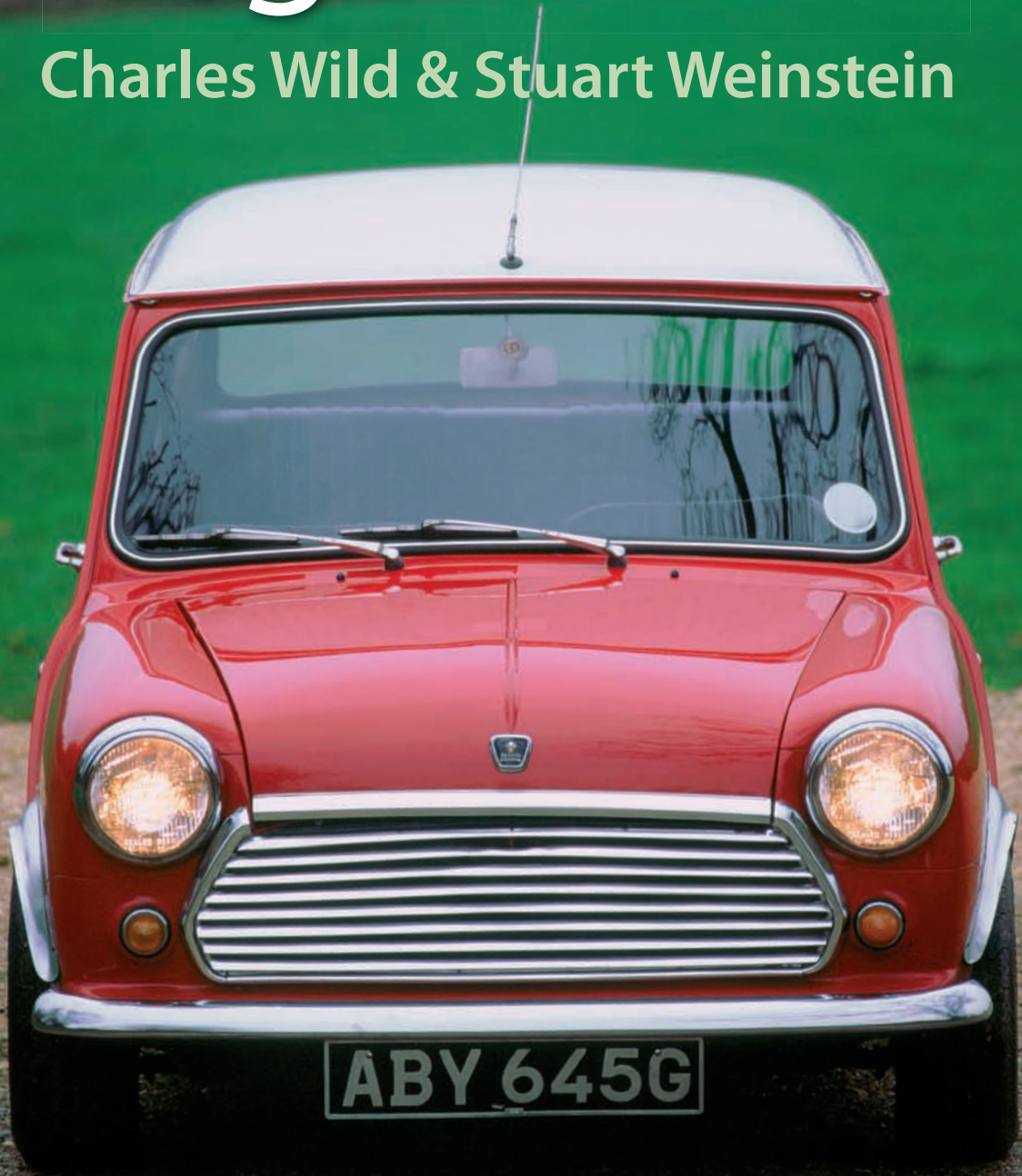


Smith and Keenan's

English Law

Charles Wild & Stuart Weinstein



seventeenth edition

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ENGLISH LAW

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17th Edition

Smith & Keenan's

ENGLISH LAW

TEXT AND CASES

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Pearson Education Limited

Edinburgh Gate
Harlow CM20 2JE
United Kingdom
Tel: +44 (0)1279 623623
Web: www.pearson.com/uk

First published in Great Britain under the Pitman Publishing imprint in 1963 (print)

Second edition published 1966 (print)

Third edition published 1969 (print)

Fourth edition published 1973 (print)

Fifth edition published 1975 (print)

Sixth edition published 1979 (print)

Seventh edition published 1982 (print)

Eighth edition published 1986 (print)

Ninth edition published 1989 (print)

Tenth edition published 1992 (print)

Eleventh edition published 1995 (print)

Twelfth edition published 1998 (print)

Thirteenth edition published under the Longman imprint in 2001 (print)

Fourteenth edition published 2004 (print)

Fifteenth edition published 2007 (print)

Sixteenth edition published 2010 (print)

Seventeenth edition published 2013 (print and electronic)

© Kenneth Smith and Denis Keenan, 1963, 1966 (print)

© Denis Keenan and Mrs K. Smith, 1969, 1973, 1975, 1979, 1982 (print)

© Denis Keenan, 1986, 1989, 1992, 1995, 1998, 2001, 2004, 2007 (print)

© Pearson Education Limited 2010 (print)

© Pearson Education Limited 2013 (print and electronic)

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(OGL) v1.0. www.nationalarchives.gov.uk/doc/open-government-licence.

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ISBN: 978-1-4082-9527-4 (print)

978-1-4082-9605-9 (PDF)

978-1-292-00349-8 (eText)

British Library Cataloguing-in-Publication Data

A catalogue record for the print edition is available from the British Library

Library of Congress Cataloging-in-Publication Data

Wild, Charles.

Smith & Keenan's English law : text and cases / Charles Wild, Phd, MBA, LL.M., PCHE, LPC, CPE, BSC (Econ), Dean of the School of Law, University of Hertfordshire, Head of the Centre for International Law, University of Hertfordshire; Stuart Weinstein, JD, MBA, BA Associate Dean (research & enterprise), School of Law, University of Hertfordshire solicitor, Supreme Court of England and Wales Attorney-at-Law, New York, California, District of Columbia. -- 17th edition.

pages cm

Includes index.

ISBN 978-1-4082-9527-4 (pbk.)

1. Law--England. 2. Law--Wales. I. Weinstein, Stuart. II. Smith, Kenneth, 1910–1966. English law. III. Keenan, Denis J. Smith and Keenan's English law. IV. Title. V. Title: English law. VI. Title: Smith and Keenan's English law.

KD661.S6 2013

349.42--dc23

2013006607

10 9 8 7 6 5 4 3 2 1

16 15 14 13

© Motoring Picture Library/Alamy

Print edition typeset in 9/12pt ITC Giovanni Std by 35

Print edition Printed by Ashford Colour Press Ltd., Gosport

NOTE THAT ANY PAGE CROSS REFERENCES REFER TO THE PRINT EDITION

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ON THE WEBSITE

Preface

The major feature of this seventeenth edition is the continued restructuring of key subject areas, together with the introduction of new topics, so as to maintain both the currency and relevance of this text to the reader. As such, the following important changes have been made to the new edition, in addition to bringing it up to date with recent case and statute law:

- Part 1 has been significantly reworked so as to explore the English common law in far greater depth as well as to take the opportunity to focus on specific topic areas including: the country's unwritten constitution, the legal profession, and the recent emergence of ABSs (alternative business structures). This will enable the reader to appreciate the changing nature of the legal sector following the Legal Services Act 2007 and its impact on the sector. No one can have missed the media's fascination with concepts such as 'Tesco Law'. Further changes are anticipated to follow the Legal Education and Training Review (LETR) particularly in terms of the greater role which professional bodies such as CILEX (Chartered Institute for Legal Executives) may play alongside the more traditional routes to qualification as a solicitor or barrister.
- The area of ADR (alternative dispute resolution) is explored for the first time, examining the various procedures which have been grouped together under this umbrella term (i.e. negotiation, mediation and arbitration). There is a consensus that this aspect of the English legal system has not only become a significant part of dispute resolution over the past few years but will also continue to grow in importance. Consequently, it is critical for the reader to be aware of this development, along with its implications.
- The chapters dealing with the Law of Torts have been reworked so as to include greater consideration of case law and judicial thinking in the area. In addition, a section on nervous shock (psychiatric harm) has been introduced.
- Similarly, the section on the Law of Contract has also been updated so as to provide the reader with

an effective overview of the subject area as well as greater clarity as to specific topics.

- Finally, the section dedicated to Employment Law has continued to be expanded in order to give a more complete picture of the potential issues which may be faced by both employers and employees, including an analysis of the contract of employment, the termination of employment, and issues of discrimination in the workplace. The impact of the Equality Act 2010 is considered in detail throughout.

The volume of law that emanates from Parliament in terms of statutes, and Whitehall in terms of ministerial orders, and the courts in terms of rulings in case law is enormous. Indeed, as pointed out in previous prefaces, the pace of legal change only serves to accentuate the feeling that we may diligently pursue but seemingly never overtake the fleeting vision of the law. What has this publication done to alleviate the problem though?

- First there has been rigorous updating of the text so that the relevant law keeps us up to date to the end of September 2012.
- Secondly it will be noticed that as the text proceeds there is a reference to reform.
- Finally this edition will, as has been the case with previous editions, receive updating through the companion website (details of which appear on page xi.)

A further distinctive feature of the book is to be found in the extensive Cases and Materials section which forms the final part. The reasons as to why such an extensive treatment of case law is included within this text are as follows:

- Many texts are often either too sketchy or too academic in their coverage of cases. Far too often a case summary describes 'A selling goods to B' and such summaries are often uninteresting for the reader and difficult to remember because there is no detailed description of the facts which may impress themselves upon the memory. This book therefore gives the reader ready access to the cases themselves.

- It was usual at one time for law students to buy a leading academic text and a separate casebook. However, this has become an expensive exercise for students and, for that reason, this book seeks to include both principles and cases.
 - The case summaries in this text are detailed and the relevant circumstances identified and described, verbatim extracts from judgments often being given.
 - The headnote to a case or group of connected cases also allows the reader to browse the Cases and Materials section separately from the main text and, in particular for students, to revise from this section when the text has been mastered.
 - The extended case summaries are particularly useful where either there is great pressure upon the library facilities or students wish to have their own comprehensive resource at hand. However, to assist in the use of a law library, page xvi lists the law report abbreviations used in the Cases and Materials section. Furthermore, an extended summary of a case for the student can represent a permissible economy of time, eliminating immaterial facts in the longer full report. It should be remembered that, particularly in the common-law subjects, the cases are the authority for the points made in answers to examination questions, and students should try to have an appreciation at least of the major cases.
 - The Cases and Materials section assists the lecturer by removing the chore of producing case summaries of the more extended kind, allowing the lecturer to fulfil the much more useful role of giving comment, discussion and criticism of a case.
 - Please note that where the male 'he' and 'him' is used in the text, this should also be taken to refer to the female 'she' or 'her'. Where 'they' is used as a singular, this should be taken to refer to both male and female.
- We would like to thank those members of staff at Pearson Publishing who have helped produce this edition, particularly Christine Statham and Gabriella Playford. Our thanks are also due to those who designed, set, printed and bound the book.
- We would also like to thank our respective families who have shown considerable patience and understanding. The production of any text requires a significant support network and for that we are both truly grateful.
- Any errors and omissions at the level at which the text is aimed are down to the authors.

Charles Wild and Stuart Weinstein
Hertfordshire, September 2012

The book at a glance

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1 The nature and development of English law	2 The unwritten constitution	3 The law-making process: legislation and case law	4 The courts of law
5 Tribunals and judicial review	6 Alternative dispute resolution	7 The main legal professions	8 Legal services
9 Civil procedure	10 Criminal procedure	11 The Human Rights Act	12 Persons and the Crown

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30 The law of property – including real and personal property generally, landlord and tenant, transfer of land and securities

Part 6 CRIMINAL LAW		
31 Criminal law: general principles – including strict offences and corporate liability	32 Specific offences – including murder, manslaughter, wounding, and sexual offences	33 Age and responsibility: general defences – including insanity, automatism and self-defence

Part 7 EMPLOYMENT LAW		
34 The contract of employment	35 Workplace discrimination	36 Termination of contract of employment

Part 8 CASES AND MATERIALS

Law Report abbreviations

The following table sets out the abbreviations used when citing the various series of certain Law Reports which are in common use, together with the periods over which they extend.

AC	Law Reports, Appeal Cases 1891–(current).
ATC	Annotated Tax Cases 1922–1975.
All ER	All England Law Reports 1936–(current).
All ER (Comm)	All England Law Reports (Commercial Cases) (current).
All ER (D)	All England Law Reports (Direct) (online) (current).
All ER Rep	All England Law Reports Reprint, 36 vols 1558–1935.
App Cas	Law Reports, Appeal Cases, 15 vols 1875–1890.
BCLC	Butterworths Company Law Cases 1983–(current).
B & Ad	Barnevall & Adolphus’ King’s Bench Reports (England & Wales).
B & CR	Reports of Bankruptcy and Companies Winding-up Cases 1918–(current).
Beav	Beavan’s Rolls Court Reports (England & Wales).
Bing	Bingham’s New Cases, English Common Pleas.
Ch	Law Reports Chancery Division 1891–(current).
Cl & Fin	Clark & Finnelly’s House of Lords Reports New Series (United Kingdom).
CLY	Current Law Yearbook 1947–(current).
CMLR	Common Market Law Reports 1962–(current).
Co Rep	Coke’s King’s Bench Reports (England & Wales).
Com Cas	Commercial Cases 1895–1941.
Cr App R	Cohen’s Criminal Appeal Reports 1908–(current).
Crim LR	Criminal Law Review 1954–(current).
EGCS	Estates Gazette Case Summaries (England & Wales).
EHRR	European Human Rights Reports (current).
EWCA	Court of Appeal (England & Wales).
EWHL	House of Lords (England & Wales).
ExD	Law Reports, Exchequer Cases (England & Wales).
Fam	Law Reports Family Division 1972–(current).
ICR	Industrial Court Reports 1972–1974; Industrial Cases Reports 1974–(current).
IRLB	Industrial Relations Law Bulletin 1993–(current).
IRLR	Industrial Relations Law Reports 1971–(current).
ITR	Reports of decisions of the Industrial Tribunals 1966–(current).
KB	Law Reports, King’s Bench Division 1901–1952.
Lev	Leving’s King’s Bench and Common Pleas Reports (England & Wales).
LGR	Local Government Reports 1902–(current).
LJ Ch	Law Journal Reports, Chancery Old Series (England & Wales).
LJQB	Law Journal Reports, Queen’s Bench New Series (England & Wales).
Lloyd LR or (from 1951)	Lloyd’s List Law Reports 1919–(current).
Lloyd’s Rep	
LRQB	Law Reports, Queen’s Bench (1st Series) (England & Wales).

LRRP	Law Reports Restrictive Practices 1957–(current).
LT	Law Times Reports (England & Wales).
NLJ	New Law Journal.
P	Law Reports, Probate, Divorce and Admiralty Division 1891–1971.
P & CR	Planning and Compensation Reports 1949–(current).
PIQR	Personal Injuries and Quantum Reports.
Russ	Russell’s Chancery Reports tempore Eldon (England & Wales).
QB	Law Reports Queen’s Bench Division 1891–1901; 1953–(current).
Sol J	Solicitors’ Journal 1856–(current).
Starkie	Starkie’s Nisi Prius Reports (England & Wales).
STC	Simon’s Tax Cases 1973–(current).
Sty	Style’s King’s Bench Reports (England & Wales).
Tax Cas (or TC)	Tax Cases 1875–(current).
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UKHL	House of Lords (United Kingdom).
WLR	Weekly Law Reports 1953–(current).

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Part 1

THE ENGLISH LEGAL SYSTEM

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1

The nature and development of English law

Classification of English law

There are a variety of ways in which English law can be categorised, all of which prove challenging to those approaching the discipline for the first time. The following are the main classifications of English law with which this book deals and each will be considered in more detail in the chapters which follow. They are given here merely as an overview of what is to come.

However, it is also worth mentioning from the outset the distinction to be made between common-law and civil law systems. The origins of the common law will be discussed later in this chapter, but the term 'common law' when applied to a legal system implies that the country in question (e.g. the United States of America) has, to some degree, adopted the approach of the English legal system. By contrast, the term 'civil law' when applied to a legal system means that a country has followed the continental system of law which is derived predominantly from ancient Roman law, though also owing a lot to the Germanic tradition.

The main distinction to be made between these two approaches is that civil law legal systems tend to consist of a codified body of legal principles which exert considerable control over judicial decision making. By contrast, a common-law legal system is characterised by a case-centred approach which, in turn, means that the judiciary has greater scope in terms of decision-making discretion and which many argue leads to a more pragmatic and responsive approach to the resolution of problems brought before the courts. The reality lies somewhere between these two rather polarised descriptions, as common-law judges are not entirely free to exercise their discretion, whilst civil law judges have not had their ability to exercise judicial discretion taken away. Indeed, any analysis of the modern landscape within the European Union highlights the fact that the two approaches are moving closer to a shared middle ground, though there will always be distinct differences in approach.

Common law and statute law

As will be noted later in this chapter, the term common law refers to the substantive law and procedural rules which have been developed over hundreds of years by the courts via the judicial decisions (cases) they have heard. By contrast, the term statute law covers the aspects of the law which have been created by Parliament via legislation (discussed further in this chapter as well as in Chapter 3). The relationship between these two areas is central to any understanding of the English legal system.

Private and public law

Private law is concerned with the legal relationships of ordinary persons in everyday transactions. It is also concerned with the legal position of corporate bodies and associations of persons the first of which are given a special form of legal personality. Private law includes contract and commercial law, the law of tort, family law (e.g. divorce, adoption and guardianship), trusts and the law of property

4 Part 1 The English legal system

which involves a consideration of the rights which can exist in property and how property can be transferred from one person to another.

Public law is concerned with the constitution and functions of the many different kinds of governmental organisations, including local authorities, such as county councils, and their legal relationships with the citizen and each other. These relationships form the subject matter of constitutional and administrative law. Public law is also concerned with crime which involves the state's relationship with the power of control over the individual.

There is also a division into *criminal and civil law*. Criminal law is concerned with legal rules which provide that certain forms of conduct shall attract punishment by the state, e.g. homicide and theft. Civil law includes the whole of private law and all divisions of public law except criminal law.

In order to understand the various branches of substantive private law which are considered in detail later, it is necessary to be able in particular to distinguish the following:

Contract

A contract is an agreement made between two or more persons which is intended to have legal consequences. Thus, if there is a breach of contract, the parties can go to court and obtain a remedy. We shall see in the chapters on contract which agreements the courts will enforce, under what conditions they are enforceable, and what remedies are available to injured parties. It should be noted that the parties to a contract in general enter voluntarily into their obligations; the function of the law is merely to act in an impartial way in order to settle any disputes which may arise between the parties to the contract.

