Seventh Edition

English Law

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English Law

Preface

to seventh edition

This edition has been substantially updated in view of the many significant changes in the law which have taken place since the last edition.

There has been a slight change in style since the opportunity has been taken in this edition to introduce rather more by way of comment on the cases in the Appendix. Some comments suggest weaknesses in the decision, while others consider the application of a decision in slightly different circumstances, thus giving the student food for thought about the case law beyond the sometimes narrow confines of the decision itself.

There are a number of matters on which changes have been made since the typescript of this edition was submitted; the more important of these are set out below.

Legal aid (p. 46 of text)

The Legal Aid Bill of 1982 will make some changes in legal aid in *criminal matters*. The main feature of the Bill is likely to be the setting up of a statutory framework for duty solicitor schemes in magistrates' courts. Unfortunately, at the time of writing it does not appear that the Bill will tackle the issue of the inconsistent legal aid grant/refusal rate in magistrates' courts. This is apparently seen as a long-term problem which requires further research.

Coroners—treasure trove (p. 87 of text)

The Antiquities Bill, 1982, which is currently before Parliament, changes the common law of treasure trove so that it includes metals which are not pure gold or pure silver. The Bill, when it passes into law, will reverse the decision in *Attorney-General of the Duchy of Lancaster* v. *G. E. Overton (Farms) Ltd* [1980] 3 All E.R. 503.

Companies—*ultra vires* rule (p. 210 of text)

The High Court, in *International Sales and Agencies Ltd and Another* v. *Marcus and Another* [1982] 132 N.L.J. 112, gave the first consideration to s. 9(1) of the European Communities Act, which is concerned with *ultra*

vires transactions of companies. M was a director of a money-lending company, B Ltd. F borrowed £30,000 from B Ltd. F had not repaid this loan at the time of his death insolvent. F's friend, X, who was a director of I Ltd and another company, J Ltd, told M that the £30,000 was in jeopardy. X and M came to an arrangement under which I Ltd gave B Ltd four cheques for £5,000 each, and J Ltd gave B Ltd a cheque for £10,000. The other directors and shareholders of I Ltd and J Ltd learned about these payments and caused I Ltd and J Ltd to claim repayment of the sums involved, i.e. £30,000 in total, from M and B Ltd. The payments were clearly *ultra vires* I Ltd and J Ltd and it was not contended by either side that it could be otherwise.

The claims of I Ltd and J Ltd were defended on the basis that although the cheque transactions were *ultra vires* and therefore void at common law they were protected by s. 9(1) of the ECA 1972.

Mr Justice Lawson held that the claims of I Ltd and J Ltd succeeded. M and B Ltd received the £30,000 as constructive trustees. M had actual notice that the payments were a consequence of X's breach of trust as a director of I Ltd and J Ltd; B had imputed notice by reason of M's actual notice.

Section 9(1) of the 1972 Act had no bearing on the liability of persons to return money held by them on constructive trust to its rightful owner. This decided the matter, but Mr Justice Lawson did say in passing (or *obiter*), that s. 9(1) did not apply in any event, because although the dealings of I Ltd and J Ltd were decided on by their respective directors, since X was the sole effective director to whom all actual authority to act for the boards had been effectively delegated, the payment did not arise from dealings with I Ltd and J Ltd. In other words there had been no 'dealing with a company' which s. 9(1) requires. The cheques paid out by I Ltd and J Ltd were merely used by X as part of his personal desire to be generous to M and M's company, B Ltd. Thus the dealings were with X personally, and did not come within s. 9(1).

Furthermore, the defendants could not claim the protection of s. 9(1) because the plaintiff companies could prove that neither M nor B Ltd had acted in good faith, which is also a requirement of the section. Of considerable interest is the judge's view that one director could bind the company in appropriate circumstances, i.e. if he is acting for the company with the consent of the board, in spite of the fact that the 1972 Act says that the transaction must be 'decided on by the directors' before the section can apply.

Damages (p. 317 of text)

The Administration of Justice Bill, 1982 will, when enacted, enlarge the class of those who can claim in respect of torts causing death to include former spouses and all ascendant and descendant dependents of the deceased, though exclusion of a dependent co-habitee will be continued. Claims for

loss of consortium, and for loss of expectation of life are abolished, but there is to be a new claim for damages for bereavement of a fixed sum of £3,500 which will be available to the parents of a child or to a surviving spouse. Claims for damages for bereavement and for loss of income during the 'lost years' will not, in future, survive to benefit the deceased's estate.

