

PLEASE NOTE

This is a draft paper only. Please do not cite without the express permission of the author.

Judges and Judging 1176-1307

Paul Brand

I

In late January 1176 King Henry II held a large and well-attended meeting of his great council at Northampton. The council was concerned with the 'legal system of the kingdom' (*statuta regni sui*). A contemporary chronicler tells us of a decision to divide England into six parts or 'circuits', and the king's appointment of three justices to serve on each circuit. Only the sequel indicates that this was not intended to create a permanent arrangement, merely to make *ad hoc* arrangements for a single judicial visitation held later that year. The chronicler gives part of the instructions drawn up for these justices. They were assigned certain specific responsibilities in the matter of *criminal justice*. The justices were to 'carry out the assize on wicked thieves and malefactors of the land, which has been decreed by the counsel of the lord king and his son and their men', evidently to make enquiries through local presentment juries as to those reputed to have committed a variety of criminal offences. They were given instructions about what to do when someone accused in this way appeared to stand trial, and also what to do when they failed to appear. They were given specific responsibilities in the area of *civil justice*. They were to make enquiry (*percognicio*) into the complaints of heirs whose fathers had died in seisin of lands, but whose lords were refusing to admit them to their father's inheritances. If they found their claims justified, they were to secure their admission to the land and fine their lord. They were also to take jury verdicts (*recognicionem*) on disseisins made contrary to 'the assize' (*super assisam*), but only during the brief period since May 1175. They were also to do 'all justice and right' (*omnes justicias et rectitudines*) belonging to the lord king and his crown by the writ of the lord king or his representatives, for half a knight's fee or less. This evidently refers to the more general type of land litigation brought by the writ of right or writ *precipe*. A *third kind* of responsibility was to make enquiries on the king's behalf (through presentment juries) and report back on escheats, churches, lands, and women who belonged to the king's gift, and about castle-guard (who owed it and how much and where). A *fourth kind* of responsibility was to take executive action on the king's behalf: taking fealties to the king from everyone who wished to stay in the kingdom (from earls and barons down to free tenants and 'rustics'), and ensuring that (unlicensed) castles were properly destroyed. The king also had each

justice swear an oath that they 'would keep (*custodirent*) the assizes that had been made (*has subscriptas assisas*) and have them observed by all the men of the realm'; and a second chronicler mentions a more general oath that they would do justice to all (*quod suam cuique justiciam conservabunt*).

The Pipe Rolls of 22 and 23 Henry II (1175-6 and 1176-7) record financial information arising out of the judicial work of the circuits. They prove that the justices did indeed visit all (or almost all) of the counties allotted to their circuits. They also tell us something of the business they dealt with, both civil and criminal. There are also seven surviving final concords made before the same justices (at least one of which is an original), settling civil litigation heard before them, whose dates fall between mid-March and late September 1176.

The year 1176 looks to be a good date from which to trace the beginnings of the *General Eyre* as an institution within the English judicial system, the first time when we can see that teams of justices appointed by the king brought royal justice to each of the counties of England within a particular limited period of time, by holding sessions in each of the counties assigned to their circuits at which they heard civil and criminal cases, and conducted enquiries on matters of interest to the king. Later visitations down to 1189 varied the number of circuits and the counties assigned to each and also the number of justices assigned to each circuit. The smallest number of circuits was the two into which the country was divided in 1178-9 and 1181-2; the largest the five of 1188-9. The number of justices assigned to individual circuits also varied: between a minimum of three and a maximum of nine. There might be a case for placing the origins of the Eyre one year earlier, when something like a nationwide visitation by two circuits of justices took place, but we know of this only from the Pipe Roll evidence and we have too little information about the functioning of the visitations to be certain that they shared all the characteristics of the 1176 and later Eyres. 1176 seems therefore the better point to take our starting-point.

More significantly for my present purpose, it can also be argued that 1176 marks the first appearance of justices of a type recognisably the same as (or at least a prototype of) the *standard form of justice* that becomes the norm in all major courts in the later Middle Ages, and (in essence) through to the nineteenth century, with a number of specific general characteristics. One obvious characteristic which they share with justices commissioned prior to this date on an *ad hoc* basis by the king to hear specific cases: appointment by the king, apparently here on the advice of his council. A second is that prior to their sitting as justices they took some kind of judicial oath which reminded them of their obligations as justices. This seems to have been new; 1176 provides the first evidence of the use of such an oath. A third characteristic they clearly shared with their successors was

that they only exercised such jurisdiction as they had been specifically granted by the king, either through the written instructions he gave them at the council or through royal writs; in essence, therefore, they exercised only the jurisdiction delegated to them in writing by the king. It is this which, I think, explains why six out of the seven surviving 1176 final concords identify the sessions of the itinerant justices as being sessions of the **king's** court (*curia regis*). A fourth connected characteristic seems to be that they united in themselves the two hitherto separate roles of acting as presiding officers and being judgment-makers of the court. Sessions held by royal justices locally under earlier kings do not seem to have been considered sessions of the king's court but rather special sessions of the county court or courts, and it was the normal judgment-makers of the county court (the suitors, who were local landowners) who made judgments at those sessions. A fifth characteristic that is worth noting mainly in the context of contemporary developments in the ecclesiastical courts and the possible influence of Roman law is that they were appointed not as single individual judges but as part of *groups of justices*. Although we cannot look inside the workings of these courts at this period, there seems no reason to doubt that the justices also sat as a group hearing cases rather than dividing up the work between themselves. A final characteristic is one for which there is only indirect evidence: that their judicial activity was recorded in writing. There are no surviving plea rolls recording proceedings before itinerant justices of a date earlier than 1194. But some of the business these justices did must have been recorded. When the king asked for information he must have expected to receive it in written form, and the Dialogue of the Exchequer, written c. 1179, seems to presuppose the existence of a written record of other business from which financial dues could be extracted. It seems likely that fairly full written records of the eyre were being kept from 1176 onwards and that none have survived from the first two decades simply because initially no care was taken to ensure that they were preserved in the king's treasury.

There was also a second royal court in 1176 in which civil litigation was being heard on something like a regular basis. This was the 'king's court at Westminster', whose personnel seem to have been interchangeable with that of the Exchequer, the institution responsible for English financial administration. In effect a single institution seems to have exercised both financial and judicial responsibilities, the judicial only on an irregular basis from the mid-1160s but regularly from the mid-1170s through to the end of the reign. The main source of information for its judicial activities prior to the mid-1190s is the surviving final concords made in the court, as preserved by the parties to these concords. These are probably only a relatively small proportion of the concords

originally made and they provide no way of estimating the volume of unconcorded litigation that came to the court. The personnel of this court are sometimes described in these concords as 'justices', sometimes as 'barons' (the later term for the main officials of the Exchequer), but even if they were functioning as justices (in our sense) when they were hearing such cases, they were clearly primarily, or perhaps equally, officials in the king's financial administration. It is significant that almost two-thirds of the surviving final concords of the period from the court include the treasurer, the main official of the Exchequer as a financial body, as one of the members of the court before which the agreement had been reached. The 'justices' of this court may not have entirely conformed to the general model of royal justices I outlined, but in general terms they did. The references in the final concords to 'justices' or 'barons' of the lord king and to them constituting the 'king's court' both point to the likelihood that they were appointed by the king to sit in the court; so too do the references to those sitting in the Exchequer (for financial matters) in the Dialogue of the Exchequer, as sitting there 'by the king's command'. These men must also have taken some kind of oath to the king. The justices of the king's court at Westminster can only have acted if they received some kind of specific authorisation from the king or the chief justiciar (in his absence), though the earliest specific reference to a royal writ being used to initiate litigation in the court comes only from 1178. It also seems clear that these 'justices' or 'barons', or whatever they are called, and only they, were the men who both presided and made judgments in the king's court at Westminster. The king's court at Westminster in Henry II's reign, as revealed to us by the evidence of the final concords, varied considerably in size, from a minimum of three to a maximum of fourteen justices, with an average of around eight. This was a large court by later English standards. There are no surviving plea rolls of this court prior to the mid-1190s, but a number of copies of entries on rolls that do not survive take us back to 1181, and we know that in 1200 it was believed that plea rolls had been compiled during the period Richard de Lucy had been the king's justiciar, that is prior to 1178. So it looks as though these justices, too, share the overall characteristic of having their proceedings and judgments recorded in writing.

