Common Law

Abstract

The Common Law is a body of law, developed over time from the decisions and practices of courts, upon which the English legal system has developed. Through the impact of British colonial expansion, the English Common Law has also formed the basis of the legal systems of the United States and many Commonwealth countries.

The history of the English Common Law may be traced back at least to the twelfth century. Here, a programme of legal reform undertaken during the reign of Henry II (1154–1189) began to routinise royal intervention in land disputes and increase royal control over criminal pleas. English justice became increasingly centralised around the Crown and the foundations were laid for further legal development in the following centuries.

Earlier English Law

The emergence of the English Common Law is frequently attributed to the routinisation and centralisation of royal justice in the reign of Henry II (1154–1189). However, the developments of Henry's reign took place within a legal landscape shaped by the Anglo-Saxon and Anglo-Norman periods.

English law in the Anglo-Saxon period had many characteristics of Germanic customary law. The *Leges Henrici Primi*, a later legal text, written c. 1116, suggests that England had three main regional laws: those of Mercia, Wessex, and the Danelaw (c. 6, Downer ed., p. 96), although it is uncertain whether this distinction existed so clearly in practice.

Following the Norman Conquest, any tripartite division of laws that did exist seems to have disappeared. It is nevertheless unlikely that the Conquest itself made great changes to most aspects of English custom. The greatest impact of the Conquest was on patterns of landholding and the development of new courts in which disputes concerning land were heard. Following his coronation, William granted land to a number of his followers to hold of him, who became known as the king's 'tenants-in-chief'. Many of these then subinfeudated part of their land to their own supporters. Lords with tenants would then hold courts to resolve the disputes arising in their fee. These seignorial courts do not appear to have existed before the Conquest, with disputes instead heard in the local courts of the county, or the county's administrative subdivisions, known as 'hundreds' (or 'wapentakes' in former Danelaw regions). Disputes heard in seigniorial courts would frequently concern land, but lords with 'sake and soke' also enjoyed jurisdiction over some offences against individuals or their goods.

Despite the importance of seigniorial justice, local courts remained in use. An 1108 writ of Henry I explains that, if parties to a dispute concerning land claimed to hold the tenement in question of different lords, the matter would be heard in the county court. (*EHD ii*, no. 43). Likewise, cases concerning offences against the person which did not fall within the sake and soke jurisdiction of a lord's court continued to be heard in the hundred or county courts. Serious cases were usually heard in the county court, and

serious felonies and cases which concerned royal rights (which came to be known as 'Pleas of the Crown') might be heard in the presence of a royal official.

The president of a court, whether the lord or his steward in a seigniorial court, or the sheriff or his bailiff in a county or hundred court, might exert significant influence over proceedings. Nevertheless, decisions were generally made by 'suitors', individuals who were bound to attend court and hear cases. The suitors decided on the type of proof required from the parties and reached a judgment based on this proof. The nature of the case determined the type of proof required, which could range from documentary evidence to oath-swearing. If the matter could not be resolved in any other way, recourse might be made to the unilateral ordeal of hot iron or cold water. Trial by battle, probably introduced by the Normans, might also be used.

The demands of good kingship required the king to ensure that justice was done throughout the realm. It was natural that he would hear the pleas of his tenants-in-chief, just as his barons or other major landholders heard the pleas of their tenants. However, the king's position as defender of justice also meant that he might intervene in other lawsuits, and have certain pleas brought directly before him. This intervention was, however, *ad hoc* rather than routine.

The Angevin Legal Reforms

The routinisation and centralisation of royal justice in Henry II's reign which laid many of the foundations of the Common Law took place in several stages. The most significant developments concerned the disputes of freeholders over land. Royal writs ordering a lord to do 'right' to a party who claimed to hold land of them had been issued in earlier periods, but from the early years of Henry II's reign these writs begin to take a standardised form and became known as 'writs of right patent'. Although a writ of right patent ordered the dispute to be heard in a lord's court, it was possible for the case to be removed to the county court through the process of 'tolt', and then put before royal justices by the process known as *pone*. The development of the writ of right patent was accompanied by the increased use of a similar writ, known as the writ '*praecipe*', which ordered disputes concerning right to land to be brought directly before the king's justices. If the parties to an action of right could not be brought into agreement, trial by battle was used to decide the case.

