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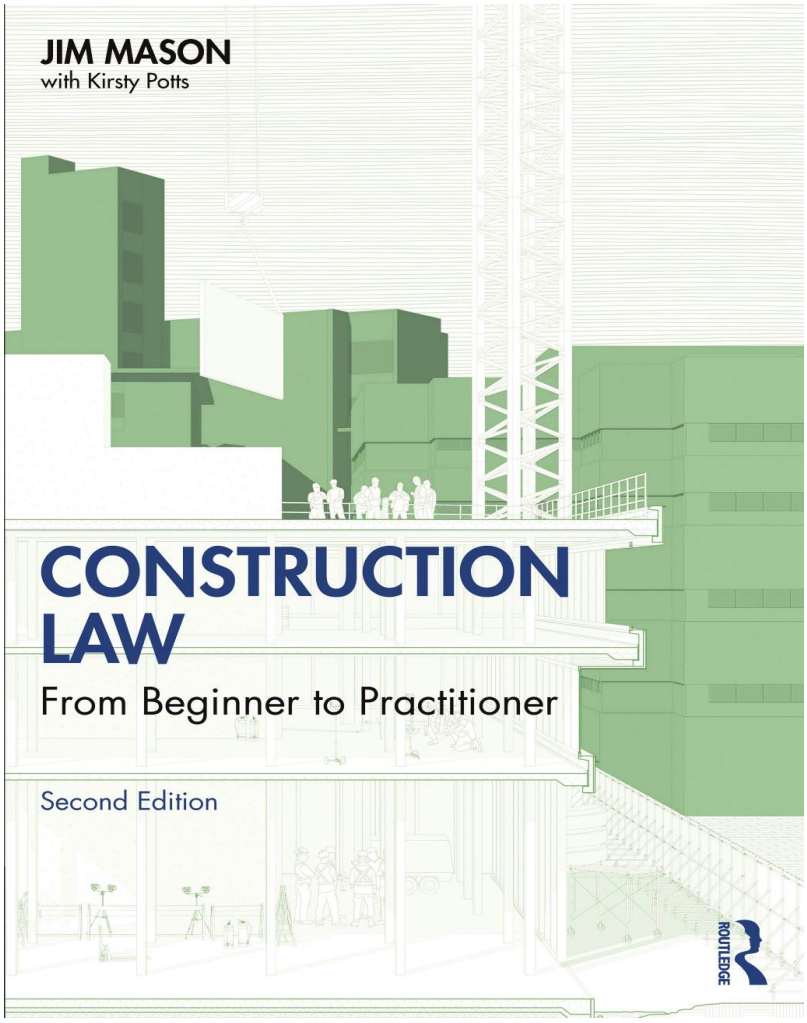

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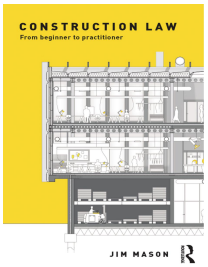

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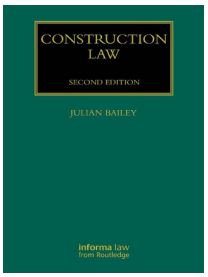

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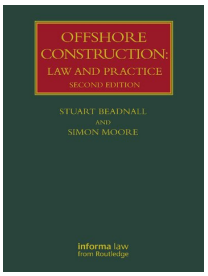

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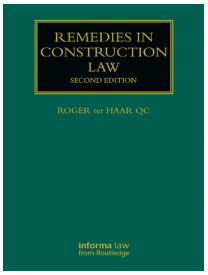

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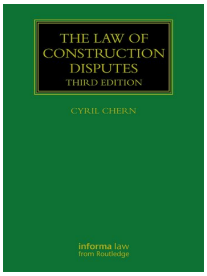

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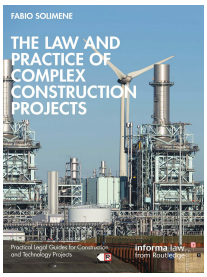

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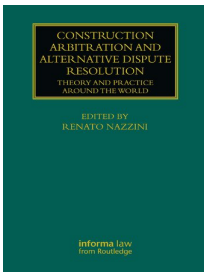

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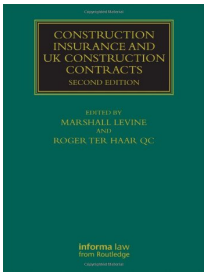

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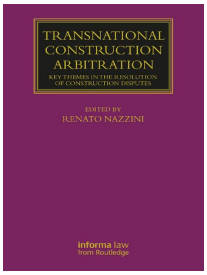
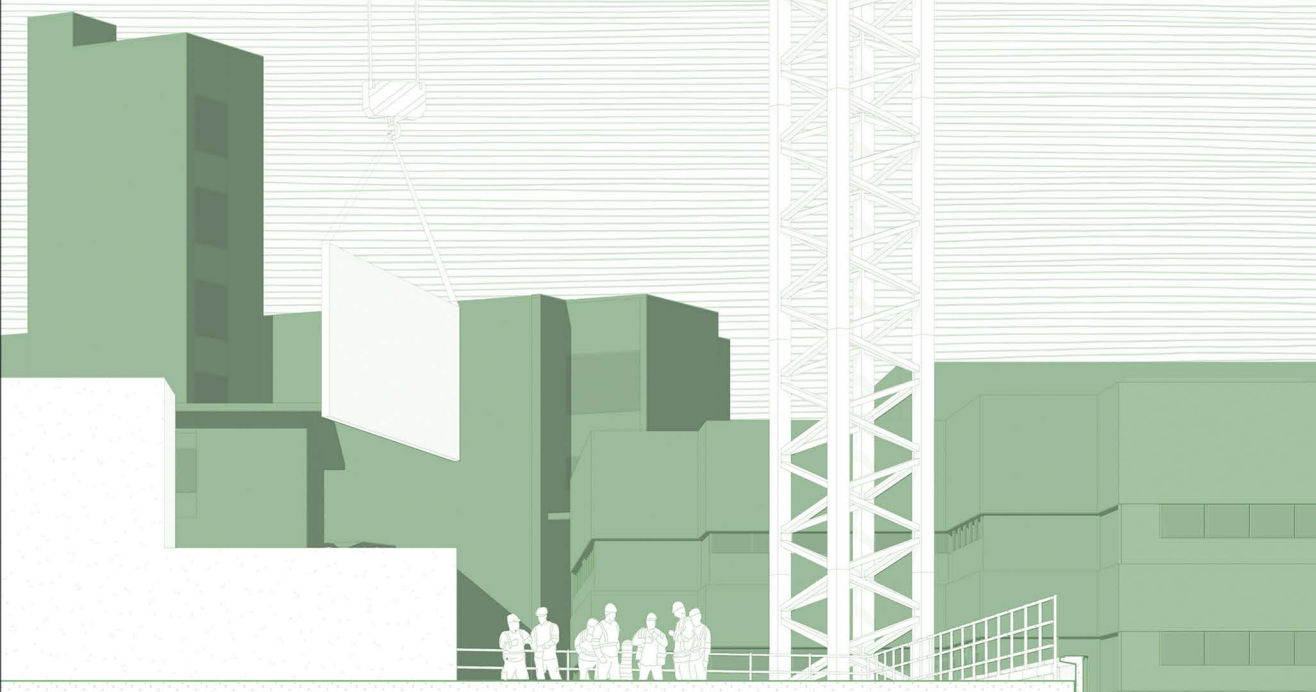


JIM MASON
with Kirsty Potts



CONSTRUCTION LAW

From Beginner to Practitioner

Second Edition

ROUTLEDGE

Construction Law

This second edition of *Construction Law: From Beginner to Practitioner* provides a thorough and comprehensive guide to construction law by blending together black letter law and socio-legal approaches. This mixed methodology makes an ideal introduction to the subject for those studying to enter the architecture, engineering and construction (AEC) industry in a professional capacity. Designed to equip the student with all they need to know about construction law, the topics covered include:

- the fundamentals of law and the English legal system;
- contract, business, tort and property law;
- procurement, subcontracting and partnering;
- claims, damages, losses and expenses;
- dispute resolution including mediation, arbitration, litigation and adjudication.

The book's suitability for study is enhanced by its logical structure, chapter summaries and further reading lists whilst the role of law in achieving a more collaborative and less confrontational AEC industry is examined in detail. Fully updated throughout, this new edition includes coverage of post-Grenfell legislation; increased coverage of modern methods of construction and continuously evolving technologies such as BIM and digital twins; NEC4 and the latest JCT contract suite and the Construction Playbook.

This book is useful not only for understanding the basics, but also as a reference that practitioners will use time and again.

Jim Mason is Associate Head of Department Built Environment Programmes in the School of Architecture and Engineering at the University of the West of England.

