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CHAPTER I

HISTORICAL INTRODUCTION

I. THE COURTS

The present system of courts of law in England and Wales depends almost entirely on legislation passed during the last hundred years. Yet it is difficult to describe the present system without referring to older courts, since the functions of some of the newer courts were defined in terms of 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 half-century Parliament has entrusted judicial and quasi-judicial functions to various persons or bodies; if this process had occurred a hundred years or more ago, these tribunals would be 'ordinary' courts. To ignore these tribunals would lead to a lop-sided view of the administration of justice. There are, however, advantages in first discussing the system of 'ordinary' courts, for they are still the most important part of our system, and further because it is largely the limitation of 'ordinary' judicial process that has led to the creation of special administrative tribunals. This problem is discussed in chapter VI.

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 King's (now the Queen's) judges, the King's or Queen's courts, and H.M. prisons, just as we speak of the Royal Mail and H.M. ships of war. But if we consider the early history of our courts we find entirely different conceptions. In the Norman period the King's Court was merely one of many courts. There were old local courts surviving from Anglo-Saxon times. These were the courts of the County[1] and of the Hundred,

[1] The ancient County Court must not be confused with the present-day County Court, on which see p. 28, below.

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which was a subdivision of the County. Both County and Hundred courts had a wide jurisdiction over both civil and criminal offences. Feudal courts arose from the principle that any overlord 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 holding of courts was not thought of as being a public service. 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, and the system he devised was good enough to withstand the upheavals under John. Magna Carta was, on the whole, an attempt to safeguard the rights of the propertied classes in the kingdom, and 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 increasing business led to institutional

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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 when they are completed 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 the King held for carrying on his government. The King's Council continued to be sometimes large and sometimes small; the small council was a group of officials and advisers in more or less continuous session; the large council was convened when matters of great importance arose. The beginning of Parliament in the late thirteenth century was in essence a strengthening of advisers to the King: the small council is reinforced by the great men of the realm, and this is reinforced by representatives of the counties and boroughs, that is, the commons. During the fourteenth century the great men are only summoned when the commons are summoned—the large council becomes the House of Lords. 'The Council' from the fourteenth century onwards is the small group of advisers and officials. The judicial work had been a council activity, but gradually it had come 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 where the King was particularly concerned (such as control over inferior 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 they were staffed (by the close of the fourteenth century) by professional judges appointed by the King from the ranks of the practising barristers. 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. Domesday Book was compiled from the answers to inquiries made by itinerant commissioners. The purpose of a 'judicial visitation' and the authority for the activities of

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the commissioners was contained in the terms of the royal commission; it might be a comprehensive overhaul of the administration of a county or it might be limited to a few matters upon which the King wanted information. 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, the lesser offences being dealt with locally by the sheriff and later by justices of the peace. Virtually all criminal trials therefore took place in the county where the crime was committed. Civil litigation could be in a local court if the sum in dispute were small,[1] but all cases of importance tended to go to one of the common law courts at Westminster. Since trial was frequently by jury, and early juries were essentially neighbour witnesses, the parties to the suit and the jurymen would all have to travel to Westminster, which might be a grievous burden on them. The comparative excellence of the central courts was somewhat discounted 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 set 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 iterant justice, 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 the itinerant justices when they visited the counties had to do both criminal and civil work. This is still the position, although since 1875 the whole of a civil case (that is, the commencement and judgment as well as the hearing) takes place in the Assize town, and we talk of the 'civil side' instead of 'nisi prius'. The old language is preserved in some Assize Court buildings, where one of the court rooms bears the legend 'Crown Court' and is used for the trial of prisoners, whilst the other is labelled 'Nisi Prius Court' and is used

[1] The Statute of Gloucester 1278 provided that cases under 40*s*. should not be brought in the superior courts, but the judges interpreted this to mean that cases involving more than 40*s*. could not be brought in inferior courts.

