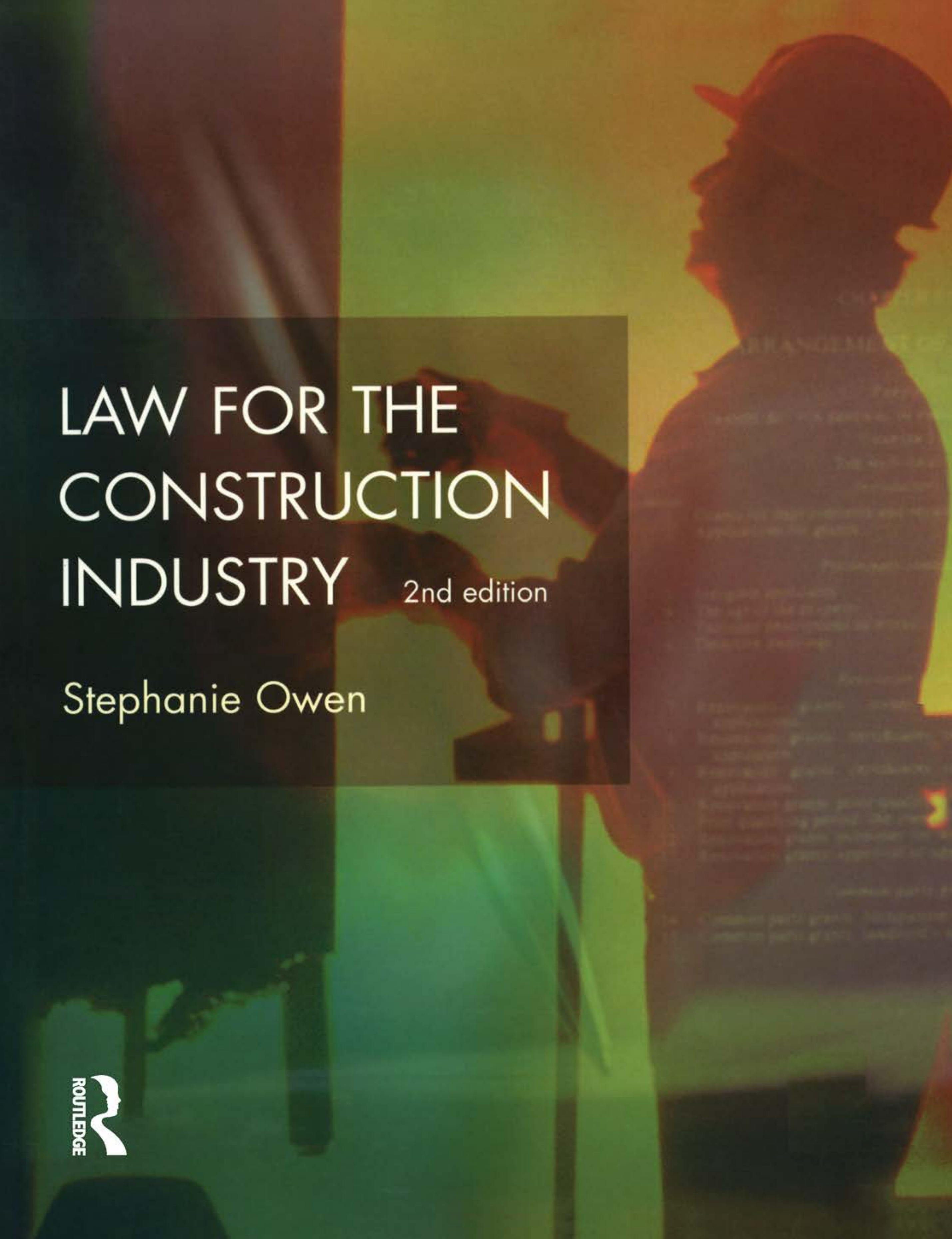

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2nd edition

Stephanie Owen

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For Barry, Edward and Chloë

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Preface to the second edition

I was very pleased to be asked to update my original book, 'Law for the Builder', published 10 years ago. Now in its new guise, 'Law for the Construction Industry', I hope that a new generation of building students will find it useful, not only in their academic work but also on site, as I know it has been in the past. Extensive revisions have been made, as can be seen from the text. I have tried to steer a middle course, providing sufficient detail and depth, where I have thought it important or necessary. Where only an overview has been given, I hope that the book will provide a useful springboard and the appropriate legal advice is sought. The revision has been rather like painting the Forth Bridge and whilst every effort has been made to bring the law as up to date as possible, events often overtake one and a keen eye should be kept on the construction journals and newspapers. My greatest piece of advice to students based on my recent teaching experiences, is 'Buy the book!' or certainly, at least a text-book. Student finances are precarious, I know, but too many are trying to get through examinations, with only lecture notes and the occasional borrowed library book. My other piece of advice is that the law is not difficult – there is just so much of it. Steady work right from the beginning of the course will pay good dividends. If you don't understand something, leave it till the next day when you are fresh and better able to absorb the information, and if you still don't understand, make sure you ask your lecturer for help.