Construction Law

From Beginner to Practitioner

Second Edition

Jim Mason

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For Becky

Contents

Foreword to the first edition

The purpose of this book is to guide the student from the first tentative steps in a law subject through to the development of a detailed understanding of this fascinating field of study. The aim is to give the student knowledge of construction law and the confidence to rely on their own ability to research and resolve any issues arising in this area. As such, an appreciation of the matters discussed forms a starting point for a wider study into all aspects of construction law.

The layout of the book takes the student through subject areas broken down into parts. The parts build on the concepts introduced in the preceding chapters to allow students to expand their knowledge at their own pace. The parts range from basic legal concepts in Part 1 through to a more detailed analysis of the background to construction law in Part 2. The notion that the construction industry is a specialist user of legal services is explored in Part 3. Part 4 takes the student through the dispute resolution mechanisms available to the construction industry. The distinctive and innovative features of the construction industry and the legal ramifications are considered in Part 5.

The book is intended to support the study of construction law as a component of both undergraduate and postgraduate degree courses in the built environment. Equally, the work supports a study of construction law as a discrete discipline. In part, the style adopted follows the textbook approach of disseminating information in a methodical manner. Elsewhere, the writing is intended to be more academic in terms of making connections between different parts of the law and the specific character of the construction sector by exploring developing themes. In some areas consistency of approach has given way to the desire to put across my approach on construction law for the reader's benefit. As a result this is more than just a law book. Aspects of construction and project management are drawn in when necessary to give the reader a holistic view of the applications of law in this field. This book also provides an opportunity to reflect on recent initiatives within the built environment sector. I have set out therefore to add my contribution seeking to encourage the compelling case made by the agents of change who would see the construction industry continue to take measures to improve its practices.

The main stimulus for writing this book is a desire to plug a gap I perceive to be evident between the 'black letter law' approach taken by many legal writers and the expectation of professionals working and studying in this area. I have sought, throughout my career as a solicitor and then as an academic, to make the law accessible to everyone. Any failures on my part to follow the norms of legal writing are acknowledged as a conscious decision to present the law in a more accessible way than is the case in a good number of legal

textbooks. The expectation, which I recall vividly from my time as a law student, that the reader will invest the time needed to locate, print and read the law cases referred to belongs to a different era. I hope that the reader will be able to follow and make the necessary connections and reflections on what you already know, thereby unlocking a deeper appreciation of construction law. Jim Mason[1] September 2015

1 Department of Architecture and Built Environment University of the West of England, Bristol, UK

Foreword to the second edition

The original edition of this book was written in 2015 and, as every law lecturer knows, there is an ongoing need to update, reflect and accommodate developments on a regular basis. That said, the basic law and procurement foundations laid out in the book remain 'evergreen', and the lion's share of the content from the first edition remains extremely relevant for those seeking to develop their skills and knowledge in this area.

Key areas of updating that were required are around the still emerging post-Grenfell steps and legislations and the advent of modern methods of construction and design for manufacture which were launched by the Farmer report. Further, many of the standard forms of contract have gone through a refresh. We now have the NEC4 and the JCT 16 forms as the industry norms. Other contracts have emerged such as the Framework Alliance Contract.

The topic of increased technological capabilities is featured more heavily in my other book, *Construction Law, Towards the Digital Age* published in 2021. Nevertheless, this new edition charts the movement towards enabling these developments through the Government's Construction Playbook (Cabinet Office 2022) and Platform Rulebook (Construction Innovation Hub 2022).

My approach in the new edition remains around the socio-legal context rather than black letter law. This emphasis on relating the law as it is received by its users has hopefully made the work accessible to the wider construction professional community. I have had good feedback around the book from several sources over the years who appreciated this open access approach. If I were to predict future developments, then I would like to see this branch of the law become techno-socio-legal.

I remain positive around the prospects of technologically enhanced construction law to address poor practice within the industry. This confidence is shaken at times by the stark truth that neither the incidence of disputes nor the prevalence of short-term thinking around procurement have diminished. Nevertheless, moves towards harmonisation, digitisation and rationalisation should lead to a much better performing industry. How can it not?

Jim Mason, November 2022

Further Reading

Cabinet Office (2022) *The Construction Playbook*: available at: https://www.gov.uk/government/publications/the-consultancy-playbook.

Construction Innovation Hub (2022) *The Product Platform Rulebook*: available at: https://constructioninnovationhub.org.uk/wp-content/uploads/2022/09/The-Product-Platform-Rulebook_Edition-1-1.pdf.

Preface

This book is intended to be a stand-alone reference point for those studying construction law. I have included a further reading section at the end of each chapter which identifies textbooks containing more information for the student to follow up on should they wish. Where multiple chapters refer to the same books, I have identified the sections to which particular attention should be paid.

This book refers to the 'employer' by which reference is intended to the client or buyer of construction services. The 'contractor' refers to the building company supplying the construction services. References to 'he' and 'him' should be taken to imply equally to 'she' and 'her'.

This book refers to the AEC industry by which reference is made to the architecture, engineering and construction industry. The integration of these previously separate fields of practice is one of the major changes in the sector in the last 20 years.

The numbering system used by the book is intended to assist navigation around the various chapters, and there are cross-references made in the text. Reference to 'paragraphs' is intended to refer to both the actual paragraphs and the numbered sub-chapters featured in the work.

Acknowledgements

My thanks to Kirsty Potts for editing and updating from the first edition to the second. Thanks to Sebastian Pigott for rewriting Chapter 5 on property law. Thanks to Joe Hyett for the cover design and to my colleagues at UWE Bristol for their friendship and support. Thanks to Ciara Eastell, OBE for her extremely useful coaching and helping me to become a "renaissance man." Thanks to my friend Rob Bonham for his help with the indexing. Finally, thanks to the thousands of alumni and current students at UWE Bristol on the construction and property courses. It has been a great pleasure to interact with you and hopefully pass on a thing or two along the way. Graduation remains as a yearly highlight.

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Statutes

Cases

Government reports

Banwell, H. (1964) 'The Placing and Management of Contracts for Building and Civil Engineering Work', HMSO

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Wolstenholme, A. (2009) *Never Waste a Good Crisis*, Constructing Excellence

Part 1

The background law

1 Legal systems

1.1 Introduction to construction law

Most people understand the role that architects, engineers and surveyors perform in the construction industry. Less is known about the role of construction lawyers and how they contribute to the building process. Construction law can be regarded as the underpinning beneath all other fields of practice in the industry, enabling other roles to be performed safe in the knowledge that their actions are regulated.

At the project inception stage, construction lawyers play an essential role in ensuring that all parties comply with government regulation and that the parties' rights and responsibilities are written into contracts reflecting what they hope to achieve. If any party infringes their rights, then the contract must allow that party the right to pursue a remedy through the courts or such other dispute resolution technique as may apply.

The drafting of the construction contract is one of the key tasks performed by the construction lawyer and is essential to the success of any construction project. The contract outlines the roles and responsibilities of the parties, allocates project risks and sets out procedures for the avoidance and resolution of any disputes arising. The contract attempts to anticipate everything that might happen during the project and directs the parties as to how they should deal with any such developments.

Construction projects rarely end up being constructed exactly in accordance with the original drawings and specifications. During construction changes will almost inevitably occur. For example, the employer may change their mind about an aspect of the design and ask the contractor to perform extra or different work. Alternatively, the contractor might start excavations and discover what lies beneath the ground is different to what was envisaged. For example, the soil might be contaminated and require remediation experts to be called upon, requiring extra time and money.

These sorts of issues can result in the parties making claims against each other during the course of a project. For example, the contractor may believe they are entitled to extra time and money and will seek the assistance of a construction lawyer to prepare a claim. Alternatively, the owner may believe they are entitled to withhold money from the contractor because the project is behind schedule. The making of claims during the course of a construction project can strain the relationships between parties. Construction projects have earned an unenviable reputation for being highly adversarial and prone to many conflicts and disputes. This is due in part to the uncertain nature of construction and the involvement of multiple parties in the process, each with their own agenda and needs. The extent to which these excuses justify the high incidence of disputes is open to debate.

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All too often, disputes that arise during the project are not resolved until after the completion of the project. Construction lawyers help the parties to resolve these disputes using a variety of methods such as alternative dispute resolution, litigation and arbitration.

This portrait of lawyers only being on hand to assist in the unwelcome incidence of dispute belies the true importance of the law throughout the construction process. It is necessary to first return to the notion of why law is needed. Would it be possible to operate without construction law and lawyers? The first requirement before a study of construction law can be undertaken is to appreciate the function that law serves, how law is made and the different sources of law.

1.2 Introduction to law

Law is an inescapable feature of daily life. Most democratic countries promote the freedom of their citizens to do as they please. However, the populace is nevertheless bound to obey the rule of law in their dealings with one another.

