AJ LEGAL HANDBOOK

edited by Anthony Speaight and Gregory Stone

THIRD EDITION

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The Law for Architects

Edited by ANTHONY SPEAIGHT and GREGORY STONE

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Editors' Preface

This third edition of the *Architects' Journal Legal Handbook* marks a development of this work from a collection of distinct articles into a comprehensive guide to the law for architects.

The idea for this work took shape in the mind of Peter Davey, now editor of the *Architectural Review,* when he was still a student working for his professional practice examination. At that time there was no up-to-date textbook on the law for architects. He realised that the questions were ill-put and the answers inevitably ill-informed. He had already worked in the Technical Section of the *Architects' Journal* and returned to the magazine determined to organise a series of articles which could form the basis of an adequate textbook to serve as a guide both to the student sitting the professional practice examination and to the practising architect.

Davey was determined that the lawyers who contributed should all be leaders in their own fields: but in order to realise this conception he needed advice on the selection of such contributors and also on the arrangement of the subject matter. He was lucky enough to meet an architect with a unique knowledge of the law—Evelyn Freeth, formerly principal of the Royal West of England Academy School of Architecture, and shortly to become co-editor of a textbook on building contract law. Freeth devised the general structure, which is still followed in this edition, and suggested the names of authors for the individual sections. Two other distinguished consultant editors were appointed: George Stringer, legal adviser to the RIBA, and George Burnet, legal adviser to the Royal Incorporation of Architects in Scotland. The separate sections appeared first in issues of the *Architects' Journal,* and in 1973 were published in book form. A second edition followed a few years later.

This new edition has involved much updating, some closer integration of the text, and the addition of entirely new sections. The necessary revision has been very extensive. Since the last edition, entirely new standard building contract forms have been published by the Joint Contracts Tribunal. This volume now includes not only a full discussion of the standard form, but also an equally extensive treatment of the main subcontract form. The section on Building Contracts in Scotland has required similarly extensive rewriting to take account of the new Scottish supplement and related documents. The practice of arbitration has been profoundly affected by the Arbitration Act 1979. Planning law has been altered by several enactments, notably the Local Government, Planning and Land Act 1980. The Highways Act 1980 and Housing Act 1980 are dealt with in the chapter on Statutory Authorities in England and Wales. New contract and appointment documents, the introduction of the new RIBA Codes of Conduct, ARCUK guidelines and RIAS Codes have necessitated complete rewriting of the chapters on professional conduct. There has been much other new statutory material and many important cases have been reported: in fact, almost every page incorporates some revision.

At the same time architects have become uncomfortably aware of the development of seemingly novel liabilities when buildings prove defective. The shockwaves of the House of Lords' decision, *Anns* v *Merton Borough Council,* have reverberated right through the profession. Accordingly, this edition contains an entirely new chapter on the liability of architects. Another area of rapidly growing importance to architects is employment law. On that too, there is an entirely new chapter.

We hope that these changes will enhance the value of this new edition to our readers, without losing any of the distinctive features which have won for this book its assured place on the shelves of students and practicising architects alike. We believe that the calibre of our new contributors matches that of the distinguished team of former editions. And of this, at least, we have no doubt—that it is more important today than it has ever been for architects to have some knowledge of the law that affects them. It will more than satisfy us if the new edition goes any distance towards a more complete fulfilment of the original inspiration of Peter Davey and Evelyn Freeth.

We have many debts of gratitude. George Burnet has continued to give invaluable assistance in relation to the Scottish sections of the book. Peter Hollins, RIBA Co-ordinator for Professional Training, has given us the benefit of his wide experience on the needs of architectural students: he also wrote the appendix. Maritz Vandenberg, the Managing Editor of Architectural Press Books, has guided us patiently from start to finish. We regret that space does not permit us to name the many others who have helped us, including several users, architects and students, who have described to us how they used previous editions.

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1 Introduction to English Law

RICHARD GORDON

1 The importance of law

Ignorantia juris non excusat
1.01 The well-worn maxim that ignorance of the law is no excuse applies with equal force to everyone, including architects. Everyone who offers a service to others and claims expertise to do what he offers has a responsibility to society in general and to his clients in particular to know the law.

Architects and the law
1.02 Architects and other professional people are under a special obligation to have a sound working knowledge of the law in every aspect of the services they give. The responsibility is a heavy one. In matters such as building law and regulations, planning legislation, and building contracts, clients seem to expect near infallibility. Architects should always be capable of advising what action should be taken, when and in what circumstances, but readers must realise that architects must never assume the role of barristers or solicitors in offering advice in purely legal matters. At most they should do no more than express their considered opinions, which should be reinforced by knowledge and enlightened judgement. All architects should tell their clients to seek their own legal advice on matters that exceed the knowledge an architect can reasonably be expected to have.

The legal system—rules of society
1.03 People living in all types of community have one thing in common: mutually agreed rules of conduct appropriate to their way of life, with explicit consequences for failure to observe the rules. This is what law is about. The more varied the activities and the more complex the social structure, the greater is the need for everyone to be aware of the part he or she must play in formulating and observing the rules. In highly developed communities these rules have grown into a complex body of law. In England and Wales the law is continually developing and being modified as personal rights and social responsibilities are re-interpreted.

The English system of law
1.04 There is no single code of English law such as exists in many countries, though there is an increasing tendency towards codification, and the statute books already contain codes covering many areas of law. Roman law, on which most of the continental codes were based, failed to make a lasting impression in England; Roman laws, like their architecture, disappeared with the legions. Roman influence has survived to a much greater degree in Scotland, where, by the Act of Union of 1707, a largely independent system has been preserved. This accounts for many differences between English and Scottish law (see Scottish sections of this book, particularly Chapter 2).

In the previous editions, this chapter was written by Evelyn Freeth.

2 The legal system

2.01 English law may be conveniently divided into two main parts—unwritten and written—and there are several branches of these.

Common law
2.02 Common law—the unwritten law—includes the early customary laws assembled and formulated by judges, with modifications of the old law of equity (para 7.09). Common law therefore means all other than enacted law (para 2.06), and rules derived solely from custom and precedent are rules of common law. It is the unwritten law of the land because there is no official codification of it.

