



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE LORD BURNETT OF MALDON, LORD CHIEF JUSTICE

WHAT'S IN A NAME? THE HIGH COURT AND ITS DIVISIONS

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Introduction

1. It is a pleasure to have been asked to give this year's Pilgrim Fathers lecture and particularly because it has enabled me to return to Plymouth where I spent happy weeks as a High Court Judge when presiding judge on the Western Circuit. When the Pilgrim Fathers set off on their great journey across the Atlantic, the subject of my talk, the High Court of England and Wales, did not yet exist. More accurately, it did not exist in its current form. As we will see the High Court of England and Wales and its three Divisions, the Queen's Bench, Family and Chancery Divisions, like so much of our constitutional architecture, is the product of a long and continuous evolution, jockeying for position and political horse-trading. The names are familiar but save for the Family Division, created in 1970, they give no real hint of the work done within the jurisdictions.
2. The High Court's ultimate origin lies, as with so much else, in the events of 1066 and the establishment of settled changes in the governance of England in the years that followed. Conquest saw the replacement of Saxon justice with Norman justice dispensed by the Curia Regis – the King's court. "Court" meant more than it does today. It was as much an advisory body as it was a judicial one. Because of its dual role, it was composed not only of what were



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known as the King's Justiciars, who were learned in the law – the predecessors of the Justices of the High Court – but also the great officers of state, many of whose offices continue today. They numbered, for instance, the Lord High Treasurer, now the Lords Commissioners of the Treasury, two of whom we know as the Prime Minister and the Chancellor of the Exchequer, and the Lord High Chancellor, the Lord Chancellor for short. As might be expected for feudal times, justice was not just dispensed in the King's name by the Curia Regis, but by the King himself. As one historian explained the position,

‘We may consider the King as sovereign or chief Lord of this Realm, and the fountain of justice to his subjects . . . Their causes were heard and judged either before the King himself, or else (most usually) before his Chief Justiciar, or before him together with some others styled Justiciae or Justiciars.’¹

That the sovereign remains the fountain of justice is evidenced daily in our courts. It is symbolised by the Royal Court of Arms in our court rooms, and as Lord Devlin explained in giving judgment in the case of *Re K* in the House of Lords in 1965, ‘all justice flows from the prerogative’², that is to say the royal prerogative.

3. In today's lecture I want to trace the development of the courts, the creation of the High Court and its Divisions, and consider recent reforms.

The courts of the common law and equity

¹ Marsh, *History of the Court of Chancery and of the Rise and Development of the Doctrine of Equity* (Carswell) (1890) at 5 – 6 and at 10, cites Madox, *History of the Exchequer* at 84 <<https://archive.org/details/cu31924084264252/page/n11>>.

² *Re K* [1965] AC 201 at 237.



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4. The early middle ages were, as we all know, a rather energetic time for monarchs. Most spent significant amounts of time fighting wars, visiting their overseas dominions or engaged in attempts to stamp out civil war or maintain control at home. It was unsurprising then that over time the Curia began to hear and determine disputes without the King being present. Justice was done by the Curia in the King's name rather than by the King.

5. That was not simply for reasons of convenience, but also due to the principle emerging that justice should be dispensed by individuals who were learned in the law – the judiciary. That the monarch could not dispense justice personally was put beyond doubt during the reign of James 1st. In the Case of Prohibitions in 1607, one of the courts that evolved out of the Curia Regis overturned an attempt by James to decide a property dispute. Property disputes between subjects were dealt with by the Court of Common Pleas. The King had wished to determine a case himself. James stated that,

"In cases where there is not express authority in law, the King may himself decide in his royal person; the Judges are but delegates of the King."

The King considered that there was no need to know any law to dispense justice. He was endowed by God with all the qualities that were needed and could apply his sense of justice

6. Sir Edward Coke, one of the most influential judges in our history, was then Chief Justice of the Court of Common Pleas. He disagreed, saying,

"the King in his own person cannot adjudge any case, either criminal – as treason, felony etc, or betwixt party and party; but this ought to be determined and adjudged in some court of justice, according to the Law and Custom of England."



