Major legal systems in the world today.

matters respecting the ownership and possession of land[8] and serious criminal matters affecting the peace of the kingdom. Three different courts—Court of Exchequer, Court of Common Pleas, Court of King's Bench—heard matters coming within each of these categories at the beginning, but very soon this division of jurisdiction disappeared and each of the three courts at Westminster could hear any dispute brought before the royal courts.

Apart from these three categories, all other disputes were settled by the Hundred or County Courts, feudal courts, ecclesiastical courts—and later, as well, when this became necessary, by different commercial or municipal courts. The privilege of rendering justice was granted for certain types of cases to the latter and they applied the international customary law of commerce, the *lex mercatoria* or *ley merchant*, or municipal regulations.

274. Extension of royal jurisdiction

The powers of the king grew as sovereign justiciar. It was, moreover, in the interests of the chancellor and the royal judges that they hear more and more cases because of the fees accruing from the administration of justice. The courts were also prompted to increase their jurisdiction upon the solicitation of the people in whose eyes royal justice appeared superior to that of any other court. It was only the royal courts that had the means to summon witnesses and to enforce judgments; and only the king, apart from the church, could require the swearing of an oath. The royal courts, therefore, employed more modern procedures and submitted the judgment of cases to the verdict of a jury,[9] whereas other courts perpetuated their out-moded procedures and archaic system of making proof.

The royal courts thus gradually enlarged their jurisdiction and, by the end of the middle ages, had become in fact the only courts of justice. The feudal courts were eclipsed, as the Hundred Courts had been; municipal and commercial courts handled matters of

[8] An owner is master in his own house, but who is an owner? To decide this it was natural to resort to the royal courts. Questions of rights to possession of land concerned the public order and peace of the kingdom.

[9] For the conditions in which the jury appeared and developed in England, and its considerable influence upon English procedure right up to the present time, *cf.* Hamson (C. J.) and Plucknett (T. F. T.), *The English Trial and Comparative Law* (1952).

only minor importance; and the ecclesiastical courts only heard cases in relation to marriage and the discipline of clergy.

275. Writs

The royal courts, however, only became the ordinary courts of general jurisdiction in the nineteenth century. Until 1875 they remained, at least in theory, special courts to which the citizen had no automatic access.

Historically, then, to press a claim before the king's courts was not a right but a favour which the royal authority might or might not grant. The person who solicited this privilege had first of all to address his request to an important royal official, the Chancellor, asking him to deliver a writ (*breve*), the effect of which was to enable the royal courts to be seized of the matter upon the payment of fees to the Chancery. Apart from this procedure the judges could only be seized directly upon a complaint or petition (*querela*, *billa*). Some of the writs appear to have been the crystallisation of judicial practice established on the basis of such complaints.[10]

It was not automatic that a writ would issue from the royal Chancery or that the judges would be convinced that they should take up a matter upon which a complaint was lodged. Royal authority in the thirteenth century was not such that the chancellor might issue a writ or the judges consent to render judgment in all cases. For some considerable time, each instance had to be individually examined to determine whether it was expedient that the writ should issue, and the list of established situations where writs were granted automatically (*brevia de cursu*) was slow to grow. A first list of writs, drawn up in 1227, reveals that there were 56, and there were only 76 in 1832 when the system was considerably modified.

The extension of the jurisdiction of the royal courts is not, however, to be measured by the increase in the list of the *brevia de cursu*, nor is it to be explained (contrary to what was believed and taught for many years) by the passage of the *Statute of Westminster II* of 1285[11] which authorised the chancellor to deliver writs *in con-*

[10] Milsom (S. F. C.), *Historical Foundations of the Common Law* (1969).

[11] Plucknett (T. F. T.), "Case and the Statute of Westminster II" 31 Col. L. Rev. (1931) 778–799.

simili casu, that is to say in instances having great similarity to others for which the delivery of the writ was already established. The technique adopted was rather as follows: the plaintiff, in his "declaration," the initial step in the procedure, explained the details of the facts of the case and prayed the royal judges to hear the case and render judgment. The new instances in which they did admit their jurisdiction were for this reason called "actions on the case" (actions *super casum*). In time these actions multiplied and were given special titles in the light of the facts which justified them—actions of assumpsit, deceit, trover, negligence and so on.