Judicial precedent
2.03 The basis of all legal argument and decision in the English courts is founded upon the application of rules announced in earlier decisions and is called *Stare decisis* (let the decision stand). From this has evolved the doctrine of judicial precedent, now a fundamental characteristic of common law.

2.04 Two factors contributed to the important position that the doctrine of judicial precedent holds today: the Judicature Acts (para 7.12) and the creation of the Council of Law Reporting, which is responsible for issuing authoritative reports which are scrutinised and revised by judges and which contain a summary of arguments by counsel and of the judgements given. It is essential for the operation of a system of law based on previous cases that well-authenticated records of arguments and decisions be available to all courts and everyone required to advise on the law.

Authority of a judgement

2.05 Legally, the most important part of a judgement is that where the judge explains the principles on which he has based his decision. A judgement is an authoritative lecture on a branch of the law; it includes a *ratio decidendi* (the statement of facts or grounds for the decision) and one or more *obiter dicta* (things said by the way, often not directly relevant to the matters at issue). It is the *ratio decidendi* which creates precedents for the future. Such precedents are binding on every court with jurisdiction inferior to the court which gave the decision; even courts of equal or superior jurisdiction seldom fail to follow an earlier decision. Until recently both the Court of Appeal and the House of Lords regarded themselves as bound by their own decisions. The House of Lords has to some extent freed itself from this limitation but took the opportunity in *Davis* v *Johnson* [1978] 1 All ER 84 of stating that the Court of Appeal remains strictly bound by its own decisions.

Legislation

2.06 Legislation—the written or enacted law—comprises the statutes, acts, and edicts of the sovereign and his advisers. Although historically enacted law is more recent than common law because Parliament has been in existence only since the 13th century, legislation by Acts of Parliament takes precedence over all other sources of law and is absolutely binding on all courts while it remains on the statute books. If an Act of Parliament conflicts with a common law rule, it is presumed that Parliament was aware of the fact and that there was a deliberate intention that it should do so.

2.07 All legislation must derive its authority directly or indirectly from Parliament; the only exception being that in cases of national emergency the Crown can still legislate by Royal Proclamation. In its statutes, Parliament usually lays down general principles, and in most legislation Parliament delegates authority for carrying out the provisions of statutes to non-parliamentary bodies. Subordinate legislation is required which may take the form of Orders in Council (made by the government of the day—in theory by the sovereign in Council), regulations, statutory instruments or orders made by government departments, and the by-laws of statutory undertakings and local authorities.

2.08 The courts are required to interpret Acts in accord with the wording employed. They may not question or even discuss the validity of the enactment. Rules have been established to help them interpret ambiguities: there is a presumption that Parliament in legislative matters does not make mistakes, but in general this principle does not apply to statutory instruments unless the governing Act says anything to the contrary. The courts may decide whether rules or orders are made within the powers delegated to the authorised body ordered to make them, or whether they are *ultra vires* (outside the body's power). By-laws must not only be *intra vires* but also reasonable.

Branches

2.09 Of the branches of the law, those with the greatest general effect are civil law and criminal law; others are ecclesiastical (canon), military and naval, and administrative laws. These latter derive more than most from Roman law.

Civil law

2.10 Civil law is related to the rights, duties, and obligations of individual members of the community to each other, and it embraces all the law to do with family, property, contract, commerce, partnerships, insurance, copyright, and the law of torts (para 5). The latter governs all actionable wrongs against persons and property—actions for damages, such as defamation, trespass, nuisance, negligence, and a wide variety of other matters.

Criminal law

2.11 Criminal law deals with wrongful acts harmful to the community and punishable by the State. Except when wrongful action may fall within the scope of both civil and criminal wrong, architects are usually concerned with civil law.

Architects and the courts

2.12 Architects involved in civil cases in England are likely to find themselves in the High Court where actions are tried before puisne judges (or in a County Court before a County Court Judge if damages are claimed for less than £5 000).* Appeals from the High Court go to the Court of Appeal and if further appeal is allowed, to the House of Lords (see para 7.13 for notes on relationships of the courts).

2.13 The procedure for initiating an action in the High Court is as follows: first the plaintiff's solicitor issues and serves a writ on the defendant; the writ sets out the nature of the action, and the defendant must reply. Then, the plaintiff describes his case in a statement of claim, or first pleading. The defendant must reply within a fortnight with a second pleading setting out his objections to the plaintiff's case. These are laid before a Master (usually a senior barrister) who decides whether the case can proceed or whether further pleadings are required for clarification.

2.14 Discovery of documents, the next stage, starts when the Master is satisfied: both sides must reveal the papers they intend to use. After at least a fortnight, the summons for directions is issued when the Master makes arrangements for the trial, which takes place when it can be fitted into the timetable of the Court.

3 The law of contract

3.01 'Agreement' signifies concurrence between two or more persons about opinions held or actions to be done or forborne. A 'contract' is simply an agreement between individuals which can be enforced in law; if it is breached, the law gives remedy. Most people enter into contracts many times a day, though we may not always recognise them as legally binding; one is created with every purchase made in a shop or with every journey made by bus or train. Whether it involves only small amounts or vast undertakings the law regarding a contract is the same. Apart from building contracts, to which architects are not parties but which depend almost entirely upon them for satisfactory fulfilment, they have other more direct contractual obligations: contracts for services to clients (employers); partnership agreements and contracts of employment between employees and employers (see Chapter 15).

*This figure refers to cases in contract and tort (but excluding libel and slander), but by section 42 of the County Courts Act 1959 any of the above limits may be raised by the written agreement of the parties. Jurisdiction in actions relating to land (section 48) was raised to a rateable value of £1 000 by the Administration of Justice Act 1973. For equity matters (eg trusts, mortgage, dissolution of partnerships etc) the upper limit is £30 000.

C. Williams, 1817

Blessings of Brittain (*sic*) or a Flight of Lawyers—'*A Darksome cloud of locusts swarming down*'—Milton

Types of contract

3.02 Contracts must be considered under two main classes: first, speciality contracts, ie those made by deed,* as required for conveyances of land, leases of property for periods of more than three years, and articles or deeds of partnership (see Chapter 15). The second class consists of simple contracts (those that need not be under seal) which may be made informally: they may be oral or even implied by conduct (though they can be in writing). Problems may arise in cases where there is no written evidence of contract owing to possible difficulties of establishing proof on precisely what had been agreed on.