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7. The King was not happy with this outcome. Sir Edward was moved to be Lord Chief Justice of the King's Bench, the most senior of the judicial positions. It was thought he could do less harm there to the prerogatives of the King, but he went on to hold that the King was subject to the Law and could not legislate by proclamation.³ He was dismissed from office but went back to the House of Commons where he had sat and been Attorney General before becoming a judge. He remained a thorn in the side of the Stuarts.
8. Which were the courts that dispensed justice by the time Sir Edward Coke was clarifying one aspect of what today we call the separation of powers? Over the course of the 11th to the 14th centuries the Curia's judicial functions had gradually evolved into four courts, the superior courts of common law and equity. Three were on the common law side. First, the Court of Common Pleas which generally dealt with disputes between the King's subjects. Secondly, the Court of Exchequer of Pleas, of which until the 1870s the Chancellor of the Exchequer was a judge.⁴ It dealt originally with revenue matters. Its primary jurisdiction was between the King and subject, although through the use of legal fictions it developed jurisdiction to hear personal actions between private individuals. The legal fiction employed was for the plaintiff to claim that he was either a farmer or a debtor of the Crown.⁵ Finally, the Court of King's or Queen's Bench. It was originally an itinerant court, following the King wherever he went. Its main function was to adjudicate on matters in which the Crown had an interest. It exercised both a criminal jurisdiction and also a supervisory jurisdiction; the foundation for today's judicial

³ The Case of Proclamations [1610]

⁴ Section 96 of the Supreme Court of Judicature Act 1873; F. Maitland, *The Constitutional History of England*, (1908) (1st Edition) (Cambridge University Press) at 135.

⁵ R. Kerr, *An Action at Law: Being the outline of the Jurisdiction of the Superior Courts of Common Law, with an elementary view of the Proceedings in Personal Actions and in Ejectment*, (T & J Johnson) (1854) at 26.



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review jurisdiction. On what was known as the Plea Side, it had jurisdiction to deal with various types of dispute between private individuals, such as trespass to the person.

9. The final court was the superior court of equity: the High Court of Chancery.⁶ Originally, it too was a common law court with a jurisdiction that focussed on the power to issue the writs that formed the basis of the common law courts' jurisdiction.⁷ It was headed by the Lord Chancellor. The Common Law Courts decided forms of action which were restricted and formalistic. Yet there were many legal disputes that could not be resolved within the forms of action required by the Common Law Courts. From this developed the equitable jurisdiction of the High Court of Chancery many of whose features still permeate our law, for example the distinct concepts of legal and equitable interests and the subtlety of the law of trusts. Until the 17th century equitable relief depended on the personal approaches, some would say prejudices, of the Lord Chancellor of the day, often ecclesiastics rather than lawyers. From this came the famous aphorism of the jurist John Seldon:

“Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.”

Thereafter it developed its own rules and the law of equity became a distinct and parallel code alongside the common law.

⁶ There was a fifth court, the Court of Exchequer Chamber. It was, however, an appellate court and a creature of statute.

⁷ W. Holdsworth, *A History of English Law*, (1966) (Sweet & Maxwell) (7th Edition) (Holdsworth (1966)) Vol. 12 at 395ff



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10. In addition to the common law and equity courts there was a further judicial strand: that of the civilian courts. Civilian because they exercised a civil law jurisdiction, rather than the common law or equity. There were two main civilian courts: the High Court of Admiralty,⁸ and the ecclesiastical courts, which amongst other things had jurisdiction over matters of probate as well as defamation.⁹
11. The organic development of three distinct jurisdictions, common law, equity and civilian law, with six or more major courts had a number of inevitable, but undesirable, consequences. The first was competition, as each sought to expand their jurisdictions to increase their workload and fee income, in which the judges had an interest until their salaries were fixed.¹⁰ One consequence of this competition was the development of technical complexity in the law. Moreover, the Court of King's Bench increasingly developed legal fictions to expand its jurisdiction into what ought otherwise to have been the province of the Court of Common Pleas.
12. It would take too long to set out the twists and turns of the struggle for supremacy, of this great competition in the delivery of justice, but its consequences did not well serve the administration of justice or the rule of law. By the 19th century, as is well-known from literature