I wish all readers every success in their studies.

Stephanie Owen, Ashtead 1997

Preface to the first edition

This book is not intended for lawyers. It has been written for the many thousands of builders who are faced with legal problems either in their daily work or when studying for their building examinations. After lecturing to building students for a number of years it became apparent that the average builder takes to the law like a duck to water, providing the information is shown to be relevant to the building industry and wherever possible plenty of diagrams are given. This book has been designed to convey the essential elements of English law in a relatively simple way, providing as much information and practical suggestions as possible and there are over 50 diagrams to assist. The index is detailed and should be used in conjunction with the text as a glossary.

Preferably the book should be read from the beginning as many of the mysteries of English law can be simply explained by reference to legal history.

In a book of this nature which covers so many areas of the law, I had to finally fix the law as best I could as at October 1985. I appreciate that there will be some areas in which there will be changes and I urge the reader to open a legal file into which he can start putting relevant cuttings, brief notes on radio programmes, articles from professional journals etc. so that he builds up a living picture of the English legal system as it affects him. I hope also that by the time he throws away this book (and buys a new edition) that it will be dog-eared with use, pencilled and underlined, which is how a law book should be especially for those studying for examinations. There is undoubtedly a correlation, in my experience, between high grades in examinations and 'dog-earedness' of books.

In a book of this nature, it would be extremely difficult and lengthy if I were to use both masculine and feminine examples at all times. For this reason I have adopted the usual law textbook approach i.e. by Section 6 of the Interpretation Act 1978, where words referring to the masculine gender are used, the female is included unless the contrary is shown.

Finally I hope that my book will encourage all builders to share my enthusiasm for the law. No other discipline is so relevant to everyday life and a well informed person gets much more satisfaction from their work.

Stephanie Owen
Ashtead, April 1986

Acknowledgements

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The miracles of the word processor have meant that I can now type my own manuscript, however, I am still indebted to Breda Dallimore, Margaret Gierlinska, Eileen Powell-Davies, Charlotte Johnson and my husband Barry for their help in proof-reading. I would also like to thank the library staff at NESCOT and the Law Society for their assistance with my research, and Valerie Leach and Ann Davidson for helping to keep my family ticking over. My one regret is that my great friend Leslie Bell, who proof-read virtually the whole of the first edition, is no longer alive. He is sadly missed in this community.

Whilst every effort has been made to ensure accuracy, any errors remaining are my own. In practical legal difficulty, I cannot recommend too highly that professional advice is sought as soon as possible and before the situation gets worse.

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1 The nature of law and its sources

'To begin at the beginning' DYLAN THOMAS/UNDER MILK WOOD

What is law?

The law

Laymen often have a jaundiced view of the law, and no wonder. To them the 'law' means big bills, policemen, red tape, divorce, prison and American movies. What they forget is that the more harrowing aspects should only play a small part in the life of the average man. In other respects, however, the law can creep into every nook and cranny of his life. Nearly every important occasion is affected by legal considerations, whether it is registering a birth, celebrating a coming of age, marrying, buying a house, making a will or dying. Even the builder lives his life in this manner!

The law and the builder

At work, the builder is even more beset with the need to comply with legal requirements. Before he can build, he may have to buy land by the process known as conveyancing. He may enter into a contract to build on someone else's land and will have to enter into hundreds of contracts to buy all the necessary materials. He must make sure that he has planning permission and must deposit plans which satisfy the Building Regulations. He will have to enter into contracts of employment with his workers and may negotiate with trade unions. He may operate his business as a sole trader or in partnership or may form a limited company. He must build carefully to comply with the contract specifications, the Construction Regulations, the Defective Premises Act 1974, the Health and Safety at Work etc. Act 1974 and to avoid being sued for breach of contract or negligence. He must not cause nuisances to his neighbours whilst building. He should make satisfactory insurance arrangements to cover his liability for many occurrences. He must not trespass on the neighbour's land, build beyond building lines, cause obstructions of highways nor dismiss his workers without good reason. The list is endless!

Why do we need laws?

Even in the most primitive of societies, people live their lives by rules which they create. Some things they make compulsory, others they prohibit. Such rules are imposed to make people behave in a similar way, in order to provide a harmonious way of life. For example, it is undesirable to have uncontrolled violence or theft, and ancient British tribes would have had customary rules dealing with such matters, punishing those who transgressed.

Without such rules, each person would have to make individual choices concerning his behaviour, which, whilst being perfectly logical and moral for himself, would not benefit society as a whole. For example, it is logical and much more usual to drive on the right-hand side of the road, yet it is the law of England and Wales that we drive on the left. Anyone failing to do so would cause chaos. And so it is for the bulk of our law – it is there to prevent chaos, to create an ordered way of life.