It is, however, worth noting even at this early stage that not all contractual obligations are undertaken voluntarily. In order to protect the consumer, certain obligations are implied into some contracts by statute and cannot in some cases be removed, e.g. an undertaking that the goods are of satisfactory quality in consumer sales where the Sale of Goods Act 1979 applies.

Tort

A tort, on the other hand, is a civil wrong independent of contract. It arises out of a duty imposed by law, and not by agreement, and a person who commits a tortious act does not voluntarily undertake the liabilities which the law imposes on him. There are many kinds of tort with a common characteristic: injury of some kind inflicted by one person on another. Nuisance, inflicting injury by negligence, trespass, slander and libel are well-known civil wrongs. The typical remedy in this branch of the law is an action for damages by the injured party against the person responsible for the injury. Such damages are designed not to punish the wrongdoer but to compensate the injured party.

Crime

A crime is in a different category. It is difficult to define a crime, but it is basically a public offence against the state, and, while an individual may be injured, the object of a criminal charge is to punish the offender, not to compensate the victim, though under the provisions of the Powers of Criminal Courts (Sentencing) Act 2000 compensation orders can be made. Criminals are prosecuted, usually by a Crown Prosecutor, and if found guilty receive the appropriate punishment.

Crimes and civil wrongs distinguished

The distinction does not lie in the *nature of the act* itself. For example, if a railway porter is offered a reward to carry A's case and runs off with it, then the porter has committed a crime, that of theft, and two civil wrongs, i.e. the tort of conversion and a breach of his contract with A. Again, a railway signalman who carelessly fails to operate the signals so that a fatal accident occurs will have committed one

crime, i.e. manslaughter, if persons are killed, and two civil wrongs, the tort of negligence in respect of those who die and those who are merely injured and a breach of his contract of service with the employer in which there is an implied term to take due care. It should also be noted that in this case the right of action in tort and the right of action in contract would be brought by different persons. However, although the example is valid, it should be noted that an employer who has been successfully sued for damages by those injured by the signalman's act is unlikely in modern law to try to recoup them from the employee by an action for breach of contract because this upsets industrial relations and is strongly resisted by trade unions.

The distinction does depend on the *legal consequences* which follow the act. If the wrongful act is capable of being followed by what are called criminal proceedings that means that it is regarded as a *crime*. If it is capable of being followed by civil proceedings that means that it is regarded as a *civil wrong*. If it is capable of being followed by both, it is both a crime and a civil wrong. Criminal and civil proceedings are usually easily distinguishable; they are generally brought in different courts, the procedure is different, the outcome is different and the terminology is different.

Terminology and outcome of criminal and civil proceedings

In *criminal proceedings* a prosecutor *prosecutes* a defendant. If the prosecution is successful, it results in the *conviction* of what is now the offender. After the conviction the court may deal with the offender by giving him a custodial sentence, e.g. prison; or a non-custodial sentence, e.g. a community sentence. In rare cases the court may discharge the defendant without sentence.

As regards *civil proceedings*, a claimant *sues* (brings a claim against) a defendant. If the claimant is successful, this leads to the court entering judgment ordering the defendant to pay a debt owed to the claimant or money damages. Alternatively, it may require the defendant to transfer property to the claimant or to do or not to do something (injunction) or to perform a contract (specific performance). Some of these remedies are legal and others equitable. (The matter of remedies for breach of contract and for torts will be dealt with in more detail in the chapters on those topics.)

Trusts

A trust arises where one or more persons holds property, e.g. shares, for the benefit of other persons. People often wish to provide for their children or grandchildren when they die. They may leave some of their property on trust, particularly where, as in the case of grandchildren, they are minors, i.e. under the age of 18 years. They can appoint trustees who will take over the ownership of the property but they will not themselves benefit from that ownership since the capital and/or income of the trust will be used for the benefit of the children or grandchildren who are called the beneficiaries. It is, however, necessary to include a charging clause in the trust instrument or will to allow payment of fees where the trustees are professional persons or a trust corporation. Trusts may also be set up by living persons. The characteristics of a trust are that the trustees own the trust property but the beneficiaries get the benefits.

The study of law

Finally, it should be noted that the study of law may be approached in a number of distinct ways. The traditional approach is frequently referred to as being 'black letter' and is based on the study, and understanding of the law, within a discreet 'legal environment' quite separate from social, political or economic considerations. In other words, this approach is focused on developing an understanding of the specific legal rules which regulate society. By contrast, the 'contextualist' approach appreciates that law operates within a social, political and economic context and, as such, needs to be understood within that environment. The maintenance of order and regulation of society needs to be undertaken and it is the function of the law to perform such tasks.

The difference between these two approaches is significant and it is important to understand the implications of such a change in emphasis. The black letter approach examines law in isolation, analysing and evaluating it in its own terms. It also refers to the basic standard elements for a particular field of law, which are generally known and not subject to disagreement, e.g. the standard elements for a contract or the technical definition of battery. The contextualist approach builds on this and encourages the student to examine the law within its social context and, consequently, seek to evaluate its performance against its purported aims and, ultimately, what it is seen to accomplish.

Finally, black letter law is a term used to describe those areas of English law that are characterised by technical rules, as opposed to those areas of law which are characterised by possessing a more conceptual basis. For examples, contract, tort and land law are regarded as typical black letter law subjects, compared to public law, which may be considered considerably less black letter.

The development and sources of English law – generally

Our present legal system began, for all practical purposes, in the reign of Henry II (1154–89). When he came to the throne, justice was for the most part administered in local courts, i.e. by local lords to their tenants in the feudal courts, and by the County Sheriffs, often sitting with the Earl and the Bishop, in the courts of the Shires and Hundreds. A Shire was a territorial division of England equivalent in many ways to what we would call a county. A Hundred was an administrative division of a Shire supposed originally to have contained 100 families. They administered the law in their respective areas and decided the cases which came before them on the basis of local custom. Many of these customary rules of law were the same or similar in all parts of the country, but there were some differences. For instance, primogeniture, the right of the eldest son to inherit the whole of his father's land where there was no will, i.e. on intestacy, applied almost universally throughout England; but in Kent there existed a system of landholding called gavelkind tenure whereby on intestacy all the sons inherited equally; while in Nottingham and Bristol, under the custom of Borough-English, the property passed to the youngest son. These customs were finally abolished by s 1 and Part IV of the Administration of Estates Act 1925, and replaced by the rule that land goes to those administering the deceased's estate for distribution to near relatives – in most cases spouse and children.

A Royal Court existed called the *Curia Regis* (King's Council) but this was in general available only to high-ranking persons to whom the King had granted interests in large estates.

In addition, the *Curia Regis* followed the person of the King and those wishing to complain to the court had to incur the expense, delay and frustration of pursuing the King in his constant movements about the country and abroad. It seems that one claimant followed the King through England and France for five years before his case was heard.

However, clause 17 of Magna Carta, provided that what is now the High Court should not follow the King but should be held 'in some certain place'. This turned out to be Westminster and so the High Court became centred in London. It is now in the Strand.

Steps were also taken to ensure that Royal justice would go out to the Shires and be open to all. This began with the General Eyre which also was instrumental in unifying the law. This is considered below.

The common law

The evolution of the common law is, quite understandably, intertwined with the history of the British Isles. It is frequently observed that the administrative ability of the Normans began the process destined to lead to a unified system of law. However, the Normans were not concerned with changing English customary law entirely by imposing Norman law on England. Indeed, many charters of

William I giving English boroughs the right to hold courts stated that the laws dispensed in those courts should be the laws of Edward the Confessor, which meant that English customary law was to be applied.

Following the Roman occupation of Britain, Germanic tribes invaded the country and established regional kingdoms, with tribes of Angles settling in the Midlands and North. This process gave rise to the geographical expression 'England'. Furthermore, their gradual intermingling with Saxon settlers gave rise to the development of the phrase 'Anglo-Saxon' during the seventh century. The original Celtic Britons whom the Anglo-Saxons displaced were referred to as 'wealas', meaning stranger, and gave rise to the modern word 'Welsh'.

One of the first references to the notion of a single ruler within England may be traced to the *Historia Ecclesiastica Gentis Anglorum* (Ecclesiastical History of the English People) by the Venerable Bede. Bede is regarded as the Father of English History and sought to emphasise unity via the concept of 'Bretwalda' (Britain Ruler), creating the perception of a common identity and destiny. One of the rulers which Bede suggested should be regarded as an emperor of all England was Edwin (586–633) who was King of Deira and Bernicia (Northumbria).

Alfred the Great (848–99) was King of Wessex and is responsible for one of the most significant documents in English history: the Treaty of Alfred and Guthrum. The treaty divided up the kingdom of Mercia along the River Thames, and rivers Lea and Ouse recognising Viking control over eastern and northern England (which became known as 'Danelaw') but also confirming the political unity of the non-Danelaw areas under the rule of the House of Wessex. However, Alfred is also credited with seeking to improve the kingdom's legal system via the issue of a *domboc* (law code) which consisted of his own laws together with those of his predecessor, King Ine of Wessex.

It is perhaps worth noting at this point the way in which disputes were frequently settled. During Anglo-Saxon times (450–1066), a system had developed based on oaths, and continued well into the twelfth century, where the two sides to a case would each take an oath that what they said was the truth. The accused individual would frequently be tested to see if they indeed were telling the truth via a 'trial by ordeal' which could involve carrying a piece of red hot iron or being dunked in water. One example of this involved Emma of Normandy, mother to Edward the Confessor (1003–66), who was accused of adultery with Bishop Elfwine of Winchester, but proved her innocence by walking barefoot, unharmed, over burning ploughshares. The Assize of Clarendon 1166, stated that 'anyone who shall be found, on the oath of the aforesaid, to be accused or notoriously suspect of having been a robber or murderer or thief, or a receiver of them . . . be taken and put to the ordeal of water'.

As noted earlier, William the Conqueror (1028–87) was not concerned with changing English customary law entirely. Rather attempts were made to ensure a greater uniformity in English law and the chief means by which this was achieved was the introduction of the General Eyre (which simply means 'a journey') whereby representatives of the King were sent from Westminster on a tour of the Shires for the purpose of checking on the local administration. During the period of their visit they would sit in the local court and hear cases, and gradually they came to have a judicial rather than an administrative function and were then called the Justices in Eyre.

It is also worth noting the influence which the Domesday Book and Curia Regis had upon the legal system. Whilst at the time the Domesday Book represented a survey of England's productive capacity it is also seen by many as the birth of the modern concept of property rights. Similarly, whilst the *Curia Regis* (a council of tenants in chief who held land directly from the King) replaced its Anglo-Saxon predecessor, the Witenagemot (an advisory council to the King), it eventually developed into the Parliament we know today. However, in its early form, the Curia Regis was used to oversee the feudal system which William had brought from his native Normandy. During the reign of William II (1056–1100), the Earl of Northumbria, Robert de Mowbray, refused to attend the Curia Regis. His punishment was dispossession of land and imprisonment.

Henry II (1133–89) was the great grandson of William the Conqueror and the first of the House of Plantagenet to rule England. He was also the first king to use the title 'King of England' as opposed to

that of 'King of the English'. Henry II is often referred to as the father of the common law, and for good reason. Unlike continental civil law, the English system is derived from 'tradition expressed in action', (the Latin 'tradere' means 'to hand over'), originating as customary law used in the King's court to settle disputes which affected the monarch directly and, to begin with, only including the more serious crimes which became 'Pleas of the Crown'. Equally, even after Norman attempts to organise the legal system, many different types of court existed apart from the royal court, (e.g. the feudal and manorial courts and church courts). An interesting aspect of the church courts was the fact that they were permitted to try anyone who was a member of the clergy. However, aside from priests and monks, so long as a person could recite certain verses from the Bible, they could claim what was called 'benefit of clergy' and, as such, be tried by the church courts. (These biblical verses were known as the 'halter verses' or 'neck verses' as they could save a man's life.)

Henry II did not try to remove all of these courts but rather sought to make the system more straightforward and to ensure that the same laws were applied by all courts. As such, in 1154, he institutionalised common law by creating a unified court system common to the country through incorporating and elevating local custom to the national level, ending control at a local level, arbitrary remedies and reinstating a jury system of citizens sworn by way of an oath to investigate criminal accusations and civil claims. These jurors (the Latin term 'jurati' means sworn men) were far from our modern understanding of the concept, and were local people who used their common sense and knowledge of people and events in order to reach a verdict. However, it is generally agreed that a true 'common law' did not exist until around 1250, with Bracton (Dean of Exeter and a Justice Itinerant to Henry III) writing the first exposition of the common law (*A Treatise on the Laws and Customs of England*) by the end of the thirteenth century. Indeed, it is worth noting that Bracton was influenced by an early twelfth century text entitled *Leges Edwardi Confessoris* which was a record of the laws and customs in the time of Edward the Confessor which had been recorded at the request of William the Conqueror.

Judges of the realm went on regular journeys throughout the country bringing the King's justice to everyone, forming a nucleus of judges with national jurisdiction who had no local roots and, as such, were less susceptible to the influence of local officials. It was under Henry II that judges were for the first time sent on 'circuits', hearing pleas in the major places they visited and taking over the work of the local courts. In 1635, William Lambard wrote:

In the three and twentieth year of his reign [Henry II], did cut the realm into six parts, and to every of these parts appointed three justices, which by Henry Bracton are called intinerantes, and in Britton's book justices in eyre, quasi errantes. . . . The proper names of which justices are set down by Roger Hoveden, who also describeth their circuits, not to differ much from the same that our Justices of Assize do now ride.

In time these decisions were written down and, as court decisions came to be recorded and published, so the practice developed where past decisions (precedents) would be cited in argument before the courts and would be regarded as being of persuasive authority.

Henry II took steps to formalise the jurisdiction of the General Eyre by the Assize of Clarendon (1166) and the Assize of Northampton (1176). These provided that in relation to the criminal law there should be 12 men in every county to be responsible for presenting to the sheriff those suspected of serious crimes. The accused were then brought before the General Eyre when it arrived in the area. As regards the civil law, a new civil remedy called the Assize of Novel Disseisin (lately dispossessed) was offered to persons who complained that their land had been wrongly seized. From this remedy grew a range of civil actions which were brought before the General Eyre. Thus, royal and more uniform justice began to come to the country as a whole.

The reign of King John (1167–1216) is frequently associated with the signing of Magna Carta, which will be discussed later on in this chapter. However, his reign coincided with another important event for the development of the common law. In 1215, Pope Innocent III banned priests from blessing

trials by ordeal. England subsequently had to decide whether to follow the continental methods of proof (i.e. the inquisitorial system), or to follow its own path of trial by jury. It was eventually decided to pursue the latter course and, as such, the 'jury' which had evolved under the Anglo Saxons evolved so as to use local 'cheap' knowledge from the common man in the street. The first known jury trial took place in 1220 and by the late 1200s, juries were a familiar part of English law. However, unlike today's trials, decisions were based upon the jury's own personal knowledge and beliefs rather than on evidence.

With the development of juries and the formalisation of legal decision making in England, a need arose for people to rely on professionals to take care of their legal business. Consequently, over time it became commonplace to appoint an attorney (today's solicitor) to manage the case. However, the case would then be pleaded in court by an advocate, called a serjeant (today's barrister). (This will be discussed in greater detail in Chapter 8).

The General Eyre disappeared in the reign of Richard II (1377–99), but a system of circuit judges from what is now the High Court took its place, the first circuit commission having been granted in the reign of Edward III (1327–77). The Justices in Eyre were replaced by more formally trained lawyers over the period 1327–77. By selecting the best customary rulings and applying these outside their county of origin, the circuit judges gradually moulded existing local customary laws into one uniform law 'common' to the whole kingdom. Thus, customs, originally local, ultimately applied throughout the whole of the realm. Even so, there was no absolute unification even as late as 1389, and in a case in what is now the High Court in that year, a custom of Selby in Yorkshire was admitted to show that a husband was not in that area liable for his wife's trading debts, though the common law elsewhere regarded him as liable.

Furthermore, the right to make a will of personal property, e.g. jewellery, was not universal in England until 1724 when it finally extended to the City of London. Before that time half of the personalty (i.e. property unconnected with land), 'the dead man's part', went to the church and the other half to the wife and children. Land could still not be left by will but descended to the heir at law, though it later became possible, as it is today, to leave land by will.

However, many new rules were created and applied by the royal judges as they went on circuit and these were added to local customary law to make one uniform body of law called 'common law'. Thus, the identity between custom and the common law is not historically true, since much of the common law in early times was created by the judges, who justified their rulings by asserting they were derived from the 'general custom of the Realm'. Thus, in *Beaulieu v Finglam* (1401) YB 2 Hen 4, f 18, pl 6, it was said that a man who by his negligence failed to control a fire so that it spread to his neighbour's house was liable in damages according to 'the law and custom of the realm', though it is not easy to see which customary rule the court based its decision on.

Equity

The growth of the common law was rapid in the thirteenth century but in the fourteenth century it ceased to have the momentum of earlier years (in particular through new restrictions on the writ system). As a legal profession came into existence the judges came to be chosen exclusively from that profession instead of from a wider variety of royal officials as had been the case in the thirteenth century. The common-law courts became more self-conscious about what they were doing and attempted to become more systematic. There was much talk about the proper way of doing things, of not being able to do this or that and much clever reasoning. Reports of cases in the Year Books, the nearest we have to law reports at this time, show a considerable concern with procedural points and niceties, a reluctance to depart from what had become established, a close attention to the observance of proper forms and much less concern with what the circumstances of a particular case demanded if it was to be settled in an appropriate way.

As a result of this hardening up of the system, many people were unable to seek redress for wrongs through the common-law courts and complaints were made by large numbers of people about the inadequacy of the service provided by the courts and about the defects of the common law. This in turn led many people to petition the King directly (though as will be noted later, the King would usually pass these petitions on to the Chancellor, as he was the King's chief minister). The main defects were as follows:

The writ system

Writs (now claim forms) were issued by the clerks in the Chancellor's office, the Chancellor being in those days a clergyman of high rank who was also the King's Chaplain and Head of Parliament. Where a plaintiff wished to have a case heard by a local court, or by an Eyre if one happened to be visiting the County, there would be no need to obtain a writ. Actions in local courts could usually be started by an informal complaint, which did not necessarily need to be written down. However, in the expansion of the King's legal powers, an important role was played by the clergy. They developed a range of claim forms, called writs, and established procedures which, perhaps significantly, gave them greater importance and provided a generous income. Therefore, if a plaintiff wished to bring an action in one of the King's courts, he would need a writ (a command of the King) from the Royal Chancery (or office) to enable him to do this. A writ was a sealed letter issued in the name of the King, and it ordered some person, Lord of the Manor, Sheriff of the County or the defendant, to do whatever the writ specified. Initially for common law, recourse to the King's courts was unusual, and something for which a plaintiff would have to pay.

The old common-law writs began with a statement of the plaintiff's (now claimant's) claim, which was prepared in the Royal Chancery (or office) and not by the claimant's advisers as is the statement of case today. Henry II devised a number of standard writs, or standard legal procedures that provided free tenants a certain security, such as the writ of *novel disseisin*. Someone who had been recently dispossessed (disseized) by force could buy this writ, which commanded the sheriff or royal justices to call together a jury of local men, who under oath would declare if indeed the plaintiff had been recently dispossessed. If the jury said he had, he got the land back, with no questions.