The law is sometimes described as being 'black and white', by which it is meant that the law is clear and that there is no room for any argument around its meaning. This is true of some laws but not all. Law can deliberately provide room for argument on and around the provisions it introduces. Judges are given discretion as to how the law is interpreted. This is evident in criminal law in suggested ranges for prison sentences to be imposed (e.g. from two to five years) and the identification of a band within which fines can be imposed. Neither is the stated law always accessible for the layperson to discern its meaning, and it often needs explaining by legal advisers or judges. One of the key notions underpinning law is that legal argument is a valid end in itself even if it does not provide definitive answers. The law stated in this book is a summation of what the law is. Conversely, law texts can themselves be sources of law inasmuch as they represent the embodiment and codification of the law.

Legal argument and success in a contested case therefore depends on the skill of the advocate but also on the facts of any given situation, and opposing interpretations frequently occur. Which view and version of events should prevail? The answer depends on which legal argument the tribunal are more persuaded by on the day. The importance of legal argument based on the presentation of a strong case cannot be overstated.

The legal system considered in this chapter is primarily the English legal system made up in part of the common law. This represents one country's attempt to develop, interpret and protect legal rights. The English approach has been exported to many other countries around the globe, mainly through the legacy of colonisation. Some readers will also be familiar with other approaches to law, most notably the civil law approach founded on Romano-German principles and Islamic approaches that incorporate religious teaching in the legal system. These different approaches are discussed at points throughout the book to compare and contrast with the general common law approach covered.

1.3 Civil and common law distinguished

National law systems, sometimes known as jurisdictions, can be described as being 'common' or 'civil'. The key difference is shown in Figure 1.1 and can be described as follows:

- *Common law* places great emphasis on the importance of case law. Cases can create principles of law that apply across the legal system. In this sense, common law can be seen as being a 'bottom-up' system. Cases, sometimes starting in a lowly ranked

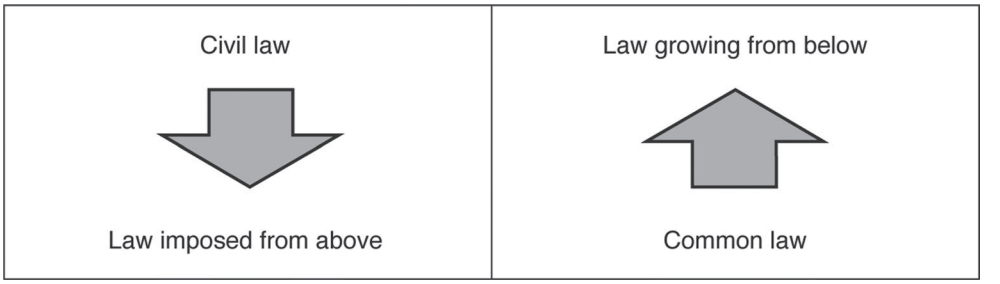

Figure 1.1 Civil and common law systems

court, can, usually through a system of appeal, become the dominant source of law on any given issue in the jurisdiction. Common law jurisdictions use elements of civil law to complement the common law approach. Common law countries can therefore be described as taking a dual approach to their lawmaking.

- *Civil law* involves law being written down in a legal proclamation. The types of proclamations vary greatly and are known by such terms as statute, code, constitution, declaration, regulation and directive. Civil law can be seen as being a 'top-down' approach to lawmaking. Law is created for the politicians by drafters who capture the purpose of the required law in a document which everyone must obey. Changes to civil law can be influenced by case law; for example, amendments to the US Constitution. Amendments to the constitution are sometimes required where cases have been brought in court requiring a decision on an aspect not previously covered by the written constitution. The constitution is therefore amended (changed) so that it takes account of the new issue raised. However, this reaction to a case brought in the court does not amount to the same power that judges have in a common law country. Put simply, civil law judges do not normally have the same ability to make new law in their judgements as is the case in common law jurisdictions.

1.4 Why law is needed

Law can be described as society's rulebook – our attempt to regulate ourselves. This was summed up by Thomas Hobbes in his seventeenth-century work:[1] 'Law is the formal glue that holds fundamentally disorganised societies together'.

Consider a queue at the check-in desk at the local airport. People queue because they know that, in the normal course of events, their turn in the queue will come and this will allow them to catch the aeroplane in good time. If there was no queue and no airline staff to process the tickets, this might result in a free-for-all. Only the pushiest and loudest people will have an opportunity to catch the aeroplane. The queuing system is fairer and more just – a key theme in any debate about the need for law.

1 Hobbes, T. (1651) *The Leviathan*.

The airport example shows one aspect of the purpose of law. A more complete list of the benefits of a legal system is considered in the next sections.[2]

1.4.1 Providing guidance on how to behave and interact with others

If there were no laws (especially written laws), then people would be without guidance on what is acceptable behaviour in society and what is not. The relationship between laws and customs is a grey area, and the two concepts interrelate to a large degree. Travellers visiting foreign countries should be mindful that customs in those countries may dictate that behaviours considered acceptable in their own countries are unacceptable to their hosts (such as allowing the head to be uncovered or entering a temple whilst wearing shoes). If the custom/law were written down, then a visitor would have a better chance of knowing about it and therefore being able to avoid inadvertent offence.

Breaking customs is unlikely to be regarded as seriously as breaking the law. People are largely forgiven for breaking customs and ignorance, in this case, is a defence. Ignorance of the law is no defence. Customs, unlike laws, do not usually involve a system of enforcement. In some legal traditions, this distinction between laws and customs is not made, meaning that extra care is needed to observe customs with the force of law. Another term of use in this area is 'legal norm', which involves a mandatory rule of social behaviour established by the state. An example of this might be receiving a speeding ticket even though the speed limit was not known to the car driver.

1.4.2 Providing protection of certain interests

It is high on the list of importance for most people to want to own property and use property free from interference. This is not the only view; political ideology has sometimes sought to impose a different approach, most strikingly the anarchist view that 'all property is theft'.[3] Property in this sense does not simply mean real estate (land and buildings) but can also extend to a person's belongings and intangible property. The role of law here is to protect all property and recognise forms of ownership. The following list demonstrates the range of property interests with the relevant protecting/enabling law shown in brackets:

- physical interests (tort law);
- dignitary interests (tort law);
- property interests
    - real property (property law)
    - chattels or belongings (tort law)
    - intangible property interests (intellectual property law); and
- financial interests (contract law).

Tort, property and contract law are considered separately in later chapters in Part 1. The desirability of the protection afforded by these laws is felt very keenly in the world of construction as can be demonstrated in the following example.

2 Based on Cane, P. (1997) *The Anatomy of Tort Law*, Oxford: Hart Publishing.
3 Proudhon, J.-P. (1840) *What Is Property?*

Landowner A needs to establish that they own the land on which they intend to build (*property interest*). Builder B wants to know that they may occupy the land for the duration of the project and that the contract they sign with the landowner will be enforceable in the event of non-payment (*financial interest*). Landowner A wishes to rely on the designs that have been prepared with due professionalism by architect C (*property interest*). Architect C wishes to ensure that ownership over their designs stays within their organisation and will not be copied either by the client or by a third party (*intangible property interest*). Builder B wants to ensure that their good name is not libelled in newspaper articles complaining about their standard of work (*dignitary interest*).

The persons involved at each stage of the example given are able to consult the law to apprise themselves of their rights in the situation. They may each, either by themselves or through a lawyer, take steps to enforce their rights in the event that they perceive that there has been or will be an infringement against those rights.

1.4.3 Expressing disapproval (criminal law)

The analogy of the check-in queue at the airport has already been used. Most people will feel annoyed if queue jumping is allowed and may want to see the offenders sent to the back of the queue. This sentiment involves aspects of punishment for improper actions. Looked at another way, interests need to be protected and rule breakers to be admonished. This is one of the functions of criminal law.

There are several different approaches to criminal law, ranging from a strict authoritarian *zero tolerance* approach to more reconciliatory views. Rehabilitation of offenders focuses on the desire to reintegrate people who have erred into society once they have reflected on and realised the negative impacts of their actions. The lawmaking process is more typically concerned with the punitive element. The criminal law involves imposing tariffs for fines, bans and prison sentences on offenders. The underlying theme here is the expression of disapproval for transgressing legal norms or acceptable behaviour at whatever societal level the offence is encountered. This is often referred to as white-collar crime (professional crime such as fraud) or blue-collar crime (offences related to injury to people or property).

There are many examples of the application of the criminal law to situations in and around construction law. Serious breaches of health and safety procedures can lead to criminal proceedings and the imposition of fines. A great deal of effort has been made both domestically and internationally to curb corruption in construction. In 2009 in the UK, this included an investigation by the Office of Fair Trading culminating in prosecutions against 103 contracting firms found guilty of cover pricing between 2000 and 2006. Internationally, the work of Transparency International and the World Bank has been concerned with reducing the incidence of bribery. The resource wasted through these nefarious activities runs into billions of pounds every year. These themes are considered in more detail in Chapter 22.

