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EXAMINATION NOTE BOOK

ENGLISH LEGAL SYSTEM

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FOREWORD

This little book is intended as a friend to the student in that last hectic hour before his examination.

ENGLISH LEGAL SYSTEM

INTRODUCTORY

English Law and Legal History

The English legal system is the product of more than a thousand years of English history. It has roots in Anglo-Saxon times, for William I, after the Conquest, declared that whenever no new law applied the ancient laws and customs of the people should be observed.

An understanding of the principles of English law and much of its language involves a study of English legal history from which it will be seen that English law is an indigenous product which owes little to the only other great system of jurisprudence—Roman Law.

Modern Sources of English Law

The sources of English law at the present day are:

1. *Acts of Parliament* (often called statutes).
2. *Statutory Rules and Orders* and (since 1948) *Statutory Instruments* made by the Queen in Council (Orders in Council) or by Government Departments in exercise of the prerogative powers of the Crown or powers conferred by statute.
3. *Judicial decisions.* In accordance with the principles of judicial precedent and *stare decisis* the decisions of a court are binding on all courts

inferior to it. The decisions of the House of Lords are binding on itself.

The decisions of the Judicial Committee of the Privy Council are of great persuasive authority but do not bind other courts.

Only the "*ratio decidendi*" is binding; *obiter dicta* are of persuasive force only.

The interpretation of statutes is a matter for the courts. They are assisted by (i) the INTERPRETATION ACT, 1889, (ii) interpretation clauses in statutes, (iii) rules of judicial interpretation which have been evolved in accordance with judicial precedent.

The decisions of the judges are ascertained from law reports. Since 1866 *The Law Reports* have been published by the Incorporated Council of Law Reporting and the judgments are revised by the judges. But any report authenticated by a barrister may be cited.

4. *Custom*: (i) in so far as it is embodied in the common law, (ii) the custom of merchants embodied in the law merchant now partly codified by statute (*e.g.*, BILLS OF EXCHANGE ACT, 1882) and absorbed into the common law, (iii) local custom when judicially established and found to be reasonable, and (iv) trade usages when proved.

5. *Textbooks*. Early treatises on law, *e.g.*, Coke's *Commentaries on Littleton*, are often accepted as stating the law as it was when they were written. Modern textbooks, *e.g.*, Winfield's *Textbook of the Law of Tort*, are sometimes quoted by counsel and judges as being accurate statements of law and are always of persuasive value.

6. *Practice rules.* The settled practice of conveyancers is treated with respect. So, also, is the practice of the courts as stated in the "White Book."
7. *Sources of administrative law* are growing apace: *e.g.*, decisions of the Minister of Housing and Local Government, and of the National Insurance Commissioners, Departmental Circulars and Explanatory Memoranda.

Divisions of English Law

Historically, English law is divided into Common Law—the system administered by the Courts of King's Bench, Exchequer and Common Pleas—and Equity—the system evolved by the Chancellors and the Court of Chancery to supplement and aid the Common Law. Since 1876 the two systems have been administered by the same courts.

The Common Law is divisible into:

Tort.
Contract.
Criminal Law.
Law of Property.

Tort

A tort is a civil wrong giving rise to a common law action for unliquidated damages, and not being merely the breach of an agreement.

The object of the law of tort is to define the circumstances in which a person can recover damages for a wrong done to him. It is to be distinguished from criminal law, the object of which is to define the circumstances in which a wrongdoer can be punished

for the crimes which he has committed. ("The object of the law of tort is to give the plaintiff his deserts: the object of the criminal law is to give the prisoner *his* deserts.") The same act can be a tort and a crime, *e.g.*, an assault.

The modern law of tort is mainly a development of the writ of Trespass, which alleged an injury *vi et armis contra pacem domini regis*, and the writ of Trespass on the Case (commonly called Case), which did not allege force of arms but set out in detail the facts of the case giving rise to the injury. Trespass provided a remedy for forcible and direct injury to the person, land or goods. Case provided a remedy where the injury was consequential or indirect. Case developed in time so as to give a remedy for defamation, fraud, conversion, negligence, nuisance, and the escape of dangerous things from land.

Other remedies for tort include: Replevin, Detinue, Deceit and Conspiracy.

Contract

The common law at first provided no direct remedy for breach of an agreement. Inadequate remedies were Debt (to recover a liquidated sum), Detinue (to recover chattels), Covenant (to recover unliquidated damages for breach of covenant under seal) and Account (for recovery of goods and money). These were superseded by a development of Case (*supra*) which came to be called Assumpsit. This applied first to misfeasance (carrying out an undertaking badly), then to malfeasance (doing wrong in the course of carrying out an undertaking), lastly (in 1505) to non-feasance (failure to carry out an undertaking).

In the early common law there was no remedy unless an appropriate form of action was available (*ubi remedium ibi jus*). The forms of action were abolished by the COMMON LAW PROCEDURE ACT, 1852, and today a plaintiff has only to set out the material facts of his case and the court will decide if he has a cause of action (*ubi jus ibi remedium*).

Criminal Law

Crimes are (1) indictable and triable by a jury, or (2) non-indictable and triable summarily by justices of the peace (magistrates).

Indictable offences are (1) treason, (2) felonies, *e.g.*, murder, or (3) misdemeanours, *e.g.*, common assault.

Except in certain statutory offences, to constitute a crime there must be *mens rea* (a guilty mind).

Attempts to commit crimes are punishable even if it is impossible to complete the crime.

Excuses for criminal acts are Coercion, Necessity, Mistake, Infancy, Insanity and Drunkenness. Persons exempt are the Queen, foreign sovereigns and ambassadors.

Property Law

Property in English law is divisible into Real Property and Personal Property.

