I

Common law

1

Judges and judging 1176–1307

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I

In January 1176 King Henry II held a meeting of his great council at Northampton.[1] A decision was taken there to divide England into six judicial circuits, and the king appointed three justices to serve on each circuit. The chronicler who tells us of this then gives part of the instructions drawn up for them. Specific criminal justice responsibilities were assigned to them. They were to 'execute the assize on wicked thieves and malefactors of the land'. This meant making enquiries through local presentment juries about those reputed to have committed certain criminal offences. They were also told what to do both when those accused appeared to stand trial and also when they failed to appear. Specific responsibilities were also assigned to them in regard to civil justice. They were to enquire into complaints from heirs whose fathers had died in seisin of land but whose lords had refused to admit them to the succession and they were, if necessary, to remedy this by securing the heirs' admission. They were also to take jury verdicts on disseisins made contrary to 'the assize' (*super assisam*) since May 1175. There is no mention of the king's writ being required to provide specific authorisation for the hearing of individual cases of either of these two types. Perhaps we should envisage the justices acting without it, simply on the basis of the general authorisation and on the basis of oral complaints. A separate clause talked of the justices doing 'all justice and right' (*omnes justicias et rectitudines*) belonging to the lord king and his crown for (holdings of) half a knight's fee or less by the writ of the lord king or his representatives. This seems to refer to more general land litigation of the kind brought by the writ of right or writ *precipe* but limited their

[1] *Gesta Regis Henrici Secundi Benedicti abbatis*, ed. W. Stubbs, Roll Series, 2 vols. (1867), I, pp. 107–8.

jurisdiction to smaller holdings. The justices were further entrusted with making enquiries into a variety of other matters of interest to the king such as his escheats, churches and lands, women who (or whose marriages) were in his gift and (who owed) castle-guard. They were also to take fealties to the king from all the king's subjects and to arrest anyone refusing and to ensure that all unlicensed castles were properly destroyed. After their nomination, the king had each of the justices swear an oath on the gospels that they 'would keep the assizes that had been made and have them observed by all the men of the realm'. A second chronicler mentions a more general oath to 'do justice' to all.[2] The Pipe Rolls of 22 Henry II (1175–6) and 23 Henry II (1176–7) both record financial information arising out of the work of the six circuits thus established on a county-by-county basis. This confirms that the justices did indeed visit most, if not all, of the counties allotted to their circuits and also tells us something of the business they dealt with. There are also seven surviving final concords made before the same justices, recording the settlement of civil litigation heard before them. Their dates fall between mid March and late September 1176. One circuit accounts for three of the concords, a second for two, and two others for one each.[3]

It is from 1176 that we can trace the beginnings of the General Eyre as an institution within the English judicial system. Thereafter teams of justices appointed by the king brought royal civil and criminal justice to each of the counties of England within a limited period every two or three years by holding sessions in each of the counties assigned to their circuits. Later Eyre visitations, however, varied both as to the number of circuits covering the country (anywhere between two and five), and the number of justices assigned to each circuit (anywhere between three and nine).[4] It is also arguable that 1176 marks the first clear appearance of the type of royal justice characteristic of royal courts in the later Middle Ages: justices who brought to the courts in which they sat an authority derived from their own direct relationship with the king. They were appointed by the king, perhaps orally, at Northampton; they took an oath to serve the king faithfully; and they exercised only such

[2] *Radulphi de Diceto, Opera Historica*, ed. W. Stubbs, Roll Series, 2 vols. (1876), I, p. 404.
[3] *Pleas before the King or his Justices, 1198–1212, III*, ed. D. M. Stenton, Selden Society, vol. 83 (London, 1966), pp. lvii–lviii; The National Archives, London [TNA] PRO C 260/186, no. 1C.
[4] P. Brand, *The Making of the Common Law* (London, 1992), p. 84.

jurisdiction as they had been specifically granted by the king, either through written instructions given at the council or by royal writs. In essence, therefore, they exercised only such jurisdiction as had been delegated to them in writing by the king. Their sessions could therefore be, and were, described as sessions of the king's court (*curia regis*). The justices also united in themselves the two formerly separate, and clearly distinct, roles: of presiding officers in their court and judgment-makers of the court. Before this, sessions held by royal justices in the localities under earlier Norman kings (and perhaps in the earlier part of Henry II's reign as well) had been considered only as special sessions of the county court or courts concerned, and the usual judgment-makers of the county courts made judgments at those sessions, the royal justices only presiding.[5] In this new form of court, where the king's justice was dispensed by his appointees, the final characteristic is also a novelty, in England at least: that all of their judicial activity was recorded in writing. When the king asked for information on a variety of matters he clearly expected to receive it in written form. The *Dialogue of the Exchequer*, written *c.*1179, seems to presuppose the existence of a written record of other business at the Eyre, too, from which financial dues owed to the king could be extracted. It therefore seems likely that fairly complete written records of the Eyre were being made from 1176 onwards, although initially no care was taken to ensure that they were preserved in the king's Treasury and thus the earliest surviving plea rolls of itinerant justices date only from 1194.[6]