II

Three significant changes took place during the last decade of the twelfth century. Around the middle of the 1190s the Common Bench separated out from the Exchequer and became a distinct institution. Its justices now became exclusively royal justices. In the summer of 1195, the king's courts began to retain a third official

copy (the 'foot') of every final concord made there, which means that we now have a much more complete record of all sessions held by royal justices and of the concords made before them. From 1194 come the first surviving plea rolls recording cases heard before royal justices (both the Common Bench and the Eyre), allowing us for the first time to see the volume and nature of the business transacted in those courts, though often in an unrevealing, summary form. For the next three-quarters of a century (down to the end of the reign of Henry III in 1272), though, the survival rate for plea rolls remains patchy, since little care was taken to ensure that records were handed in to the treasury for safe custody. Surviving plea rolls cover only about half the terms the Common Bench is known to have held sessions between 1194 and 1272, and there is a similar survival rate for records of the justices in Eyre. One other significant change took place later. This was the emergence c. 1234 of a permanent court of King's Bench, a court travelling round England in close proximity to the king. There had been such a court for the periods during Henry II's reign when the king was in England, and also for periods in John's reign, but the continuous history of the court as a permanent court that functioned even when the king was a minor or out of the country dates only from the mid-1230s. It is also only from then that the court began to develop the distinctive jurisdiction required to justify its separate existence.

The fuller evidence that survives from the period from the mid-1190s onwards allows us to begin to describe the characteristic features of royal justices and look at what they did in rather more detail and with less guesswork. The earliest surviving record of *letters of appointment* of justices in eyre come from the minority of Henry III, from 1218, when copies of the different instruments were first enrolled on the Patent and Close Rolls of chancery. Thereafter such appointments were commonly, though not invariably, enrolled in this way. The story is rather different in the Common Bench. Here the earliest surviving copy of any of the instruments associated with the appointment of a justice comes from 1234, and only seven more such appointments were recorded between 1234 and 1272. There is no reason to suppose that the many other justices appointed during this period were not also appointed by the king and in the same way; but none of them were enrolled. No letters of appointment for any of the justices of King's Bench appointed between c. 1234 and the end of the reign survive, and there is no evidence to suggest such letters ever existed. The very closeness of the relationship between the king and King's Bench as an institution may have rendered such letters unnecessary; and even without these letters we can be certain that it was the king who appointed these justices.

An *oath of office* was almost certainly regularly taken by royal justices on taking up office in the period

between 1189 and 1272. There are references to a 'form of oath' (*forma sacramenti*) having been handed over to the senior justices of each of the eyre circuits in 1218, but without any record of what it contained. Letters relating to the appointment of three men as justices of the Common Bench in 1234 require the justices to take an oath in the presence of the existing justices 'to (faithfully) attend to the king's business in the Bench'. The oath may have been a little more elaborate than that. It is only *Bracton* that gives us in an undated form a full version of one of these oaths. The justice in eyre makes a threefold promise: 'to do right justice, according to his ability, in the counties where they are to hold the eyre [perhaps specified in the oath], to both rich and poor'; 'to keep the assize in accordance with the chapters below written' [this is perhaps not quite exactly what was said]; and 'to perform all duties and exercise all jurisdiction belonging to the king's crown'. *Bracton* tells us that the justice taking the oath was then reminded that he was to keep the king's profit in mind, but this was evidently not part of the oath. We know nothing about any oath of office taken by the justices of King's Bench.

The justices of Common Bench, King's Bench and the General Eyre continued throughout the period down to 1272 to be subject to the general principle that their jurisdiction was a matter of specific delegation from the king. The justices of the Common Bench provide the clearest and simplest case. As soon as we get records of the court's proceedings we see defendants objecting when a royal writ used to initiate litigation in the court is defective in any respect, precisely on the ground that this meant that the court did not possess adequate authority for hearing the case. The presupposition is that a written authorisation through a royal writ is required and that authorisation must match exactly the claim that the demandant is trying to make or the complaint he wants remedied. The same seems also to be true of King's Bench. The General Eyre is more complicated. Civil pleas business reached the Eyre in this period via three different routes. Some cases were initiated by royal writs which required the sheriff to summon the defendant (and sometimes also the requisite jurors) to appear before the king's justices at their 'first session' (*ad primam assisam*) in the county (*cum ad partes illas venerint*). Others had been initiated by royal writ in the county court but been removed into the Eyre by writ *pone*. Both these kinds of writ provided specific authorisation for the Eyre justices to hear the case. The third kind of case was cases pending in the Common Bench at Westminster when the eyre was summoned. These were automatically adjourned into the Eyre by a general proclamation made in the Common Bench. For these the sole written authorisation was the relevant writs sent from the Common Bench plus that proclamation. The automatic transfer of all county cases pending in the Common Bench to the Eyre goes back to at least 1194. Criminal pleas

were brought before the Eyre mainly by a single part of the instructions to the justices which ordered enquiry as to 'pleas of the crown both old and new and all which had not yet been determined before the king's justices' (as the 1194 instructions put it) or later modifications of this article. The third element in the work of the justices in Eyre was the enquiries that they made under the articles of the Eyre. The arrangements recorded in 1218 show that the articles (*capituli*) were handed over at the beginning of an Eyre circuit to the chief justice on each circuit; and the private treatise, *Judicium essoniorum*, derived from answers given 1218x1230 to a series of questions put to a justice who had participated in a previous eyre by a justice who was about to set out on one, indicates that this was done in London by the chancellor and that a standard set of the articles was handed over under seal (to provide a template for copies handed over to the presentment jurors). We have the set of enquiries from 1194 and a number of copies of subsequent sets. These show the list of questions put to the juries steadily growing over the period down to 1272. What also becomes clear once we have a record of the Eyres themselves is that increasingly the articles were intended to produce actionable information for the Eyre justices themselves.

During this period we get our first glimpses of what justices actually did *after* their appointment. In civil pleas, a significant part of their time and effort seems to have been spent on *matters of process*: authorising the next stage of mesne process against absent defendants, the view of the land being claimed, receiving essoins (excuses for absence) and the like. Once plea rolls begin to survive they commonly, if not invariably, record the appearance of the plaintiff and then the court's judgment (*judicium*) that the local sheriff should employ the next stage of process against the absent defendant. *Glanvill* suggests that the appearances in court on the three days preceding the day on which judgment was given on a default were also appearances 'before the justices' though no separate record was kept of these. The justices were responsible for authorising the issue of judicial writs to local sheriffs ordering the next stage of process. The first surviving set of Common Bench judicial writs from the summer of 1199 are all in the name of the justiciar, Geoffrey fitzPeter, but the attestations are in the names of two other, more junior justices. The majority are in the name of Richard of Herriard (regularly placed fourth out of six in precedence in final concords); a minority in the name of Simon of Pattishall (regularly placed fifth). These two justices were probably individually responsible for checking that the writ written by one of the clerks associated with the court was indeed warranted by the record of the court's judgment on the plea roll. It is possible, but not certain, that they alone had also dealt with the business prior to that point. *Hengham Magna*, written c. 1260, tells us of the part played by a royal clerk, the keeper of writs and rolls (*prenotarius*), in the

receipt of essoins but also tells us that the judgment of essoins (their acceptance by the court) normally required the checking of the related writs and discovering what stage the case had reached, and that it was 'the justices' who did this.