Later in the reign of Henry II a number of other actions were introduced which, once the claimant had obtained the necessary writ, brought cases concerning free tenements immediately before the king's justices. These were distinguished from actions concerning right on the basis that they addressed disputes arising only from recent facts, and did not require a full investigation into title. They were instead designed as swift actions which would award possession of the disputed tenement to the wronged party. The deeper question of ultimate right to land could then be examined at a later date if one of the parties brought an action of right. Of these possessory actions, also known as 'petty assizes', the most important were the assize of *novel disseisin*, designed to address recent dispossessions made 'unjustly and without judgment', and *mort d'ancestor*, designed to address situations in which an heir had been denied their inheritance on the recent death of a close relative.

A common feature of the new possessory actions was the use of a panel of twelve freemen to decide cases through a sworn verdict on the facts in dispute. This form of jury procedure, known as a 'recognition', may suggest a growing suspicion amongst Angevin administrators about the reliability of other modes of proof, especially trial by battle. Indeed, a recognition was subsequently offered, probably in 1179, to the claimant's opponent (known as the 'tenant') in an action of right, who could elect to have the case removed from the lord's court and brought directly before royal justices. Here, it would be decided through the sworn testimony of a panel of twelve knights in a recognition known as a 'Grand Assize'.

The importance of the role of the Crown in land disputes eventually gave rise to the rule, found in the legal treatise known as *Glanvill* (written c. 1188), that "no-one is bound to answer concerning any free tenement of his in the court of his lord unless there is a writ from the lord king or his chief justice" (XII, §25, Hall ed., p. 148). It is unclear whether this rule began as a simple statement of fact which reflected the new reality of land litigation in England, or whether it was a provision of a now-lost royal ordinance. Nevertheless, it illustrates the extent to which the Crown had come to control English land law. *Glanvill's* explicit reference to 'any free tenement' also highlights the fact that royal justice primarily concerned the cases of freeholders. Disputes concerning land held in *villeinage* were still heard by lords in their manorial courts.

Royal control over criminal cases also increased during the reign of Henry II. The most common method of criminal prosecution, as it had been in earlier periods, was the private 'appeal' of felony, in which one individual publicly accused another of an offence. The case would then be tried, usually at the county court, through trial by battle between the parties. If one of them was too old or infirm to fight, they could instead undergo the ordeal of hot iron or cold water. However, during this period there was an increased effort to ensure serious offences (i.e. Pleas of the Crown) were dealt with in the presence of royal justices. Likewise, Henry II's reign witnessed the increased use of juries of presentment to 'present' to the royal justices individuals suspected of serious offences, but lacking a specific individual accuser. Evidence for some use of presentment juries exists from earlier periods, but enactments of Henry II's reign made them a regular part of English justice. Most notably, the 1166 Assize of Clarendon ordered that inquiry was to be made throughout the country, through "twelve more lawful men of the hundred and through four of the more lawful men of each village" about those suspected of robbery, murder, or thievery. Those suspected of these crimes, or of harbouring such offenders, were reported to the royal justices, and were put to the ordeal of water. The 1176 Assize of Northampton added forgery and arson to the list of crimes covered by presentment. Punishment for failing the ordeal was mutilation, although the use of the death penalty increased in subsequent years. Even those who passed the ordeal had to abjure the realm if they were considered of ill-repute or, following the Assize of Northampton, had been accused of homicide or another serious felony. This, again, suggests that the Angevin reformers had some doubts over the reliability of supernatural proof.

