16

English Common Law: The Formative Age

16.1 Introduction

The advent of the Normans in 1066 opened a new era for England, the imprint of which has characterised English history among others, until the present day. The common law created by the Normans in time has constituted an imposing legal system. It was a 'common' law for several reasons: because it contrasted with the multiplicity of local and customary laws of pre-Norman England which the conquerors did not abolish; because it was created and managed in a unitary and centralised way by royal judges with the instruments of judicial procedure of which we shall be speaking; because it was applied generally, that is, more broadly than sovereign privileges, special laws or norms pertaining to specific social groups; because it was managed by secular courts and not ecclesiastical courts which applied the canon law of the Latin Church; and because it was separate from the parallel body of rules of equity which emerged at the end of the Middle Ages through the Chancery.

Common law is characterised by fundamental differences with respect to the *civil law* of the continent: among them, the absence of a code of law and a written constitution; lack of a clear separation between public and private law; the eminent role of judges; the marginal role played by doctrine and legal academia; the lack of separation between substantive law and procedure; criminal procedure resting on an accusatory rather than an inquisitory model; an 'exclusionary rule' that binds judges to the letter of the law avoiding investigation of the legislative intention; and others.[1]

English law stems from the creativity of royal judges, which through an uninterrupted stream of decisions on specific cases beginning in the twelfth century constructed a vast and complex body of rules and principles producing a quintessentially judge-made law, in which

[1] On these distinguishing features of the English *common law* from continental law, see Van Caenegem, 1991, pp. 8–60; id., 2002, pp. 38–54.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

legislation, though not absent, has a relatively marginal role. The Roman legal tradition handed down in the *Corpus iuris* and the heart of the continental legal tradition has remained mostly outside the principal line of development of common law. In addition, doctrinal legal science – the fruit of analysis, coherent study and systematisation undertaken by learned university jurists, which has so profoundly influenced the development of law on the continent – had a more circumscribed role in English law. The training of jurists and the structure of legal professions in England followed a different route than that on the continent, as English lawyers and judges were trained in the practice of their profession, not at university; and it is in the pursuit of their jurisprudential practice that in time a sophisticated body of legal skills was developed.

It is a system, therefore, both different and original, the worldwide historical influence of which has been vast and profound: one need only remember that the law of the United States stems directly from the English model. Other regions of the planet such as Australia, India and Canada have in the course of the modern era adopted it either by direct influence or indirectly under English dominance.

Common law has nevertheless also interacted with European continental law: historical research has brought to light clear evidence of how Roman, canon, customary and commercial law, as well as the university-learned doctrine of the continental law has time and time again, in the course of the Middle Ages and the modern era, directly inspired a whole series of institutes which have become part of English common law: from wills to bills of exchange, from marriage law to the regime of juristic persons.

In turn, English law had a strong impact in some phases of continental legal history: for example, influencing the basic architecture of the modern constitutional states; giving currency to the separation of powers introduced in England in the seventeenth century and developed in the European Enlightenment; in the transplanting to France at the end of the eighteenth century of the English criminal jury system; in the reception of English commercial law on the continent during the nineteenth century.

The two-way relations between common law and continental civil law have therefore always been important, beginning in the Middle Ages until the present day.[2]

[2] See the vol. *Relations between the ius commune and English Law*, 2009.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

16.2 The Norman Kingdom

With William the Conqueror (1028–1087), the English kingdom acquired some characteristics which remained unchanged over time.[3] The first is the principle that the entire territory of the kingdom belonged to the king, so every right over land and immovable property was held to legally derive, either directly or indirectly, from royal concession. It follows that every man was a 'king's man' also in relation to his property rights, according to a very different view from that of the Roman free *dominium*, adopted by continental law. A minute inventory of landed property was undertaken by order of King William in the 1086 compilation of the *Domesday Book*, an extraordinary enterprise of analytically registering the census of every parcel of land in the kingdom, with momentous consequences in terms of dependency and of revenues for the crown [Hudson in OHLE, II, pp. 118, 224].

Another important feature was the line drawn between royal and ecclesiastical jurisdictions, which during the Anglo-Saxon kingdoms had been for centuries, not unlike on the continent, often intermingled: this separation was aimed at reclaiming not only the king's sovereignty and autonomy from the Church, but also his control over ecclesiastical power [Helmholz, 2004]. As is well known, the relationship between the king and the archbishop of Canterbury was bitterly conflictual at the time of Bishop Anselm of Aosta. Their 1107 reconciliation with regard to the investiture of bishops sanctioned the primacy of the Church over the king, along the lines of the Diet of Worms, fifteen years later in 1122, which was to end the long and bitter battle over investiture on the continent. However the conflict between the Church and the state did not come to an end in England. In fact, during the kingdom of Henry II – who had further legislated on the relationship between Church and state in the Court of Assizes of Clarendon (1164) – the conflict resulted in the tragic murder of Thomas Becket, the intransigent bishop who would not bend under royal pressure.