Any writ which was new, because the claimant or his advisers had tried to draft it to suit the claimant's case, might be abated, i.e. thrown out by the court. Thus, writs could only be issued in a limited number of cases, and if the complaint could not be fitted within one of the existing standard writs, no action could be brought.

For example, the writ of trespass to land was available. However, trespass is a direct wrong, e.g. actually being on the land. *Indirect* activity affecting enjoyment of land was not covered, e.g. nuisance from smelly pigs or smoky bonfires. There was *at that time* no writ to deal with this type of indirect harm. The common law came to expand its writs to cover an action for damages in this situation, but in the meantime equity had carved out a jurisdiction and had an ideal remedy to deal with nuisance, i.e. the issue of an injunction requiring the defendant to cease the activity or pay a fine or be imprisoned for contempt of court. Moreover, writs were expensive, and their cost could deprive a party of justice. In some cases the cost of the writ was more than the amount of the claimant's claim so he did not bother to sue.

However, a practice grew up under which the clerks in Chancery provided new writs even though the complaint was not quite covered by an existing writ, thus extending the law by extending the scope of the writ system, although in practice the clerks of the Chancery would re-use old forms, and there were many books that were collections of forms of writ, rather than reinventing the wording of a legal document each time they wish to create one. The problem with this approach though was that the ability to create new writs amounted to the ability to create new forms of action. Plaintiffs' rights would be defined, and in most cases limited, by the writs available to them. Thus, the ability to create new writs was close to the ability to create new rights, a form of legislation. Moreover, a writ, if one

could be found fitting the plaintiff's case, provided the legal means to remove the dispute from the jurisdiction of the local court, often controlled by a lesser noble, and instead have it heard by the King's judges. The nobility thus saw the creation of new writs as an erosion of their influence due to the fact that it appeared to Parliament to be a taking away of its powers as the supreme lawgiver and, perhaps more importantly, it took much work away from the local courts into the Royal Courts, thus diminishing the income of the local barons.

Over time, opposition to the creation of new writs by the Chancery increased. For example, in 1256, a court was asked to quash a writ as 'novel, unheard of, and against reason' (*Abbot of Lilleshall v Harcourt* (1256)). Ultimately, in 1258, King Henry III was forced to accept the Provisions of Oxford, which prohibited, among other things, the creation of new forms of writ without the sanction of the King's council. New writs were created after that time, but only by the express sanction of Parliament, and the forms of writ remained essentially static, each writ defining a particular form of action. However, this approach proved so inconvenient that an attempt to remedy the situation was made by the Statute of Westminster II in 1285 which empowered the clerks in Chancery to issue new writs *in consimili casu* (in similar cases), thus adapting existing writs to fit new circumstances. The common law began to expand again, but it was still by no means certain that a writ would be forthcoming to fit a particular case, because the clerks in Chancery used the statute with caution at first.

Procedure

Other difficulties arose over the procedure in the common-law courts, because even the smallest error in a writ would avoid the action. If X complained of the trespass of Y's mare, and in his writ by error described the mare as a stallion, his action could not proceed and he would have to start again. Furthermore, some common-law actions were tried by a system called 'wager of law', and the claimant might fail on what was really a good claim if a defendant could bring more people to say that the claim was false than the claimant could get to support it.

The system worked well in local courts where the witnesses (called 'oath helpers') knew the parties and circumstances of the case. However, in cases brought at Westminster it fell into disrepute because 'oath helpers' who would support any case could be hired outside court for a few pence a head.

Defences and corruption

In common-law actions the defendant could plead certain standard defences known as *essoins* which would greatly delay the claimant's claim. For example, the defendant might say that he was cut off by floods or a broken bridge. He might also plead the defence of sickness which could delay the action for a year and a day. In early times these defences were checked by sending four knights to see the defendant, but at a later stage there was no checking and the defences were used merely to delay what were often good claims. There were also complaints about the bribery, corruption or oppression of juries, the bias of sheriffs in favour of the powerful and the inability of a successful claimant to enforce a judgment or recover property from his more powerful neighbour.

Remedies

The common law was also defective in the matter of remedies. The only remedy the common law had to offer for a civil wrong inflicted on a claimant was damages, i.e. a payment of money, which is not in all cases an adequate compensation.

For example, if A trespasses each day on B's land, B is unlikely to be satisfied with damages. He would rather stop A from trespassing which equity could do by its remedy of injunction. The common law could not compel a person to perform his obligations or cease to carry on a wrong, though it is not true to say that the common law was entirely lacking in equitable principles, and even in early

times there were signs of some equitable development; but generally the rigidity of the writ system tended to stifle justice.

Trusts and mortgages

Furthermore, the common law did not recognise the 'concept of the trust or use' and there was no way of compelling the trustee to carry out his obligations under the trust. Thus, if S conveyed property to T on trust for B, T could treat the property as his own and the common law would ignore the claims of B. In addition, the main right of a borrower (or mortgagor) is the right to redeem (or recover) the land he has used as a security for the loan. Originally at common law the land became the property of the lender (or mortgagee) as soon as the date decided upon for repayment had passed, unless during that time the loan had been repaid. However, equity regarded a mortgage as essentially a security, and gave the mortgagor the right to redeem the land at any time on payment of the principal sum, plus interest due to the date of payment. What is more important, this rule applied even though the common-law date for repayment had passed. This rule, which still exists, is called the equity of redemption.

Many people, therefore, unable to gain access to the King's courts, either because they could not obtain a writ, or because the writ was defective when they got it, or because they were caught in some procedural difficulty, or could not obtain an appropriate remedy, began to address their complaints to the King in Council. For a time the Council itself considered such petitions, and where a petition was addressed to the King in person, he referred it to the Council for trial. Later the Council delegated this function to the Chancellor, and eventually petitions were addressed to the Chancellor alone. By 1474, the Chancellor had begun to make decisions on the cases on his own authority, as opposed to in the capacity of 'substitute' for the King, and represented the beginnings of the Court of Chancery.

The Chancellor, who was usually a member of the clergy and considered to be the 'keeper of the King's conscience', began to judge such cases in the light of conscience and fair dealing. He was not bound by the remedies of the common law and began to devise remedies of his own. For example, the Chancellor could compel a person to perform his obligations by issuing a decree of *specific performance* or could stop him from carrying on a wrong by the issue of an *injunction*. The Chancellor also recognised interests in property which were unknown to the common law, in particular the concept of the trust (as it became known) under which persons might be made the legal owners of property for the use or benefit of another or others. As we have seen, the common law did not recognise the interests of the beneficiaries under a trust, but allowed the legal owner to deal with the property as if no other interests existed. Equity, however, enforced the beneficial interests.

In order to bring persons before him, the Chancellor issued a form of summons, called a *subpoena*, which did not state a cause of action but merely told the recipient to appear in Chancery. There were no rules of evidence and the Chancellor's Court did not sit in a fixed place; some hearings were even held in the Chancellor's private house. Equity was thus not cramped by anything like the writ system or the excessive formality of the common law. Eventually, as new Chancellors took over, and Vice-Chancellors were appointed to cope with the increasing volume of work, uncertainty crept into the system, and conflicting decisions were common.

At this stage in its development equity adopted the practice of following previous decisions (or *stare decisis*) which had proved so powerful a force in unifying the diverse systems of local custom under the common law. This was precipitated by the Reformation and by the appointment in 1530 of Sir Thomas More as Chancellor. More was a common lawyer and not a cleric. From then on non-clerical Chancellors were drawn from the ranks of the common lawyers and naturally followed the system of precedent which they had seen used in the common-law courts. Lord Ellesmere (1596–1617) began to apply the same principles in all cases of the same type, and later, under Lord Nottingham (1673–82), Lord Hardwicke (1736–56) and Lord Eldon (1807–27), equity developed in scope and certainty.

Relationship of common law and equity

Although law (by which we mean the common law) and equity eventually operated alongside each other with mutual tolerance, there was a period of conflict between them. This arose out of the practice of the Court of Chancery which issued ‘common injunctions’ forbidding a person on threat of imprisonment from bringing an action in the common-law courts, or forbidding the enforcement of a common-law judgment if such a judgment had been obtained.

Thus, if X by some unfair conduct, such as undue influence, had obtained an agreement with Y, whereby Y was to sell X certain land at much below its real value, then, if Y refused to convey the land, X would have his remedy in damages at common law despite his unfair conduct. However, if Y appealed to the Chancellor, the latter might issue a common injunction which would prevent X from bringing his action at common law unless he wished to suffer punishment for defiance of the Chancellor’s injunction. Similarly, if X had already obtained a judgment at common law, the Chancellor would prevent its enforcement by ordering X, on threat of imprisonment, not to execute judgment on Y’s property.

However, the common-law courts retaliated by waiting for the Chancellor to imprison the common-law litigant for defiance of the injunction, and then the common law would release him by the process of *habeas corpus*, which was and still is a type of writ used to obtain the release of a person who has been unlawfully detained in prison or elsewhere.

This period of rivalry culminated in the *Earl of Oxford’s* case in 1615 when Lord Coke, representing the common-law courts, offered a direct challenge to the Court of Chancery’s jurisdiction. The challenge was taken up and James I, on the advice of Lord Bacon, then his Attorney-General and later Lord Chancellor, gave a firm decision that, where common law and equity were in conflict, equity should prevail. This principle now appears in s 49 of the Supreme Court Act 1981, having appeared in a number of earlier Judicature Acts.

After that the two systems settled down and carved out separate and complementary jurisdictions. Equity filled in the gaps left by the common law, and became a system of case law governed by the binding force of precedent. However, it also lost much of its earlier freedom and elasticity. It was certainly no longer a court of conscience and, as such, the question was posed as to whether equity still needed its own courts. The problem faced by many people was that equitable and legal remedies had to be sought in different courts, which was time-consuming and frequently ineffective. Consequently, the Judicature Acts, 1873–75, which brought about an amalgamation of the English courts, and established the basis for the current court structure we have, provided that equity and common law could be administered by all courts. Since then both common-law and equitable remedies have been available to a litigant in the same action and in the same court.

Before leaving the topic, it is worth noting that the Judicature Acts did not combine the common law and equity, simply their administration within the courts. Consequently, an important characteristic of equity should be noted which is that whilst equity still prevails, it never states that the common law is wrong, but merely provides alternative solutions to legal problems. This is illustrated by certain cases in the law of contract. For example, the decision in *Central London Property Trust Ltd v High Trees House Ltd* (1947) (see Chapter 17) shows how modern equity sometimes adopts a different solution from that provided by the common law. Equity is not, therefore, a complete system of law. It complements the rules of the common law but does not replace them.

The Earl of Oxford’s case, 1615 – Relationship of law and equity (1)



Finally, it is worth noting a couple of fundamental characteristics of equity. First of all it is frequently stated that one who comes to equity must do so with clean hands (or alternatively, equity will

not permit a party to profit by his own wrong). Consequently, if a person asks for help but has acted wrongly themselves, then they probably do not have 'clean hands' and may not receive the help sought. For example, in *D & C Builders v Rees* (1965), a small building firm undertook work on a house owned by Rees. The bill eventually came to £732, of which Rees had already paid £250. When the builders asked for the balance of £482, Rees announced that the work was defective, and that he was only prepared to pay £300. As the builders were in serious financial difficulties (which, importantly, Rees was aware of at the time), they reluctantly accepted the £300 'in completion of the account'. The decision to accept the money would not normally be binding in contract law, and afterwards the builders sued Rees for the outstanding amount. Rees claimed that the court should apply the doctrine of equitable estoppel. However, Lord Denning refused to apply the doctrine on the grounds that Rees had taken unfair advantage of the builders' financial difficulties and, as such, had not come 'with clean hands'.

A second characteristic, which overlaps with that outlined above, is that a person who seeks equity must do equity. In other words, in order to receive equitable relief, the petitioning party must be willing to complete all of its own obligations as well. The applicant to a court of equity is just as much subject to the power of that court as the defendant. This is illustrated in the case of *Chappell v Times Newspapers Ltd* (1975).

The Royal Commissions

The circuit judges from what is now the Queen's Bench Division came eventually to derive their authority from Royal Commissions, the granting of which marked the real beginning of the assize system. The Commissions were:

Commission of oyer and terminer

This commission, which dates from 1329, directed the judges to 'hear and determine' all complaints of grave crime within the jurisdiction of the circuit. It was given to persons by now referred to as circuit judges.

General gaol delivery

This commission, which dates from 1299, gave the judges power to clear the local gaols and try all prisoners within the jurisdiction of the circuit. It was originally given to the Justices in Eyre to formalise the purpose of their visits to the Shires.

Other criminal cases were heard by Justices of the Peace either summarily or sitting in quarter sessions (now abolished) and the circuit judges were also made Justices of the Peace so as to increase their jurisdiction.

Commission of Assize for Civil Actions

Civil actions were usually heard at Westminster but under the Statute of Westminster II, 1285, the Justices in Eyre and later the circuit judges heard *civil cases* under provisions known as *nisi prius* which required the local sheriff to send a jury to London *unless before* the appointed time the royal justices came to hear the case locally, which in practice they always did. Thus, civil cases were opened in London, tried by a circuit judge and jury in the locality and the verdict recorded in London. This lasted until the nineteenth century when a Commission of Assize for Civil Actions was granted to assize judges on circuit.

The Courts Act 1971

The system, which lasted for many years, was brought to an end by the Courts Act 1971, s 1(2) which provided that all courts of assize were abolished and commissions to hold any court of assize would

not be issued. This section, having achieved its purpose, was repealed by Sch 7 to the Supreme Court Act 1981.

Stare decisis

Initially the system was held together by the doctrine of *stare decisis*, or standing by previous decisions. Thus, when a judge decided a new problem in a case brought before him, this became a new rule of law and was followed by subsequent judges. In later times this practice crystallised into the form which is known as the binding force of judicial precedent, and the judges felt bound to follow previous decisions instead of merely looking to them for guidance. By these means the common law earned the status of a system. Indeed it was possible for Bracton, Dean of Exeter and a Justice Itinerant of Henry III, to write the first exposition of the common law before the end of the thirteenth century – *A Treatise on the Laws and Customs of England*. There was also an earlier treatise ascribed to Ranulph de Glanvill in 1187, but this was not so comprehensive as the work of Bracton. Nevertheless, the number of writs which Bracton describes as being available in the Royal Courts is much in excess of those described by Glanvill and shows the rapid growth of the system in its first 100 years.

To sum up, the common law is a judge-made system of law, originating in ancient customs, which were clarified, *much* extended and universalised by the judges, although that part of the common law which concerned the ownership of land was derived mainly from the system of feudal tenures introduced from Europe after the Norman Conquest. It is perhaps also worth noting that the term ‘common law’ is used in four distinct senses, i.e. as opposed to (a) local law; (b) equity; (c) statute law; and (d) any foreign system of law.

Legislation

In early times there were few statutes and the bulk of law was case law, though legislation in one form or another dates from AD 600. The earliest Norman legislation was by means of Royal Charter, but the first great outburst of legislation came in the reign of Henry II (1154–89). This legislation was called by various names: there were Assizes, Constitutions, and Provisions, as well as Charters. Legislation at this time was generally made by the King in Council, but sometimes by a kind of Parliament which consisted in the main of a meeting of nobles and clergy summoned from the Shires.

In the fourteenth century, parliamentary legislation became more general. Parliament at first asked the King to legislate, but later it presented a bill in its own wording. The Tudor period saw the development of modern procedure, in particular the practice of giving three readings to a Bill.

From the Tudor period onwards Parliament became more and more independent and the practice of law making by statute increased. Nevertheless, statutes did not become an important source of law until the last two centuries, and even now, although the bulk of legislation is large, statutes form a comparatively small part of the law as a whole. The basis of our law remains the common law, and if all the statutes were repealed we should still have a legal system of sorts, whereas our statutes alone would not provide a system of law but merely a set of disjointed rules.

Parliament’s increasing involvement with economic and social affairs increased the need for statutes. Some aspects of law are so complicated or so novel that they can only be laid down in this form; they would not be likely to come into existence through the submission of cases in court. A statute is the ultimate source of law, and, even if a statute is in conflict with the common law or equity, the statute must prevail. It is such an important source that it has been said – ‘A statute can do anything except change man to woman’, although in a purely legal sense even this could be achieved. No court or other body in the United Kingdom can question the validity of an Act of Parliament.

However, the validity of an Act of Parliament can be challenged before the European Court of Justice (ECJ) on the ground that it is in conflict with the Treaty of Rome. Reference should be made to *Factortame Ltd v Secretary of State for Transport (No 2)* (1991) (see Chapter 14) where a successful

challenge to the validity of the Merchant Shipping Act 1988 in the ECJ was successful and resulted in the repeal by the UK government of certain sections of that Act.

It should also be noted that the Human Rights Act 1998 permits UK courts to make declarations of incompatibility where a UK Act of Parliament is found to violate the European Convention on Human Rights. However, UK courts cannot disapply Acts of Parliament on this ground in contrast to the situation where a challenge is made on the ground of violation of Community law.

Statute law can be used to abolish common-law rules which have outlived their usefulness, or to amend the common law to cope with the changing circumstances and values of society. Once enacted, statutes, even if obsolete, do not cease to have the force of law, but common sense usually prevents most obsolete laws from being invoked. In addition, statutes which are no longer of practical utility are repealed from time to time by Statute Law Repeal Acts. Nevertheless, a statute stands as law until it is specifically repealed by Parliament. This may take place by implication as where an earlier Act is repealed by a later one which is inconsistent with it.

An Act of Parliament is, in general, binding on everyone within the sphere of its jurisdiction, though it may not be binding if it infringes the Treaty of Rome, as the *Factortame* case shows. All Acts of Parliament can be repealed by the same or subsequent parliaments; this is a further exception to the rule of the absolute sovereignty of Parliament – it cannot bind itself or its successors.

Cheney v Conn, 1968 – The court cannot in general declare a statute to be invalid (2)

Prince of Hanover v Attorney-General, 1957 – A statute remains law until repealed (3)

Vauxhall Estates Ltd v Liverpool Corporation, 1932 – Repeal by implication (4)



Repeal of statutes and the European Communities Act 1972

As regards the power of Parliament to abolish or alter statute law by a later Act, an interesting situation arises in connection with our membership of the European Community.

Since this is the first time we have met the expression 'European Community' it would perhaps be desirable to consider whether the expression 'Community' or 'Union' should be used. The parts of the European cooperation arrangements include: the European Community (economic cooperation – the old EEC); the European Atomic Energy Community (EURATOM); the European Coal and Steel Community (ECSC); and the Maastricht areas. When referring to all of them, the correct legal reference is to the European Union, and the same is true when referring only to the Maastricht area of cooperation. (For further discussion of this point refer to Chapter 13.)