What sort of laws do we need?

Obviously, laws are needed which support popularly held ideals. Thus, in the early days of English law, people would have been most concerned with protecting themselves, their families, land and property, and the laws that developed reflected this.

As society became more complex, and people stopped manufacturing everything on their own, they began to buy and sell things, and to get others, such as builders, to work for them rather than do the work themselves. As a result of these business dealings, a large body of mercantile law developed.

Following the Industrial Revolution, the state increasingly began to take a protectionist attitude towards the people, far different from the old *laissez-faire*, caveat emptor approach of nineteenth-century law. Much social and consumer legislation has been passed in the twentieth century, and today there is a high level of legal control in all walks of life.

Thus, the law has to a certain extent mirrored the changes in society, getting more complex and increasing in volume as society has grown more sophisticated. Similarly, the methods of law creation have grown more complicated. What originally would have been a mere customary rule must now be created either by Parliament or by judges making decisions on the finer points of law in court cases.

Who benefits from the law?

As stated before, the law is mainly needed to benefit society as a whole, but this should not be at the cost of the individual. A fine balance must be maintained. This is so in nearly every country. However, sometimes the balance is tipped in favour of the state, as in communist countries. Even in this country, many people feel that the law is unfair to them individually.

Substantive and adjective law

The laws necessary to achieve a harmonious way of life are substantive laws, i.e. the very substance of the law itself such as a law against killing people. Such law on its own, however, would fail through lack of procedure to follow the law through to prosecution and, if necessary, punishment. Thus, adjective law, which is concerned with procedural law, court practice and rules of evidence, is needed to make substantive law actually work.

Good law and bad law

What is good law and bad law is entirely subjective. What may be good for society may be bad for the individual. What is good and what is bad? Once again, the law can only reflect society's wishes, and if society does not meet with our personal conception of right or goodness, then we dub it bad law. Nazi Germany or Idi Amin's Uganda had laws which were perfectly valid during those regimes. To change such law one needs to change the society that created it. This can be done peacefully by evolution, as in most Western states today, or forcefully, by revolution, for example, as in Iran, where a modern legal system has been replaced by traditional Islamic law.

Even with an evolutionary process such as we now have in England and Wales, we have good and bad law, depending on our particular point of view. The way we think depends on our upbringing, religion, education, politics and many other external influences. Such factors also affect one's private morals, and for that reason morality is generally not the concern of the law.

Because we are not all alike, the law will not suit everybody. It is merely the lowest common denominator which will satisfy most people's requirements of a legal system, and achieve maximum stability in the state.

The 'law' compared with other types of law

- The long arm of the *Law*
- The *Law* of gravity
- Criminal *Law*
- French *Law*

The word 'law' of course, is used in other contexts, and thus it is important to define one's terms. Scientific laws, for example, are totally different from legal ones, for they describe things which must necessarily happen, such as the law of gravity. Legal laws can only lay down rules for people to follow. Whether they do or not is up to them. To encourage adherence to the rules, most have some element of coercion behind them, whether it is a threat of loss of liberty or some other right, or a financial penalty.

Every country in the world has law of some sort, and within each legal system there are many different areas covering all aspects of life. Fortunately, for the purposes of this book, we are 'only' going to examine English law, i.e. the law applying to England and Wales.

The composition of a legal rule

Every area of law is made up of many individual little laws. A complex example of this can be found in the law of contract, which has hundreds of thousands of legal rules.

Each legal rule consists of two parts: a **right** and a **duty**. Thus, there is a duty imposed on all people in this country – not to kill others. Conversely, everyone has a right to life, or a right not to be killed. If someone breaks this rule, or as we say **breaches** his duty, then the state, on behalf of the people for whom the rule was designed to protect, will punish the wrongdoer. Thus, all legal rules are rather like see-saws (see Figure 1.1).

This book is therefore concerned with many rights and duties under the law with which the builder must concern himself, and it is hoped that this introduction to the concept of law will help the reader with his studies.

English law

Legal systems in the British Isles

English law is the law of England and Wales – not of the United Kingdom, for in the United Kingdom of Great Britain and Northern Ireland there are three legal systems, Scotland and Northern Ireland having their own. The Channel Islands and the Isle of Man are merely direct dependencies of the Crown and have their own legal systems. The reason for there being no uniformity is purely historical. The Scottish legal system, for example, developed in an entirely different way with much European influence, as it was a totally separate country until the Act of Union 1707. It would be foolish to imagine that two countries would ever develop in the same way through a period which knew no other forms of communication than that provided by horse or foot. Wales, on the other hand, was conquered by the English in the thirteenth century, at a time when English law was only in its infancy. The new overlords imposed the new developing law on the Welsh, and thus the laws of Hywel Dda are now lost in the mists of antiquity.