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for civil cases. The expression 'itinerant justice' suggests that he is a professional judge: strictly speaking he was, and is, a person commissioned by the King. The hearing of civil cases at Assizes stressed the need for the itinerant to be a lawyer of adequate standing, and the practice grew up of giving such commissions to the judges of the common law courts. The Assize Court judge sits as commissioner, and not by virtue of his office as judge. This principle is useful, because judges, like other people, are apt at times to get bad colds and influenza, and there may not be enough judges to go on circuit; some eminent barrister who is named in the commission can then be asked to act as Assize Court judge.[1]

It thus appears that in the fourteenth century England had a fairly comprehensive judicial system, the Assize Courts being 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 law throughout the realm tended to be uniform.[2] This was, however, achieved at the expense of flexibility. Our thirteenth-century judges considered that they were empowered to do what justice demanded: after the early fourteenth century the judges considered that their duty was to apply the law. 'Justice' and 'Justice according to the law' are different conceptions; a man has the latter if his case has been fairly tried and the law has been accurately ascertained and applied to the facts, even if the result offends the general idea of what is 'justice'. Common law was narrow, and dominated by technicality; the merits of a case might be totally obscured by a fog of procedure. Further, 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 lead to disputes with a foreign prince, and certain kinds

[1] In recent years there has been extensive use of commissioners for dealing with divorce cases (see p. 57, below).

[2] In addition to the courts already mentioned, there were many courts with special jurisdiction. Ecclesiastical courts were the most important.

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of disorder may directly affect 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 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 himself made the decree. When this stage is reached it becomes proper to speak of the Court of Chancery. The medieval Chancellor was the general secretary of state, and he was also an ecclesiastic; his idea of justice was very different from that of the common law judges. 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', which was of course no precise guide, but 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 supplementary to that of common law.

During the sixteenth century the Council was re-organised. 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 dispute, and in 1641 the Star Chamber and allied courts were abolished; the Court of Chancery survived.

A review of the law courts under Charles II shows the old three common law courts, Assizes, and the Court of Chancery dominating the scene.[1] The common lawyers, siding with the successful parliamentarians, had got rid of serious competition from Council courts, had 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

[1] The Courts of Justices of the Peace are discussed later on p. 94.

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King's Bench benefited most by this change, and became the most important of the common law courts. The Court of Chancery was no longer attacked: it was accepted, and invaded by the common lawyers. The old idea of 'conscience' slowly suffered an eclipse. 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. Down to 1700 there are 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. For the eighteenth century there are 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, seeking 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 saw little difference between them. By the early nineteenth century a working partnership was well established. Equity was a gloss on 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.

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 co-ordination. A complete re-organisation was made by the Judicature Acts 1873–5. The courts numbered 1–12 in Table I 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 1–8 was conferred on the High Court, and the former jurisdiction of courts 9–12 was (with modifications and additions) conferred upon the Court of Appeal. The High Court was divided into five divisions and Assizes, but in 1881 three of the divisions were consolidated: the High Court now consists of the Chancery, Queen's Bench, Probate Divorce and Admiralty Divisions, and the Assize Courts.

The scheme of the Judicature Acts 1873–5 has been retained; the

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present authority is the Supreme Court of Judicature (Consolidation) Act 1925 together with subsequent amendments.

The Judicature Acts 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, and so 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. In a case of a conflict of rules, equity must prevail. The nature of common law and equitable remedies is retained. Suppose that *X* has a house on the edge of his land, with windows looking over land belonging to *Y*, and that *X* has acquired a right to light, sometimes called 'ancient lights'. If *Y* builds on his land so as to block *X*'s windows, then *Y* has infringed *X*'s rights: *X*'s remedy at common law is to sue *Y* and recover damages. The remedy in equity would be to ask the court to grant an injunction prohibiting *Y* from erecting the building, or, if the building is already erected, to command *Y* to pull it down. The court is not bound to grant an injunction. The judge will consider, among other things, whether the infringement is serious or trifling, and whether *X* has behaved reasonably; if *Y* had no reason to think that *X* had such a right, and *X* did not protest but waited until the building was completed, then the court might say that *X*'s conduct was such that he should not have an injunction. All equitable remedies are discretionary, but the discretion is exercised according to well-known principles. The common law remedy of damages is 'as of right'—if the right is infringed then damages *must* be given, but these may be very small if the plaintiff has not suffered substantially. Further, we still keep an ancient distinction between methods of enforcing a remedy. If damages awarded are not paid, the normal process is for the sheriff's officers to seize some property of the defendant, sell it, and hand the proceeds to the plaintiff. An equitable remedy is enforced by commanding the defendant to do or not do some specific act; if he disobeys the command, then he can be imprisoned for contempt of court, which means that he stays in prison until he apologises and 'purges his contempt' by being obedient. Since law and equity are now administered by all courts, an action for infringement of 'ancient lights' would normally be for damages for the past and an injunction for the future, both claims being made in the same action.

