A CONCISE HISTORY
OF THE
COMMON LAW

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The previous chapter has told only half the story of Tudor reform in the sphere of law, for besides the common law courts the Tudors also inherited a group of institutions which modern historians describe as prerogative courts. The ancient common law courts had been consecrated by the centuries; the Tudor financial courts had been solemnly established by parliamentary statutes; but the courts to be considered in this chapter could claim neither antiquity nor legislative sanction. Some of them had grown up imperceptibly in various departments of government or around some officer of state; others were erected by royal commission. There was nothing irregular or "unconstitutional" in this, and the legitimacy of these institutions was undoubted. We have already seen, even in the fourteenth century, that the powers of Justices of the Peace owed as much to their royal commissions as to the statutes of Parliament.

The principal characteristic of prerogative courts, apart from their peculiar origins, was that they did not use the ancient system of common law writs, forms of action, or procedure. Instead, they used various forms of bill or petition between party and party, while crown proceedings could be begun by information, citation and like. The fundamental limitation on their jurisdiction came from the common law rule that a man could not lose his land, save by a royal (which was interpreted
as a common-law) writ. Legal estates in real property were thus beyond their reach. It likewise followed that prerogative courts could not try treason or felony, for the forfeiture or escheat of land would be involved. During the Tudor age these courts nevertheless elaborated important bodies of law such as equity in the Chancery, maritime and commercial law in the Admiralty and Court of Requests, libel and slander and much criminal law in the Star Chamber, and so on.

THE NEED FOR NEWER INSTITUTIONS

We have frequently insisted that the common law was essentially the law of land. The implications of this fact were very far-reaching. Its procedure was designed to reach people who owned land, and consequently was directed principally against the land rather than the person. The King's Court was at first concerned with the king's tenants and their feudal rights and duties, and such people could be most surely reached through their feudal holdings. When the common law of the King's Court was becoming the common law of the country, it had to deal with very different problems. Other heads of law besides real property had to be developed, and litigants of the newer type were not always landowners of any consequence, although they may have had other forms of wealth. The old procedure was not always effective in these cases. The common law procedure was generally patient and long-suffering, for it well knew that the tenant's land at least could not be removed from its jurisdiction. It knew also that haste was practically undesirable, for agriculture was an exacting pursuit which made it impossible for a landowner to leave his estate at a moment's notice. Relics of this still persist, for the long vacation of the courts and universities was once necessary to permit bench, bar and litigants to reap and garner their crops and plough their lands. Fixed terms, widely spaced, were designed to enable court work to fit in with agricultural work.

With the growing complication of society, law had to deal with people who could not be reached quickly, if at all, by means of a procedure directed against land—with people, that is to say, who could not be identified with certain acres. Similarly, there were matters which could best be settled by securing the prompt personal attendance of parties, and by giving them direct personal commands to act or to desist in certain matters. The common law rarely achieved anything so logically direct as this action in personam, simply because its main pre-occupation was real property, and in that particular subject it was as convenient to reach a man by attacking his land, as later admiralty found it useful to reach a man by attacking his ship.

This did not prevent Chancery from adjudicating upon uses, or the Council in Star Chamber from awarding possession.

For the Admiralty courts, see below, pp. 660 ff.

Plucknett, Legal Chronology, in Handbook of Dates, ed. C. R. Cheney.
principles; but the antagonism of contemporaries (and the confusion of later historians) was created by the claims that these rights were the result of "absolute" or "prerogative" powers in the monarch, when in fact they were nothing of the sort. The result of this mistaken policy was therefore to arouse opposition to many Crown practices which would never have been attacked had it not been for this attempt to regard them as extra-legal when in sober fact they were really legal. As for the "administrative" practice of Tudor and Stuart governments, there were undoubtedly some striking innovations, especially in the direction of injunctions by the Council against suing officials at common law. But even here the mediaeval principle that officials had privileges to the courts to which they were responsible will account for much, and the practice of the Exchequer relieving subjects against the oppression of royal officers must also be regarded as evidence that "administrative" principles were no novelty in the sixteenth and seventeenth centuries.

THE COMMON LAW, SOLE AND SUPREME

The conflict with the Star Chamber and the Court of Chancery was not the only aspect of the crisis, for the common lawyers had formed the grandiose plan of making their system sole and supreme over all persons and causes.

Against Chancery they had suffered a defeat which was well deserved; their own justice was an inferior product to that of the chancellors. Against the Star Chamber and High Commission they won a victory which, on the balance, we may regard as fortunate, although here again it must be admitted that the common law criminal procedure was behind that of the Star Chamber, which did at least allow the accused to give evidence in his defence. The struggle with other rivals must now be briefly mentioned.