Leasehold reform (pp. 409–11 of text)

The Leasehold Reform Bill, 1982 amends the Leasehold Reform Act, 1967. Clause 1 reduces the qualifying period during which a tenant has to occupy a house before purchase of the freehold from three years to twelve months. Clause 3 removes the restriction imposed by the 1967 Act under which once a tenant had obtained an extension of his lease he could not again apply for a further extension or seek to acquire the freehold. It also removes the provisions by which a landlord could oppose an application under the 1967 Act on the grounds that he wished to demolish or reconstruct the premises or take the premises over for use by his own family. Clause 4 provides that the grant of any lease of a house for more than twenty-one years and less than 999 years shall take effect as the grant of a freehold. Clause 5 provides for any tenant entitled to purchase the freehold to be warned of his rights by requiring his landlord to give him twelve months' notice of his rights, and supply him with the necessary forms. If the landlord defaults, the lease will be extended until twelve months after compliance with this duty.

Matrimonial Homes and Property Act 1981 (p. 429 of text)

This contains a further important protection for a spouse where the matrimonial home is not in joint names. Let us suppose that a husband owns the house and lives with his wife. Husband and wife fall out and the wife registers a charge against the husband's legal ownership of the house. Let us further suppose that the house is subject to a mortgage and that the repayments have fallen behind. Under s. 1(5) of the Matrimonial Homes Act, 1967 the wife could always make repayments but the building society would have to treat them as paid by the husband. However, by s. 2 of the 1981 Act the wife is entitled to be joined in any proceedings for possession which may be taken by the building society or another lender, such as a bank, and if it seems to the court that there is no special reason against it, the wife may be allowed to take over the mortgage in whole or in part. In addition of course, the fact that the lenders are entitled to possession under the mortgage will not prevent the wife's claim to remain in the house.

Nervous shock (Appendix p. 702)

In *McLoughlin* v. *O'Brian* [1982] 2 All E.R. 298 the House of Lords allowed an appeal from the Court of Appeal decision and held that the

illnesses caused to the appellant by nervous shock were foreseeable by the respondents who also owed her a duty of care.

Negligence (p. 361 of text)

In *Junior Books Ltd* v. *The Veitchi Co. Ltd, The Times,* 17 July 1982 the House of Lords decided that a negligent physical act causing economic loss was actionable in tort. Lord Roskill was prepared to accept that the decision was an extension of *Donoghue* v. *Stevenson* 1932[431] in that under the *Junior Books* decision the plaintiff in *Donoghue* v. *Stevenson* could have recovered for the diminished value of the ginger beer and not only for the personal injury suffered. Junior Books, said the House of Lords, would be allowed to recover damages if they could prove that a floor in their factory was laid negligently by Veitchi as Junior Books alleged. An action would lie in tort even though Veitchi were subcontractors and there was no contractual relationship between them and Junior Books.

In addition to the above a correction should have been made on p. 63. It is no longer the case that an 'appearance' is entered to a writ. S.I. 1979/1716 replaces entry of appearance by acknowledgement of service.

In the preparation of this edition the publishers and I have once again received the invaluable assistance of my wife in terms of the preparation and editing of the typescript, indexes, and proofs, together with the general organization of sources of new material since the last edition.

I must also express my thanks to Eric Dalton and Patricia Pye of Pitman Books for their help throughout and also Pitman Press for their assistance in processing the typescript and the proofs.

In conclusion I must once again mention the contribution of my students. Their questions, to which I have not always had a ready answer, have raised, of course, the need to research one and in the process I have been able to clarify my thoughts and, I hope, theirs on some of the more abstruse aspects of the law.

For the errors and omissions I am, of course, solely responsible.

Maenan,
Gwynedd.
July 1982

Denis Keenan

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1 The development of English law

Our present legal system began, for all practical purposes, in the reign of Henry II (1154–1189). 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. 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, applied almost universally throughout England; but in Kent there existed a system of landholding called gavelkind tenure whereby 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 of the Administration of Estates Act, 1925.

The Curia Regis existed as a central royal court but was the feudal court for those high-ranking persons who were tenants-in-chief of the king, and not a general court open to all. Henry II took steps to ensure that royal justice would be open to all. In the Assizes of Clarendon (1166) and Northampton (1176) he provided in relation to the Criminal Law that there should be 12 men in every county to be responsible for presenting to the sheriff those suspected of serious crimes. The accused were brought before certain royal officials who travelled the country from time to time looking after the king's affairs, a system known as the General Eyre (see below). As regards the Civil Law a new civil remedy called 'The Assize of Novel Disseisin' was offered to persons who complained that their land had been wrongly seized. From this remedy grew a range of civil actions and in this way the General Eyre came to have a criminal and civil jurisdiction. Thus royal and more uniform justice began to come to the country as a whole.

THE COMMON LAW

The administrative ability of the Normans began the process destined to lead to a unified system of law which was nevertheless evolutionary in its development. The Normans were not concerned to change 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 laws of Edward the Confessor, which meant that English customary law was to be applied.