As a consequence of these reforms, it was necessary for the machinery of royal justice to expand to accommodate the increasing number of civil and criminal cases coming before the king's justices. A system of general eyres developed, in which the country

was divided into circuits and royal justices travelled through each county on their circuit to hear pleas. The first major visitation of this kind took place in 1176 and was probably planned at the Council of Northampton which took place earlier that same year. Likewise, in the 1190s a central royal court emerged at Westminster, probably as an outgrowth of the judicial functions exercised by the Exchequer. The king also heard pleas in the court which travelled with him while he was in England, known as the court *coram rege*.

The administration of royal justice was characterised by the extensive use of written records. In addition to the use of writs to initiate actions concerning land in the royal courts, plea rolls were made to record the cases which came before the justices. The earliest surviving plea rolls date from 1194, although earlier rolls may have been lost. From 1195 onwards, written records of settlements (fines) made between parties also begin to survive in great number.

By the end of the twelfth century, the increased centralisation of justice around the Crown had laid the foundations of the English Common Law. The traditional view, pioneered by the historian F. W. Maitland, was that Henry II had planned this expansion of royal justice and, in what might be seen as an attack on feudalism, intended to usurp the jurisdiction of seigniorial courts over land disputes (Pollock and Maitland, 1898). Maitland's interpretation has remained the orthodox view, although S. F. C. Milsom later advanced what he termed the "heretical" idea that Henry and his advisers had not conceived of an alternative legal landscape to that built around the jurisdiction of lords' courts (Milsom, 1976). The new procedures introduced in the twelfth century concerning land were, Milsom argued, intended purely as controls to ensure that seigniorial justice worked as it should. It was by accident rather than design that they took over the functions of the courts that they were designed to control. Milsom's thesis remains an important consideration for legal historians. It has not, however, been universally accepted.

Developments from the thirteenth century onwards

The principal Common Law courts, the Court of Common Pleas and the Court of King's Bench, emerged during the thirteenth century. The Court of Common Pleas, an evolution of the Bench which sat at Westminster during the reigns of King Richard (r. 1189–1199) and King John (r. 1199–1216), became the central court for ordinary litigation between individuals. The King's Bench, which developed from the court *coram rege*, initially heard similar cases to the Court of Common Pleas. By the early fourteenth century, however, it had acquired general supervision over criminal justice and heard civil pleas in which the defendant was alleged to have breached the king's peace. The court of the Exchequer also continued to exercise a judicial function concerning financial cases, although its caseload was not as large as the Court of Common Pleas or the King's Bench. By the fifteenth century, the Lord Chancellor's practice of providing remedies to litigants based on principles of fairness, or 'Equity', rather than the strict rules of the Common Law, led to the development of the Court of Chancery. The subsequent administration and development of Equity alongside the Common Law is outside the scope of this article. It should be noted, however, that by the mid-sixteenth century the court of the Exchequer also began to hear cases concerning Equity.

Alongside these central courts, which eventually became permanently settled at Westminster, the Common Law continued to be administered locally. The 1217 reissue of Magna Carta demanded that justices would travel to the counties once a year to hear possessory assizes, a reduction of the 1215 Charter's demand for visitations four times a year. These routine visitations never materialised, but by the 1220s a system existed whereby justices could receive special commissions to travel to the counties to hear individual cases on an *ad hoc* basis. However, these commissions were not issued in great numbers and were largely accessible only to wealthy or privileged litigants. The bulk of litigation at first continued to be heard at general eyres. These continued until 1294, from which point their importance waned and visitations took place infrequently. The last surviving records of the eyre date to 1348. The demise of the general eyre did not, however, create a vacuum in the administration of local justice. During the later thirteenth century, a loosely defined system known as 'the assizes' had developed. This system, which eventually saw assize commissioners tour pre-determined circuits twice a year, allowed a range of civil and criminal cases to be heard from beginning to end. Assize commissioners could also, under the '*nisi prius*' system, hear jury verdicts on disputed facts arising in civil cases which had been initiated at the central courts, and report the verdict back to the appropriate bench.