It is not always straightforward to ascertain the difference between criminal and civil law. 'Civil' law in this context means both common (case law) and civil law (codified) systems. This book is primarily concerned with civil law – the law that offers private protection and a means whereby the aggrieved party can be compensated for any loss suffered. The successful outcome of a civil case is usually an award of damages (money) to the winning party. Most cases in construction law are civil based rather than criminal.

Civil law has its own court system and the parties are referred to as the claimant (the person bringing the claim) and the defendant (the person against whom the claim is brought). It is standard practice to refer to one party versus or -v- the other party to show that a court case

is involved. The outcome of the case is of primary interest to the parties involved. However, if the case is reported, it is of interest to others given its status as precedent.

The purpose of the criminal law is, in contrast to the civil law, to protect the public as a whole rather than any particular individual. The successful outcome of a criminal action is that the offender is convicted of a crime and punished. This punishment might be financial or involve taking away the offender's liberty by means of a custodial sentence. There is a slight crossover with civil law in the sense that financial compensation is sometimes available to the victim or their family through a government-sponsored scheme, although this may be more limited than damages in civil law.

Criminal law has its own court system, kept separate from the civil law system. In keeping with the notion that it is society bringing the action against the rule breaker, the parties are known, in England and Wales, as *Regina* (Latin for Queen) v the defendant (rule breaker). In other jurisdictions, the public are referred to collectively by such terms as the People v (USA) and *La République* v (France).

This reference to the Queen in criminal action shows the historical importance of the Crown in the development of the English legal system. Table 1.1 helps summarise the differences between criminal and civil law.

1.4.4 Providing a means of resolving disputes

In any society, people occasionally fall out. This occurs in many different scenarios including, for example, squabbling siblings disputing their inheritance in the absence of a will, neighbouring landowners arguing over a boundary or a dispute between an employer and a disgruntled former employee. In the construction context, the parties disagreeing might include a developer and builder with divergent views on a final account payment or a supplier and subcontractor disputing the quality of items supplied. Differences are commonly dealt with by negotiation. However, when parties cannot resolve their differences by agreement, they need recourse to the courts for a decision on who is right and who is wrong. Courts and other tribunals that are available frequently act as a deterrent in that people are rightly nervous about the exorbitant costs involved in a fully contested hearing. The types of dispute resolution procedures used in the AEC industry (architecture, engineering and construction) are covered in Part 4.

1.4.5 Supplanting morality with law

Morality largely stems from religious teaching. Historically, religious laws were, and in some cases remain, very important in the development of legal systems. In the Christian tradition, biblical pronouncements such as the Ten Commandments are expressed as laws

Table 1.1 The differences between criminal law and civil law

Criminal law	*Civil law*
For public protection	For private protection
Offender punished	Aggrieved party compensated
Criminal courts	Civil courts
Regina v Martin	Smith v Jones

being handed down from a higher authority. However, in most secular societies, the law and religious teachings have become distinct to the extent that one has supplanted the other. For example, taking another biblical reference, 'an eye for an eye, and a tooth for a tooth'[4] might be a religious teaching, but it is not part of our legal system. If you are wronged then you must rely on the legal system to mete out justice on your behalf rather than taking matters into your own hands as the religious teaching might be interpreted.

This separation of religious and secular law is not universal. Sometimes the religious and/or political will of a country precludes the formation of a separate legal system. An example of this is Sharia law where the law is regarded as an expression or extension of religious principles. This manifests itself in ways such as a prohibition in Middle Eastern countries on adding interest to debts, which is seen as being against the scriptures. Contracting firms operating in Arabic countries need to be aware of such local variances when undertaking projects in these areas. The links between religious and modern laws are still present in Western societies, albeit more diluted and indirect.

These sections have involved a wide-ranging discussion about the role of law and may seem a long way removed from the day-to-day operation of construction contracts. It is only by appreciating the context and purpose of law that we can understand the specifics as they apply to the chosen field of study.

1.5 Legal systems

The previous section looked at why law is needed and the interests law protects. The next issue to consider is how law is delivered. The protection afforded by the law is only as good as the legal system's ability to satisfy the demands placed upon it. Consideration is now given to how the legal system meets these requirements and its performance.

1.5.1 Introduction

Confidence in the ability of the legal system to uphold the law is essential. There are three component requirements to deliver this confidence in the performance of the legal system. The system must be:

- consistent in its approach;
- consistent in its results;
- accountable for its actions.

Consistency involves reassuring the users of a legal system that the same law will be applied to the same type of cases. The outcome of similar cases must be consistent. Put another way, judges must use the same general criteria when arriving at their decisions. If new rules are introduced, there should be a clear explanation of the reasoning and evolution behind their creation. Third, the legal system should be accountable in the sense that it can be held responsible for its own actions. If something goes wrong with the legal system, there needs to be a means for redress. This redress is provided through the system of appeal.

4 Matthew 5:38 in Carroll, R. and Prickett, S. (eds) *The Bible: Authorized King James Version,* Oxford: Oxford University Press, 1998.

1.5.2 Historical development

The English legal system (this refers strictly to England and Wales – Scotland and Northern Ireland have their own legal systems) has developed in such a way as to meet the requirements of consistency and accountability. Table 1.2 lists some historical events playing an important role in the development of the modern-day legal system.

The consistent and accountable approach desired by legal users was on its way to being in place by the end of the seventeenth century. Access to justice and the right to appeal a bad decision were established as basic human rights. These rights continue to evolve and are set out in such statutes as the Human Rights Act 1998.

1.5.3 The separation of powers

Any discussion around the historical development of law demonstrates the political worth of the lawmaking function and its powerful nature. The ability to make law can have an intoxicating effect on those wielding it, and this has led to efforts to contain its use. This sentiment is summed up in the oft-quoted phrase of Lord Acton from 1887: 'Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men'.[5] Democracies (and other legal systems) have developed ways of ensuring that power is separated into different lawmaking institutions, or estates. In this way, we can attempt to keep the 'bad men' under control.

Table 1.2 Key historical dates in the development of the English legal system

Pre-Norman Conquest 1066	Before the Normans arrived, English law was a mixture of local customs. The law dispensed by local lords would differ from one region to the next. The monarch had nominal overall authority but rarely had the time or inclination to be concerned with legal matters other than raising taxes to fund their military campaigns.
Rule of Henry II 1154–89	Henry II was the first Norman king to take real interest in organising the legal system. Norman rule had settled down in England and Wales to the extent that a decent attempt was now made to establish a legal system including a clearly defined hierarchy of the courts and lawmaking bodies.
Magna Carta 1215	Not all Norman kings took as great an interest in lawmaking as Henry II. King John was a notoriously bad king, and the barons/landowners became frustrated with (amongst other shortcomings) his lack of attention to maintaining the law. The barons therefore forced him to sign a charter whereby he pledged to bring a properly constituted legal system into being and to enshrine certain rights. This document was known as the Magna Carta, or 'big charter', and represents the end of absolute monarchy in England and Wales inasmuch as the power of the sovereign was now circumscribed in the area of lawmaking.
Bill of Rights 1689	Fast-forwarding several centuries, this date is picked out because it represented further inroads into the monarch's absolute power. Absolute power had first been compromised by the signing of the Magna Carta. From 1689, a constitutional monarchy was set up which basically ensured that the legal system was now fully accountable for its actions. Parliament now reigned supreme and the monarchy became largely subservient.

5 Letter to Bishop Mandell Creighton, April 5, 1887, published in *Historical Essays and Studies*, edited by J.N. Figgis and R.V. Laurence, London: Macmillan, 1907, p. 504.

The attempt to restrict the excess of power has been a central theme running through the historical legal development known as the separation of the powers. The central notion is to separate the functions of law to ensure that its proper exercise can be checked by other institutions.

In the context of the English legal system, separation is achieved by keeping the judiciary (judges) separate from and not under the control of the executive (monarch and later Parliament). The executive (government) is itself kept separate from the legislative, or parliament, often referred to as the upper chamber. This separation ensures each legal estate performs its own role and, as far as the legal system is concerned, gives the judiciary a free hand to dispense justice regardless of whether this compromises or undermines the actions of the executive and legislature. Each lawmaking institution is therefore balancing the power of the others. This is known as the system of checks and balances, which ensures power is not abused.