The European Court of Justice has no automatic jurisdiction in the Maastricht areas and so rightly continues to call itself the Court of Justice of the European Communities, though confusingly the Council calls itself the Council of the European Union even when passing EC legislation! The Treaty of Amsterdam, which was agreed at the European Council in Amsterdam in June 1997 and which was incorporated into UK law by the European Communities (Amendment) Act 1998, has relevance to the legal system in that it extends the powers of the ECJ in regard to action by the Union on asylum and immigration and co-operation on police and judicial matters.

Those in business tend to use the term 'Union' at all times and there is no harm in this. Practising lawyers would no doubt feel that they had to be precise.

The obligation of the British Parliament on entry to the European Community was to ensure that Community law was paramount. The view of the European Court is that Community law overrides English law where the latter is inconsistent with it. Section 3 of the European Communities Act 1972 binds our courts to accept this principle and talks of applying the principles of Community law with

the idea that it prevails. Section 2(4) of the 1972 Act states that a UK statute should be construed so as to be consistent with Community law. However, many authorities on constitutional law see this obligation as a dilemma in the sense that Community law cannot be paramount when like the rest of our law the 1972 Act is at the mercy of any future Act of Parliament which must, under the fundamental rule of our constitution, prevail over any pre-existing law whatsoever. In other words, Community law is paramount as the result of the European Communities Act 1972, which could be repealed by a future Act of Parliament. It would seem to be the duty of our courts to accept that repeal.

Delegated legislation

Many modern statutes require much detailed work to implement and operate them, and such details are not normally contained in the statute itself, but are filled in from some other source. For example, much of our social security legislation gives only the general provisions of a complex scheme of social benefits, and an immense number of detailed regulations have had to be made by civil servants in the name of, and under the authority of, the appropriate Minister. This method of legislating is increasingly common in the field of business law, where companies, insolvency and consumer statutes give a large number of powers to government ministers to make rules and orders to flesh out the statute. These regulations, when made in the approved manner, are just as much law as the parent statute itself. This form of law is known as delegated or subordinate legislation.

The major difference between an Act of Parliament and delegated legislation is that the courts can declare the latter to be invalid and inapplicable because it was made beyond the powers given in the parent statute and/or the proper procedures were not followed in its enactment as where consultation required by the parent statute was not carried out (see further Chapter 3).

Custom

In early times custom was taken by the judges and turned into the common law of England, and it is still possible, even today, to argue the existence of a local or trade custom before the courts. Local customs consist in the main of customary rights vested in the inhabitants of a particular place to use, for various purposes, land held in the private ownership of another: for example, to take water from a spring (*Race v Ward* (1855) 24 LJQB 153) and for fishermen to dry their nets on private land (*Mercer v Denne* [1905] 2 Ch 538). A local custom can also affect the terms of a contract as is illustrated by *Hutton v Warren*, 1836 (see Chapter 20). As a present-day source of law, however, custom is of little importance.

The law merchant

Mercantile law, or *lex mercatoria*, is based upon mercantile customs and usages, and was developed separately from the common law. The Royal Courts did not have a monopoly of the administration of justice, and certain local courts continued to hear cases long after the Royal Courts were established. One notable area was that involving mercantile and maritime disputes. Disputes between merchants, local and foreign, which arose at the fairs where most important commercial business was transacted in the fourteenth century, were tried in the courts of the fair or borough, and were known as 'courts of pie powder' (*pieds poudrés*) after the dusty feet of the traders who used them.

These courts were presided over by the mayor or his deputy or, if the fair was held as part of a private franchise, the steward appointed by the franchise holder. The rules applied were the rules of the European law merchant developed over the years from the customary practices of merchants, and the jury was often made up of merchants. The fair or borough courts were supplemented for a time by 'Staple Courts' which sat in the staple towns. These towns, which were designated by Edward III

(1327–77) as the exclusive centres of trade for such commodities as wine, wool, leather and tin, were required to hold courts to decide the trading disputes of merchants and again the customary practices of merchants were used.

Maritime disputes were heard by maritime courts sitting in major ports such as Bristol. These, too, applied a special European customary law developed from the customary practices of seamen.

The common-law courts were slow to show an interest in dealing with commercial matters. In part this was due to the idea that their jurisdiction had a geographical limit and was restricted to matters which had arisen in England between English citizens. Foreign matters, and many of these commercial disputes did involve either a foreign merchant or a contract made or to be performed abroad, were left to some other body, especially if it could raise questions about the relations between the King and foreign sovereigns where the King's Council might be a more appropriate body. To some extent also it was due to the fact that the common-law courts and the common law had come into existence at a time when land was the most important commodity and the procedures and concerns of the common-law courts were adapted to problems arising from disputes about the possession and ownership of land. They were formal, slow and ill-adapted to the needs of merchants who required a speedier justice administered according to rules with which they were familiar.

When the Court of Admiralty developed, it took over much of the work of the merchants' courts, but from the seventeenth century onwards the common-law courts began to acquire the commercial work, and many rules of the law merchant were incorporated into the common law. This was achieved partly by fiction. For example, to get over the fact that technically it still lacked jurisdiction over matters arising abroad the Court accepted allegations that something that had occurred abroad had in fact occurred in England within its jurisdiction, e.g. by using the fiction that Bordeaux was in Cheapside.

Lord Mansfield and Lord Holt played a great part in this development, in particular by recognising the main mercantile customs in the common-law courts without requiring proof of them on every occasion. Perhaps the most important mercantile customs recognised were that a bill of exchange was negotiable and that mere agreements should be binding as contracts. In this way the custom of merchants relating to negotiable instruments and contracts including the sale of goods became part of the common law, and later, by codification, of statute law in the Bills of Exchange Act 1882, and the Sale of Goods Act 1979.

International conventions

Where the UK has signed up to an international convention, the convention really represents the customary consensus of the states signing up to it in terms of rulings to be given on certain matters such as the carriage of persons and goods by sea and air. These conventions become part of UK law and the common law cannot override them. An example is provided by *Sidhu v British Airways plc* [1997] AC 430. The claimants sued the airline for damages at common law for breach of contract and negligence following delays in their flight when the plane they were on landed in Kuwait and the delays arose out of arrests made by the authorities of themselves and other passengers. The House of Lords, in the eventual appeal, rejected their claim. The matter was governed by the Warsaw Convention on International Carriage by Air 1929 which the United Kingdom had signed up to and under which only two years were allowed for a claim against the six years allowed by the common law. The claimants were out of time under the Convention.

Canon law

A brief mention should be made of the ecclesiastical or church courts since prior to 1857 they dealt not only with offences against church doctrine and morality but also with other matters such as matrimonial causes, legitimacy and the inheritance of property when a person died. Many of the rules

laid down by these courts were derived from Roman law and were inherited by the civil courts to which these matters were eventually transferred. In 1970 the civil courts concerned were amalgamated into the Family Division of the High Court (see Chapter 4).

The present position is that the church courts remain to deal with certain matters, e.g. decoration, alteration and use of churches.

Since disciplinary hearings against clergy receive more publicity these days, it is worth noting that the church courts only heard disciplinary matters where the clergy involved were incumbents, i.e. those appointed to livings within the Church of England. Those who hold appointments as priest-in-charge were not covered by these procedures but are subject to a disciplinary hearing before a Bishop under what are called the Canons of the Church of England. There has been reform also even in regard to disciplinary matters affecting incumbents where the Consistory Courts (see below) are replaced by a system of clerical tribunals on the lines of those existing for doctors and lawyers, i.e. domestic tribunals.

The court of first instance is that of the diocesan chancellor, called a Consistory Court. He must be a member of the Church of England and is usually a practising barrister. Appeal lies from him to the Court of Arches in the province of Canterbury, and to the Chancery Court of York in the northern province. On matters concerning conduct, there is a further appeal to the Judicial Committee of the Privy Council and on other matters, e.g. the suitability of a Henry Moore altar in a Wren church (*Re St Stephen Walbrook* [1987] 2 All ER 578), there may be an appeal to the Court of Ecclesiastical Causes Reserved. The church courts are not courts of common law and the prerogative orders – which operate as a valuable check on the abuse of power by other courts and tribunals – do not apply to them.

Legal treatises

One last source remains to be considered – namely, legal treatises. Throughout the centuries great English jurists have written books, some in the nature of legal textbooks, which have helped to shape the law and inform the legal profession.

We have already mentioned Bracton whose *Treatise on the Laws and Customs of England* was written in the thirteenth century and was probably based on the decisions of Martin de Pateshull, who was Archdeacon of Norfolk, Dean of St Paul's and an Itinerant Justice from 1217 to 1229, and on those of William de Raleigh who was the Rector of Bratton Fleming in Devon and an Itinerant Justice from 1228 to 1250.

Sir Edward Coke, who lived from 1552 to 1634, is a celebrated name. His *Institutes* covered many aspects of law. For example, his *First Institute*, published in 1628, was concerned with land law. His *Second Institute*, published in 1642, was concerned with the principal statutes. The *Third Institute*, published in 1644, dealt with criminal law, while the *Fourth Institute*, also published in 1644, was concerned with the jurisdiction and history of the courts, this work containing bitter attacks on the Court of Chancery. Although at first sight 'Institute' may seem an odd word to use to describe a legal text, it is derived from the Latin *Institutio* which means 'instruct, arrange, make order of'.

During his lifetime Coke occupied the offices of Recorder of London, Solicitor-General, Speaker of the House of Commons, Attorney-General and finally Chief Justice of Common Pleas.

Sir William Blackstone, who lived from 1723 to 1780, published his *Commentaries on the Laws of England* in 1765. These are concerned with various aspects of law and are based on his lectures at Oxford. He was a Judge of the Common Pleas and was also the first Professor of English Law to be appointed in any English university.

In addition to older treatises such as those mentioned above, the works of modern writers, sufficiently eminent in the profession, are sometimes quoted when novel points of law are being argued in the courts.



2

The unwritten constitution

One of the unusual characteristics of our legal system is the fact that there is no written constitution, compared with virtually every other Western country which has one. However, the fact that there is no single document outlining the country's constitution does not mean that Britain does not have a constitution. Rather, the reality is that, as with the other aspects of English law, elements of the constitution have built up over time in the form of Acts, judicial decisions and other legal documents which, collectively, may be taken to form the main part of Britain's constitution.

Key events in the development of the constitution

The starting point for any discussion of Britain's constitution must be King John (1167–1216) and the signing of Magna Carta. The Magna Carta of 1215 required John to proclaim certain liberties, and accept that his will was not arbitrary, for example by explicitly accepting that no freeman could be punished except through the law of the land, a right which is still in existence today. It also provided that what is now the High Court should not follow the King around the country but rather be located in one place – Westminster. The Magna Carta also established that the King could not levy or collect any taxes (except the feudal taxes to which they were accustomed), save with the consent of the Royal Council (to later become Parliament).

However, once signed, John sought to evade the binding effect of Magna Carta by persuading the Pope (Innocent III) to annul the document. This action meant that the Civil War recommenced, though it was cut short by John's death in 1216. Henry III, aged only nine, replaced him as king. The Magna Carta was redrafted and reissued in 1216, 1217, and again with revisions in 1225. This final version became law in 1295, though the process was contested by Henry III throughout his reign.

In practice, the Magna Carta in the mediaeval period did not in general limit the power of kings; but by the time of King Charles I (1600–49) and the English Civil War, it had become an important symbol for those who wished to show that the King was bound by the law: a symbol which also influenced the early settlers in New England (forming the basis for the United States Constitution).

The Statute of Rhuddlan was enacted in 1284, during the reign of King Edward I (1239–1307), after the military conquest of the Principality of Wales. The statute assumed the lands as legally part of the lands of England under Edward I and introduced the English common-law system. The Statute remained in effect until Henry VIII's Act of Union in 1536, spending some 250 years on the statute books. (The 1536 Act ensured the whole of Wales came under the authority of the Tudor Monarch.)

The reign of Edward III (1312–77) represented significant developments in both legislature and government. The 'Model Parliament' established by Edward I in 1295 had by this time been separated into two Houses and was assuming some of its modern day form. In addition, the first circuit commission was granted (commencing the replacement process to the General Eyre and leading to more formally trained lawyers being in place). This process was completed during the reign of Richard II (1367–1400).

Henry VII (1457–1509) revived an earlier practice of using a small (and trusted) group as a personal or Prerogative Court. The court took its name from the ‘Star Chamber’ which was built in the reign of King Edward II specifically for the meetings of the King’s Council. It was made up of Privy Counsellors, as well as common-law judges, and supplemented the activities of the common-law and equity courts in both civil and criminal matters. The court was ostensibly set up by Henry VII to ensure the fair enforcement of laws against prominent people (those so powerful that ordinary courts could never convict them of their crimes). Court sessions were held in secret, with no indictments, no right of appeal, no juries, and no witnesses. However, over time it became a symbol of the misuse and abuse of power by the English monarchy and courts as characterised by the rule of Charles I. In 1641, the Long Parliament, led by John Pym, abolished the Star Chamber with an Act of Parliament, the Habeas Corpus Act 1640. This meant that for the first time, the common law ruled supreme.

Charles I (1600–49) was influenced significantly by two books – *The True Law of Free Monarchies* and *Basilikon Doran* (Royal Gift) – written by his father James I (1566–1625). The ‘True Law’ set out the divine right of kings and proposed an absolutist theory of monarchy. In other words, a King could impose new laws by royal prerogative and which ultimately led to the struggle for power between Charles I and Parliament and, ultimately, the English Civil War. However, during Charles’ reign, one of the three crucial constitutional documents of England was passed: the Petition of Right.

Passed on 7 June 1628, the Petition of Right contains restrictions on non-Parliamentary taxation, forced billeting of soldiers, imprisonment without cause, and restricts the use of martial law. (The Petition had a profound influence on the authors of the Constitution of the United States, with the clauses relating to the billeting of troops leading to the Third Amendment to the United States Constitution.)

The judiciary of the time was asked by Charles I as to what standing it would give the Petition were it to be passed; it concluded that it was a potentially legislative Act. It was later enforced by the courts: when Selden and other Members of Parliament were imprisoned the Petition was cited as a reason to grant *habeas corpus*, something which the judges accepted.

Bushel’s Case (1670) arose from a previous case involving two Quakers charged with violating the Conventicle Act 1664, which forbade religious assemblies of more than five people outside the auspices of the Church of England. The judge in their case charged the jury that they ‘shall not be dismissed until we have a verdict that the court will accept’. When the jury acquitted the two men, the judge refused to accept the verdict, fined them and sent them back to deliberate further. Edward Bushel, a member of the jury, refused to pay the fine, at which point the judge threatened him, saying, ‘[Y]ou shall be locked up without meat, drink, fire, and tobacco. You shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.’ Bushel petitioned the Court of Common Pleas for a writ of *habeas corpus*. Sir John Vaughan, Chief Justice of the Court of Common Pleas, ruled that a jury should return a verdict in accordance with their conscience and that no juror should be punished on account of the verdict returned.

The Habeas Corpus Act 1679 was passed during the reign of King Charles II (1630–85) to define and strengthen the ancient prerogative writ of *habeas corpus*, whereby persons unlawfully detained cannot be ordered to be prosecuted before a court of law. This is generally seen as one of the fundamental elements of the country’s unwritten constitution.

On 30 June 1688 a group of political figures, known afterwards as the ‘Immortal Seven’, sent William of Orange (King William III) a formal invitation to invade the country and oust James II as King. Upon his arrival, William summoned a Convention Parliament in England, which met on 22 January 1689, to discuss the appropriate course of action following James’ flight. William wished to reign as King in his own right, rather than as a mere consort to his wife, Mary. In exchange for being crowned King of England, William accepted limits on royal power under the Bill of Rights 1689 (a contract between himself and the English Parliament).

The Bill of Rights lays down limits on the powers of the sovereign and sets out the rights of Parliament and rules for freedom of speech in Parliament, the requirement to regular elections to

Parliament and the right to petition the monarch without fear of retribution. It also sets out certain constitutional requirements of the Crown to seek the consent of the people, as represented in Parliament. (It is worth noting that the English Bill of Rights inspired in large part the United States Bill of Rights.)

On 1 May 1707, under the Acts of Union 1707, England and Scotland were united as a single sovereign state, the Kingdom of Great Britain and existed until 1801. With the 1706 Treaty of Union (ratified by the Acts of Union 1707), it was agreed to create a single, united kingdom, encompassing the whole of the island of Great Britain and its minor outlying islands, excluding Ireland, which remained a separate realm under the newly created British crown. A single parliament and government, based at Westminster, controlled the new kingdom. The former kingdoms had already shared the same monarch since James VI, King of Scotland became King of England in 1603 following the death of Queen Elizabeth I, bringing about a 'Union of the Crowns'.

Although by the beginning of the eighteenth century many of the country's liberties and freedoms had been established, the actual court system still remained mediaeval in nature. (With no police force and no forensic science, the courts relied upon exemplary punishment, including whipping, transportation and hanging.)

The Black Act 1723 was passed in response to a series of raids by two groups of poachers, known as the Blacks. Arising in the aftermath of the South Sea Bubble's collapse and the ensuing economic downturn, the Blacks gained their name from their habit of blacking their faces when undertaking poaching raids. They quickly demonstrated both 'a calculated programme of action, and a conscious social resentment', and their activities led to fear that unrest would spread throughout the country, leading to the introduction of the Black Act.

The Act introduced the death penalty for over 50 criminal offences, including being found in a forest while disguised, and 'no other single statute passed during the eighteenth century equalled [the Black Act] in severity, and none appointed the punishment of death in so many cases'.

This saw the beginning of a trend during the eighteenth century which meant that by the end of the 1700s, over 200 offences were punishable by death, including crimes such as shoplifting, petty theft, stealing cattle, or cutting down trees in public place. Most of these laws were concerned with the defence of property, which some commentators have interpreted as a form of class suppression of the poor by the rich. Grand larceny (i.e. the theft of goods worth more than 12 pence) was one of the crimes that attracted the death penalty. However, the severity of the so-called Bloody Code was often tempered by juries who refused to convict, or judges, in the case of petty theft, who arbitrarily set the value stolen at below the statutory level for a capital crime that would have made a sentence of death mandatory. (This was known as 'pious perjury'.)

Following a criminal law reform campaign in the early nineteenth century, it was largely repealed. The Judgment of Death Act 1823, introduced by Robert Peel, made the mandatory death penalty discretionary for all crimes except treason and murder. As Home Secretary, Peel reformed the criminal law, reducing the number of crimes punishable by death, and simplified it by repealing a large number of criminal statutes and consolidating their provisions into what are known as Peel's Acts (i.e. 120 statutes were transformed into one statute which was just six pages long).

Gradually during the middle of the nineteenth century the number of capital offences was reduced, and by 1861 was down to five (murder, piracy, arson in a naval dockyard, espionage, and high treason).

Robert Peel also introduced a number of important reforms of British criminal law. The Riot Act 1714 had created a mechanism for local officials to make a proclamation ordering the dispersal of any group of more than 12 people who were 'unlawfully, riotously, and tumultuously assembled together'. If the group failed to disperse within one hour, then anyone remaining gathered was guilty of a felony without benefit of clergy, punishable by death. In response to the ineffectual nature of the Riot Act, Peel proposed the creation of a police force. Initially this proposal was viewed with suspicion and regarded as the government seeking to create a 'standing army'. However, the Metropolitan Police Force (Metropolitan Police Act 1829) was eventually approved which promoted the preventive role of

police as a deterrent to urban crime and disorder. (This is the reason that police officers are frequently referred to as ‘bobbies’, after Robert Peel.)