⁸ J. H. Baker, *An Introduction to English Legal History*, (Butterworths) (Fourth Edition) (2002) at 123.

⁹ T. Plucknett, *A Concise History of the Common Law*, at 741ff; J. H. Baker, (2002) at 126.

¹⁰ Section 3 of The Commissions and Salaries of Judges Act 1760 provided for fixed salaries for the judiciary, 'And be it enacted by the authority aforesaid, That such salaries as are settled upon judges for the time being, or any of them, by act of parliament, and also such salaries as have been or shall be granted by his Majesty, his heirs, and successors, to any judge or judges, shall, in all time coming, be paid and payable to every such judge and judges for the time being, so long as the patent or commissions of them, or any of them respectively, shall continue and remain in force.'



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at the time, such as Bleak House, justice was in a lamentable condition. There was a widespread realisation that change was required. However, the legal establishment was then – and many would say now – instinctively resistant to change. The nonsense of having three competing Common Law Courts, all also in competition with the Court of Chancery was the subject of a famous debate in the House of Commons in 1828 when Henry Brougham delivered a damning indictment of the current position and articulated the need for reform.¹¹ Two years later he became Lord Chancellor in Lord Grey’s reforming Liberal Whig administration and was a powerful proponent of electoral reform and the abolition of slavery. He made little progress with the courts. The problems rumbled on and in 1867 the Judicature Commission was appointed by Queen Victoria on the initiative of the Lord Chancellor, Lord Cairns, to examine the position and make recommendations for reform. In their first report in 1868 they said this,

‘[The] distinction [between common law and equity] led to the establishment of two systems of [justice], organized in different ways, and administering justice on different and sometimes opposite principles, using different methods of procedure, and applying different remedies. . . The evils of this double system . . ., and the confusion and conflict of jurisdiction to which it has led, have long been known and acknowledged.’¹²

Those evils were procedural complexity, excess litigation cost and inherent and exorbitant delay. Claims could and were often brought in the wrong court. Procedural mistakes were rife. Any such errors would simply result in claims being struck out, at the cost of the party in error. In some cases, due to restrictions on jurisdiction, discrete aspects of the same claim had to be

¹¹ H. Brougham MP, later Lord Chancellor. HC Deb 07 February 1828 vol 18 cc127-258. <<https://api.parliament.uk/historic-hansard/commons/1828/feb/07/state-of-the-courts-of-common-law>>.

¹² First Report of the Judicature Commissioners (HMSO, 1869) at 5-6.



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litigated before different courts. If, for instance, a party to a claim in the Common Law Courts needed to secure the compulsory disclosure of evidence from the opponent, an application to the Court of Chancery was necessary. Discovery, or disclosure as it is now called, was a procedural device known only to that court due to its own canon law inheritance.

13. Worse than this, where the courts had competing overlapping jurisdiction, as was the case for instance in respect of company law disputes, the same dispute could be litigated before more than one court with contradictory judgments given by the different courts.¹³ In all of this a litigant may equally have found it necessary to instruct multiple classes of lawyer. Today we have solicitors, barristers and legal executives. Then, there were solicitors, who acted in the equity courts, attorneys, who acted in the common law courts, proctors for the ecclesiastical courts; and, of course, barristers and serjeants-at-law as advocates.
14. Organic evolution had produced a system, as Jeremy Bentham justifiably described it, that was one 'of exquisitely contrived chicanery which maximises delay and denial of justice.'¹⁴ He was right; almost nobody sought to justify the status quo. In principle all nodded in favour of reform but there were powerful vested interests at stake. The legal and political establishments spent the best part of fifty years, multiple reform reports and Acts of Parliament from the 1820s to the 1870s trying to cure the problems caused by the multiplicity of courts and jurisdictions. The answer the Judicature Commissioners finally came up with was the creation of a new, a single and unitary High Court of Justice as part of a new Supreme Court of

¹³ Ibid at 7.