This model of the separation of powers is one of the key elements in democracy as reinterpreted in many other countries. The European Union has its own version of the separation of powers. The executive, known as the European Commission, is made up of the Council of Ministers, which involves the ministers of the member states coming together to agree policy. The legislative role is mirrored in part by the European Parliament. This institution

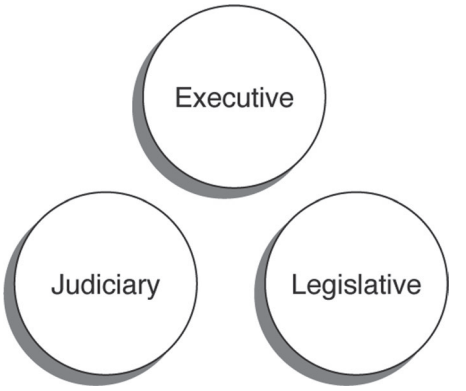

Figure 1.2 The separation of powers

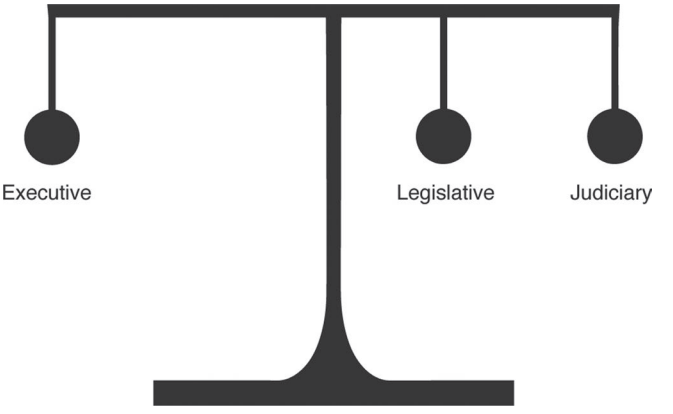

Figure 1.3 The system of checks and balances

merely debates the laws proposed by the Commission; it does not have the same power as national parliaments, such as the UK Parliament, to veto proposed laws. The European Court of Justice fulfils the role of the police.

The constitution of the judiciary, the executive and the legislative is covered in the next section where their role in creating law is described. In the construction context, the government might propose a change in the law, such as a Building Regulation aimed at reducing carbon usage. This would then be drafted and passed by Parliament and then interpreted in the courts by judges based on the specific facts of cases.

1.6 Sources of law

The three most important sources of law are:

- case law (made by judges);
- legislation (made by Parliament);
- European law (operating through a mixture of case law and legislative instruments).

The distinction and interplay between common law and civil law has already been discussed (see Section 1.3). Essentially law involves directing individuals and organisations on how to act. Direction on what to do is given either by statute (legislation) or by a judge (case law). On some occasions, both sources of law are involved as well as the need to comply with European law.

1.6.1 Case law

Case law operates through a system known as precedent. The function of the courts is to decide disputes. Precedent is the name given to the system where a decision of a judge has a binding effect on a different judge in similar circumstances. In short, the judge has to take into account the previous authority when making a decision. This is not the same as being required to follow the decision to the letter.

In presenting a legal case, the advocate will usually seek to rely on a list of cases in support of the decision they wish the judge to make. It is a truism to say that no two cases are exactly alike, and it is, therefore, by building a legal argument based on a number of related cases that the advocate hopes to win. Some cases are distinguishable from the present case either on their facts or the law applied. It is open to advocates on either side to seek to distinguish a potentially relevant case submitted by the other party on the grounds that it is not relevant to the case being discussed.

In later chapters, this work quotes cases. The cases are presented as precedent and essentially as the argument or illustration to support the point of law being made. It is possible that other cases could be cited to present an alternative view of the law. However, most areas of law are settled and the authorities which apply are well rehearsed. Consensus exists in most areas as to what the law is. Some areas of law are less clear. In those areas, divergent, yet equally valid, views are possible. Examples of this include the law surrounding concurrent delay analysis and the meaning of good faith provisions (see Sections 14.7 and 22.9). However, the common law is always evolving, and new precedents and points of law can be created at any time. This state of perpetual evolution is necessary for the legal system to continue to meet society's needs, and it provides interest and intrigue for lawyers and scholars alike.

For example, I see my neighbour walking through my garden and ask him to use a different route. He refuses. I could then say, 'It was decided in the case of *Smith* v *Jones* 1903 in the Court of Appeal that neighbours should not walk through each other's gardens if there is an alternative route'. If we then failed to resolve the issue and commenced court proceedings (civil law of trespass), I could rely on this case as a precedent and seek to direct the judge to follow this case if the facts are the same or similar. This earlier similar case is binding on the judge who should pay due attention to it in reaching a decision in my case. The decision is binding only to the extent that it applies directly to my case. If the facts of this case are different, the other side may establish that the case I have relied upon needs to be distinguished from the current case and will seek to address the judge on cases where a finding was made consistent with their argument and interpretation of events. The cases brought by the other side will therefore favour their desired outcome. They may argue that the alternative route is not practical for my neighbour to use as it involves a two-mile detour. In a contested hearing, both parties will arm themselves with a number of cases to seek to persuade the judge as to the veracity of their case.

To function properly, precedent needs two things:

- *Proper law reporting* – What exactly did the earlier judge say? This has only been reliably available from the nineteenth century onwards. However, some laws still in use today stretch back to cases made several hundred years earlier. For example, an important authority on the law of consideration dates from Pinnel's case[6] of 1602 when the first Queen Elizabeth was on the throne of England. The use of these cases requires that reliable records had been taken at the time. This would usually involve a case or court of some importance being involved and the careful noting down of a transcript of the judgement itself. The status and level of the decision made should be easily identifiable in the law report. Later in this work when cases are referred to, there is an accompanying reporting reference. The most common reports are taken from All England Reports (All ER) and Weekly Law Reports (WLR).[7]
- *A hierarchy of courts* – Which judges' decisions are binding on which other judges? This question is now considered.

1.6.2 Court systems

Precedent is the system whereby an earlier judgement in one court can be binding on another, which means that the earlier decision has to be followed. For this system to work effectively, there needs to be a hierarchy of the courts to give clarity on which court's decisions are binding on which other court(s).

The court in which an action is commenced will depend on either the severity of the crime (criminal law) or the amount of money/importance or the specialist nature of the issue involved (civil courts). The lower courts are the starting point for minor cases. Access to the

6 (1602) 5 Co. Rep 117a.

7 For a full list of courts referred to in the cases cited, see *OSCOLA: The Oxford University Standard for Citation of Legal Authorities*, Fourth Edition. Faculty of Law, University of Oxford, www.law.ox.ac.uk/oscola.

higher courts will depend on your ability to appeal against a decision in a lower court related to the amount/importance of the matter concerned. Appeal means the ability to take the matter out of the hands of the original court and ask for a higher court to rehear the case. The right to appeal is a fundamental right underpinning the English legal system. An appeal to a higher court is restricted to instances where one party contends that the judge has made an error in law rather than in the facts of the case.

The lower courts

Smaller cases start in the lower courts, which are called the magistrates' court for criminal matters and the county court for civil matters. Magistrates' courts and county courts are found in most towns in England and Wales. In the civil sector, higher-worth cases and specialist courts (e.g. employment tribunals) start in the high court. Serious offences in criminal matters are tried in the Crown court although *interim* matters (such as confirming details and setting a timetable for trial) take place in the magistrates' court. Crown courts and high courts are only found in cities in England and Wales.

The higher courts

The higher courts are known as the appeal courts – it is only if the losing party in the trial at first instance wishes to challenge the decision that leave may be given to appeal. The appeal is heard in the higher court by judges who are more senior.

Cases involving construction law issues are commenced in a branch of the high court known as the technology and construction court. This branch of the high court was purposefully created in recognition of the need for specialist knowledge in the field of construction law. It also serves as a reminder of the contentious nature of construction and the frequent need to have recourse to the courts. Other specialist branches include the family court and the insolvency court. Case reports from the technology and construction court sometimes carry the suffix TCC.

The Court of Appeal and the Supreme Court are both located in the Royal Courts of Justice in London.

The criminal court hierarchy

The hierarchy of criminal courts is shown in Table 1.3.

The civil court hierarchy

The United Kingdom left the European Union on 31 January 2020 (Brexit). On this date the Supreme Court regained its status as the ultimate court of appeal in the country in most cases. Previously, the European Court of Justice was able to override the national courts on certain matters. There is a separate European Court of Human Rights, created solely to rule on abuses of human rights where the right to take a matter to Europe remains notwithstanding Brexit. There have been many headline cases involving this procedure over the years involving such issues as gender identity and the rights of unborn children. Recourse to the European Court of Human Rights is often thought necessary where the national law does not recognise, or has not considered, laws in these areas.