The substantive growth of the Common Law in the later Middle Ages was based upon the emergence of new writs and the enactment of statutory provisions. The voluminous treatise known as '*Bracton*', written predominantly in the 1220s and 1230s, provides a notable illustration of the intellectual energy that was devoted to the development of English law. It was during the thirteenth century that land law evolved more fully the doctrines of 'tenure' (that all land is held, immediately or mediately, of the Crown), and 'estates' (concerning the nature and timespan of a tenant's interest in land). Alongside the creation of new real actions to cover additional situations in which disputes could arise concerning land, the later Middle Ages also witnessed the further development of personal actions. Of these, the action of trespass stands out for the role it played in the subsequent development of the Common Law. Trespass was a wide-ranging action, which could be used to address various wrongs that might have been committed against an individual. It became established during the thirteenth century that, in order to bring such an action before the royal courts, the claimant needed to allege that the wrong had been committed with the use of force and arms and against the king's peace. By the mid-fourteenth century, however, this allegation was no longer required and a form of the action known as trespass 'on the case', or simply 'case', came to be used. Actions 'on the case' made remedies more readily available in the Common Law courts for a range of wrongs, including negligence and defamation. Trespass also gave rise to the action of 'ejectment' which, by the Tudor period, supplanted the old real actions as the usual means of recovering land.

Although significant developments to the Common Law occurred throughout the Middle Ages, several particularly important statutes were passed during the reign of Edward I (1272–1307): The Statute of Westminster (1275); The Statute of Gloucester (1278); The Statute of Westminster II (1285); and *Quia Emptores* (1290). These enactments were to have a lasting impact on the shape of the Common Law and would later earn Edward the title 'The English Justinian', after the Eastern Roman Emperor Justinian I, who oversaw the production of the great written collection of Roman Law known as the *Corpus Iuris Civilis*.

The area of English law which experienced the least growth throughout the medieval period was that which concerned crime. Presentment juries, similar to those formalised by the Assize of Clarendon, continued to be used to indict suspects at the assizes. Likewise, cases could still be brought to court by private appeal of felony. The most significant change to criminal procedure occurred following the 1215 Fourth Lateran Council, which forbade the clergy to participate in judicial ordeals. This deprived unilateral ordeals such as trial by fire or water of the sacred properties necessary for the revelation of God's judgment. Lay-peoples' doubts about the reliability of such modes of proof may also have been growing and, shortly after Lateran IV, the unilateral ordeal fell out of use. In its place, trial by jury emerged. The trial jury became known as the 'petty jury' to distinguish it from the jury of presentment, now known as the 'grand jury'. Trial by battle, often used to try cases brought to trial by the private appeal of felony, did not require such involvement from the clergy and was therefore not immediately affected by Lateran IV. Nevertheless, restrictions imposed by the judiciary meant that, by the mid-thirteenth century, trial by battle had also fallen out of use and criminal appeals also began to be tried by juries.

As the Common Law developed during the later Middle Ages, so did the English legal profession. As early as the twelfth century, it was possible for litigants to appoint an attorney to stand in for them at court. These attorneys were, however, frequently members of the litigants' families or households. By the reign of Edward I, a class of professional attorneys had emerged, as had a group of professional 'serjeants' who specialised in pleading. The role of attorneys and serjeants was soon clearly defined and regulated: attorneys stood in for their principal to facilitate the progress of the case through its procedural stages, whereas serjeants spoke for their client only in formal pleading. Apprentices hoping to obtain the rank of serjeant could learn the art of pleading at one of the Inns of Court which emerged in the fourteenth and fifteenth centuries in London to provide hospitality and education for lawyers.

