1 THE DIVISIONS OF THE LAW

> But in these nice sharp quillets of the law,
> Good faith, I am no wiser than a daw.
>
> —Shakespeare, *King Henry the Sixth*, Part I, II, iv.

This book aims to help principally those who have decided to study law—whether in a University, College or other institution, or as a professional qualification.

From time to time I have been told of some who have read the book before making the decision to study law, and have been sufficiently attracted by the taste it has given them of legal studies to make up their minds to continue. I did not, however, intend to proselytise when I wrote. As you will see when you look at Chapter 13, there are quite enough people trying to enter the legal profession without adding to the number. If you are uncertain about your career there may be strong personal and social reasons why you should take up something else: entering the world of commerce or industry, or becoming a technologist or research scientist. In the foreseeable future there is likely be a much greater shortage of IT professionals, electronics specialists, good business managers (not overlooking areas such as banking and management consultancy) and people who combine linguistic skills with other abilities than there will be of lawyers. I assume, however, that you have decided to study the law or that you are giving the possibility serious thought.

On the question whether you should study law as opposed to some other discipline during your time at university, with a view to qualifying to practise law later (assuming, that is, that you have decided that you wish to practise law), it is difficult to be seen to offer objective advice. The former course offers a quicker and cheaper route to employment, and the opportunity to assess for yourself at an early stage whether the law is a discipline to which you wish to attach yourself. But there are some legal practitioners (who may themselves have

studied something other than law at university) who would claim that too early a specialisation in the law can narrow rather than broaden the mind by depriving the student of the opportunity to be exposed to other disciplines.[1]

That is not a view that I share.[2] On the contrary, I would wish to argue that a university law course offers a chance to acquire both a necessary legal framework and a deeper understanding of the law. Even if you are only at the stage where you have narrowed your immediate options to obtaining higher education in one of the humanities, I would certainly wish to bring to your notice the attraction of law as compared with the traditional arts subjects.

Law is the cement of society, and an essential medium of change. Its study at a university enables you to explore how and why this is so. A common misunderstanding is that the study of law involves little more than the rote learning of legal rules. Closer acquaintance will show that it is more complex and challenging than that. Far better to think of the law as forming an integral part of a constantly evolving social landscape. Knowledge of law increases one's understanding of public affairs, as well as affording some understanding of social values. At a more practical level, its study promotes accuracy of expression, facility in argument and skill in interpreting the written word. It is of wider vocational relevance than most arts subjects. Its practice does, however, also call for much routine, careful, unexciting work, and it is for you to decide whether you think you are temperamentally suited to that.

In this book I offer an introduction to English law and its study at university or college. A word or two about the term English law. The use of "England" is taken generally to include both England and Wales. Without at this stage wishing to trouble you with the constitutional niceties, you should know that the Scottish legal system is in detail very different from the English. When England, Wales and Scotland are intended to be referred to as a single entity, the correct term is "Great Britain", and when Northern Ireland is added,

[1] A debate on the issue between Lord Sumption SCJ and Professor G. Virgo of Cambridge is available on line at *http://www.law.cam.ac.uk/press/news/2013/03/those-who-wish-to-practise-law-should-not-study-law-at-university/2190*

[2] For a passionate defence of the importance of the study of law in the university, see Professor P. Birks, "The Academic and the Practitioner" [1998] L.S. 397.

it becomes the "United Kingdom". The reason why the law emanating from these islands is worthy of study is that it is the home of the common law; the place where a family of law was born, quite different from the civil law that underlies much German, Italian and French law, and very different from Islamic law. The system of law that was historically developed in the courts of Westminster spread with the growth of the British Empire throughout much of the western world—to the United States of America, to the Commonwealth countries of Canada, Australia and New Zealand, to the African continent and to parts of the far east—India, Singapore, Malaysia and many more besides. Ideally, perhaps, a university would offer the chance to study at least some of the elements of these other legal systems—comparative law. But that would place a great burden upon the already crowded curriculum, and the ideal is rarely achieved.

CRIMES AND CIVIL WRONGS

One of the non-lawyer's inveterate errors is to suppose that the law is largely—even exclusively—concerned with the criminal law. In fact the law is divided into two great branches, the criminal and the civil,[3] and of these much the greater is the civil. An old chestnut that the reader beginning legal studies is likely to hear recounted (so why not by me?) concerns the visitor who was being given a glimpse of the Court of Chancery. He peered round and asked where was the prisoner?[4] It is important to grasp the nature of the division at the outset to understand the structure of the English legal system; the terminology is different, the procedure is different and the outcome is different. I shall, therefore, try to give a simple explanation of it.

The distinction between a crime and a civil wrong, though capable of giving rise to some difficult legal problems, is in essence quite simple. The first thing to understand is that the distinction does not reside in the nature of the wrongful act itself. This can be proved quite

[3] "Civil law" is a phrase used in several meanings. It may mean, as in the above context, the law that is not criminal law. It may also mean the law of a state as opposed to other sorts of law like international law; or it may mean Roman law. A "civilian" is a person learned in Roman law.

[4] According to a gloss on the tale, someone then explained that a Chancery judge does not try anything except counsel's patience.

simply by pointing out that the same act may be both a crime and a civil wrong. If I entrust my bag to a person working in the left-luggage office at a railway station, and that person then runs off with it, he or she commits the crime of theft and also two civil wrongs—the tort[5] of interference with goods and breach of a contract with me to keep the bag safe. The result is that two sorts of legal proceedings can be taken: a prosecution for the crime, and a civil action for the tort and for the breach of contract. (The claimant in the latter action will not get damages twice over merely because there are two causes of action; there will be only one set of damages.)

To take another illustration. If a railway signaller, in the words of the poet "to dumb forgetfulness a prey", fails to press the button at the right moment so that a fatal accident occurs, this carelessness may be regarded as sufficiently gross to amount to the crime of manslaughter. It is also the tort of negligence towards the victims of the accident and their dependants, and a breach of contract with the employer to take due care whilst at work. It will be noticed that, this time, the right to bring an action in tort and the right of action in contract are vested in different parties.

