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I

HISTORICAL INTRODUCTION

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1

THE COURTS

The present system of courts of law in England and Wales depends almost entirely on legislation passed during the last 150 years. Yet it is difficult to describe the present system without referring to older courts, because the functions of some of the newer courts have been defined in terms of the older institutions; the legislative changes did not so much sweep away the debris of centuries as take materials that were to hand and from them fashion a new design. When our superior courts were rehoused in the Strand, in 1882, they were given a huge neo-Gothic building. It would have symbolised our legal institutions much better if the architect had made a building out of all the styles and dates to be found in the country. The past history of our courts is also responsible for a curious distinction being made between courts of law (often called 'ordinary courts') and special tribunals. This is not a distinction of function, but a distinction of age. During the last century, Parliament entrusted some judicial and quasi-judicial functions to various persons or bodies; if this process had occurred at a more remote time, these tribunals would now be 'ordinary' courts. To ignore these tribunais would lead to a lop-sided view of the administration of justice. However, there are advantages in discussing the system of 'ordinary' courts first, for they occupy a key position in our system. Furthermore, it is largely the limitations of 'ordinary' judicial process that have led to the creation of tribunals. These limitations are discussed in part II.

Today we generally assume that the administration of justice is a function of government to be exercised by the State. We express this in terms of the Sovereign, and speak of the Queen's judges, the Queen's courts, and Her Majesty's prisons, just as we speak of Her Majesty's ships of war. But if we consider the early history of our courts, we find that they used to be viewed quite differently. In the Norman period, the King's Court was merely one of the many courts, including the old local courts surviving from Anglo-Saxon times. These were the courts of the County – not to be confused with the present-day county court, on which see chapter 5 – and the courts of the Hundred which was a subdivision of the County. The ancient County and Hundred Courts had a wide jurisdiction over both civil and criminal offences. The Church claimed jurisdiction over laymen in a multitude of matters, and exercised it through a country-wide network of courts. Feudal courts arose from the principle that any overlord

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who had tenants enough could hold a court for his tenants. In theory the feudal courts had no criminal jurisdiction, but in practice they dealt with minor offences. The King also had his court. All these courts were concerned with a great deal of business other than the trying of cases. In fact, the early King's Court was far more concerned with non-litigious matters than with litigation, for it was in effect the machinery of central government: it was composed of the great officers of State and such other men as the King chose to summon, and that assembly, sometimes large and sometimes small, legislated and administered and judged. The right to hold a court, and take the profit to be made, was more in the nature of private property. It was on the same footing as the right to run a ferry and exclude anyone else from running a ferry in competition. These were called franchises, which always signified the exclusive right of a private person to exercise functions which we now consider should be in public hands. Privately run jurisdiction no more shocked the conscience of the Norman period than privately owned land shocks our conscience today.

The early development of the judicial machinery centred round one process: the King's Court gradually ousted most of the other courts and took over their work. This was not a sudden process. No frontal attack could be made, because the issues were those of property. A decree that feudal courts or franchise courts were to be abolished would have been an expropriation of property, hardly distinguishable from seizing rents due from other people's tenants. The success of the King's Court was due to the fact that the King offered better justice – his courts were selling a better and more reliable commodity. The first great steps were taken under Henry II (1154–89), and the system he devised was good enough to withstand the upheavals under King John. The Magna Carta was, on the whole, an attempt to safeguard the rights of the propertied classes in the kingdom. It included one clause designed to stop the King from taking work from feudal courts, but apart from this it accepted the existing judicial system. During the thirteenth century the King's Court steadily increased its jurisdiction, partly by inventing judicial remedies that no other court was able to offer. Royal justice was the most popular justice. The increase in business led to institutional changes. The old King's Court or Council split into several different institutions, with far more specialised functions. These divisions, or the germs of them, can all be seen in the thirteenth century, but it is easier to take stock of the changes at their completion in the late fourteenth century.