Throughout its history, English Common Law remained largely detached from the 'common law' of the *ius commune*, a body of law based on Roman law and aspects of Canon law, which began to take shape during the same period, and which had a significant influence on the development of civil law systems in Continental Europe. Some legal ideas from the *ius commune* may have influenced the medieval development of the English Common Law, for example, the Roman law idea of 'possession' may have influenced the development of the possessory assizes introduced in the twelfth century. However, the Common Law developed without a large-scale reception of Romano-canonical ideas. This was probably because English legal education took place within professional circles rather than at universities which taught Roman and Canon law. From early on, the Common Law had also acquired an identity of its own which was thought worthy of protection. At the 1236 Council of Merton, for example, the English barons rejected a proposal to bring the Common Law in line with the Church practice of treating children born before the marriage of their parents as legitimate. They did so with the resounding statement *Nolumus leges Angliae mutare*: "We do not wish to change the laws of England" (*EHD iii*, no. 30, c. 9).

Bibliography

Primary Sources:

"Charter of Henry I concerning the holding of courts shire and hundred (26 July 1108 – August 1111)", in *English Historical Documents, vol. 2, 1042–1189,* ("*EHD ii*"), eds D. C. Douglas and G. W. Greenaway, 2nd ed. (London: Routledge, 1981), no. 43, at 474–5.

De Legibus et Consuetudinibus Angliae ("*Bracton*"), ed., G. E. Woodbine, trans, with revisions and notes S. E. Thorne, 4 vols (Cambridge, MA.: Belknap Press of Harvard University Press, 1968–77).

Leges Henrici Primi, ed. and trans, L. J. Downer, (New York: Oxford University Press, 1972).

"The So-Called Statute of Merton, 1236", in *English Historical Documents, vol. 3, 1189–1327* ("*EHD iii*"), ed. H. Rothwell (London: Eyre & Spottiswoode, 1975), no. 30, at 351–4.

Tractatus de Legibus et Consuetudinibus Regni Angliae ("*Glanvill*"), ed. and trans G. D. G. Hall, with a guide to further reading by M. T. Clanchy (Oxford: Clarendon Press, 1993).

Statutes and Other Enactments

Assize of Clarendon (1166).

Assize of Northampton (1176).

Lateran IV (1215).

Magna Carta (1215, 1217 and 1225).

Statute of Merton (1236)

Statute of Westminster (1275).

Statute of Gloucester (1278).

Statute of Westminster II (1285).

Quia Emptores (1290).

Secondary Literature:

Baker, Sir John H., *An Introduction to English Legal History* 4th ed. (London: Butterworths, 2002).

Brand, P. A., *The Origins of the English Legal Profession* (Oxford: Blackwell, 1992).

Brand, P. A., *The Making of the Common Law* (London: The Hambledon Press, 1992).

Brand, P. A., *Kings, Barons and Justices, The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge: Cambridge University Press, 2003)

Caenegem, R. C. van, *The Birth of the Common Law*, 2nd ed. (Cambridge: Cambridge University Press, 1988).

Hudson, J. G. H., *The Formation of the English Common Law: Law and Society in England from King Alfred to Magna Carta*, 2nd ed. (Abingdon: Routledge, 2018).

Hudson, J. G. H., *The Oxford History of the Laws of England Volume II 871-1216* (Oxford: Oxford University Press, 2012).

Maitland, F. W., *Equity, also The Forms of Action at Common Law: Two Courses of Lectures*, eds A. Chaytor and W. J. Whittaker (Cambridge: Cambridge University Press, 1909).

Milsom, S. F. C., *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976).

Plucknett, T. F. T., *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown and Company, 1956).

Pollock, Sir Frederick and Maitland, F. W., *The History of English Law before the Time of Edward I*, 2 vols, 2nd ed. (Cambridge: Cambridge University Press, 1898, reissued with new introduction by S. F. C. Milsom in 1968).

Simpson, A. W. B., *A History of the Land Law*, 2nd ed. (Oxford: Oxford University Press, 1986).