The fundamental means by which the crown of England gained control of the entire territory was with the progressive expansion of royal jurisdiction [Van Caenegem, 1959]. The Normans retained the Anglo-Saxon territorial partitioning and organisation: the kingdom was divided into *shires*, each of which was headed by an *earl* (a noble vassal of the

[3] Alongside the great basic works by Maitland and Holdsworth, see the valuable summaries by Baker, 2002; Brand, 1992; Hudson, 1996; Langbein et al., 2009; Milsom, 2007, as well as the recent vast *Oxford History of the Laws of England* (OHLE).

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

king), but effectively controlled on behalf of the king by the *sheriff* (*shire reeve*) who was nominated by the king to a directly dependent and revocable position. Traditional justice was administered by the *county courts*, made up of *freeholders* of land, and within the counties by the *hundred courts*, these too dating back to Anglo-Saxon times and common among many other Germanic kingdoms of the early medieval period, although many were by then defunct. To resolve judicial cases, recourse continued to be made, in the first phase of the Norman reign, to traditional English customs, which were reiterated in a text written around 1108, during the reign of Henry I, the *Leges Henrici Primi*.[4]

It was taken for granted that a king was first of all a judge in early medieval European kingdoms. The Norman king's council (*Curia regis*) therefore also dealt with judicial matters, in which the sovereign himself would often take part. If the king moved from one place to another on the territory, trials could take place anywhere he would reside. It became more and more frequent for English subjects to turn to royal justice when ordinary county justice had not dealt with or resolved a case to their satisfaction. By the twelfth century this was to produce a range of effects. Some members of the *Curia regis* were entrusted to exercise their judicial functions by moving from place to place within different districts (*circuits*) and to instruct and decide on cases in the name of the king, in procedures which took the name of *assize*. Otherwise a claimant had access to royal justice by going to court, unless in the meantime (*nisi prius*) a judge delegated by the king had intervened to resolve the case locally.

16.3 Writs

The active intervention of the English monarchy in the sphere of justice was to unequivocally manifest itself only a century after the Conquest, during the reign of Henry II (1154–1189). The ways in which it became possible to establish the primacy of royal jurisdiction over seigniorial and local laws, which had previously prevailed, constitutes one of the most interesting features in European legal history. The Norman kings of England on one hand made use of their duty to safeguard internal order (the king's peace), and on the other hand availed themselves of the power given the *sheriffs* of the counties, as they could impose on the local lords the alternative of either doing justice themselves or having the

[4] *Leges Henrici Primi*, ed. L. J. Downer, Oxford 1972.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

case taken away from them and transferred to royal judges. Thirdly, royal justice provided a set of procedural instruments which were more effective than the traditional ones of the duel and the ordeal, instruments which only the king himself could establish and impose on his own judges. The combined action of these three elements ensured, in the span of two centuries after the Conquest, the full victory of the king's jurisdiction.

In the instance of a litigant turning to the king to claim that his lord (the feudal superior to the litigants and competent to judge cases concerning his vassals) had refused him justice over a right, the king granted access to the county court (administered, as we have seen, by a sheriff nominated by the king) in case the lord continued to deny justice to the litigant after the king had ordered him to do so. The brief memorandum (*breve, writ*) written by the Royal Chancery and addressed to the lord was the *writ of right (breve de recto)*.[5] For lands which a lord had received directly from the king, the *writ* was sent by the king's chancellor directly to the local sheriff, in the form of an order that the defendant accept the request of the plaintiff – who had turned to the king in order to obtain the *writ* – for the immediate return of the contested lands (*writ praecipe quod reddat*).[6] Should the defendant fail to do as ordered, the *sheriff* would order his appearance before the king's judges.

Through a supplementary procedure of amendment promoted by the Royal Chancery, the *writ* was in this way to substantially undermine the lord's jurisdiction over the territory. By the late twelfth century, it was already impossible to reclaim rights over lands against a *freeholder*; this dispute could not be heard by the feudal lord without the plaintiff having previously obtained a *writ* from the Royal Chancery. Despite the barons having in the thirteenth century obtained the concession of jurisdiction over lands not granted directly by the king,[7] recourse to royal jurisdiction on the part of freeholders was to take root.