276. "Remedies precede rights"

The procedure observed before the royal courts at Westminster varied according to the manner in which the suit was begun. To each writ there corresponded in effect a fixed procedure which laid down the others steps to be followed, the handling of incidental questions, the admissibility of evidence, and the means of enforcing the decision. In any given procedure the plaintiff and defendant had to be styled by specific wording; their inappropriate use in another procedure would be fatal to the proceeding. In one type of action the jury would be employed; in another, the evidence was adduced by "wager of law" (the action would fail if the defendant were able to produce the required number of witnesses who attested under oath to his credibility). In some actions judgment could be rendered against the defendant after his default to appear; in others not. The features of this system applied to the procedures of whichever writ was seen as most appropriate in the circumstances. A procedure very generally followed was that of the writ of "trespass," which was regarded as the most modern and most satisfactory.[12]

Procedural considerations, therefore, had a primary importance in the development of English law. While jurists on the continent turned their attention principally to the determination of the individual's rights and duties (*i.e.* substantive legal rules), English jurists concentrated on matters of form and questions of procedure. If the historical background of English law is to be grasped, the importance of procedure must always be borne in mind.

[12] Maitland (F. W.), *The Forms of Action at Common Law* (2nd ed., 1948), p. 52.

Remedies precede rights. The Common law, in its origins, was made up of a number of procedures—"forms of action"—upon the completion of which a judgment would be rendered, although the substantive principle serving as the basis for the decision might itself be uncertain. The first and foremost consideration for the litigant was to select the correct form of action or writ by which the court could be seized, and thereby convince the court that it had jurisdiction in the matter, and then to carry through with the formalistic procedure laid down. What would the judgment be? That question had no certain answer—the Common law was only gradually evolving substantive principles defining individual rights and duties.

277. Contemporary interest of this history

These circumstances in which the Common law developed are not of merely historical interest. From at least four points of view they have left their mark upon English law and even today their influence can be detected. English jurists have, in the first place, traditionally emphasised matters of procedure. Secondly, many of the categories and concepts of English law have been shaped by these historical circumstances; they have, in the third place, led to the rejection in English law of the distinction between public and private law. Finally the early development of the Common law was an obstacle to the reception of Roman law categories and concepts. Each of these points will now be discussed.

278. Emphasis upon procedure

The principal concern of English jurists until the nineteenth century was directed to the various formalistic procedures put into operation by the writs, rather than to the elaboration of those principles upon which just solutions to disputes would be based. *Remedies precede rights.* Attention was focused on procedures because the procedures had a single purpose: the formulation of questions of fact to be put to the jury. It must not be lost from view that even as late as 1856 actions instituted in the Common law courts involved submissions to a jury and that the other more archaic procedures that did not rely upon this institution had only gradually been abandoned. English law was thus deeply marked by a preeminence given to matters of procedure.

It was, therefore, within the framework of these various procedures available to litigants that the development of English law was—indeed, had to be—organised. The law, to adopt the striking phrase of Sir Henry Maine (1822–1888), appears to have been "secreted in the interstices of procedure."[13] The Common law did not appear to be so much a system attempting to bring justice as a conglomeration of procedures designed, in more and more cases, to achieve solutions to disputes. The twelfth century author Glanvill (d. *circa* 1190),[14] and the thirteenth century author Bracton (*circa* 1210–1268),[15] describing the whole of English law by means of an explanation (in Latin) of its principles, gave analyses of the various writs available in the courts of Westminster. The chronicles known as the *Year Books*, written in Law French, which inform us of the state of the law between 1290 and 1536, concentrate principally on relating matters of procedure and often omit altogether whatever solutions were given in the disputes themselves which they recorded.[16]

279. Example drawn from law of contract

In order to illustrate the artificiality in the development of English law, an example may be drawn from the history of the law of contract.

In the thirteenth century, at the time of the *Statute of Westminster II*, contract fell within the jurisdiction of various courts—ecclesiastical, municipal or commercial. The courts of Westminster did not hear cases on contract. Glanvill, at the end of the twelfth century, states with simplicity: "Private covenants are not generally protected in the courts of our lord the king." There were no writs or any procedures for contractual matters through which, in fact, the royal courts could be seized. What was to be done? In some cases the notion of ownership sufficed. The lessee, the borrower, the person who had possession of property for another or

[13] Maine (Sir Henry S.), *Early Law and Custom* (1861), p. 389.

