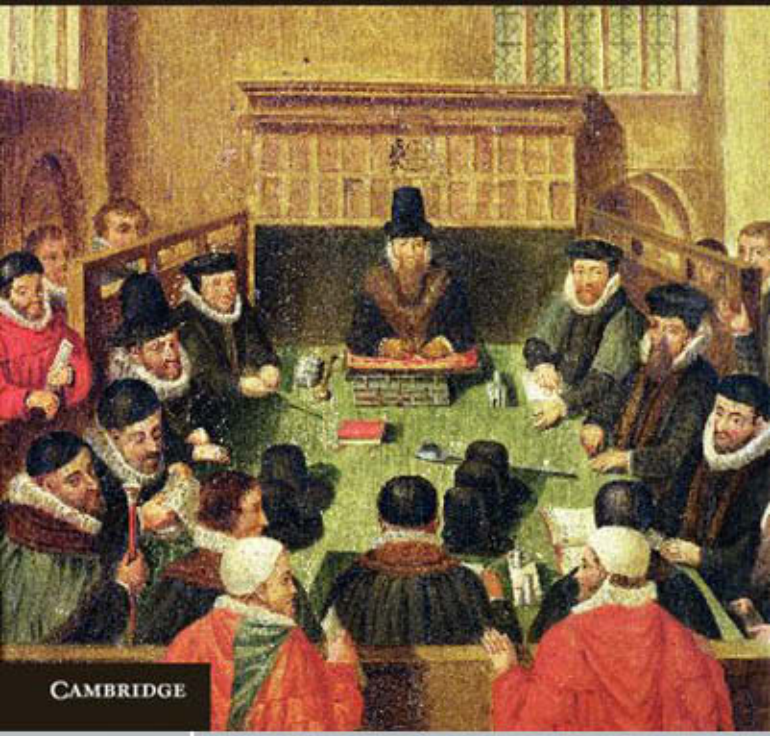
EDITED BY PAUL BRAND AND JOSHUA GETZLER

Judges and Judging in the History of the Common Law and Civil Law

From Antiquity to Modern Times



CAMBRIDGE

JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW

In this collection of essays, leading legal historians address significant topics in the history of judges and judging, with comparisons not only between British, American and Commonwealth experience, but also with the judiciary in civil law countries. It is not the law itself, but the process of law-making in courts, that is the focus of inquiry. Contributors describe and analyse aspects of judicial activity, in the widest possible legal and social contexts, across two millennia. The essays cover English common law, continental customary law and *ius commune*, and aspects of the common law system in the British Empire. The volume is innovative in its approach to legal history. None of the essays offers straight doctrinal exegesis; none takes refuge in old-fashioned judicial biography. The volume is a selection of the best papers from the 18th British Legal History Conference.

PAUL BRAND is a Senior Research Fellow at All Souls College, Oxford and Professor of English Legal History in the Faculty of Law, University of Oxford.

JOSHUA GETZLER is a fellow and tutor at St Hugh's College, Oxford and Professor of Law in Legal History in the Faculty of Law, University of Oxford.

JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES

Edited by

PAUL BRAND
All Souls College, Oxford

and

JOSHUA GETZLER
St Hugh's College, Oxford

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107018976

First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Judges and judging in the history of the common law and civil law : from
antiquity to modern times / edited by Paul Brand and Joshua Getzler.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-107-01897-6 (hardback)
1. Judges – History 2. Judicial process – History. 3. Judicial review – History.
4. Courts – History. I. Brand, Paul, 1946– II. Getzler, Joshua.
K2146.J82 2012
347'.0109–dc23
2011037679

ISBN 978-1-107-018976 Hardback

CONTENTS

PREFACE

More than 200 legal historians, from every corner of the globe, met in Oxford at the Eighteenth British Legal History Conference in early July 2007 to hear and present papers on the history of 'judges and judging'. A selection of the papers presented at the conference has now been revised and edited to form the chapters of this volume. Perhaps the theme of the conference and of this publication needs some initial explanation. The legal realists of the 1920s and 1930s rightly questioned the pre-eminence given to the study of decision-making in the courts in American legal education, and similar ideas have entered British and Commonwealth legal education in the past generation; the utterances of judges are not taken as the sum of, or even the core of, the law. But this is hardly news for legal historians. They have long been effortless, even naively unselfconscious, realists, always concerned to understand the making of the law within the context of its time, with due attention to the society in which law is embedded and the shifting mentalities of professionals and other players in the legal system. Legal historians have not tended to regard law as the process of technocratic development in courts of timeless truths. The chapters of this book bring to bear legal historical analysis of the highest order to describe aspects of judicial activity, in the widest possible legal and social contexts, across two millennia. The essays cover English common law, the Continental customary law and *ius commune*, and aspects of the common law system in the British Empire. It is noteworthy that just as none of the authors have offered traditional doctrinal exegesis, so none have taken refuge in the conventional limits of judicial biography.

The opening chapter by Paul Brand uses a variety of original sources to shed new light on the early development of the English common law judicial system. He discusses the revolutionary change which took place in later twelfth-century England: the creation of a new type of royal justice sitting as part of a group of justices in new royal courts whose authority derived from a direct relationship to the king who appointed them and to whom they gave an oath of faithful service and who granted

them special authority to wield judicial power in each case where jurisdiction was exercised; who united in themselves the formerly separate roles of presiding in the court and making judgments there; and whose judgments were for the first time regularly recorded in writing. He then demonstrates, how over the course of the thirteenth century, the multiplication of available sources allows us to see in ever closer focus the ways in which judges judged in the new courts and their role in guiding the pleading of cases and in directing and questioning juries and in making judgments. He also shows how the new sources allow us to pierce the normal veil of collective judicial anonymity to glimpse the role of smaller groups of justices within courts and of the role of outsiders within the judicial process.

In his chapter David Seipp discusses the arguments about the nature of corporations made in a dozen reported cases heard between 1478 and 1482. He sees those arguments as belonging generically (in modern terms) to one of two camps: either a 'formalist' one (which sees corporations as wholly separate from the individuals who comprise them) or a 'realist' one (which pierces the veil of corporate identity to see and take account of the particular individuals who comprise them). He also looks at the possible intellectual roots of the 'formalist' position within theology and canon law and prior English politics and practice. He finds that individual serjeants and justices who participated in these cases were not, in general, consistent in the 'camp' to which they belonged from case to case, and notes that this suggests that neither group invested their own individual personalities or intellectual convictions in the performance of their professional duties.

Ian Williams's chapter looks at the development of a theory of precedent amongst English judges during the period from the sixteenth century up to the Civil War. He asks why judges by the mid seventeenth century had come to see reported case law as binding, whilst their predecessors a century earlier most emphatically did not. He suggests that the results of cases as shown on the record had long been regarded as having binding force, but not the reasoning by which judges had reached for those results. After all, reported *rationes* were often distorted or fabricated in contemporary or subsequent reporting. Matters changed as modern claims were brought in more informal guises, such as the actions on the case. Omnibus writs like these made the accompanying narrative of the claim into part of the court's reasons for giving or denying a remedy. This move to a freer narrative of facts helped the courts see the whole case as precedential, in contrast with the

older law where counsel and judges were busy in debating how the pleading of stylised facts activated a particular form of action.