These examples show that the distinction between a crime and civil wrong cannot be stated as depending upon *what is done*, because what is done (or not done) is the same in each case. The true distinction resides, therefore, not in the nature of the wrongful act but in *the legal consequences that may follow it*.[6] If the wrongful act (or omission) is capable of being followed by what are called criminal proceedings, that means that it is regarded as a crime (otherwise called an *offence*). If it is capable of being followed by civil proceedings, that means that it is regarded as a civil wrong. If it is capable of being followed by both, it is both a crime and a civil wrong.

THE COURTS

Civil and criminal courts in England and Wales are largely but not entirely distinct. *Magistrates* are chiefly concerned with criminal

[5] The meaning of which will be explained in due course: see p.19. For now, it is enough to know that it is a civil wrong, as opposed to a criminal offence.

[6] *cf. per* Lord Esher M.R. in *Seaman v Burley* [1896] 2 Q.B. 344 at 346.

cases, but they have important civil jurisdiction over licensing and family matters. The *Crown Court* has almost exclusively criminal jurisdiction. On the other hand, the jurisdiction of the *County Court* is only civil, and so is the *High Court*, apart from appeals.

Over most of the country, magistrates are lay justices of the peace sitting with a clerk. The *clerk to the justices*, whose function is to advise on matters of law, is legally qualified. But he or she is often occupied with administration, and is in practice supported by assistant clerks who may be legally unqualified.[7] In the large cities magistrates' courts are now presided over by full-time *district judges (magistrates' courts)*[8] who are legally qualified, and who until relatively recently were known as *stipendiary magistrates*, or colloquially as "stipes". Since the Access to Justice Act 1999 requires that professional, full-time magistrates are to be known as District Judges (Magistrates' Courts), the expressions "justices of the peace"[9] and "magistrates" have effectively become synonymous.

Courts with civil jurisdiction

Before looking more closely at the courts by which civil cases are tried, the general point might be made that justice in this country is conducted in public. With a few exceptions (particularly relating to the welfare of young people and matters of family law), all courts are open to public view. An intending student should take the opportunity to visit one court of each level[10] operating in the locality to see the process of justice in operation.

Neglecting magistrates' courts, the English system of civil judicature about to be explained may be represented thus:

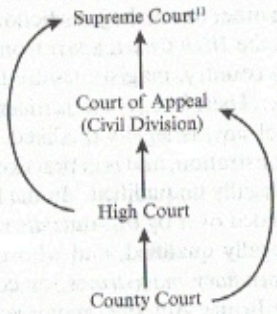
[7] See Penny Derbyshire, "Raising Concerns about Magistrates' Clerks" in S. Doran and J.D. Jackson ed., *The Judicial Role in Criminal Proceedings* (2000).

[8] Not to be confused with district judges of the Family Division of the High Court, or with district judges who sit in the county courts and District Registries of the High Court; see (2001) 151 N.L.J. 505.

[9] Justices of the Peace Act 1997.

[10] Addresses of all courts can be found online at *https://courttribunalfinder.service.gov.uk/search/*. Those for Magistrates' Courts, Crown Courts and county courts can also be found on the Court Service website, *www.hmcourts-service.gov.uk*.

Figure 1



The courts with original[12] civil jurisdiction are chiefly the High Court and county courts. The High Court is divided into three divisions: the *Queen's Bench Division*[13] (commonly referred to as the *Divisional Court*), the *Chancery Division*, and the *Family Division*. The first administers primarily the *common law*, the second primarily *equity*.[14] More will be said about this particular distinction later in the chapter. The Family Division was created by the Administration of Justice Act 1970 in place of the previous Probate, Divorce and Admiralty Division—a curious miscellany of jurisdictions (over "wills, wives and wrecks" was the jocular reference) which were lumped together for no better reason than they were all founded (to some extent) on Roman and canon law. In 1970, wills went to the Chancery Division and wrecks to the Queen's Bench Division. For administrative purposes, the head of the Divisional Court is the Lord Chief Justice of England, assisted by a President of the Queen's Bench Division. The Chancellor of the High Court presides in practice over

[11] Formerly, the highest court in the land was the House of Lords, but it was replaced by a Supreme Court as from October 2009. See p.9 below.

[12] i.e. jurisdiction as a court of first instance, conducting trials as opposed to appeals.

[13] There has been a proliferation of separately created parts of the Queen's Bench Division dealing with specialist areas of the law. Thus, an Administrative Court was established in 2000 dealing with matters of administrative law (principally judicial review) and made part of the Queen's Bench Division, joining there the Admiralty Court, the Commercial Court and the Technology and Construction Court.

[14] In 1977 a Patents Court was set up and made part of the Chancery Division.

the Chancery Division (technically, the Lord High Chancellor is the head of Chancery) and the most senior judge of the Family Division is known as the President.

A civil trial in the High Court is held before a judge, sometimes called a *puisne* (pronounced "puny") judge, generally sitting without a jury. The judge may sit in London or in one of the other major legal centres.[15] In practice, the sheer volume of work is such that High Court cases are often taken by deputy High Court judges. By contrast, certain applications to the High Court are made to the Queen's Bench Division consisting of a Lord Justice and a judge of the High Court.

Court of Appeal (Civil Division)

There is almost always the possibility of an appeal *from* (i.e. against) the decision of a court of trial, providing permission is given by the trial judge or by the Court of Appeal itself. The party who appeals is the *appellant*,[16] the other is the *respondent*. For the High Court the appropriate appellate court is the *Court of Appeal (Civil Division)*. This may be presided over by one of the following: the *Master of the Rolls*, the *Lord Chief Justice*, one of the *Heads of Division* of the Court of Appeal or a *Lord Justice of Appeal*—there are currently nearly 40 members of the Court of Appeal who are Lords (or Lady[17]) Justices. The Court of Appeal generally sits with three members but sometimes with two (depending on the importance of the case), and there will be several such courts in action at the same time.

Other courts and tribunals

There are many courts and tribunals of special jurisdiction, dealing in particular with disputes between citizens and the state, that arise in relation to disputes over such matters as benefit entitlements and other aspects of the state's regulatory framework. The tribunal system developed historically in a rather piecemeal and haphazard

[15] The peregrinating High Court was formerly called the *Assize Court*, but this was abolished upon the creation of the Crown Court in 1972.