¹⁴ J. Bentham cited in J. Dillon, *Bentham's Influence on the Reforms of the 19th Century*, in *Select Essays in Anglo-American Legal History*, Vol. 1, (1907, 1992 Reprint) (Boston, Little Brown & Company) Vol. 1 at 496 <<https://oll.libertyfund.org/titles/schools-select-essays-in-anglo-american-legal-history-vol-1>>.



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Judicature. The other part of the Supreme Court would be, for the first time, a general Court of Appeal. It is that structure which, apart from changing the name of Supreme Court to Senior Courts in 2005,¹⁵ remains in place today.

The High Court and its Divisions

15. On any assessment the Victorian reforms were radical. The Judicature Acts of 1873 and 1875 did not abolish the common law, equity and civilian courts, but preferred to consolidate them in the new High Court thus preserving and transferring their jurisdiction to it.¹⁶ There were five divisions: Queen's Bench, Common Pleas, Exchequer, Chancery and Probate, Divorce and Admiralty - the last coming via the civilian legal tradition. Nonetheless, the change was substantial. For the first time in 900 years, there would be a single superior court with universal jurisdiction, its procedure operated according to a new, simple and less technical civil procedure code – the Rules of the Supreme Court – with a single judiciary. The judges of the previous courts became the judiciary of the new High Court and Court of Appeal. All applied the same law, borrowing where necessary from the traditions of the predecessor courts. As an aside, I would commend the simplicity of the Rules of Court contained in a Schedule to 1873 Act. Our Victorian forebears would be shocked to see the volume and complexity of the Civil Procedure Rules of today and the barnacles encrusted on them in the form of judicial gloss all set out in two volumes in the White Book, with hundreds more pages available through online links.

¹⁵ Constitutional Reform Act 2005, s.59.

¹⁶ Supreme Court of Judicature Act 1873, s.3, 'From and after the time appointed for the commencement of this Act, the several Courts herein-after mentioned, (that is to say,) the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.'



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16. For the first time the Lord Chancellor became the head of the judiciary.¹⁷ That was a radical change that caused the judiciary some discomfort, as it transferred the authority of the Chief Justices of the former common law courts to the government. The Lord Chancellor had previously been head only of the Court of Chancery. Sir Alexander Cockburn Bt, then Lord Chief Justice of the Court of Queen's Bench and before that Chief Justice of the Court of Common Pleas said that this aspect of the reform compromised the 'independence of the Superior Courts' and gave 'dangerous power to the executive'.¹⁸ How times and perspective change. When the decision was taken some 130 years later to remove the Lord Chancellor as a judge and as head of the judiciary, transferring that role to the Lord Chief Justice, it was assumed by some that he had always been head of the judiciary as well as a Cabinet Minister speaking for the judiciary in Government. Much had changed in the intervening years. The judicial heads of the common law courts, themselves almost always former politicians, had no difficulty in making the voice of the judiciary heard in Government, alongside the Lord Chancellor as head of the Court of Chancery who was also a minister. The Lord Chancellor's role as the voice of the judiciary and guardian of the rule of law at the Cabinet table evolved and assumed greater significance during the 20th Century as the worlds of law and government became more remote from each other.

17. Reform may have been radical, but steps were taken to disguise that fact as far as possible.

One of the ways this was done was through the creation of the High Court's Divisions. What

¹⁷ Supreme Court of Judicature Act 1873, ss.5 and 6.

