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The English Legal System under Elizabeth I

I have lived through one Elizabethan age – so far – and spent part of my career time-travelling in the other. I can still dimly remember the euphoric optimism in the 1950s greeting the new Elizabethan age, and it has certainly proved as transformational a period in the nation's history as that of the first Elizabeth. Both queens have been greatly admired, and their loving subjects have seen changes beyond all imagination when they acceded to the throne. Their reigns are separated by an enormous distance of time. In theory, though, England was subject in both periods to the same common law. One does not need to be a historian to appreciate that this is the kind of theory which borders on fiction. After four centuries of evolution, the queen's courts and their proceedings look very different. But the theory does have a basis in truth. What it means is that there has been no sudden jurisprudential break, no Justinian or Napoleon, no Lenin or Mao, to disturb the legal continuity in England between the sixteenth century and the present. Elizabethan cases can still be cited, if they are relevant to some current question and have not been overruled or overtaken by later cases or statutes, though in the nature of things this is now rare.[1] Likewise, Elizabethan

[1] E.g. *Wood* v. *Ash* (1586) Godb. 112 (ownership of lambs born to leased sheep) was followed in *Tucker* v. *Farm and General Investment Trust Ltd*

statutes are still law if they have not been repealed, though most of them have been. The law actually is the same law, if we understand the word 'same' in the way that the present writer is the same John Baker as the boy of that name who was at primary school when the queen was crowned, even though there is little discernible similarity between the two entities and not one molecule remains of the earlier being. It is quite possible to be the same organically and yet to evolve and to grow, and also (eventually) to decline.

Although the common law of the two Elizabethan periods is the same law, in that sense, it has certainly grown much older. Whether that means it is more advanced or more decrepit, or just ageing gracefully, is a question which properly belongs neither with history nor with law. But perhaps the present experiment in comparative law may qualify as an approximation to the kind of enquiry which Miss Hamlyn wished to encourage. It might be objected that the sixteenth century is too remote from us to merit such attention. But we still learn and draw inspiration from the works of Shakespeare, even though the language and social context have moved on, because so much of the human experience is timeless. Tudor legal language does not usually match Shakespeare's, it is true, and it is a barrier to the uninitiated;

[1966] 2 QB 421, being the only previous English authority. For other modern citations see *Anon*. (1584) Ch. 2, n. 119; *Heydon's Case* (1584), Ch. 3, n. 17; *Rooke's Case* (1598), Ch. 3, n. 84; and *Semayne's Case* (1602), Ch. 2, n. 72. *Pinnel's Case* (1602) 5 Co. Rep. 117 is well known from textbooks on contract and has been cited in the Court of Appeal more than once in the present reign.

and yet the law which governs everyone's lives should surely be as interesting to us as war, intrigue and dynasties.

The Queen's Courts

The survey had best begin with the legal system. For the Elizabethans it was a medieval inheritance, and the concept of 'due process' – developed from Magna Carta – seemingly rendered it immune to alteration. In reality, there had been considerable alterations over the preceding century, mostly achieved by accretion or circumvention, without abolishing anything. There had long been three central common-law courts in Westminster Hall, the reason for which need not be explained here. The Common Bench (or Common Pleas) was historically the most important for civil purposes, though the King's Bench (as it was usually known) was gaining ground by offering more advantageous remedies.[2] The Exchequer was still principally a revenue court, assisted in relation to feudal revenue by the relatively new Court of Wards and Liveries. Alongside them were the Court of Chancery, no longer an extraordinary tribunal but a burgeoning court of equity; the Star Chamber, now in its heyday as an extraordinary court for civil disputes;[3] and the Court of Requests, notionally a court for poor people but increasingly concerned (like all the others) with real property.

[2] *IELH* (5th edn), pp. 48–52. King's Bench (more rarely Queen's Bench) was an informal name because in records it was 'the queen's court held before the queen herself'.

[3] I.e. civil in substance. In principle, 'every suit in the Star Chamber is for the queen': *Drywood* v. *Appleton* (1600) 5 Co. Rep. 48 (tr.).