Essentials of a valid contract

3.03 All that is required of most contracts in both classes to make them valid and legally enforceable is that they comply with certain relatively simple and clearly defined rules. These are as follows:

1 *Agreement* Parties to the contract must agree at the outset that there shall not merely be a moral but a legal obligation to fulfil what they are promising to undertake and there must be evidence that agreement exists.

2 *Certainty* There must be certainty about the terms of the agreement. Since the contract is created as the result of an 'offer' made by one party and 'acceptance' by the other, he who makes the offer and he who accepts it are presumed to be of one mind. In these circumstances the law will not interfere, and once a contract document is signed, both parties are bound to accept it as a whole.

3 *Consideration* There must be some 'consideration' involved to bind the parties unless the contract is made under seal. The law of contract was originally developed to meet the needs of commerce, and this is reflected in the rule that only an agreement which has an element of bargain will be enforced by the Courts. English law is peculiar in that it will not enforce gratuitous contracts such as a promise to make some gift in the future. So there must be an agreement by which each party gives something to the other in return for the benefit he is receiving. This 'something' is known as consideration. Consideration then simply means that something must be paid, or exchanged, for the contract to be binding and enforceable in

* Deed—a written or printed document effecting a legal agreement. Execution of deeds (eg sealing and delivery) must also include signatures, and in the case of a corporation the affixing of the seal of the corporation. Delivery is held to be performed by the person who executes the deed placing his finger on the seal, and saying 'I deliver this as my act and deed'.

law. It can be money or a service or some other benefit. Whatever it is, the consideration must be definite and certain.
4 *Capacity to contract* The parties to the contract must have proper capacity to enter into legal relations. This condition offers protection to infants (in law younger than 18), the mentally disordered, and persons under the influence of drink or drugs against committing themselves to binding agreements. For example, for infants (under the Infants Relief Act 1874) certain types of contract are void; in other cases some exceptions are made for contracts to meet necessities.
5 *Consent* Consent to the agreement must be genuine and freely given. That is, it must not be obtained by fraud, misrepresentation of fact, or under duress.
6 *Legality of object* The object must not be for any purpose which contravenes the law (such as agreements to commit crimes or torts—para 5).
7 *Object* The object of the contract must be possible.
8 *Necessary formality* Sometimes the law requires that a contract has to be written in order for it to be enforceable. Examples of such contracts are contracts for the sale of land and contracts of guarantee.

3.04 All the above must be present for a fully enforceable contract. The absence of one might lead the contract to be one of the following:
1 Void—without any legal effect.
2 Voidable—it may cease to be effective at the instance of one of the parties; for example, it can be voided if it can be shown to have been induced by fraud.
3 Unenforceable—a valid contract in the main, but lacking evidence or presentation in the form required by law.

Discharge
3.05 Discharge (ending) of contracts may arise:
1 By agreement—a mutual decision by both parties to bring their contractual relationship to an end.
2 By performance—each party having duly fulfilled his obligations under the contract.
3 By breach—either because one party fails to perform his part of the agreement or repudiates his liability; such behaviour would entitle the injured party to an action for damages or in some circumstances to treat the contract as discharged.
4 By frustration—when performance of the agreement proves to have been impossible from its inception and is, therefore, a void contract.
5 By operation of law—in practice when a contract is entered into for a specified period of time, the contract is discharged at the end of that period.
6 By lapse of time—unless there are provisions in the contract itself, lapse of time does not generally discharge the contract, though it may render it unenforceable in law. The Limitation Act 1939 provides for limitation of court action for enforcing contracts. Simple contracts are barred from actions after a period of six years from the time when an action could have been brought (ie from the time when a contentious point was discovered); twelve years is the period for speciality contracts (para 3.02). But see important decisions, made in 1976 and 1977, considered in para 5.14.

Conditions and warranties
3.06 In the Sale of Goods Act 1893 (as amended by the Sale of Goods Act 1979), which is concerned with contracts for exchange of goods for money, two expressions are used which occur frequently in other aspects of contract: conditions and warranties. The difference is that a condition is regarded as going to the root of the contract; a breach of a condition gives the right to repudiate the contract. A warranty is regarded only as supplementary (collateral) to the main purposes of the contract, and breach only entitles to a claim for damages. Whether a particular stipulation is a condition or a warranty is a question of construction in each contract. In either case it can be effective only if it is part of the contract; 'mere representation' prior to the making of the contract are neither conditions nor warranties, and their breach will result in neither damages nor the right to repudiate the contract.

Implied terms
3.07 An important recent addition to the legislation for contract, amending and reinforcing the Sale of Goods Act 1893, is the Sale of Goods Act 1979. The conditions implied in the Sale of Goods Act are mainly concerned with the quality of goods; as, for instance, that goods being bought for any particular purpose must be reasonably fit for that purpose, ie that they are of merchantable quality. This term is defined by section 62(1) of the principal Act, and again in section 14(6) of the 1979 Act. It is a definition of great interest to people working in the construction industry. See also section 14 for implied terms as to quality and fitness, and section 5 of the Unfair Contract Terms Act 1977 for exclusion of implied terms and conditions.

3.08 It is well to remember that it is not only the implied terms relating to the sale of goods that are met with in the construction industry. The Standard Forms of Contract themselves bristle with them and are frequently coming before the courts for interpretation. The House of Lords in one of the most important cases in modern times dealt with the points made in the previous paragraph as follows: 'A person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty' (*Young and Marten* v *McManus Childs* [1968] 2 All ER 1169).

3.09 More recently, and of rather special interest to architects and designers generally, there was the important decision reached in the case of *Greaves (Construction) Ltd* v *Baynham Meikle* [1975] 3 All ER 99. This case was concerned with design liabilities and, apart from its general implications, raised important points which arise particularly in 'package deal' situations. It was concerned with the design and erection of a storage warehouse where within a few months after completion the first floor was damaged by the vibration caused by trucks carrying heavy oil drums. The damage was alleged to be due to inadequate design. The designer had been warned that heavy loads would be involved and also about the danger of vibration and should have taken these matters into account. It was held that there had been not only a breach of duty by the designer but also a breach of an implied term that the design should be fit for the purposes intended, ie the storage and traffic of loaded trucks. (See also para 5.08 *et seq* on negligence and duty of care.)