Table 1.3 The criminal court hierarchy

Court	*Personnel involved*	*Precedent status*
1 Magistrates' court	Either one stipendiary or three magistrates hear the cases. These usually involve minor traffic offences and breaches of the peace.	Bound by decisions of all the higher courts
2 Crown court	One judge sits in the Crown court. There is a right to jury trial for some offences where the accused pleads 'not guilty'.	Bound by the decisions of Court of Appeal and the Supreme Court
3 Court of Appeal (Criminal)	Three Law Lords chosen from the Supreme Court of Lords sit and rehear the legal arguments from Crown court decisions if leave to appeal was granted.	Bound by its own decisions and those of the Supreme Court
4 Supreme Court	Five or more Law Lords sit and rehear the legal arguments from the Court of Appeal.	Not bound by its own decisions

Table 1.4 The civil court hierarchy

Court	*Personnel involved*	*Precedent status*
1 County court	Cases are heard in the county court by district judges who preside over full lists including mortgage arrears and divorce cases.	Bound by the decisions of all the higher courts
2 High court	Larger-worth cases start in the high court where there are specialist judges to hear their own lists of cases, including family law judges and technology and construction law judges. The high court can hear appeals from the county court.	Bound by the decisions of the Court of Appeal and the Supreme Court
3 Court of Appeal	Three Law Lords chosen from the Supreme Court sit and rehear the legal arguments from high court decisions if leave to appeal was granted.	Bound by its own decisions and those of the Supreme Court
4 Supreme Court	Five Law Lords sit and rehear the legal arguments from the Court of Appeal.	Not bound by its own decisions

An example of how important the European Court of Justice decisions on construction matters were concerns the implementation of the public procurement regime whereby national governments are punished for practices which are seen as being against the single and open market for competing for construction contracts (see Section 7.9). The impact of European law on the construction industry also manifested itself in improvements to health and safety, consumers regulation and environmental protection. Most contractors are familiar with the Building Regulations, which have been one of the main means of ensuring compliance with European standards. The extent to which European law and United Kingdom law will now diverge following Brexit is of great interest to the legal observer.

1.6.3 Legislation

One of the roles of government is to introduce new law. The separation of powers dictates that the executive (government) cannot do this on its own and requires the assistance of the legislature (Parliament). In England and Wales, Parliament consists of two houses – the House of Commons and the House of Lords. A government is made up of whichever

political party (or parties) can form a majority in the House of Commons following a general election. The majority is required in order to be able to have the opportunity to vote in new law. Amongst the lords in the House of Lords are the Law Lords who make up the highest court in the land, also known as the Supreme Court. At the opening of Parliament, the government sets out its proposed new laws in the Queen's speech. The government then promotes these proposed new laws (known as bills) and seeks to have the bills passed into law within the four-year or five-year term of Parliament. Passing the law involves debating and drafting the law before submitting the bill to the upper chamber (in this case the House of Lords) for its consideration. It is common for interest groups affected by the new law to be consulted in subcommittees.

The involvement of a lower and upper house in making new law is replicated throughout the world. The upper house is often referred to as a Senate and the lower as a House of Representatives or National Assembly. The idea of a senate comes from ancient Rome and is so called as an assembly of the senior and thus wiser members of society.

It can be observed that Acts of Parliament have a very important role to play in the functioning of a legal system. When the government wants to create law, it does so through Acts of Parliament. This is the means by which the government 'steers' the country. For example, to improve on current high rates of childhood obesity, the government may wish to ban sugary foods for children. This might entail an 'Anti-Obesity (Minors) Bill'. The bill will become an Act if it makes it through the various rounds of drafting and consultation and the issue attracts sufficient support from Members of Parliament and the House of Lords.

To continue the example introduced earlier, my neighbour brings a copy of a new Act of Parliament to court. The Act is entitled 'The Right to Recycle Act 2015' and section one of the Act says that a neighbour may cross his neighbour's gardens if it is reasonably necessary for the purpose of putting out his recycling on a weekday. He says that the Act supports his case and contends it is much more recent and therefore more relevant than the old case I was relying on. The judge agrees with my neighbour.

This example seems to suggest that case law and legislation can conflict. In fact, this is rarely the case. Legislation is often used by Parliament to untangle an area of law that has been made unclear by conflicting case law. There then usually follows some cases where judges try to interpret exactly what Parliament meant in its Act of Parliament. For example, what exactly does 'reasonably necessary' mean in the context of the imaginary Right to Recycle Act 2023? It may be necessary to await a judicial pronouncement on this point so that a clearer picture emerges on what exactly was intended by Parliament and where the line should be drawn.

Case law and legislation are common features of this book, and heavy reliance is placed on both explaining and expanding on legal concepts and principles. Law students are well versed in writing down case and statue names and conducting their own legal research into the facts of the case and related pieces of law. This book attempts to represent a single source of construction law, but the law student's discipline remains a good one and students of this book are encouraged to seek out the primary sources of law when appropriate.

1.6.4 European law

The UK was part of the European Union since the European Communities Act 1972 was passed through Parliament until Brexit in 2020. From a legal point of view, during those dates the UK handed over the ability to self-govern. European law was and remains of fundamental importance. The sources of European law are as follows:

- Treaty of Rome 1957 – one of the founding treaties of the European Community;
- regulations – laws which had direct effect into national law;
- decisions – European court decisions which must be obeyed and were implemented by national courts; and
- directives – laws to be implemented into domestic law by member states within a given time frame.

It is beyond the scope of this book to provide more than a cursory discussion about the functioning of the European legal system. Suffice to say that the development of UK and European law was very closely intertwined during the 47 years of co-existence. Unpicking those parts of the legal relationship which are deemed undesirable by the United Kingdom is proving to be a very long and tortuous process. Examples are given later in this book of regulations with direct effect – such as the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 – and European Court of Justice judgements – for example, in public procurement such as *Commission of the European Communities* v *Ireland* (the Dundalk case).[8] This case involved the fairness of a tender competition and whether tenderers from across Europe had a level playing field on which to bid for the work. Some of the regulations went on to become, in some form, incorporated through the enactment of domestic legislation, such as the Consumer Rights Act 2015, which was inspired by the Unfair Terms in Consumer Contracts Regulations 1999. It is possible that domestic adoption of European law will continue in the United Kingdom, not least for reasons of trade and commerce where matching standards will remain of great importance.

1.7 Who's who in the law?

All industry sectors feature different professional roles and the law is no exception. An understanding of the roles within the law gives further insight into the workings of the legal system.

1.7.1 Solicitor

The first point of contact on legal matters will usually be a solicitor. The solicitor may advise that a barrister is also instructed, if necessary. At its simplest level, the way the two branches of the legal profession are divided is that the solicitor prepares the case for court and the barrister presents it. However, this is an oversimplification as there are solicitor advocates who appear in court. Likewise, barristers can be very useful in the preparation of a case in terms of strategy, specialist knowledge and how to approach the gathering of evidence and similar matters. The majority of legal work is not focused on the courtroom but the protection of rights as discussed earlier in Section 1.4.2. This work is described as non-contentious and is usually the exclusive field of practice of solicitors.

Solicitors usually group themselves in partnerships whereby the firm of solicitors will comprise partners operating in business together. The business model frequently used is to have one or more solicitors expert in several different fields to provide a range of services; for example:

- conveyancer (buying and selling houses);
- trust/probate lawyer (dealing with inheritance issues and drafting wills);

8 C-45/87.

- litigator (taking cases to trial);
- commercial lawyer (drafting contracts and setting up businesses);
- commercial property lawyer (drafting leases and acquisitions of land);
- family lawyer (dealing with divorce and children issues).

Modern firms do not necessarily follow this pattern, and there are many niche and specialist firms only undertaking one form of work; for instance, specialists in road traffic accident compensation. A small firm may process many thousands of such claims each year.

Solicitors are assisted by paralegals and legal executives. The former are used for labour-intensive tasks whilst the latter are capable of undertaking any solicitor-based work.

1.7.2 Barrister

The profession of barrister is steeped in tradition, and this survives today in many of the practices and procedures that have been around for centuries. The key role for the barrister is advocacy in the courtroom and advising on strategy in preparing a case for trial together with advising on the likely prospects of success. Barristers do not enter into partnerships with each other but operate from the same offices, known as barristers' chambers. Barristers or counsel, as they are also known, are self-employed, merely gathering together to share expenses such as clerks' fees and office costs.

The top barristers are known as QCs (Queen's Counsel) and have been selected by the Queen's officers as being at the top of their profession. QCs are permitted to wear special robes made of silk. Becoming a QC is therefore known as 'taking silk'. All barristers are said to be 'called to the Bar' when they qualify, and part of their training involves eating dinners at one of the 'inns of court'. Inns of court refer to the key barristers' chambers in London, situated not far from the Royal Courts of Justice.

Members of the public are not allowed access to barristers except in limited circumstances, such as through a direct access scheme. It is usually for the solicitor to instruct the barrister on the client's behalf. Efforts to modernise the profession have been slow to take hold. The wearing of gowns and wigs continues to give the courtroom an anachronistic feel, although they are largely reserved for the criminal courts. Suits are now more common amongst civil practitioners.

1.7.3 The judiciary

Strictly speaking, solicitors and barristers are the two branches of the legal profession. However, the judges, the rule-makers themselves, also need to be considered. Judges are usually chosen from amongst the ranks of the barristers together with a minority of solicitor appointments. Barristers can regard appointment to the bench as career progression and are then one of the privileged few in terms of becoming a member of the judiciary. A judge is a civil servant in the same way as a politician, and their salaries are paid for by the taxpayer.