Of the part played by justices in the *pleading of civil cases* we see little evidence before the final years of Henry III's reign. One brief glimpse is to be found in a 1203 case. Osbert son of Alexander claimed land given as a marriage portion to his mother and then held by his parents but which had been gaged (given as a security for a loan) by his father after his mother's death to the current tenant, Alan. Alan denied Alexander had gaged the land to him or that he held the land in gage. When Alan was subsequently questioned (*interrogatus*) through whom he had acquired title to the land he said it had been through his own father. The question must have come from one of the court's justices and perhaps reveals a more common practice. A much clearer picture of a judiciary active in the course of the pleading of cases does, however, emerge from the pleading manual, *Brevia Placitata*. This was compiled probably in the later 1250s, and perhaps in part from real cases; in any case it almost certainly reflects what was happening in real court rooms in this period, perhaps much earlier. Some of the judicial interventions were evidently purely *formal prompts*. In an annual rent case the justice after the reading of a deed attesting the quitclaim of a rent asked the party in whose name it was 'Now, H., what do you answer to this writing?' The justice can sometimes be seen pushing a party to provide *further clarification*. In a land action the tenant pleaded that he was not obliged to answer the claim because the claimant was 'not such a one that any inheritance ought to descend to him'. This was too vague. The justice pressed him by asking 'Who is he now? You say and we will give judgment'. The tenant then explained that the reason he was not entitled to a response to his claim was that he was a (special) bastard born before his mother's marriage. There are also examples of what can best be classified as *rulings*. In an annual rent case the defendant pleaded a quitclaim. The plaintiff noted the deed was unsealed and so was void. The defendant said it had been handed over to third parties in lieu of sealing since the plaintiff said he did not have his seal with him. The justice did not rule directly on the validity of the deed but he told the plaintiff that 'it is necessary that you put yourself on a jury [as to the validity of the deed] or you will lose your claim in perpetuity.' The justices seem also to have played at least a formal role in decisions about modes of proof and the formal preliminaries to their acceptance. In a 1220 writ of right case the claimant produced a champion, who initially offered to prove the seisin of the claimant's wife's grandfather in the reign of Henry II (the basis of their claim) as of his own view, what he had seen and was ready to prove.

The tenant objected that even the wife's father (to whom the right had descended) had died in 1180. The champion had not even been born then. He could hardly have witnessed the seisin he was offering to prove. The champion was then allowed to shift ground to saying that he was offering to prove what his father had witnessed, not himself. The justices allowed battle to proceed and they gave their reasons. The champion could claim to be a witness (through his father) to something that had happened in the time of king Henry II. In a 1261 action of covenant the defendant is initially recorded on the plea roll as having waged his law in denial of a failure to acquit his lessee of services. This was subsequently reversed 'because the justices record that the said law was not waged by the judgment of the court nor in the presence of the opposite party'. Subsequently the same issue went to jury trial instead.

The justices evidently also played an active role at the *proof stage of litigation*, normally a separate stage in time in all except the petty assizes. *Bracton* has most to tell us about the assize of novel disseisin. Its author evidently did not think it proper for the presiding justice or justices normally to say anything much 'for the instruction of the jurors' (*ad instruccionem juratorum*) after they had been sworn. He does, however, advocate the justice(s) taking an active role prior to the assize jury being sworn (but when the jurors are already in court) to establish the precise nature of what was being claimed; the plaintiff's title to the land and the nature of his estate in it; how long the plaintiff claimed to have been in seisin; whether the plaintiff claimed to have wholly disseised or merely impeded in enjoying his seisin; the alleged manner of the disseisin, whether by night or day and with or without arms. *Bracton* also envisages an active role for the justice(s) when the jurors give their verdict. The 'judge' is responsible for giving a just judgment on the basis of their verdict. So he needs to examine the actions and words of the jurors and to compel them to elucidate any obscurities in what they say, so that he is in a position to proceed securely to judgment. It may often seem that the power of judgment in the assize belongs to the jurors since judgment is in accordance with their verdict, but it is only the facts ('the truth') that are the province of the jury; justice and judgment are matters for the judge.

There is some more direct evidence for justices taking an active role when taking jury verdicts. In the 1227 Kent eyre we hear of a grand assize jury that had been taken in the court of the archbishop of Canterbury and before the archbishop's bailiffs but in the presence of the justices of the Eyre. The clerk carefully recorded not just a verdict for the tenant but also that the jurors had shown sufficient reasons for it (*et sufficientes ostendunt rationes*). Unwittingly, the enrolment is probably recording the normal expectation in all grand assize verdicts:

that there would be more than a blank verdict, all that would normally get recorded. There would also be a justification for that verdict. This was something on which the jurors could (and often would) get questioned by the justices. In the 1261 Northamptonshire eyre an assize of darrein presentment (for the right to present to a vacant church) was sued by the king as guardian of Richard the son and heir of Richard of Dover. The jury gave a verdict explaining how the advowson had apparently passed to the defendants. They were then asked (evidently by the justices) if it was true that the heir's grandfather had presented as 'true patron' to the living. They explained how they knew this to be the case. There had been an enquiry held in church court that had confirmed this. They were asked if they had ever seen the supposed charter of the heir's grandmother made after her husband's death granting the advowson in addition to the manor and how they knew of this charter. They said they had not seen the charter and knew nothing of it except from what they had been told (*nisi ex relatione quorundam*). The defendants were given a chance to produce the charter but refused. Judgment was then given for the king. The case was special because it involved the king and this probably explains why it was enrolled in the way it was. There must be a good chance that similar process of questioning lay behind other, much blander verdicts on the roll.

Only *Brevia Placitata* allows us to glimpse what may have been the common form when a party had waged his or her law. 'The Justice says: 'Adam, go to the bible and lay your hand on it. G. who is there came into this court and claimed against you £40 by a tally. You have had a view of the tally. Look at it again for it has been in our keeping all the time since'. He looks at it and then the justice says 'You will swear on all the saints that you never made this tally in his favour and that you do not owe the forty pounds which he claims from you by this tally.' No rational fact-finding is going on here, but there is a clear attempt on the part of the justice to build up the psychological pressure on the person making their law in an attempt to ensure they did not perjure themselves.

It is during this period that we first get something which looks like a clear statement of principle against a royal court *ever* consisting of less than two justices. A 1221 mandate to the justiciar of Ireland rebuked him for the fact that there was only a single itinerant justice in Ireland 'which significantly departs from the custom of our realm of England, in which there are always several itinerant justices, because only one justice itinerant does not customarily bear record, and because there is danger in having only one roll and this is avoided by having several justices because each has his own roll.' Although stated as a rule about itinerant justices the same

principle also clearly applied to the Common Bench. In England, Eyre circuits (redrawn for each visitation) continued after 1189 to be run by significantly larger number of justices than this minimum. The *average* number of justices assigned to each circuit between 1189 and 1272 ranged over a fairly narrow spectrum, between a minimum of four and a maximum of six, but in the late twelfth and early thirteenth centuries some eyre circuits had as many as eight or nine justices assigned to them. By the end of Henry III's reign the largest single complement of justices assigned to any eyre circuit was six justices. The Common Bench also remained a multi-justice court, though with a gradual decline in the average number of justices assigned to the court from seven in Richard's reign to an average of just three between 1250 and 1272. For a significant number of terms in these last two decades the nominal compliment was reduced still further, to the minimum number of just two. For periods in Henry III's reign King's Bench seems to have had no more than a single full-time justice and its normal complement in Henry II's reign did not exceed two. It seems likely, however, that the single justice never sat alone, for the stewards of the royal household also sat in the court as and when required.