At the same time, in controversies concerning land rights the defendant was empowered by King Henry II to argue his side through the testimony under oath of twelve neighbours (*Grand Assize*), rather than

[5] The formula for the *writ of right*: '*Edwardus rex [. . .]comiti Lancastriae salutem. Praecipimus tibi quod sine dilatione plenum rectum [right] teneas A. de B. de [. . .] viginti acris terrae cum pertinentiis in I., quae clamat tenere de te per liberum servitium unius danarii per annum, quod W. De T. deforciat. Et nisi feceris, vicecomes Nottingham faciat, ne amplius inde clamorem audiamus*' (Baker, 2002, p. 538). See Langbein et al., 2009, p. 97; Milsom, 2007, pp. 124–133.

[6] See the formula in Baker, 2002, p. 240.

[7] Magna Carta (1215), c. 34.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

the judicial duel. This was an early appearance of what was to become one of the most important institutions of common law that is the *trial by jury*, although in this instance the witnesses were called on to pronounce themselves on the existence of a right, not a question of fact.[8]

A similar procedure – through the sworn testimony of a group of neighbours (*petty jury*) – was introduced in the same years to decide on controversies over possession. A subject claiming that he had been illegally deprived of the possession (*seisin*) of lands could obtain a *writ* from the Royal Chancery for the purpose of having it reinstated (*writ of novel disseisin*).[9] Akin to the *interdicta*, and possibly inspired by them, but not in fact in every way equivalent to Roman law,[10] these *writs*[11] provided the safeguarding of real estate possession as distinct and autonomous from that of the right of ownership. The basic Roman and continental distinction between possession and property does not have an exact parallel in common law, in which the *writ of right*, regarding the validity of the right of property, is governed by each of the parties trying to prove that his possession (*seisin*) goes further back in time or is more well-founded than that of his adversary [Plucknett, 1956, p. 358].

These legal instruments provided a strong and effective strategy for ensuring royal jurisdiction: they provided appropriate, timely and efficient protection, which royal judges could grant through a probatory regime unique to them; the sworn testimony of neighbours (*jurata, jury*), which was a far more reliable instrument than the traditional ordalic proof: the duel; the ordeals themselves and the sworn statement of the

[8] The fundamental role of the monarchy and the derivation of the English jury from the Norman model were clearly illustrated for the first time by Maitland in 1895 (Pollock and Maitland, 1968, I, pp. 140–142).

[9] *Writ of Novel Disseisin*: '*Rex vicecomiti N. salutem. Quaestus est nobis A. quod B. iniuste et sine judicio disseisivit eum de libero tenemento suo in C. [. . .]. Et ideo tibi praecipimus quod si praedictus A. fecerit te securum de clamore suo prosequendo, tunc facias tenementum illud reseisiri [. . .] usque ad primam assisam cum justiciarii nostri in partes illas venerint. Et interim facias duodecim liberos et legales homines de visneto [neighbourood] illo videre tenementum illud [. . .] et summone eos quod sint coram praefatis justiciariis ad praefatam assisam*' (see Baker, 2002, p. 544; Langbein et al., 2009, p. 101; Milsom, 2007, pp. 137–142).

[10] Actually the Roman distinction between property and possession does not coincide with that of common law, which follows a specific notion of property. Moreover, possession is protected by different procedural rules from Roman law as in *common law* it is tied to the violation of the 'king's peace' as well as being founded on the testimony of the jurors.

[11] The *writ mort d'ancestor* (introduced in 1176) belongs to the same category for the ascertaining of the legitimate possession of a property of an inheritor of someone who is deceased; and so does the *writ darrein presentement* on the right of a patron to nominate a beneficiary for the possession of ecclesiastical property.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

defendant's trustees (*wagers by law*). In this way, royal jurisdiction gained considerable ground, although it entailed considerable expenses for the litigant. All *writs* were in fact issued on payment of a substantial sum.

During the reign of Henry II there was another advance in royal jurisdiction. During the Anglo-Saxon period a specific range of crimes and behaviours were severely punished because they were held to violate the 'king's peace'. With the Normans, this range was extended to include all serious crime: a sort of legal fiction held that all criminal acts could be said to disturb the 'king's peace' and were therefore prosecutable before the king's judges. In 1166 the Clarendon Court of Assizes ruled that the king's judges should periodically visit various parts of the kingdom in the guise of itinerant judges, in order to investigate crimes committed on the territory based on the accusations and witness accounts presented by local juries. Before the king's judges, the perpetrator of a crime could be prosecuted not only as an offender of the victim, but also as one guilty of 'felony' for having violated his fiduciary pact with the king and disturbed the king's peace by his behaviour. In this way, all crimes became *pleas of the crown* (*placita coronae*):[12] a result which has been judged to be a defining step in the history of criminal law [Maitland, 1950, p. 109].