John Langbein writes on the slow dethronement of the jury in the civil justice procedures of the English common law. Far too slow for Langbein, who argues that the Continental procedure using a fact-finding judge with power to interrogate witnesses yielded a far more rational and accurate system of adjudication, since fact-trying lies at the core of any legal process and skilled lawyers are likely to do a better job at it than random samples of laymen. He examines the self-informing juries of the medieval common law and the lay fact-triers guided by the rules of evidence and judicial direction of later periods, and finds that the imperfections of the jury created many distortions in the giving of justice, such as arcane pleading rules and too great an emphasis on documentary evidence, notably sealed deeds. Chancery procedure was only a temporary palliative as adversarial fact-proving soon took over in that forum as well. A long battle to confine the jury with guiding laws had to be joined across the nineteenth and early twentieth centuries, until judges finally took control of fact as well as law. With newly powerful judges, a powerful appellate process was now finally installed. Langbein's puzzle is to explain why the example of Continental procedure did not provide a short-cut for the English as they slowly evolved a modern civil process.

Rebecca Probert gives the history of an important legal-historical mistake. In 1811 Sir William Scott made the confident assertion as judge of the London Consistory Court that, prior to the Clandestine Marriages Act of 1753, it had been possible for parties to marry by informal words of present consent. Probert shows that clandestine marriage historically denoted not secret marriage but a marriage ceremony conducted before a celebrant who lacked full qualifications or who had not followed the correct canonical procedures. Probert traces the reasons for Scott's category mistake and how in later law this confusion of secrecy and validity distorted understanding of the nature of an act of marriage as a legal, a sacramental and a formal act. She also shows the crucial imperial dimensions of this mistake, as the law grappled with the application to a multi-faith empire of an antique marriage law based on the Anglican confession.

Michael Lobban paints on a broad canvas, interrogating the politics of the English judiciary in the high Victorian age, from the 1830s through to the 1880s. He shows how commercial pressures, the needs of litigants, and the Victorian yearning for rationalising reform, transformed the doctrines and institutions of the law and gave us many of the elements of today's

legal system. In a sophisticated treatment of the main judges, reformers and politicians of this era and the legal changes they worked through, Lobban suggests that politics played a role in judicial thinking, and that ideology often weighted *rationes* as much as it informed parliamentary statutes. But close attention to leading judges and their work suggests that the common law, even with statutory overlays, was becoming a technocratic exercise where strong political views were becoming largely irrelevant to the process of applying articulate legal doctrine to the facts of disputes. Lobban illustrates the complex dialectic of political values and judicial creativity by examining a wide gamut of legal problems, especially in the commercial economy.

Phil Handler's chapter suggests revisions to the view that English criminal justice moved across the nineteenth century from discretion to legal rigour. Despite the stream of modernising statutes formulated by utilitarian and humanitarian reformers, judges devoted to discretionary control of the criminal process were in fact highly successful in resisting the introduction of a rule-bound system. The application of the death penalty was successfully curbed despite strong support for this ultimate sanction amongst the judiciary, but strong discretion in prosecution, trial and sentencing continued outside the capital crimes. Handler uses evidence of how the judges engaged with Parliament and governmental commissions to show that the Victorian judiciary was a politically varied group, with Liberal and Conservative actors at both appellate and trial levels. What united them was the desire to maintain judicial freedom and power within the criminal justice system, and to that end the judges succeeded in colonising the legislative process and putting their stamp on many statutory enactments.

Chantal Stebbings peers under the Diceyan dogma of no special administrative courts in Britain, and demonstrates that in the tax field lay adjudicators appointed by the executive, whether amateur or professional, just about dominated the field. She investigates the specialist bureaucratic courts of excise and income tax appeals and the complex of appeal procedures, both legal and administrative, and shows how there was a strong impulse within government to resist full professional juridification of the tax assessment and appeal process. Partly this was to siphon off tax claims to specialist tribunals with strong expertise who could process the plethora of claims more surely and at less cost than conventional courts. Stebbings suggests that critics of administrative fiscal courts proved to be correct in their warnings that such adjudication could lack due independence from political and bureaucratic distortion, and that pragmatism sometimes triumphed over rule of law virtue.

The next group of chapters widens the geographical focus by looking at judges in classical Roman law, medieval Continental customary law and the later *ius commune*. Starting in an early period of classical Roman law, Ernest Metzger explains how the Roman procedure of trial before a lay judge endowed with fact-finding powers was regulated by quasi-delictual actions. These were claims that through incorrect use of powers something akin to a wrong had been committed which demanded a remedy. Metzger anatomises the Roman trial, showing how claimants sought a formula, joined issue, and then sought to transmogrify their claim into the remedial obligation specified in the formula. A judge who accepted a commission to test facts and decide the issue had a duty to do so properly, and if he mistook or fumbled or delayed then he was said to have 'made the cause his own', a form of bias or nullification of his role. Such a judge could be disciplined before a magistrate and sued personally to provide a surrogate remedy for the original claim. Using fresh archaeological evidence, Metzger suggests that these disciplinary actions were not a substitute process of appeal but a key means for magistrates to hold judges to their duty.

In his chapter Dirk Heirbaut looks at the makers and shapers of customary law in northern France, the Low Countries and Germany in the period from the twelfth to the early fourteenth century. He argues that in courts in these areas where there was normally a group of judges to make judgments it was the most expert member of this group who normally acted as the spokesman of the group in giving judgment but who had also normally played an important role in the prior debate which shaped the judgment agreed by the group. Evidence from the area around Lille *c.*1300 shows that these spokesmen were semi-professional legal experts, active also as legal advisers, presiding officers and as the lords in other courts; it also shows that the spokesmen kept their own brief unofficial reports of the cases in which they were involved. They were not university-educated lawyers nor were they influenced by the *ius commune*, but they were more than simply amateurs.

Ulrike Muessig's chapter provides a comparative overview of the 'superior courts' of early-modern France, England and the Holy Roman Empire, whose emergence can be viewed as part of the wider project of state-building in each of these political units. Despite the difficulties of comparison, she sees certain common themes emerging from the history of these courts: their encouragement of the development of professional lawyers and of law reporting and the tendency of some, if not all, of these courts over time to escape full monarchical control and indeed pose challenges to monarchical authority.

The functioning and jurisprudence of the eighteenth-century Supreme Court of Holland Zeeland are the concern of Boudewijn Sirks's chapter. His focus is on the unofficial notes of two leading judges of the court, Cornelis van Bijnkershoek and his son in law Willem Pauw, which were rediscovered in 1918 and published between 1923 and 2008. These cover 5,000 cases heard in the court between 1704 and 1787 and they show that judgments were reached in the court by majority vote but without members of the majority having to agree on the reasons for their decision. They also reveal that the university-educated judges of the court relied mainly on Roman law in making their judgments unless there was quite explicit local customary law to the contrary.