Exclusion clauses

3.10 Section 3 of the Unfair Contract Terms Act 1977 states that where one of the parties is a consumer or is dealing on another's written standard terms of business (such as an RIBA contract), any contractual term excluding liability or allowing for performance in a substantially different manner must satisfy the test of reasonableness.

3.11 Furthermore, by section 2 of the 1977 Act, liability for negligence can never be excluded where death or personal injury has been caused. In cases of other types of damage the exclusion must be reasonable to be effective.

Misrepresentation

3.12 The Misrepresentation Act 1967 amends the law relating to innocent misrepresentation, as does section 8 of the Unfair Contract Terms Act 1977, with which it must be read.

3.13 Misrepresentation in relation to the law of contract is '. . . an untrue statement of fact made by one party either before or at the time of entering into the contract with the intention that the other party will act upon it'. A misrepresentation may be either innocent or fraudulent. Innocent misrepresentation is made in the belief that the statement is true, without intention to deceive. Fraudulent misrepresentation is 'made knowingly, or without belief in its truth, or recklessly careless whether it be true or false' (Lord Herschell in *Derry* v *Peek* [1889] All ER Rep 1).

3.14 In cases of fraud, the plaintiff may:
1 Sue for damages for the tort of deceit.
2 Repudiate the contract, or have it rescinded by the court (with or without claiming damages).
3 Affirm the contract and still, if he wishes, claim damages for deceit.

3.15 Before the Misrepresentation Act 1967, an injured party could only rescind the contract; he had no case against a supposedly innocent misrepresentation even though he may have suffered loss thereby, unless it became incorporated as a term of the contract. The new Act (section 2) gives the right for anyone suffering loss as a result of misrepresentation to sue for damages, whether or not the misrepresentation was made fraudulently. The onus is on the person making the misrepresentation to prove that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts he represented were true.

3.16 An alternative remedy to the Misrepresentation Act would be to sue in tort under *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* (see para 5.15).

Trade Descriptions Act 1968

3.17 This Act is closely associated with the Sale of Goods Act, but distinct from it. The Sale of Goods Act puts obligations on the seller with regard to the general description and quality of goods. It gives rights to the buyer to insist that those goods supplied to him compare in all respects with what he ordered; if not, money must be refunded. The Trade Descriptions Act imposes much stricter rules about the accuracy of the description of both goods and services. Its purposes and provisions are intended to extend far beyond everyday transactions in shops. The Trade Descriptions Act deals only with selling goods and not with selling buildings or land, but the Misrepresentation Act deals with the latter. As an example of the Acts' application, the Trade Descriptions Act does not cover an estate agent's literature, but the Misrepresentation Act does, and there would be a civil claim if a house were bought on the faith of a misrepresentation—and an infringement of the Trade Descriptions Act is a criminal offence. Powers for enforcement of the law are vested in the local trading standards authority and in the Department of Trade.

3.18 For so vast and important a subject, this discussion of contract law is much restricted. In general an architect's knowledge of contract is confined to a fairly expert understanding of the Standard Forms of Building Contract (see Chapters 5 and 6). Too often he overlooks the fact that he is part of the world of commerce for which the law of contract has been developed. It is increasingly desirable that architects extend their interest and reading more widely in this field. Whenever an architect recommends or selects materials and components (whether chosen as a result of trade catalogue description, or samples, persuasive 'sales talk', or any other means) and when he commissions specific works, he must remind himself that legislation such as the Sale of Goods Act 1979, the Unfair Contract Terms Act 1977 and others have special relevance for him (see para 3.07).

4 The law of agency

Definition

4.01 The term 'agency' implies the relationship which comes into being when one party (the agent) is employed by another (the principal) to enter into contractual obligations with a third party on the principal's behalf; that is, to undertake acts for the principal.

4.02 The law of agency is uncodified, but forms part of the law of contract. As such, the conditions already outlined in para 3.03 as being necessary for creation of a legal contract are equally applicable to the contractual relationship of agency. This section is concerned with the general liabilities of agents and, in particular, with the architect's position as agent.

Types of agency

4.03 The extent of authority in each case is governed by the type of agency. Agents may be:
1 Universal, having unrestricted authority to act on a principal's behalf under power of attorney.
2 General, where the agent is appointed to act in transactions in a particular sphere, eg as estate managers.
3 Special, where agent and principal contract for one particular commission (as is usual with architects).

Agent's duty and liability

4.04 An agent's duty is simply to apply reasonable skill and diligence to all he has been employed to do; in so doing he must see that he does not put himself in a position where his own interests might be in conflict with his duty. The degree of liability depends largely upon the type of agency. In general the principal is liable for all conduct of his agent falling within the scope and purpose for which the agency is created. Therefore, every act the agent performs on behalf of his principal must be within the scope of his authority and is binding in law on the principal (but see para 5.04 for torts).

4.05 When the relationship exists on the basis of a definite contract for services, as it does between employer and employee, the employer is liable for the conduct of his employees for acts committed in the course of employment. Conversely, for any act in excess of what is authorised and which adversely affects him in any way the principal must accept the consequences and obtain redress (if this is necessary and possible) from his employee. The maxim applicable here is *Qui facit per alium facit per se* (he who acts through another is deemed to act in person).

4.06 The contractual relationship between employer and agent differs from that of a normal contract of employment

under which the employer (master) is in the position of being able to direct the manner in which the employee (servant) carries out his duties. In the absence of any specific agreement to the contrary an agent in the ordinary sense of the term is free to perform his duties in his own way. Nevertheless, in the conduct of business affairs on behalf of his employer, particularly in all correspondence with persons invited to tender for contracts and on similar matters, the architect must safeguard himself by disclosing the name of the client on whose authority he is acting as agent. In cases of unusual or unorthodox action he should obtain his principal's approval.