¹⁸ Sir Alexander Cockburn cited in P. Polden, *Mingling the Waters – Personalities, Politics and the making of the Supreme Court of Judicature*, Cambridge Law Journal 575 at 579.



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underpinned the fears of Sir Alexander Cockburn and the other common law judges was not just a governmental takeover of the courts. As a common law judge he feared that the new High Court would be nothing more than, as he put it, “the Court of Chancery . . . under a new and high-sounding name . . . to reign exclusively supreme.”¹⁹ Ironically, the most active complaints by the legal profession came from the Chancery Bar. Cockburn saw in the reforms not just what was described as “the triumph of equity”²⁰, but the emasculation of the common law and its traditions. In some ways he was not altogether wrong in his fears.

18. Aspects of the common law systems of justice were effectively replaced by those drawn from the Chancery Court. Three examples illustrate this point. First, the common law courts historically would sit *en banc*. All the judges would sit together to hear cases. The numbers were then small with each of the common law courts having four or five ordinary judges together with the chief. In Chancery the Lord Chancellor, the Master of the Rolls, or Vice-Chancellors sat alone. Secondly, at common law, the court’s authority was divided between judge and jury. In Chancery, there were no juries. Thirdly, at common law the pleading process was highly technical and restricted by the forms of action, the aim being to reduce each dispute to a single issue. In Chancery, while the pleading process was technical, it was not limited by any forms of action, and rather than being aimed at reducing disputes to a single issue, it sought to decide all relevant matters arising in the dispute. On each of these, and other points, the approach in Chancery came substantially to be adopted. The survival of Divisional Courts to hear some cases in the Queen’s Bench Division when it is exercising its supervisory and criminal jurisdiction might be seen as a vestigial remnant of the pre-1873 practice of the Common Law

¹⁹ Cited in P. Polden at 579.

²⁰ Cited in P. Polden at 580.



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Courts of sitting *en banc*. The same reforms also effected the statutory merger of solicitors, attorneys and proctors into a single profession. Once more, the Chancery route was taken. The name chosen for the newly fused profession was that of solicitor.²¹ As Stephen Subrin, an American procedural scholar put it when he considered equivalent reforms in the United States, equity conquered the common law.²²

19. The creation of the High Court Divisions was one way to ameliorate the judges' and lawyers' concerns. The new Supreme Court of Judicature was to be a shell, divided into permanent Courts: the High Court and the Court of Appeal, the latter at the time only to have civil jurisdiction. The Court of Criminal Appeal was not created until 1908 and its jurisdiction was not transferred to the Court of Appeal until 1966 when the structure we have today of two divisions of the Court of Appeal was established.²³ The High Court was divided into the separate divisions I have identified. Each Division was to be given specific jurisdiction to deal with particular types of dispute.

20. The naming of the Divisions was a matter of acute debate. The original suggestion was that they be called the 1st Division, 2nd Division, 3rd Division and so on.²⁴ The aim was to ensure

²¹ Supreme Court of Judicature Act 1873, s.87, 'From and after the commencement of this Act all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called Solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called Solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.'

²² S. Subrin, *How equity conquered common law: the Federal Rules of Civil Procedure in historical perspective*, 135 U. Pa. L. Rev. 909 1986-1987.

²³ Criminal Appeal Act 1966.

²⁴ P. Polden *ibid* at 583. The original suggestion was that of Lord Selborne LC.