Real property consists of freehold estates in land.

Personal property comprises chattels, interests in land less than freehold, *e.g.*, leaseholds, and all other property which is not real property.

Freehold estates or interests in land are the fee simple, the fee tail (or entailed interest) and life interests. Estates less than freehold are leases for a

term of years or from year to year, or tenancies at will or at sufferance.

The fee simple is the largest interest in land in English law. It originated in the feudal system of tenure, as established in England by the Conquest. Tenures were either (1) free tenures (a) by knight service, (b) frankalmoign, (c) serjeanty, or (d) free socage, or (2) unfree tenures (a) copyhold, (b) customary freehold (holding by copy of court roll according to the custom of a manor). The LAW OF PROPERTY ACT, 1922, abolished (from January 1, 1936) all tenures except free socage.

Under the LAW OF PROPERTY ACT, 1925, the only legal estates in land are (1) the fee simple absolute in possession, (2) the term of years absolute. Certain interests, *e.g.*, easements and rentcharges, may exist as legal interests. All other interests in land are equitable.

Equity

In English law Equity is the system of law which began when the early ecclesiastical Chancellors heard petitions to the King in cases where the Common Law gave no adequate remedy. The Chancellor acted *in personam* by imprisoning the wrongdoer until he purged his conscience by doing what he should. This developed into a system by which rights could be enforced which the Common Law did not recognise, *e.g.*, trusts; and remedies could be obtained which the Common Law courts did not give, *e.g.*, injunction, specific performance and discovery of documents. Equity later became very slow and expensive. It was reformed in the nineteenth century and now the same courts administer both Common Law and Equity.

THE JUDICIAL SYSTEM

The House of Lords

The House of Lords is the final court of appeal in civil matters from the (English) Court of Appeal, the (Scottish) Court of Session, and the Court of Appeal of Northern Ireland. It hears appeals from the Court of Criminal Appeal only when the Attorney-General gives his *fiat* that the decision involves a point of law of exceptional public importance.

The Supreme Court of Judicature

This consists of—

(1) the Court of Appeal;

(2) the High Court.

The Court of Appeal hears appeals from the High Court (except in criminal matters) and the county courts.

The High Court consists of—

(a) the Chancery Division;

(b) the Queen's Bench Division;

(c) the Probate, Divorce and Admiralty Division.

The High Court has civil and criminal jurisdiction. Its criminal jurisdiction is exercised on assizes and at the Central Criminal Court (the Old Bailey), which is the permanent assize court for Middlesex and London.

The High Court, sitting as a "Divisional Court" has appellate jurisdiction from magistrates' courts (Petty Sessions and Quarter Sessions) on points of law stated by the magistrates ("case stated"). And the High Court can review and quash any proceedings of Petty Sessions or Quarter Sessions by an order of certiorari.

NOTE. The judges of the Queen's Bench tour England on circuits, holding assizes, at which they clear up all the civil and criminal cases awaiting hearing.

The County Courts

The County Courts have jurisdiction in civil matters only. Their jurisdiction in contract or tort is limited to claims not exceeding £200. The parties may agree to give the court jurisdiction whatever the amount. They have jurisdiction by statute in many special matters, the most important of which are claims under the Rent Restriction Acts.

The Court of Criminal Appeal

This court was created by the CRIMINAL APPEAL ACT, 1907. It hears appeals in criminal matters from (1) judges of the High Court on assizes (including the Central Criminal Court); (2) Quarter Sessions. The judges of the court are the Lord Chief Justice and all the judges of the Queen's Bench Division.

(NOTE.—There is (very recently) a Courts-Martial Appeal Court.)

Quarter Sessions

In counties this consists of the justices of the peace; in boroughs, the Recorder of the borough is the judge.

Quarter sessions have original jurisdiction in criminal matters except the most serious felonies. They also hear appeals from petty sessions.

Petty Sessions

This consists of (lay) justices of the peace (advised on law by their clerk); in large towns or cities a

(lawyer) stipendiary magistrate holds the court; in London the magistrate is called a metropolitan police magistrate.

Petty Sessions investigate the more serious crimes, and if there is a prima facie case send them for trial at Quarter Sessions or Assizes. They try all offences triable summarily and have jurisdiction to make orders of affiliation, maintenance and separation. Juvenile offenders are tried before suitably qualified justices in Juvenile Courts.

Arbitrators

Instead of proceeding to law the parties may agree to appoint an arbitrator to adjudicate on their dispute. Resort to arbitration is most common in mercantile matters where a merchant familiar with the usage of the trade is appointed arbitrator. The procedure is regulated by the ARBITRATION ACT, 1950.

The High Court will not interfere with the award of an arbitrator unless there is an error of law on the face of the award. An arbitrator may state a question of law for the opinion of the High Court.

LEGAL HISTORY

A. Pre-Norman Law

1. *Law* lacked uniformity: there was no "Common Law." What there was was local and customary, Danelaw, Mercian law, Wessex law—uncodified until Henry I began this work. It was mainly Teutonic in principle, with Scandinavian and Norman elements. Its chief function was to ensure peace and good order.

2. *Courts* were those of the Hundred (meeting every four weeks) and Shire (twice a year). No process to compel attendance; no police system; no professional help. Some courts were in private hands in virtue of rights of *sac* (= power to hold a court) and *soc* (= rights to profits therefrom).
3. *Procedure*: Court first decided how and by whom proof of guilt or otherwise was to be established.