There were no appeals in the modern sense, but the King's Bench could reverse Common Pleas judgments for errors on the face of the record, and after 1585 it was possible for King's Bench judgments to be similarly reviewed in a statutory Court of Exchequer Chamber.[4]

Counting cases in any of these courts is problematic for technical reasons, but in 1558 there were probably at least 10,000 cases commenced each year in the two benches alone, rising to around 20,000 by the end of the reign.[5] That is more than the figure for the Queen's Bench Division today. The number of Chancery cases was considerably smaller than the figure for the Chancery Division today,[6] though the present jurisdiction is too different from that of the Elizabethan Court of Chancery to be meaningfully compared.[7] However, there

[4] 27 Eliz. I, c. 8; first proposed in 1581: *Proc. Parl.*, i. 532. It had nothing to do with the Court of Exchequer but met in the conveniently large chamber. Exchequer judgments could be reversed in what a medieval statute called the Council Chamber (also, de facto, the Exchequer Chamber).

[5] Brooks, *Pettyfoggers and Vipers*, p. 51 (cf. *Lawyers, Litigation and English Society since 1450* (1998), p. 11), calculated that there were 13,300 cases 'in advanced stages' in the two benches in 1580, and 23,453 in 1606. Yet it was stated by a contemporary that 13,500 writs were issued in 1569, and almost twice that number by 1584: ibid. 76, 304; BL MS. Lansdowne 47, fo. 122. These figures are difficult to reconcile, because very few cases reached 'advanced stages' and many were commenced without writ.

[6] W. J. Jones, *The Elizabethan Court of Chancery* (Oxford, 1969), p. 304 n. 1, estimated that around 1,600 cases were commenced annually in 1600. In 2014 around 24,000 cases were commenced in the Chancery Division: Royal Courts of Justice Tables, published online by the Ministry of Justice.

[7] The majority of cases in the Chancery Division now are either in the Companies List (over 20,000 in 2008; just over 9,000 in 2014) or in the

was no County Court then, as we know it. Since actions for as little as 40s. – equivalent to between £300 and £1,000 today[8] – went to Westminster Hall, a true comparison would have to include today's County Court. Over one and a half million suits are commenced in the County Court every year,[9] seventy times the 1600 figure, whereas the population is only seventeen times the size. On the other hand, there is an unknown but enormous figure for the number of small claims which went to the myriad local jurisdictions, such as borough courts, manorial courts and ancient county courts, which still flourished in the Tudor period. Then, as now, only a tiny proportion in any court proceeded as far as a trial,[10] the great majority being merely uncontested steps in the process of debt collection. Even allowing for that, what must strike us as remarkable today is that all the trials and legal arguments in

Insolvency List (nearly 19,000 in 2008; around 7,000 in 2014). The peak in 2008 reflected the financial crisis. Another large part of today's business concerns intellectual property.

[8] The Currency Converter 1270–2017 on the National Archives website suggests that £1 in 1560 ≡ £233 today, while £1 in 1600 ≡ £138. The Bank of England Inflation Calculator suggests that £1 in 1560 ≡ £502 today, while £1 in 1600 ≡ £300. Halfway between these two, MeasuringWorth.com gives the corresponding figures as £355 and £219.

[9] The figure for 2015–16: *Briggs Report* (2016), p. 172. Only 50,638 resulted in hearings. In 2014 the county courts (created in 1846) were merged into a single County Court. It has nothing to do with counties. And its judges, now called circuit judges, do not go on circuit.

[10] Modern statistics fluctuate wildly. Between 1960 and 1990 the number of trials in the Queen's Bench Division fell from around 3,000 to nearer 500, representing 0.5% of suits commenced: Genn, *Judging Civil Justice*, pp. 33–5. In the County Court the proportion is only 0.03%: previous note. Figures for Elizabethan trials have not yet been ascertained.

common-law cases commenced in the central courts were dealt with by a mere ten to twelve judges, who also despatched all the most serious criminal cases at the assizes and the Old Bailey. Only forty judges were appointed during the entire reign. With three exceptions, they served till death, since there were no regular pension arrangements.[11] We now have over a hundred judges of the High Court at any one time, and over a thousand sitting in the County Court.