Originating from the 'king's peace' and 'felony' was another important action known as the *writ of trespass*,[13] which beginning in the middle of the thirteenth century gradually became the principal instrument for obtaining retribution from one who had committed a tort. The *trespass* presupposed an act of violence against either a person or a movable or real possession, and was based on proof submitted to the jury for deliberation, and granted the right of demanding compensation from the king's judges for the damage inflicted. Originally *trespass* included a limited number of offences, but gradually grew to include a numerous and disparate array of torts, the recovery of damages depending on the plaintiff's ability to provide a precise factual account of the tort.[14] In time a more general form of action for torts was to develop, known as *trespass*

[12] *Placita corone or La corone pledee devant justices*, ed. J. M. Kaye. – London 1966 (Selden Society, Suppl., 4).

[13] Writ of trespass: '*Rex vicecomiti S. salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. quod sit coram nobis in octabis Sancti Michaelis ubicumque fuerimus tunc* in *Anglia ostensurus quare vi et armis in ipsum A. apud N. insultum fecit et ipsum verberavit*' (Baker, 2002, p. 544); on a 1341 case, *ibi*, p. 554. See Langbein et al., 2009, p. 103.

[14] '*ostensurus quare*': the plaintiff had to demonstrate why (*quare*) and on the basis of which facts was his recourse to the king's justice.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

on the case, which, unlike the original *trespass*, was only civil in character and did not involve the arrest of the defendant.[15]

For contracts the genesis of the procedural protection before the royal courts was more complex. At the end of the twelfth century Glanvill still declared that the king's justice did not include 'private agreements'. What did exist was the *writ of debt*,[16] but this was a crude form for simply requesting the 'restitution' of a sum of money which the plaintiff claimed was owed him without having to provide proof of the cause (it constituted almost a subspecies of the *writ praecipe quod reddat*); furthermore, it implied recourse to the proof by duel and finally it involved an expense on the part of the litigant equal to a third of the value of the sum demanded [Plucknett, 1956, p. 632]. Half a century later, Bracton attests to the existence of an action which made express reference to a contract (*writ of covenant*), but this was to be brought about only if the plaintiff could show a formal written act stamped with a seal, or if the money or goods had already exchanged hands. Proof was obtained by means of an oath taken by the 'co-jurors' (*wager of law*), in the medieval style of sacramentals (*sacramentales*).[17] A more effective protection of contracts was to develop at a later date, as discussed later.

There was a historical phase during which the Royal Chancery created a growing number of new *writs* – only a few have been mentioned here – to protect claims presented to the king, in this way extending the scope of sovereign jurisdiction. At the end of the thirteenth century, in the fundamental Westminster Statute of 1285,[18] the barons obtained that no more new *writs* were to be enacted, so as not to lose any further ground in their judicial power. But it was admitted that the usual and current writs (*brevia de curso*) could also be applied by analogy to similar cases (*in consimili casu*), whereas for cases for which a *writ* did not exist,

[15] On the origin of this instrument and on some cases decided in the mid-fourteenth century, see the analysis by Ibbetson, 1999, pp. 48–56; the *writ of trespass* becomes the instrument to validate the breach of contract using royal justice without the actor having to prove the 'breaking of the peace'.

[16] Formula: '*Rex vicecomiti N. salutem. Praecipe A. quod juste et sine dilatione reddat B. centum solidos quos ei debet et iniuste detinet ut dicit. Et nisi fecerit etc.*' (Baker, 2002, p. 540).

[17] The attempt at having a parallel canon safeguard alongside these forms of contract through a solemn promise or oath – which as such was drawn into the sphere of canon law and ecclesiastical legislation as it put the salvation of the soul at risk – was scotched in 1164 by the will of Henry I (Clarendon Constitution, which denies ecclesiastical jurisdiction in matters to do with contracts).

[18] Statute of Westminster (1285).

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

and for which the intervention of the king was sought, recourse to Parliament was needed.

The system of *writs* is fundamental to the genesis of common law and influenced all of English law until the present day.[19] Based on specific forms of action, in the twelfth and thirteenth centuries the king's judges originated a complex set of rules to solve civil controversies and to punish civil and criminal torts. The procedure was rigidly formalised, not only in the sense that – at the risk of otherwise losing the case – it was compulsory for litigants to immediately indicate the *writ* to which they planned to make recourse, but also because the procedure – in particular having to do with proof – was not the same for all *writs*: only a few *writs*, for example, allowed proof by jurors rather than proof by co-jurors or a judicial duel. Moreover, the competence of the courts was not the same, as some *writs* could only take place in one of the royal courts and not in others. The sanctions also varied and were specific in the different *writs*. In any case, one could not act outside the recognised and admitted *writs*.