   In civil and criminal cases compurgation (*i.e.*, oath-helpers) was normal—in the former either alone or with helpers; in the latter the accused had to be held "oath-worthy" or (if he had no helpers) he went to the ordeal. Compurgation grew from either blood relationship or kinsmen, or from associations like the Tithing or voluntary guilds; there was no method of trying "intent."
4. *Witan*: This royal council of the great and wise seems to have acted both as an advisory and confirmatory body and as a kind of appeal court when dissatisfied with local courts' decisions or if justice was denied or delayed.

Generally, the immediate pre-Norman period was one of change from Caste to Contract, when capacity for office was replacing precedence by birth.

B. The Norman Conquest

William I was not a law-maker; his work lay in matters of police and administration; he brought Continental feudalism "with the fangs drawn." His type of feudalism depended not only on the theory that the King owned all the land (the Domesday Inquest and Book reinforced this claim) but that *all* land-holders (tenants) owed fealty and

homage to him (hence the Oath of Sarum, 1086). He built a feudal pyramid of land-holders, "territorialised" public office, made suit of court compulsory on tenants and subtenants, centralised control of justice and general administration, and, in effect, made England a well-behaved, closely administered piece of private property. He declared for the laws which prevailed under Edward the Confessor but granted the Church her separate courts over clerics and laymen in matters which pertained to the "government of souls."

The law courts were either Royal, Feudal, or Manorial. The Royal Court of Justice was one aspect of the *Curia Regis* in which the King did justice to tenants-in-chief who were compelled to attend; the Feudal Courts of the Barons passed on this principle to the minor tenants; Manorial Courts concerned themselves chiefly with internal economic matters. The pre-Conquest courts of Shire and Hundred became the places wherein the sheriff, as King's financial and military representative, gradually extended his power until replaced by the royal itinerant justices.

The Normans introduced two novel features into the administration of justice, (1) Trial by Combat, which was never forced upon the English, and (2) the Inquest, which compelled a man to speak upon oath—employed in the compilation of Domesday Book and thereafter gradually in the courts.

C. Post-Conquest Century (1066–1154)

This was a period of "tidying-up," regularising, and incipient reforms. The courts were reformed and strengthened in part, but types that were weak tended to disappear.

1. *The Curia Regis*, the chief royal court, took the form of either an assembly of the great men at wide and irregular intervals (probably the Great Council), or a small body of royal friends and highly capable servants for administrative and legal purposes.
2. *Exchequer* became a separate department of the *Curia Regis* in the reign of Henry I and dealt with disputes about the collection of revenue.
3. *County Court*, the Shire Court of Saxon times, was the maid-of-all-work in legal administration. Bishop and earl disappeared; sheriff became chief executive official. Suitors declared the law and he operated it. He received royal writs, and exercised jurisdiction in crime, tort and debt, as well as in "real" actions if feudal court in default. This court alone could outlaw a person. The court was administrative power in shire. Met twice a year for great matters, with, from thirteenth century, 10 other minor, monthly meetings.
4. *Burghmote* = Shire Court, in a borough having municipal privileges.
5. *Hundred Court* (or Wapentake Court in N.E. England), met monthly until 1234; thenafter, every three weeks. Tried, chiefly, personal actions. President was bailiff, the sheriff's representative. Twice a year sheriff presided in person for "view of frankpledge" (sheriff's "Tourn"). Court dealt with minor matters summarily; sheriff held culprits on major charges till visit of royal justices.
6. *Manorial Courts* were (a) Court Baron, for problems of freehold tenants, and (b) Customary

Court for problems of villeins. By special royal grant a Court Leet with criminal jurisdiction could be held.

7. *Forest Courts* administered the Forest Law in those areas known as Forests (Latin, *Foras* = "out of"; Forests were taken "out of" the jurisdiction of the Common Law). By mid-thirteenth century there were two Justices of the Forests and under them a Warden for each forest, with verderers, foresters, regarders, agisters, as minor officers. Every six weeks the court of the forest bailiwick met and dealt with offences against the *vert*; court of verderers and foresters dealt with offences against *venison*. Court of Forest Eyre met at intervals of seven years. These courts were royal courts.

8. *Ecclesiastical Courts* were outside the feudal scheme and the King was concerned (as in the CONSTITUTIONS OF CLARENDON, 1164) merely to limit their powers of jurisdiction to spiritual matters; the struggle to achieve this was long and bitter.

D. Century of Progress (1154–1272)

This is the period of Henry II, Glanvil, MAGNA CARTA and Bracton; the law became "common" through the writ system and the justices on circuit. Royal justice absorbed local courts, for it offered remedies which were swift, certain, and, roughly, just. It took over from local courts jurisdiction in cases of "treason, homicide, arson, robbery, rape, forgery, and suchlike": petty courts were limited to petty offences.

1. *The Writ System.* This grew out of the Continental royal "Ban," which developed into a royal Boon. It was a command in writing from the King (later, too, from royal judges) to sheriff or baron ordering something to be done forthwith or, in default thereof, the matter would be dealt with by sheriff or judge. "The writ did not institute litigation; this followed on neglect of it" (Maitland). Disobedience to writ was contempt of a royal command. From the time of Henry II the King, by his writ, took cases out of the Lord's or the Manorial Court, especially by the writ *Praecipe*, forbidden by MAGNA CARTA, but revived 1276. Henry II enacted that no man should answer for his freehold except by royal writ; and a lord could empower his tenant to sue out this Writ of Right in the King's court, or could adjourn a difficult case to the King's court. In any case, where an act was alleged to be "against our peace," it had to go to a royal court.

Henry II introduced the Grand Assize as an alternative to trial by battle where the proprietorship of freehold was in question. The process began with the issue of a Writ of Right and the respondent would "put himself on the Grand Assize." Four knights of the shire were selected to choose 12 more, and these 16 decided the problem of which claimant had the better title. If they disagreed, they were "afforced" by extra members until 12 did agree. This process did not actually disappear until 1833.