The judicial activities of the 'King's Court' were separated from the general governmental activities, and this separation led to a change in nomenclature. 'King's Court' then signified judicial institutions, and 'King's Council' was applied to the assemblies which the King held for carrying on his government: the large council of important people, sometimes fortified with representatives of the commons, which evolved into Parliament, and the small council of advisors and officials, which unlike the large council was almost permanently in session. 'The Council' from the fourteenth century onwards was the small group of

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advisors and officials. The judicial work had originally been a council activity, but gradually it came to be exercised in definite institutions which lost touch with the council and emerged as three independent law courts. There was overlapping of the jurisdiction of these courts, but the main line was that disputes between subject and subject should be brought in the Court of Common Pleas. Cases in which the King was particularly concerned (such as control over inferior courts and tribunals and royal officials) went to the court of King's Bench and revenue cases went to the Court of Exchequer. These three were central courts sitting at Westminster, and by the end of the fourteenth century, they were staffed by professional judges appointed by the King from the ranks of the practising bar. They were known as the *common law* courts, to distinguish them from the ecclesiastical courts and other tribunals with special jurisdiction. The expression *common law* is discussed in the next section.

The common law system also included the Assize Courts. From early Norman times the King had sent trusted persons to visit the counties for various purposes. The Domesday Book was compiled from the answers to inquiries made by itinerant commissioners. The purpose of such a visitation depended on the terms of the royal commission. At first these commissioners exercised very little judicial authority, being far more concerned with making inquiries into matters where the King might have a fiscal interest, but eventually their judicial activities became the main purpose of their visits: they became itinerant justices, and each county was visited three or four times a year. The commission usually instructed the itinerant to hear and determine allegations of serious crime, while lesser offences were dealt with locally by the sheriff and later by justices of the peace. Thus virtually all criminal trials took place in the King's Courts in the county where the crime was committed. Civil trials in the King's Courts, however, at first usually went on in one of the common law courts at Westminster. With the growth of jury trial this became highly inconvenient. Since early juries were essentially neighbour witnesses, both the jurors and the parties to the suit had to travel to Westminster, which could be a grievous burden upon them. The comparative excellence of the central courts was thus somewhat undermined by the distance that might separate a litigant from the fountain of justice. To meet this it was provided in 1285 that an action could be begun in one of the common law courts at Westminster and would be sent down to be tried there, unless first – *nisi prius* – a justice of Assize should visit the county. The practical working was that the action was started at Westminster, the actual hearing took place in the county before the itinerant justice – who was usually a judge of one of the common law courts, but who might be an eminent practising barrister sent as a commissioner – and the formal judgment was made at Westminster. The proceedings at Westminster could be conducted by attorneys and counsel, so that the parties, witnesses and jurymen would have to attend only at the Assize Court in the county town. Hence, when the itinerant justices visited the counties they had to do both criminal and civil work. After 1875 the whole of a civil case (that is,

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commencement and judgment as well as the hearing) took place in the Assize town, and we talk of the 'civil side' instead of '*nisi prius*'. The system of itinerant justice was extremely durable and lasted until modern times. It was not until 1 January 1972 that Assizes were abolished: the criminal side was replaced by a network of permanent Crown Courts, and the civil side was replaced by an arrangement whereby the High Court – the modernised version of the courts at Westminster – distributes justice from a number of permanent locations outside London.