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that the old courts did not simply come back in a new form, even if the work of the Divisions was to correspond to that of the old courts, save for the admiralty and ecclesiastical courts' jurisdiction which would be wrapped up one. This was a step too far for many. When the reforms had first been introduced in a Bill by the Liberal Lord Chancellor, Lord Hatherly, he had neglected to do the ground work of getting influential support on board and put almost everybody's noses out of joint. He did not even square his proposals in advance with Lord Cairns, who had chaired the Commission and was Conservative leader in the House of Lords. The Bill left much to rules and delegated legislation which many found offensive. It faltered. A revised Bill was introduced by his successor, Lord Selbourne, who was more adept at securing the necessary support. His Bill, which became the 1873 Act, provided more detail and calmed nerves by retaining the old names. The serving Chief Justices of the various courts were also to become the heads of the new Divisions. A final subtlety was introduced to assuage the fears of the common law judges. When the amendments to the Judicature Bill were made to introduce the new Divisions, top of the list was the Queen's Bench Division,²⁵ not the Chancery Division. The Chief Justice of the Queen's Bench became the first Lord Chief Justice of England. Ever since then the order of precedence has seen Queen's Bench take the top spot.

21. The Court of Queen's Bench had long been the senior of the common law courts. This was reflected in two tangible ways. First, its Chief Justice was paid an astonishingly large salary - £10,000 per annum by the mid nineteenth century - and second by convention he was given a peerage. That, however, was denied to Sir Alexander Cockburn by Queen Victoria. She noted that "this peerage has been more than once previously refused upon the ground of the

²⁵ P. Polden *ibid* at 583.



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notoriously bad moral character of the Chief Justice."²⁶ He lived with and had children by a woman to whom he was not married.

22. The new High Court was thus made to look as similar to its predecessors as possible, even if in substance its jurisdiction was drawn from all of them. That said, this similarity was intended to be no more than temporary. It was made clear that the Divisions were not to be permanent, and that as the business of the courts changed in the future, reorganisation would take place. Sir George Jessel QC MP, at the time Solicitor-General and later Master of the Rolls, was responsible for the Act's passage through the House of Commons. He set out the position when explaining why there was to be no office of Vice-Chancellor created,

‘the Chancery Division was not meant to be permanent, but was merely transitional; and it was hoped, in a short period, perhaps about ten years, to obtain this result – that both practitioners and Judges would have become sufficiently familiar with the principles of Equity to administer it in a satisfactory manner in all the Courts.’²⁷

Judges would not be appointed to permanent Divisions. Any appointment was subject to potential structural reorganisation. As the Judicature Commissioners had previously put it, the new High Court should be divided into ‘as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require.’²⁸

23. Intentions are fine things. The reality was somewhat different. Regular reorganisation did not take place. The three common law Divisions merged into the single Queen's Bench Division.

²⁶ Letters of Queen Victoria" 1.257, ed. G. E. Buckle; cited in the Dictionary of National Biography

²⁷ Parliamentary Debates, 3rd s. vol 216 cols 1587 – 1588 (30 June 1873)

²⁸ Judicature Commission, First Report at 9.



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That was facilitated by the death of both Sir Alexander Cockburn and Sir Fitzroy Kelly, the Chief Baron of the Exchequer, in 1880. That left Lord Coleridge, the earlier-ennobled Chief Justice of the Common Pleas to become Lord Chief Justice of England, an office he held until 1894. All three had previously been Attorney General. That remains the only time the statutory power within the Judicature Act to reorganise the Divisions has been exercised.²⁹ The Divisions have been subject to one further statutory reform, when in 1970 the Family Division was created out of the Probate, Divorce and Admiralty Division. Probate was divided between the Chancery and Family Divisions, and lost its name as a Divisional title. Admiralty became a court again rather than a Division. It was transferred to the Queen's Bench Division and became a specialist court within it. This reform was not carried out under the mechanism provided in what by then was the power to restructure the Divisions in the Supreme Court Act 1925. It was wrought by statutory reform in the Administration of Justice Act 1970.³⁰ The amalgamation of the three common law divisions into the Queen's Bench Division was an early gain which had to await the retirement or death of the transitional chief justices. Whatever Sir George Jessel and other reformers might have intended in the 1870s, the Chancery Division and equally, since 1880, the Queen's Bench Division have proved to be anything but temporary.