In addition, there were Petty Assizes of 12

"lawful men" who decided problems of possession under such titles as—

(a) Novel Disseisin—dispossession.
(b) Mort d'ancestor—heir dispossessed.
(c) Darrein Presentment—over advowsons, or rights to "present" a parson to a parish.
(d) Utrum—to decide "whether" land was held on free or spiritual tenure.

By the writs *Tolt*, *Justicies* and *Pone* cases could be removed from the Lord's to the Shire Court and thence to the King's court.

2. *System of Itinerant Justices.* The royal writ primarily removed a case to Westminster, but this inconvenience was gradually overcome by the method of sending royal justices on tour in the provinces to meet the suitors in the Shire Courts. There they dealt with those crimes and suits over which the King intended to have control. Behind it all was no abstract conception of justice, but the royal desire to obtain the income which judicial fines ensured for the Exchequer. Henry I began the itinerant justice system; he did not desire to kill the Shire Court, but to keep it to its proper local work. Henry II organised six circuits of three judges each, but later chose two clerics and three laymen to form a stationary central court—from which there was a right of "appeal" to the King and his Council. He divided the land into four circuits. These itinerant judges were not necessarily lawyers; the central judges were. From these—and from the Council—grew a sub-divided set of courts—Exchequer, King's Bench, Common Pleas; MAGNA CARTA insisted that the Common Pleas

should sit in a fixed place, later, Westminster; and the circuit judges were gradually drawn from the lawyers of the Curia Regis.

E. Common Law Courts

From the time of the Norman Conquest the core and essence of the administration of justice has been the King. For several centuries the King actually presided over his own courts; we find Edward I and Edward II both carrying out this duty; and Coke had great difficulty in the seventeenth century in restraining James I from doing the same thing. Kings were not always a success, however, in the role of judge, and Henry II, in one case, when called on for his decision, was compelled to retort, "*Deus novit*; *nos autem ignoramus*" (God knows; I don't). From the fourteenth century, however, kings left this work to their professional judges in the common law and in the Conciliar Courts. There was keen rivalry between these sets of tribunals, and the Common Law Courts often had the support of Parliament in their fierce opposition to the other type; and it was the Long Parliament which, in 1641, all but abolished the hated relics of the King's prerogative. The rivalry, too, may have been partly due to the fact that the judges' salaries were, right into the nineteenth century, dependent upon fees extracted from the litigants: "*justitia magnum emolumentum est*" (doing justice carries great rewards), was a principle that survived for nearly seven centuries.

The development of the three great courts from the Curia Regis saw the line of Justiciars end, and from 1268 there were Chief Justices of King's Bench and Common Pleas. The former court accompanied the

King on his journeys. Its duty was to punish all crimes amounting to a breach of the peace; it had, as it was technically sitting *coram rege ipso* (in the presence of the King himself), appellate jurisdiction over inferior courts, and over Common Pleas on "error." The Chief Justice and three *puisne* judges formed the court; writs were returnable to it "before the King" and not at Westminster; and it gradually extended its authority by "fictions," using the writ of *Latitat* (he lurks). It could also control inferior courts by means of the prerogative writs, *Mandamus*, *Prohibition* and *Certiorari*. The Court of Exchequer also used the "fiction" (*Quominus*) that plaintiff had to sue defendant because the latter's indebtedness to him prevented him paying debts due to the Crown. As the Common Pleas dealt with disputes between subjects, the latter began about 1300 to appear by attorney. The three courts vied with each other to obtain litigation, for the judges' income was dependent upon fines, amercements and fees extracted from the litigants. Until the ACT OF SETTLEMENT, 1701, the judges were the King's judges, dismissible by royal caprice.

F. Jury System

The jury system grew out of the Frankish "*Inquisitio*," a method of obtaining information upon oath used by the Conqueror's agents in compiling the Domesday Book. Henry II developed it for obtaining information in land disputes through his Grand and Petty Assizes. He first utilised it in criminal matters when the ASSIZES OF CLARENDON (1166) and NORTHAMPTON (1176) ordered a jury to present notable crimes and criminals to the circuit judge; this

was the first form of Grand Jury, not abolished until 1934. Trial by Ordeal came to an end after the Lateran Council, 1215, forbade clerics to share in the ceremony. Thus a trial jury became necessary, and the presenting jury seems to have done this until it was forbidden in 1351. Thereafter the Petty Jury becomes distinctive—the accused is tried *per pais*, he puts himself "on the country." But he could not be compelled to accept this method, so a legal form of torture, *peine forte et dure*, was introduced to compel him to plead. The jury did not give a decision on evidence adduced, but on their own knowledge or on hearsay. About 1460 evidence began to be taken from witnesses, but the accused was not allowed to call witnesses for the defence until 1702. From 1708 he was supplied with a list of prosecutor's witnesses and of the jury, and from 1758 counsel was permitted to address the jury on his behalf. Until *Bushell's Case* (1670), it was deemed lawful to punish a jury who chose to give a finding contrary to the evidence or to the direction of the judge.

G. Edward I (1272–1307)

This King's reign was unequalled for legislation until that of William IV (1830–1837); and he made those changes in judicial institutions and the administration of justice which lasted, in the main, until 1875. From his reign begins the series of Year Books; in his reign the Curia really took on its fissiparous character; and the judicial side became distinct from the advisory and executive side—the Council proper, with which elected members from the communities of Shire, City and Borough combined to form Parliament. The Council developed into a House of Lords

in legislative matters and appellate jurisdiction, but still retained royal powers of judicature as seen in Chancery, Star Chamber and Court of Requests. But the unity was still emphasised by the fact that a meeting of the Council was, for centuries, "the core and essence of Parliament"; and the Parliament Roll was originally a Roll of the King in Council in Parliament; later, this was kept by Parliament alone; and one of the allegations against the Star Chamber in the Act which abolished it in 1641, was that it kept no Rolls. Edward's Parliaments did much beside legislation; they did judicial work, and received petitions which were so numerous that Receivers of Petitions sorted them into groups for the Chancery, Exchequer, Estates, King and Council; committees were appointed to deal with these; and, it should be noted, they were presented *at* a Parliament and not *to* a Parliament, which was an act rather than a body of people.