It is also worth noting *Somerset’s Case* which took place during the reign of William IV (1765–1837). On 13 January 1772, Granville Sharp was asked for help by James Somerset, a slave from Virginia in America, who had come to England with his master Charles Stewart in 1769 and had run away in October 1771. After evading slave hunters for 56 days, Somerset had been caught and put in the slave ship *Ann and Mary*, to be taken to Jamaica and sold. Three Londoners had applied to Lord Mansfield for a writ of *habeas corpus*, which had been granted, with Somerset having to appear at a hearing on 24 January 1772. Calling on his knowledge of the law regarding individual liberty, Sharp briefed Somerset’s lawyers who eventually won the case.

Lord Mansfield’s judgment on 22 June 1772 was a clear victory for Somerset with the acknowledgement that English law did not allow slavery, and only a new Act of Parliament (‘positive law’) could bring it into legality. However, the verdict in the case is often misunderstood to mean the end of slavery in England. It only dealt with the question of the forcible sending of someone overseas into bondage. A slave becomes free the moment he sets foot on English territory. Nevertheless, it was one of the most significant milestones in the campaign to abolish slavery throughout the world, though perhaps more for its effect than for its actual legal weight.

The Reform Act 1832, passed during the reign of William IV, introduced wide-ranging changes to the electoral system of England and Wales. Its preamble stated that the Act was designed to ‘take effectual measures for correcting diverse abuses that have long prevailed in the choice of members to serve in the Commons House of Parliament’. While calls for reform had been discussed before 1832 this had been to no effect. The Act was proposed by the Whigs and met with considerable opposition from the Tory factions in Parliament that had long governed the country. The Act granted seats in the House of Commons to large cities that had sprung up during the Industrial Revolution, and took away seats from the ‘rotten boroughs’ – those with very small populations. The Act also increased the number of individuals entitled to vote, increasing the size of the electorate from about 400,000 to 650,000, and allowing a total of one out of six adult males to vote, in a population of some 14 million.

Finally, the Parliament Act 1911 asserted the supremacy of the House of Commons by limiting the legislation-blocking powers of the House of Lords. It also reduced the maximum life of a Parliament from seven years to five years. The Parliament Act 1949 further limited the power of the Lords by reducing the time that they could delay bills, from two years to one.

Fundamental principles underpinning the constitution

Given this rather piecemeal development, it is worth outlining the various principles which, having been derived from this rather colourful history, underpin the British constitution. These may be summarised as follows:

Separation of powers

One of the key principles is that all state power may be divided into three categories: (i) executive, (which equates to the Government and its servants); (ii) legislative (which refers to Parliament); and (iii) judicial (which includes the legal authority exercised by the judiciary), and should not be held by a single person/group. In other words, each of these three elements should operate independently so as to ensure that there are adequate ‘checks and balances’ within the system. (For further discussion see: Montesquieu, *The Spirit of the Laws*, 1989.)

This system of checks and balances was summarised quite neatly by Lord Bingham in his lecture entitled ‘The Rule of Law’, delivered in 2006 as part of the Sir David Williams Lecture series:

The historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years due to the increased complexity of government and the greater willingness of the public to challenge governmental decisions. Even under our constitution the separation of powers is crucial in guaranteeing the integrity of the courts' performance of this role.

Indeed, this view reflects that expressed by other Law Lords in the past, including Lord Diplock in *R v Hinds* [1979] Crim Law 111, in which he stated: 'It is taken for granted that the basic principle of the separation of powers will apply.'

Supremacy of Parliament

The supremacy of Parliament, or parliamentary sovereignty, refers to the fact that Parliament is the highest source of law in the country. As such, Parliament may pass any laws that it wishes (subject to all rules of parliamentary procedure being complied with), and they must be applied by the courts. The rationale for this approach is the fact that Parliament is a democratically elected body and, as such, should have the authority to drive the law-making process forward (as opposed to the judiciary who are not democratically elected).

The doctrine of parliamentary supremacy has been upheld as recently as 2005 by Lord Bingham in the case of *R (Jackson) v Attorney-General* [2005] UKHL 56, stating: 'The bedrock of the British Constitution is . . . the Supremacy of the Crown in Parliament'. While there is a distinction to be made between legal sovereignty and political sovereignty this does not necessarily mean that Parliament is not legally sovereign. Parliament can legally pass any legislation it wishes, as noted by Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 who stated:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts would not hold the Act of Parliament invalid.

However, this approach is at odds with most democratic countries which usually have a Bill of Rights that takes precedence over other laws and enables the courts to refuse to apply legislation that infringes any of the rights protected by it. Many European countries have incorporated the European Convention on Human Rights into their legal systems which fulfil this function.

Britain's approach has been slightly different in this respect. Parliament passed the Human Rights Act 1998, which incorporates the European Convention into domestic law. However, the Act does not give it a superior status over English Law. Rather, the Act requires that, wherever possible, legislation should be interpreted in line with the principles of the Convention. Furthermore, the Act only provides the courts with the power to issue a declaration of incompatibility where they believe that the terms of an Act of Parliament are in contravention of the rights guaranteed by the Human Rights Act. The effect of the declaration is not to enable the courts to override the contravening Act but to send a signal to Parliament of the matter who may then choose to amend the offending provision. (Refer to Chapter 11 for further discussion.)

It is also worth noting at this point that membership of the European Union has impacted on the principle of supremacy of Parliament. As noted by the European Court of Justice in 1963 in the case *Van Gend en Loos*, the European Union represents a 'new legal order of international law for the benefit of which the [Member] States have limited their sovereign rights, albeit within limited fields'. Consequently, where European Union legislation exists in a particular area of the law, it must take precedence over laws passed by Parliament.

There is an interesting debate as to whether, and if so how, Parliament may withdraw from the European Union in the future. Given the fact that the United Kingdom became a member of the European Union through Acts of Parliament (European Communities Act 1972), it may be suggested

that Parliament could simply pass further legislation unilaterally withdrawing the United Kingdom from the European Union. Alternatively, such an Act could be passed in parallel with the withdrawal procedure laid down in Article 50 of the Lisbon Treaty, whereby a member state would notify the European Council of its intention to secede from the European Union and a withdrawal agreement would be negotiated between the European Union and the United Kingdom.

It is this debate which brings us back to the case of *R (Jackson) v Attorney General* [2005]. While parliamentary sovereignty was upheld by the House of Lords, it was nevertheless acknowledged that the nature of this concept had changed over time. Lord Bingham noted:

This is where we may have to come back to the point about supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear. The settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights, as incorporated into our law by the Human Rights Act 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.

The rule of law

The third core principle of Britain's constitution is the rule of law, the precise meaning of which depends upon the belief system of the individual(s) in question and the period in time under discussion (i.e. the contemporary situation) as the context and content of the legal system inevitably evolves. In general, it is agreed that the 'rule of law' seeks to pose normative questions regarding which rules the government *should be* under as well as those that it *is* under. Consequently, the rule of law ideal is likely to be invoked when considering controversial powers of the government that stray from precedent, depart from the Human Rights Act 1998, or break new legislative ground.

The starting point for any discussion of this concept is Albert Venn Dicey (*An Introduction to the Study of the Law of the Constitution*, 1885) who suggested that there were three distinct elements to the rule of law:

- An absence of arbitrary power on the part of the State. In other words, both the extent and actual use of power by the State is restricted by the law.
- Equality before the law. As Dicey notes, this not only means that 'no man is above the law, but that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'. In other words, everyone is equal in the eyes of the law irrespective of background or role. As Lord Denning noted in *Gouriet v Union of Post Office Workers* [1977] QB 729 (CA): 'To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: "Be you never so high, the law is above you."'
- Supremacy of ordinary law. This concept highlights the origins of the constitution in that there is no single written document to which an individual can point but rather the constitution is the outcome of the ordinary law of the land as developed by the courts.

Trevor Allan (*Constitutional Justice: A Liberal Theory of the Rule of Law*, 2003), sees the rule of law as, primarily, a vehicle for the protection of rights against 'irresponsible legislative encroachment' in the face of a Government with a large authority, backed by (normally) a significant majority in the House of Commons.

FA von Hayek (*The Road to Serfdom*, 1971), seeks to provide a definition of the concept, stating 'the Rule of Law means that government in all its actions is bound by rules fixed and announced beforehand'. Hayek goes on to note: 'The Rule of Law implies limits on the scope of legislation, it restricts it to the kind of general rules known as formal law; and excludes legislation directly aimed at particular people.' In other words, the proposal is that law should apply to everyone and benefit no discreet person or group. It should also seek to set down general parameters/boundaries for people to observe as opposed to dictating particular modes of action.

Finally, Joseph Raz (*The Rule of Law and its virtue*, (1977), 93 LQR 195), argued a slightly different approach, acknowledging the need for State intervention and seeking to focus the concept of the rule of law so as to control discretion without eliminating it entirely. Raz suggests that the rule of law should be limited to formal values, including transparency of law making, non-retroactive law, the independence of the judiciary coupled with wide access to the courts, and the right to a fair trial.

3

The law-making process: legislation and case law

The word 'source' has various meanings when applied to law. One may treat the word 'source' as referring to the *historical or ultimate origins of law* and trace the *development* of the common law, equity, legislation, delegated legislation, custom, the law merchant, canon law and legal treatises, as we have done in Chapter 1. But on the other hand, one may treat the word 'source' as referring to the *methods by which laws are made or brought into existence*, and consider the current processes of legislation, delegated legislation, judicial precedent and, to a limited extent, custom. In this chapter, we shall first be concerned with the *methods by which laws are made*, i.e. the *active or legal sources of law* and in particular the laws which are made by the Westminster Parliament and how they are interpreted by the judiciary. We shall then, second, be concerned in this chapter to explain the methods by which the judiciary become involved in the law-making process and the effect of European Union legislation – how it is made and interpreted, together with the official bodies involved in law reform. Thus the second half of this chapter will focus on case law.

The United Kingdom

There are within the United Kingdom two parliaments and two assemblies. However, for our purposes, there is one parliament and one assembly to consider. This text is concerned with the law of England and Wales and so no reference is made to the powers of the Scottish Parliament or the Northern Ireland Assembly.

The Welsh Assembly

The Government of Wales Act 1998 provides for an Assembly for Wales. It creates for the first time an all-Wales elected government. It has 60 members sitting in Cardiff. Elections are held every four years on a basis of proportional representation. Forty members are elected from Welsh Westminster parliamentary seats with a top-up of 20 from five electoral regions, four from each. The Assembly has a budget of several billion pounds (though only about one-half of the Scottish budget) and there are no taxing powers. Its legislative powers are currently confined to *subordinate legislation* for Wales. The Government of Wales Act 2006 gives the Assembly power to make *statutes* for Wales which, if approved by Parliament, will become part of the statute book. The First Minister is appointed by the Queen following nomination by the Assembly. The Queen will also approve the First Minister's choice of other ministers, bringing the governance of Wales more into line with the Westminster mode.

It has control over:

- health and education;
- training policy;
- local government and social work;
- housing and planning;

- economic development and financial assistance to industry;
- tourism;
- some aspects of transport;
- environment and national heritage;
- agriculture, forestry and fisheries;
- food standards;
- the arts.

The members of the Assembly are called Assembly Members (or AMs).

The Westminster Parliament

The Westminster Parliament consists of two chambers: the House of Commons and the House of Lords.

The House of Commons

This currently consists of 650 (subject to 2013 boundary review) sitting members, called MPs, who meet in London at Westminster. Elections are held at least every five years and all MPs are elected on a first-past-the-post basis. There is, in theory, a five-day week, but for MPs with constituencies outside London it is, in effect, a four-day week to allow them to return to those constituencies to conduct, e.g., surgeries for constituents. Most business is conducted between 11 am and 7 pm, except on certain days when debates start at 9.30 am. The Commons sits for between 30 and 35 weeks a year and has a budget well in excess of £300 billion. Perhaps obviously, it has taxing powers limited only by the sanction that the electorate would not return a Parliament which adopted draconian taxing policies.

The House of Lords

Recent and ongoing changes are a continuation of our evolving constitution. Today there are various routes by which members are appointed to the House and four main categories of member:

Life peers. Appointed for their lifetime, life peers make up the minority (92 in September 2012) of the total membership (760 in September 2012), following a series of reforms. The power to appoint belongs formally to the Crown, but members are essentially created on the advice of the Prime Minister. Life peers' titles cease on death.

Law Lords. In effect, they were the first life peers. The Appellate Jurisdiction Act 1876 provided for up to 12 Law Lords to be appointed to hear appeals from the lower courts. They are full-time professional judges and can continue to hear appeals until they are 70 years old. After they retire they go on sitting in the House. Note: the judicial function of the House of Lords ended in October 2009 when the separate Supreme Court was established.

Archbishops and bishops. The Anglican archbishops of Canterbury and York, the bishops of Durham, London and Winchester and the 21 senior diocesan bishops of the Church of England have seats in the House. This is because the Church of England is the 'established' Church of the State. When they retire as bishops their membership of the House ceases.

Elected hereditary members. The House of Lords Act 1999 ended the right of hereditary peers to sit and vote in the House of Lords. Until then there had been about 700 hereditary Members. While the Bill was being considered, an amendment was passed which enabled 92 of the existing hereditary peers to remain as members until the next stage of reform. The 92 elected hereditary peers are made up as follows: 15 'office-holders', i.e. Deputy Speakers and Deputy Chairmen, elected by the House; 75 party and crossbench members, elected by their own party or group; and two who hold royal appointments – the Lord Great Chamberlain, who is the Queen's representative in Parliament, and the Earl Marshal, who is responsible for ceremonies such as the State Opening of Parliament.

The system of hereditary peers was deemed to be undemocratic in that these peers followed on taking a seat in the Lords by inheritance and were never subjected to election. There are also some

arguments to suggest that the life peerage system is undemocratic in that it has been used by prime ministers to elevate to a life peerage certain of those who have lost an election, in some cases where they have lost a subsequent by-election or, in one classic case, where the life peer had as prospective MP lost two subsequent by-elections! In other words, having been rejected by the people once or even twice or three times, the ex-MP returned to the legislature via a life peerage. The Department for Constitutional Affairs has undertaken to reform the Appointments Commission that handles new peerages and look again at the matter of how long a peer should serve in the House. In addition, the government has expressed a preference for a fully elected House of Lords although this preference has not been brought forward by legislation.

The Westminster Parliament has control of:

- foreign policy;
- defence and national security;
- the civil service;
- stability of fiscal economic and monetary system;
- border control;
- drug policy;
- common markets for UK goods and services;
- electricity, coal, oil, gas and nuclear energy;
- transport safety and regulations;
- social security policy and administration;
- employment legislation;
- abortion;
- broadcasting;
- equal opportunities.

The Westminster Hall debates

The House of Commons has another chamber sited in the Grand Committee Room off Westminster Hall. It sits in the morning and is designed to be non-confrontational and a forum for a reasoned discussion on select committee reports and to allow MPs to raise issues relating to their constituencies by seeking to get them on the agenda. Instead of the face-to-face arrangement of the Commons benches, this parallel chamber seats MPs in a semi-circle. The proceedings are presided over by the deputy speaker and the quorum is three. About one-and-a-half hours are given to a topic and cover such subjects as police numbers and issues of law and order in rural areas, together with ancient woodlands and tourism. The list is potentially endless.

The Westminster Hall debates have become more popular in recent times and sometimes there are more MPs at these debates than in the Commons chamber which of course is seldom well attended except where matters such as the Budget are considered and for Prime Minister's Questions or where an international crisis is looming. In particular, debates have been initiated by the opposition parties and, in terms of business, MPs have used the system to initiate debates on, e.g. the government's action in putting Railtrack into the insolvency procedure of administration – somewhat hurriedly some thought, to the disadvantage of its shareholders.

From now on, in this and other chapters of the text, a reference to 'Parliament' means the Westminster Parliament.

Collapse of Regional Assembly Scheme

The Regional Assemblies (Preparations) Act 2003 received the Royal Assent on 8 May 2003. It makes provision for the holding of referendums about the establishment of elected assemblies for regions

of England (except London). It implements the first stage of the White Paper, *Your Region, Your Choice: Revitalising the English Regions*, May 2002. However, on 25 July 2007, Prime Minister Brown decided to abolish regional assemblies from 2010. The regional assembly system turned out to be deeply unpopular with the British public – proven by the North East referendum which resulted in 78 per cent rejecting it. It must be noted that the North East was specially selected as it was the area most likely to be supportive of such a regional assembly.

Types of Bills

A session of Parliament normally lasts for one year commencing in October or November. During that time, a large number of Bills become law, most of which are *government Bills*. An Act of Parliament begins as a Bill, which is the draft of a proposed Act. The government is formed by the parliamentary party having an overall majority, or at least the greatest number, of members in the House of Commons, or more rarely by a formal coalition of, or more informal arrangement between, two or more parties who between them can command such a majority. The government is led by a Prime Minister who appoints a variety of other Ministers, such as the Chancellor of the Exchequer, the Home Secretary, the Foreign Secretary, the Justice Secretary and others to manage various departments of state. A small group of these Ministers, called the Cabinet, meets frequently under the chairmanship of the Prime Minister and formulates the policy of the government. An important part of this policy consists of presenting Bills to Parliament with a view to their becoming law in due course. Such Bills are usually presented by the Minister of the department concerned with their contents.

Queen's Speech

The legislative intentions of the government are given in outline to Parliament at the commencement of each session in the Queen's Speech. This is read by the Queen but is prepared by the government of the day. Most government Bills are introduced in the House of Commons, going later to the House of Lords and finally for the Royal Assent. However, some of the less controversial government Bills are introduced in the House of Lords, going later to the Commons and then for the Royal Assent. Money Bills, i.e. those containing provisions relating to finance and taxation, e.g. the annual finance Bill, and other Bills with financial clauses must start in the Commons.

Private Members' Bills

Members of either House whether government supporters or not have a somewhat restricted opportunity to introduce *private members' Bills*. Such Bills are not likely to become law unless the government provides the necessary parliamentary time for debate. Some, however, survive to become law – for example, the Murder (Abolition of Death Penalty) Act 1965. Those that are lost usually fail to be debated fully because influential and anonymous objectors work behind the scenes to ensure that they are taken towards the end of the session when parliamentary time is at a premium. In addition, the severe restriction of debating time for private members' Bills makes such time as is available an ideal stamping ground for the determined filibuster who wishes to talk the Bill out. In spite of all this, many more private members' Bills have reached the statute book in recent times.