The final group of chapters, on legal themes from the British Empire, begins with Paul Halliday's study of the early-modern history of the writ of habeas corpus. Halliday concedes that more than most, he has to contend with a 'large presentist elephant in the room'. But his research was conceived and commenced well before the security crisis of 9/11 and the justice crisis of Guantanamo Bay. The technique of the paper is to reconstruct the intellectual parameters of the earlier habeas doctrine as 'mutual obligations binding subject to sovereign', with a strong emphasis on control of Crown powers rather than the rights of subjects. The 1679 Habeas Corpus Act is then re-characterised as no more than the codification of a vibrant practice of court control of the executive that was already in being. The chapter then examines in close detail little-known cases of prisoners of war and enemy aliens discovered in a plethora of primary sources, showing how key dimensions of the rule of law were developed by the judges during Britain's long imperial wars with its European rivals.

Martin Wiener shows how hard it could be for imperial judges to maintain the judicial rule of law in a colonial setting. He tells the story of how a Canadian barrister, Sir Henry Austin, was appointed as chief justice in the Bahamas in 1880, upsetting the local elites who wanted jobs for the boys. Austin tried to apply rule-of-law discipline to the colony, and tried two brothers for racially motivated and connected killings. The local whites angrily demanded the chief justice's recall, and the governor and law officers combined to force Austin out. When his successor as chief justice proved to be a zealous campaigner against local corruption he too was destroyed, partly through effective lobbying of influential politicians in England. Wiener wryly observes that in the law at least this was a case of the periphery controlling the centre.

Susan Priest narrates the extraordinary episode of the High Court of Australia's 'strike' of 1905, when the judges refused to hear cases in

protest against the Commonwealth Attorney-General's attempts to constrain the new court's costs. The judges of the High Court saw their circuits to the far-flung states of the newly founded federation of Australia as a basic principle of the court's work, and refused to accept the dictates of the executive as to how to conceive their jurisdiction and procedure. This squall can be seen as an important step in establishing the prestige and independence of the new court as a notable forum of the common law world.

The final chapter by David Williams tells of five judges in New Zealand who grappled with the definition of native title from the middle of the nineteenth century until the Great War. He argues that native title was not the common law doctrine invented or discovered in late twentieth-century courts; rather it was a dynamic doctrine of the mid eighteenth century, born of a mixture of American constitutional creativity, international law norms and British imperial policy. This meant that extinguishment of a common law native title was unknown in an earlier period. The law was really founded on a balance of politics, as expressed in legislation and treaties, and juridification of the native rights debate came much later. Whether Williams' careful historical analysis will shift the agonised modern native title discourse into new paths will have to be seen.

The editors are grateful for the patience and co-operation of the contributors as the book wended its way to press. Material help for the success of the project was provided by Cambridge University Press, the Journal of Legal History, Oxford University Press, the Oxford Law Faculty, All Souls College, St Hugh's College and St Catherine's College where the original conference was held. Our colleague Michael Macnair helped plan the conference and advise us on elements of the book, and our colleague Boudewijn Sirks also gave us wise counsels. Tariq Baloch, Freya El Baz and Adam Turner deserve our warmest thanks for their help in planning and executing the conference, as does Eesvan Krishnan for his skilled contribution to the final editing of this book.

Joshua Getzler and
Paul Brand

CONTRIBUTORS

PAUL BRAND
Professor of English Legal History, University of Oxford and Senior Research Fellow, All Souls College, Oxford.

PAUL D. HALLIDAY
Professor, Corcoran Department of History, University of Virginia.

PHIL HANDLER
Lecturer, School of Law, University of Manchester.

DIRK HEIRBAUT
Professor, Department of Jurisprudence and Legal History, University of Ghent.

JOHN H. LANGBEIN
Sterling Professor of Law and Legal History, Yale University.

MICHAEL LOBBAN
Professor of Legal History, Queen Mary, University of London.

ERNEST METZGER
Douglas Professor of Civil Law, School of Law, University of Glasgow.

ULRIKE MUESSIG
Chair of Civil Law and German and European Legal History, Faculty of Law, University of Passau.

SUSAN PRIEST
Assistant Professor, Faculty of Law, University of Canberra.

REBECCA PROBERT
Professor, School of Law, University of Warwick.

DAVID J. SEIPP
Professor of Law and Law Alumni Scholar, School of Law, Boston University.

A. J. B. SIRKS
Regius Professor of Civil Law, Faculty of Law, University of Oxford and Fellow of All Souls College, Oxford.

CHANTAL STEBBINGS
Professor of Law and Legal History, University of Exeter.

MARTIN J. WIENER
Mary Gibbs Jones Professor of History, Rice University, Houston, Texas.

DAVID V. WILLIAMS
Professor, Faculty of Law, University of Auckland.

IAN WILLIAMS
Lecturer, Faculty of Laws, University College London.

I

Common law

1

Judges and judging 1176–1307

PAUL BRAND

I

In January 1176 King Henry II held a meeting of his great council at Northampton.[1] A decision was taken there to divide England into six judicial circuits, and the king appointed three justices to serve on each circuit. The chronicler who tells us of this then gives part of the instructions drawn up for them. Specific criminal justice responsibilities were assigned to them. They were to 'execute the assize on wicked thieves and malefactors of the land'. This meant making enquiries through local presentment juries about those reputed to have committed certain criminal offences. They were also told what to do both when those accused appeared to stand trial and also when they failed to appear. Specific responsibilities were also assigned to them in regard to civil justice. They were to enquire into complaints from heirs whose fathers had died in seisin of land but whose lords had refused to admit them to the succession and they were, if necessary, to remedy this by securing the heirs' admission. They were also to take jury verdicts on disseisins made contrary to 'the assize' (*super assisam*) since May 1175. There is no mention of the king's writ being required to provide specific authorisation for the hearing of individual cases of either of these two types. Perhaps we should envisage the justices acting without it, simply on the basis of the general authorisation and on the basis of oral complaints. A separate clause talked of the justices doing 'all justice and right' (*omnes justicias et rectitudines*) belonging to the lord king and his crown for (holdings of) half a knight's fee or less by the writ of the lord king or his representatives. This seems to refer to more general land litigation of the kind brought by the writ of right or writ *precipe* but limited their

[1] *Gesta Regis Henrici Secundi Benedicti abbatis*, ed. W. Stubbs, Roll Series, 2 vols. (1867), I, pp. 107–8.

jurisdiction to smaller holdings. The justices were further entrusted with making enquiries into a variety of other matters of interest to the king such as his escheats, churches and lands, women who (or whose marriages) were in his gift and (who owed) castle-guard. They were also to take fealties to the king from all the king's subjects and to arrest anyone refusing and to ensure that all unlicensed castles were properly destroyed. After their nomination, the king had each of the justices swear an oath on the gospels that they 'would keep the assizes that had been made and have them observed by all the men of the realm'. A second chronicler mentions a more general oath to 'do justice' to all.[2] The Pipe Rolls of 22 Henry II (1175–6) and 23 Henry II (1176–7) both record financial information arising out of the work of the six circuits thus established on a county-by-county basis. This confirms that the justices did indeed visit most, if not all, of the counties allotted to their circuits and also tells us something of the business they dealt with. There are also seven surviving final concords made before the same justices, recording the settlement of civil litigation heard before them. Their dates fall between mid March and late September 1176. One circuit accounts for three of the concords, a second for two, and two others for one each.[3]