H. Edward's Legislation

His reign has been compared with that of Justinian —"like comparing childhood with second childhood," says Maitland; and his legislation was largely a consolidation of that of Henry II. Chief enactments were:—

1275. Statute of Westminster I.

1278. Statute of Gloucester (Jurisdiction of Courts).

1285. Statute of Westminster II (*De Donis; In Consimili Casu; Nisi Prius*).

1290. Statute of Westminster III (*Quia Emptores*).

By means of the *Quo Warrantis* inquiry he checked the development of feudal jurisdiction.

I. High Court of Parliament

In feudal theory all tenants-in-chief were peers of the King's court, but these gradually divided into major and minor sections; the former grew gradually into the Council, who are mentioned in MAGNA CARTA as an element in the taxing body of the realm; and these magnates with the permanent servants of King and Council formed the Great Council on which Parliament was based. When the advisory Council broke off from the larger body, the appellate jurisdiction of the Great Council remained with the House of Lords in matters of common law; Chancery appeals were added in 1621. The Lords ceased to be a general court of first instance after *Skinner* v. *E. India Co.* (1666); but still decides matters of peerage on reference from the Crown. The Lords, as a Court of Appeal, consisted at first of lords nominated by the Crown plus certain judges; later the nomination was by the House itself; from 1834 only professional peers sat; and the APPELLATE JURISDICTION ACT, 1876, nominated the personnel of the court. The Commons claim no rights of judicature except in purely domestic matters affecting themselves as a House.

The residuary royal justice, civil and criminal, began to be administered by the King in Council or by the Council, often in reply to petitions for justice; and a cleavage into distinct courts is seen as early as the end of the fourteenth century. Three further courts developed (all conciliar, non-jury courts).

J. Star Chamber

This was formed gradually. It was a full and ordinary meeting of the Council, at first in an appellate

capacity, in civil cases; it later gained criminal jurisdiction over offences not covered by the common law. It was refounded statutorily in 1487 and its constitution and powers enumerated—to deal with "maintenance and giving of licences, signs and tokens, unlawful assemblies and great riots"; later were added forgery, perjury and libel. The Tudor Kings used it to break the power of the "over-mighty subject." Its methods were inquisitorial, secret and heavy-handed: its punishments were often crushing but it could not inflict the death penalty. Under the Stuarts it became oppressive in enforcing the royal will; it used spies extensively; it punished political offenders savagely; it imprisoned juries for giving unacceptable verdicts; and it inflicted heavy sentences on the "Libellers," notably Prynne, 1632. It was abolished by the Long Parliament, 1641. Its jurisdiction in crime—and especially over attempts—gained it a name as a "court of criminal equity"; it permanently enlarged the English criminal law which the King's Bench took over; and its power of receiving and hearing petitions remained in the Council as far as the Colonies were concerned.

K. Court of Requests

First seen in early fifteenth century as a branch of the Council sitting to hear petitions from the King's household or from poor men — hence, "poor man's court of equity." Had two features only in common with Star Chamber: both were regulated by Henry VII; in both the professional element was strong in its judges. It went on all royal journeys until Wolsey fixed it at Whitehall, 1519. "Masters of Requests" were the judges from Henry VIII's time. After the

dissolution of the monasteries it was especially active on behalf of "poor copyholders." It was a popular court; its personnel was largely that of the Star Chamber; its jurisdiction was civil only. It survived the suppression of the Star Chamber but expired in 1642, when, at the outbreak of the Civil War, the Privy Seal was withdrawn. It was a cheap, prompt, efficient court : hence, disliked by common law courts.

L. Court of Chancery

The Chancellor at first was a mere royal secretary and domestic chaplain, always a cleric until sixteenth century. Had the King's ear and was keeper of the royal seal and the royal conscience. He early presided in the Chancery—the writ office. All litigation began with the issue of a writ: hence, his early connection with administration of the common law. The STATUTE OF WESTMINSTER II (1285) gave Chancery power to issue a writ, where the common law was defective, by virtue of King's residuary justice: this was done by the Chancellor—"Secretary of State for all departments." Hence, his gradual rise to power. For a time his power was merged in that of the Council, and Parliament, in the fourteenth and fifteenth centuries, complained of jurisdictions other than that of the common law, and did not distinguish between Council and Chancellor, for the Councillors sat in Chancery as judges till mid-fifteenth century. Thus, Chancery, like the Exchequer, began as a ministerial bureau and ended as a law court. The purely judicial side began about 1350, as the Chancellor often sat with the other members; he sat alone from about 1520, although his first sole decree dates from 1474. Under Henry VI and Edward IV Chancery was the final court

of law merchant and law ecclesiastical; it also dealt with the "over-mighty subject" and with cases not covered by law; but did not distinguish civil from criminal matters.

Equity operated in three chief directions:—

(1) In the exercise of its *exclusive jurisdiction* it gave relief where no relief whatever was available at common law, *e.g.*, the whole doctrine of trusts was unknown to the law, and the trustees, in law, were under no obligation to the beneficiaries. It was equity which not only recognised the trust as binding, but which gave equitable remedies for any breach thereof. By means of the writ *subpoena*, the acute *viva voce* examination and the imprisonment for contempt of the Chancellor's decrees, equity wielded a most fruitful compulsion and built up the body of rules which, later, became statutory.