A magistrate is a type of judge dealing with minor criminal matters. Traditionally magistrates have been chosen from members of the public who have volunteered to hold the office. Being tried by one's peers in criminal cases – whether by another member of the public (magistrate) or by a jury (twelve members of the public) – is an important principle in the English legal system. Juries are only available in civil law for defamation trials. A jury trial is a legal proceeding in which a jury either makes a decision or makes findings of fact, which then direct the actions of a judge. Jury trials are used in serious criminal cases in most common law legal systems.

Many lay (untrained) magistrates have now been replaced with paid professional magistrates called stipendiaries. The professional magistrates are able to deal with cases much more quickly and effectively than lay magistrates. Most commentators see this as necessary despite the compromise it involves of the legal principle of trial by one's equals.

The office held by a judge depends on the court in which they appear. The higher the court, the more weight is given to their judgements in accordance with the precedent hierarchy discussed earlier.

1.8 Conclusion

This chapter has taken a broad-brush approach to a complicated and wide-ranging topic. The intention is for the reader to acquire the background knowledge and assumptions on which the later sections of this book build. The reader should now have established a proper understanding of the processes at work and their genus.

The next chapter looks at contract law and follows the legal writing discipline of making a statement and then supporting the statement by reference to statute or case law. Any statement of law made without support or evidence is open to challenge. It is by referencing the statements that authority is given to the pronouncement. This need to reference is a core skill in terms of both academic writing and any discussion or setting down of the law.

The key points to take away from this chapter include an appreciation that:

- a legal system is created by its users to suit their needs;
- a legal system must deliver the needs identified if it is to work effectively and enjoy the support of its users;
- the English legal system has evolved over the centuries to define and meet the needs of its users;
- any discussion of law involves a consideration of the source of laws – primarily case law and legislation;
- the role of Europe remains of importance and must not be overlooked in connection with the English legal system;
- the organisation of the legal system is closely linked with the functions of Parliament and the other organs of state, including the monarch;
- the legal profession comprises solicitors, barristers and judges;
- the hierarchy of the courts and judiciary is necessary for the system of precedent to work effectively.

1.9 Further reading

Wild, C. and Weinstein, S. (2013) *Smith and Keenan's English Law*, Seventeenth Edition, Harlow: Pearson, Part 1.

Wood, D., Chynoweth, P., Adshead, J. and Mason, J. (2011) *Law and the Built Environment*, Second Edition, London: Wiley-Blackwell, Chapter 1.

2 The law of contract

2.1 Introduction

The law of contract is of central importance to the study of construction law. This importance is reflected in the more detailed examination given to it in these pages than the other background legal subjects. This chapter seeks to capture the essentials of the law of contract whereas the other subjects are dealt with as 'aspects of' commercial, tort and property law. Contracts are extremely prevalent in the interrelationships between stakeholders in the construction industry. The contract execution (or signing) is the single most important stage in the process when land or buildings are transferred and when building projects are undertaken. 'Putting pen to paper' is to enter into a contract and to bring the force of contract law in regulating the agreement reached.

The 'golden age' of the law of contract was in the nineteenth century when major principles were evolved, based on free market ideologies. The embodiment of these principles is that the parties are free to contract on whatever terms they choose provided the contract is legal. In other words, lawmakers have long seen it as their role not to interfere in contracts and have been reluctant to intervene. Many of the cases referred to in this chapter date from this groundbreaking period. The case illustrations used are not limited to this period but range from the very old to the very modern.

A contract is a legally binding agreement. It is a bargain and each side, or party to the contract, must contribute c to be so. The legally binding element must be present before a valid contract can emerge. In other words, the parties must be able to demonstrate their intention to adhere to the agreement made. The protection afforded by entering into a contract is that if it is broken by one party, the other party must be able to take the contract-breaker to court if desired. This is the closest thing any party has to that most sought-after commodity in legal dealings – certainty.

A distinction is made between a situation where the parties exchange mutual promises, known as a bilateral contract, and where one party promises to do something in return for the other party carrying out some task, known as a unilateral contract. When the task is completed, the promise made in a unilateral contract becomes enforceable.

2.2 Formalities

A contract may be made in any form the parties wish. This is the case regardless of the sums involved or the complexity of the agreement. There are advantages in having the contract formally drafted by a solicitor, particularly if a large sum of money is involved or the matter is complicated. There is no essential requirement in English law that a contract should be in

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writing, and as a general rule, the parties to a contract may insert whatever provisions they wish into the agreement provided it is for a legal purpose.

Simple contracts

These are contracts made verbally or in writing or a combination of both. No particular form is required. The phrase 'contract signed under hand' refers to a simple contract being formed. Mere signature by the parties is enough to evidence the formation of the agreement.

Deeds

A contract made by deed is known as a specialty contract. Until 1990, certain contracts had to be made 'under seal' and delivered up 'as a deed'. The sealing of a contract referred to a more elaborate execution of a written contract than a mere signature. Typically, this could involve an impression made by a signature ring or company motif in wax dripped onto the document. A seal is no longer necessary, but to be valid, a deed must be signed on behalf of each party to the contract.[1] The distinctive features of a contract signed as a deed rather than as a simple contract include the rule that no consideration is necessary for a deed to be valid. Another practical advantage of a contract being made by deed is that the limitation period (meaning the period in which a party can bring a claim) governing such contracts is 12 years as opposed to six years in the case of a simple contract.

In the AEC industry, it is common for the building owner to insist on the longer 12-year limitation periods for the agreements entered into. Supply agreements are more likely to be signed 'under hand' with six-year limitation or less if express terms are included to this effect.

Contracts which must be made in writing or evidenced in writing

Certain types of contract cannot be enforced or are invalid unless they are in writing, although they do not have to be made in the form of a deed. This applies to consumer credit and hire agreements governed by the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006). These Acts require that the relevant agreements are 'not properly executed' unless in the form prescribed. Failing to comply with the requirement has the effect of rendering the contract unenforceable. The requirement that a contract be in writing also applies to the sale or other disposition of an interest in land,[2] whilst contracts of guarantee need to be evidenced in writing pursuant to the Statute of Frauds 1677.

The requirement for these contracts to be in writing underlines their importance and the need for certainty in recording exactly what was agreed in the event that future scrutiny is required.

2.3 Standard form contracts

Certain transactions are governed entirely by standard terms which are predetermined. For example, negotiating personal terms on which a bank lends money to a consumer or terms on which a road haulier delivers construction material are far from straightforward propositions.

1 Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

2 The Law of Property (Miscellaneous Provisions) Act 1989 section 2 repealed the Law of Property Act 1925 section 40, which required such contracts merely to be evidenced in writing.

Where this arises, the customer is often not in a position to negotiate over the terms of the contract. Instead the person requiring the goods or the services contracts on a standard form prepared in advance by the dominant organisation. Such a contract departs from the concept of freedom of contract except insofar as the customer can choose whether to contract or to walk away.

The type of standard form of contract which is commonplace in construction and land transactions is much fairer. Standard clauses have been settled over the years by negotiation between the various stakeholders in the relevant industries. The purpose of these forms is to facilitate the conduct of trade and a fair allocation of risk between the parties. The types of contract invariably used in large-scale construction works include the Joint Contracts Tribunal (JCT) Standard Form of Building Contract and the New Engineering Contract (NEC). Both forms tend to govern major works along with the International Federation of Consulting Engineers (French acronym FIDIC) contract employed on international projects. Another form of contract is the Project Partnering Contract (PPC2000). These forms of contract are considered separately in Chapter 9.

2.4 The essential elements of a valid contract

A simple contract has three essential elements:

- agreement;
- consideration;
- the intention to create legal relations.

The following sections set out the law on these elements in some detail. The law is presented in accordance with the standard practice of stating the relevant cases as authority for the submissions made along with the supporting statutes where relevant. This is the first time this book uses the legal convention of citing authorities, meaning legislation or case law as evidence, and the reader should be aware of the approach taken. The approach may seem strange at first.

2.4.1 Agreement

Before a formal agreement can be reached, there must be a valid offer made by the offeror and a valid acceptance of that offer by the offeree. It may be relatively easy to ascertain whether a valid agreement has come into being if a contract is entered into solely on the basis of a standard form. It may be considerably more difficult to ascertain whether an offer and acceptance have been made where, for instance, a contract is alleged to have come into being by a combination of statements made orally together with documents in writing. The real test is whether the parties have accepted obligations to one another. If that can be established then a valid agreement may be inferred from the conduct of the parties.