It is from 1176 that we can trace the beginnings of the General Eyre as an institution within the English judicial system. Thereafter teams of justices appointed by the king brought royal civil and criminal justice to each of the counties of England within a limited period every two or three years by holding sessions in each of the counties assigned to their circuits. Later Eyre visitations, however, varied both as to the number of circuits covering the country (anywhere between two and five), and the number of justices assigned to each circuit (anywhere between three and nine).[4] It is also arguable that 1176 marks the first clear appearance of the type of royal justice characteristic of royal courts in the later Middle Ages: justices who brought to the courts in which they sat an authority derived from their own direct relationship with the king. They were appointed by the king, perhaps orally, at Northampton; they took an oath to serve the king faithfully; and they exercised only such

[2] *Radulphi de Diceto, Opera Historica*, ed. W. Stubbs, Roll Series, 2 vols. (1876), I, p. 404.
[3] *Pleas before the King or his Justices, 1198–1212, III*, ed. D. M. Stenton, Selden Society, vol. 83 (London, 1966), pp. lvii–lviii; The National Archives, London [TNA] PRO C 260/186, no. 1C.
[4] P. Brand, *The Making of the Common Law* (London, 1992), p. 84.

jurisdiction as they had been specifically granted by the king, either through written instructions given at the council or by royal writs. In essence, therefore, they exercised only such jurisdiction as had been delegated to them in writing by the king. Their sessions could therefore be, and were, described as sessions of the king's court (*curia regis*). The justices also united in themselves the two formerly separate, and clearly distinct, roles: of presiding officers in their court and judgment-makers of the court. Before this, sessions held by royal justices in the localities under earlier Norman kings (and perhaps in the earlier part of Henry II's reign as well) had been considered only as special sessions of the county court or courts concerned, and the usual judgment-makers of the county courts made judgments at those sessions, the royal justices only presiding.[5] In this new form of court, where the king's justice was dispensed by his appointees, the final characteristic is also a novelty, in England at least: that all of their judicial activity was recorded in writing. When the king asked for information on a variety of matters he clearly expected to receive it in written form. The *Dialogue of the Exchequer*, written *c*.1179, seems to presuppose the existence of a written record of other business at the Eyre, too, from which financial dues owed to the king could be extracted. It therefore seems likely that fairly complete written records of the Eyre were being made from 1176 onwards, although initially no care was taken to ensure that they were preserved in the king's Treasury and thus the earliest surviving plea rolls of itinerant justices date only from 1194.[6]

By 1176 there was also a second royal court in which civil litigation was regularly being heard. This was the 'king's court at Westminster', whose personnel seem to have been interchangeable with that of the Exchequer, the institution responsible for English financial administration. In effect, a single body exercised both financial and judicial responsibilities, the judicial ones only on an irregular basis from the mid 1160s but regularly from the mid 1170s through to the mid 1190s.[7] The main source of information on its judicial functions is the final concords made there and preserved or copied by the parties involved. These may well represent a relatively small proportion of the concords made there; nor is there any way of estimating the total volume of litigation that came to the court. In these concords the personnel are sometimes described as 'justices', sometimes as 'barons' (the later term for the main officials of the Exchequer), and the same individuals clearly exercised both judicial

[5] *Ibid*., pp. 80–2. [6] *Ibid*., p. 95. [7] *Ibid*., pp. 86–9.

and financial roles. The references in the final concords to 'justices' or 'barons' of the lord king and to them constituting the 'king's court' also indicate that they were appointed by the king for this purpose (or these purposes).[8] The earliest specific reference to a royal writ being used to initiate litigation in the court comes only from 1178,[9] but it seems likely that specific authorisation had always been needed. The justices probably also swore an oath to the king. The king's court at Westminster, as it can be seen in the final concords, varied in size, consisting of between three and fourteen justices, with an average of around eight. The exclusion of the treasurer (the main official of the Exchequer) from a third of the concords suggests that those named in the concord owed their place to actual participation in the hearing of the specific case concerned. It is a large court by later English standards. It also seems clear that these men both presided and made judgments in the court. There are no surviving plea rolls from this court before the mid 1190s, but copies of individual entries which do survive take the compilation of plea rolls back to 1181. In 1200 it was believed that plea rolls had been compiled during the period Richard de Lucy was the king's justiciar, prior to 1178.[10] The proceedings of this court, too, were therefore probably recorded in writing from at least the mid 1170s.

II

In the mid 1190s the Common Bench separated out from the Exchequer and became a distinct institution and its justices became exclusively royal justices.[11] There is also a significant change in the surviving evidence for judicial activity. In the summer of 1195, both the Common Bench and Eyres began to make a third, official copy (the 'foot') of every final concord made in these courts and these feet were subsequently deposited in the Treasury. Most, but not all, survive.[12] From 1194 come the first surviving plea rolls recording cases heard before the royal justices of the Common Bench and the Eyre. For the next three-quarters of a century the survival rate of plea rolls remains patchy, but the rolls that do exist make it possible to see

[8] *Dialogus de Scaccario*, ed. C. Johnson (London, 1950), p. 70.
[9] *Bracton's Note-Book*, ed. F. W. Maitland (Cambridge, 1887), p. 1095.
[10] Brand, *Making of the Common Law*, p. 95.
[11] P. Brand, *The Origins of the English Legal Profession* (Oxford, 1992), p. 22 and n. 47.
[12] For evidence of the losses of Eyre feet of fines see D. Crook, *Records of the General Eyre*, Public Record Office, Record Handbooks (London, 1982), XX, pp. 8–9.

something of the volume and nature of the business of those courts, if only in summary form.

One other significant change took place later: the emergence of a third permanent royal court, the court of King's Bench, which travelled round England in close proximity to the king. Such a court had existed intermittently during Henry II's reign while the king was in England, and also for periods in John's reign, but as a continuously functioning institution which existed even when the king was a minor or out of the country, it dates only from the mid 1230s. It is also only from then that the court began to develop its own distinctive jurisdiction.[13]

The earliest surviving record of letters of appointment of justices in Eyre comes from 1218, when copies of the instruments appointing them to itinerate 'for the business of the king and kingdom' and notifying the relevant counties of their appointment were enrolled on the Patent and Close Rolls.[14] Thereafter such appointments were commonly, but not invariably, enrolled in this way.[15] The earliest surviving copy of any of the instruments associated with the appointment of a justice of the Common Bench comes from 1234,[16] but only seven further appointments were enrolled between 1234 and 1272.[17] Although all those appointed were described as 'justices' the formula for what they were appointed to do varied considerably and no standard form emerged. No letters of appointment are enrolled for the justices of King's Bench. It is possible that the very closeness of the relationship between the king and King's Bench rendered written appointment unnecessary.[18]