The courts in Westminster Hall sat for only around 100 days a year. Another fifty to sixty days were spent by the judges travelling on assize, a burdensome role which could leave them out of pocket.[12] The judges on circuit not only delivered the gaols but also conducted jury trials in civil cases begun in the two benches. Hardly any cases were tried in Westminster Hall, where the full courts sat. The usual procedure was to try issues of fact in the county where the cause of action arose, by a jury drawn from that county.[13] This system was crucial to the administration of justice, since it enabled cases to be tried within ready reach of the parties, witnesses

[11] Only one, John Clench, retired with a pension. By 1602, aged sixty-seven, he was so decrepit that he was unable to venture out of Suffolk: Yale Law School MS. G.R29.15, fo. 31. John Southcote was discharged in 1584, aged around seventy-four; he died in 1585. For Robert Monson's dismissal in 1580 see Ch. 5, n. 22.

[12] The allowance given to each pair of judges for 'the diets and charges of themselves, their assistants, servants and horses' ranged from £5. 14s. to £7. 2s. 8d. *per diem*: BL MS. Lansdowne 53, fo. 198 (1587); MS. Lansdowne 78, fo. 93 (1595). Catlin CJ complained in 1574 to Lord Burghley that this was insufficient: BL MS. Harley 6991, fo. 78.

[13] London cases were tried at the Guildhall, since there were no assizes in London.

and jurors. And it was relatively inexpensive to manage. There were no dedicated court buildings. The judges would sit in the castle or town hall, if there was one, or sometimes in a ramshackle court set up in the open air. Any inconveniences of the latter were offset by its being more salubrious than a packed courtroom with the ever-present risk of gaol-fever.[14] Trials were short, and there was no question of adjourning a hearing overnight. It would not have been possible to complete the circuit if trials had lasted more than half an hour on average. Even so, it was common to sit beyond sunset in order to get through the calendar.[15] The parties themselves were not allowed to give evidence, and the number of witnesses in most cases must have been small. Although counsel were allowed to conduct civil trials, direct evidence for the extent of their involvement in routine cases is sparse. There was enough work for Edward Coke at the height of his fame as a barrister to earn £80 at a single assizes, but he was exceptional;[16] indeed, he will feature prominently throughout this book.[17] Counsel seem not to have received trial briefs

[14] At Oxford's 'Black Assize' in 1577 both judges (Bell CB and Serjeant Barham) and hundreds of others died; at Exeter in 1586 Flowerdew B and eight JPs died; and in 1598 Beaumont J and Serjeant Drew both died of gaol fever caught on the Northern circuit.

[15] *Withers* v. *Drewe* (1599) Co. Nbk, BL MS. Harley 6686B, fo. 347 (tr.: 'the justices of assize are used to sit after the setting of the sun'). There was similar pressure at the Old Bailey. Serjeant Fleetwood reported that on 2 July 1585 he sat there from 7 a.m. to 7 p.m.: BL MS. Lansdowne 44, fo. 113.

[16] Holkham Hall 8014, endpaper (1587).

[17] Edward Coke (1552–1634), 'famous utter-barrister of the Inner Temple' (BL MS. Add. 25196, fo. 121v, tr.), was de facto leader of the Bar by the mid-1580s;

from attorneys at this date, since they were expected to draw briefs themselves from oral instructions.[18] There were no piles of lever-arch files, storage boxes or bulging trial bundles. If documents were put in evidence, they were likely to be single records, deeds or letters patent; and if anything turned on their wording, they could be copied into a special verdict and discussed later. In what must have been a longer than average trial at Nottingham assizes in 1584, the evidence consisted of court rolls, an exemplified verdict, a Chancery exemplification, a deed of conveyance, and eight witnesses, some of whom had apparently deposed written evidence upon interrogatories in the Star Chamber.[19] The common-law courts did not themselves take depositions or order the disclosure of private documents.