Common law

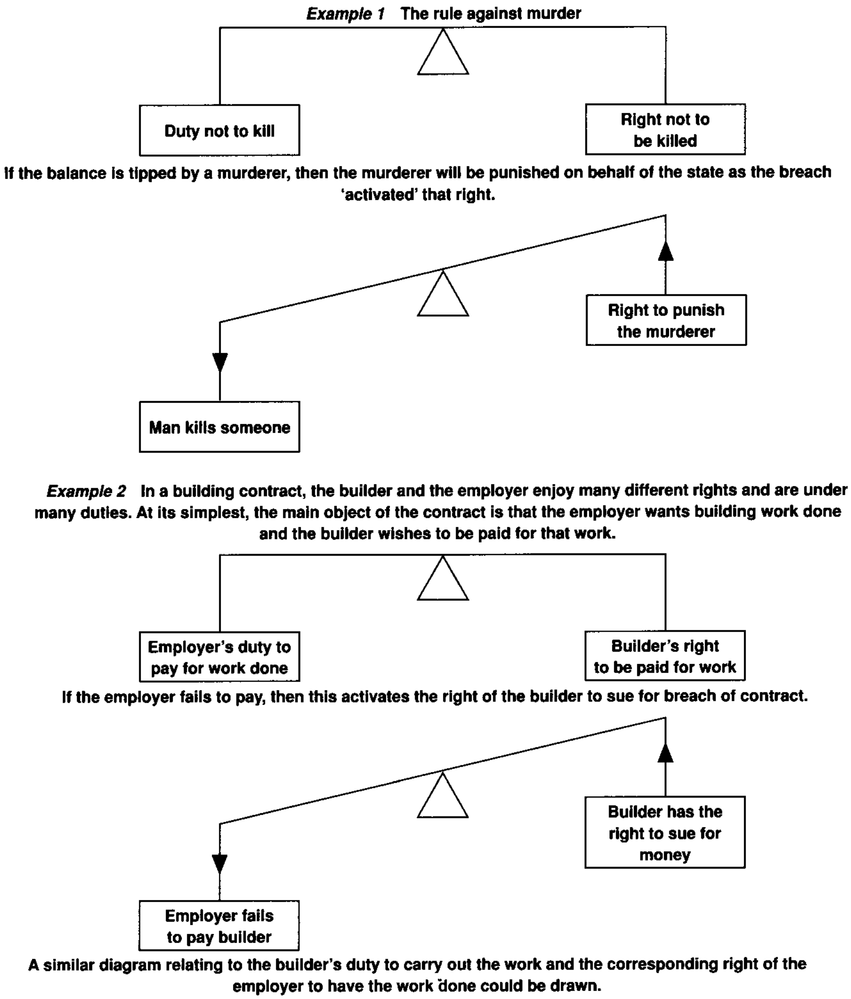
English law is a common-law system which is also found in many other countries in the world, mostly former British colonies. The words 'common law' have a number of different meanings. The first is of historical significance, and is the key to understanding what our law is all about. It is probably far easier to understand modern English law, with all its peculiarities, if one first looks at its historical development.

The development of English common law

Before the Norman Conquest

Before 1066, England was not as we know it today. It was merely a collection of many different kingdoms, e.g. Mercia, Wessex and Kent. These kingdoms were in perpetual disruption, because of fighting between their respective leaders and invasions from Europe of many warring tribes such as the Saxons.

Highly significant in the north-east was the arrival of the Vikings, who established their own kingdom called the Danelaw. All these tribes settled and interbred, so that old and new customs were intermingled. Some of their customs would obviously have concerned 'legal' ideas, i.e. not killing people or stealing their sheep. As few people could read or write, and the dialects


Example 1 The rule against murder
Duty not to kill
Right not to be killed
Right to punish the murderer
Man kills someone
Employer's duty to pay for work done
Builder's right to be paid for work
Builder has the right to sue for money
Employer fails to pay builder

If the balance is tipped by a murderer, then the murderer will be punished on behalf of the state as the breach 'activated' that right.

Example 2 In a building contract, the builder and the employer enjoy many different rights and are under many duties. At its simplest, the main object of the contract is that the employer wants building work done and the builder wishes to be paid for that work.

If the employer fails to pay, then this activates the right of the builder to sue for breach of contract.

A similar diagram relating to the builder's duty to carry out the work and the corresponding right of the employer to have the work done could be drawn.

Figure 1.1 Diagram to illustrate the concepts of rights and duties

were different, most laws tended to be unwritten and customary.

In 924, Athelstan was crowned on the Kings Stone at Kingston-upon-Thames, having invaded Scotland, defeated many tribes in the North of England and been paid homage by Welsh and Scottish kings. England was now united, but its laws remained much the same, and without an efficient system of communication it would have continued but for the Norman Conquest.