[16] Emphasis on the second syllable; so also in "appellate."

[17] There are currently 8 women members of the Court.

way from the early part of the 20th century, and is in the process of substantial reorganisation and development following the enactment of the Tribunals, Courts and Enforcement Act 2007.

There is now an Upper Tribunal consisting of four "Chambers". To give you an idea of their scope, they deal with such matters as "Administrative Appeals", "Tax and Chancery", "Immigration and Asylum" and "Lands". Under this body is the "First Tier Tribunal", whose seven chambers deal with such matters as "War Pensions and Armed Forces Compensation", "Social Entitlement", "Health, Education and Social Care", "Tax", "Immigration and Asylum" and "Property".

It is an indication of the seniority of these tribunals that the Upper Tribunal is not bound by decisions of the High Court.[18]

Appeals lie from the decisions of the First Tier to the Upper Tribunal with possible further appeals to the Court of Appeal and Supreme Court.

Still lying outside this system is the Employment Tribunal, which is yet to become a Chamber of the First Tier, and from which appeals are still made to the *Employment Appeals Tribunal*.

County courts

Going down the ladder again, the less important civil cases are tried in the county courts, with appeals to the High Court if permission is given.[19] If the High Court or county court judge when granting permission considers the matter to be of sufficient general importance, the case may be referred directly to the Court of Appeal.

Magistrates' courts

Magistrates also have some civil jurisdiction, chiefly in matrimonial matters, guardianship, adoption, and child support cases. There are

[18] *Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 169 (TCC), [2015] Ch 183.

[19] Until 2 May 2000, appeals from the county courts lay directly to the Court of Appeal. By virtue of regulations made under the Access to Justice Act 1999, most appeals are now to the High Court, but with the possibility of an appeal to the Court of Appeal still available in limited situations.

approximately 350 magistrates' courts (numbers have been declining rapidly in recent years as the court system is "rationalised"), staffed by 18,857[20] lay magistrates and approximately 132 District Judges and 135 Deputy District Judges (magistrates' courts). Appeals from magistrates' courts (by means of what is called a "case stated") go to a Divisional Court—which in family matters will be composed of judges of the Family Division.[21]

Together the Crown Court, High Court and Court of Appeal (but for reasons to be explained, not the House of Lords) make up the Supreme Court of Judicature. The present High Court, and the Court of Appeal on its civil side (but not yet criminal) were set up by the Judicature Act 1873.[22]

Appeals to the Supreme Court

Parliament enacted a Constitutional Reform Act 2005 which, when it came in to operation in 2009 created for the United Kingdom a new Supreme Court to replace the Appellate Committee of the House of Lords. The driving force behind the reform was the idea that it was no longer constitutionally appropriate for the most senior judges to be simultaneously members of the legislature.[23] The existing members of the Appellate Committee of the House became Justices of the Supreme Court but, since they retain their Peerages, are still referred to by the former titles. As further members are appointed, they are known as Justices of the Supreme Court, but they are still accorded the courtesy title as "Lord" or "Lady". The Head of the Court is known as the President.

Now the position is as follows: When an appeal is taken to the Court of Appeal (either from the High Court or from a Divisional Court),

[20] In 2013, the number was 23,244.

[21] Another mode of appeal from magistrates is to the Crown Court; this is a full rehearing, unlike the appeal by case stated which is theoretically only on points of law. When an appeal is taken from magistrates to the Crown Court, a further appeal lies from the Crown Court to a Divisional Court on case stated.

[22] The High Court superseded the old courts of Queen's Bench, Common Pleas, Exchequer, Chancery, Probate, Divorce and Admiralty, and a few minor courts. The Court of Appeal superseded the old Court of Exchequer Chamber and Court of Appeal in Chancery.

[23] This view was shared by some of the members of the House, such as the senior Law Lord (Lord Bingham) "The Evolving Constitution" [2002] E.H.R.L.R. 1, 15.

a further appeal lies (with permission) to the Supreme Court. Why two appeals should be allowed can be explained only by reference to history. "The institution of one court of appeal may be considered a reasonable precaution; but two suggest panic", said A.P. Herbert. It is a panic that pays little regard to the resources of the parties to the proceedings who must bear the costs.

The Judicature Act 1873, which was passed by a Liberal Government, would have abolished the appellate jurisdiction of the House of Lords; but the Conservatives took office before it came into force, and repealed this provision fearing that the abolition of the Lords as a judicial body might be the thin end of the wedge leading ultimately to their abolition as a legislative body.[24] Such fears have nothing to do with the question whether a double appeal is justifiable. From time to time there have suggestions that we should dispense with our top-heavy system.

Despite its undoubted expense, however, the balance of opinion is clearly in favour of a further appeal, for a number of reasons.[25] The sheer volume of work undertaken by the Court of Appeal (particularly the Criminal Division) is such that it does not have the opportunity for detached reflection that should characterise the work of a final court. Both Divisions of the Court of Appeal (i.e. civil and criminal) operate in several courts simultaneously, giving rise to the possibility (admittedly rare) that the courts will decide the same point in different directions. Should that happen, it is open to a later Court of Appeal to choose between the two, but the decision of a higher court is more definitive. In those circumstances, with the consent of the parties and on certificate from the judge, a civil case may go on appeal direct from the High Court to the Supreme Court under the "leap-frogging" procedure introduced by the Administration of Justice Act 1969. This can happen if the case turns on the construction of legislation, or is governed by a previous decision of the Court of Appeal, House of

[24] See Robert Stevens, *Law and Politics* (1977), pp.52 *et seq.* The Royal Commission on the Reform of the House of Lords, *A House for the Future* which reported in January 2000 (Cm. 4534) took the view that, as long as certain conventions were observed, it was appropriate that the judicial functions of the House should be preserved. But this was overtaken by subsequent events.

[25] See A. Le Sueur, "What Do the Top Courts Do?" (2000) 53 C.L.P. 53 and A. Le Sueur and R. Cornes, *The Future of the United Kingdom's Highest Courts* (UCL, Constitution Unit, 2001).

Lords or Supreme Court which one of the parties wishes the Supreme Court to overturn.