[14] *The Treatise on the Laws and Customs of England commonly called Glanvill.*

[15] *De legibus et consuetudinibus Anglie* (On the Laws and Customs of England) written in the 1250s.

[16] The *Year Books* appear to have been used as student texts. Some were printed as early as 1482, and a further selection was published in 1679 by Sergeant Maynard: *Reports del Cases en Ley*. A critical edition was undertaken at the beginning of this century under the auspices of the Selden Society. *Adde* Lambert (J.), *Les Year Books de langue française* (1928).

transported it for him—these persons were bound because they detained, without title to it, the property of another rather than because of any agreement, and the *writ of detinue* was sufficient to sanction those situations. In other instances the obligation to perform a promise was linked to the *form* in which it was entered into, and the defendant was bound upon the *writ of debt* because he had described himself as a debtor in a formal document without, however, any enquiry being made as to whether he really did consent.

But the *writ of detinue* and the *writ of debt* did not cover all possible cases and the procedures involved in each were not entirely satisfactory. For these two reasons an effort was made to find other means for developing the law of contracts, and the form of action known as *trespass* was used. The object of the writ of trespass was to sanction an act of a wrongful nature committed by the defendant, such as an unjust blow or attack on the person, or some harm to land or goods. As such, it had nothing to do with contracts, but the pleaders endeavoured to persuade the court in cases where a promise was made but not fulfilled that the facts of the case justified that it be treated like those which had been previously considered matters of *trespass*. Gradually the royal courts accepted this line of reasoning. First they sanctioned contractual engagements in cases of *misfeasance*, that is to say an act committed in the performance of the contract by one of the parties causing damage to the person or goods of the other party. More than a century elapsed however before the courts accepted to sanction in addition to *misfeasance* the case of *non-feasance*: where a person who has entered into an agreement simply did not perform it at all. It was a particularly delicate matter to admit an action *on the case* when the plaintiff could still act by using the action of *debt*; it was accepted where an express promise to perform the undertaking (*special assumpsit*) had been made before it was admitted that such an obligation was itself implicit in any promise (*indebitatus assumpsit*); the decision of 1602 which did make this step was considered a victory and it is really only from this date that the English law of contract begins.[17] A long time and much effort were necessary for the action of *assumpsit*, an off-shoot of the delictual action of *trespass on the case*, to be freed from the rules linked to its delictual origin, such as those preventing transmissibility of the action,

[17] *Slade's case* (1602), 4 Co. Rep. 92a, 76 E.R. 1073.

requiring proof of fault and establishing the precise amount of damages resulting from non-performance.

280. Categories and concepts of English law

The forms of actions have now been abolished for more than one hundred years, but the rules and categories of English law still bear witness to the obstacles which prevented, because of procedure, a fully rational development of its institutions. "The forms of action we have buried," said Maitland (1850–1906), the great historian of English law, "but they still rule us from their graves."[18] The remark was significant.

Take another example from the law of contracts: the Common law could only allow for the awarding of damages as a sanction for the breach of contracts, because the ancient action of *assumpsit*, a derivative of the action of *trespass*, could only so conclude. Moreover, for English law, the concept of contract only included those agreements which, until the middle of the nineteenth century, were sanctioned by the action of *assumpsit*: it included neither "gratuitous contracts" nor those involving the restoration of a thing of which the plaintiff remained owner (the cases of *bailment* or what in the Romano-Germanic laws are known as "deposit," "loan for use" and the carriage of goods, in which the plaintiff has delivered his property in bailment ("bailed" it) to another), nor certain kinds of agreements in which English law sees a "trust."

The grip of the past is even more evident in the law of *torts*, that is to say the law of liability for civil wrongs (delicts). English law never achieved a general principle linking this liability to a comprehensive idea of fault or to the custody of property, but developed a series of special or nominate civil wrongs: deceit, nuisance, trespass, conversion, libel and slander, the "rule in *Rylands* v. *Fletcher*," and so on. Some of these civil wrongs correspond to the ancient writs; others, having been introduced by actions "on the case," are of more recent date. The important point to note is that an English jurist has difficulty in freeing himself from the way of thinking produced by these ancient procedures. It was only with some effort that a general principle of civil liability was developed

[18] Maitland (F. W.), *The Forms of Action at Common Law* (2nd ed., 1948), p. 2.

from a nominate tort (that of *negligence*), and even today, alongside this principle, there remain special regimes for a number of nominate torts.