It thus appears that in the fourteenth century, England had a fairly comprehensive judicial system, as the Assize Courts were a happy compromise between centralisation and decentralisation. The best available justice was brought to the counties, points of law were chiefly argued at Westminster, and the common law courts were therefore able to develop a law which was uniform for the whole realm. Unfortunately, however, the law gradually lost its flexibility as it developed. Our thirteenth-century judges considered that they were empowered to do what justice demanded, but after the early fourteenth century, judges considered that their duty was to apply the law as their predecessors had laid it down. Common law became narrow and dominated by technicality; the merits of a case might be totally obscured by a fog of procedure. Furthermore, especially in the fifteenth century, a litigant might be deprived of remedies at common law through the activities of 'over-mighty subjects'; juries and even judges were often intimidated by powerful men. Many would-be litigants thought that common law would not or could not give them justice, and in such cases they adopted the expedient of petitioning the King. Since the King acted through his Council, the petition might be addressed to the King, or Council, or to individual councillors. The Council was the government of the country and was generally disinclined to waste its time considering petitions. Some petitions raised points in which the Council felt a real interest: piracy might have led to disputes with a foreign prince, and certain kinds of disorder might have directly affected the government. But most of the petitions were disposed of by telling the petitioner to go to common law, or by handing the petition over to the Lord Chancellor – who was then the general secretary of state – to investigate. At first the Chancellor investigated it with the help of a few councillors. Later he did it alone and reported his conclusion to the Council, who then made such decree as they saw fit. By the late fifteenth century, petitioners frequently sent their petitions direct to the Chancellor, and he investigated the case and made the decree himself. When this stage was reached it becomes proper to speak of the Court of Chancery. We do not know very much about the methods of the Chancellor in the earlier days, but in the sixteenth century there was a regular Chancery Court and its practice is fairly well known. The guiding principle of Chancery was 'conscience'. This was of course no precise guide, but it meant that relief would be given to a petitioner if the Chancellor thought that good conscience entitled him to a remedy. Within that vague limit, the work of Chancery was supplemental

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to that of the common law. There were occasional unseemly wrangles, but the relationship beween Chancery and the common law courts was mainly quite harmonious. Fifteenth-century judges accepted the need for a mechanism to bypass the usual procedures in cases of emergency, just as modern judges accept the need for the Home Secretary's discretion to release persons wrongly sent to prison when the usual safeguards have failed.

During the sixteenth century the Council was reorganised. Some councillors were assigned to attendance on the King, and these formed what was later called the Privy Council. Others were to stay at Westminster to do routine work. Most of the routine work was of a judicial nature, being a continuation of the judicial activities of the Council: this became known as the Court of Star Chamber. Other courts closely connected with the Star Chamber were also set up. The political conflicts of the seventeenth century brought all courts connected with the Council into disrepute. In 1641 the Star Chamber and allied courts were abolished though the Court of Chancery survived.

A review of the law courts in the later seventeenth century shows that the old three common law courts, Assizes, and the Court of Chancery dominated the scene.[1] The common lawyers, siding with the successful parliamentarians, had got rid of serious competition from the Council courts, captured the commercial work previously done in the Court of Admiralty, and prevented any extension of ecclesiastical courts. The old division of work between the Exchequer, Common Pleas and King's Bench had broken down; by ingenious fictions litigants could bring ordinary actions in whichever court they preferred. The King's Bench benefited most by this change and became the most important of the common law courts. The Court of Chancery was accepted and thoroughly taken over by the common lawyers. The old idea of 'conscience' was gradually eclipsed. Chancery was still said to be a court of 'equity', but equity ceased to be a fluid thing and became a set of rules. This is shown very clearly by the use of decided cases. Up until 1700 there were over a hundred volumes of reports of common law cases and only eighteen volumes of Chancery cases, and few of these contain decisions earlier than 1660. In the eighteenth century there were almost as many Chancery reports as common law reports. Eighteenth-century Chancellors had received the same training as common lawyers and they ran their court in much the same way, looking for definite rules to be found in and deduced from previous decisions. In fact, common law and equity (using this term in its technical sense of the rules applied in the Court of Chancery) were approaching each other so fast that Blackstone[2] saw little difference between them. By the early nineteenth century a working partnership was well established. Equity became a gloss on the common law; it was a set of rules which could be invoked to supplement the deficiencies of common law or to ease the clumsy working of common law actions and remedies.

[1] The courts of justices of the peace are discussed in chapter 19 (ii).
[2] *Commentaries on the laws of England* (1768), III, 429ff.