This rigidity is reminiscent in many ways of the formulary system of classic Roman law, although common law affirmed itself by its own strength and outside, if not in contrast with, the Roman system of the Justinian Compilation, the spirit of which was, in any case, at this point very far from the law of the classical era.

16.4 Royal Courts and Judicial Decisions

The extension of justice administered by the king's judges, through the instruments mentioned previously, imposed a new and more complex organisation of the courts. Local county justice and feudal justice did not altogether disappear,[20] but their activity was reduced, whereas the

[19] As Frederic Maitland famously wrote, 'The forms of action we have buried, but they still rule us from their graves' (Maitland, 1948, p. 2).

[20] A significant example among many, is given by Hudson (in OHLE, vol. II, 871–1216, p. 304 f.): in the lawsuit of a private individual against the Abbot Gunther of Torney around 1110 to claim the rights over land in Charwelton, asking that he should be given possession (*saisitio*), the abbot's court – the abbot being one of the parties in contention – asked the plaintiff to prove within a single day his full right (*maius rectum*); the men sent by the royal sheriff to closely examine the case (after the plaintiff had turned to the king's justice) joined the abbot's judges in declaring his rights over Charwelton. The case is interesting also because it is an example of a historical phase in which the king's justice was exercised jointly with traditional seigniorial justice.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

activity of the royal judges was to grow exponentially.[21] The increase in cases subjected to the king forced him to implement the expedient of periodically sending some of his judges out into the territory in the guise of itinerant judges (*justices in eire* from the Latin *itiner*), to administer civil and criminal trials in his name. But this measure was not to curtail the increase in the number of cases reaching London.

In the course of the thirteenth century this led to the branching out of the original single royal court into three separate central courts: the *Court of Common Pleas* that decided on disputes between private parties, no longer in the presence of the king; the *Exchequer*, the oldest of the three, which dealt with fiscal justice, but also other high functions of an administrative and financial nature; whereas the more important criminal, civil and feudal cases were dealt with by the *King's Bench*, in which in the thirteenth century (but not thereafter) the king would still be present in person. This tripartite division was to last for more than six centuries, until the nineteenth century [Holsworth, I, 1922].

It was in these central courts that common law was to take shape and rapidly develop. Based on the *writs* granted by the Chancery, the few but highly qualified judges nominated by the king were to give life to a body of decisions that between the end of the twelfth and the middle of the thirteenth century had already constituted a complex network, if not yet a real 'system'. It has correctly been observed [Van Caenegem, 1988, p. 90] that the non-reception (even with some exceptions, as we shall see) of the Roman *ius commune*, which has separated England from the continent[22] by creating a dualism between civil and common law, is probably due to the early development of the system of *writs* and the king's judges beginning in the twelfth century, precisely at a time when the influence of the new legal science was gaining ground on the continent. If this early development of common law had occurred only a few decades later, it is not improbable that the new university legal science of Roman origin would have spread also to England as it had, for example, to Normandy, and to the kingdom of Sicily, which in many respects, as

[21] An example of this process of expansion: the 1278 statute of Gloucester established that no case valued at less than 40 shillings should be heard by the king; but the royal judges soon had a different principle prevail, i.e. that no case of superior value could be heard in the local courts.

[22] This happened despite the fact that in the twelfth and thirteenth centuries a number of Italian jurists travelled to England, among whom were Vacarius, Bassianus, Franciscus Accursius, Johannes Bononiensis and others; furthermore, canon law was very much alive in England, on which see Brundage, 2008, p. 92; Helmholz, 2004; Zulueta-Stein, 2002.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

far as being centralised monarchies, were quite similar to the Norman kingdom of England.

The decision of the king's judges began to be transcribed in 1194 into specific registers named *Plea Rolls* written in Latin. The oldest minutes of discussions which took place in the language of the Norman rulers (Law French) at the trials before the king's judges are from a century later, in 1292: these are the *Reports*, documented in the *Year Books*,[23] an indispensable source in following the historic development of common law which has the character of judge-made law, stemming in great part from judicial decisions. Actually the *Reports* contain the live exposition of the debate that took place before the king's judges, with the *narratio* (*count*) of the case on the part of the *serjeant*, mentioned later, and with the arguments leading to a precise identification of the object of the controversy and the facts to be presented to the jury for a verdict.

The editing of the *Reports* was probably in the hands of young aspiring lawyers who assisted the hearings to learn the techniques of common law [Baker, 2002, p. 179]. Only the actual contact with judicial controversy, and a direct understanding of the dynamics of the trial, could teach the difficult profession of the common law jurist.