For governmental purposes, it was divided into shires, each with its own courts. Shires were subdivided into hundreds which also had their own courts. The king's representative in the shire, the shire reeve (or sheriff) would sit as a judge in the shire courts with the gentry and clergy, for there were no lawyers as such.

The landowners also operated a sort of private enterprise court system, known as the manorial courts, which dealt with disputes between people living and working on their land. In all the courts, local customary law was used, supplemented by the occasional written law known as a Doom issued by the King and his advisors, the Witan.

This, then, was the legal picture at the time Harold lost the Battle of Hastings.

After 1066

William of Normandy had been promised the throne of England by Edward the Confessor, who had been brought up partly at the Court of the Duchy of Normandy. Unfortunately, Edward also named Harold II as his heir. To right this betrayal, William invaded England, and fought and won the Battle of Hastings.

Realising that to retain the throne of England would be a difficult task, he set out to overcome the Anglo-Saxon hatred of their Norman conquerors, and to establish himself as a strong ruler. In this seeking after complete power, he sowed the seeds of what was to become England's first unified legal system, or law – common to all men. However, he did not abolish the existing legal system based on custom, knowing that this would be too unpopular.

The development of modern English law occurred as a result of a number of innovations introduced by William and subsequent Norman kings.

The feudal system – a form of land holding

First, the legal structure of society was completely changed by the introduction of the Norman *feudal system*. This was a system of land tenure or holding, whereby the king confiscated all the land, declaring himself to be the only true **owner** of England. He then made grants of the land to those he wished to reward for past favours. These people merely held the land as tenants of the king. They in turn granted estates or interests in the land, and so on. All the tenants and sub-tenants owed their loyalty to their immediate landlord, and had to pay feudal dues to keep their land. In addition, all swore to be faithful to the king. This process of granting sub-tenancies was called *subinfeudation* (see Figure 1.2). By this means, William repaid past loyalty, and ensured continued obedience, as land could be forfeited to the landlord in certain situations.

The feudal system also produced a form of communication from the king right down to the lowest of the low, the serfs. They were rather similar to slaves, in that they could be sold with the land, they could not hold an interest in land itself, and could not marry without their lord's permission.

In a time of poor communication, this system provided an adequate framework on which society in England could be unified. It also provided, by means of the feudal dues, money and armies to strengthen the monarchy, which were needed to impose the embryonic king's law on the antiquated, inefficient and regional legal system already in existence.

The Curia Regis – a forerunner of government departments, House of Lords and modern courts

Second, the Norman kings reinforced their rule with the introduction of the Curia Regis or King's Council, which was an advisory body, consisting of the tenants-in-chief, or barons. Initially they met only on formal occasions, but as life became more complex, many of the advisors took on special responsibilities for various aspects of government, such as taxation. Later, they gathered around them departments of suitably educated staff to help with administration, and from these beginnings, Parliament and the courts as we know them began to develop.

Circuit judges – unifying England by common legal rules

Third, the kings started to send Royal judges around the counties, giving them specified tasks known as commissions, e.g. the Commission of the Assize. They went on circuit, and took with them 'central' policy from the King's Council. At first they had to use the old customary laws at the trials, as there was no other law. These, they applied, but on their return to the king, those customs of which they disapproved would be rejected, and those they liked would be incorporated into a new set of rules, to be used all over England, the common law.

Thus, the English people now had two court systems, the old pre-1066 courts, and those which were modified or introduced by the Norman kings. The Church continued to deal with matters relating to marriage and the family. Gradually, the