An oath to the king was probably taken by all royal justices on taking up office. There are references to a 'form of oath' (*forma sacramenti*) being given to the senior justices of each of the Eyre circuits in 1218, but no record of what it contained.[19] *Bracton* gives us an undated version of the oath taken by a justice in Eyre. This contained a threefold promise: 'to do right justice, according to his ability, in the counties where they are to hold the Eyre, to both rich and poor', to 'keep the assize in accordance with the chapters below written' and 'to perform all duties and exercise all jurisdiction

[13] Brand, *Making of the Common Law*, p. 24.
[14] *Patent Rolls 1216–25*, pp. 206–8; *Rotuli Litterarum Clausarum*, I, 380b.
[15] Crook, *Records of the General Eyre*, pp. 5–7.
[16] *Close Rolls 1231–4*, p. 565.
[17] *Close Rolls 1231–4*, pp. 445, 570; *Close Rolls 1234–7*, p. 348; *Close Rolls 1251–3*, p. 249; *Close Rolls 1254–6*, p. 268; *Close Rolls 1256–9*, p. 47; TNA PRO, C 66/72, m. 2 and C 66/89, m. 17.
[18] As suggested by Sayles in *Select Cases in the Court of King's Bench, IV*, Selden Society, vol. 74 (London, 1957), p. xi.
[19] *Patent Rolls 1216–25*, pp. 206–8; *Rotuli Litterarum Clausarum*, I, 380b.

belonging to the king's crown'.[20] Letters relating to the appointment of three justices of the Common Bench in 1234 envisaged them taking an oath in the presence of the existing justices 'to (faithfully) attend to the king's business in the Bench' with those justices.[21] The oath may well have been more elaborate than that. We know nothing of the oath of office taken by the justices of King's Bench.

The justices of the king's courts continued in principle to exercise jurisdiction only by specific delegation from the king. The Common Bench provides the clearest and simplest case. Its justices required a written authorisation through a royal writ for any case they heard and this had to match exactly the claim that the demandant was trying to make or the complaint that he wanted remedied.[22] The same seems also to be true of King's Bench. The General Eyre is more complicated. Civil pleas business reached the Eyre in the main via three different routes. Some civil pleas at the Eyre were initiated by royal writs which required the sheriff to summon the defendant (and sometimes also the requisite jurors) to appear before the king's justices at their first session (*ad primam assisam*) when they came to the county. Other pleas had been initiated by royal writ in the county court but been removed into the Eyre by the writ *pone*. Both provided specific authorisation for the Eyre justices to hear the case. The third kind of case, however, was one pending in the Common Bench at Westminster when the Eyre was summoned. From at least 1194 onward all cases from the county were automatically adjourned into the Eyre by a general proclamation made in the Common Bench.[23] For these the sole authorisation was the relevant writ and proclamation plus the form of writ of summons for the Eyre. Criminal pleas were brought before the Eyre mainly under a single part of the instructions to the justices which ordered them to enquire from local presentment juries as to 'pleas of the crown both old and new and all which had not yet been determined before the king's justices'. There was also a specific reference to pleas of the crown in the writ of summons to the Eyre. The third element was the enquiries made under the articles of the Eyre. The

[20] *Bracton*, ed. G. E. Woodbine and tr. S.E. Thorne, 4 vols. (Cambridge: MA, 1968–77), II, p. 309.
[21] *Close Rolls 1231–4*, pp. 445, 565, 570.
[22] Hence the relatively common form of exception to any variation between writ and count. For two early examples see *Rotuli Curie Regis*, II, pp. 39, 95.
[23] *Chronica Rogeri de Hovedene*, ed. W. Stubbs, Roll Series, 4 vols. (1868–71), III, p. 262.

arrangements recorded in 1218 show that the articles (*capituli*) were handed over at the beginning of an Eyre circuit to the chief justices of each circuit.[24] The private treatise *Judicium Essoniorum* indicates that it was the chancellor who handed them over under seal in London. We have the set of enquiries from 1194 and a number of copies of subsequent sets. These show the list of questions put to the juries steadily growing over the period down to 1272.[25] What also becomes clear once we have a record of the Eyres themselves is that, although some of the questions were intended simply to produce information, many were intended to produce actionable information and it was for the Eyre justices themselves to take that action.

We now also begin to get glimpses of what justices actually did after their appointment. In civil pleas, a significant part of their time seems to have been spent on procedural matters: authorising the next stage of mesne process against absent defendants or the holding of a view of the land claimed, adjudging the essoins (excuses for absence) of litigants and the like. Once plea rolls begin to survive they commonly record the appearance of the plaintiff and then the court's judgment (*judicium*) that the local sheriff employ the next stage of process against the absent defendant. *Glanvill* suggests that the appearances in court on the three days preceding the day on which judgment was given on a default were also appearances 'before the justices'.[26] The justices were also responsible for issuing the judicial writs to local sheriffs ordering the next stage of process. In the first surviving set of judicial writs from the summer of 1199, which are all in the name of the justiciar, Geoffrey fitzPeter, who presided in the Common Bench, the attestations are in the names of either Richard of Herriard (regularly placed fourth in precedence out of six in final concords made in the court) or Simon of Pattishall (regularly placed fifth).[27] It seems likely that these two justices were individually responsible for checking that the writ written by one of the clerks associated with the court was indeed warranted by the record of the court's judgment as recorded on the plea roll. *Hengham Magna* of *c.*1260 tells us of the part played by the keeper of writs and rolls (*prenotarius*) in the receipt of essoins but also tells us that the

[24] *Patent Rolls 1216–25*, pp. 206–8.

[25] H. Cam, *Studies in the Hundred Rolls: Some aspects of thirteenth century administration*, Oxford Studies in Social and Legal History (Oxford, 1921), VI; *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C. A. F. Meekings, Wiltshire Archaeological and Natural History Society, Records Branch (Devizes, 1960), XVI, pp. 27–45.

[26] *Glanvill*, ed. G. D. G. Hall (London, 1965), I, ch. 7, pp. 5–6.

