James's wife, the Lady Isabel of Berkeley, who remained in London to become the sole solicitor of her husband's law cases. Of the activities of this admirable and high-spirited lady, there is found among the Berkeley papers only one memorial. This is a letter written by her from London in which she tells her husband of the many difficulties with which she is confronted, and the ever present danger of her being cast into the Tower, and the many plots and schemes that were on foot to compass the death and overthrow of her husband. It reads, in part, as follows: <sup>19</sup>

"And Sur I trust to God and you will not treat with them, but keep your own in the manlyest wise, yee shall have the land for ones and end: Bee well ware of Venables of Alderley, of Thom Mull and your false Counsell; keep well your place, the Earle of Shroesbury lyeth right nye you, and shapeth all the wyles that hee can to distruss you and yours.  
\* \* \*"

She also asked him to send her money.

"\* \* \* At the reverence of God send money or els I must lay my horse to pledge and come home on my feet: keep well all about you till I come home, and trete not without mee.  
\* \* \*"

A year later, on her return to Gloucester, this courageous lady was captured and murdered by the retainers of the Countess of Shrewsbury.

By this time, the thirtieth year of the unhappy reign of Henry VI (1452), the whole kingdom had fallen into disorder. The courts had practically ceased to function, and trickery and violence provided the only means of prosecution and defense. It was in this year that Margaret, Countess of Shrewsbury, a forceful

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<sup>19</sup> See 2 SMYTH, *op. cit. supra* note 7, at 62, where this letter appears in full. We are told further that Lord James thereupon borrowed twenty-two marks of Mr. Nicholas Pointz, pledging therefor divers articles of an altar service. "Hereby this family seeth the true fidelity of marriage in a just husband to a correspondent wife, who would rather seeme to disfurnish God of the ornaments of his worship, then leave her necessitous estate unsupplied."

and ruthless person, whom Smyth of Nibley declares to be "as angry a lady as I have observed in all my readings," by corrupting one of the servants of Lord James, treacherously secured entrance for her retainers into Berkeley Castle. Lord James and his four sons were captured and carried close prisoners to the manor of Wotton, then in possession of the Countess. The Countess was a woman of action and had little scruple as to the means used in order to get results. Divers deeds and releases whereby James and his sons were made to relinquish all right, title, and interest, even in Berkeley Castle, as well as in all of the other Berkeley estates, were prepared and the prisoners forced to execute them. As Smyth of Nibley relates:

"\* \* \* and they were plainly told by the said Countess, that if they would not in each thing do as they were required, they should plainly dye: whereupon to their great heaviness they did whatsoever she would, how prejudiciall so ever to their inheritance and contrary to all right and conscience.  
\* \* \*

Not content with these muniments of title so violently obtained, Margaret, with her coparceners, sued out of Chancery a commission of oyer and terminer and brought before such commission an action of forcible entry, under the statute 5 Richard II, against Lord James and his four sons. On the return day she took her prisoners to Cirencester, where the commission was sitting, and there compelled them by threats of death to file in the pending action such pleas as were prepared by counsel for the said Margaret. In this action we are told that a plea in bar, a replication, a rejoinder, and a sur-rejoinder were all filed in one day; and that upon issue joined, a venire facias was issued, a jury returned, a verdict rendered, and a judgment entered all in the same day. It is needless to say that the verdict of the jury and the judgment of the court were in favor of the Countess Margaret and her sisters. It appears that Justice Bingham presided at this farcical trial; but we are told by Smyth of Nibley that although he lived for twenty-eight years after the proceedings recited, he could never be induced to certify the judgment.<sup>20</sup> But the merciless

<sup>20</sup> "\* \* \* But the same was certified by his widow upon a writ of certiorari to her directed in the fourth of king Henry the seventh, as the record it self sheweth: whereby may bee gathered that hee held the shuf-

Countess of Shrewsbury was not yet content. She wished to make estoppel by record perfect. She therefore compelled Lord James of Berkeley, under pain of death, to bring an action of attaint against the jury that brought in the adverse verdict at Cirencester. The jury impaneled to try this attaint immediately brought in a verdict that the verdict of the defendant jury was good and lawful.