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During the nineteenth century other superior courts were set up. In 1857 the jurisdiction of ecclesiastical courts over wills and intestacies and matrimonial cases was abolished and a Probate Court and a Divorce Court were established. Special provision was made for bankruptcy proceedings. Further, the elaborate and exceedingly inefficient system of appeal courts was mended piecemeal. There was no lack of superior courts: the trouble was mostly one of overlapping jurisdictions, varying procedure and lack of coordination. A complete reorganisation was made by the Judicature Acts 1873–75. The courts numbered 1 to 12 in figure 1 were abolished. A Supreme Court of Judicature was established, divided into the High Court and the Court of Appeal. The jurisdiction formerly possessed by courts here numbered 1 to 8 was conferred on the High Court and the former jurisdiction of courts 9 to 12 was (with modifications and additions) conferred upon the Court of Appeal. The High Court was at first divided into five divisions and Assizes. The five divisions were consolidated into three divisions: Queen's Bench Division,[1] Chancery Division and Probate Divorce and Admiralty Division in 1881. In 1972 the divisions were further rearranged with the abolition of Assizes and the Probate Divorce and Admiralty Division being replaced by a new Family Division. The Apellate Jurisdiction Act 1876 provided salaried professional judges for the House of Lords so that the House in its judicial capacity became an adequate final court. The Judicature Acts also ended the separation of 'law' and 'equity'. The High Court succeeded to the jurisdiction of the old common law courts and the old Court of Chancery, so it can do anything that any of those could have done. The rules of common law and the rules of equity were not fused: the provision made was that *all* courts should apply and use both sets of rules and that in case of conflict between the rules, the rules of equity should prevail.

The growth and expansion of the King's Courts was doubtless an excellent thing for the building of a uniform law and standard of justice in the country, but it was achieved at the expense of competing courts which were perhaps more suitable for poor litigants and small cases. The greatest number of disputes relate to small sums of money and most of the inhabitants of this country were – and are – not wealthy. The King's Courts offered trial at Westminster or at Assizes held at most four times a year; neither proceeding was cheap. In Tudor times there had been an attempt to deal with small cases and poor litigants by the creation of a Court of Requests, but it was too close to the King's Council to survive the political storms of the seventeenth century. In many of the ancient towns there were local courts which survived and some of these were improved by statutes of the eighteenth and early nineteenth centuries. There was no system at all, but this was largely remedied by the creation of county courts by statute in 1846. The passing of this Act was not easy. Lord Brougham's propaganda had to overcome an opposition which included most of the legal profession. The County Courts

[1] Which automatically becomes the King's Bench Division when the sovereign is a King.

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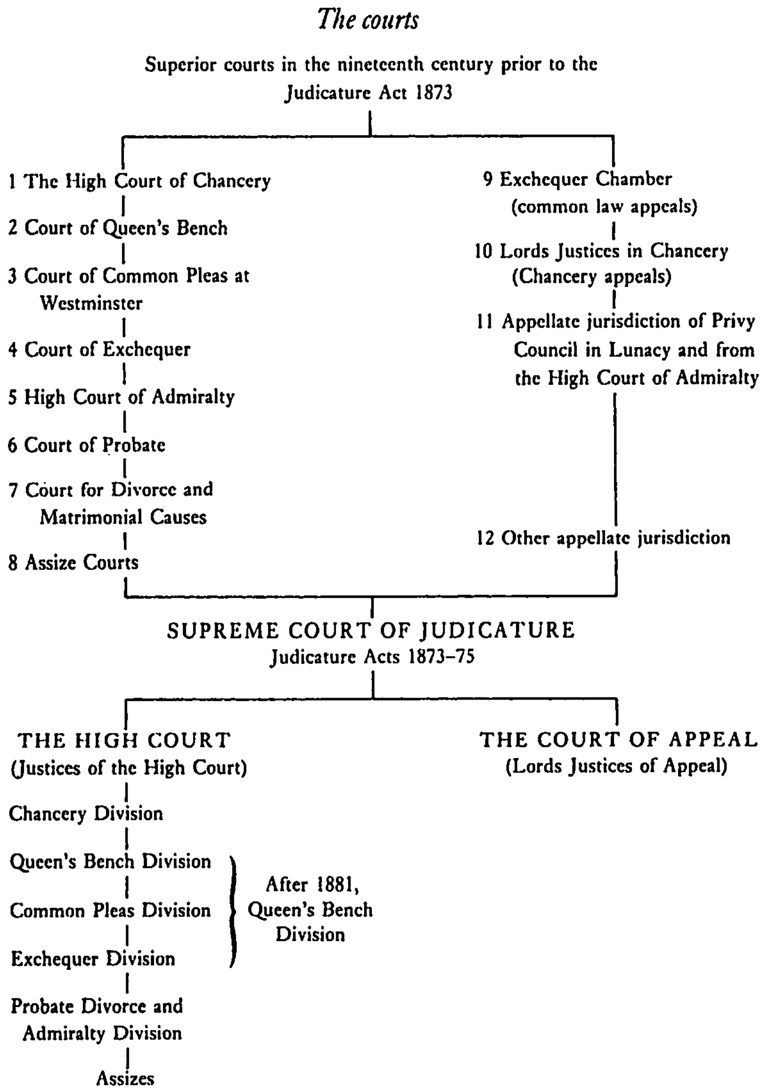