A small amount of evidence from this same period allows us to pierce the screen of collegiality to see individual justices or groups of justices at work in the courts. From the chronicle account of litigation between the abbot of Crowland and the prior of Spalding and his superior the abbot of St Nicholas Angers we get various glimpses of the part played by individual justices. When the abbot of Crowland was called to the Exchequer in 1192, for example, it was Robert of Wheatfield (one of the court's more junior justices) who took the lead in asking for the four knights who had been sent to see whether his illness was such as to confine him to bed; Robert too who pronounced the court's judgment that the abbot should lose his seisin of the land, but not forfeit all right in it. In Michelmas term 1266 an enrolment in the Common Bench shows that even a nominal complement of three justices could not always be relied upon to secure enough justices to do business in the court. The king had ordered the Common Bench justices to levy a final concord recording an agreement between the bishop of Bath and the abbot of Glastonbury in association with the treasurer. But only one of the court's justices, Gilbert of Preston, was present since both his colleagues (William Bonquer and John de la Lynde) were overseas. It was hoped they would return before Hilary term, so the business was adjourned till then. A surviving roll of the court's business this term shows that in practice it was possible for the court to do ordinary business with only a single justice, whatever the earlier theory may have been. There is also evidence towards the end of this period showing the justices of the Eyre organising their activities in a more efficient manner by

dividing up into separate groups to do different types of business. Four justices were appointed to the 1253 Rutland eyre. Half heard pleas of the crown (criminal cases) in the grange of Oakham castle; half civil pleas in the hall of the castle. Rutland was the smallest English county and hearing all the county's business at an eyre can have posed few problems. If justices in eyre divided into separate groups for Rutland by this date it seems a reasonable guess that they were also doing this in other counties as well. That eyre justices, too, might sometimes sit on their own is suggested by evidence from the 1271 Kent eyre. A litigant claimed he had been adjourned to Westminster by Hengham, one of the four justices of the eyre, 'who then sat alone on the bench' (*qui tunc solus sedebat in banco*) and put himself on his 'record'. When he did come, Hengham denied having done so, but it was clearly not unthinkable that he might have done this.

We also now first get clear evidence that the justices of a court might take advice from other royal officials and justices and even have them sitting in the court with them. The account of the Crowland litigation shows that when in Michaelmas term 1194 archbishop Hubert Walter was too busy to sit with his fellow-justices of the Exchequer court and fledgling Common Bench he simply sent two of his close advisers (*familiares consiliares*) in his place to 'hear, understand and pronounce' on what was to be done. In a Common Bench case of Michaelmas term 1269 Alexander king of Scotland was claiming the Nottinghamshire manor of Wheatley against John de Burgh senior. There was a hearing before the justices of the Common Bench but they were reinforced by Richard of Middleton the chancellor, Philip Basset, Robert Aguillon two councillors and master Richard of Staines, a justice of King's Bench.

We now begin to get a **record** of what the king's justices did. The 1221 mandate to the justiciar of Ireland alerts us to the fact that there was not a single official record of what each court did, but a different record made for each of the justices. From at least 1219 onwards a further roll (the so-called 'Rex' roll) was also compiled in the Common Bench for a senior royal clerk, the keeper of writs and rolls. At the time the relevant part of *Bracton* was written it was this roll that was regarded as the 'first' or primary record of the court and its record was to be followed by the rolls of all the other justices. In 1253 it was decided that the senior justice of the court should become responsible for the court's 'first' roll, and the keeper of writs and rolls the 'second'. The other justices were expected to continue producing identical duplicate rolls as well. Something similar was evidently also true of the Eyre. There survives a roll made for a junior Eyre justice in John's reign. Under Henry III two different rolls of proceedings survive for fourteen individual Eyre sessions and there are as many as four

rolls recording crown pleas heard in the 1250 Norfolk eyre. In practice, therefore, serving as a royal justice seems to have meant not just having your proceedings recorded in an official record but being responsible for compiling such a record. In theory at least all these records were supposed to be identical. It seems quite likely that plea rolls were being made for each justices from the very beginning; whether initially all were identical seems less certain.

III

The reign of Edward I (1272-1307) brought several further major changes in our sources of information on the workings of the English judicial system (on what judged did) and also in that system itself. From 1272 the survival rate of plea rolls improves dramatically. In the Common Bench virtually every term of every year is represented by at least one surviving plea roll; surviving plea rolls (often in several duplicates) record every aspect of the business of itinerant justices in each county they visited; and there is a surviving King's Bench plea roll for virtually every term of every year. The rolls themselves become more informative and there is much more evidence of courts taking measures to punish misconduct in legal proceedings, which has much to tell us about the ways in which the courts conducted their business. The first surviving law reports come from the final years of the reign of Henry III. These allow us to hear lawyers and justices talking in direct speech in the French they used in court and within a decade they normally tell us which particular lawyers and justices were involved in the pleading of particular cases. During the initial stage of law reporting (down to 1291) law reporting was on only a limited scale. When volume IV of my *Earliest English Law Reports* is published later this year I will have published all 411 pre-1290 law reports. None survive in collections assigned to specific terms or years or sessions of the eyre. A stepchange took place in 1291 in the practice of law reporting. This is apparently associated, in the case of the Common Bench at least, with arrangements made in the summer of that year to set aside a specific area in the courtroom for the use of the 'apprentices of the Bench', fledgling professional lawyers, to allow to listen to what was said in court in order to learn the law, and which also allowed them to take notes on what they heard. Thereafter law reporting was on a much larger scale and reports begin to survive in substantial collections assigned to particular terms or particular sessions of the eyre, though they are also found in other formats as well. The phenomenon of law reporting is, however, very largely confined to the Common Bench and the Eyres; there are only a relatively small number of identifiable King's Bench reports and nothing

like termly collections of reports from the court.

A major change also took place in 1278 in arrangements made for the holding of Eyres. There were substantial additions to the articles of the eyre, a whole new section of *novi articuli* for the justices to enquire into. The justices were also now given the task in each county they visited of registering all claims to franchises and hearing and determining challenges made to some of the franchises claimed in the name of the king, and also of hearing royal claims to land and other real property. There was also a total reorganisation of the arrangements for holding eyres. In place of a varying number of circuits holding countrywide visitations within a set period of time, two groups of itinerant justices were appointed on what seems to have been intended to be a permanent basis. Visitations were suspended on the outbreak of war with France in 1294 and thereafter there were only one-off visitations in 1299 and 1302; but the idea of permanent eyre circuits had not been definitively abandoned by 1307.

The general principle that all royal justices were appointed in the name of the king was maintained. As before 1272 the most fully recorded of the appointments were those of the eyre justices. They were appointed to 'itinerate for common pleas' in a specific county or counties and to this was added in 1278 a responsibility 'to hear and determine pleas on franchises in accordance with the provision and ordinance made on them and to heard and determine trespasses and complaints ...'. Appointments are recorded for only nine of the twenty-eight justices who served in the Common Bench. The appointment of King's Bench justices, however, still remained an oral and informal process.

After 1272 for the first time we get reliable information from official sources about the wording of the **judicial oaths** taken by newly appointed royal justices. In 1278 the Close Rolls record the wording of the oaths to be taken by the justices in eyre. This begins with a general promise to serve the king 'well and loyally in the office of justice in your Eyre' (*'qe bien e leaument servirez le Roy en le office de Justecerie en vostre Eyre'*), but then goes on to spell out that what this means: that the justice is 'to do justice to rich and poor to the best of your ability' (*'e dreiture a vostre poer freez a tuz ausibien as povres com as riches*) and not to prevent or delay justice against right or the law of land for the great or the rich, nor out of hatred or favour, nor for the estate of anyone, nor for any benefit, gift or promise given or to be given or in any other way (*'e qe pur hautesce ne pur richeyce ne pur hayne ne pur favour ne pur poer ne pur estat de nuli persone ne pur bienfet, doun ne promsse de nulli qe fet vus soit ou vus purra estre fet ne par art ne par engyn autri dreiture ne desturberez ne respiterez cuntre resun ne cuntre les leis de la terre*), but

loyally to do right to all according to law and custom (*'mes saunz regard de nulstat ne de persone leaument freez fere dreiture a chescun solum les leys usees*) and in particular not to receive anything from anyone (*e qe nule rien ne prendrez de nulli*). In 1290 the two Exchequer Memoranda Rolls record the form of oath taken by the justices of the Common Bench (and perhaps King's Bench, too) as revised after the disgrace of Thomas Weyland and most of his colleagues. The oath is closely related to that taken by the justices in eyre in 1278 though the initial promise is for service to the king 'in the office of justice' (*'qe ben e laument serverunt le Rey en office de la Jesticerie*) and the promise to take nothing from anyone has been modified to allow this with the king's permission (*e qe ren ne prendrunt de nuly saunz cunge le Rey*) with the entries recording an oral concession by king that the justices receive food and drink for the day. There is also a new clause promising not to assent to any wrongdoing on the part of the justice's colleagues.