By 1176 there was also a second royal court in which civil litigation was regularly being heard. This was the 'king's court at Westminster', whose personnel seem to have been interchangeable with that of the Exchequer, the institution responsible for English financial administration. In effect, a single body exercised both financial and judicial responsibilities, the judicial ones only on an irregular basis from the mid 1160s but regularly from the mid 1170s through to the mid 1190s.[7] The main source of information on its judicial functions is the final concords made there and preserved or copied by the parties involved. These may well represent a relatively small proportion of the concords made there; nor is there any way of estimating the total volume of litigation that came to the court. In these concords the personnel are sometimes described as 'justices', sometimes as 'barons' (the later term for the main officials of the Exchequer), and the same individuals clearly exercised both judicial

[5] *Ibid.*, pp. 80–2. [6] *Ibid.*, p. 95. [7] *Ibid.*, pp. 86–9.

and financial roles. The references in the final concords to 'justices' or 'barons' of the lord king and to them constituting the 'king's court' also indicate that they were appointed by the king for this purpose (or these purposes).[8] The earliest specific reference to a royal writ being used to initiate litigation in the court comes only from 1178,[9] but it seems likely that specific authorisation had always been needed. The justices probably also swore an oath to the king. The king's court at Westminster, as it can be seen in the final concords, varied in size, consisting of between three and fourteen justices, with an average of around eight. The exclusion of the treasurer (the main official of the Exchequer) from a third of the concords suggests that those named in the concord owed their place to actual participation in the hearing of the specific case concerned. It is a large court by later English standards. It also seems clear that these men both presided and made judgments in the court. There are no surviving plea rolls from this court before the mid 1190s, but copies of individual entries which do survive take the compilation of plea rolls back to 1181. In 1200 it was believed that plea rolls had been compiled during the period Richard de Lucy was the king's justiciar, prior to 1178.[10] The proceedings of this court, too, were therefore probably recorded in writing from at least the mid 1170s.

II

In the mid 1190s the Common Bench separated out from the Exchequer and became a distinct institution and its justices became exclusively royal justices.[11] There is also a significant change in the surviving evidence for judicial activity. In the summer of 1195, both the Common Bench and Eyres began to make a third, official copy (the 'foot') of every final concord made in these courts and these feet were subsequently deposited in the Treasury. Most, but not all, survive.[12] From 1194 come the first surviving plea rolls recording cases heard before the royal justices of the Common Bench and the Eyre. For the next three-quarters of a century the survival rate of plea rolls remains patchy, but the rolls that do exist make it possible to see

[8] *Dialogus de Scaccario*, ed. C. Johnson (London, 1950), p. 70.
[9] *Bracton's Note-Book*, ed. F. W. Maitland (Cambridge, 1887), p. 1095.
[10] Brand, *Making of the Common Law*, p. 95.
[11] P. Brand, *The Origins of the English Legal Profession* (Oxford, 1992), p. 22 and n. 47.
[12] For evidence of the losses of Eyre feet of fines see D. Crook, *Records of the General Eyre*, Public Record Office, Record Handbooks (London, 1982), XX, pp. 8–9.

something of the volume and nature of the business of those courts, if only in summary form.

One other significant change took place later: the emergence of a third permanent royal court, the court of King's Bench, which travelled round England in close proximity to the king. Such a court had existed intermittently during Henry II's reign while the king was in England, and also for periods in John's reign, but as a continuously functioning institution which existed even when the king was a minor or out of the country, it dates only from the mid 1230s. It is also only from then that the court began to develop its own distinctive jurisdiction.[13]