Prorogation and its effect

A session of Parliament is brought to an end by the Monarch by prorogation and a Bill which does not complete the necessary stages and receive the Royal Assent in one session will lapse. It can be introduced in a subsequent session but must complete all the necessary stages again. This lapse is not, however, inevitable since there is a procedure under which the government of the day can by

negotiation with the Opposition allow a Bill to carry on with its remaining stages in the next session. This procedure was used, e.g., with the Financial Services and Markets Act 2000 when it was at the Bill stage. The Bill was of great length and dealt with fundamental changes in the regulation of the financial services industry and the City of London as a financial market. By agreement it was carried over after the end of the 1998/9 session to the 1999/2000 session in order to complete its stages. Bills also lapse when Parliament is dissolved prior to a General Election. The above provisions do not apply to *private Bills* (see below) which because of the costs involved in promotion can complete their remaining stages in a new session. The sittings of Parliament within a session are divided by periods of 'recess'. Bills do not lapse when Parliament goes into recess.

Public and private Bills

Bills are also divided into *public* and *private* Bills. *Public Bills*, which may be government or private members' Bills, alter the law throughout England and Wales and extend also to Scotland and Northern Ireland unless there is a provision to the contrary. *Private Bills* do not alter the general law but confer special local powers. These Bills are often promoted by local authorities where a new local development requires compulsory purchase of land for which a statutory power is needed. Enactment of these Bills is by a different parliamentary procedure.

The Speaker of the House of Commons rules whether a Bill is public or private if there is doubt as where, e.g., the Bill might affect areas beyond that of the local authority concerned, as would be the case if a seaport authority forbade the export of live animals from the port.

Enactment of Bills

A public Bill and a private members' Bill follow the same procedure in Parliament. These Bills may be introduced in either House, though, as we have seen, a money Bill, which is a public Bill certified by the Speaker as one containing provisions relating to taxation or loans, must be introduced in the Commons by a Minister and not a private member. The following procedure relates to a public or private members' Bill introduced in the Commons.

The various stages

On its introduction the Bill receives a purely formal first reading. Only the title of the Bill is read out by the Clerk of the House. The purpose of this stage is to tell members that the Bill exists. It is then printed and published. Later it is given a second reading, at which point its general merits may be debated, but no amendments are proposed to the various clauses it contains. There is an alternative procedure for the second reading stage of *public Bills in the Commons*, which is designed to save parliamentary time. A Minister may move that the Bill be referred to a Standing Second Reading Committee of between 30 and 80 MPs. They report to the Commons recommending with reasons whether or not the Bill should be read a second time. The report of the Committee must be put to the House for a vote without debate or amendment. This procedure does not apply if 20 Members rise in their seats to object. Private members' Bills are automatically referred to the Second Reading Committee.

The Second Reading Committee procedure has saved a lot of parliamentary time and assisted the passing of many non-controversial Bills for which the government would otherwise have had to find debating time. There is also a rule limiting speeches in second reading debates in the Commons to ten minutes, which also saves time.

Having survived the second reading, the Bill passes to the Committee stage. Here details are discussed by a Standing Committee chosen in proportion to the strength of the parties in the House of Commons. The number of members varies but is in general between 20 and 30. Amendments to the clauses are proposed, and, if not accepted by the government, are voted on, after which the Bill returns to the House at the Report stage. The Committee mentioned may be a Committee of the Whole House,

if the legislation is sufficiently important. Certain Bills in the Commons may be sent to a Special Standing Committee which is given power to hear evidence from outsiders, thus following to some extent the procedure for private Bills (see below).

At the Report stage the amendments may be debated, and the Bill may in some cases be referred back for further consideration. It is then read for the third time, when amendments may strictly speaking be moved but in practice only verbal alterations are taken.

After passing the third reading, the Bill is said to have 'passed the House'. It is then sent to the House of Lords where it goes through a similar procedure and must pass through all stages successfully *in the same session of Parliament*. If the Lords propose amendments, the Bill is returned to the Commons for approval. At one time the House of Lords had the power to reject Bills sent up by the Commons. Now, under the provisions of the Parliament Acts 1911 and 1949, this power amounts to no more than an ability to delay a public Bill (other than a money Bill) for a period of one year; a money Bill may be delayed for one month only (and see below). The supremacy of the Commons stems from the fact that it is an elected assembly, responsible to its electors and coming periodically at intervals of not more than five years before the public for re-election. The Lords may veto a private Bill and have retained the power to reject a Bill which attempts to extend the duration of Parliament beyond five years.

Parliament Acts 1911 and 1949 – the procedure

The procedure involved where the Commons wishes, in effect, to pass legislation without the consent of the Lords is as follows:

Money Bills. Where a money bill has passed the Commons, it shall receive the Royal Assent without the approval of the Lords unless it has been passed by the Lords within one month of being sent to the Lords, provided that the Bill was sent to the Lords at least one month before the end of the relevant session.

Other Public Bills. If a Bill has been passed by the Commons and then rejected in the Lords, and *in the next session of Parliament* it is again passed by the Commons but the House of Lords does not pass it without amendments (except those that are approved by the Commons), the Commons has the power to send the Bill for the Royal Assent, despite the opposition by the Lords. However, it is also provided that at least one year must have elapsed between the second reading of the Bill in the Commons in the first session and the third reading in the Commons in the second session.

As we have seen, the power of the Lords to veto any Bill which attempts to extend the life of Parliament beyond five years remains.

Parliament Acts 1911 and 1949 – a challenge

A challenge to the validity of the Hunting Act 2004, which banned hunting with dogs, reached the House of Lords, where an instructive judgment was given on the validity of Acts passed into law without the consent of the Lords. The Hunting Act 2004 did not receive the consent of the Lords (see *R (Jackson and others) v Attorney-General* [2005] 2 WLR 866).

The Government contended that the 2004 Act was valid, since it was passed under procedures laid down in the Parliament Act 1911, as amended by the Parliament Act 1949. The 1911 Act was passed by the Lords largely because the King promised he would create, if necessary, sufficient new peers who would support its passage through the Lords.

As we have outlined, s 2(1) of the 1911 Act provided that, after a period of two years had elapsed, a Bill that had still not received the consent of the Lords, being a public Bill other than a money Bill or a Bill to extend the maximum duration of a Parliament beyond five years, could become an Act of Parliament without being passed by the Lords. The 1949 Act amended the 1911 Act by reducing the period of two years to one year. The provisions of the Parliament Act 1911 as amended were used to enact the 1949 Act.

The claimants seeking to make void the ban on hunting with dogs under the Hunting Act 2004 said that the 1911 Act was passed by the Lords and could only be lawfully amended with the consent of the Lords. Thus, since the 2004 Act was passed under the amended 1911 Act, and since the amending Act of 1949 was unlawful, the 2004 Act was also unlawful.

Their Lordships did not agree. The basis of their ruling that the 2004 Act was valid was based in the main on the fact that the Parliament Act 1949 was valid because it did not fundamentally change the relationship between the Commons and the Lords. A Bill could, as before, under the 1911 Act, be enacted without the consent of the Lords. It was merely that the period in the procedure had been reduced from two years to one year. The Lords' delaying power was maintained, but for a shorter period.

Other challenges to the Hunting Act 2004 were made in *R (on the application of Countryside Alliance and others) v Attorney-General* (2005) *The Times*, 3 August (judicial review) and in the House of Lords (now the Supreme Court) on appeal from a failed judicial review in the Divisional Court of Queen's Bench and the Court of Appeal in *R (on the application of Jackson) and others v Attorney-General* [2006] 1 AC 262. The claimants failed in both hearings and the Hunting Act 2004 remains valid.

Private Bills – a judicial stage

The main difference between the enactment of a *private Bill* and a *public Bill* is that the committee stage of a private Bill may be judicial. Any person whose interests are specifically affected by the Bill, normally in relation to property or business interests, may lodge a petition against the Bill in accordance with the procedure set out in Standing Orders. In such a situation the Bill is referred to an Opposed Committee consisting of four MPs of all parties appointed by the House. They must be entirely disinterested in a material sense, in the matters with which the Bill is concerned. The Committee hears both the petitioner and the promoter, who usually appear by counsel. If the petition succeeds the Bill is amended to take account of it. There is no appeal against the decision of the Committee. Since this is a somewhat lengthy procedure, some statutes allow Ministers to grant special powers to local authorities by what is called a Provisional Order. Such an order does not take effect unless and until it is embodied (usually along with others) in a Provisional Order Confirmation Bill which is passed by Parliament and given the Royal Assent. There are also radical proposals to change the Private Act of Parliament procedure because the parliamentary timetable is becoming clogged up by the number of these Bills, many of which are concerned, e.g., with new powers for docks and harbours. The suggestion is that power of approval be given to local authorities and/or public inquiries followed by a parliamentary debate only. This could well be an improvement since public inquiries are more accessible than the private Bill procedure though the above proposals have not, as yet, been taken further.

Royal Assent

When a Bill has passed through both the Commons and the Lords, it requires the Royal Assent. It is not customary for the Monarch to consent in person, and in practice consent is given by a committee of three peers, including the Lord Chancellor. The Royal Assent Act 1967 provides that an Act is duly enacted and becomes law if the Royal Assent is notified to each House of Parliament, sitting separately, by the Speaker of that House or the acting Speaker.

The former Bill is then referred to as an Act or a statute, and may be regarded as a *literary* as well as a *legal* source of law. However, an Act may specify a future date for its coming into operation, or it may be brought into operation piecemeal by ministerial order. The courts have no power to examine proceedings in Parliament in order to determine whether the passing of an Act or delegated legislation has been obtained by means of any irregularity or fraud.

British Railways Board v Pickin, 1974 – The courts and parliamentary proceedings (6)



Short title – numbering and citation

It should be noted that, as well as having a title setting out what its objects are, each Act has, under the provisions of the Short Titles Act 1896, a short title to enable easy reference to be made. Each Act has also an official reference. The Law of Property Act 1925, is the short title of an Act whose official reference is 15 & 16 Geo 5, c 20, which means that the Law of Property Act 1925 was the twentieth statute passed in the session of Parliament spanning the fifteenth and sixteenth years of the reign of George the Fifth.

The Acts of Parliament Numbering and Citation Act 1962 provides that chapter numbers assigned to Acts of Parliament passed in 1963 and after shall be assigned by reference to the calendar year and not the session in which they are passed. For example, the official reference of the Sale of Goods Act 1979 is 1979, c 54.

Statute law and case law distinguished

The essential differences between statute law and case law are apparent from the definition of a statute. It is:

an express and formal laying down of a rule or rules of conduct to be observed in the future by the persons to whom the statute is expressly or by implication made applicable.

Thus a statute openly creates new law, whereas a judge would disclaim any attempt to do so. Judges are, they say, bound by precedent and merely select existing rules which they apply to new cases (but see below). A statute lays down general rules for the guidance of future conduct; a judgment merely applies an existing rule to a particular set of circumstances. A judgment gives reasons and may be argumentative; a statute gives no reasons and is imperative.

Delegated legislation

Modern statutes may require much detailed work to implement and operate them. In such a case the Act is drafted so as to provide a broad framework, the details being filled in by Ministers by means of delegated legislation. For example, much of our social security legislation gives only the general provisions of a complex scheme of social benefits and an immense number of detailed regulations have had to be made by civil servants in the name of and under the authority of the appropriate Minister. These regulations when made in the approved manner are just as much law as the parent statute itself. This form of law is known as *delegated* or *subordinate* legislation.

Advantages

A number of advantages are claimed for delegated legislation as follows.

- (a) **It saves Parliamentary time** in that Ministers are left, with the civil service, to make the detailed rules, Parliament concerning itself solely with the broad framework of the legislation.
- (b) **Speed.** The Parliamentary procedure for enacting Bills is slow whereas rules and orders can be put more rapidly into law, particularly in a time of national emergency.
- (c) **Parliament cannot foresee all the problems** which may arise after an Act has become law. Delegated legislation can deal with these if and when they arise.
- (d) **Delegated legislation is less rigid** in that it can be withdrawn quickly by another statutory instrument if it proves impracticable.

(e) **The aptitude of the legislature is limited** and experts in the departments of state can better advise a Minister on the technicalities of a certain branch of law. It would be difficult to give this kind of advice to the Lords or Commons as a whole.

Disadvantages

However, there are disadvantages as follows.

(a) **Parliamentary control over legislation is undoubtedly reduced.** However, the power to make delegated legislation must be given by an Act of Parliament (sometimes referred to as the enabling statute) and so Parliament is to that extent in broad control because it must pass the enabling statute.

Beyond that much depends upon what the enabling statute says about reference to Parliament when instruments are made. There are different requirements and the inclusion of one rather than another in an enabling statute does not appear to be based upon any detectable principle.

The enabling Act may require:

- (i) that the instrument be merely laid before Parliament. Where this is so, MPs and Peers have no right to change it but laying before Parliament does, at least, inform them that the instrument exists, and in any case there is a scrutiny committee. In some cases the instrument is already in force. However, Members may ask Parliamentary questions about instruments laid for information only;
- (ii) that Parliament may annul the instrument, e.g. within 40 days of laying. Where this is so a resolution of either House to annul the instrument is effective, but if there is no such resolution the instrument passes into law. However, whether there is a debate leading to a resolution to annul, the instrument is entirely dependent upon the initiative of an MP or Peer to engineer the debate since the government is not obliged to find time for it;
- (iii) that each House of Parliament must pass a resolution approving the instrument. Where this is so, the government must obviously find time for a debate and a resolution approving the instrument must be made in each House, otherwise it will not become law;
- (iv) that the instrument be laid in draft before Parliament and may only be issued if an affirmative resolution is passed by each House in its favour;
- (v) that the instrument be laid in draft without reference to affirmative resolutions, in which case by s 6 of the Statutory Instruments Act 1946 it may be made law after a period of 40 days if no resolution is passed during that period by either House against it.

It should be noted that if it is essential that an instrument comes into operation before copies of it can be laid before Parliament, then it may do so provided notification is sent to the Lord Chancellor and the Speaker of the House of Commons explaining why copies could not be laid before the instrument came into operation.

There is a special procedure for what are called Deregulation Orders. Part I of the Deregulation and Contracting Out Act 1994 gives power to amend or repeal by ministerial order primary legislation, i.e. Acts of Parliament, that impose an unnecessary burden on business. This somewhat extraordinary power is exercisable only after special scrutiny procedures have been followed. The 1994 Act provides a two-stage process for the parliamentary scrutiny of deregulation orders. A document containing the proposal is laid before Parliament under s 3(3) of the Act in the form of a draft of the order, together with explanatory material; and the Deregulation Committee in the Commons and the Select Committee on the Scrutiny of Delegated Powers in the Lords have 60 days in which to consider and report on it. The Government then lays under s 1(4) of the 1994 Act a draft order, either in its original form or amended to take account of the views of the two Committees, for approval by resolution of each House. In the Lords, a motion to approve a draft order can only be moved after the Lords Committee has made a second report on it. Thus, although the power to repeal or amend an Act of Parliament in

this field rather than the requirement elsewhere to use another Act of Parliament seems to some a potentially dangerous and undemocratic process, the controls as listed above are very strict.

There are also other controls both by the judiciary and by Parliament itself (see below).

The 1994 Act has not been as successful as it might have been in removing red tape from business, because the Act provides that proposed changes to simplify procedures *must not impose fresh burdens of any kind*. If, therefore, it was decided to simplify an employment law procedure currently not applying to, say, employers with 20 or fewer employees, then if the proposal to simplify would only work if the simplified proposals were extended to all employers to save the complication of dealing with some employers as exceptions, it would not be possible to make the change because a new burden, albeit a simplified one, would be placed on the relevant small employers. Parliament has expressed an intention to remove the restriction, but it requires primary legislation and none is, as yet, forthcoming.

(b) It is said that there is too much delegated legislation so that it is difficult to know what the law is, particularly in view of the fact that little publicity is given to statutory instruments whereas most important Acts of Parliament are referred to at one time or another in the press. The difficulty is that a defendant's *ignorance of the law is no excuse*, though s 3(2) of the Statutory Instruments Act 1946 protects a person in respect of a crime contained in a statutory instrument *if the instrument has not been published*, unless it is proved that reasonable steps have been taken for the purpose of bringing the content of the instrument to the notice of the public or of persons likely to be affected by it or the person in fact charged. The section does not protect if the instrument has been published but a particular defendant does not know of its existence.

A way of dealing with the mass of delegated legislation is to introduce '*sunset clauses*' into regulations so that they would have to be reviewed or die after a specified period. This method is used in the United States with some degree of success and the UK government is looking at it and may introduce it here.

(c) The dangers of sub-delegation are on occasions quite real. One can find in some cases a pedigree of four generations of instrument emanating from a statute as follows:

- (i) regulations made under the statute;
- (ii) orders made under the regulations;
- (iii) directions made under the orders;
- (iv) licences issued under the directions.

When this happens it does reduce very seriously the control by Parliament of the making of new laws since Parliament would only see the parent statute and the first set of regulations.

Types of delegated legislation

In modern statutes delegated powers are exercisable by four main vehicles as follows:

(a) Statutory instruments. Most powers conferred on Ministers in modern statutes are exercisable by ministerial or departmental regulations or orders, called collectively statutory instruments.

(b) Orders in Council. Powers of special importance relating to constitutional issues, e.g. emergency powers, are conferred on the Queen in Council. These powers are in fact exercised by the Cabinet who are all Privy Counsellors by means of an order in council.

(c) By-laws of local authorities. These are made by local authorities under powers given to them in Acts of Parliament and require the approval of the appropriate Minister.

(d) Rules of the Supreme Court (Senior Courts) and County Court. These are made by Rules Committees set up by statute specifically to make rules concerning the practice and procedure of the courts. The Rules Committees are made up of judges and senior members of the legal profession.

Judicial control

Delegated legislation takes effect as if it were part of the enabling statute. Therefore, it has statutory force and, as we have seen, the courts cannot declare a statute *ultra vires*. However, delegated legislation does not acquire statutory force unless it is *intra vires*, i.e. properly made in accordance with the terms of the enabling Act. The courts can declare delegated legislation *ultra vires* in this sense. There are two approaches to the *ultra vires* rule as regards delegated legislation as follows:

(a) Substantive *ultra vires*. This means that the Minister has exceeded the powers given to him in the parent statute. If a Minister is authorised to make regulations as to road traffic, clearly if he purports to make regulations under the same parent statute concerning rail traffic, they would be held by the courts to be *ultra vires* and invalid.

(b) Procedural *ultra vires*. This means that the instrument is invalid because the Minister has failed to follow some mandatory procedural requirement specified in the parent Act. For example, much social security legislation requires the Minister to consult various advisory bodies before making rules and orders. If a rule or order was made without the necessary consultation, then it would be *ultra vires* in procedural terms and invalid.

Hotel and Catering Industry Training Board v Automobile Proprietary Ltd, 1969
– Delegated legislation and *ultra vires* (7)



Parliamentary control

The main Parliamentary control is through a Joint Committee on Statutory Instruments between the House of Commons and the House of Lords. The Joint Committee is appointed to consider statutory instruments with a view to determining whether the special attention of Parliament should be drawn to the legislation on various grounds. The grounds, briefly, are that the legislation:

- (a) imposes a tax on the public;
- (b) is made under an enactment containing specific provisions excluding it from challenge in the courts;
- (c) purports to have retrospective effect where there is no express authority in the enabling statute;
- (d) has been unduly delayed in publication or laying before Parliament;
- (e) has come into operation before being laid before Parliament and there has been unjustifiable delay in informing the Speaker of the delay under s 4(1) of the Statutory Instruments Act 1946;
- (f) may be beyond the powers given by the parent statute or makes some unusual or unexpected use of those powers;
- (g) calls for better explanation as to its meaning.