16.5 Glanvill and Bracton

Two works by jurists offer a precise and detailed picture of the formative stages of common law. The first compendium of Anglo-Norman[24] law was to see the light around 1187 and was attributed to Ranulf of Glanvill, chief justice at the court of King Henry II. In it he describes the system of *writs* still in the process of developing, the primary reference being the *writ of right* and the Assizes: this is an irreplaceable source of information on the initial phase of the new system. A little more than half a century later, around 1250, an exceptionally clear account of the by now mature system of common law – drawn from a complex of around 500 judicial decisions of the time[25] – is represented by the vast treatise *De legibus et*

[23] A series of critical editions of *Reports* dating back to the beginning of the fourteenth century was progressively included in the principal collection of studies and historical sources of common law, promoted by the Selden Society of London.

[24] Glanvill, *The Treatise on the Laws and Customs of the Realm of England [. . .]* (*De legibus et consuetudinibus Angliae*), ed. by G. D. G. Hall, London 1965.

[25] An example: Bracton declares that English law (*Lex Angliae*) says that the personal or hereditary possessions of a wife who has died should belong to the husband on condition that from the marriage was born at least one live child. The proof must be furnished by the

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

consuetudinubus Angliae attributed to Henri Bracton,[26] also a king's judge. The rules outlined in the treatise are those developed in the central courts by judges of the highest level such as William Raleigh, who was also author of some new *writs*. The systematic scheme adopted by Bracton was founded instead on the continental model drawn from Roman sources, in particular on the system of the Justinian *Institutions* and the teachings of the great Glossator from Bologna, Azo, whose works the author knew well.[27]

Despite the system's derivation, as far as contents and framework, the differences with the Roman continental *ius commune* are deep-rooted and undeniable.[28] The role of the trial instruments was decisive in the evolution of substantive law: it was the protection introduced with the *writs* that shaped the regime of real patrimonial rights and of contracts: as Sumner Maine put it, in England 'substantive law developed in the interstices of procedure'.

16.6 Legal Professions

Litigants who made recourse to royal jurisdiction were soon required to appoint someone to represent them, travelling to London if necessary: beginning in the thirteenth century attorneys from different counties were present with the power to represent the party by whom they had been chosen. Their decisions regarding procedure were binding for their client. In 1292 a *writ* from the king addressed to his judges prescribed that attorneys should be centrally controlled, meaning by the judges themselves.

In this early phase, another completely separate function, as representatives in the judicial proceedings, belongs to a different category of

witness account of the infant having cried out at birth and the cry having been heard 'within the four walls', i.e. in the room and witnessed directly. Bracton adds that an alternative proof can be the baptism of the child, as it occurred in the minutes of the hearing of the royal judge Martin of Pateshull, well known in Lincolnshire in the tenth year of the reign of Henry [III: anno 1226]: Bracton, *De legibus et consuetudinibus Angliae*, f. 438 (ed Woodbine-Thorne, vol. IV, p. 360).

[26] Bracton, *On the Laws and Customs of England*, ed. by G. E. Woodbine; trans. by S. E. Thorne, Cambridge (Mass.) 1968–1977, 4 volumes.

[27] Maitland, 1895.

[28] E.g. the claim to movable possessions (most of all animals: *chattels*) for *common law* does not feature as real action (*actiones in rem*) in that the plaintiff could have chosen to demand restitution or compensation for damages, which is a personal action.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

jurists. It was the work of *narrators* (counters) to set out the controversy of the case in judgement, particularly to illustrate the specific reasons that had induced the plaintiff to appeal to the judge. The narrators (or perhaps only some of them) were later to qualify as *serjeants*, which would seem to indicate a role of service to the king. They eventually succeeded in monopolising legal assistance in the Court of Common Pleas, competent for most of the cases that came under the king's jurisdiction. In the fourteenth century a distinct corporation came into being – the Order of the Coif[29] – where only a few *serjeants* were chosen and admitted annually by the king.

Two branches of the profession came into being in this way, henceforth remaining quite distinct: on one side attorneys later known as *solicitors*, representing the litigant, on the other the defender (*narrators* or *serjeants*). To the latter were added other jurists of lower rank, beginning with young aspiring legal professionals, some of whom would later have access to the small circle of *serjeants*, who carried out the more complex tasks and discussed the more lucrative cases.

The dynamics of the debate[30] (pleading) entrusted the *narrator* of the plaintiff with the task of relating the facts of the case thought relevant to the decision. The exposition[31] was in Law French, a particular language which had been brought to England by the Normans and that only in the course of the seventeenth century was gradually replaced with English. Whereas an account of the trial (to be transcribed in the Plea Rolls), was written in Latin, after the initial phase of oral debate during which the discussion could still lead to the modification of the disputed facts, whereas the minutes in Latin of the Plea Rolls could no longer be altered.