It will have been understood from what has gone before that "the House of Lords" was an ambiguous expression. It referred (1) to all the peers who choose to sit[26] as the Upper House of the legislature (Parliament), which continues to be the case, and also (2) to a court consisting of the highest level of the judiciary. The House of Lords no longer performs the latter function. Originally the House of Lords was a single body, but a convention (understanding) developed that only peers with senior judicial experience should decide appeals. This was finally established in 1844. Because they were regarded as being a part of Parliament, the House of Lords was not part of the Supreme Court of Judicature.

The "Law Lords" (the "Lords of Appeal in Ordinary" and peers who held or had held high judicial office such as former Lords Chancellors), as the *Judicial Committee* of the House of Lords, exercised its judicial function. The Lords of Appeal in Ordinary (like Lord Mance and Lord Carnwath) were (and still are) salaried life peers appointed by the Crown. Generally, this was by way of promotion from the Court of Appeal, but it was not unknown for a member of the Bar to be appointed directly to the House.[27] Members of the Court of Appeal are appointed by promotion from the High Court. Even after the Supreme Court had been created, those remaining members of the old body as Law Lords are truly peers, and can take part in debates and vote in the House, though by custom the Lords of Appeal in Ordinary do so only on legal matters. It has been the practice since the creation of the Court to accord the courtesy title of "Lord" to members who were appointed subsequently to the Court's creation,. The "Lords Justices" of the Court of Appeal, by contrast, are not peers and cannot sit in Parliament. We refer, for example, to "Lord Justice Elias", not "Lord Elias".

Although, when exercising its appellate jurisdiction, the House of Lords consisted exclusively of the Law Lords, it nevertheless sat in the same building as the House of Lords when meeting as a limb

[26] Or in the case of hereditary peers, the majority of whom were excluded by the House of Lords Act 1999, those who are still permitted to sit.

[27] Most recently, Lord Sumption, who took office in 2012.

of the legislature; these sittings were in a committee room rather than on the floor of the House itself.[28] This changed when the House became the Supreme Court, but one reason for the delay in implementing the Constitution Act 2005 has been the entirely practical need to find new accommodation for the new Supreme Court. In October 2009, the Justices of the Supreme Court sat for the first time in the new court which is in the former Middlesex Guildhall on Parliament Square. The Court is consequently much easier to visit than was the case when it was housed in Parliament, but if you do not have time to make a visit, you can watch the proceedings of the Court, either live streamed, or archived on the Court's website.

Courts with criminal jurisdiction

The classification of offences

Next, the trial of criminal cases in England. Crimes are divided into *indictable, summary* and offences *triable either way*. Indictable offences are the most serious sorts of crimes, triable by judge and jury in the Crown Court. Summary offences are tried by magistrates in a magistrates' court. Many crimes, though capable of being tried on indictment, can be tried in magistrates' courts if certain conditions are satisfied; these are the intermediate category of offences "triable either way", so called because they might be tried in either the Crown Court or the magistrates' court.

Crown Court

Created by the Courts Act 1971, the Crown Court is now the main criminal court. Theoretically a single court, it is (like the High Court and Court of Appeal) in fact manifold, sitting in nearly 80 centres throughout the country.

A criminal trial in the Crown Court is generally by jury, the exception being where the court is hearing an appeal from magistrates by way of rehearing, in which case the judge will be assisted by two lay

[28] For an interesting note on the (surprisingly recent) origins of the present sitting arrangements of the Appellate Committee, see (1968) 118 N.L.J. 1160.

magistrates. The court is normally presided over by a *circuit judge* or *recorder*, who controls the trial and directs the jury; but it may also be constituted with a High Court judge.[29] Notwithstanding their name, circuit judges do not travel a circuit; they are located in one of the six[30] *circuits* into which the country is divided. High Court judges are generally presumed to be more able or more experienced than circuit judges; and the theory is that they therefore try the more serious and difficult cases. But the time of the High Court judge is precious, so having tried any case requiring that level of expertise, the more senior judge will leave lesser cases to be tried by a circuit judge. The old name "recorder" is preserved for part-time judges who are given the same jurisdiction as circuit judges; they continue other occupations such as practice at the Bar or as solicitors, whereas circuit judges are full-time.

The Crown Court sitting in the City of London (off Ludgate Hill) is still known officially as the Central Criminal Court and colloquially (never in court) as the Old Bailey (or, more frequently, the Bailey). Two of its judges (of senior circuit judge rank) are called the Recorder and the Common Serjeant of London. Some of the centres in which the Crown Court sits are served only by circuit judges, but some are also visited from time to time by High Court judges.

Court of Appeal (Criminal Division)

Appeal from the Crown Court in criminal cases lies (with leave) to the *Court of Appeal (Criminal Division)*. This was created in 1966, superseding the Court of Criminal Appeal, which in turn had superseded the Court for Crown Cases Reserved in 1907. The Court of Appeal (Criminal Division) sits in practice in several separate courts. One is often presided over by the Lord Chief Justice, others by a Lord Justice of Appeal, the remaining members of the court being either two High Court judges or one such judge and a circuit judge. Where the appeal is against sentence only (and not conviction), it is not uncommon for only two judges to sit. This court and the Divisional Court normally sit in London, but they very occasionally sit in regional centres. So far

[29] A judge of the Court of Appeal may sit as a High Court judge.

[30] A seventh (European) circuit was created in May 2001, but this is of its nature rather different from the other six, since it does not represent a geographical region of England and Wales as the others do.

as the conviction is concerned, the appeal may be on law or fact, but only the defendant can appeal—not the Crown.[31] On sentence, the Attorney-General can appeal against those considered to be unduly lenient.[32] Where an appeal against conviction is successful, the court will quash[33] the conviction either completely, or substituting a conviction of some other offence of which the jury could have convicted.

From the Court of Appeal a further appeal lies in important cases (with leave)[34] to the Supreme Court. At this stage the appeal is open even to the prosecutor.

In summary cases, the defendant may appeal to the Crown Court, which rehears the whole case; there is no jury, but at least two magistrates sit with the judge or recorder. Or a case may be stated on a point of law for the decision of a Divisional Court of the Queen's Bench Division[35]; and a further appeal may be taken from the Divisional Court (subject to restrictions) to the Supreme Court.