Recent and possible future reform

24. The longevity of the Divisions might have appeared unlikely following the late 19th century reforms and particularly the amalgamation of the three common law Divisions in 1880. With hindsight it is clear to see why such a view was not justified by that merger. It had been apparent

²⁹ Order in Council, of 16 December 1880. See *Wilson's Judicature Acts* (3rd edition, 1882) at 42 – 46.

³⁰ Administration of Justice Act 1970, s1.



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for decades, indeed almost two centuries, before the 1870's reforms, that the three common law courts were essentially administering the same law. Their continued existence did not rest on any fundamental difference in the law they applied, as it did with the divide between the common law and equity courts, that is the Court of Chancery. There really was no credible argument for maintaining three courts or Divisions exercising a very similar jurisdiction. The reality was that the distribution of work tended to mean that much, if not all, of the work that called for the use of the old equitable jurisdiction was assigned to the Chancery Division; and there it remained.

25. The underlying philosophy of the reforms was that Divisions could be created and reformed to reflect changes and developments in the needs of litigation. Towards the end of the nineteenth century there was no fixed view that there should be three Divisions into which all should be shoehorned. An opportunity arose in the 1890s to make a radical change. There was a justified concern that the High Court could not provide specialist, speedy and cost-effective adjudication in commercial cases. Indeed, the business community had earlier been vocal throughout the first 70 years of the 19th century in support of court reform. That concern came to a head due to problems in the way Mr Justice Lawrance dealt with the case of *Rose v Bank of Australasia*³¹. His judgment took a very long time to emerge and when it did, it failed to deal with some of the claims in issue. There was rumbling discontent not assuaged when his overall conclusions were vindicated in the House of Lords. The point was that the English courts were not meeting the needs of business in the same way as they did in the 18th century when the common law rose to the challenge of keeping pace with mercantilism.

³¹ [1894] AC 687.



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26. The criticism went to the quality of the judgments and also to the nature of the procedures in the Queen's Bench Division. This might have provided a peg on which to make divisional reform and create a Commercial Division of the High Court. If, as was said in the 1870s, the Divisions were to be subject to regular reorganisation depending on changes in business before the courts, what better example than this that such need had arisen? Surely a Commercial Division would be created. But as we know, that did not happen. A different route was taken which kept the Divisions intact. The judiciary has power to reorganise the internal business of the Divisions. Rather than create a new Division, in 1895 they created by Order a new court, the Commercial Court within the Queen's Bench Division.³² It would formally become a specialist court of that Division in 1970 by the same legislation that created the Family Division.³³

27. That decision might be seen as the moment when the Divisions which emerged in 1880 became cemented. The judiciary had identified a mechanism by which reform could take place without having to go through a statutory procedure to alter the Divisions. The creation of new lists,³⁴ and where necessary new courts, within the existing structure was easier to achieve than Divisional reform. It did not require any prescribed procedure to achieve and its use has been flexible and prodigious.

³² Notice as to Commercial Causes (February 1895) reprinted in A. Colman, *The Practice and Procedure of the Commercial Court*, (Lloyd's Press) (1983, 1st edn) at 7.

³³ Administration of Justice Act 1970, s.3; now see Senior Courts Act 1981, s.6(1)(b).

³⁴ The creation of formal lists is now subject to rules of court.



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28. Since the 1890s, we have seen the expansion of specialist lists. Most recently, to meet modern business needs, we have created a specialist Financial List,³⁵ the first example of a joint list of both the Commercial Court in the Queen’s Bench Division and the Chancery Division. After almost 130 years it was a first formal admixture, not merger, of the jurisdiction of the old common law and equity courts in the High Court through their successor Divisions. We have also just created a new media and communications list which draws on judges from both the Queen’s Bench and Chancery Divisions. The intention underpinning its creation is the need to meet developments in defamation, privacy and data protection law.³⁶ There are also insolvency and companies lists. The Administrative Court sits within the Queen’s Bench Division, as the successor of the Crown Office list; so too the Planning Court and the Technology and Construction Court. Within the Chancery Division sits the Patents Court and the Intellectual Property Enterprise Court.