Figure 1 Reorganisation of the superior courts of law in the nineteenth century

Act 1846 set up a network of local courts to deal with small claims and with various minor changes the original scheme survives intact today. The organisation of county courts is explained in chapter 5.

Until recently, the system of courts in England and Wales was self-contained, in that the courts' decisions were not open to scrutiny in any tribunal outside the

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United Kingdom. This state of affairs had existed ever since Henry VIII broke with the Pope and thereby put an end to appeals to the ecclesiastical courts in Rome, after which any attempt to challenge the laws of England in courts abroad was condemned as *praemunire*. This was a vague offence: the Tudor equivalent of 'anti-soviet activities', and it theoretically remained in existence until its quiet abolition in 1967. However, two important changes have come about in the last twenty-five years. One is a result of Great Britain's entry into the EEC in 1973. By Article 177 of the EEC Treaty, points of EEC law which arise in English litigation always may be and sometimes must be referred to the European Court at Luxembourg for determination. The English court is then bound by what the European Court decides. The other change is the result of Great Britain's ratification of the European Convention on Human Rights. Since 1966 it has been possible for an individual who thinks that a decision of the English courts violates his human rights to complain to the European Commission on Human Rights, and this may result in the English decision being condemned by the European Court of Human Rights at Strasbourg. This is a moral censure only. As a matter of English law, such a condemnation does not automatically overturn the offending decision of the English court. However, the resulting embarrassment usually causes Parliament to change the relevant law. The European dimension is discussed in chapters 35–37.

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THE COMMON LAW

The expression *common law* originally came into use through the canonists. 'They use it to distinguish the general and ordinary law of the universal church both from any rules peculiar to this or that provincial church, and from those papal *privilegia* which are always giving rise to ecclesiastical litigation.'[1] The phrase passed from the canonists to the lay lawyers. The emergence of the three courts of Common Pleas, King's Bench and Exchequer gave England a system of courts with wide jurisdiction. The judges were appointed to administer the 'law and custom into the realm', which meant that (apart from the small amount of law enacted by the King and Council or, later, Parliament) the judges built up their own set of principles and rules. Their material consisted of general and local custom and the juridical ideas of an age in which theology and law shared the hegemony of intellectual effort. The different 'laws' that had governed various parts of England tended to disappear. There emerged a general body of principles and rules that were applied in the King's Courts at Westminster and carried through the realm by the Assize judges on their circuits. This part of the law was 'common', and was to be contrasted with anything that was particular, extraordinary or special, such as surviving local custom, canon law or Roman law. The essence of common law was that it grew through judicial decisions recorded by lawyers.

The use of reports of decisions in past cases is not a phenomenon peculiar to English lawyers, although the actual technique they have developed is highly specialised. The tendency to look to past practice for guidance is prevalent in meetings and other organised activities. The appeal to the past minutes of clubs and societies is a familiar proceeding, and one would, for example, expect a local Jubilee Celebration Committee to begin its work by looking over the records of previous celebrations. The judicial use of precedents is a more formalised method of following what is really a widespread habit of mind. What is peculiar about the English courts in this respect is that they generally consider themselves *bound* to follow their previous decisions. This was not always so. The older view was

'that precedent is evidence, the best possible evidence, of rules of law, but *not more than*

[1] Pollock and Maitland, *History of English law* (2nd ed. 1898), p. 176.

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