The defendant could simply deny the fact claimed by the *narrator*, or deny it in part, or confirm its being correct but adding another fact which altered its meaning, or, lastly, confirm the fact *in toto*, but argue that it conformed with the law (*demurrer*). Only in this last instance was it up to the judge to untangle the question, whereas in the first three instances (which were much more common) the conflict between the version of the plaintiff and that of the defendant constituted the specific issue examined by the jury [Baker, 2002, p. 77].[32]

[29] *Coif*: because its members wore a white linen or silk cap.
[30] On this see the clear account by Baker, 2002, pp. 76–85.
[31] Known as *count*, that is narration (*narratio*).
[32] An example, drawn from Bracton. To the woman requesting the return of her dowry (according to the concession in the *writ of dower*), the husband can counter saying: a) that

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

Whereas on the continent beginning in the twelfth century legal education took place at the universities – although in the middle of the century there are traces of legal teaching at Oxford (1149) entrusted to Vacario, the Lombard expert on Roman law, who for the purpose was to write a summary of Justinian law known by the title of *Liber pauperum*[33] – a different system was to take hold in England: common law jurists were in fact trained in the central Courts of justice, under the skilled instruction of readers. Young trainees were expected to become conversant with legal techniques not only through simulated court proceedings and arguments, but also by annotating discussions from proceedings and producing texts which were subsequently collected in Reports and in the Yearbooks. Before becoming *narrators* or *serjeants*, they were trained as apprentices in the specific techniques of the *writs* and of crown court procedure. Once admitted to the role of defensor, they entered into a corporation of *serjeants* (Inn of Court),[34] the four most important of which are still in existence today.[35]

Soon kings began to adopt the criteria of choosing central court justices exclusively from the pool of *serjeants* in the Order of the Coif, among those who had acted for many years in the prestigious role of defence councils. The justices were therefore all older and authoritative lawyers, with a direct acquaintance with their colleagues in the Inns of Court. This explains the extraordinary integrity, the prestige and mutual respect which have until the present age characterised the English legal profession, the two fundamental components of which are justices and barristers.

16.7 The Jury

A fundamental aspect in the history of English law is the institution of the jury, entrusting ordinary lay citizens with a central role in the

the woman was never his wife ('*nunquam fuit ei desponsata*'); b) that she was married, but with an act rendered null and void because the husband was already married to another woman; c) that she was, but is no longer his wife, as they had been divorced (Bracton, *De legibus et consuetudinibus Angliae*, f. 302, ed. Woodbine-Thorne, vol. II, p. 372). Each of these exceptions naturally had to be proven and subjected to the jury.

33 Vacarius, *The Liber pauperum of Vacarius*, ed. by F. de Zulueta, London 1927.

34 This way of training jurists in the common law has remained constant in time. Until the twentieth century the qualification of *barrister* was not obtained through a university course but after a number of years of practice (pragmatically attested to by the number of meals had *in loco*) in one of the four Inns of Court.

35 Lincoln's Inn, Gray's Inn, Middle Temple, Inner Temple.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

decision-making of judicial cases. This aspect has a long and complex history,[36] traversing the entire lifespan of English law.

From the end of the twelfth century, as said earlier, in disputes concerning property royal justice granted the defendant an alternative to the judicial duel. This was the 'grand assizes', by which the question was put to twelve knights (*milites*, who belonged to the king's army), who were chosen by four knights nominated by the two parties. Crucially, these jury members had a role as witness, not judge. In the same way, again during the reign of Henry II (1133–1189), to those claiming they had been divested of the possession of land the crown judges granted a specific *writ* with which the sheriff had to choose twelve local men who could testify to the divestment having taken place.

In both cases the procedure was one reserved uniquely to the king's justice, carried out on the payment of a conspicuous sum of money. But it nevertheless provided a better guarantee to the litigant than the traditional ordalic procedure and for this reason, though an exceptional procedure to begin with, it quickly affirmed itself and extended the range of application of crown justice.

In criminal law the genesis of the jury system was different. Beginning in the Norman era, the procedure for bringing the author of a crime before the judges took two forms: the first was with the accusation on the part of the victim of the crime or his relatives, the second by *indictment*, that is by means of interrogating a group of local men to whom the itinerant royal judges would ask information regarding crimes that had been committed in the territory, requiring from them an opinion as to whether the suspected offender should be prosecuted. Indictment (which is at the basis of the English *grand jury*, finalised to producing a formal accusation, as distinct from the jury that makes a judgment, the *petty jury*) became the norm with the Assizes of Clarendon and of Northampton of 1166.