Memorandum of agreement—architect and employer

4.07 In the past it was not uncommon for architects to enter into an agency situation far too casually—often by the mere interchange of cordial letters accompanied by copies of the RIBA Conditions of Engagement and scale of fees. In a modern business context this method is no longer to be recommended, no matter how pleasant appears to be the personal relationship of the parties concerned. The accepted method today is to exchange a formal memorandum, either specially drawn up by a solicitor, or on the form prepared by the RIBA described as 'for general use between a building owner and an architect or firm of architects'. This memorandum of agreement is clear in its terms.

Architect's authority as agent

4.08 An architect's authority is strictly limited by the terms of his employment. He exercises his authority for the general direction and supervision of the Building Contract as agent to his employer in the first place, and in this capacity his duty is clearly to protect his client's interests in all his dealings with all parties. In this, his responsibility is well defined by the law of agency, subject to any provisions in the conditions of his own employment which may be expressed in the memorandum of agreement with his employer. He also stands between the two parties to the Building Contract—his own employer (the building owner) and the contractor—deriving authority from the contract conditions (clause 2). For the architect this clause is of utmost importance, since he must always bear in mind that the Building Contract is between the employer and the building contractor, and he has no power to vary, waive, or dispense with any conditions or part of the agreement, except in so far as the contract gives him express discretion and power to do so (see Chapter 5).

4.09 The architect's duties as agent do not arise while he is employed as a designer; they begin when he is instructed to invite tenders on behalf of the building employer and continue during the progress of the job until final completion and settlement. Throughout the whole period of execution and settlement of the works he must carefully balance his loyalties fairly, taking account of the interests of both building employer and contractor, in his exercise of the general control of the job (see Chapter 18). In addition to understanding his own responsibilities and authority as agent, an architect must fully appreciate those of every member of the building team, including clerk of works and site foreman (the agents of employer and contractor respectively) and all others with whom he comes in contact if he is to exercise proper control of the works.

5 The law of torts

5.01 The law of torts has a complicated and highly technical history originating in the common law; it is a branch of civil law which has many facets and a huge volume of accumulated case law of considerable interest through which it has evolved. The word 'tort' is French, and its use in English law poses many difficulties of definition even to lawyers. The law of torts has special reference to civil wrongs incurred by individuals for which the law provides a remedy in damages. There are, seemingly, as many civil wrongs as there may be crimes. A short list, including battery and assault (to persons and land), defamation (libel and slander), nuisance, and negligence, gives some indication of the range of the subject. Nuisance, negligence, defamation, dangerous property liabilities, and breaches of statutory duties are all of special importance to property owners and their professional advisers.

Characteristics of torts

5.02 The essential character of a tort may be briefly stated as 'a civil wrong not arising out of contract: a wrong done to an individual and in respect of which only the individual wronged can obtain redress'. It is a fundamental concept of the law of torts that 'you owe a duty to *all* persons you can reasonably foresee would be directly or closely affected by your actions, for it is assumed that you ought reasonably to have them in mind when you commit your acts. This is in contrast with the law of contract, in which a duty is owed only to the person with whom you make agreement' (Lord Atkin in *Donoghue* v *Stevenson* (para 5.12)).

5.03 Two points must be noted: first, a tort *may* arise from circumstances which are a breach of contract and second, the same conduct is capable of violating more than one set of rules at the same time. In the latter circumstances a tort may be both a civil wrong for which the individual may sue for damages, and a criminal offence for which the state will prosecute. For instance, the act of driving a car dangerously, without due care and failing to foresee the consequences, could result in personal injury to an individual and be, at the same time, a breach of criminal law. In such cases the interest of the state takes precedence over that of the individual; nevertheless both state and individual have cause for legal action.

Vicarious liability

5.04 A person is clearly liable for his own torts; he may also be vicariously liable for the wrongful act of another. This situation arises more often from the master/servant relationship than that of employer/independent contractor. The former is a 'contract of service', the latter 'for services'. The two have differing consequences: most importantly the employer is usually vicariously liable (*in tort*) under a contract of service but not (with some exceptions) under a contract for services (but see para 5.06). The difference between the two relationships is that the independent contractor in the case of 'for services' contract undertakes to perform some service or work, but has discretion as to the way he does it, and the employer is thus excluded from directing how it should be done.

5.05 This distinction depends on the measure of control which the employer is entitled to exercise over the acts of the employee. Care must be taken to distinguish between service and services, between independent contractor and employee, and between agent and employee. The RIBA memorandum of agreement is specifically 'for services'. In the same way a builder who does work for what is often loosely termed an 'employer' is, in fact, not an employee but an independent contractor.

5.06 Generally the employer is not liable for the torts of an independent contractor, though he is if he authorises or ratifies the tort, or interferes and assumes control, because by so doing the master/servant relationship arises. An employee (servant) on the other hand is always liable for his own torts, and his employer is also liable jointly and severally if the tort is committed in the course of the employment. For example, failure by an employee to do his work properly, resulting in injury to others, renders the employer liable. Chapter 15 gives further details of the relationship between employer and employee.

Strict liability

5.07 The rule of *Rylands* v *Fletcher* [1868] LR 3HL 330 (one of the most famous tort cases) defines certain liabilities more closely. It refers to what are called torts of strict liability, that is, where a man may be liable for damages in circumstances where proof of negligence and wrongful intention is not necessary. This rule places a duty on the occupier of land to take care that things on the land do not escape and cause damage. The case arose from circumstances where the defendant had employed independent contractors to construct a reservoir on his land, in the process of which some disused mine-shafts were breached, quite unknown to the defendant and his contractor, and which connected with the plaintiff's own mine workings at a lower level. When the completed reservoir was filled, water escaped and flooded the plaintiff's mines. It was found that the defendant had not been negligent, nevertheless he was held liable. The rule—one of strict liability—was given in the judgement by Lord Blackburn as follows, and admirably sums up this form of liability: 'A person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.'

Negligence and duty of care

5.08 Negligence is both a tort in itself and an ingredient in other torts. It involves a breach of duty to exercise reasonable care or skill. It may result from carelessness, and often does, but the law takes no cognisance of carelessness in the abstract. A man is not regarded as liable to everybody who is damaged as a result of his carelessness, only where there is a duty to take care and where failure in that duty has caused damage. Negligence has been defined as 'the omission to do something which a reasonable man, guided upon by those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not do' (Alderson, B., in *Blyth* v *Birmingham Waterworks Co* (1856) 11 Exch 781 at p784). To prove negligence, it must be shown that the wrongdoer owed a legal duty of care to the injured party and that damage actually resulted from a wrongful action.