Reverting to the earlier discussion about the wisdom of a further appeal, it might be said that, in criminal cases at least, the principle of a second (qualified) right of appeal is justifiable, if only because the volume of work confronting the Criminal Division of the Court of Appeal is such that the court only rarely has sufficient time to consider and deliver a reserved judgment, and the pressures of time are such

[31] Apart from a purely moot appeal to settle a point of law. When a defendant is acquitted the Attorney-General may ask the Court of Appeal to rule on the law for future cases, the acquittal not being affected by the outcome of the reference: Criminal Justice Act 1972, s.36.

[32] As set out in the Criminal Justice Act 1988, ss.35 and 36. The form of the appeal is an Attorney-General's reference, in appearance similar to the procedure described in the last note. But the sting is that the sentence of the trial court may be quashed and a more severe one imposed on the individual whose case gives rise to the reference.

[33] Note the word and its spelling (neither squash nor quosh). It is cognate with modern French *casser*, as in *Cour de Cassation*. Note also that lawyers speak of *decisions* of lower courts being "reversed", while *convictions* and *sentences* are quashed. The verdict of a jury is "set aside".

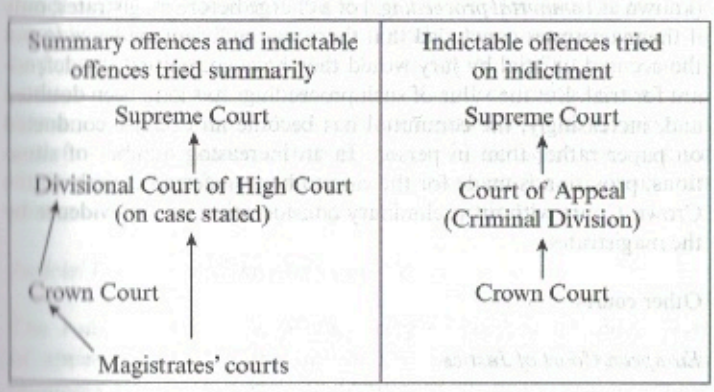
[34] This form of appeal lies direct from a magistrates' court and also from a decision of the Crown Court on appeal from the magistrates' court.

[35] The formula is strange. The lower appeal court must certify that a point of law of general public importance is involved; and then it must appear either to that court or to the House of Lords that the point ought to be considered by the House. The Court of Appeal frequently grants its certificate on the first point, and then refuses to grant leave on the second, in effect passing the question to the House itself. But if the matter is of general public importance (and granted that we have a second appeal court to consider it), why should not the appeal be allowed as of right?

that it may be doubted whether that court should be burdened with the role of being the final appeal court.

The scheme of criminal courts can be represented diagrammatically as follows:

Figure 2



The terminology of criminal procedure

The term *indictment* itself needs a bit more explanation. Originally an indictment (pronounced "inditement") was a *true bill* found by a *grand jury*, i.e. a jury for presenting suspected offenders. The trial upon it at assizes or quarter sessions was by a *petty jury*. Nowadays the grand jury is abolished, but we still retain the word "indictment" for the document commencing criminal proceedings that are to be tried by jury. The present-day indictment may be defined as a document put before the Crown Court by anyone, and signed by the clerk of the court. It may charge different offences in separate *counts*.

Prepositions have come to be used rather sloppily in criminal matters. In good usage, one is charged, tried, acquitted, convicted, or sentenced *on* (or *upon*) an indictment or count or charge. One is indicted *on* a charge of theft (or some other offence) or on two counts of theft. One is indicted or tried *for* theft, and the indictment/count/

information/charge is *for* theft.[36] (An information is a document making a criminal charge before magistrates.) We also speak of a count or charge *of* theft. One is charged (verb) *with* theft. One pleads guilty (or not guilty) *to* a count or charge or indictment of theft, or *to* theft. One is acquitted or convicted (or found guilty) *of* theft.

Formerly there would have been a preliminary investigation (known as *committal proceedings*) of a charge before magistrates; only if the magistrates concluded that there was sufficient evidence to put the accused on trial by jury would they have committed the defendant for trial. But the value of such proceedings has long been doubted and, increasingly, the committal has become an exercise conducted on paper rather than in person. In an increasing number of situations, provision is made for the case to be transferred directly to the Crown Court without preliminary consideration of the evidence by the magistrates.

Other courts

European Court of Justice

For so long as the UK remains a member of the European Union post Brexit, the Supreme Court is no longer the highest court of the United Kingdom, because the European Court of Justice (sitting in Luxembourg) adjudicates upon European Union law, and its decisions can be binding on British courts by reason of the European Communities Act 1972.[37] The impact of Community law grows continually; it is to be seen in company law, trademarks and other "intellectual property", the law of monopolies, employment law, social security, customs, and many other areas. An English court can ask the European Court for a ruling on any doubtful question of Community law.[38]

[36] Some writers misguidedly say "indicted with theft", "indicted with counts of theft and robbery", "convicted of three counts", and so on. The horrible expression "summonsed for an offence" (turning the noun "summons" into a verb) has now become accepted usage, but "summoned" remains not only allowable but preferable.

[37] After considerable judicial prevarication, this was eventually settled by the decision of the House of Lords in *Factortame Ltd v Secretary of State for Transport* [1990] 2 A.C. 85.

[38] See further below, Ch.3.

European Court of Human Rights

Any person who claims to be aggrieved by a violation of the provisions of the European Convention on Human Rights, and who is not satisfied with the determinations of the domestic courts, can still complain to the European Court of Human Rights at Strasbourg. If the decision is in favour of the applicant, the Government is under an obligation in international law to take steps to amend our law or practice accordingly. The Human Rights Act 1998 (which incorporated the Convention into United Kingdom law and which is discussed in Chapter 3) should reduce considerably the number of occasions upon which resort to this court should be necessary, since the British court should have taken the European jurisprudence into account in the course of arriving at its own decision.

Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council is the final court of appeal from what remains of the old colonial Empire (with remnants also of its appellate jurisdiction from the self-governing members of the Commonwealth). Its composition is much the same as that of the Supreme Court when exercising appellate jurisdiction, though certain Commonwealth judges (and members of the Court of Appeal, since they are Privy Councillors) may sit in addition. Until the establishment of the Supreme Court, it had jurisdiction to deal with devolution issues arising from the Northern Irish, Scottish and Welsh devolution arrangements but these have been transferred to the new Court. It used to meet in a room in Downing Street, but now there is a separate room set aside for the purpose in the same building as is occupied by the Supreme Court on Parliament Square. In either case, since justice in Britain is normally administered in public, you can (having navigated the security arrangements at the entrance) walk boldly in and listen to its proceedings.[39]

[39] Proceedings of the Supreme Court are now also available by live video stream at the Court's website.

ELEMENTARY LEGAL TERMINOLOGY

I am about to consider some elementary matters of English legal terminology, because it is important that the student should become familiar with legal language at an early stage. A preliminary word of explanation. Many lawyers think that the language of the law is opaque and difficult for the layperson to understand. Efforts have been made to alter this by changing the terminology, particularly in the course of the April 1999 reform[40] of the system of civil procedure. This has the drawback for those coming new to the law that they need to be familiar with both the new language and the old, since they will find that much of the law that they study will be couched in the language of yesteryear. The beginner may be pleased to know that the language of the criminal law has not been subjected to the same sorts of changes.

Civil terminology

Turning to civil proceedings, the terminology generally is that a *claimant*[41] (known as a *plaintiff* prior to April 1999) *sues* (i.e. brings an action against) a *defendant*. The proceedings if successful (with the defendant being found *liable*) result in *judgment for the claimant*, and the judgment may order the defendant to pay the claimant *damages* (money), to transfer property, to do or not do something (an *injunction*) or to fulfil obligations under a contract (*specific performance*). In proceedings against the government or certain public authorities, known as *applications for judicial review*, whether by means of a *mandatory, prohibiting* or *quashing* order,[42] or otherwise, the parties are also called *claimant*[43] and *defendant* respectively. In matrimonial cases in the Family Division the parties are called *petitioner* and *respondent*, the relief sought concerns *dissolution* of the marriage and the proceedings result in a *decree* of divorce.

[40] A new system of civil procedure was introduced on 26 April 1999, giving effect to Lord Woolf's proposals to be found in the report *Access to Justice* (1996).

[41] Formerly referred to as the "plaintiff". "Complainant" in family proceedings courts (as magistrates' courts are referred to in dealing with family matters).

[42] Until October 2000 known as orders of *mandamus, prohibition or certiorari* respectively.

[43] Formerly known as an *applicant*, and in the case of an application for another of the ancient writs, habeas corpus, is still so known.

Criminal terminology

In English criminal proceedings the terminology is as follows. You have a *prosecutor* prosecuting a *defendant*,[44] the result of the prosecution if successful is a *conviction*, and the defendant who is found guilty may be *punished* by one of a variety of punishments or *sentences* ranging from a fine to life imprisonment, including release on *probation* and other alternatives to custody, or may be discharged without punishment.

The terminology of the one type of proceedings should never be transferred to the other. "Criminal action", for example, is a misnomer; so is "civil offence" (the proper expression is "civil wrong"). One does not speak of a claimant prosecuting or of the criminal defendant being sued. The common announcement "Trespassers will be prosecuted" has been called a "wooden lie", for trespass has traditionally been a civil wrong, not (generally) a crime.[45]

CLASSIFICATION OF CIVIL WRONGS

The more important types of civil wrong may be briefly mentioned. One is the *breach of contract*. This is easy to understand, and all that the student needs to know at the outset of his or her studies is that a contract need not be in a formal document or indeed in any document at all. You make a contract every time you buy a newspaper or a bus ticket.

Another civil wrong is a *tort*. This word conveys little meaning to many outside the legal profession, and its exact definition is a matter of great difficulty even for the lawyer. However, the general idea of it will become clear enough if one says that torts include such wrongs as negligence and nuisance, defamation of character, assault, battery, false imprisonment, trespass to land and interference with goods. It

[44] Formerly called "prisoner" in felonies and "defendant" in misdemeanours; felonies were abolished as a separate class in 1967. The term "prisoner" is invidious for one who has not yet been convicted, and is now rarely used. Instead of "the defendant" the expression "the accused" is very commonly encountered.

[45] There are some statutory offences of trespass, such as trespass on a railway line, and *aggravated trespass* where the trespasser has the purpose of disrupting the lawful activities of others (Criminal Justice and Public Order Act 1994, ss.68 and 69).

is a civil wrong independent of contract: that is to say, it gives rise to an action for damages irrespective of any agreement not to do the act complained of. Etymologically the word comes to us from the French *tort*, signifying any wrong, and itself derived from the Latin *tortus*, meaning "twisted" or "wrung", the latter term having the same origin as "wrong".[46] Nowadays, however, a tort is not any wrong but only a particular kind of wrong that the law recognises as such, of which examples were given above.[47] The adjective from tort is "tortious": thus one speaks of a tortious act.

A third civil wrong is a *breach of trust*. A "trust" is not a mere obligation of honour, as the word may seem to suggest, but an obligation enforced by the courts. It occurs where a person, called technically a *settlor*, transfers property (such as land or shares) to another, called a *trustee*, on trust for yet another, called a *beneficiary*. Where the trust is created by will the *settlor* is also called a *testator* (the name for anyone who makes a will); and an alternative name for the beneficiary is *cestui que trust*, an elliptical phrase meaning "the person [for] whose [benefit the] trust [was created]". In this phrase *cestui* is pronounced "settee" (with the accent on the first syllable),[48] *que* is pronounced "kee", and *trust* as in English. Grammatically the plural should be *cestuis que trust* (pronounced like the singular); but by an understandable mistake it is sometimes written *cestuis que trustent*, as if trust were a verb.[49] The beginner will perceive by this time that several law-French words survive in our law from the time when French was the language of the legal class. In the case of a charitable trust there need be no definite beneficiary but the property is held on trust for the public as a whole or for some section of it. Thus the heritage organisation "National Trust" preserves beautiful places for the public enjoyment, and there are many trusts for educational and religious purposes.