The general principle that the jurisdiction of the king's justices was a delegated one and that for each piece of business done there should be either a general or a specific warrant continued to be applicable. The better evidence of this period allows us to see in much more detail what justices were actually doing. Some of that evidence suggests that senior clerks in the court were beginning to play a significant role in dealing with procedural matters, but make it clear that this was still subject to the ultimate oversight and control of the justices. For example, in 1306 when a writ of right in the city of York was removed into the Common Bench by a defective writ Henry of Hales (the chief clerk of successive chief justices of the Common Bench) looked at the writ when the essoin was made and made the initial judgment that 'we do not have power to hold this plea'. The reporter notes that Hales did not act on his own and Hengham was also present in court and agreed with him. Clerks may also not just have written judicial writs but checked and sealed them in the name of the justices. From an unidentified early fourteenth century report we learn of a writ that came to Henry of Hales for sealing (*sur qel bref H. de Hales, a qi le bref vynt pur enseler*) but of Hales taking advice from Bereford counselling him not to seal it. The ultimate responsibility of the justices who attested judicial writs for the writs so attested was restated in 1290 during the 'State Trials' when both Hengham and William of Saham were held to account for writs issued under their attestation in King's Bench.

We do not know how the order in which cases were heard was determined. In the case of both the Common Bench and King's Bench business was normally allocated to 'return days' within each term, generally at intervals of about a week, both by the process writs which required the defendant to be constrained to appear

and by the terms of the adjournment given to the plaintiff or claimant. There was always a sizeable number of litigants with their cases put down for hearing on the same return day, and there is nothing to show what determined priority as between those litigants who did appear ready to plead. The problem is even greater in the case of the Eyre where all cases in theory came on for hearing at the same time. There seems to be no sign of any set 'county' order for the hearing of cases in the Common Bench (though there was a county order for the filing of returned writs); nor has any geographical or administrative unit order been observed in the hearing of Eyre cases. Nor is there any reason to think that priority was determined by the relative seniority or status of lawyers involved as came to be the case in the early modern period. That the matter was one within the absolute, unfettered discretion of the justices is suggested by a number of complaints like that made in 1290 by the prior and convent of Huntingdon who alleged that an assize of darrein presentment had often come to the Common Bench but that it did not pass until the prior had granted an annuity to John of Chertsey, the clerk of William of Brunton. So reward or payment may have had something to do with determining the order.

The justices certainly took their role in hearing cases seriously. In a 1294 case Higham challenged a defective count and asked for judgment. Chief Justice Mettingham admitted that he and his colleagues had not been paying proper attention and had not listened to it (*e nous nentendoms nent le counte pur ceo qe nous ne donames mye garde e ne entente*) and refused to give judgment on it because, he said, they rendered judgment 'on peril of their souls' (*Nous devons rendre les jugemenz en perille de nos almes*), perhaps a reference to their judicial oath and the perils of breaking it. Counsel was therefore requested to count afresh. Sometimes, however, the problem was not lack of attention, but inability to hear what had been said due to circumambient noise in the court room. In another case of 1296 there was a dispute about whether or not the a litigant had or had not said that a chapel for which a chantry was owed belonged to him. Bereford, J. refused to 'record' what had been said since there had been too much noise when they had pleaded and so they could not hear it (*Nus ne le recordum mye kant vus pledez taunt cum la noyse e nus ne poums escuter*).

Royal justices were active participants in the *pleading stage of litigation*, joining in the argument and making substantive points or giving their opinions on the points at issue. An action of escheat was brought in the 1285 Northamptonshire eyre by the king against Richard Siward, claiming a manor as forfeited by its former Norman owners (Pain and Hugh de Saint Philibert) who had acquired it but then left England and adhered to the king of France. Counsel for Richard argued that one of those who had acquired the land had died in the

king's allegiance and had an heir who was also in the king's allegiance. Saham, J. said that this was a response which was available only to the heir himself, and suggested reasons why he too would be barred. At the end of his argument he was careful to say 'But we do not say this by way of judgment'. Of particular importance was the role of the justices in asking factual questions of, or seeking factual admissions from, individual parties or their counsel. An action of waste was brought by John de Neufmarche against his mother, Joan the widow of Adam de Neufmarche, in 1301 for various actions which had allegedly lessened the long-term value of lands in Yorkshire which she held in dower. One of the buildings which John said had been 'knocked down and sold' by Joan was a grange. The plea roll enrolment simply records Joan's defence. The house of Eustace Kirkeman close to the grange had been accidentally set on fire. The fire had then spread to the grange. She was not to be held responsible for an accident such as this. John claimed that the grange had been burned through the negligence of Joan and her servants. Only the reports show the part played by the questioning of Bereford, J. in the formulation of this issue. Counsel for the defendant initially said simply that the grange had been burned by accident. Two reports suggest that counsel also asked for judgment whether any kind of accident did not constitute a legally valid excuse for the admitted damage. Bereford's questioning shows he did not agree. He pressed counsel to specify what kind of accident was involved. Eventually, as has been seen, counsel specified that the accident had been caused by fire spreading from the house of a neighbour. The questioning here did not decide the case, but it narrowed down the issue on which the jury was to give its verdict and in a way that ensured that the jury's verdict was in accordance with the law on responsibility for accidental damage, as understood by the court. The justices also played a role in the system of 'tentative pleading' in rejecting exceptions of law 'tentatively' advanced by defendants. This was not the same thing as them giving judgment. The distinction between an indicative 'ruling' by the court and a judgment proper can be observed in a short piece of dialogue in a case from the 1299 Cambridgeshire eyre. The unnamed justice asks after a plea 'Do you wish to say anything else?'; counsel for the defendant (Scotter) answers 'if you adjudge that we should say something else we will respond sufficiently'. The justice then responds 'That is for not for us to do, to adjudge your response; but if you demur for our judgment you will see what will happen'. Counsel for the defendant took the hint and answered. They might also rule more specifically on forms of issue appropriate for jury trial. In a 1297 action of mesne, counsel for the defendant pleaded that John was not liable to acquit Simon of the rent being demanded because it had been the initial grantee of the land (John son of Robert of Ridgwell) who had

charged the land with the rent to the superior lord by agreeing to pay it without contesting the demand; and his had also been done by his brother Richard and by Simon himself. Counsel for the plaintiff (Higham) pressed him to specify one of these. Bereford, J. issued clear directions on this: '[Hold] to one, if you wish, for if the inquest was joined on the three it might be that the inquest spoke for you in respect of one and against you in respect of another. How could judgment be made in that case? So hold to one.'

Justices seem also to have played an active role at and after *jury trial* itself. Unfortunately the evidence for this is only fragmentary since only a relatively small number of law reports tell us anything about the workings of jury trial and there is also occasionally evidence to be gleaned from individual plea roll enrolments. It looks as if justices may have regularly 'charged' juries at the beginning of the jury trial stage of proceedings. When they did so they certainly seem on occasion, and perhaps as a matter of course, to have done more than tell the jury what the issue was that the parties had reached. Sometimes they significantly broadened out the issue on which they expected a verdict; sometimes they specifically instructed the jurors as to the law they were to apply. In an assize of novel disseisin in the 1299 Cambridgeshire eyre Agnes claimed to have re-entered land she had previously owned but had granted to the defendant Henry by virtue of a clause which had allowed her to re-enter if Henry failed to provide adequate maintenance for Agnes and her son Nicholas. She had then been disseised by Henry. Henry claimed Agnes had never been in seisin after the making of the agreement. The presiding judge (Ormesby, J.) instructed the jury that if the plaintiff had indeed entered the land by virtue of the agreement, even if this had been only by placing a foot on the land, and had then been ousted against her will this would constitute disseisin and they should find accordingly. The justices seem also to have played an active role in court once juries began to give their verdicts, requiring them to provide clarification of their verdicts and sometimes bringing pressure on them to find a verdict that accorded with the relevant legal rules. One example is an assize of mort d'ancestor brought before Gilbert of Rothbury sometime in the early 1290s. The issue before the jury was whether the plaintiff Adam was the closest heir of the deceased ancestor Maurice or if it was the William who had entered the land and then alienated the land to the current tenants. The jury said that William had indeed entered as Maurice's son and next heir. Rothbury, suspicious or perhaps merely cautious, asked them *how* he was the next heir. The assize answered that 'he was born and engendered of the same mother and father and his father on his death bed had acknowledged that he was his son and heir'. This was not acceptable. The common law did not recognise death-bed acknowledgments as capable of turning otherwise illegitimate