Architect's duty of care

5.09 An architect owes a duty to his client and third parties in tort. To his client he has an additional contractual duty to use care and skill—as measured by professional standards of other architects. A breach of that duty may therefore be both a breach of contract and of tort, for which, if the client has suffered loss, he may bring an action for damages. See *Midland Bank* v *Hett, Stubbs & Kemp* [1978] 3 All ER 571 and Chapter 7.

5.10 In tort, in addition to the normal and general duty of care he shares with all men, his obligations are extended by virtue of his special situation and skills as a professional expert. The courts have often had to consider this. The test to be applied is—what is reasonable in the circumstances of the case, having regard to the particular profession, or occupation? Case law relies on the pronouncements of Lord Tindall in *Lanphier* v *Phipos* (1831) 8 C & P 475. 'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill. . . . The question whether the architect . . . has used a reasonable and proper amount of care and skill is one of fact, and it appears to rest on the consideration whether other persons exercising the same profession, and being men of experience and skill therein, would or would not have acted in the same way as the architect in question.'

5.11 Many acts of negligence in the architectural profession have been committed by salaried staff, and attempts at denial of liability serve little purpose since employers are vicariously liable (para 5.04).

5.12 The tort of negligence was greatly clarified by judgement in the case known to all lawyers as 'the snail in the bottle case'—*Donoghue* v *Stevenson* [1932] AC 562. The gist of it was that a friend of the plaintiff (a woman named Donoghue) bought her a bottle of ginger beer manufactured by the defendant Stevenson. The bottle allegedly contained a decomposed snail; as the result of consuming the beverage Donoghue was said to have suffered from gastro-enteritis and shock. This case established that the manufacturer owed a duty of care to all persons who consumed his products. It is one of the most important of all cases in the law of torts, and out of it came definitions by Lord Atkin which have since served as a general guide to determining to whom a duty of care is owed: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

Statutory duty of care

5.13 Where Acts of Parliament delegate powers to councils and other bodies there is also an implicit liability. Except when a statute itself provides its own remedy, the breach of a duty

imposed by statute resulting in injury to an individual constitutes a tort actionable for damages. The recent House of Lords case of *Anns* v *London Borough of Merton* [1977] 2 All ER 492, has important implications, particularly for local government officials whose legal liability has thereby been widened. The original High Court case revolved mainly around the duty of care owed by a local council in the exercise of its statutory powers to someone who suffered financial loss, in this instance as the result of a building inspector's negligence in approving unsatisfactory foundations. The relevant part of the decision being that it was held that the purpose of building by-laws, including the inspection of the site in course of erection, is the protection of the public. If the local authority exercises its statutory powers to the injury of the public the injured person may be entitled to sue. An example of statutory obligations which concern architects in practice are those imposed under the Offices, Shops and Railway Premises Act 1963 and the Health and Safety at Work etc Act 1974.

Liability and Limitation Act 1939

5.14 *Anns* v *London Borough of Merton,* referred to in the foregoing paragraph, held that the cause of action against a local authority for negligent inspection or against a builder for defective foundations accrues when damage is manifested. This point arose when there was present or imminent danger to the persons occupying the home. It is from this point that the six-year limitation period runs. The earlier decision in *Sparham-Souter* v *Town and Country Developments (Essex) Ltd* [1976] 2 All ER 65, was followed. These judgements are likely to be used as a precedent in any new case of architect's negligence.

Negligent statements

5.15 The case of *Clay* v *A. J. Crump & Sons Ltd* [1963] 3 All ER 687, outlines the law of negligent statements. An architect had stated that a wall on a demolition job was safe, but the wall collapsed and the architect was held liable for his negligent statement. A more recent example emphasises the importance of a duty of care, which in no way depends on any client/architect relationship or on payment of professional fees and, therefore, calls for even more than usual caution in giving casual advice. The House of Lords decided in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465, that where a person made a statement to someone who it was known would be relying upon his special skill and ability, the adviser had a special duty of care in respect of the advice given. Therefore unless some qualification is made to the effect that no responsibility is accepted for the statement, the person making a negligent statement would be held liable for what he says.

Nuisance and trespass

5.16 Nuisance and trespass are two aspects of the law of torts deserving careful study by architects. Nuisance may be classed as public or private. Public nuisance is not primarily a tort but a criminal offence and the responsibility of the state. Individuals can claim relief only where they have suffered special damage over and above that of the rest of the community. Private nuisances are usually interference by noise, smells, smoke, or other means with the enjoyment of an individual's land or property (see also Chapter 3 para 2.02).

5.17 Trespass may take the form of direct interference with the person and with chattels as well as with land, although trespass to land is the most important. Trespass may take the form of temporary or permanent entry upon land owned by another, or it may be committed by placing or throwing objects upon such land. The frequently displayed 'Trespassers will be prosecuted' notice is unfounded—prosecution implies crime, and trespass is not a crime but a tort, for which a civil action only may be brought unless it is accompanied by some offence of malicious damage, like the breaking down of fences, which would bring it within the scope of the Criminal Damage Act 1971.

5.18 Trespass denotes any direct unlawful interference with the owner's (or his lawful tenant's) possessions or enjoyment of his land, and is actionable as such, irrespective of what the trespasser's intentions were and without proof of damage being necessary. Direct entry of any kind in the air space over land or premises, or digging beneath, constitutes trespass. Exceptions are that the Civil Aviation Act 1949 permits aircraft to fly over at a reasonable height, and mining rights are sometimes owned by others and can be exploited by them.

5.19 As far as architects and building contractors are concerned, even the slightest infringements are actionable, however innocent the intentions; for example, it is trespass for a surveying assistant to set foot on adjoining property without authority or, in the case of building operations, to allow any soil disturbance, or anything to overhang or fall or be thrown over the land. Land and property owners are generally suspicious of 'surveyors' and irritated by nearby 'works', so the greatest care must be exercised to see that irritation does not reach flash point and lead to legal action. A property owner's 'common duty of care' does not apply to trespassers, but only to lawful visitors whose presence is condoned by the owner or tenant of the premises. However, he still owes a duty, although a lesser one—a 'common duty of humanity'.