But just at this juncture, when the Berkeleys seemed faced with irretrievable ruin, they were saved by the great disaster that overtook the English army in France in the defeat suffered on July 7, 1453, before Bordeaux. The Earl of Shrewsbury who was in command of the English army, and his son and heir, John Talbot, the Lord Lisle, were killed. The Lord of Berkeley's second son, James, was also killed, and his next son, Thomas, was captured by the French and held to ransom in a sum that was "importable." As a result of the death of these important parties to the litigation no judgment was ever entered on the verdict in the attaint action. The incredible disorder and violence of these times is further evidenced by the numerous royal pardons for breaches of the peace that were secured by the Berkeleys and are now found among the Berkeley papers. Smyth of Nibley gives numerous instances in which royal pardons were issued also to the adversaries of the Berkeleys.

With the passing of the powerful Earl of Shrewsbury and his eldest son from the stage, the condition of the Berkeleys appears to have been somewhat improved; but it is evident that litigation and violence continued between the parties for ten years more. Finally, in 1463, as the House of Lancaster sank into hopeless defeat, the old Lord of Berkeley, then sixty-nine years of age, and the vengeful Margaret of Shrewsbury, fifty-two years of age, entered into a covenant of peace whereby they were to cease from vexing each the other, either by violent forays or suits at law; "neither of whom," remarked Smyth of Nibley, "since

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linge fowle, howsoever the dealing might seem faire before him." 2 SMYTH, *op. cit. supra* note 7, at 70.

Such a writ directed to the widow of a judge must have been extra-legal, a *tour de force*. No other instance of it is known. Richard Bingham appears to have been a justice of the King's Bench from 1447 to 1471. He died in 1476. 4 FOSS, *THE JUDGES OF ENGLAND* (1851) 419.

their ages of discretion having till that time enjoyed three months of freedom from law suits." But James was not to enjoy his new found peace long. Thirty-six days thereafter he was gathered to his fathers and buried in the church at Berkeley, where his alabaster monument can be seen to this day; and the restless and ruthless spirit of Margaret of Shrewsbury passed on within the year.

Sufficient has been told of this extended litigation to indicate quite clearly that during these times, at least, as between powerful litigants, courts of law served little purpose, save as fields for trickery and organs of oppression. The verdicts of juries were determined according to the measure of power and influence of the litigants,<sup>21</sup> while the judges dared not enter a judgment that was contrary to the interest of any powerful suitor. The status of the courts is strikingly indicated by the fact that Henry VI is shown by the Berkeley records to have exacted an oath from divers members of Parliament, including the parties to the Berkeley litigation, by which they were bound to maintain no riotous companies of men-at-arms, and to show no displeasure against the judges on account of the duties of their office. It remains to recount only briefly the subsequent events in the effort of the Berkeleys to win back their lost estates.

William, fourteenth in the line of the Lords of Berkeley, succeeded his father in 1463. He was able, energetic, and ambitious, and an accomplished soldier, but most improvident in the alienation of the family estates, practically all of which he ultimately parted with to secure noble titles and high office. Immediately upon his accession he renewed the litigation looking to the recovery of the lost estates. His proceedings appear to have been

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<sup>21</sup> " \* \* \* Dissident jurors were occasionally sent to prison to punish their obstinacy, and to teach them to be more conformable in the future. Juries which were hopelessly divided in opinion were locked up indefinitely without food or drink. 'Good people,' said Stanton J. to such a jury, 'you cannot agree? Go, put them in a house till Monday, and let them not eat or drink.' This had the desired effect. The report goes on: 'on the same day about vesper time they agreed.' A jury was 'commanded to abide in one chamber, without eating or drinking, until they agreed. And on the morrow they had agreed.' They might be dragged about in carts at the tail of the Justices from assize-town to assize-town until they could make up their minds. \* \* \*" BOLLAND, *op. cit. supra* note 1, at 97.

chiefly in chancery, where he secured a setting aside of the deeds procured by duress from his predecessor. But the long controversy seems, curiously enough, to have been settled by the last pitched battle fought in England in a private war between great houses. At Nibley Green, in 1469, two small armies met in battle. One was commanded by William, Lord of Berkeley, and the other by Thomas Talbot, Viscount Lisle and grandson of the Countess Margaret of Shrewsbury. The retainers of Berkeley won a complete victory and the young Viscount Lisle was killed. At this time Edward IV of York had quarreled with the great Earl of Warwick who was shortly thereafter defeated and slain. William of Berkeley won high favor at court; the chancellors rendered satisfactory decrees; and the Berkeley estates, so far as they were included under the fine in tail male levied by Lord Thomas III, in 1349, were restored.

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