children into legitimate ones. Rothbury warned the jury that they would need to provide him with a better reason for thinking William was Maurice's next heir or they would be locked up without food or drink till the following day. They then said that he had been born before the marriage ceremony but after the betrothal of his parents. This gave Rothbury the information he wanted as to when exactly he had been born. He went on to ask them about the appropriate damages, if any were to be awarded, before adjourning the assize for judgment. The question of William's legitimacy was one for the justices, not the jury, to decide on the basis of the facts Rothbury had elicited. In other cases the reporter records an opening statement from the jury indicating that the jury was intending to reach a particular conclusion but shows it being followed by judicial questioning, which caused them to reverse or modify that initial stance. In a trespass plea Walter alleged that William had forced his way into his house at Southcote in Berkshire and taken away chattels found there to the value of twenty pounds. A jury giving its verdict before Bereford in 1301 found that William had come to the house in his capacity as bailiff of the local sheriff because Cecily had found sureties to pursue an action of replevin in the county court. He had simply taken the chattels in order to release them, on sureties, to Cecily. The jury were evidently intending to find in William's favour. Bereford, J. turned the verdict round and helped the jurors reach the proper conclusions. His first question was whether the chattels had belonged to Walter. The answer was (in effect) yes. They had belonged to a villein of his, for they had been found in his house and on his villeinage. They were then asked whether the bailiff had broken into the house. They agreed that this was the case. They then also added the crucial information that after the chattels had been released Cecily had sued her plea of replevin but had then abandoned it. When return of the chattels was adjudged no chattels were found in her possession. In effect Walter had lost his chattels as a result of the bailiff's action. It was on the basis of these facts as found by the jury that Bereford adjudged that the plaintiff recover damages against the defendant. There is also at least one plea roll enrolment of a 1298 jury verdict which suggests how much judicial questioning and judicial decision-making may lie behind the numerous simple and blank enrolled records of verdicts which appear to show no significant judicial input into the jury fact-finding process. The plaintiff's claim was that he had been distrained by animals taken from his plough contrary to the provisions of a statute of 1275; the defendant denied having done so. The verdict, as enrolled, said simply that the plaintiff had not taken any animals belonging to the defendant on the day in question, nor had he impounded them, nor had he committed any other trespass. For once we get to see behind this blank verdict because, as a *postea* records, the plaintiff's attorney protested at the judgment. This led

to the justice of the court before whom the jury had given its verdict (Beckingham, J.) 'recording' (here, giving a verbal report) as to what had actually been said by the jury. It emerges that the jurors had actually given a much more detailed verdict than that which got on to the formal record. The jurors had said that a plaint had been made against the plaintiff and others to the defendant, the bailiff of the local hundred court. He had sent his under-bailiff to the plaintiff's manor where he had taken eight horses from the plaintiff's plough on the day alleged. He had kept them until the following Tuesday, when the plaintiff's steward had found sureties for the future appearance in court of the plaintiff's men. The jurors had been asked if the defendant's under-bailiff could have found other distresses. They had replied that he could have done so. The jurors had also been asked if the defendant had ratified the action of his under-bailiff and they had answered yes (and explained why this was so). They had then explained that, when the defendant had later seen that he had acted foolishly in retaining the animals, he had returned them. It appears to have been on the basis of this final action alone that Beckingham, J. had ruled that the verdict amounted to an acquittal of the defendant and thus to the verdict as recorded in the enrolment. It is, however, easy to see that another justice on the same facts might well have held the allegation proved. This must have been why the plaintiff protested. The court seems to have quashed the judgment and the last thing that appears in the record is the court's order for the defendant to be summoned back to court for further proceedings. Such an enrolment is, of course, highly exceptional. It is also at the very least suggestive. Justices were applying law to facts; but they were often doing it off the record.

The disposition of cases through judgments given by the justices applying or making procedural rules or applying or making substantive legal rules, but without any prior fact-finding by juries, was also a relatively common phenomenon. The only hard figures I can give you are derived from my own unpublished study of replevin cases where the plaintiff challenged the use of distraint of animals or chattels for a variety of different purposes by the defendant heard in the Common Bench. The total number of such cases for which the plea rolls record an exchange of pleadings between the two sides is 2278. In just under two thousand of these (1995) an issue of fact was joined and the record shows a jury being summoned to decide that issue. In terms of cases in which there is a recorded outcome, however, jury trial accounts for only around 12% of the total number of cases pleaded to issue. In all other cases which reached joinder of issue and an order for jury trial, the case disappears without any recorded jury verdict. Verdicts may have been given in some of these cases and not been recorded on the rolls, but in most it must be assumed that the parties agreed out of court after pleading to issue or that the

plaintiff simply failed to pursue process against defaulting jurors until he secured a verdict. This should be compared with around 10% of the cases for which there are recorded pleadings where the court is recorded as giving judgment on the basis of what had been said in court and without recourse to a jury. Such cases account then for almost half the total number of replevin cases actually *decided* in the courts.

A significant proportion of the judgments that were given on the basis of pleading were given on the basis of more or less technical procedural rules. Around a quarter were given on the basis of the defendant's objection to a defect in the writ which had originated the proceedings or which had authorised the removal of the case into the Common Bench. Other cases were dismissed on the basis of a successful challenge to a defective count made in court by the plaintiff. In the remaining cases, however, the court was more obviously applying or creating rules of substantive law. This is clearest in the 35 cases where judgment was given in the defendant's favour after an avowry (a justification of the distraint) which the plaintiff had challenged and the 37 similar cases where judgment was given in the plaintiff's favour after such a challenge. To these should be added a further 25 cases where judgment was given for the plaintiff after an avowry had been followed by the plaintiff (or the tenant on whom the lord had avowed) disavowing holding of the lord concerned. It is probably also safe to add those 20 cases where the defendant made an avowry and the plaintiff is recorded as unable to deny that this was justified. It seems reasonable to conclude that it was the justices alone, applying rules of substantive law, who decided as many as 117 replevin cases during this period. This is no more than about 5% of the total number of cases pleaded to issue, but it is just under a quarter of all cases which are known to have been determined directly by the courts.

Although the action of replevin worked differently from most other contemporary legal actions, it was not wholly exceptional in the extent to which decisions were made by the justices alone. The law reports of the reign of Edward I show the courts regularly deciding cases without the assistance of juries and on the basis not just of technical points of procedure but also by the application, and on some occasions deliberate creation, of rules of substantive law. One significant reason for this was the power exercised by the justices of asking leading questions. This allowed them then to form their judgments on the basis of those answers. A second reason was the existence of rules about the strength of the presumptions created by certain kinds of written evidence that might be produced in court by litigants in the course of pleading or about the negative deductions that could be drawn from the failure to produce other kinds of written evidence at the same stage. One well-known example

is the rules about written bonds attesting debts. By the later thirteenth century it had come to be the rule that the only defence which could be pleaded to a claim backed up by such evidence (unless the genuineness of the bond itself was called into question) was a written acknowledgment of payment of the debt or accord and satisfaction in written form. The rule was evidently felt to be a harsh one where, for example, the defendant claimed that his written acknowledgment of payment had been destroyed by accident, but in 1294 the courts rejected the use of jury trial to prove the existence and terms of such lost writings. Thus the common outcome of any case where the plaintiff claimed a debt on the basis of a bond was a judgment of the court awarding him recovery of the debt. It also seems to have been not nearly as uncommon as it later became for the justices to give judgment on the basis of the arguments made before them even without having to actively question the parties or draw particular conclusions from the presence or absence of particular evidence. A good example is a 1301 case in which Elena, the widow of William of Ravenstone, claimed dower in two Buckinghamshire villages against her son, John. For the lands in Ravenstone John pleaded that she was not entitled because after her husband's death she had held on to all her late husband's land in the village. John had needed to bring an assize of mort d'ancestor to recover them and she had counterpleaded the assize by claiming the lands had been jointly acquired by her late husband and herself in fee tail. Since she had claimed the whole of the holding to his disinheritance, and this in a court of record, he asked whether she was now entitled to claim her dower from the same holding. John was appealing to the well-established land law rule that any action by the widow to the heir's disinheritance forfeited her right to dower. Elena denied that there was any potential disinheritance, for John was heir to the couple and the land would revert to him after her dower in the same way as it would have descended to him after her death under the entail. The case was adjourned for judgment. The court later gave its judgment. The claim of a higher estate in the whole was to the heir's disinheritance and so she was barred from claiming.