29. Against this backdrop of flexibility, it is perhaps unsurprising that proposals to reform the Divisions following the 2005 Constitutional Reform Act, to create what was at one time referred to as ‘X’ Division to deal with property and business disputes were not pursued, and that was despite over ten years of consideration.³⁷ Equally, Divisional reform was considered by Lord Justice Briggs as part of the Civil Courts Structure Review in 2015. He noted that the ability to create new lists, when taken together with the recent co-location of the Commercial Court, Technology and Construction Court, and Chancery Division in the Rolls Building in

³⁵ CPR Pt 63A and PD63A.

³⁶ CPR Pt 53 and PD53A, as from 1 October 2019.

³⁷ For a discussion see, Michael Briggs, *Civil Courts Structure Review – Interim Report*, (December 2015) at 100ff <<https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>>.



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London, was able to secure effective reforms, as business needs developed, without changing the Divisions.³⁸ He described the present Divisional structure as illogical but concluded that it presented no real difficulties. It was thus ‘probably best left alone’.³⁹ Subsequently, building on the success of the Financial List, a further set of cross-divisional reforms was initiated in July 2017, when the new Business and Property Courts were launched. The loose organisational structure covers the Queen’s Bench Division’s Commercial Court and its Technology and Construction Court and the Chancery Division’s specialist business, intellectual property, financial services and insolvency work. Cross-divisional working and cross-divisional sittings are now the norm.

30. On one level the most recent administrative changes that created the Business and Property Courts have echoed the 1870 reforms. In the 1870s a new unified superstructure was created, which retained within it the organisation of its predecessor courts. In the 2010s, that unified superstructure – the High Court – complete with its retained echo of the Common Law and Chancery Courts in practice is operating, where necessary, in a unified way. There remains much work in both divisions which is exclusive to each and derives from the long historical context of their creation. The Divisions may not have proved to be a temporary measure, perhaps reflecting a greater sense of continuity than was anticipated by the 1870s reforms, but the aim of promoting a single jurisdiction divided as necessary to meet changing trends in litigation has been achieved. We remain willing and able to adapt to changing times without losing much that is valuable both in the longstanding recognition of the high reputation of our

³⁸ Ibid at 102.

³⁹ Sir Michael Briggs, *Civil Courts Structure Review – Final Report*, (2016) at 78 <<https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>>.



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specialist courts and the advantages of judges dealing with a wide range of work. This may not have been achieved as was originally intended by the Judicature Commission or the promoters of the 1870s legislation. Instead, there has been flexibility and imagination in using the possibilities of the single High Court created after 1873. Unlike the existence of the common law, equity and civilian courts, the superstructure is not a barrier to reform dictated by changing times and the developing needs of those who use our courts.

31. I would not go as far as Lord Briggs as suggesting that the Divisions of the High Court are illogical. Were we starting with a blank sheet of paper, things would look very different. That said, when one considers what came before the 1870s and the need to achieve reform through legislative change in an environment of deep legal conservatism and the guarding of vested interests, those reforms were a remarkable achievement. Their logic was driven by the art of the possible and the need to balance competing interests.

32. Making fundamental structural changes to the Divisions today now would have many practical adverse consequences – a topic for another day. Yet, the power within the judiciary to make adaptations when necessary to reflect changes in the needs of litigators has served us well and will continue to do so. There is much else on our plates, not least the urgent work to make good the lack of investment in our courts over decades made possible, in part, by the modernisation programme supported with Government funding. The judiciary is contributing its expertise to help shape the many projects with a view to improving access to justice and the effectiveness of all our systems and processes. There is no clamour for structural reform of the three Divisions. Most can live with some anomalies. Strange as it seems, the temporary



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arrangement put in place in 1873 has not served us too badly and may yet for some time to come.

33. Thank you.