[46] It is strange how the notion of wrong is wrapped up with that of twisting: the opposite of wrong is right, which is the Latin *rectus*, straight.

[47] For a further discussion of the nature of tortious liability, see *Clerk and Lindsell on Torts* (20th edn, 2010), Ch.1.

[48] The *Oxford English Dictionary* gives the pronunciation "sestwee", but this is not common among lawyers. Sir Percy Winfield told Glanville Williams that F.W. Maitland's pronunciation was the one preferred here, and that should be good enough authority for anyone.

[49] See Sweet, "Cestui Que Use: Cestui Que Trust" (1942) 26 L.Q.R. 196.

The only other type of civil obligation (it is not thought of as a wrong) that the beginner need hear about is the *restitutionary* obligation. Suppose that I pay you £5, mistakenly thinking that I owe it to you: I can generally recover it back[50] in the law of restitution. You have not agreed to pay it back and so are not liable to me in contract; but in justice you ought to pay it back. There are various other heads of unjust enrichment besides the particular example just given,[51] such as the obligation to repay money paid on a consideration that has totally failed.

PUBLIC AND PRIVATE LAW[52]

Another distinction that needs to be considered is that between public and private law. Until relatively recently, it was widely believed (or at any rate conventionally asserted) that the United Kingdom knew no system of public law regulating the citizen and the state separate from ordinary private law that governs the relationships between citizen and citizen. Professor A.V. Dicey in his *Introduction to the Study of the Constitution* (1885) had insisted that it was a feature of the rule of law itself that it was undesirable to seek to control the state other than through the ordinary law of the land, as developed for private citizens. The development in the course of the twentieth century of the doctrines of judicial review of administrative action made this perspective quite unrealistic by the beginning of the twenty-first century. "Judicial review" refers to a body of doctrine and legal rules whereby the courts have ensured that government ministers and other public authorities act within the bounds of the legal powers conferred upon them by Parliament, and that they do so in accordance with appropriate procedural practices. The result is that there is undoubtedly a distinctive body of public law, frequently studied as such in universities, sometimes called by a name such as "constitutional and administrative law".

[50] "Recover back", is not, in legal usage, pleonastic; i.e. the word "back" is not superfluous. You "recover" damages, a sum of money that you never had before. You "recover back" a certain sum of money corresponding to one that you did have at some time in the past.

[51] See G. Virgo, *Principles of the Law of Restitution* (3rd edn, 2015), Ch.1.

[52] Lord Woolf, "Public Law—Private Law: Why the Divide?" [1996] P.L. 220 and "Droit Publique—English Style" [1995] P.L. 57.

The distinction between public and private law is not hard and fast, but the dividing line can sometimes be a crucial one. The public law remedies of judicial review are not available against a purely private body,[53] for example, and different procedures are adopted for proceeding against a public as opposed to a private concern. For a time, this dichotomy threatened to return the legal system to the abysmal wrangling portrayed in Charles Dickens' novel *Bleak House*.[54] The position was rectified by the House of Lords after a decade of confusion[55]; now the applicant will lose only if the chosen course (chosen let it be said by the legal advisers, since the client will rarely have expertise in these matters) is manifestly wrong. Similarly, the notion that the validity of a byelaw could be challenged only by bringing separate proceedings for judicial review and not by way of (for example) a defence in a criminal trial was eradicated by the House of Lords before it could gain too entrenched a foothold.[56]

COMMON LAW AND EQUITY

Two technical terms of great importance that are likely to puzzle the novice are "common law" and "equity".

The law of England may be said to be composed of three great elements: legislation, common law and equity. To this must be added the directly applicable law emanating from Europe, which will be explained in Chapter 3.

Legislation

The most important kind of legislation is the Act of Parliament (otherwise called a *statute*), through which the government of the

[53] See *R. v Panel on Takeovers and Mergers, ex p. Datafin* [1987] Q.B. 815.

[54] *O'Reilly v Mackman* [1983] 2 A.C. 237 sent the law in the wrong direction, by requiring that the applicant must select the correct of the two available procedural paths, at the risk of losing the case (possibly at the end of lengthy legal proceedings) should the wrong one prove to have been adopted.

[55] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 617.

[56] *Boddington v British Transport Police* [1999] 2 A.C. 143, where the defendant to a criminal charge of smoking on a train was permitted on appeal to challenge the British Rail byelaws imposing the prohibition. Initially, it was held, the proper procedure was for the smoker to bring a civil action.

day carries into effect its principal policies. This is known as *primary legislation*. What is called *delegated legislation*, like the many government orders generally known as *statutory instruments*, has come to be of great importance as well. About 3,800 such instruments are promulgated every year, adding detail to the legislative framework created by the Act of Parliament.

A non-lawyer (or layman) is not likely to experience difficulty in understanding what constitutes primary legislation. Not so, however, with common law and equity, which need fuller discussion.

Common law

The phrase "the common law" seems a little bewildering at first, because it is always used to point a contrast and its precise meaning depends upon the contrast that is being pointed. An analogy may perhaps make this clearer. Take the word "layman". In the preceding paragraph the word was used to mean *a person who is not a lawyer*. But when we speak of ecclesiastics and laymen, we mean by "laymen" non-ecclesiastics. When we speak of doctors and laymen, we mean by "laymen" non-doctors. "Laymen", in short, are people who do not belong to the particular profession of which we are speaking. It is somewhat similar with *the common law*. Originally this meant *the law that was not local law*, that is, the law that was *common to the whole of England*. This use may occasionally be encountered, but it is no longer the usual meaning.

More usually the phrase will signify *the law that is not the result of legislation*, that is, the law created by the *decisions of the judges*. The decisions of the courts which create and lay down the law are called *precedents*.

A third use to which the phrase may be put is to denote *the law that is not equity* (i.e. that developed by the old Court of Chancery). In this sense it may even include statutory modifications of the common law, though in the previous sense it does not.[57]

Finally, it may mean *the law that is not foreign law*; in other words, the law of England, or of other countries (such as America) that have

[57] Lawyers sometimes use the term to mean only the civil law part of the common law in sense three, to the exclusion of the criminal law.

adopted English law as a starting-point. In this sense it is contrasted with (say) Roman, Islamic or French law, and here it includes the whole of English law; even local customs, legislation and equity.