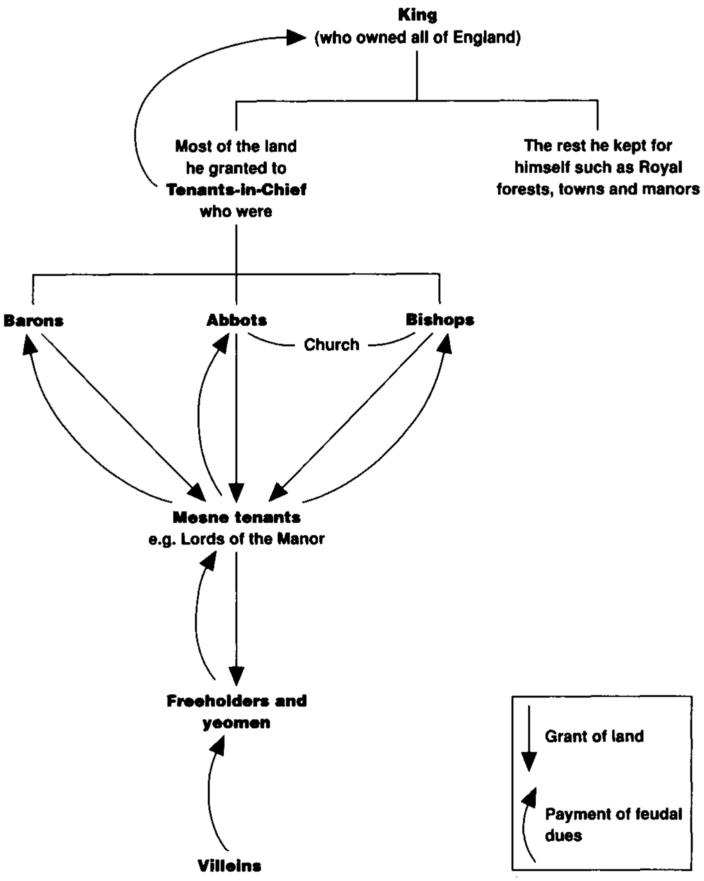

King
(who owned all of England)
Most of the land
he granted to
Tenants-in-Chief
who were
The rest he kept for
himself such as Royal
forests, towns and manors
Barons
Abbots
Church
Bishops
Mesne tenants
e.g. Lords of the Manor
Freeholders and
yeomen
Villeins
Grant of land
Payment of feudal
dues

Figure 1.2 The process of sub-infeudation

people began to see the advantages of using the circuit courts of the king, for there was uniformity in treatment, little corruption and virtually no bias. The nobles who ran the manorial courts, and who derived a great income from them, were, of course, less than happy with Royal Law. Whenever a king was weak, the nobles would force him to do something which restricted his power in some way. This is well illustrated when the development of the writ system was hindered by the enactment of the Provisions of Oxford in 1258 (see p. 7).

At first, the new royal justice was concerned with law and order, so criminal law was important. Property, of course, was of extreme significance and under the sole jurisdiction of the Crown, and the Royal judges would be asked to deal with disputes concerning property rights. In order to seek help from the new system, a plaintiff would have to obtain a document from one of the new government departments. This document was aptly called a writ. It was because of the writ administration system that the common law developed in a strange way. Eventually, because of the shortcomings of the common law, a parallel set of rules was developed known as equity (see p. 7). In addition to the common law created by the circuit judges, the king would also enact statutes on very important matters such as the Provisions of Oxford.

The writ system

Even today, if you wish to sue someone in the High Court, you need to issue a writ, a written document containing particulars of the claim you are making against the defendant (see Figure 1.3). The modern writ is a printed form, which the plaintiff completes, to cover the circumstances involved. The old writs, on the other hand, were specially written by the clerks in Chancery which was one of the new government departments spawned by the Curia Regis. The head of the Chancery was the Lord Chancellor, who was one of the most important members of the Curia Regis. In the early days of common law, he was always a priest, and also the King's Confessor. This department was mostly made up of educated clergymen, as they were some of the few people who could read and write. The clerks drew up the writs, using a mixture of old English and Norman French. Each writ was unique, in that it only applied to the circumstances pleaded by the plaintiff. One can understand the delight of those people who had travelled sometimes hundreds of miles to obtain one of the new writs, for it meant that whatever their grievance, they would be able to take a private action in the modern king's courts.

This legal 'Shangri-La' was short-lived, for a side effect of allowing the issue of writs for every private legal grievance was that the people flocked to use the king's courts. As a result, the manorial courts, run by the feudal lords, began to lose revenue to the Crown. Even today one must pay court fees before a civil action can be started.

In 1258, the Crown was comparatively weak. The lords pressurised King Henry III to enact a statute, called the Provisions of Oxford. This dealt with many matters, but one matter of great significance was that the statute forbade the making of any **new writs**. This had a profound effect on the development of the common law, for unless you had a grievance already covered by the wording of an existing writ (which could be repeated, incorporating your name and other particulars) you had **no** remedy in the Royal courts. The result of this was that for many people, the only remedy open to them was to be found in the manorial courts – a retrograde step.