There was a network of ecclesiastical courts covering England which played a large part in the lives of the ordinary folk. Archdeacons, bishops, archbishops, deans and an immense variety of peculiar and anomalous jurisdictions dispensed criminal and civil justice based on canon law. For five centuries there had been a steady growth of common law restrictions upon their activities, some based upon tradition, others on statute. Writs of prohibition to ecclesiastical judges and parties were a common feature of mediaeval law and continued after the Reformation. The courts of the Church ceased to be a serious rival to the common law, and were permitted to retain their anomalous probate jurisdiction and their more natural matrimonial jurisdiction until the middle of the nineteenth century.

Admiralty courts presented a different situation.\(^1\) During the reign of Elizabeth they had maintained a fairly equal struggle with the common

\(^1\) See Holdsworth, i. 548-568; cf. below, p. 663.
law courts, and in 1575 a conference resulted in a compromise. Coke, in 1606, renewed the struggle and declared that the alleged compromise of 1575 never existed. Here again the crippling of a court with established civil jurisdiction (important parts of it even being statutory) at once raised serious prospects. Foreign merchants properly protested that the common law offered them no such remedies in commercial causes as were available in Admiralty. Another conference followed in 1632 and again Admiralty jurisdiction was vindicated. The critical year 1641 saw another unsuccessful attack on the Admiralty, but slowly the common law courts usurped its jurisdiction over general commercial law and so were able to argue the Admiralty's proper province was the remaining purely maritime business. Here at least the common lawyers did provide a substitute in their own system for the services formerly rendered by their vanquished rival. One cannot help being tempted to wonder what the course of English law would have been if they had adopted the same policy in their struggle with Chancery. If the common law had recognised trusts, and had allowed equitable defences to actions on specialties (then a much agitated question), they might have succeeded in abolishing Chancery and uniting law and equity.

In the event, however, the common law chose to cling to its traditional views of legal estates and the sacramental character of seals, and in so doing they made the continuance of Chancery essential.
academic writers were chiefly interested in the polemics over admiralty, the freedom of the seas and the Church courts in which they were profession.]ally interested. A notary, John Marius, gave some Advice concerning Bills of Exchange in 1651, but the merchant Gerard Malynes wrote the first general English treatise on commercial law, Consuetudo vel Lex Mercatoria, in 1622. The law is put in the midst of all the other matters which interested merchants—weights and measures, geodesy, theory of numbers, economics—and although he was not a lawyer, he had a wide and accurate knowledge of the principal civilian works on his subject. In the eighteenth century the principal work was Beawes' Lex Mercatoria Radiviva, which appeared in 1758 and had a successful career until about 1789, when a flood of new works in the modern style finally separated commercial law from the practice and theory of trade.

COMMERCIAL JURISDICTIONS

The institutions which administered commercial and maritime law were the civic authorities in numerous continental towns, who frequently had the title of consuls. They appear in Milan as early as 1154 and seem first to have been the officials of a gild merchant, although their importance soon made it necessary for the cities to associate themselves with the work. Markets and fairs had their own machinery for applying commercial law; most famous of them are the courts of piepowder, which were specially concerned with wandering merchants who travelled from market to market. The word seems to have been at first a nickname referring to the "dusty feet" of its clients, but was later accepted as the official style of the court. The English courts of piepowder closely resembled similar courts on the continent, but just as the royal Admiralty superseded the local maritime courts, so a system of royal courts was set up by statute at various times in the fourteenth century which competed seriously with the local mercantile courts. These were called courts of the staple.

MARITIME JURISDICTIONS

For a long time the administration of maritime as well as commercial law rested in the hands of local jurisdictions. Seaport towns had their own maritime courts sitting on the seashore from tide to tide, but the only ones which survived in active working in England into modern times was the jurisdiction of the group of five towns called the Cinque Ports, which is the oldest existing maritime jurisdiction in England. ¹ The

¹ Markets and fairs were franchises, operated primarily for the profit of the owners. For specimen proceedings of English fairs and piepowder courts, see Select Cases in Law Merchant (ed. Gross, Selden Society).

² Statute of Staples (1353), 27 Edw. III, st. 2, consolidating earlier enactments; the policy was to force all foreign trade to pass through these monopolistic organisations, largely to simplify customs control.

³ For a thorough study of this remarkable league of ports see K. M. E. Murray Constitutional History of the Cinque Ports (Manchester, 1935).
other local maritime courts in the end were largely superseded by a newer and more centralised jurisdiction, the courts of Admiralty, held in the name of the Lord High Admiral who was appointed by the Crown.

The office of admiral\(^1\) resembled those of the chancellor, steward, constable and marshal in that it gradually developed a judicial side. At times there were several admirals, each with duties confined to particular seas, but eventually it became the practice to appoint a single admiral with powers varying according to his commission. The earliest distinct reference to a court of Admiralty in England is in 1357, and in 1361 we have the first known record of such a case\(^2\) which was heard before Sir Robert Herle, "admiral of all the fleets". The case is interesting, for the defendant having pleaded several defences, the plaintiffs demurred; but the court overruled them, "since this court, which is the office of the admiral, will not be so strictly ruled as the other courts of the realm which are ruled by the common law of the land, but is ruled by equity and marine law, whereby every man will be received to tell his facts... and to say the best he can" for his defence.