The growth and expansion of the King's Courts was doubtless an excellent thing for the building of a uniform law and standard

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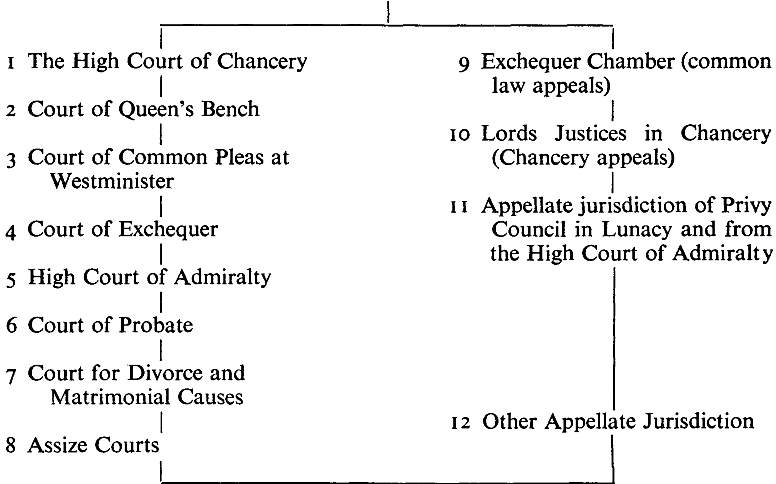
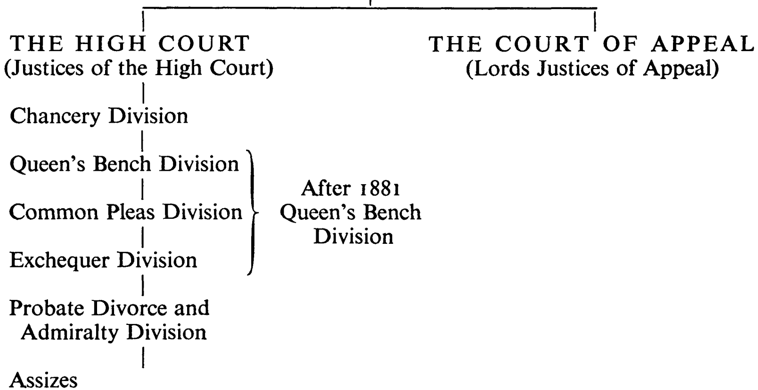
Table I. *Structure of superior courts of law*

Superior courts in the nineteenth century prior to the Judicature Act 1873



SUPREME COURT OF JUDICATURE
Judicature Acts 1873–5



HOUSE OF LORDS. Final Court of Appeal for Great Britain and (now Northern) Ireland. (Lords of Appeal in Ordinary.) Appellate Jurisdiction Act 1876.

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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 have little money. The King's Courts offered trial at Westminster, or at Assizes held at most four times a year; neither proceeding was cheap. There had in Tudor times been an attempt by the creation of a Court of Requests to deal with small cases and poor litigants, 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. 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. Several changes have been made since 1846, but the main outline has not been altered.[1] The general idea was the creation of local courts to deal with small civil cases. The title 'County Court' was singularly ill-chosen, since these courts have no connection with counties. The organisation of County Courts is explained later. The County Courts may be likened to a new industry that is in broad outline planned from its inception, whereas the rest of our courts represent an old industry that has been subjected to a 'rationalisation scheme' at the hands of Parliament.

2. 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.'[2] 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 of 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

[1] The statutory provisions are now consolidated in the County Courts Act 1959.
[2] Pollock and Maitland, *History of English Law*, I, 176.

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