[27] *Pleas before the King or his Justices, 1198–1202, I*, ed. D. M. Stenton, Selden Society, vol. 67 (London, 1953), pp. 350–418.

judgment of essoins normally required the checking of the related writs and the stage the case had reached and that 'the justices' normally did this.[28]

Of the part played by justices in the pleading of civil cases there is little evidence before the earliest law reports which come from the later years of Henry III's reign. In a 1203 case, however, we begin to see how the justices might intervene. Osbert son of Alexander claimed two hides given as a marriage portion to his mother and then held by his parents but gaged by his father after his mother's death to the current tenant, Alan.[29] Alan denied that Alexander had gaged the land to him or that he held the land in gage. He did not deny that the land had been the marriage portion of Alexander's mother. When Alan was subsequently asked (*interrogatus*) through whom he had acquired title to the land he said it had been through his own father, Philip. That question must have come from one of the court's justices. A clearer picture of judicial activity in the course of pleading emerges from the pleading manual, *Brevia Placitata*. This was compiled probably in the later 1250s, and almost certainly reflects what was happening in courtrooms in this period, and perhaps much earlier. Some of the judicial interventions were purely formal prompts. When, for example, a defendant explained why he should not have to respond in a claim for customs and services, the justice did no more than prompt the plaintiff to respond by asking him, 'John, do you know anything to be said against what he has said?'[30] But the justice's question might do more than that by pushing the party for further clarification. In a land action the tenant had pleaded that he was not obliged to answer a claim because the claimant was 'not such a one that any inheritance ought to descend to him'. The justice then pressed him by asking, 'Who is he now? You say and we will give judgment.' The tenant then explained that the claimant was a bastard who had been born before his mother's marriage.[31] We also see here examples of what are perhaps best classified as judicial rulings. In an annual rent case the defendant pleaded a quitclaim. The plaintiff noted the deed was unsealed and therefore void and asked for judgment. The defendant said it had been handed over to third parties in lieu of sealing since the plaintiff said he did not have his seal with him. The justice did not rule directly on

[28] *Radulphi de Hengham Summae*, ed. W. H. Dunham Jr (Cambridge, 1932), pp. 15–16.
[29] *Curia Regis Rolls*, II, 240.
[30] *Brevia Placitata*, ed. G. J. Turner and T. F. T. Plucknett, Selden Society, vol 66 (London, 1951), p. 56.
[31] *Brevia Placitata*, pp. 7–8.

the validity of the deed but warned the plaintiff that 'it is necessary that you put yourself on a jury [as to the validity of the deed] or you will lose your claim in perpetuity'.[32]

They seem also to have played at least a formal role in decisions about appropriate modes of proof and in the formal preliminaries to their acceptance by the court. In a 1220 writ of right case the claimant produced a champion, who initially offered to prove the seisin of the claimant's wife's grandfather in the reign of Henry II as of his own view. The tenant objected that the champion could hardly have witnessed the seisin he was now offering to prove. The champion then shifted his ground, saying that he was offering to prove what his father, not himself, had witnessed. The justices allowed battle to proceed, explaining that the champion could in this way claim to be a witness to the time of King Henry II.[33]

The proof stage of litigation was normally a separate stage in time in all except the petty assizes. *Bracton* has most to tell us about the latter, specifically about the assize of novel disseisin. The author did not think it proper for the presiding justice or justices to say anything much 'for the instruction of the jurors' (*ad instruccionem juratorum*) after they had been sworn, unless the defendant has said something to stay the assize on which their verdict was being sought.[34] He did, however, advocate the justice taking an active role prior to the jury being sworn in establishing the precise nature of what was being claimed, for example the plaintiff's own title to the land and the nature of his estate in it. The justice(s) ought then to ask the defendant if he knew any reason why the assize should stand over. *Bracton* also envisaged a potentially active role for the justice(s) when the jurors gave their verdict. The judge was responsible for giving a just judgment on the basis of their verdict. He therefore needed to examine the actions and words of the jurors and to compel them to elucidate any obscurities in what they said, so that he was in a position to proceed securely to judgment. The power of judgment in the assize might look as if it belonged to the jurors since judgment was in accordance with their verdict, but it was only the facts ('the truth') that were the province of the jury; justice and judgment were matters for the judge.[35] *Bracton* commented similarly on the active role that a justice should take in certain other limited circumstances in instructing jurors but only 'as much as is licit for him'.[36] When taking the verdict of an attaint jury, jurors should not be allowed to give a blank verdict affirming

[32] *Ibid.*, p. 112. [33] *Curia Regis Rolls*, IX, p. 120. [34] *Bracton*, III, p. 72.
[35] *Ibid.*, pp. 68–70, 72–5. [36] *Ibid.*, p. 210.

or quashing a prior verdict, but should be required to support their verdict with reasons and presumptions and to be diligently examined by the justices.[37] There is indeed some direct evidence for the justices taking an active role when receiving jury verdicts. In the 1227 Kent Eyre a grand assize jury was taken before the Archbishop of Canterbury's bailiffs but in the presence of the justices of the Eyre. The clerk carefully recorded not just the verdict for the tenant but also that the jury had shown sufficient reasons for it (*et sufficientes ostendunt raciones*).[38] The enrolment is probably recording the normal practice and expectation in all grand assize verdicts: that a justification would be given for the otherwise blank verdict, although the latter is all that normally gets recorded. Its importance is that it also provides something on which the jurors could be questioned by the justices, who could thereby help to shape that verdict. In the 1261 Northamptonshire Eyre an assize of darrein presentment was sued in the king's name as guardian of an heir. The jury gave a verdict explaining how the advowson had apparently passed to the defendants. They were then asked (evidently by the justices) if it was true that the heir's grandfather had presented as 'true patron' to the living. They not only confirmed this but explained how they knew this to be the case. They were then asked if they had ever seen a supposed charter of the heir's grandmother made after her husband's death granting the advowson. They confirmed they had not seen the charter and knew nothing of it except what they had been told. The defendants were given a chance to show the charter but refused. Judgment was then given for the king.[39] The case was recorded in detail no doubt because of the king's interest, but may well reflect general practice.

There is less we can learn about the functions of the justices in criminal business. We learn in passing from *Bracton* that the author thought it proper, when a justice received an indictment whose truth he doubted, for him to make further enquiries about how the jurors had learned about the matter, and that he even thought it possible for the justice to examine each of the jurors separately, if necessary.[40] More can be learned from a record of the 1244 London Eyre drawn up for the city itself. This shows the justices of the Eyre following up a rather blank presentment of a death with a further secret examination of two neighbours which revealed that others (not named in the presentment) had been in the house at the time of the

[37] *Ibid.*, p. 345. [38] TNA PRO, JUST 1/358, m. 10. [39] TNA PRO, JUST 1/616, m. 1.
[40] *Bracton*, II, pp. 403–4, 405–6.

death. It also shows the justices questioning the chamberlain (who acted as the city's coroner) about a child born dead after an attack on its mother. This revealed the additional information that he had seen the child with its head crushed and its left arms broken in two places and its body black from beating.[41] There is also an interesting record of the pleading in a case brought at the Eyre before the justices for crown pleas. The justices upheld the plaintiff's complaint of unlawful imprisonment against one of the sheriffs and said that equity (*equitas judicii*) required that he stay in prison for as long as he had unjustly imprisoned the complainant. The entry ends with what was evidently a single justice speaking on behalf of the court: 'For the honour of the city I concede that John [the sheriff] be now immediately imprisoned, but handed over to you on bail till I have spoken with the king.'[42]