6 The law of property

6.01 Property law is dealt with extensively in Chapters 3 and 4, which should be consulted for details. This section is intended only to provide a brief introduction to some of the concepts. Some notes on the early history of property law are given in the appendix (para 7.02 *et seq*).

6.02 Until 1925, three separate laws applied to holding land—all included useless technicalities inherited from feudal times: freeholds, leaseholds (a special law for personal property), and copyholds (a form of 'unfree tenure' in which tenants held land at the will of the lord in a manner not far removed from slavery). In 1925 copyhold was abolished and seven reforming Acts, known generally as the Real Property Acts of 1925, were passed, including the Law of Property Act 1925, and the Land Registration Act 1925. All had the object of simplifying the land laws. In the process of simplification an attempt was made to make land transfer by conveyancing easier, and the number of legal 'estates' was reduced to two: freehold and leasehold; and the number of legal 'interests' (para 6.06) which could exist over land to five (Law of Property Act 1925, section 1 (1)).

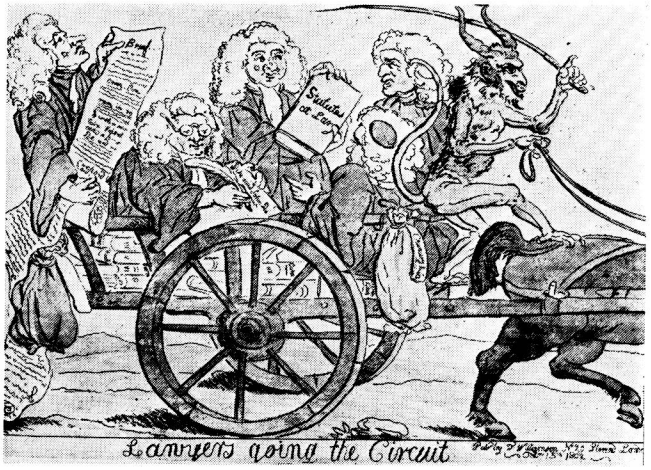
Estates of freehold

6.03 The two legal estates created by the 1925 reforms are:

1 An estate in fee simple absolute in possession.

2 A term of years absolute.

A tenant in fee simple is for all practical purposes the absolute owner of his property. His is a freehold property. The word 'fee' indicates an estate of inheritance—in other words an interest in the land which does not come to an end with his death but is capable of being inherited by another. 'Simple' means without restriction to any particular class or sex of person, for instance, eldest sons or male descendants. 'Absolute' means that the owner has unconditional enjoyment of it without fear of any change taking place as the result of a remarriage or similar happening. 'In possession' means that the holder of the estate must be in actual possession of the land or receive all its rents and profits.



6.04 Absolute title has a special significance under the provisions of the Land Registration Act 1925 (section 5) since it determines that the registered proprietor of lands with an 'absolute title' has a state *guaranteed* title that no other person has a better right to the land.

Estates of less than freehold

6.05 'A term of years absolute' denotes a leasehold, which may be granted for a specified number of years (eg 999 years) or for as little as a week. The ordinary weekly tenancy of a house is capable of being a legal 'estate'. 'Absolute' in this case means that the holding is unconditional and, provided the terms of the lease have been complied with, cannot be terminated by either landlord or tenant (lessor or lessee) except by mutual agreement. A leasehold tenancy involves the Law of Contract (para 3), and its creation must normally be by deed (para 3.02) with conditions, covenants, and so on.

Legal interests in land

6.06 The other important achievement of the 1925 legislation was to reduce the number of legal interests in land which are 'capable of subsisting or of being conveyed or created at law' to five (Law of Property Act 1925 (section 1, paragraph (2a))). Briefly they are:

1 Easements.
2 Rent charges in possession.
3 Charges by way of legal mortgage.
4 Land tax and tithe rent charges etc.
5 Rights of entry.

'All other estates, interests and charges in or over land effect as equitable interests' (section 3)—see para 7.09 *et seq* for notes on equity.

6.07 Of all the legal interests in land the laws affecting easements have special importance for architects. These are covered in detail in Chapter 3.

7 Appendix: Legal history

Origins of English law

7.01 The roots of English law lie deep in the foundations of English history. The seeds of custom and rules planted in Anglo-Saxon and earlier times have developed and grown gradually into a modern system of law. The Normans interfered little with common practices they found, and almost imperceptibly integrated them with their own mode of life. William I did not regard himself as a conqueror, but claimed to have come by invitation as the lawful successor of Edward the Confessor—whose laws he promised to re-establish and enforce.

Feudal system and land law

7.02 The Domesday Book (1086), assembled mainly by itinerant judges for taxation purposes, provided William I with a comprehensive social and economic survey of his newly acquired lands. The feudal system in England was more universally applied than it was on the Continent—a result perhaps of the thoroughness of the Domesday survey. Consequently, in England feudal law was not solely a law for the knights and bishops of the realm, nor of some parts of the country alone: it affected every person and every holding of land. It became part of the common law of England.

7.03 To the knowledge acquired from Domesday, the Normans applied their administrative skills; they established within the framework of the feudal system new rules for ownership of land, new obligations of loyalty to the administration under the Crown, and reorganised arrangements for control of the people and for hearing and judgement of their disputes. These were the true origins of our modern legal system.

7.04 Ultimate ownership of land in England is still, in theory, in the Crown. The lord as 'landowner' merely held an 'estate' or 'interest' in the land, directly or indirectly, as tenant from the king. A person holding an estate of the Crown could, in turn, grant it to another person, but the ownership still remained in the Crown. The tenant's 'interest' may have been of long or short duration and as varied as the kinds of services that might be given in return for the 'estate'. In other words many different estates and interests in land existed. Tenure and estate are distinct. 'Tenure' refers to the relation of the landlord to his overlord, at its highest level to the king. 'Estate' refers to the duration of his interest in the land, and has nothing whatever to do with the common use of the word.