The main royal courts remained collegiate throughout Edward I's reign. The number of justices serving in the Common Bench between 1272 and 1307 never fell below four nor rose higher than seven; with the average rising from five to six in the final years of the reign. For the 'northern' circuit eyres of 1278-88 the standard complement of justices was four; the 'southern' eyre circuit of 1278-89 oscillated between four and six justices. Both eyre circuits of 1292-4 had a standard complement of five justices, and this was also true of the isolated session of 1299 in Cambridgeshire and 1302 in Cornwall. The court of King's Bench presents the greatest problems for the historian. There are no records of appointments to the court and only a few final

concord survive for the court for this reign. All we have is the record of biennial payments to its justices and occasional incidental references to them elsewhere. These indicate that King's Bench remained the smallest of these regular royal courts, although the minimum number of full-time justices now rose to two, and its 'normal' complement to three, with a few terms when four or even five justices sat in the court.

The better evidence of the reign of Edward I allows us much more of a chance to pierce the collegial veil to see individual justices or small groups of justices, rather than the whole court, dealing with particular business. In the Common Bench we see the junior justice (and former clerk of the court) Roger of Leicester, sitting on his own in 1276 and again in 1278 to adjudge and adjourn essoins, and that in 1287 Leicester and another junior justice and former clerk Beckingham sat separately to render judgment on a default. Leicester makes no appearance in any of the pre-1290 reports of cases in the Common Bench and this suggests that he may have regularly sat apart from his colleagues (perhaps after 1285 with Beckingham) to deal with more routine business. The reports in fact suggest that most of the court's more significant cases pre-1290 were heard by just two of its justices, the chief justice Thomas Weyland and his junior colleague, William of Brunton. Brunton and Weyland appear alone and without recorded colleagues in 20 cases; in 22 reported cases Brunton alone appears in the report; in 27 Weyland alone. The post-1290 Common Bench evidence tells us even more. Ellis of Beckingham, who sat in the court down to the end of 1306, makes only a single appearance prior to 1302 in the much fuller surviving law reports. The plea rolls reveal why. In 1291, 1292, 1294 and 1298 there are references to judgments given by him alone. In Easter term 1291 the repleading of the case before him is said to have taken place *extra bancum* (apparently meaning away from the main place of session of the court). This is probably the same thing as what was later described (in Michaelmas term 1294) as 'the other part of this bench' (*ex alia parte istius banci*). Beckingham may commonly have sat on his own in his own division of the court prior to 1302: the reporters simply had no access to his judgments. Peter Mallore sat as a justice of the court from Michaelmas term 1292. He too only appears infrequently in law reports (and then often alone) prior to 1301. Plea roll evidence shows him sitting on his own in 1293 and 1298. This may indicate that he too commonly did so. Robert of Hartforth, who was a justice of the court from 1290 to 1294 appears rather more in the surviving reports. That he could also on occasion sit on his own is shown by a reference in 1292 to him also taking a jury *extra bancum*. In Easter term 1300 we learn of two of the court's justices (Beckingham and Mallore) being deputed by the counsel and assent of all of the justices to sit outside the main place of session at York (which was in the hall of pleas in

York castle) but within the same hall at its north end to deal with defaults sued at the quindene of Easter; and another reference shows a different proclamation having assigned Mallore alone to deal with all assizes and juries at the same return day. This suggests that there may have been no long-term and stable division of the court's business between the justices, merely a common practice of doing so, and one that regularly saw certain particular justices being entrusted with hearing cases on their own or with only a single colleague. There are references to a 'second bench' in the headings to certain membranes of plea rolls recording the business of the court in certain terms in 1305, 1306 and 1307 but these headings occur only in the sections recording the appointment of attorneys and adjournments made by the consent of the parties, and there is no attempt to assign other business heard in the court to one or the other division. There is nothing to show that the division had become any more settled or firm. The reports show that between 1290 and 1307 it remained common for a single justice or two to be reported as hearing most cases. There are no cases involving more than three justices prior to 1301. Thereafter there are a few cases where four justices are reported as hearing a case, but in none more than that. This does not mean that the justices of the court never acted collectively as a whole. They clearly did. In 1298, for example, we are told that a judgment rendered by Beckingham (alone) was quashed after reconsideration and that it was agreed 'by all the colleagues, justices of the Bench' (*concordatum est per omnes socios justiciarios de Banco*) that the parties should appear in court for a rehearing. But such collective action by the court as a whole was very much the exception, not the rule.

Records of general eyre sessions in the reign of Edward I divide up their business into a number of separate sections: civil pleas from the county; civil pleas from other counties, crown pleas and the closely connected gaol delivery, quo warranto and other king's pleas, and plaints. There is no necessary implication in this, of course, that each of these kinds of business was handled separately, by different individual justices or groups of justices. However, evidence from reports of the 'northern' eyre circuit of 1278-88 fairly consistently shows William of Saham (debarred by his clerical orders from hearing crown pleas) as hearing civil pleas, but being joined in doing so for a minority of cases by up to two other colleagues; and on the 'southern' circuit of the same period a similar role normally seems to have been played by another clerical justice, Solomon of Rochester. The reports indicate that something similar also happened in the eyres of 1292-4. In 1280 and 1281 Mettingham (and Mettingham and Siddington) sat in a separate session to hear 'foreign' pleas, but this is the only such evidence. For 'crown' pleas we know of individual justices (or pairs of justices) sitting separately to hear such

pleas in two of the eyres of the 1278-89 'northern' circuit and five on the 'southern eyre circuit, as also in the 1299 Cambridgeshire and 1302 Cornwall eyres. For 'quo warranto' pleas we have evidence for Mettingham sitting on his own or with an associate who was not one of the justices named to the general commission in three eyres of the 1278-89 northern circuit; and chronicle evidence shows Hopton and Siddington being assigned to hear such pleas in the 1286 Norfolk eyre. Two reported *quo warranto* cases from the 1293-4 Yorkshire eyre suggest such cases there were heard by Cressingham and Ormsby. Occasionally we hear of common action by all the justices. A grand assize in the 1286-7 Suffolk eyre was heard by all the justices of the Eyre; and in the following eyre (Hertfordshire 1287) all six of the justices met together after a verdict had been given and judgment rendered on it by three of their number to discuss the taxation of damages in a case.