Although the Chancery could be asked to compel the production of title-deeds for use in a court of law, a suit for discovery was not aimed at producing heaps of documents. The Chancery was, nevertheless, foremost in the network of parallel jurisdictions which, while serving justifiable purposes in principle, caused much delay and harassment in practice. An action at law was very often met by suits in the Chancery and the Star Chamber, either seeking equitable relief or attempting to impeach the evidence; there might be parallel actions or cross-actions in the other two courts of common

in 1592 he became Sol.-Gen. and in 1594 Att.-Gen., being knighted by James I in 1603; he was CJCP 1606–13 and CJKB 1613–16, when he was dismissed.

[18] This remained so as late as 1640: Baker, *Collected Papers*, i. 65.

[19] Nottinghamshire Archives, DD/4P/79/8: 'A breviate for Howley More [Holymoor]'. This brief, a disorganised aide-memoire, was seemingly written by one of the parties.

law, or even in the same court; and after judgment there might be further actions involving other parts of the same property, or different parties (such as lessees or servants), with essentially the same issue. This was seen as a grievance, but it was difficult to see how to stop it. In 1599 Egerton LK cited an old precedent of punishment by the Star Chamber for suing in two forums, saying that it would be a good practice to follow; but there is no evidence that this happened.[20] One case concerning a disputed title was said to have been before all six courts at Westminster between 1556 and 1585, when it was still litigious.[21]

Legal Argument and Decision-Making

An important feature of the assize system was that in a civil case the trial judge did not give judgment, since he was merely a commissioner to take the verdict and return it to the court where the case began. The court of first instance, whether of King's Bench, Common Pleas or Exchequer, was not (as now) the single trial judge but a bench of three or four judges sitting 'in banc' in Westminster Hall.[22] This central court was fully

[20] BL MS. Add. 35947, fo. 179, referring to *Swadell's Case* (1506). For Egerton's transcript of the case see 75 Selden Soc. 45.

[21] Burghley Papers, BL MS. Lansdowne 44, fo. 44. The case concerned the queen's title to St Lawrence's Hospital, Canterbury, which had been bought by Serjeant Lovelace but was claimed to be 'concealed land'.

[22] Nevertheless, the reports sometimes mention judges' absences in the Chancery or Star Chamber, or on grounds of illness. It was not unknown for a single judge to sit in banc: e.g. CUL MS. Ff.2.14, fo. 23 (Gawdy J, 1598); BL MS. Add. 25203, fo. 409 (Fenner J, 1601). But it was then usual to adjourn for further argument.

insulated from the fact-finding process at the assizes. The parchment memory on which it relied deliberately excluded the evidence, since that was for the jury alone to assess. Unless a point of law could be taken on the Latin words entered on the roll, judgment followed automatically from the verdict. There was no need in routine cases for the judges to give reasons for such judgments, since they had no decision to make.

In medieval times most legal argument had taken place in banc before trial, in the course of framing the question to be tried in the country; once that had been done, the die was cast and it was all up to the laymen. But it had become usual by the second half of the sixteenth century for the trial to take place first, upon pleadings drawn up in writing out of court, and for any point of law arising from the facts to be argued after the trial. This was effected by a motion in arrest of judgment, which was an attempt to persuade the court in banc that judgment should not be entered despite a verdict for the plaintiff. Usually it had to be founded on the facts as summarised in the enrolled pleadings, fictions and all; but the Elizabethan judges facilitated the procedure by allowing parties to settle a 'special' verdict, so that detailed agreed facts could be placed on the record.[23] The result of all this was that legal argument now usually focused on facts which had already been established, instead of hypothetical propositions considered before trial. Even so, it was still constrained by the Latin formulae required for starting actions, defining the

[23] This had once been permissible only in special cases, but there were no restrictions by 1586: *OHLE*, vi. 400–3; *IELH* (5th edn), p. 91 n. 71.