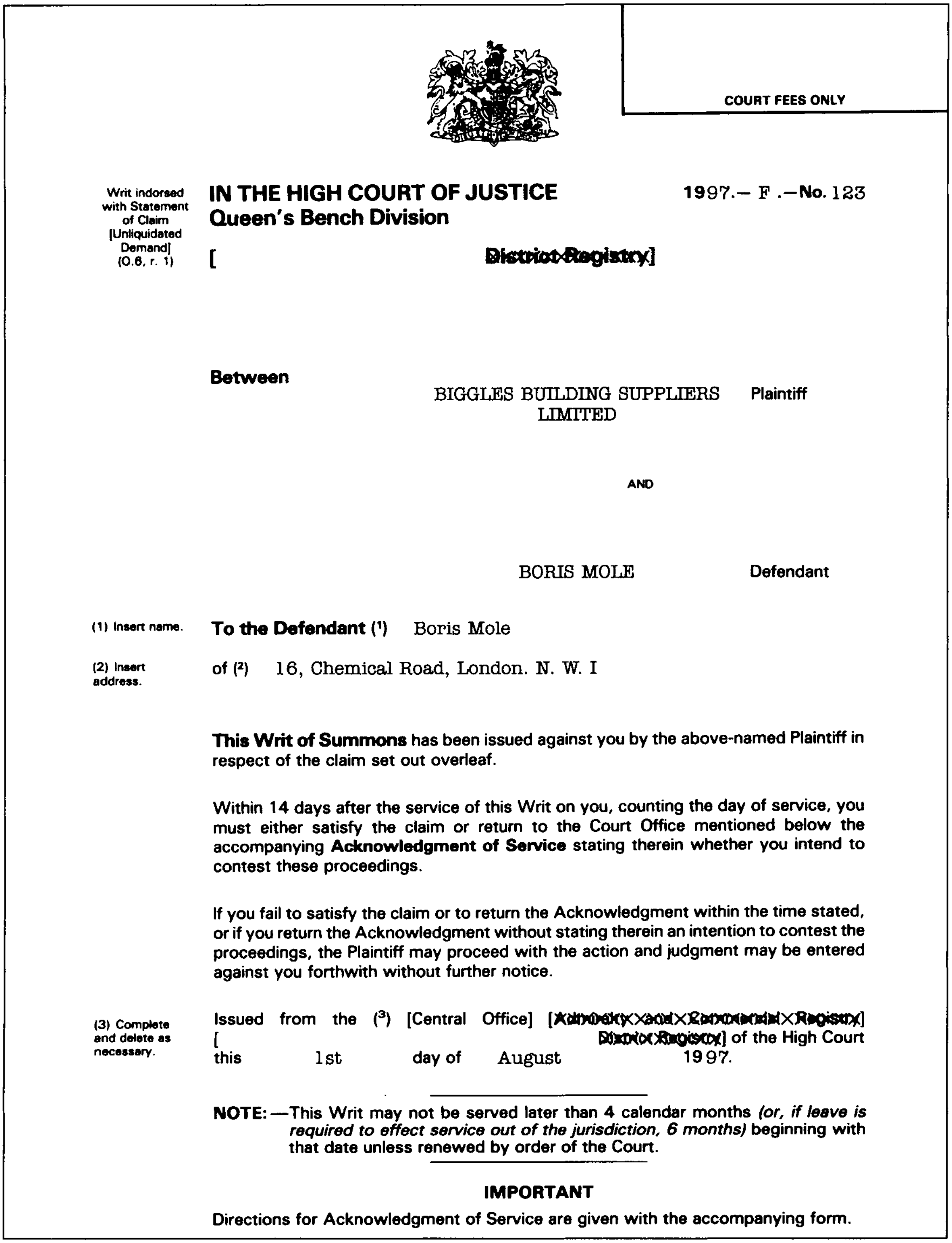
All was not lost, however. In 1285, King Edward I, a successful and strong king, enacted the Statute of Westminster II. Whilst he could not reverse the Provisions of Oxford, he could introduce a modification concerning the writ system. He decreed that, whilst no new writs could be issued, the wording of the old pre-1258 writs could be used to cover analogous situations. As a result, the civil side of common law continued to develop in an artificial fashion.

Equity

Development of equity

Thus, one of the main problems of the common law was the lack of freedom to start a private action, unless there was a suitable writ, or one that could be adjusted to fit your grievance. No writ – no right! There were other problems which stemmed from this restriction. The wording of the writ became sacrosanct. Indeed it was called the form of action, and had to be applied exactly in each subsequent case. One word wrong could lose you your case, an early example of 'sticking to the letter of the law'.

So, for people who wanted to go to law but who were unable to use the common law, because there was no writ available, there were two alternatives. Either they went back to the manorial courts, or they applied directly to the king, who was the 'fountain of all justice'. The second method was excellent, as the king could grant whatever remedy he wished. But it could involve following the king around, sometimes even behind battle lines, until one got an audience. Even so, applying directly to the king for justice became so popular that eventually the hearing of applications or petitions was taken on by the Lord Chancellor. As we saw before, although he was in charge of the Chancery, originally, his main job was to be the king's spiritual advisor. As a priest, it is understandable that he viewed the problems presented to him in an entirely different light from that of the king and the judges. His was a moral and religious viewpoint, and he made his decisions based on his own personal ideas of what was fair and just. He was not restricted by the writ system as, to start with, each appeal was made in person by



COURT FEES ONLY

Writ indorsed with Statement of Claim [Unliquidated Demand] (O.6, r. 1)

IN THE HIGH COURT OF JUSTICE 1997.— F .—No. 123

Queen's Bench Division

[~~District Registry~~]

Between

BIGGLES BUILDING SUPPLIERS LIMITED Plaintiff

AND

BORIS MOLE Defendant

(1) Insert name.

To the Defendant (1) Boris Mole

(2) Insert address.

of (2) 16, Chemical Road, London. N. W. I

This Writ of Summons has been issued against you by the above-named Plaintiff in respect of the claim set out overleaf.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office mentioned below the accompanying **Acknowledgment of Service** stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

(3) Complete and delete as necessary.