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 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. At a later stage the judges for the General Eyre were selected from the Court of Common Pleas which normally sat at Westminster but which closed down while the judges were on circuit.

The General Eyre disappeared in the reign of Richard II (1377–99), but a system of circuit judges from the King's Bench took its place, the first circuit commission being granted in the reign of Edward III (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 the Common Pleas 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. 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 that they were derived from the 'general custom of the Realm'. Thus, in *Beaulieu* v. *Finglass*, (1401), Y.B. 2 Hen. 4, f. 18, pl. 6, it was said that a man who by 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.

The circuit judges from King's Bench derived their authority *in criminal matters* 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.

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.

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

Civil actions were usually heard at Westminster but under the Statute of Westminster II 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 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.

The system, which lasted for many years, was brought to an end by the Courts Act, 1971, s. 1(2) of which provides that all courts of assize are abolished and commissions to hold any court of assize shall not be issued. (See p. 26.)

Many of the itinerant justices were clerics, initially perhaps because they could read and write. However, it seems likely that the real reason for appointing them to livings in the church was to provide them with an income, a practice followed with other servants of the Crown, the church being rich and the King often poor. In general they had no priestly duties. From the middle of the thirteenth century the number of lay judges gradually increased.

When not on circuit the justices sat in the Royal Courts at Westminster, and it was probably at Westminster that they discussed the differences in the customary law on the various circuits, selecting the best rulings and applying them both at Westminster and on circuit.

The Royal Courts of Westminster developed out of the *Curia Regis* (or King's Council) which was originally a body of noblemen advising the King. The Court of Exchequer was the first court to emerge from the *Curia Regis* and dealt initially with disputes connected with royal revenues; later it dealt with many common law actions not necessarily connected with revenue. The Court of Common Pleas was set up in the time of Henry II to hear disputes between the King's subjects. The Court of King's Bench was the last to emerge from the *Curia Regis* and initially was closely associated with the King himself. This association enabled the Court of King's Bench to exercise a supervisory jurisdiction over the other courts by the use of prerogative writs (now orders). (See pp. 80–84.)

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 crystallized 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 universalized 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.

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. 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.

DEFECTS OF THE COMMON LAW

As a result of this hardening up of the system complaints were made by large numbers of people about the inadequacy of the service provided by the courts and the defects of the common law. The main defects were as follows—

(i) *The writ system.* Writs 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. In order to bring an

action in one of the King's courts, the aggrieved party had to obtain from the Chancery a writ for which he had to pay. 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.

The old common law writs began with a statement of the plaintiff's claim, which was largely in common form, and was prepared in the Royal Chancery and not by the plaintiff's advisers as is the statement of claim today. Any writ which was novel, because the plaintiff or his advisers had tried to draft it to suit the plaintiff'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 the four corners of one of the existing writs, no action could be brought. Moreover, writs were expensive, and their very cost might deprive a party of justice.

However, a practice grew up under which the clerks in Chancery framed 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. This appeared to Parliament to be a usurpation of its powers as the supreme lawgiver. Further, it took much work away from the local courts, diminishing the income of the local barons who persuaded Parliament to pass a statute called the Provisions of Oxford in 1258, forbidding in effect the practice of creating new writs to fit new cases. This 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.

(ii) *Procedure.* Other difficulties arose over the procedure in the common law courts, because even the most trivial 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 plaintiff might fail on what was really a good claim if a defendant could bring more, or more powerful, people to say that the claim was false than the plaintiff could muster to support it.

(iii) *Defences and corruption.* In common law actions the defendant could plead certain standard defences known as *essoins* which would greatly delay the plaintiff's claim. For example, the defendant might say that he was cut off by floods or a broken bridge, or that he was off on a Crusade. 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 verified by sending four knights to see the defendant, but at a later stage there was no verification 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 partiality of sheriffs and the inability of a litigant to enforce a judgment or recover property from his more powerful neighbour.

(iv) *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 plaintiff was damages, i.e. a payment of money, which is not in all cases an adequate compensation. 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 devoid of equitable principles, and even in early times there were signs of some equitable development; but generally the rigidity of the forms of action tended to stifle justice.

(v) *Trusts and mortgages.* Furthermore, the common law did not recognize '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 has 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.

The Chancellor appears to have been chosen because he was already involved in legal matters. His clerks were engaged in the issue of common law writs and so it was convenient to delegate this new function to him. His jurisdiction had nothing to do with his supposed position of Keeper of the King's Conscience, i.e. the person to whom the King confessed his sins. In fact a compilation of the King's Confessors reveals that not one of them was Chancellor, though it is true that the early Chancellors were clerics.

The Chancellor 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 recognized interests in property which were