Possession not ownership

7.05 English law as a result has never used the concept of ownership of land but instead has concentrated on the fact of 'possession', mainly because ownership can refer to so many things and is ill-fitted to anything so permanent and immovable as a piece of land. A man's title to land in England is based on his being able to prove that he has a better right to possession of it than anyone else who claims it.

Real and personal property

7.06 Law makes a distinction between 'real' and 'personal' property. The former are interests in land other than leasehold interests; the latter includes leasehold interests and applies to moveable property (personal property and chattels). A leasehold interest in land is classed as 'personal' rather than 'real' property because in early times it was not possible to recover a leasehold interest by 'real' actions for the return of the thing (*res*). In common law a dispossessed owner of freehold land could bring an action for recovery of possession, and an order would be made for the return to him of his land. For the recovery of personal (tangible or movable) articles his remedy was limited to a personal action in which the defendant had the option of either returning the property or paying its value.

Beginnings of common law

7.07 Foundations of both the common law and the courts of justice were laid by Henry II (1154–1189). In his reign the 'king's justice' began to be administered not only in the King's Court—the *Curia Regis*—where the sovereign usually sat in person and which accompanied him on his travels about the country, but also by justices given commissions of assize directing them to administer the royal justice systematically in local courts throughout the whole kingdom. In these courts it was their duty to hear civil actions which previously had been referred to the central administration at Westminster. It was the judges of assize who created the common law. On comple-

tion of their circuits and their return to Westminster they discussed their experiences and judgements given in the light of local customs and systems of law. Thus a single system common to all was evolved; judge-made in the sense that it was brought together and stated authoritatively by judges, but it grew from the people in that it was drawn directly from their ancient customs and practices.

7.08 Under the able guidance of Edward I (1272–1307) many reforms were made, notably in procedures and mainly in the interest of the subject as against the royal officials, and the law began to take its characteristic shape. Three great common law courts became established at Westminster:
1 The King's Bench, broadly for cases in which the Crown had interest.
2 Common pleas, for cases between subject and subject.
3 Exchequer, for those having a fiscal or financial aspect.
However, as administered in these courts, the common law was limited in its ability to meet every case. This led to the establishment of the principles of equity.

Equity

7.09 In the Middle Ages the common law courts failed to give redress in certain types of cases where redress was needed, either because the remedy the common law provided (ie damages) was unsuitable or because the law was defective in that no remedy existed. For instance, the common law did not recognise trusts and at that time there was no way of compelling a trustee to carry out his obligations. Therefore disappointed and disgruntled litigants exercised their rights of appeal to the king—the 'fountain of all justice'. In due course, the king, through his Chancellor (keeper of his conscience, because he was also a bishop and his confessor), set up a special Court of Chancery to deal with them.

Rules of equity

7.10 During the early history of the Court of Chancery, equity had no binding rules. A Chancellor approached his task in a different manner to the common law judges; he gave judgement when he was satisfied in his own mind that a wrong had been done, and he would order that the wrong be made good. Thus the defendant could clear his own conscience at the same time. The remedy for refusal was invariably to be imprisoned until he came to see the error of his ways and agree with the court's ruling. It was not long before a set of general rules emerged in the Chancery Courts which hardened into law and became a regular part of the law of the land. There is, however, another and even more fundamental aspect of equity. Though it developed in the Court of Chancery as a body of law with defined rules, its ideal from earliest times was the simple belief in moral justice, fairness, and equality of treatment for all, based on the idea of natural justice as opposed to the strict letter of the law. Equity in that sense has remained to this day a basic principle of English justice.

Common law and equity in the nineteenth century

7.11 Up to the end of the fifteenth century the Chancellor had generally been a bishop, but after the Reformation the position came to be held by professional lawyers (of whom the first was Sir Thomas More) under whom the rules of equity became almost as rigid as those of common law; and the existence of separate courts administering the two different sets of rules led to serious delays and conflicts. By the end of the eighteenth century the courts and their procedures had reached an almost unbelievable state of confusion, mainly due to lack of co-ordination of the highly technical processes and overlapping jurisdiction. Charles Dickens describes without much exaggeration something of the troubles of a litigant in Chancery in the case of *'Jarndyce* v *Jarndyce'* (*Bleak House*).

Judicature Acts 1873–1875

7.12 Nineteenth-century England was dominated by a spirit of reform, which extended from slavery to local government. The law and the courts did not escape reform, and the climax came with the passing of the Judicature Acts of 1873 (and much additional and amending legislation in the years that followed) whereby the whole court system was thoroughly reorganised and simplified, by the establishment of a single Supreme Court. The Act also brought to an end the separation of common law and equity; they were not amalgamated and their rules remained the same, but henceforth the rules of both systems were to be applied by all courts. If they were in conflict, equity was to prevail.

The Supreme Court 1875–1971

7.13 The main object of the Judicature Act 1873 was an attempt to solve the problems of delay and procedural confusion in the existing court system by setting up a Supreme Court. This consisted of two main parts:
1 The High Court of Justice, with three Divisions, all courts of Common Law and Equity. As a matter of convenience cases concerned primarily with Common Law questions being heard in the Queen's Bench Division; those dealing with Equitable problems in the Chancery Division; and the Probate, Divorce, and Admiralty Division with the three classes indicated by its title.
2 The Court of Appeal—hearing appeals from decisions of the High Court and most appeals from County Courts.

Modern reforms

7.14 In 1970, mainly as the result of recommendations by a Royal Commission on Assizes and Quarter Sessions under the chairmanship of Lord Beeching, Parliament made further reforms among the Chancery Division, the Queen's Bench Division, Commercial Court, Admiralty Court, and the newly formed Family Division. The latter for dealing with guardianship, adoption, divorce, and other matrimonial matters.

Courts Act 1971

7.15 The Courts Act 1971 then followed, with effect from January 1972 and the object of separating civil from criminal proceedings throughout the country and of promoting speedier trials. The Act established the Crown Court in all cities and main towns for hearing criminal cases in continuous session, leaving the High Court to deal with civil actions. The County Courts, Magistrates' Courts, and the Coroners' Courts remain unaffected by the new changes; but the Act abolished all Courts of Assize and Quarter Session and various other long-established courts of special jurisdiction, such as the Liverpool Court of Passage and the Tolzey and Pie Poudre Courts of Bristol and others whose usefulness had long been in decline.