281. Wasting away of private law

The royal courts enlarged their jurisdiction by developing the basic idea that their intervention was justified in the interests of the crown and kingdom. Other courts in this way of thinking were, therefore, available only if private interests were in question. But these other courts gradually declined, and with them the very idea of private law disappeared in England. All cases submitted to the English royal courts thus had the appearance, as it were, of being public law disputes.

The "public law" aspect of English law emerges from an examination of the special technique of the *writ* by which the action before the royal courts began. The writ was not simply the plaintiff's authorisation to act; technically it was an order given by the king commanding his officers to order the defendant to act according to the law by satisfying the claim of the plaintiff. If the defendant refused to obey the order, the plaintiff could then proceed against him; his action before the royal court would be justified not so much because of the opposition made to his claim but because of the defendant's disobedience of an order of the administration. The English trial is a matter of public not private law. It was essentially a debate as to whether an administrative act, the writ, issuing from the royal chancery, was properly issued and whether the order it embodied to the defendant was to be maintained. The trial was not for the purpose of setting aside an administrative act prejudicial to the person who requested it; on the contrary, he who obtained and meant to take advantage of it instituted an action in order that the procedure, if contested, be confirmed.

282. Substantive law: reception of Roman law impossible

Where did the judges find the substantive rules that would provide solutions to disputes brought before them?

The answer given in England is different from that on the European continent at the same period; and the result has been that for centuries, and indeed right up to the present time, English law has

a different appearance from continental laws. The courts of Westminster were in a situation very dissimilar to that of the various traditional European continental courts which, rather than wasting away, continued to function, as they had in the past, with changes only in their composition and their internal rules and an increasing submission to royal authority. It was only natural that they continue to render justice according to the custom of their territory, and changes on this matter came about very slowly. From the beginning these courts had general jurisdiction in all litigation; they were never restricted to only certain kinds of cases made possible through special procedures. And since they were free from such obstacles, the continental courts were able to modernise their procedures generally by turning to the new, written procedures of Canon law. Having general jurisdiction, they were also able to concentrate upon the systematic development of principles of justice and to allow themselves to be guided in this respect by the model offered by Roman law.

In England on the other hand the situation was totally different because the royal courts, the courts of Westminster, were special courts only having jurisdiction in special cases for each of which there was a particular procedure; they had come into existence because of a completely new factor—the development of a centralised royal power. The royal courts, emerging as independent branches of the *curia regis*, were first of all political rather than judicial organs because it was intended that they resolve problems involving the interest of the king and the kingdom—in other words, the general interest—and not principally, in theory at least, the private interests of individuals. For the new kinds of problems that had arisen a new kind of law was therefore required. The courts of Westminster could not apply local customs because these had not evolved with these new kinds of problems in view. And of course the overriding necessity that all questions be handled within the traditional procedural framework was a major obstacle to the reception of the rules and concepts of Roman law.

In these circumstances, the courts of Westminster had to construct a new law. Many of its elements derived from different local English customs, selected and synthesised into a coherent whole. It also took some elements from Roman law; it is established, for

instance, that in Bracton's thirteenth century description of legal institutions much was borrowed from the post-glossator, Azo (*d.* 1230).[19] All these elements, however, were re-shaped and melded in the procedural moulds used by the courts. Moreover, their origin was never divulged by the judges; the Common law, constructed decision by decision by the courts, was presented as essentially a work of reason (*resoun*); it expressed the idea of justice and political expediency of the thirteenth century, its great period of development. Later, the so-called *general immemorial custom of the realm*, of which the judges were the oracles, was said to be the basis for this work of reason. But one must not be misled by such language: this general immemorial custom was a pure fiction; the only true customs existing in England in the twelfth and thirteenth centuries were *local* customs. It was in order to provide the Common law with a foundation in agreement with the traditional, canonic and Roman theories of the sources of law that this concept of general immemorial custom was, *a posteriori*, invented. It was not based on any reality.