It is during this period that we first get something looking like a clear statement of the principle that a royal court should never comprise fewer than two justices, complete with its rationale. A 1221 mandate to the justiciar of Ireland reproved him for the fact that there was only a single itinerant justice in Ireland 'which significantly departs from the custom of our realm of England, in which there are always several itinerant justices because only one justice itinerant does not customarily bear record and because there is danger in having only one roll and this is avoided by having several justices, since each has his own roll'.[43] Although stated as a rule about itinerant justices the same principle clearly also applied to the Common Bench. In England, the Eyre circuits (redrawn for each visitation) continued after 1189 to be staffed by a significantly larger number of justices than this. The average number of justices assigned to each circuit between 1189 and 1272 ranged between a minimum of four and a maximum of six.[44] In the late twelfth and early thirteenth century some Eyres (and even some circuits) still had as many as eight or nine justices assigned to them, but by the end of Henry III's reign the largest single complement of justices assigned to an Eyre was six.[45] The Common Bench also remained a multi-justice court, though with a gradual decline in the average number of justices assigned to it from seven during Richard I's reign to an average of just three for the decade 1250–60 and again for the period 1261–72. For a significant number of terms during these last two periods the nominal complement

[41] *London Eyre of 1244*, no. 157. [42] *London Eyre of 1244*, no. 345.
[43] *Rot. Litt. Claus*, I, 451. [44] Brand, *Origins of the English Legal Profession*, p. 21.
[45] Crook, *Records of the General Eyre*.

of the court was reduced further, to the minimum number of two.[46] For periods in Henry III's reign King's Bench seems to have had no more than a single full-time justice and its normal complement in Henry III's reign did not exceed two. However, it seems likely that this single justice never sat alone, for the stewards of the royal household seem also to have sat in the court as and when required.[47]

A small amount of evidence from this same period allows us to pierce the normal screen of collegial activity to see individual justices or groups of justices at work in the courts. A detailed account of litigation between the abbot of Crowland and the prior of Spalding and his superior, the abbot of St Nicholas Angers, about marshland adjacent to Crowland shows that when the abbot of Crowland was called to the Exchequer in 1192 it was Robert of Wheatfield (one of the court's more junior justices) who took the lead in asking for the four knights who had been sent to see whether his illness was such as to confine him to bed; Robert, too, who pronounced judgment that the abbot should lose seisin, but not forfeit all right in the marsh.[48] In a renewal of the case in Michaelmas term 1194 a yet more junior justice (Richard of Herriard) spoke up in the discussion between the justices that preceded judgment. He was able to reverse the judgment which the most senior of his colleagues (Archbishop Hubert Walter) had been intending to give.[49] When the case was renewed in the Common Bench in Michaelmas term 1202 it was Simon of Pattishall (again one of the more junior justices) who adjourned the case on the grounds that many of his fellow justices were absent from the court because Advent was being celebrated and this was the only case pending.[50] In Michelmas term 1266 an enrolment in the Common Bench shows that even a nominal complement of three justices might not always be relied upon. The king had ordered the justices to levy a particular final concord. Only Gilbert of Preston was present in court. Both his colleagues (William Bonquer and John de la Lynde) were overseas. Since it was hoped they would return before Hilary the business was adjourned till then.[51] Yet the surviving roll of the court's business in this same term shows that the court did continue to transact its ordinary business with only a single justice present.

[46] Brand, *Origins of the English Legal Profession*, p. 25. Only two justices are recorded as sitting in the court by the final concords made in T1251, T and M1255, H and E1256, E and T 1258, H1261, T1263, M1265, H1266, H, T, M1267, M1270.

[47] Brand, *Origins of the English Legal Profession*, p. 25.

[48] D. M. Stenton, *English Justice between the Norman Conquest and the Great Charter, 1066–1215* (Philadelphia, 1964), pp. 170, 172.

[49] *Ibid*., pp. 182, 184. [50] *Ibid*., p. 195. [51] TNA PRO, KB 26/176, m. 33d.

As for the Eyre, there is, as has long been known, the first evidence towards the end of this period to show the justices of the Eyre dividing into separate groups to do different types of business simultaneously. Four justices were appointed to the 1253 Rutland Eyre. An almost contemporary official reference shows that two of them heard pleas of the crown in the grange of Oakham castle while the other two heard the civil pleas of the county in the hall of the castle.[52] Rutland was the smallest English county and can have posed few problems for justices wanting to deal with all its cases in the time available. If they divided into separate groups for Rutland they must also have been doing this in other counties as well by 1253, and perhaps for long before. If there were more justices allocated to an Eyre they may well have split into more than two groups. That Eyre justices by 1272 might sometimes sit on their own is suggested by evidence from the 1271 Kent Eyre.[53] A litigant claimed he had been adjourned to Westminster by one of the four justices of the Eyre 'who then sat alone on the bench' and put himself on his 'record'. When he appeared, Hengham denied that he had been sitting alone. The claim, however, clearly shows that this was not unthinkable.

It is also in this period that we first get evidence that justices sometimes took advice from other royal officials and even had them sitting with them when making judgments. In 1202 the justices of the Common Bench went to take advice from the barons of the Exchequer (from whom they had so recently split) and other subjects of the king residing there.[54] I know of no further evidence for this before the final years of Henry III's reign. In a Common Bench case of 1269 Alexander, king of Scotland, was claiming the Nottinghamshire manor of Wheatley. One hearing of this case took place before the justices of the Common Bench as reinforced by Richard of Middleton the chancellor, Philip Basset, Robert Aguillon and master Richard of Staines.[55] Something similar seems to have happened in a difficult dower case of 1271 involving an alleged divorce where a judgment was given *de consilio curie* and is recorded as given in the presence of Richard of Middleton the chancellor, Walter of Merton and others of the king's council.[56]

The 1221 mandate to the justiciar of Ireland alerts us to the fact that there was more than one official record of what each court did.[57] In the

[52] TNA PRO, KB 26/168, m. 17d.
[53] TNA PRO, JUST 1/365, m. 71d.
[54] Stenton, *English Justice*, p. 194.
[55] TNA PRO, KB 26/194, m. 37.
[56] TNA PRO, KB 26/200A, m. 37d.
[57] For evidence of the survival of three different rolls compiled in Trinity term 1220 see *Curia Regis Rolls*, IX, 163.

Common Bench from at least 1219 onwards a further roll (the so-called *Rex* roll) was also being compiled for a senior clerk, the keeper of writs and rolls, who was directly appointed by the king. When the relevant part of *Bracton* was written it was this roll that was considered and treated as the 'first' or primary record of the court and its record was supposed to be followed by the rolls of all the other justices – that is, they were meant to be copied from it.[58] In 1253, however, a decision was taken that the senior justice of the court should become responsible for the court's 'first' roll, and the keeper of writs and rolls the 'second'. It seems that the other justices were also expected to continue producing identical duplicate rolls as well.[59] Something similar was evidently also true of the Eyre. There is some evidence to suggest rolls were being made for junior Eyre justices already in John's reign.[60] From Henry III's reign duplicates, and even on occasion as many as four copies of rolls, survive for some of the business heard in some Eyres.[61] In practice, therefore, serving as a royal justice seems to have meant not just having your proceedings recorded in an official record, but also being responsible, through one or more clerks, for compiling that record.