(2) Equity had a *concurrent jurisdiction* with the common law where the latter recognised a right but gave an inadequate remedy. Here, equity gave its aid to *enforce* a *legal* right, *e.g.*, where damages at common law were inadequate to recompense for a breach of contract, equity might well grant a decree of specific performance; or where damages might be inadequate to compensate for loss of a right to light, equity might grant an injunction to compel the offender to remove the obstacle.

(3) In its *auxiliary jurisdiction* equity merely lent its aid to a litigant trying to enforce a legal right, as where it might compel the defendant to "discover" all relevant documents which he possessed and which were essential to the administration of real justice.

Over the centuries the Chancellors gradually added to these such topics as mortgages and liens, the care of

the property of infants and married women; the relationship between partners and sureties, the adjustment of relations between people where fraud, mistake or accident had played a part — and the whole body of equitable doctrine in connection with the law of mortgages. In every case the Chancellor claimed that he did nothing more than supply remedies where the law was defective; he did not, at least openly, claim to base his rules on superior principles or on any theory of natural justice.

From the sixteenth century onwards equity tended to become rigid, although it did not acquire its *rigor mortis* until the Chancellorship of Eldon (1801–1827); by then it had accepted the principle of binding precedent as the common law had done. The principles of equity did not spring from any *a priori* theories as to rights; it was a gradual accumulation of the decisions of individual Chancellors such as Ellesmere (1603–1617), Coventry (1625–1639) and Nottingham (1673–1682), the "Father of English Equity." Indeed, so marked is this influence of individual Chancellors on the *corpus* of equitable rules, that Dr. Potter has neatly declared that "a history of Equity is the history of the Chancellors of England."

The JUDICATURE ACT, 1873, made no fundamental change in the content of the *corpus* of equitable rules, which have remained essentially as they were left by Lord Eldon at the close of his long tenure of office.

The Court of Chancery operated on the respondent's conscience; its judgments were *in personam*; parties were competent witnesses (not in common law before 1851); it could compel specific performance; its greatest weapon was the writ *sub poena*, aided by the writs *praemunire* and *venire facias* to sheriff for any

witness. It used also the writ *habeas corpus cum causa* for wrongful imprisonment.

This court's remedy of injunction appeared under Henry VI, and common law courts objected to its use to disturb their decisions; under Elizabeth, Chancellors began the use of Commission of Rebellion, giving its officers power to break open houses in execution of decrees and arrest rebels, and Commission of Sequestration, to sequester party's lands.

These problems came to a head in the 1616 quarrel between Chancellor Ellesmere and C.J. Coke. James I decided for the former and granted power to issue injunctions, which remained undisturbed until 1873; it still exists. (The custody of records was transferred from Chancellor to the new Master of the Rolls in 1326.)

M. Court of Admiralty

Title of admiral appeared here in 1290, and in 1300 one was appointed Admiral of the Fleet of the Cinque Ports. Admiralty Court first appeared about 1350 over piracy and "spoil" claims between English and foreign kings, as our courts of law offered no redress. Battle of Sluys, 1340, made Edward III sovereign of the seas, and he founded a court to keep his peace there. Some towns had "Courts of the Seaports" from early times, and these quarrelled with Admiralty Courts over jurisdiction. Both were defined in 1390, after the Captain of the Fleet had been authorised to hear pleas.

The legal theory was that all matters outside the jurisdiction of the common law was an Admiralty matter; hence, later Probate and Divorce matters went to Admiralty Court. In 1482 first judge was

appointed to Admiralty Court, and Henry VIII made mutual arrangement with France to try piracy charges with dispatch. By Henry's Act, 1536, all treasons, felonies, robberies and murders on the high seas were to be tried by common law in the Admiralty Court by admiral, or his deputy or the common law judges; later legislation made such offences triable by any competent court. In civil matters the common law courts never tried to limit Admiralty jurisdiction which took control of matters arising over contracts made abroad, bills of exchange, charterparties, insurance, etc.

By about 1600 common law courts and Admiralty had agreed on their limits of jurisdiction; but the former gradually extended theirs by the fiction of foreign contracts made at the Royal Exchange or other inland place.

In 1840, the first ADMIRALTY COURT ACT was passed, increasing its jurisdiction and conferring power to enforce decrees; the 1854 MERCHANT SHIPPING ACT and second ADMIRALTY COURT ACT increased its procedural efficiency and its power over wages and salvage; the 1861 third ADMIRALTY COURT ACT increased its jurisdiction now exercisable *in rem* or *in personam*. Minor cases were allocated to county courts in coastal areas by the 1868 Act, after the MUNICIPAL CORPORATIONS ACT, 1835, had abolished all the former maritime courts except that of the Warden of the Cinque Ports.

Appeals in the fifteenth century went to Crown delegates or to *ad hoc* commissioners. In 1534 there were Delegates of Appeal for Admiralty and Ecclesiastical Courts, and the 1832 Act transferred their powers to the King in Council, which, in 1834, became the Judicial Committee of the Privy Council, formed to

hear all appeals to the King in Council. The JUDICATURE ACT, 1873, merged the Admiralty Court in the High Court of Justice with appeals to the Court of Appeal and thence to the House of Lords.

Colonial Vice-Admiralty Courts were established in 1832, and the VICE-ADMIRALTY COURTS ACT, 1863, made Colonial Governor *ex officio* Vice-Admiral and Chief Justice of his colony, and *ex officio* judge of his court; appeals must be made to Privy Council within six months. By COLONIAL COURTS OF ADMIRALTY ACT, 1890, every competent court in a British possession has Admiralty jurisdiction.