The rigour of the Common law procedures and the need to conform to a traditional framework were the main reasons preventing the wholesale reception of Roman legal concepts in England, at a time when the courts at Westminster, extending their original jurisdiction, gradually made it complete and most often were deciding purely private law disputes. These procedures, from many points of view archaic and typically English, forced a process of "anglicisation" to take place when substantive elements were borrowed from Roman or Canon law. The complexity and technical nature of these procedures were such that they could only be learned through practice. A university education based on Roman law might very well be of some help for meditating upon the just solution for a dispute; it did not help win a trial. In England, practitioners and judges, right up to the present time, have been trained essentially in the practice of law; for them, unlike their counterparts on the continent, university training has not been either necessary or, for many centuries, even usual.

[19] Maitland (F. W.), *Select Passages from the works of Bracton and Azo* (1895); Winfield (P. H.), *Chief Sources of English Legal History* (1925), p. 60.

SECTION III—GROWTH OF EQUITY (1485–1832)

283. Need for reform of common law

Because it had developed in strict compliance with formalist procedures, the Common law was exposed to two dangers: that of not developing with sufficient freedom to meet the needs of the period and the danger of becoming paralysed because of the conservatism of the legal world of the time. After its remarkable expansion in the thirteenth century, it did not escape either of these dangers and was thus exposed to a very great risk: the formation of a rival system by which, in the course of centuries, it might be supplanted just as the classical civil law of Rome was supplanted by the law of the praetors and the local customs supplanted by the Common law itself. This rival was *Equity*.

The limited jurisdiction of the royal courts may have been tolerable so long as other courts existed alongside them to decide disputes for which Common law offered no remedy. But the decline and disappearance of these other courts made it necessary to find a corrective for the insufficiencies of the Common law.

284. Appeal to royal authority

The obstacles encountered in the administration of justice by the courts of Westminster inevitably meant that in a number of cases no just solution could be, or was in fact, found. In such a case, it came very naturally to the mind of the disappointed party to seek another way of obtaining redress: a direct appeal to the king, the fountain of all justice and favour. If the royal courts were unable to give satisfaction could not the king remedy the malfunctioning of his courts? To the medieval mind, this final appeal to the king was very natural and the royal courts were not offended, at least at the beginning, to see the parties requesting the King to exercise his "prerogative." After all, the royal courts themselves owed their development to the operation of the same principle—that one could, in exceptional cases, appeal to the king to obtain justice.

From the fourteenth century it happened, therefore, that private persons unable to obtain justice from the royal courts or shocked by the solution given, addressed the king asking him to intervene as an act of royal grace "to satisfy conscience and as a

work of brotherly love." In such cases the appeal normally passed through the chancellor; as a member of the royal household and the king's confessor, he had the responsibility of guiding his conscience and would, if he thought it appropriate, transmit the request to him for judgment in his council. This recourse to the "prerogative," perfectly justifiable and unopposed so long as it remained exceptional, could not fail to give rise to a conflict when it became institutionalised and developed into a system of legal rules set up in opposition to the Common law.

That precisely is what happened at the time of the Wars of the Roses (1453–1485) when it was difficult for the king himself to sit as judge in his own council. In the fifteenth century the chancellor became a more and more autonomous judge deciding alone in the name of the king and council upon a delegation of their authority. His interventions were, in addition, more and more frequently requested because procedural difficulties and judicial traditionalism stood in the way of the necessary development of the Common law. His decisions, in the beginning made on the basis of "the equity of the case", became increasingly systematised and the application of "equitable" doctrines soon amounted to additions and correctives to the "legal" principles applied by the royal courts.

285. Equity under the Tudors

Tudor absolutism of the sixteenth century was based on an extensive use of the royal prerogative. In criminal law, the famous Court of "Star Chamber" (*camera stellata*), after having been usefully employed to re-establish order following the civil war, was a formidable threat to the liberty of subjects. In civil matters, the equitable jurisdiction of the chancellor, founded as well on royal prerogative, was also considerably broadened. After 1529, the chancellor no longer served as confessor to the sovereign and was not an ecclesiastic but usually a lawyer. The chancellor examined the petitions addressed to him as a real judge, and in observation of a written procedure inspired by Canon law, one entirely different from the principles of procedure observed at Common law. The substantive principles he applied were also largely taken from Roman law and Canon law to whose reception procedure was no obstacle in this case as it was at Common law. These principles,

rather than the very often archaic and outmoded Common law rules, generally gave more satisfaction to the Renaissance ideas of social good and justice. And because of their concern for justice and good administration, the English sovereigns of this period favoured the chancellor's jurisdiction.