In general principle, however, even where the justices divided up the business between themselves the justices remained collectively responsible for everything done in their court. In 1290 all the justices sitting in the Common Bench in Trinity term 1288 (plus the court's chief clerk, the keeper of rolls and writs) were held responsible for the chief justice's erasure of his rolls and substitution of a judgment by default for the joining of jury issue, though Weyland may well have heard the case on his own and it seems unlikely that all were implicated in his misconduct. Something similar happened in 1290 to the justices of the 1286 Norfolk eyre (plus the chief clerk of the crown in that eyre) who were held collectively responsible for failure to take action on two presentments made at the eyre, though it seems likely that only two of them (Boyland and Hopton) had been responsible in this eyre for dealing with presentments. The same theory of joint responsibility was applied in various proceedings in 1290 where other complaints of misconduct were made against justices. Their immediate response was that they were not liable to answer without their colleagues who had been sitting at that time in the same court. There were exceptions, however, to this general rule. When a complaint was made against William of Saham in 1290 relating to his conduct as a justice of the 1286 Huntingdonshire eyre he pointed out that there was also one other surviving justice from that eyre, John of Mettingham (recently appointed chief justice of the Common Bench) who was associated with him in the said eyre to hear and determine pleas (*sibi associatus in itinere predicto ad placita ibidem audienda et terminanda*). The auditors of complaints did not automatically assume Mettingham's responsibility but asked him if he was present at the plea with Saham (*si interfuit predicto placito cum predicto Willelmo*). Mettingham was able to say that he had then been hearing pleas of *quo warranto* in a separate building and so should not be held liable. They also elicited from the complainant that

he had no wish to proceed against Mettingham since he had not been present when the misconduct had taken place. In two other cases from the same circuit Mettingham was exempted from any responsibility on his simply 'recording' that he had not been sitting with Saham at the time the judgment complained of had been made.

The post-1272 evidence for 'outside' justices and others not appointed as permanent members of a court playing a significant role in assisting and reinforcing the justices of particular royal courts in making their decisions and judgments is significantly more plentiful than that which exists from before 1272. There seem to be three separate mechanisms at work here. One, first attested in 1283 when the Common Bench was to hear a case brought by its chief justice, Thomas Weyland, claiming the right to present to the living of Chipping Sodbury against the prior of Worcester was royal authorisation for the association of outsiders (here the treasurer and barons of the Exchequer) for this particular piece of business to ensure right was done. Something similar is also known to have happened in 1284 and 1307. A second possibility, revealed incidentally in one of the proceedings on complaints made against one of the justices of the Common Bench in 1290, was of an outside justice (here, John of Mettingham, at the time simply a regular Eyre justice) sitting in on the jury stage of a case in another royal court because he was a 'well-wisher' to one of the parties. A third, and perhaps, the most common, is revealed incidentally by Hengham in his answer to another complaint of 1290 in which he denied responsibility for a judgment made in the Common Bench, even though he had been present for the pleading of the case. It often happened, he said, that he came into the court and sat in it at the request of its justices when they had difficult cases to decide, to provide them with advice and assistance (*consilium et auxilium*). The pre-1290 Common Bench reports certainly show Hengham sitting with the justices of the court on a number of different occasions. There are also mentions of Mettingham, Siddington and Saham doing so. The plea rolls mention discussion of cases with the justices of King's Bench after 1290 and reveal the presence of Thornton, Brabazon, Rothbury and Spigurnel while justices of King's Bench for the hearing of Common Bench cases. The evidence for outside justices sitting in on Eyre cases is less extensive but indicates that it did also happen there.

There were also other kinds of 'outsider' to be found participating in decision-making in the courts. In the eyres of the 1280s and 1290s Mettingham sat with outside associates to hear quo warranto pleas in three eyres and two men heard foreign pleas in Michaelmas term 1281 while the justices of the 1281-4 Lincolnshire eyre were at parliament. Nicholas of Warwick, the king's serjeant, sat as a justice of Common Bench in Hilary and Trinity terms of 1307 without receiving any kind of formal appointment or being included among the court's

justices in any final concords. After 1272 we begin to get clear evidence that senior clerks played an important and quasi-judicial role in the working of the courts. The reports record the arguments or decisions of successive chief clerks of the chief justice of the Common Bench (Anger of Ripon and Henry of Hales), of the keeper of rolls and writs (John Bacun) and the future Common Bench justice, Hervey of Stanton. The phenomenon is also attested in the Eyre, though not on the same scale.

The general principle seems to have remained true throughout the period down to 1290 and perhaps as late as 1307 that a separate plea roll was compiled for each of the justices of the major royal courts (and also for the keeper of writs and rolls). In 1290 Walter of Hopton petitioned to escape his share of responsibility for the collective failure of the justices of the 1286 Norfolk eyre to take action on two presentments. He said that at that time of the alleged failure he had not possessed sufficient warrant from the king to sit as a justice and 'could not be at their council nor have a clerk nor a roll' (*ne il ne pout estre a lur consail ne clerk aver ne roule*). Most of the surviving Common Bench rolls were made for successive chief justices, but a number of 'Rex' rolls made for the keeper of rolls and writs also survive and three made for John de Lovetot and from a list of the rolls he handed over in 1290 we know there were once more. Separate rolls were evidently also made for William of Brunton since he refers to them in his responses to complaints made against him in 1290. It is also relatively common down to 1290 for rolls to survive for many (and sometimes all) of the justices sitting on an eyre plus the keeper of rolls and writs. It is only after 1290 that there are no surviving rolls except for those made for the chief justice and the keeper of writs and rolls. A stray glimpse of enrolment practice given by the record of proceedings on a complaint made in 1290 allow us to see that the practice in the 1287 Hertfordshire eyre was for an enrolment of the case to be made 'in the presence of the justices' and first in the 'chief roll' (evidently the roll of the chief justice), then in the 'rolls of the lord king' (evidently the 'Rex' roll made for the keeper of writs and rolls) and of the other justices, the procedure laid down in 1253 for the rolls of the Common Bench, but evidently of wider application.

These rolls were not handed in to the king's treasury immediately and there seems to have been a sense in which they did not become a fully formal record until they had been. In theory the justices were meant to check their rolls before doing so or perhaps had often been given the opportunity to do so. In 1279 master Roger of Seaton responded to a letter from the keeper of the rolls of chancery asking him to hand in his writs and rolls by saying that he was willing to hand them over but he was not willing to 'avow' them since 'perhaps one thing

was done and another has been written in the rolls by the clerks, because they are not always able to understand correctly pleaders and litigants'. It was perhaps *only* at this stage that the justice's own memory of what had been decided in a case was allowed to trump what was written in the rolls. The special status of the rolls once handed in to the treasury is alluded to in proceedings on a complaint against two of the clerks of Solomon of Rochester at the 1287 Hertfordshire eyre. The clerks' eventual position in this case was that the rolls had been delivered into the treasury and these rolls (therefore) 'bear full and perfect record and they ought not to answer in any respect for those things contained in those rolls since nothing could be added or removed from them'.

IV

The story of royal justices and their activities in England is a continuous one which begins in 1176 with the creation of a new type of royal justice. The story becomes clearer in the course of the following century and a quarter with major leaps in both the quality and quantity of the available evidence occurring in the final decade of the twelfth century and again in the final quarter of the thirteenth century. I have concentrated in this paper on certain specific topics: the evidence for their appointment and oath-taking, the delegation of jurisdiction to them by the crown, the evidence for how they actually operated within their courts, and the creation of a formal record of what they did. The paper could have been twice the length had I also discussed other important aspects of the history of the judiciary in this period, in particular significant changes over time in how they were recruited and their gradual movement towards professionalisation. Because the evidence gets better over time it is tempting to think that what we are seeing is itself relatively static, something that had been there all the time gradually emerging from the shadows. I think it is probably more complicated than that. The history of the judiciary and its functions is partly a history of responses to a changing legal environment. Jury trial had become a much more important part of the legal system by 1300 than it had been in 1200 and the evidence suggests that the justices were largely successful in ensuring that as it became more common they continued to control its functioning or even increased their control both by determining suitable jury issues and by charging juries and by questioning juries on their verdicts. We also see the justices reacting to the emergence of professional lawyers as normal participants in legal proceedings when we see them taking a firm hold on the pleading process: intervening in argument, ruling out tentative pleadings, judging on the basis of concessions made in the course of pleading by the parties. The other change to which thirteenth century courts and their justices evidently

reacted was the growth in court business over the course of the thirteenth century. It was this, it seems likely, that led to the adoption of informal arrangements for the division of the courts' work between the justices of the courts that is observable both in the Common Bench and in Eyres. The basic lineaments of the classic royal justice were created in 1176, but the context within which they functioned certainly changed and developed over time. It continued to change and develop down to 1307.