III

The reign of Edward I (1272–1307) brings a great increase in the available evidence. From 1272 the survival rate for plea rolls improves dramatically. Virtually every term of every year is represented by at least one extant plea roll in the Common Bench; surviving plea rolls (often in multiple copies) also record every aspect of the business of the itinerant justices in every county that they visited; and there is a King's Bench plea roll for almost every term of every year. From the final years of the reign of Henry III come the first surviving law reports, allowing us to hear lawyers and justices talking and arguing in the language of the courts (insular French), and within a decade also normally naming the particular lawyers and justices involved in the reported cases.[62] For its first two decades law reporting was on a relatively limited scale but a step change took place in the summer of 1291. In the case of the Common Bench, this

[58] *Bracton*, IV, 113. [59] *Close Rolls 1251–3*, p. 374.
[60] Crook, *Records of the General Eyre*, pp. 13–14.
[61] Crook, *Records of the General Eyre*, pp. 14–15.
[62] P. Brand, *The Earliest English Law Reports, IV*, Selden Society, vol. 123 (London, 2007), pp. xi–xvii.

is associated with arrangements made to set aside a specific area in the courtroom for the use of the 'apprentices of the Bench', fledgling professional lawyers, for them to listen, learn the law, and take notes on what they were hearing. Thereafter, law reporting was on a much larger scale and reports begin to survive in substantial collections assigned to particular terms or individual county sessions of the Eyre.[63] There are a relatively small number of identifiable King's Bench reports, often mixed in with those of the Common Bench.

(a)

From 1278 the work of the Eyre justices changed.[64] A whole new section of *novi articuli* was added to the articles for the justices to enquire into. They were also given the task of registering claims to royal franchises in each county they visited and of hearing challenges made on behalf of the king to some of the franchises claimed, and also of hearing royal claims to land and other real property. The justices were also made responsible for hearing complaints of wrongdoing against royal and private officials and others. There was also a total reorganisation of the arrangements for holding Eyres. In place of a varying number of circuits conducting countrywide visitations within a set period of time, two groups of itinerant justices were appointed to travel round the country holding sessions, apparently on a permanent basis. Their visitations were, however, suspended on the outbreak of war with France in 1294 and thereafter there were only visitations of single counties in 1299 and 1302, though the idea of having permanent Eyre circuits had still not been abandoned by 1307.

The general principle that all royal justices were appointed by or in the name of the king was maintained after 1272. The appointment of King's Bench justices remained an oral and informal process. As before, the most fully recorded appointments were those of the Eyre justices. They were appointed to 'itinerate for common pleas' in a specific county or counties and to this was added in 1278 a responsibility to hear and determine pleas on franchises in accordance with the related provision and ordinance and to hear and determine trespasses and complaints.[65] Appointments are recorded for only nine of the twenty-eight justices

[63] P. Brand, *Observing and Recording the Medieval Bar and Bench at Work: The origins of law reporting in England*, Selden Society lectures (London, 1999), pp. 16–18.
[64] Brand, *Origins of the English Legal Profession*, pp. 20–1.
[65] Crook, *Records of the General Eyre*, pp. 7, 142–80.

who served in the Common Bench in Edward's reign and the precise wording of the appointments still varied.[66] It is also only after 1272 that, for the first time, we get reliable information from official sources about the wording of the judicial oaths taken by newly appointed royal justices.[67] In 1278 the Close Rolls record the oath to be taken by the justices in Eyre. It begins with a general promise to serve the king 'well and loyally in the office of justice in your Eyre', but goes on to spell out what this means. The justice is 'to do justice to rich and poor to the best of your ability' and 'not to prevent or delay justice against right or the law of the land for the great or the rich, nor out of hatred or favour, nor for the estate of anyone, nor for any benefit, gift or promise given or to be given or in any other way, but loyally to do right to all according to law and custom and in particular not to receive anything from anyone'. The wording is substantially revised from that included in *Bracton*, but much of the revision may have taken place prior to 1278. In 1290 the two Exchequer Memoranda Rolls also record the form of oath taken by the justices of the Common Bench as revised after the disgrace of Weyland CJ and most of his colleagues. The oath is closely related to that taken by the justices in Eyre in 1278, though the initial promise is for service to the king 'in the office of justice'. The promise to take nothing from anyone has been modified to allow this with the king's permission and the entries record an oral concession by the king allowing the justices to receive food and drink for a day. There is also a new clause promising not to agree to any wrongdoing on the part of the justice's colleagues, but to attempt to prevent it if possible, and to report it, if necessary, to the king's council or to the king himself.

(b)

The general principle that the jurisdiction of the king's justices was delegated and that for each piece of business there should be either some general or specific warrant also continued to be applicable. It is, moreover, in this period that we first begin to see in much more detail and much more frequently what it was that justices were actually doing. We do not know for certain how the order in which cases were heard was determined. In the case of the Common Bench and King's Bench the

[66] TNA PRO, C 66/104, m. 3; C 66/108, m. 6d; C 66/109, m. 43; C 54/109, m. 9; C 66/111, m. 4; C 66/113, m. 12d; C 66/117, m. 5d; C 66/121, m. 7; C 66/127, m. 27.

[67] Brand, *Making of the Common Law*, pp. 149–51.

court's business was normally allocated to 'return days' within each term, generally at intervals of about a week, both by the process writs which required the defendant to be constrained to appear on one of these days and by the terms of the most recent adjournment given to the plaintiff. Thus there was always a sizeable number of litigants (some ready to plead, some not) with cases put down for hearing on the same return day but with no obvious way of determining relative priority between them. The problem is even greater in the case of the Eyre, where all civil cases in theory came on for hearing at the same time. The evidence, such as it is, seems to indicate that priority was determined by the discretion of the justices. This is suggested by a number of complaints made in 1289–93 alleging that a particular justice or justices had prevented a case being heard out of favour or in order to secure a bribe.[68]

When they did hear pleading in cases, the justices evidently took their responsibilities seriously. In a 1294 case a serjeant challenged a defective count and asked for the court's judgment. Mettingham CJ admitted that he and his colleagues had not been paying proper attention and refused to do so. The reason he gave was that the justices rendered judgment 'on peril of their souls', which was probably a reference to their judicial oath and the perils of breaking it. Counsel was therefore requested to count afresh.[69] The justices were active participants in the pleading stage, joining in the argument, making substantive points and giving their opinions on points at issue. An action of escheat was brought by the king in the 1285 Northamptonshire Eyre, claiming that a manor had been forfeited by its former Norman tenants (Pain and Hugh de Saint Philibert) when they left England to live within the allegiance of the king of France.[70] Counsel tried to argue that one of them had died in the king's allegiance and had an heir who was also in the king's allegiance. Saham J said that this response was available only to that heir himself and suggested reasons why he too would be barred. But at the end of his argument he was careful to say 'But we do not say this by way of judgment.'

Of particular importance was the role of the justices in asking factual questions of individual parties or their counsel. Take the action of waste brought by John de Neufmarche against his mother in 1301 for various

[68] P. Brand, 'Ethical standards for royal justices in England, *c*.1175–1307' (2001) 8 *U. Chi. L. Sch. Roundtable* 257–60, 263–5.

[69] LI MS. Miscellaneous 738, f. 121v.

[70] *Earliest English Law Reports, III*, Selden Society, vol. 122 (London, 2005), pp. 286–8 (85 Northants. 22).