As regards law coming from the European Union, there is also a system of three standing committees consisting of ten MPs to examine the proposals of the Union in terms of legal matters and to question Ministers about them. There are also Commons debates before the twice-yearly EU summit meetings to give MPs a chance to air their views on the agendas for the summit meetings.

By-laws of local authorities

These must be *intra vires*, i.e. within the powers given to the local authority in the enabling statute, and also reasonable. Thus, in *Kruse v Johnson* [1898] 2 QB 91 a local authority by-law making it an offence

to sing within 50 yards of a dwelling house was upheld but the court decided that unreasonableness could be a ground for invalidating by-laws.

Burnley Borough Council v England, 1978 – By-laws: challenge in court (8)



Interpretation of statutes by the judiciary

The main body of the law is to be found in statutes, together with the relevant statutory instruments, and in case law as enunciated by judges in the courts. But the judges not only have the duty of declaring the common law, they are also frequently called upon to settle disputes as to the meaning of words or clauses in a statute.

Parliament is the supreme lawgiver, and the judges must follow statutes (but see *Factortame Ltd v Secretary of State for Transport (No 2)* (1991) 1 All ER 70). Nevertheless, there is a considerable amount of case law which gathers round Acts of Parliament and delegated legislation since the wording sometimes turns out to be obscure. Statutes were at one time drafted by practising lawyers who were experts in the particular branch of law of which the statute was to be a part. Today, however, statutes are drafted by parliamentary counsel to the Treasury, and, although such persons are skilled in the law, the volume of legislation means that statutes are often obscure and cases continue to come before the courts in which the rights of the parties depend upon the exact meaning of a section of a statute. When such a case comes before a judge, he must decide the meaning of the section in question. Thus even statute law is not free from judicial influence.

The judges have certain recognised *aids to interpretation*, and these are set out below.

Statutory aids

Judges may get some guidance from statute law.

- (a) The Interpretation Act 1978, which is itself a statute, defines terms commonly used in Acts of Parliament, e.g. that 'person' includes a corporation as well as a human being.
- (b) A complex statute will normally contain an interpretation section, defining the terms used in the particular Act, e.g. ss 735–744A of the Companies Act 1985 define, among other things, 'accounts' and 'director', and the judges have recourse to this.
- (c) Every Act of Parliament used to have what was known as a preamble, which set out at the beginning the general purpose and scope of the Act. The preamble was often quite lengthy and assisted the judge in ascertaining the meaning of the statute. Modern public Acts do not have this type of preamble, but have instead a long title which is not of so much assistance in interpretation. For example, the Sex Discrimination Act 1975, which contains 87 sections and a number of schedules, says merely: 'An Act to render unlawful certain kinds of sex discrimination and discrimination on the grounds of marriage, and establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally; and for related purposes.' All private Acts must have a preamble setting out the objects of the legislation, and this preamble must be proved by the promoters at the Committee stage in the House of Lords. So far as private Acts are concerned the preamble may be of assistance.

Hutton v Esher UDC, 1973 – Statutory interpretation and the Interpretation Act (9)



General rules of interpretation evolved by judges

There are a number of generally recognised rules or canons of interpretation, and some of the more important ones are now given.

The mischief rule

This was set out in *Heydon's case* (1584) 3 Co Rep 7a. Under this rule the judge will look at the Act to see what was its purpose and what mischief in the common law it was designed to prevent.

Broadly speaking, the rule means that where a statute has been passed to remedy a weakness in the law the interpretation which will correct that weakness is the one to be adopted.

The literal rule

According to this rule, the working of the Act must be construed according to its literal and grammatical meaning whatever the result may be. The same word must normally be construed throughout the Act in the same sense, and in the case of old statutes regard must be had to its contemporary meaning if there has been a change with the passage of time.

The Law Commission, in an instructive and provocative report on the subject of interpretation (Law Com 21), said of this rule that 'to place undue emphasis on the literal meaning of the words of a provision is to assume an unattainable perfection in draftsmanship'.

The rule, when in operation, does not always achieve the obvious object and purpose of the statute. A classic example is *Whiteley v Chappell* (1868–9) 4 LRQB 147. In that case a statute concerned with electoral malpractices made it an offence to personate 'any person entitled to vote' at an election. The defendant was accused of personating a deceased voter and the court, using the literal rule, found that there was no offence. The personation was not of a person entitled to vote. A dead person was not entitled to vote, or do anything else for that matter. A deceased person did not exist and could therefore have no rights. It will be seen, however, that the literal rule produced in that case a result which was clearly contrary to the object of Parliament.

The golden rule

This rule is to some extent an extension of the literal rule and under it the words of a statute will as far as possible be construed according to their ordinary plain and natural meaning, unless this leads to an absurd result. It is used by the courts where a statutory provision is capable of more than one literal meaning and leads the judge to select the one which avoids absurdity, or where a study of the statute as a whole reveals that the conclusion reached by applying the literal rule is contrary to the intentions of Parliament.

Thus, in *Re Sigsworth* [1935] Ch 89 the court decided that the Administration of Estates Act 1925, which provides for the distribution of the property of an intestate amongst his next of kin, did not confer a benefit upon the person (a son) who had murdered the intestate (his mother), even though the murderer was the intestate's next of kin, for it is a general principle of law that no one can profit from his own wrong.

The ejusdem generis rule

This is a rule covering things of the same genus, species or type. Under it, where general words follow particular words, the general words are construed as being limited to persons or things within the class outlined by the particular words. So in a reference to 'dogs, cats, and other animals', the last three words would be limited in their application to animals of the domestic type, and would not be extended to cover animals such as elephants and camels which are not domestic animals in the United Kingdom.

Expressio unius est exclusio alterius

(The expression of one thing implies the exclusion of another.) Under this rule, where specific words are used and are not followed by general words, the Act applies only to the instances mentioned. For

example, where a statute contains an express statement that certain statutes are repealed, there is a presumption that other relevant statutes not mentioned are not repealed.

Noscitur a sociis

(The meaning of a word can be gathered from its context.) Under this rule words of doubtful meaning may be better understood from the nature of the words and phrases with which they are associated.

Gardiner v Sevenoaks RDC, 1950 – The mischief rule **(10)**

Keene v Muncaster, 1980 – The golden rule **(11)**

Lane v London Electricity Board, 1955 – The *eiusdem generis* rule **(12)**

R v Immigration Appeals Adjudicator, ex parte Crew, 1982 – The rule of *expressio unius* **(13)**

Muir v Keay, 1875 – The rule of *noscitur a sociis* **(14)**



Compatibility with Convention on Human Rights

Section 3 of the Human Rights Act 1998 provides that, as far as it is possible to do so, both primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights (see Chapters 2 and 11). The section applies to past as well as future legislation and the court is not bound by previous interpretations of past legislation in terms of Convention rights. This has implications for the rule of precedent (see below) under which judges generally follow previous decisions. It may be that a Crown Court will be obliged to refuse to follow a previous ruling of the Court of Appeal or the Supreme Court where this is required in order to give effect to Convention rights. It is expected that the courts will in almost all cases be able to interpret UK legislation compatibly with Convention rights.

Other considerations and presumptions

In addition to the major rules of interpretation, there are also several other considerations which the court will have in mind.

Use of Hansard

In general terms, the court will concern itself only with the wording of the Act and will not go to Hansard to look at the reports of debates during the passage of the Act.

There is here some conflict with the mischief rule, since it might be thought there is no better way to ascertain what mischief the Act was designed to prevent than by reference to the Parliamentary debates in Hansard. Nevertheless, the Law Commission in their deliberations on the matter of statutory interpretation had decided against the use of Hansard since they doubted the reliability of statements made in Parliamentary debates.

The general rule that Hansard should not be referred to as an aid to interpretation was relaxed in *Pepper v Hart* [1993] 1 All ER 42. The House of Lords held that reference to Hansard should be allowed where:

- (a) the legislation is ambiguous or obscure or where a literal interpretation would lead to an absurdity. The House of Lords subsequently made it clear that this condition must exist before reference to Hansard can be made and that the judiciary has no general power to refer (see *R v Secretary of State for the Environment, ex parte Spath Holme Ltd* [2001] 1 All ER 195);

- (b) the material which is referred to consists of statements by a Minister or other promoter of the Bill together with such other Parliamentary material as is necessary to understand the statements and the effects of them;
- (c) the statements relied upon are clear.

Their Lordships held that the above references would not contravene parliamentary privilege.

The House of Lords (now the Supreme Court) decided in *Davis v Johnson* [1978] 1 All ER 1132 that it is now permissible for the court to refer to reports by such bodies as the Law Commission and committees or commissions appointed by the government or by either House of Parliament from which the reform of the law stems. However, according to the judgments, e.g. that of Lord Diplock, 'Where legislation follows on a published report of this kind the report may be used as an aid to identify the mischief which the legislation is intended to remedy but not for the purpose of construing the enacting words . . .'. In other words, the relevant report can assist in terms of what the legislation was designed to do but not whether the words it uses achieve it.

Of course, it may be the case that a reference to Hansard will not clarify the position. For example, in *R v Deegan (Desmond Garcia)* [1998] 1 CLY 966 the defendant appealed against his conviction for possessing a bladed knife in a public place. The issue was whether the type of knife he was carrying came within the scope of s 139 of the Criminal Justice Act 1988 under which he was charged. On referring to Hansard, it was discovered that ministerial statements were not consistent and of no assistance, so existing definitions of knives of a type described in earlier case law relating to bladed articles were followed, and the defendant's appeal to the Court of Appeal failed.

Finally, the House of Lords (now the Supreme Court) considered the way in which *Pepper v Hart* should be used with respect to the Human Rights Act in the case of *Wilson v Secretary of State for Trade and Industry* (2003), in which Lord Nicholls observed:

I expect the occasions when resort to Hansard is necessary as part of the statutory 'compatibility' exercise will seldom arise. The present case is not such an occasion. Should such an occasion arise the courts must be careful not to treat ministerial or other statements as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.

No retrospective effect or alteration of existing law

A statute is presumed not to alter the existing law unless it expressly states that it does. There is also a presumption against the repeal of other statutes and that is why statutes which are repealed are repealed by specific reference.

In the absence of any express indication to the contrary, a construction which would exclude retrospective effect is to be preferred to a construction which would not. Thus in *Alexander v Mercouris* [1979] 3 All ER 305, where the claimant sued the defendant for alleged defective workmanship in the conversion of two flats, the claimant tried to bring his case under the Defective Premises Act 1972 (see further Chapter 26) which came into force on 1 January 1974. However, it appeared that the defendant commenced the work in November 1972 and it was held by the Court of Appeal that no claim could be brought under the Act as the Act could not be construed as having retrospective effect. Some Finance Acts do have retrospective effect in terms of taxation.

Miscellaneous rules

When a statute deprives a person of property, there is a presumption that compensation will be paid. Unless so stated it is presumed that an Act does not interfere with rights over private property. There

is a rebuttable presumption against alteration of the common law. Any Act which presumes to restrict private liberty will be very strictly interpreted, though the strictness may be tempered in times of emergency. It is presumed that an Act does not bind the Crown on the ground that the law, made by the Crown on the advice of the Lords and Commons, is made for subjects and not for the Crown. Furthermore, as we have seen, the courts lack the power to examine proceedings in Parliament in order to determine whether the passing of an Act has been obtained by means of any irregularity or fraud (see *British Railways Board v Pickin* (1974)).

Purposive interpretation

However, the Law Commissioners have recommended that more emphasis should be placed on the importance of interpreting a statute in the light of the *general purposes behind it and the intentions of Parliament*. This is referred to as a purposive interpretation. Thus in *Fletcher v Budgen* [1974] 2 All ER 1243 the Divisional Court of Queen's Bench decided that under the Trade Descriptions Act 1968 a buyer of goods, in this case a car dealer, could be guilty of the offence of falsely describing goods when he told a private seller that his car was almost worthless, bought it, repaired it and sold it at a considerable profit. Lord Widgery, CJ said that although he had never thought of the Act as applying to buyers of goods, it was necessary in the public interest that it should, at least in the case of expert buyers, and that in his view such decision 'is not in any sense illogical and is not likely to run counter to any intention which Parliament may have had'.

In *Knowles v Liverpool City Council* [1993] 1 WLR 1428 a council employee was injured while handling a defective flagstone. He was awarded damages under the Employers' Liability (Defective Equipment) Act 1969. The council appealed on the grounds that a flagstone was not 'equipment' under the Act; the matter reached the House of Lords (now the Supreme Court) which said that it was equipment. The purpose of the Act was to protect employees from exposure to dangerous materials.

Again, in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 the House of Lords (now the Supreme Court) discovered a drafting error in the Arbitration Act 1996 which prevented a right of appeal from a decision of the High Court. The court ruled that the Act should be interpreted as allowing the appeal since this was the intended purpose of the legislature.

However, as Lord Scarman said in *Shah v Barnet London Borough Council* [1983] 1 All ER 226 at p 238: 'Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy.'

Rules of interpretation tend to some extent to cancel each other. Thus by using one or other of these rules judges can be narrow, reformist, or conservative. In fact Pollock, in his *Essays in Jurisprudence and Ethics*, suggests:

English judges have often tended to interpret statutes on the theory that Parliament generally changes the law for the worse and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.

It must be said that this comment applies particularly to judicial interpretation of welfare law where they have sometimes been reluctant to fill in gaps in order to make the law work, whereas if the Act is in the field of 'lawyers' law, then they have been prepared to do precisely this in order, for example, to convict a guilty person of a crime. This is, however, not surprising since judges are the product of a legalistic training and are clearly ill-equipped to pronounce upon welfare law, whereas in crime, for example, they are dealing with rules which they better understand so that they feel less reluctant to fill in gaps. There is now, of course, a much wider training of the judiciary that may overcome this problem.

Explanatory Notes

The Department of State sponsoring the Bill now produces Explanatory Notes at least for major Bills. These are available for purchase through the Stationery Office and state clause by clause and in ordinary language the provisions of the Bill. However, the Notes are prefaced with the warning that they are not part of the Bill and have not been endorsed by Parliament. They are not judgmental and are in no sense binding on a court in terms of the interpretation of the Bill once it becomes law. Nevertheless, they are useful to professionals and those in business as a means of understanding quickly the aims and intentions of the legislation.

Case law or judicial precedent

Case law still provides the bulk of the law of the country, although Parliament is becoming much more active in making new laws and statute law may come to dominate the common law. This trend is, of course, encouraged by the existence of the Law Commission which is constantly putting forward proposals to codify the law by statute. Some case law states the law itself, and some is concerned as we have seen with the interpretation of statutes. We will examine here case law which is law in its own right. Case law is built up out of precedents, and a precedent is a previous decision of a court which may, in certain circumstances, be binding on another court in deciding a similar case. This practice of following previous decisions is derived from custom, but it is a practice which is generally observed. As Park, CJ said in *Mirehouse v Rennell* (1833) 1 Cl & Fin 527, 'Precedent must be adhered to for the sake of developing the law as a science.' In more modern times attention to precedent is essential because without it no lawyer could safely advise his client and every quarrel would lead to a law suit. Even in early times the itinerant judges adopted the doctrine of *stare decisis* (abiding by precedent), and this doctrine has been developed in modern times so that it means that a precedent binds, and must be followed in similar cases, subject mainly to the power to distinguish cases in certain circumstances, though there are other exceptions listed later in this chapter.

The modern doctrine of the binding force of judicial precedent only fully emerged when there was (a) good law reporting, and (b) a settled judicial hierarchy. By the middle of the nineteenth century law reporting was much more efficient, and the Judicature Acts 1873–75 created a proper pyramid of authority which was completed when the Appellate Jurisdiction Act 1876 made the House of Lords (now the Supreme Court) the final Court of Appeal. Judicial precedents may be divided into two kinds:

- binding precedents;
- persuasive precedents.

Before we explain the precise meaning of these terms, we have still to find out where these precedents are to be found. The answer is in the law reports, and, as we have seen, the doctrine of judicial precedent depends upon an accurate record being kept of previous decisions.

Law reports

Since 1865 law reports have been published under the control of what is now called the Incorporated Council of Law Reporting for England and Wales, which is a joint committee of the Inns of Court, the Law Society and the Bar Council. They are known simply as the Law Reports, and they have priority in the courts because the judge who heard the case sees and revises the report before publication. Nevertheless, private reports still exist, and of these the All England Reports, published weekly and started in 1936, are the only *general* reports existing in the private sector. These reports are now revised by the judge concerned with the case. The All England series now includes specialist reports entitled

Commercial Cases, also *European Cases*, together with the *All England Direct* online service. The citation of the first reports is, e.g. [2000] 1 All ER 10 (Comm), the second is cited, e.g. [2000] All ER (EC) 10, and the online reports are cited, e.g. [2000] All ER (D) 10.

In 1953 the Incorporated Council began to publish reports on a weekly basis and these are known as the Weekly Law Reports. *The Times* newspaper publishes summarised reports of certain cases of importance and interest on the day following the hearing, as do other newspapers, e.g. *The Financial Times*, *The Independent* and *The Guardian*, and there are also certain specialised series of reports covering, for example, the fields of taxation, shipping, company law and employment law. In a Practice Direction in 1990 (see *The Times*, 7 December 1990) the Master of the Rolls stated that in the House of Lords (now the Supreme Court) and the Court of Appeal the general rule was that the Law Reports published by the Incorporated Council of Law Reporting should be cited in preference to other reports where there was a choice. It is not absolutely essential that a case should have been reported in order that it may be cited as a precedent, and very occasionally oral evidence of the decision by a barrister who was in court when the judgment was delivered may be brought.

Citation of unreported cases

The issue of the citation of unreported cases was raised by Lord Diplock in the House of Lords (now the Supreme Court) in *Roberts Petroleum v Bernard Kenny* [1983] 1 All ER 564, and Sir John Donaldson, MR in *Stanley v International Harvester* (1983) *The Times*, 7 February. These have become readily available since the Lexis Computer Retrieval System, among others, came into use. Lexis records, for example, 3,000 Court of Appeal decisions a year. Of these only some 350 are reported in any of the major series such as All England, and Weekly Law Reports. These, as we have seen, are edited by the judge(s). Both judges seemed determined to discourage the growing resort by counsel to unreported cases. Indeed, in the *Stanley* case the view was that counsel should beware of citing to the courts cases which are of no great novelty or authority, but which are supplied in unnecessary profusion by computers.

Also relevant is a Practice Statement issued in May 1996 by the Master of the Rolls. It states that leave to cite unreported cases before the Court of Appeal will not usually be granted unless counsel can assure the court that the trial transcript in question contains a relevant statement of legal principle not found in reported authority and that among other things the unreported authority is not being cited as an illustration of an established legal principle.