The play of political considerations was also in its favour. The private, written and inquisitorial procedure of Chancery which never made use of the jury, rather than the oral and public Common law procedure, may also have been preferred by a monarch of authoritarian disposition. There was also probably some idea that if Roman law were to be adopted by the chancellor the law would then be reduced to a simple private law and lawyers' work, as in Rome, would then be limited to private relations, thereby giving greater scope to royal absolutism and executive discretion. *Princeps legibus solutus est.*[20] *Quod principi placuit, legis habet vigorem.*[21] How were such attractive maxims found in the Digest to be resisted? It may also have seemed simpler, in fact, to evolve an entirely new legal system and judicial administration than to attempt to bring about the reforms in the Common law that were so necessary at this time. English law thus narrowly escaped joining the European continental legal family in the sixteenth century because of the success of the chancellor's equitable jurisdiction and the decay of the Common law.[22] There was a risk that disputing parties would abandon the Common law courts and that these would fall into disuse, just as the Hundred Courts were deserted and abandoned three centuries before when the courts of Westminster, then in their full glory, offered a more modern justice administered according to a procedure superior to the traditional methods.

286. Compromise between common law and equity (1616)

Several reasons explain why this did not take place. The resistance of the common lawyers had to be taken into consideration by

[20] Digest, 1.3.31. (The prince is above the law.)
[21] Digest, 1.4.1. (That which receives the assent of the prince has force of law.)
[22] Maitland (F. W.), *English Law and the Renaissance* (1901). It was Roman law and Canon law rather than English law to which reference was made when, in the seventeenth century, the courts set up in India were directed to apply the principles of "justice, equity and good conscience." *Cf.* Derrett (J. D. M.), "Justice, Equity and Good Conscience" *in* Anderson (J. N. D.) ed., *Changing Law in Developing Countries* (1963) pp. 114–153.

the monarchy. To defend their position and their work, and to support them against royal absolutism, the Common law courts found an ally in Parliament. The poor organisation of Chancery, its congestion and venality were all weapons in the hands of its enemies. The revolution that might have brought England into the family of Romanist laws did not take place. In the end, a compromise was worked out which left the Common law courts and the court of the chancellor side by side, in a kind of equilibrium of power.

This compromise was not the result of legislation or a formal decision by royal authority or the judges. Very much the contrary. At the end of an extremely violent conflict[23] between Chancery and the Common law courts represented by Chief Justice Coke (1552–1634), who was also leader of the liberal parliamentary opposition, James I pronounced in favour of the former in 1616. The danger, however, had been serious and the chancellors were wise enough not to abuse their victory, and thereby disarmed parliamentary hostility. Parliament was, in truth, more interested in ending another abuse of royal prerogative, the Court of Star Chamber (abolished in 1641), than it was in the disappearance of Equity as such. A tacit understanding was established on the basis of the *status quo*. It was understood that the jurisdiction of the chancellor was to remain but that it would attempt no new encroachments at the expense of the Common law courts; it would also continue to adjudicate according to its precedents and thus escape from the criticism that it was arbitrary. It was further understood that the king would no longer use his prerogative to create new courts independent of the established Common law courts. Even the nature of Equity itself was to change[24]: the chancellor, as a legal or political figure, was no longer seen as judging on the basis of morality alone and tended to act more and more as a true judge. Further, after 1621, the control by the House of Lords over the decisions of the court of Chancery was admitted. In

[23] The decisions or decrees of the Court of Chancery were not directly enforceable; their effectiveness, however, was assured by the possibility of imprisoning the contravening party or by the sequestration of his property. The common lawyers declared that they considered a person who opposed such measures, even to the point where he had killed an officer of the Chancery charged to enforce them, as having acted in legitimate self-defence.

[24] Yale (D. E. C.), *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (1965); the introduction describes the transformation of Equity in the seventeenth century.