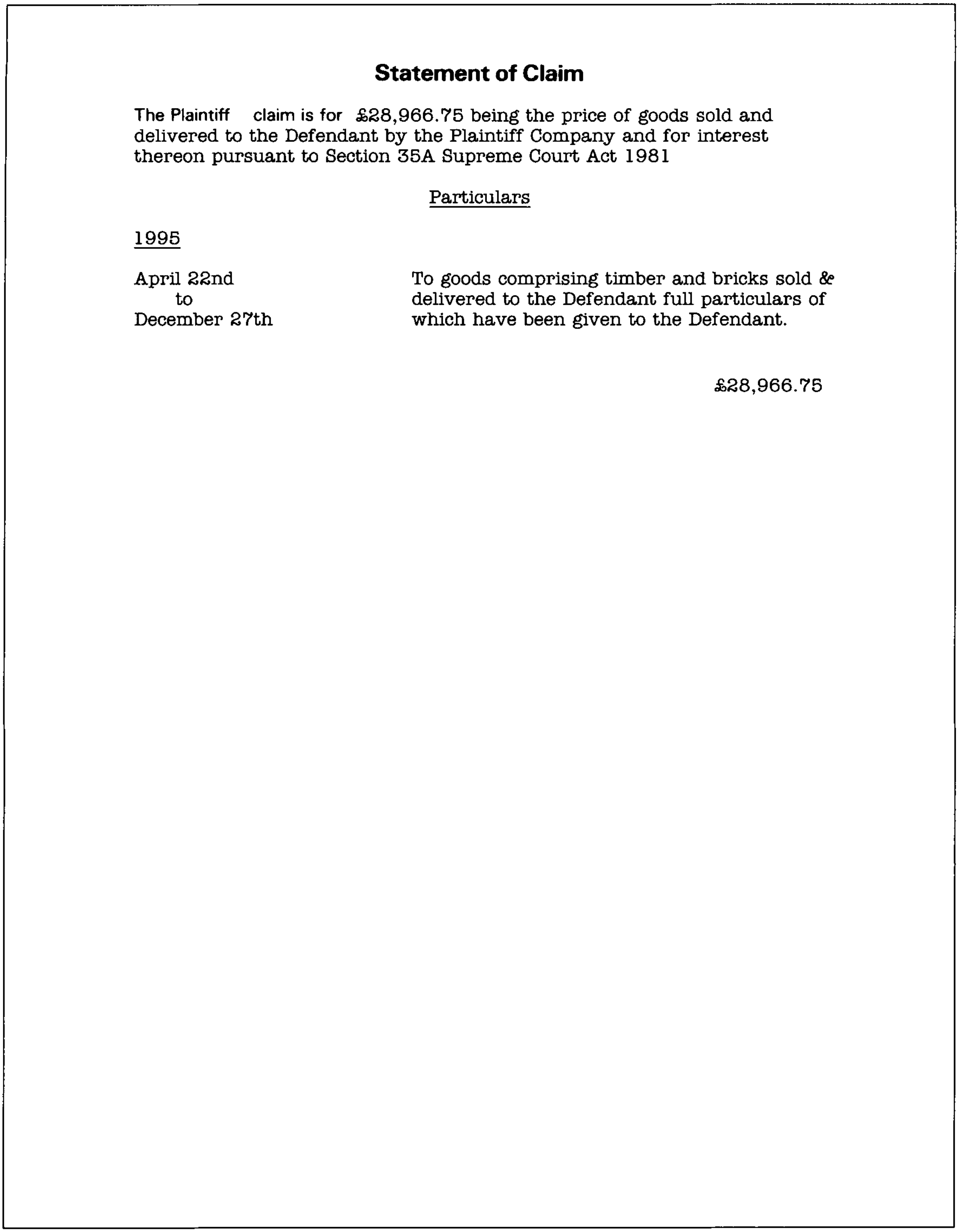
Issued from the (3) [Central Office] [~~Admiralty and Commercial Registry~~]
[~~District Registry~~] of the High Court
this 1st day of August 1997.

NOTE:—This Writ may not be served later than 4 calendar months *(or, if leave is required to effect service out of the jurisdiction, 6 months)* beginning with that date unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

Figure 1.3 Writ endorsed with statement of claim for liquidated sum. High Court form A3B reproduced by kind permission of The Solicitors' Law Stationery Society Limited.



Statement of Claim

The Plaintiff claim is for £28,966.75 being the price of goods sold and delivered to the Defendant by the Plaintiff Company and for interest thereon pursuant to Section 35A Supreme Court Act 1981

Particulars

1995	
April 22nd to December 27th	To goods comprising timber and bricks sold & delivered to the Defendant full particulars of which have been given to the Defendant.
	£28,966.75

Figure 1.3 cont'd