The earliest surviving record of letters of appointment of justices in Eyre comes from 1218, when copies of the instruments appointing them to itinerate 'for the business of the king and kingdom' and notifying the relevant counties of their appointment were enrolled on the Patent and Close Rolls.[14] Thereafter such appointments were commonly, but not invariably, enrolled in this way.[15] The earliest surviving copy of any of the instruments associated with the appointment of a justice of the Common Bench comes from 1234,[16] but only seven further appointments were enrolled between 1234 and 1272.[17] Although all those appointed were described as 'justices' the formula for what they were appointed to do varied considerably and no standard form emerged. No letters of appointment are enrolled for the justices of King's Bench. It is possible that the very closeness of the relationship between the king and King's Bench rendered written appointment unnecessary.[18]

An oath to the king was probably taken by all royal justices on taking up office. There are references to a 'form of oath' (*forma sacramenti*) being given to the senior justices of each of the Eyre circuits in 1218, but no record of what it contained.[19] *Bracton* gives us an undated version of the oath taken by a justice in Eyre. This contained a threefold promise: 'to do right justice, according to his ability, in the counties where they are to hold the Eyre, to both rich and poor', to 'keep the assize in accordance with the chapters below written' and 'to perform all duties and exercise all jurisdiction

[13] Brand, *Making of the Common Law*, p. 24.
[14] *Patent Rolls 1216–25*, pp. 206–8; *Rotuli Litterarum Clausarum*, I, 380b.
[15] Crook, *Records of the General Eyre*, pp. 5–7.
[16] *Close Rolls 1231–4*, p. 565.
[17] *Close Rolls 1231–4*, pp. 445, 570; *Close Rolls 1234–7*, p. 348; *Close Rolls 1251–3*, p. 249; *Close Rolls 1254–6*, p. 268; *Close Rolls 1256–9*, p. 47; TNA PRO, C 66/72, m. 2 and C 66/89, m. 17.
[18] As suggested by Sayles in *Select Cases in the Court of King's Bench, IV*, Selden Society, vol. 74 (London, 1957), p. xi.
[19] *Patent Rolls 1216–25*, pp. 206–8; *Rotuli Litterarum Clausarum*, I, 380b.

belonging to the king's crown'.[20] Letters relating to the appointment of three justices of the Common Bench in 1234 envisaged them taking an oath in the presence of the existing justices 'to (faithfully) attend to the king's business in the Bench' with those justices.[21] The oath may well have been more elaborate than that. We know nothing of the oath of office taken by the justices of King's Bench.

The justices of the king's courts continued in principle to exercise jurisdiction only by specific delegation from the king. The Common Bench provides the clearest and simplest case. Its justices required a written authorisation through a royal writ for any case they heard and this had to match exactly the claim that the demandant was trying to make or the complaint that he wanted remedied.[22] The same seems also to be true of King's Bench. The General Eyre is more complicated. Civil pleas business reached the Eyre in the main via three different routes. Some civil pleas at the Eyre were initiated by royal writs which required the sheriff to summon the defendant (and sometimes also the requisite jurors) to appear before the king's justices at their first session (*ad primam assisam*) when they came to the county. Other pleas had been initiated by royal writ in the county court but been removed into the Eyre by the writ *pone*. Both provided specific authorisation for the Eyre justices to hear the case. The third kind of case, however, was one pending in the Common Bench at Westminster when the Eyre was summoned. From at least 1194 onward all cases from the county were automatically adjourned into the Eyre by a general proclamation made in the Common Bench.[23] For these the sole authorisation was the relevant writ and proclamation plus the form of writ of summons for the Eyre. Criminal pleas were brought before the Eyre mainly under a single part of the instructions to the justices which ordered them to enquire from local presentment juries as to 'pleas of the crown both old and new and all which had not yet been determined before the king's justices'. There was also a specific reference to pleas of the crown in the writ of summons to the Eyre. The third element was the enquiries made under the articles of the Eyre. The

[20] *Bracton*, ed. G. E. Woodbine and tr. S.E. Thorne, 4 vols. (Cambridge: MA, 1968–77), II, p. 309.
[21] *Close Rolls 1231–4*, pp. 445, 565, 570.
[22] Hence the relatively common form of exception to any variation between writ and count. For two early examples see *Rotuli Curie Regis*, II, pp. 39, 95.
[23] *Chronica Rogeri de Hovedene*, ed. W. Stubbs, Roll Series, 4 vols. (1868–71), III, p. 262.

arrangements recorded in 1218 show that the articles (*capituli*) were handed over at the beginning of an Eyre circuit to the chief justices of each circuit.[24] The private treatise *Judicium Essoniorum* indicates that it was the chancellor who handed them over under seal in London. We have the set of enquiries from 1194 and a number of copies of subsequent sets. These show the list of questions put to the juries steadily growing over the period down to 1272.[25] What also becomes clear once we have a record of the Eyres themselves is that, although some of the questions were intended simply to produce information, many were intended to produce actionable information and it was for the Eyre justices themselves to take that action.