N. Other Conciliar Courts

In times of inadequate and slow communication when rebellions were frequent it was not enough to establish central courts linked to the rest of the country through the circuit judges and the J.P.s. Strong, permanent local courts were essential; and the Council of the North (at York) and the Council of Wales and the Marches (at Ludlow) were most effective branches of the central council for judicial, executive and administrative tasks; and unrest on the borders was ruthlessly kept in check. Additional checks were provided by the Palatine Courts at Chester, Durham and Lancaster, all three of which had *jura regalia*.

O. Justices of the Peace

It is possible that the *Conservatores pacis* established in 1195 for the *keeping* of the peace were the precursors of the justices created to punish offenders. It was clear in the thirteenth and fourteenth centuries

that local authority to enforce the peace and punish offenders was essential. By that date both the sheriff and the coroner had declined in authority and lacked the confidence of the central government. In 1327 Edward III ordered "good and lawful men" in each county to be appointed to "keep the peace," but their authority was very limited. In 1330 they were empowered to receive indictments and keep the accused in custody until the judge came round. In 1344 they were given power to hear and determine felony and breach of the peace, and to punish. In 1360, separate commissions for each county were provided; their qualifications and duties were laid down; they were authorised to hear and determine, at the King's suit, felonies and trespass in their county; and they were to take securities for suspected persons. By the 1388 Act the number of justices in each commission was fixed at six (not counting judges) to hold sessions four times a year. The present quarter sessions is substantially that established in 1388, for later legislation varied their authority, etc., with little material change in judicial scope: the reduction in *types* of offences dealt with was off-set by *numbers*. Quarter sessions, too, was the core of local government until the late nineteenth century.

Until 1842 the jurisdiction of quarter sessions was based on the above-named statutes, and on commissions issued thereunder (form settled in 1590). They dealt with all crimes except, possibly, treason; but in cases of difficulty a judge of assize or of one of the benches was to be present. They could inflict death penalty till 1842, when treason, murder, capital felonies and other specified offences were removed from their cognisance. From 1896, burglary became

triable at quarter sessions. In certain incorporated boroughs with a Commission of the Peace distinct from that of the shire, a recorder as sole judge may be appointed by virtue of the MUNICIPAL CORPORATIONS ACT, 1882. The county quarter sessions is not merely a court of first instance, for its appeals committee may hear appeals from petty sessions by way of a re-hearing.

The Justices' Court of Petty Sessions hear and determine over 90 per cent. of the cases heard in criminal courts; and one or more justices may sit to hear the preliminary stages of serious offences, with power to dismiss the case or to remit it, remanding the accused on bail or in custody, to the next appropriate court of quarter sessions or assizes. In London and many other towns the work of the J.P.s in petty sessions is done by Metropolitan magistrates or by stipendiaries, each of whom has the power of two justices. They and borough justices are appointed by the Crown on the advice of the Home Secretary; county J.P.s are appointed via the Lord Lieutenant and the Lord Chancellor.

The powers of the justices in quarter and petty sessions in matters other than judicial have been largely transferred to elected local authorities by statute; but they still retain certain civil authority in matrimonial disputes and in matters of inn licences and concert halls.

P. The Sheriff

This official, as shire-reeve, originated in Anglo-Saxon times as the leading freeman in the shire "fyrd" (militia), as executive officer in the shire and

as one of the presidents of the Shire Court. After the Conquest his power grew and he became King's representative in all fiscal, judicial, military and administrative matters—a kind of "provincial viceroy." For the century after the Conquest his power grew as royal control grew, but as his office tended to become hereditary and as he married into (often untrustworthy) county families, the kings suspected him (and rightly) of treachery. From the end of the twelfth century his power declined and "the whole history of English justice and police might be brought under this rubric, The Decline and Fall of the Sheriff" (Maitland). By the thirteenth century hereditary rights in the office vanished; by Edward III's time any claim to elect him failed; but, from 1344, his appointment has been annual. The circuit judges and J.P.s replaced him in his criminal jurisdiction; his county court gradually became little more than a small debt court; the decline of feudalism reduced his power and his income; his military functions passed to the Lord Lieutenant under the Tudors; and, by the seventeenth century, there was difficulty in inducing men to accept the office. He is still the ceremonial head of the county, but most of his few remaining duties are performed by the under-sheriff whom he appoints. His decline in power is clearly shown when the fifteenth century Parliament took fiscal matters out of his hands.

Q. Coroner

Originally appointed (possibly in 1194) by election in the county court as a King's officer to hear pleas of the Crown (forbidden by MAGNA CARTA). He still could pass judgment on felons caught red-handed, and often

sat in county court with sheriff to hear civil suits. In default of sheriff so acting, he executed King's writs. The Statute de Officio Coronatoris, 1276, declared (but did not create) his duties. He was not paid until modern times, and the office was not sought. The appointment was put in hands of county council by the Local Government Act, 1888. His duties, which have varied little from the time of Edward I until recent times, are as follows:—

(1) To inquire into causes of suspicious deaths.
(2) To apprehend all guilty and to attach all who knew anything of the circumstances.
(3) To inquire into treasure trove.
(4) To look after deodands, *i.e.*, chattels which had caused death (abolished 1846) and have them valued.
(5) To look after wrecks.
(6) To hear "appeals of felony" prior to judges' arrival.
(7) To keep a roll or record of events between judges' visits.

His inquest (inquiry) was usually made with a jury, which varied in number, drawn, as a rule, from the local townships; whether this bore any relationship to the medieval petty jury is uncertain.