In 1301 we find English and foreign merchants endeavouring to use the court of the steward and marshal for commercial causes, both because of its speed, and also because it took cognisance of contracts made out of the realm; their prayer for its further recognition failed: non potest fieri quia contra magnam cartam.\(^3\)

In the meanwhile, however, it was the council which had most influence. All through the middle ages the council had made itself the protector of foreign merchants for the obvious reason that dealings with them frequently raised matters of international politics. The council developed this position, and in the later sixteenth century acquired a considerable commercial jurisdiction both original and also of a supervisory character over other courts, such as Admiralty, sometimes exercising it in the Star Chamber. Civilians were regularly called in to assist the council, for the commercial and maritime matters in the Digest were taken as forming part of the custom of merchants, while common law judges upon occasion would be consulted too. This jurisdiction of the council in the later sixteenth century was matched by that of the Star Chamber in the earlier part of the century and for obvious reasons.

The court of Admiralty has left us regular records from the year 1524, and it is clear that in the Tudor period it exercised a steady and direct influence upon both commercial and maritime law. Its procedure, however, was of the slower civilian type, and not that of the continental jurisdictions which operated under the decretal Saepe.\(^4\) Nevertheless,

\(^1\) Holdsworth, i. 544 ff.

\(^2\) This case was discovered by Mr Charles Johnson and printed in the *Camden Miscellany*, vol. xv (1929). For a collection of early material, see *Select Cases in Admiralty* (ed. Marsden), 2 vols., Selden Society.

\(^3\) Sayles, *King's Bench*, iii. pp. lxxvii, cxxv; Magna Carta (1225), c. 11; cf. Articuli super Cartas (1300), 28 Edward I, c. 3.

\(^4\) Above, p. 305.
the English court of Admiralty acquired a familiarity with negotiable instruments, insurance, charter-parties, bills of lading and other commercial business of which the common law as yet knew nothing. The other prerogative courts were less important in this connection, although the accident that most of the judges of the court of Requests were also Admiralty lawyers temporarily gave the court of Requests a certain amount of Admiralty jurisdiction by delegation from the Council. Chancery was principally concerned with partnership (for it had facilities for investigating accounts) and bankruptcy.

STATUTORY JURISDICTIONS

In the middle ages opinion was not altogether satisfied with Admiralty. In 1390 and 1391 statutes used strong language in criticism of it and restricted its powers; in 1450 and 1453 portions of its work were transferred to Chancery; not until the Tudors did Admiralty, like the navy itself, come into its own. From Henry VIII's reign onwards the admiral's commission empowered him to hear matters of shipping contracts, and of contracts to be performed beyond the seas, or made beyond the seas, the statutes notwithstanding. A remarkable act of 1536 inaugurated the new policy of strengthening Admiralty by confirming its jurisdiction over crime committed on the seas, and permitting trial by jury; the reason given is that the civil law of proof by confession of witnesses is practically impossible under the circumstances without torture, for witnesses are unobtainable. Shortly afterwards, another statute confirmed and enlarged its civil jurisdiction. There was also a tendency, however, to place a few mercantile matters under the jurisdiction of a special statutory court; thus the recorder of London, two civilians, two common lawyers and eight merchants were set up as a summary court for insurance matters in 1601.

ATTACKS BY THE COMMON LAWYERS

As soon as mercantile and maritime jurisdiction seemed desirable, the common lawyers began to covet it. The local courts felt the attack first. Fair courts were being hampered both by statute and by decision even in the fifteenth century; in the sixteenth, the local maritime courts waged

1 13 Rich. II, st. 1, c. 5; 15 Rich. II, c. 3.
2 29 Hen. VI, c. 2; 31 Hen. VI, c. 4.
3 Holdsworth, i. 549 n. 7; cf. the commission of 1618 in Prothero, Statutes and Documents, 388 at 391.
4 28 Hen. VIII, c. 15. The act was followed by a sharp rise in the number of convictions. But if witnesses were unobtainable, how did the juries reach their verdicts? The trials were to be before commissioners, of whom the admiral might be one. Later on, the commission was filled by common lawyers.
5 32 Hen. VIII, c. 14.
6 43 Eliz. c. 12.
7 Holdsworth, i. 539.
a losing fight with Admiralty,\(^1\) and in the late sixteenth century Admiralty itself came into conflict with the courts of common law.