In this connection, the case of *Hamblin v Field* (2000) *The Times*, 26 April is instructive. In hearing a bankruptcy case, the judge had been given a summary of what was a recent case. There was later an appeal to the Court of Appeal which commented on the citing of such summaries. The one in question was a Lawtel summary. Lord Justice Peter Gibson said that the object of these summaries was merely to give practitioners notice via computer that a particular case in a particular area of law had been decided. It did not appear from the summary whether the judgment was summarised by a professional lawyer still less a member of the Bar (as is usual). The intention was that Lawtel should be contacted to obtain a copy of the complete judgment. The practice of using such summaries should not be tolerated.

Reference to decided cases

Decided cases are usually referred to as follows: *Smith v Jones*, 1959. This means that, in a court of first instance, Smith was the claimant, Jones the defendant, and that the case was published in the set of reports of 1959, though it may have been heard at the end of 1958. This is called the 'short citation'. A longer citation is required if the report is to be referred to, and might read as follows: *Smith v Jones* [1959] 1 QB 67 at p 76. The additional information means that the case is to be found in the first volume of the Reports of the Queen's Bench Division, the report commencing on page 67, the number 76 being used to indicate the page on which an important statement is to be found. Where the date

is cited in square brackets, it means that the date is an essential part of the reference, and without the date it is very difficult to find the report in question. For many years now the Incorporated Council's reports have been written up in a certain number of volumes each year. It will be seen that a mere reference to Vol 1 of the Queen's Bench Division will not be sufficient unless the year is also quoted. The same procedures are followed in the All England Reports.

The early reports by the Incorporated Council and other collections did not use the year as a basic item of the citation, but continued to extend the number of volumes regardless of the year. So a case may be cited as follows: *Smith v Jones*, 17 Ch D 230. It can be found by referring to Vol 17 of the Chancery Division reports, and it is not necessary to know the year in which the report was published, though this will be ascertained when the report is referred to. Where the date is not an essential part of the citation, it is quoted in round brackets. The abbreviations used in the Official Reports for the various divisions are: QB for Queen's Bench, Ch for Chancery, Fam for Family, and AC for the House of Lords (now the Supreme Court) and Privy Council (Appeal Cases). The reports of decisions of the Court of Appeal appear under the reference of the division in which they were first heard. As regards the case title petitions for leave to appeal and appeals to the Court of Appeal carry the same title as that which obtained in the court of first instance. This results in the claimant being shown first in the title whether he be the petitioner/appellant or respondent in the Court of Appeal. Since a Practice Note of 1974 ([1974] 1 All ER 752), this is now true of the House of Lords (now the Supreme Court) so that appeals now carry the same title as that which obtained in the court of first instance, though in the Official Reports the reference AC is still used in House of Lords (now the Supreme Court) and Privy Council cases.

Media-neutral citations

Decided cases in the High Court and above are now given what are called media-neutral reference numbers. Examples are EWHC (QB) or (Ch) or (Fam) 103, say. These numbers cover the three divisions of the High Court in England and Wales and sometimes (Admin) may be found to indicate the Administrative Court. For the Court of Appeal the references are EWCA Civ 289, say, for the Civil Division and Crim for the Criminal Division. For the House of Lords (now the Supreme Court) the citation is EWHL 421, say. In all cases the year of the case is in square brackets, i.e. [2009].

The numbers are media neutral because they do not relate to a publication such as *The Times* or the All England Law Reports and so on. However, if the case is reported in a publication such as *The Times* or the All England Law Reports that reference appears after the media-neutral one. These numbers do not relate in any way to a computer or other report of the case but would assist in identifying a case in court records or for identifying a transcript. It is an advance on the citation '(unreported)'.

A practitioners' text would be expected to include these media-neutral citations. However, since they are of no assistance in ascertaining the facts of the case in themselves and will assist only those who wish to purchase expensive transcripts, they are not included in this text.

Precedent – generally

We are now in a position to refer to a decided case but we still have to find out where the precedent is to be found, since the whole of the case is reported, and the judge may have said things which are not strictly relevant to the final judgment. We must know what to take as precedent, and what to ignore, so that we can find what is called the *ratio decidendi*. The doctrine of precedent declares that cases must be decided in the same way when their *material* facts are the same. The *ratio* is therefore defined as the *principle* of law used by the judge to arrive at his *decision* together with his *reasons* for doing so. To take an example from contract law, in *Household Fire Insurance Company v Grant* (1879) (see Chapter 16) the court *decided* that a letter of acceptance took effect when it was posted, the *reason* behind this *principle* being that the Post Office was the common agent of the parties.

The *ratio decidendi* of a decision may be narrowed or widened by a subsequent judge before whom the case is cited as an authority. Although a judge will give reasons for his ruling, he is neither concerned nor obliged to formulate *all* the possibilities which may stem from it. Thus, the eventual and accepted *ratio decidendi* of a case may not be the *ratio decidendi* that the judge who decided the case would himself have chosen, but the one which has been approved by subsequent judges. This is inevitable, because a judge, when deciding a case, will give his reasons but will not usually distinguish in his remarks, in any rigid or unchangeable way, between what we have called the *ratio decidendi* and what are called *obiter dicta*. The latter are things said in passing, and they do not have binding force. Such statements of legal principle are, however, of some persuasive power, particularly the *dicta* of cases heard in the House of Lords (now the Supreme Court).

The reason why *obiter dicta* are merely persuasive is because the prerogative of judges is not to make the law by formulating it and declaring it (this is for the legislature) but to make the law by applying it to cases coming before them. A judicial decision, unaccompanied by judicial application, is not of binding authority but is *obiter*. A judge does sometimes indicate which of his statements are *obiter dicta*. For example he may say: 'If it were necessary to decide the further point, I should be inclined to say that . . .' What follows is said in passing.

It may, therefore, be said that the *ratio decidendi* of any given case is an abstraction of the legal principle from the *material* facts of the case and the *decision* which the judge made thereon, together with his *reasons* for so doing. Of course, the higher the level of abstraction, the more circumstances the *ratio decidendi* will fit. Let us take the following fact situation: 'At 12 noon on a Saturday A, a woman aged 30, drove a car through the centre of Manchester at 80 mph. She mounted the pavement and injured B, an old man of 90. B sued A and the judge found that she was liable.' If a subsequent judge thinks that the principle in *B v A* should be restricted he will tend to retain many of the facts of the case as material. If he thinks that the principle should be extended, he will not regard many of the facts of the situation as material and so produce a broad principle of wide application. Thus, a very narrow *ratio* would be as follows: 'If a woman aged 30 by the negligent driving of a car injures an old man of 90, she is liable to compensate him in damages.' However, the law of negligence is a much wider principle and the *ratio* is: 'If A, by negligence injures B, A is liable to compensate B in damages.'

The same principles of abstraction apply when a judge chooses to follow *obiter dicta*. This is well illustrated by the way in which the decision of the House of Lords (now the Supreme Court) in *Donoghue v Stevenson*, 1932 was developed to produce the modern doctrine of negligence (see further Chapter 26).

Binding force – generally

It is now necessary to examine which precedents are binding, and this depends also upon the level of the court in which the decision was reached. (It would be useful to consider again at this point the diagrams in Chapter 4 which deal with the structure of the civil and criminal courts.)

The Supreme Court (formerly House of Lords)

The rules regarding precedent that applied to the House of Lords now apply to the Supreme Court. The House of Lords was bound by its own decisions (*London Street Tramways v London County Council* [1898] AC 375), except, for example, where the previous decision had been made *per incuriam*, i.e. where an important case or statute was not brought to the attention of the court when the previous decision was made. However, in July 1966, the House of Lords abolished the rule that its own decisions on points of law were absolutely binding upon itself. The Lord Chancellor announced the change on behalf of himself and the Lords of Appeal in Ordinary in the following statement:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.

A Practice Direction issued in March 1971 by the Appeal Committee of the House of Lords (now the Supreme Court) requires lawyers concerned with the preparation of cases of appeal to state clearly in a separate paragraph of the case any intention to invite the House to depart from one of its own decisions.

The declaration was not used for over 20 years to overrule decisions in the field of criminal law. It has now been used in the context of crime. For example, in *R v Howe* [1987] 2 WLR 568, the House of Lords (now the Supreme Court) overruled its previous decision in *DPP for Northern Ireland v Lynch* [1975] 1 All ER 913 which had decided that duress could be a defence in a prosecution for murder. *R v Howe* removes the defence of duress from the law relating to murder altogether so that the defence is now never available to any participant in murder.

Schorsch Meier GmbH v Hennin, 1975 – A case leading to the use of the 1966 declaration (15)



Miliangos v George Frank (Textiles) Ltd, 1975 – The declaration applied (16)

The Court of Appeal

On the next rung of the hierarchy there is the Court of Appeal (Civil Division), and this court is bound by its own previous decisions, as well as by those of the House of Lords (*Young v Bristol Aeroplane Co* [1944] 2 All ER 293). There are, however, two main exceptions to the above rule.

- (a) If there are two conflicting decisions of its own on the case before it the court may choose which one to follow.

The court may follow the most recent decision but this is not necessarily the rule. Where the *ratio* of an earlier decision is directly applicable to the circumstances of the case currently before the court but that decision has been wrongly distinguished in a later decision of the Court of Appeal, it is in principle open to the Court of Appeal to apply the *ratio* of the earlier decision and to decline to follow the later one (see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] All ER (D) 472. A case concerned with whether a notice required to be served under a rent review clause in a lease had been served in sufficient time to make the rent review valid).

- (b) The court will not follow a decision of its own if that decision is inconsistent with a decision of the House of Lords (now the Supreme Court) or the Judicial Committee of the Privy Council. Thus, *Re Polemis* [1921] 3 KB 560, a Court of Appeal decision which said that in negligence all *direct* harm was actionable even if not foreseeable, was disapproved of by the Privy Council in *The Wagon Mound* (1961) (see Chapter 25) and was not subsequently followed by the Court of Appeal.

The decisions of the Court of Appeal (Civil Division) are binding on the lower civil courts, i.e. the High Court and the County Court.

On the criminal side, the Court of Appeal (Criminal Division) is bound by the decisions of the House of Lords (now the Supreme Court) and normally by its own decisions and those of the former Court of Criminal Appeal and the earlier Court for Crown Cases Reserved. However, an ordinary court of three judges in the Criminal Division may deviate from previous decisions more easily than the Civil Division because different considerations apply in a criminal appeal where the liberty of the accused is at stake and in any case a full court of the Criminal Division can overrule its own previous decisions.

In this connection, a court of five judges including the Lord Chief Justice declined to follow and overruled a previous decision of the Court of Appeal Criminal Division stating in particular that the decision could create problems if allowed to stand and bind the Criminal Division because in criminal cases there were many situations where in practice there was little prospect of an appeal to the House of Lords (see *R v Simpson* (2003) *The Times*, 26 May).

A full court generally consists of five judges instead of three as is usual in an ordinary sitting. A decision of the Civil Division is not binding on the Criminal Division and vice versa. Decisions of the Criminal Division are binding on lower criminal courts, i.e. the Crown Court and Magistrates' Courts.

It is perhaps worth noting that Lord Denning in *Davis v Johnson* [1978] 1 All ER 841 took the view that the Court of Appeal should take for itself guidelines similar to those taken by the House of Lords (now the Supreme Court) in 1966 to depart from a previous decision of its own where that decision was clearly wrong. However, Lord Denning does not appear to have received sufficient support for this view and a declaration on the lines he suggested has not been made.

However, it was decided in *Williams v Fawcett* [1985] 1 All ER 787 that the Court of Appeal could depart from one of its own previous decisions where that decision was felt to be wrong in law and there was unlikely to be an appeal to the House of Lords (now the Supreme Court) by a person whose liberty was at stake.

R v Gould, 1968 – Precedent in criminal appeals (17)



Divisional Courts

Divisional Courts are, in civil cases, bound by the decisions of the House of Lords (now the Supreme Court), the Court of Appeal (Civil Division) and generally by their own previous decisions. However, a Divisional Court of Queen's Bench decided in *R v Greater Manchester Coroner, ex parte Tal* [1984] 3 All ER 240 that a Divisional Court would normally follow a previous decision of another Divisional Court but could in rare cases exercise its power to refuse to follow a previous Divisional Court decision if the court was convinced that the previous decision was wrong. In criminal cases there is, under ss 12–15 of the Administration of Justice Act 1960, an appeal from the Divisional Court of the Queen's Bench Division straight to the House of Lords (now the Supreme Court), and the Divisional Court is not bound by the decisions of the Criminal Division of the Court of Appeal. The decisions of Divisional Courts are binding on judges of the High Court sitting alone and on Magistrates' Courts but not on Crown Courts (see below).

The High Court

At the next lower stage, a High Court judge, although bound by the decisions of the Court of Appeal and the House of Lords (now the Supreme Court) is not bound by the decisions of another High Court judge sitting at first instance (*Huddersfield Police Authority v Watson* [1947] 2 All ER 193). Nevertheless, such a judge will treat previous decisions as of strong persuasive authority. If a judge of the High Court refuses to follow a previous decision on a similar point of law, the Law Reports will contain two decisions

by judges of equal authority and the cases will remain in conflict until the same point of law is taken to appeal before a higher tribunal whose decision will resolve the position (and see the statement of Nourse, J in the *Colchester Estates* case considered later in this chapter).

The Crown Court

A judge sitting in the Crown Court, the jurisdiction of which is largely confined to criminal cases, is bound by decisions made in criminal matters by the House of Lords (now the Supreme Court) and Court of Appeal (Criminal Division) but not apparently by decisions of the Divisional Court of the Queen's Bench Division (*R v Colyer* [1974] Crim LR 243). A judge sitting in the Crown Court and exercising a civil jurisdiction, e.g. licensing, is bound by the decisions of the House of Lords (now the Supreme Court), Court of Appeal and the High Court.

Magistrates' Courts and County Courts

These courts are bound by the decisions of the higher courts. Their own decisions are not reported officially and have no binding force on other courts at the same level.

The Employment Appeal Tribunal (EAT)

As regards this tribunal, only the decisions of the Court of Appeal and the House of Lords (now the Supreme Court) on matters of law are binding, though the decisions of the earlier Industrial Relations Court and the High Court in England are of great persuasive authority and the tribunal would not lightly differ from the principles which are to be found in those decisions (*per* Bristow, J in *Portec (UK) Ltd v Mogensen* [1976] 3 All ER 565 at p 568). These remarks remain valid even though the *Portec* case was overruled in terms of its decision by *Wilson v Maynard Shipbuilding Consultants AB* [1978] 2 All ER 78. Nevertheless, Wait, J, who as President of the EAT presided in *Anandarajah v Lord Chancellor's Department* [1984] IRLR 131, ruled that no assistance could be derived from precedent in deciding whether a dismissal was unfair (see further Chapter 36). The EAT is not bound to follow its own decisions and the decision of an employment tribunal binds no one except the parties to the dispute.

The Judicial Committee of the Privy Council

The decisions of the Judicial Committee of the Privy Council are in general not binding, either on the Committee itself or on other English courts, save the Ecclesiastical and Prize Courts. Its decisions are technically only of persuasive authority in English law, and this derives from the fact that the Judicial Committee hears appeals from overseas territories. Thus, when it hears an appeal from Belize, it may not apply a rule of law used (say) in a previous appeal from the Channel Islands. As regards the relationship of the Judicial Committee and the House of Lords (now the Supreme Court), where the law applicable to the case is English, the Committee will feel bound to follow a relevant decision of the House of Lords but not otherwise (*Tai Hing Cotton v Liu Chong Hing Bank* [1985] 2 All ER 947).

Although in general terms the decisions of the Privy Council are persuasive only, there may rarely be cases where a decision of the Privy Council can overrule a decision of the House of Lords.

This occurred in a case concerning provocation as a defence to a charge of murder which, if accepted by the court, can reduce the charge to one of manslaughter. The difficulty (as Chapter 33 will further illustrate) is whether in the act put forward as a provocation any special characteristics of the defendant can be taken into account as leading him to be provoked when a person without those characteristics would not. In *R v Smith (Morgan James)* [2000] 4 All ER 289, the House of Lords ruled that the defendant's depressive illness could be taken into account. In *Attorney-General for Jersey v Holley* [2005] 2 AC 580 the Privy Council ruled that alcoholism could not. The matter came before the House

of Lords in *R v James* [2006] 1 All ER 759. James had killed his wife after they had separated and psychiatric evidence was adduced and James sought to regard this as a special characteristic, though the killing was not spontaneous. Should the House of Lords follow *Holley* or *Smith*, bearing in mind that the Privy Council in *Holley* had said *Smith* was wrongly decided?

The House of Lords followed *Holley*. Why? Because the Privy Council which heard the *Holley* case consisted of nine of the Lords of Appeal in Ordinary: a very strong court. We have seen that the House of Lords (now the Supreme Court) can overrule its own decisions and in effect surely that is what it was doing here under the guise of the Privy Council.

General exceptions to the rule of binding precedent

Having examined the relationship of the above courts with regard to the rule of binding precedent, it should be noted that a court is not always bound to follow a precedent which according to the rules outlined above ought to be binding on it. It is by avoiding the following of precedents that judges can, and do, make law.

Thus, when the court in question is invited to follow a binding precedent, it may refuse to do so, for example:

(a) by distinguishing the case now before it from the previous case on the facts. A case is *distinguished* when the court considers that there are important points of difference between the facts of the case now before it and a previous decision which it is being invited to follow. As Lord Halsbury said in *Quinn v Leatham* [1901] AC 495:

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are found.

This process of narrowing down the implications of the *ratio decidendi* of a previous case by 'distinguishing' is a device often used by a court which does not wish to follow an earlier decision which would otherwise be binding on it.

If a court deems that an earlier case was wrongly decided but cannot overrule it because the *ratio decidendi* of the case now before it does not cover all the matters raised in the earlier case, it may, by way of *obiter dictum*, *disapprove* the earlier case which is then to some extent affected as a precedent. Examples of distinguishing are to be found by comparing the decisions in *Ingram v Little* (1961) and *Lewis v Averay* (1971) (see Chapter 19);

(b) by refusing to follow the previous case because its *ratio* is obscure. Thus, in *Harper v NCB* [1974] 2 All ER 441 the Court of Appeal refused to follow the decision of the House of Lords in *Central Asbestos Co v Dodd* [1972] 2 All ER 1135 because the majority of three to two judges who found for Dodd left behind no discernible *ratio*. It was unclear whether the decision that Mr Dodd, who brought an action against his employers because he contracted an industrial disease in the course of his employment after the time limit of three years had elapsed, succeeded (i) because he knew that the injury arose from his employment but did not know that he could sue; or (ii) because he knew he could sue but not that the disease arose from his employment;

(c) by declaring the previous case to be in conflict with a fundamental principle of law, as where, for example, the court in the previous case has not applied the doctrine of privity of contract (see *Beswick v Beswick* (1967) (see further Chapter 17));

(d) by finding the previous decision to be *per incuriam*, i.e. where an important case or statute was not brought to the attention of the court or ignored (see view of Bristow, J in *Miliangos*) when the previous decision was made;