We now also begin to get glimpses of what justices actually did after their appointment. In civil pleas, a significant part of their time seems to have been spent on procedural matters: authorising the next stage of mesne process against absent defendants or the holding of a view of the land claimed, adjudging the essoins (excuses for absence) of litigants and the like. Once plea rolls begin to survive they commonly record the appearance of the plaintiff and then the court's judgment (*judicium*) that the local sheriff employ the next stage of process against the absent defendant. *Glanvill* suggests that the appearances in court on the three days preceding the day on which judgment was given on a default were also appearances 'before the justices'.[26] The justices were also responsible for issuing the judicial writs to local sheriffs ordering the next stage of process. In the first surviving set of judicial writs from the summer of 1199, which are all in the name of the justiciar, Geoffrey fitzPeter, who presided in the Common Bench, the attestations are in the names of either Richard of Herriard (regularly placed fourth in precedence out of six in final concords made in the court) or Simon of Pattishall (regularly placed fifth).[27] It seems likely that these two justices were individually responsible for checking that the writ written by one of the clerks associated with the court was indeed warranted by the record of the court's judgment as recorded on the plea roll. *Hengham Magna* of *c.*1260 tells us of the part played by the keeper of writs and rolls (*prenotarius*) in the receipt of essoins but also tells us that the

[24] *Patent Rolls 1216–25*, pp. 206–8.
[25] H. Cam, *Studies in the Hundred Rolls: Some aspects of thirteenth century administration*, Oxford Studies in Social and Legal History (Oxford, 1921), VI; *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C. A. F. Meekings, Wiltshire Archaeological and Natural History Society, Records Branch (Devizes, 1960), XVI, pp. 27–45.
[26] *Glanvill*, ed. G. D. G. Hall (London, 1965), I, ch. 7, pp. 5–6.
[27] *Pleas before the King or his Justices, 1198–1202, I*, ed. D. M. Stenton, Selden Society, vol. 67 (London, 1953), pp. 350–418.

judgment of essoins normally required the checking of the related writs and the stage the case had reached and that 'the justices' normally did this.[28]

Of the part played by justices in the pleading of civil cases there is little evidence before the earliest law reports which come from the later years of Henry III's reign. In a 1203 case, however, we begin to see how the justices might intervene. Osbert son of Alexander claimed two hides given as a marriage portion to his mother and then held by his parents but gaged by his father after his mother's death to the current tenant, Alan.[29] Alan denied that Alexander had gaged the land to him or that he held the land in gage. He did not deny that the land had been the marriage portion of Alexander's mother. When Alan was subsequently asked (*interrogatus*) through whom he had acquired title to the land he said it had been through his own father, Philip. That question must have come from one of the court's justices. A clearer picture of judicial activity in the course of pleading emerges from the pleading manual, *Brevia Placitata*. This was compiled probably in the later 1250s, and almost certainly reflects what was happening in courtrooms in this period, and perhaps much earlier. Some of the judicial interventions were purely formal prompts. When, for example, a defendant explained why he should not have to respond in a claim for customs and services, the justice did no more than prompt the plaintiff to respond by asking him, 'John, do you know anything to be said against what he has said?'[30] But the justice's question might do more than that by pushing the party for further clarification. In a land action the tenant had pleaded that he was not obliged to answer a claim because the claimant was 'not such a one that any inheritance ought to descend to him'. The justice then pressed him by asking, 'Who is he now? You say and we will give judgment.' The tenant then explained that the claimant was a bastard who had been born before his mother's marriage.[31] We also see here examples of what are perhaps best classified as judicial rulings. In an annual rent case the defendant pleaded a quitclaim. The plaintiff noted the deed was unsealed and therefore void and asked for judgment. The defendant said it had been handed over to third parties in lieu of sealing since the plaintiff said he did not have his seal with him. The justice did not rule directly on

[28] *Radulphi de Hengham Summae*, ed. W. H. Dunham Jr (Cambridge, 1932), pp. 15–16.
[29] *Curia Regis Rolls*, II, 240.
[30] *Brevia Placitata*, ed. G. J. Turner and T. F. T. Plucknett, Selden Society, vol 66 (London, 1951), p. 56.
[31] *Brevia Placitata*, pp. 7–8.