At the close of the fifteenth and the beginning of the sixteenth centuries we had in England a Reception of the Italian mercantile law; and yet, a century later, in the first years of the seventeenth century, Coke asserted that "the law merchant is part of the law of this realm".\(^2\) This Reception was effected largely through the prerogative courts. Italian influence had always been strong in English finance, and when the revival of Roman law spread over Europe in the sixteenth century the Mediterranean mercantile customs, together with their civilian and canonist aspects, accompanied it. This Reception was general in northern Europe, and it was obviously prudent that England should follow suit, if, as the Tudors always maintained, England was to develop its pace in European trade. The prerogative courts, therefore, contained a strong element of foreign-taught civilians, whose activities were never welcomed by practitioners of the native system. The common law judges were frequently present at conferences, and this may have tempted the common lawyers to try to acquire this jurisdiction for themselves; when Coke came to the bench he deliberately set himself to cripple the court of Admiralty and to capture mercantile law for the common lawyers. Prohibitions were constantly issued to the Admiralty and other mercantile courts, while by a daring fiction which begins to appear frequently in the sixteenth century the common law courts assumed jurisdiction over acts which took place abroad, by the simple device of describing the place as being "in the parish of St Mary-le-Bow in the ward of Cheap". This allegation was not traversable. In this way the common law began to capture the field of mercantile affairs, but for a long time it regarded itself as administering a strange and foreign law. It viewed the matter from the standpoint of custom; it was prepared to apply mercantile custom when that custom had been proved. Each case, therefore, had to allege the existence of a mercantile custom and then establish it by a jury of merchants.\(^3\)

Admiralty did not submit without a struggle. They secured a conference with the common law judges in which the position was defined and a few concessions made to Admiralty,\(^4\) in 1575. When Coke came to the bench in 1606 he denied that the agreement was ever ratified, and renewed the conflict with much bitterness. It was, of course, the mercantile community which suffered through the attachments, contempts, prohibitions, writs of corpus cum causa and the rest; whichever court he sued in the other was powerful enough to frustrate him and prevent its rival from doing justice; and the common law courts were clearly incapable of doing anything in a large proportion of

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\(^1\) Holdsworth, i. 531.

\(^2\) Co. Lit., 182.

\(^3\) For an early example (1292) see Sayles, King's Bench, ii. 69-72.

\(^4\) The documents are printed in Prynce, Animadversions on Coke's Fourth Institute.
mercantile cases.\textsuperscript{1} Ambassadors protested, and finally another conference and another settlement (also in favour of the Admiralty) was effected in 1632. Like that of 1575 it was not observed, and the conflict continued through the Commonwealth, was renewed at the Restoration, and dragged on until the nineteenth century reconstituted Admiralty jurisdiction.

Meanwhile, the claim of the common law courts to rival some at least of the law of the Admiralty was being made good. What was merely a claim when Coke made it, became something more in the hands of Holt a century later, for by the close of the seventeenth century the constant repetition of finding mercantile custom in each case that arose was seen to be unnecessary, and the courts began to take notice of some of the more notable mercantile customs without requiring proof of them, and this policy was finally adopted as a general practice by Lord Mansfield.\textsuperscript{2} In this way the common law set out to rediscover principles of commercial law which were known to the Admiralty judges several generations earlier, and to fit them into its framework of historical forms—which fortunately was a little more flexible in the eighteenth than in the seventeenth century.

THE CONTENT OF EARLY LAW MERCHANT

We must now consider the law which these local mercantile authorities administered. They exercised a very wide power of regulation—and the middle ages thoroughly believed in the public regulation of every sort of activity. The only restrictions imposed upon them were the law of the city authorities which must not be contravened, a general requirement of reasonableness, and a restriction to purely mercantile matters.

Besides developing law and applying discipline to members of the estate of merchants, there were also matters of a diplomatic character which the consuls undertook. Treaties and commercial conventions with other communities were frequently negotiated, while down to the fourteenth century they were frequently engaged in reprisals. This meant that if a merchant was unable to obtain justice against a foreigner in the foreigner's court, then his own government would authorise him to recoup himself out of the property of any merchant of the foreign jurisdiction in question whom he could find. The foreigner was then left to take the matter up with his own government if he could. This system was, of course, extremely inconvenient. Nevertheless it was widespread; even in England we find different cities taking reprisals against one another, justifying it on the custom of merchants.\textsuperscript{3} By the fourteenth century reprisals became much more rare.

\textsuperscript{1} See the examples in Holdsworth, i. 555.

\textsuperscript{2} See generally, L. S. Sutherland, [1934] Trans. R. Hist. Soc., 149-176; in detail, Fifoot, Mansfield, 82-117.

\textsuperscript{3} For the abolition of this rule in Kent, save merchant towns, in 1259, see the remarkable example of county legislation in E. F. Jacob, Baronial Rebellion, 351, 352, and in Law Quarterly Review, xii. 252.