R. Judicature Acts

With the growth of population, business, transport and means of communication in the nineteenth century, it was clear that medieval methods of administering justice had to be changed drastically, especially as the courts of Chancery, Admiralty, Probate and Divorce, and common law used different principles; and the report of the Commission (1869) became the

basis of the JUDICATURE ACTS, 1873–76, which reorganised the superior courts, fused common law and equity remedies, and saved the appellate jurisdiction of the Lords. The existing central courts were abolished and there emerged, after an Order in Council (1880), a Supreme Court divided into a Court of Appeal and a High Court of Justice in three Divisions —Queen's Bench, Chancery and Probate, Divorce and Admiralty. Judges on circuit are regarded as sitting in a local branch of the High Court with, in most matters, full powers. The APPELLATE JURISDICTION ACT, 1876, reorganised the Lords as a final court of appeal by the creation of Lords of Appeal in Ordinary to replace a full sitting of the House; and the Court of Appeal was to be staffed by Lords Justices of Appeal. This reorganisation of the courts was made more effective by the declaration that, in the administration of justice, if the principles of law and of equity were at variance, then those of equity were to prevail—every court became a court of equity.

THE LEGAL PROFESSION

The Judges

The judicial functions of the House of Lords are performed by—

(1) the Lord Chancellor;
(2) the nine Lords of Appeal in Ordinary;
(3) ex-Lord Chancellors and other peers who hold or have held high judicial office.

The judges of the Court of Appeal are the Master of the Rolls and eight Lords Justices.

The judges of the Chancery Division are six puisne judges and a special Patent Judge. The Lord Chancellor is technically the head of this Division.

The judges of the Queen's Bench Division are the Lord Chief Justice and 23 puisne judges.

The judges of the Probate, Divorce and Admiralty Division are the President and seven puisne judges.

NOTE. All the above are appointed from practising members of the Bar (Barristers).

Barristers

Barristers (often referred to as counsel) are all members of one or other of the four Inns of Court (which are ancient associations consisting of judges, barristers and students, governed by Masters of the Bench (Benchers)). They have exclusive audience in the Superior Courts (House of Lords and Supreme Court of Judicature). In other courts they share the right of audience with solicitors. (NOTE. In either case a litigant may appear in person.)

Barristers are either Queen's Counsel or junior counsel (also known as "utter" barristers).

Barristers may not sue for their fees or form partnerships. They are not liable for negligence.

A barrister cannot appear for a lay client unless instructed to do so by a solicitor.

Solicitors

A solicitor deals directly with the lay client, and it is through him that barristers are instructed to advise or to appear in court. Solicitors are all members of the Law Society in London or of a provincial Law Society. They have a right of audience in the inferior courts. Their fees are mainly regulated by statute. They may sue for their fees, are liable in negligence and may form partnerships.

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Address from the Inhabitants of BRIXHAM, TORBAY
to HIS ROYAL HIGHNESS Prince WILLIAM HENRY
Duke of Clarence, Lord High Admiral of the
United Kingdom on his visit to this place
JULY 21st 1828.

TO His Royal Highness Prince WILLIAM HENRY
Duke of Clarence, Lord High Admiral of the United Kingdom of
Great Britain and Ireland etc etc etc.

The Humble Address of the Inhabitants of BRIXHAM, TORBAY.

May it Please your Royal Highness.

We the Inhabitants of BRIXHAM beg leave humbly to approach your ROYAL HIGHNESS with our congratulations on your safe arrival in TORBAY for the first time since your appointment to the distinguished Office of LORD HIGH ADMIRAL of the United kingdom. We rejoice to see the Heir and Representative of Royalty so actively engaged in promoting the Naval Interests of this Country, and we sincerely pray that life and health may long be given to your ROYAL HIGHNESS for the completion of the important objects you have in hand. We felicitate ourselves on having this opportunity of expressing our Respect and Attachment to your ROYAL HIGHNESSs person and although unable to vie with others in the splendour of the reception we offer you, we yield to none in Loyal and Dutiful Devotion towards YOURSELF and EVERY MEMBER of your ILLUSTRIOUS HOUSE. We humbly beg leave to present this our Respectful Address in a Box of Heart of Oak, 800 years old containing a small portion of the stone on which King WILLIAM the THIRD placed his foot when he first landed in England and we shall from henceforth value this stone the more highly from its having had the honour of bearing your ROYAL HIGHNESSs person when you stepped ashore this day.

To which HIS ROYAL HIGHNESS was pleased to reply.

Gentlemen, I am very thankful for your congratulations on my arrival in this Beautiful and Magnificent Bay, in the execution of the High Office I now hold under the gracious goodness of HIS MAJESTY. I feel most sensibly your approbation of my conduct in promoting as I ought the Naval Interests of this Country. I receive with perfect satisfaction the expressions of Loyalty and Dutiful Devotion to the KING and accept with sincere pleasure the Box of Heart of Oak which is and ought to be the Pride as it is the Salvation of our Country.

Recollecting as an ENGLISHMAN the benefit conferred on this TRULY HAPPY ISLAND by the landing of WILLIAM the THIRD in this Bay, I shall ever preserve, as a precious Relick, the portion of stone on which King WILLIAM the THIRD placed his foot when HIS MAJESTY first landed in England.

WILLIAM.

To the Inhabitants of BRIXHAM.


WILLIAM
PRINCE OF ORANGE,
AFTERWARDS
WILLIAM III.
KING OF GREAT BRITAIN & IRELAND
LANDED NEAR THIS SPOT
5TH NOVEMBER 1688
AND ISSUED HIS FAMOUS DECLARATION
"THE LIBERTIES OF ENGLAND
AND
THE PROTESTANT RELIGION
I WILL MAINTAIN."