The person accused by indictment had to defend himself by means of recourse to the judicial duel, in the same way as one who had been accused by a private party. But in the age of Henry II, it became more frequent for the accused to request and be granted the possibility of defending himself from the accusation by recourse to the testimony of twelve neighbours rather than the duel: in these cases, it was said that the accused '*ponit se super patriam*', that is, he subjected himself to the testimony of his countrymen. Following the Fourth Lateran Council of

[36] On the origins, see Langbein et al., 2009, pp. 5–85.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

1215, the Church forbade the clergy from making recourse to ordeals, among which the judicial duel and this form gradually fell into disuse also in lay trials. In theory it remained possible to request a duel as opposed to a jury, but in practice those who chose to refuse recourse to the testimony of jurors were severely punished. In case they were to say nothing, so as not to have to make the choice, the penalty inflicted was 'firm and harsh' (*peine forte et dure*), a form of judicial torture so cruel as to sometimes lead to death.[37]

So at the end of the thirteenth century the trial by jury had become the usual way of proceeding both in civil and in criminal cases. It was actionable by means of recourse to a plurality of procedures connected to specific kinds of actions and *writs*; the jurors functioned as expert witnesses, not fact finders; and unanimity was not required.

The greater responsibility of the judge, who was no longer tied to the result of ordalic justice, but author of the decision even at the risk of not saving his soul, would evolve in time and lead to the formulation of sentencing only when culpability was proven 'beyond a reasonable doubt': a doctrine whose origins are theological and of canon law [Whitman, 2008].

With these characteristics, though they would be modified in the course of time, the role of the lay jurors had become an essential component of the common law system.

16.8 The Magna Carta

The active involvement of citizens in the English kingdom, all the more significant because applied within a constitutional system which attributed very decisive powers to the crown, also manifested itself in another context. In 1215, in a moment of weakened royal authority, the barons obtained the recognition of a vast gamut of rights and powers, which found expression in the momentously important document of the *Magna Carta*.[38] This celebrated text was edited and modified a number of times – the final version in which some prerogatives granted to the barons at the expense of royal power had been deleted, is dated 1225 – was not limited to reiterating the freedom of the Church and that of the City of London, but recognised the prerogatives of the lords with regard to their subjects, freemen and tenants, in particular to do with their judicial rights, which the *writ praecipe* could in any case no longer in the future interfere.

[37] The punishment used, for a long time not inflicted, was formally abolished only in 1772.
[38] *Magna Carta*, ed. J. C. Holt, Cambridge 1992.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019

Moreover, it was established that 'no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land' (c. 39 of the 1215 text). This provision originally had a markedly feudal character, as the 'court of peers' (*curia parium*) was made up, in England [Baker, 2002, p. 472] as on the continent, of vassals of the same rank as the plaintiff in the case. However the *Magna Carta*, unlike similar privileges of the medieval sovereigns on the continent, in England was kept alive and constantly referred to in the successive centuries, so that the same formulas in time acquired different meanings. In the seventeenth century the great assembly of the reign still had feudal characteristics, and was made up essentially of barons and grandees; in the course of the same century not only were representatives of the cities and villages added to the county representatives – the king's direct 'tenants in chief' – but these three categories also became part of Parliament through an elective process, no longer by a choice at the discretion of the *sheriff*: this figure now being limited to ensuring the election of two knights per county (shire), two citizens for each city (town), two burgesses for each village (borough).

The elected members not only jointly deliberated in Parliament, but their deliberations bound the electorates of their respective shires, towns and boroughs throughout the kingdom: they therefore had full power of representation. Only the dispositions approved by Parliament were to be called *statutes*, as opposed to the ordinances approved by the King's Council. From 1295 onwards, the institutional structure exhibited by Parliament on the occasion of a new convocation has been retained. It must be stressed, however, that English statutes are not comparable to the statutes of the Italian commune and even less to the laws of modern parliaments: the essentially jurisdictional nature of the English Parliament is reflected also in the statutes, which in certain ways are similar to judicial decisions with extended and permanent effect.

If the reasons that lead to the approval of the *Magna Carta* are, as always in history, also due to contingencies – Henry II, looking for funds to support the wars and expenses of the kingdom, was forced to expand the pool of contributors from whom he could extract revenues and involve them in decisions on taxes, thereby greatly strengthening their role – this does nothing to diminish the historical importance of this early evolution, which places the English kingdom at the origin of the European system of political representation.

Downloaded from https://www.cambridge.org/core. UZH Hauptbibliothek / Zentralbibliothek Zürich, on 18 Sep 2019 at 07:46:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316848227.019