It will thus be seen that the precise shade of meaning in which this chameleon phrase is used depends upon the particular context, and upon the contrast that is being made. In contrasting common law with legislation and equity I am making particular reference to the distinctions set out in the second and third senses of the phrase.

Equity

The term *equity* is an illustration of the proposition that some words have a legal meaning very unlike their ordinary one. In ordinary language "equity" means natural justice; but the beginner must get that idea out of mind when dealing with the system that lawyers call equity. Originally, indeed, this system was inspired by ideas of natural justice, and that is why it acquired its name; but nowadays equity is no more (and no less) natural justice than the common law, and it is in fact nothing other than a particular branch of the law of England.

Equity, therefore, is law. Students should not allow themselves to be confused by the lawyer's habit of contrasting "law" and "equity", for in this context "law" is simply an abbreviation for the common law. Equity is law in the sense that it is part of the law of England; it is *not* law *only in the sense that it is not part of the common law*.

The process whereby equity came into being may be briefly described as follows. In the Middle Ages, the courts of common law failed to give redress in certain types of case where redress was needed. Disappointed litigants petitioned the King, who was the "fountain of justice", for extraordinary relief and the King, through the Chancellor, eventually set up a special court, the Court of Chancery, to deal with these petitions. Eventually the rules applied by the Court of Chancery hardened into law and became a regular part of the law of the land. The most important branch of equity is the law of *trusts*, but equitable remedies such as *specific performance* and *injunction* are also much used.

The student will learn how, in case of *conflict or variance* between the rules of common law and the rules of equity, equity came to prevail. This was by means of what was called a *common injunction*. Suppose

that A brought an action against B in one of the non-Chancery courts and, in the view of the Court of Chancery, the action was inequitable. B's proper course was to apply to the Court of Chancery for an order, called a common injunction, directed to A and ordering him not to continue the action. If A defied the injunction the Court of Chancery would put him in prison for contempt of court. Equity thus worked "behind the scenes" of the common law action; the common law principles were theoretically left intact, but by means of this intricate mechanism they were superseded by equitable rules in all cases of conflict or variance.[58] The result justified the sarcasm of the critic who said that in England one court was set up to do injustice and another to stop it.

This system went on until 1875, when as a result of the Judicature Act 1873 the old courts of common law and the Court of Chancery were abolished. In their place was established a single Supreme Court of Judicature, each branch of which had full power to administer both law and equity. Also, common injunctions were abolished and instead it was enacted that, in cases of conflict or variance between the rules of equity and the rules of common law, the rules of equity should prevail.

Common law as made by the judges

When the term "common law" is used in contrast to statutory law, it may mean either of two things, though they are closely related. It generally means the body of law produced by decided cases without the aid of legislation.[59] Occasionally, however, the invocation of the common law refers not to previously existing law but to the power of the judges to create new law under the guise of interpreting it. Nearly all the common law in the first sense is created by the common law in the second sense, that is to say by the judges in the exercise of their discretion. How much discretion a judge has to expand the law is a complex question. Part of the answer to it will appear in Chapter 6.

[58] The common law courts, after a famous struggle in the seventeenth century, lay passive under this process; they did not help but they did not hinder. In some cases they even took account positively of equitable doctrines. See *Master v Miller* (1791) 4 T.R. at 341, 100 E.R. at 1053; *Legh v Legh* (1799) 1 Bos. & Pul. 447, 126 E.R. 1002; *Bosanquet v Wray* (1815) 6 Taunt. 597, 128 E.R. 1166; *International Factors Ltd v Rodriguez* [1979] Q.B. 351.

[59] The expression is used in this sense in Professor J. Beatson's "Has the Common Law a Future?" (1997) 56 C.L.J. 291.

FURTHER READING

A number of works give a description and evaluation of our courts and their workings: Catherine Elliott and Francis Quinn, *English Legal System* (16th edn, 2015). Martin Partington's *Introduction to the English Legal System 2015–16* provides a panoramic perspective. The book is now published annually, and a new edition is pending at the time of writing.

If you have a taste for history, you will derive much pleasure and profit from J.H. Baker's *An Introduction to English Legal History* (4th edn, 2002). A shorter and less ambitious treatment, confined to the history of the courts, but very readable, is H.G. Hanbury and D.C.M. Yardley, *English Courts of Law* (5th edn, 1979). Professor S.F.C. Milsom's *Historical Foundations of the Common Law* (2nd edn, 1981) is the best treatment of the subject, but is perhaps too difficult for a beginner.

2 THE MECHANISM OF SCHOLARSHIP

> "I hold him not discreet that will *sectari rivulos*, when he may *petere fontes*."[1]
>
> —Coke, Preface to 4th part of Reports.

The person who wants to become a lawyer, and not merely to pass law exams (which is not at all the same thing), must learn to use legal materials. A complaint met with increasing frequency is that too many modern (twenty-first century) graduates are unable to conduct "research", by which is meant amongst other things that the student has not been taught (or at any rate has not learnt) how to handle legal materials. To acquire proficiency in this, students must get to know their way about the law library,[2] and must acquire the habit of first-hand work among what lawyers call the sources. It must be said, however, that much modern legal education overlooks this aspect of the process. So keen are most lecturers that the student should engage with the doctrines and principles inherent in the law that they simplify the process by making available large amounts of pre-digested material extracted from cases, statutes, regulations, official publications and other sources. Students are then left to pick up lawyerly skills such as finding the relevant materials for themselves as best they can. One of the purposes of this book is to remedy that deficiency.

The great campaigner among teachers of law for exposure to primary materials at first hand was Sir Frederick Pollock, affectionately known to his own generation as "F.P."; no apology is necessary for repeating his thoughts, since they are difficult to better (though the language in which they are couched may seem aggressively masculine to the modern reader):

[1] "Why chase after little streams when you can go straight to the source?"

[2] More detailed and extremely valuable guidance is contained in J. Knowles and P. Thomas, *Effective Legal Research* (4th edn, 2016) and P. Clinch and J. Beaumont, *Legal Research: A Practitioner's Handbook* (2nd edn, 2013).