In the case of *Trentham (G Percy) Ltd* v *Archital Luxfer Ltd*,[3] a building subcontract was held to have come into existence even though the parties had not reached full agreement on all terms when the subcontractor began the work. During the progress of the works, outstanding matters were resolved by further negotiations. The judge was satisfied in this case that there was sufficient evidence to conclude that there was a binding contract; the parties had

3 [1993] 1 Lloyd's Rep 25.

Figure 2.1 Yin and yang symbol representing contract formation

clearly intended to create a legal relationship between each other and had covered enough of the basic points to be contractually bound. In other words, there was sufficient legal certainty on the contents to proceed with the contract.

Notwithstanding this case, the general rule is that arrangements which are too vague, are uncertain or are conditional will not take effect. There must be a clear and formal offer and an unequivocal acceptance of that offer. These rules surrounding the formation of an agreement can be compared to the rules of a game such as chess or the steps in a dance routine. The aim is to end with a situation where the offer and acceptance are matched as in the ancient symbol of yin and yang (see Figure 2.1).

The dots in Figure 2.1 indicate that each half contains an element of the other. This is the same with contract formation where the acceptance is based on the offer that was itself made on the assumption that it would be acceptable.

Offers and invitations

AN OFFER MUST BE DISTINGUISHED FROM AN INVITATION TO TREAT

An invitation to treat is a preliminary stage in negotiations which may or may not result in an offer being made. It is not possible to accept an invitation to treat and thereby create a valid agreement. Marked prices on articles for sale or advertisements will amount to invitations to treat rather than offers to sell. In the case of *Fisher* v *Bell*,[4] a flick knife was displayed in a shop window with a price tag attached. The seller was prosecuted under the now repealed Restriction of Offensive Weapons Act 1961, which made it an offence to offer to sell such items. The seller was acquitted on the basis that under the ordinary law of contract, the display of the article in the shop window was merely an invitation to treat.

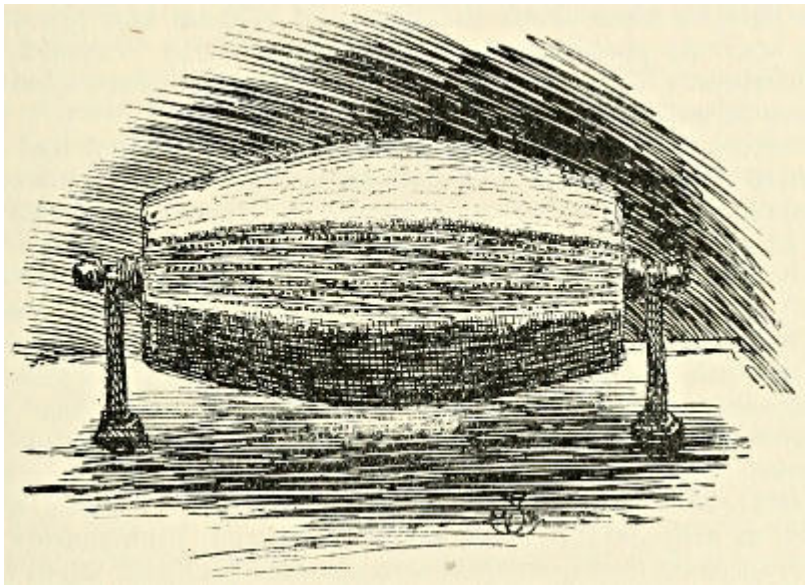
A similar situation arose in the case of *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists (Southern) Ltd*.[5] This case involved the display of prescription drugs on a shelf

4 [1961] 1 QB 394.
5 [1952] 2 All ER 456.

Random documents with unrelated content Scribd suggests to you:

the structure of the whole system, the cuneiform writing in which they represented their language was their own invention in more than one respect, since they did not thoughtlessly use what was ready to hand, but modified and altered it with deliberation.

Writing was also used by the Babylonians and Assyrians for purely literary purposes. The narratives, legends, or poems were inscribed on tablets of clay, and if in case of a work of greater size, the two sides covered with microscopic characters did not suffice, a series of such was used, which were clearly designated and numbered, so that they were in fact leaves of a book. Generally the title of the whole, as usual with the Hebrews, the first words and the first words of the following tablet were inscribed on every tablet. This literature even if limited to the productions of the imagination, is comparatively abundant. Although in this respect it may not equal the literature of some races still living, such as the Chinese, Arabian, Persian, and Indian, nor that of the ancient times of Greece and India, which in the last named country grows as luxuriantly as its vegetation, yet on the other hand, it excels in this respect that of the other Semitic races, the Hebrews not excepted. This is proved not only by the writings so far discovered but also by the catalogues of books in Babylonian libraries or of similar works elsewhere. However, enough has been brought to light, and in a fair state of preservation, to enable us to form an opinion of the literary talent of the Babylonians, and to prove to us what great varieties of it they cultivated.



Baked Clay Cylinder of Sargon II, King of Assyria, B.C. 722-705, inscribed with a Chronicle of his Expedition

The Assyrians stand, in a literary sense, in about the same relation to the Babylonians as the Romans to the Greeks, disciples who never equalled their masters, although as far as can be seen, even relatively considered, Roman literature stands higher in relation to Greek than Assyrian stands in relation to Babylonian. The tendency of the Assyrians was warlike, and directed to practical ideas: to found a mighty empire, and to maintain their supremacy was the end for which they strove. Therefore they were more interested in history than in creations of the imagination; purely literary work had little charm for them. Only much later, a desire is awakened in them to become acquainted with the productions of the Babylonians in this field, and to acquire as much as possible of it for themselves. And perhaps even here interest in the ancient religions and national traditions played a greater rôle than love for poetry.

The Assyrians seem to have had more taste for what may be designated the science of the period, than for literature. Here also, they were following the lead of the Babylonians, and accomplished little beyond taking possession of the treasures of the Babylonian libraries. The prestige which attached to the Babylonians in antiquity as the earliest cultivators of science is well known, although some

thought that they had borrowed it from the Egyptians. Without doubt they reached the greatest eminence in antiquity in the knowledge of astronomy. Kalisthenes sent Aristotle astronomical observations from Babylon, which, according to the most moderate statement, reach back to 1903 before Alexander, *i.e.*, 2324 B.C.; and there is nothing improbable in this. The number of eclipses mentioned on the astronomical tablets would lead to a conclusion that there was an even longer period of recorded calculations. It may be that the Ziggurat of the temples, which originally had a religious significance, might, in Assyria at least, have been used as observatories. It has even been surmised that the Babylonians had some sort of a telescope, and this surmise rests upon the finding of a lens in the ruins, and upon the fact that they were acquainted with the planet Saturn, which is invisible to the naked eye; but this doss not seem probable. One thing is certain, they gave names to the constellations, especially to the signs of the Zodiac, which have in part remained in use. They were acquainted with five planets, and distinguished them very exactly from the other heavenly bodies. They observed, and with great accuracy, the eclipses of the sun and moon, perhaps also the sun spots, the comets, the orbit of Venus, and the position of the Polar star; but they had some very childish ideas about the causes of eclipses and the character of the other heavenly phenomena. Naturally the Milky Way did not escape their observation. They even calculated the regular recurrence of eclipses of the moon as well as its phases.

A few of the mathematical tablets extant prove that they had made great progress in arithmetic and higher mathematics, so indispensable to the study of astronomy. The prevalent system was the sexagesimal, with the 60 as the unit, but the decimal system seems to have been known and used. However in spite of the recognition of the high value of these researches, they hardly deserve the name of science. These researches were certainly not undertaken from a love of science. The prime object, no doubt, was to discover the will of the gods in regard to the future. The science of mathematics itself was made subservient to the art of divination.

Astronomy was a secondary object, astrology the principal one. Knowledge was sought of what must happen when there should be a recurrence of certain phases of stars and heavenly bodies. All observations of planets, comets, and other stars, of eclipses and other phenomena, were immediately connected with occurrences on earth, which at some former time had fallen in conjunction with them and consequently must be expected again.

No more were other branches of science besides astronomy cultivated for their own sakes. Their science of medicine was based almost entirely upon magic, and appears to have stood on a lower plane than that of the Egyptians, at least in so far as the still existing inscriptions will permit us to judge. They indeed used as did the Vedic Indians external and internal remedies, but they probably regarded them as charms; whatever progress they may have made in the science of medicine, the records of it in the ancient inscriptions prove that it was somewhat less than what we know of the Vedic physicians and their cures. Thus it is rather an exaggeration to speak of physical, geographical, grammatical, and mythological writings of the Babylonians and Assyrians, unless the myths and legends belonging to literature already discussed are meant.

There are various reasons for the supposition that each of the Babylonian libraries according to the studies of the several religious and scientific schools had a distinctive character. The Assyrian libraries, on the other hand, being all of later date, had more general and more varied contents.

The idea that these libraries were for the use of the general public, is not well founded, and rather improbable. They were probably designed in the first place, for the learned men and scribes of the king, as well as for his own use, for the instruction of his sons, and future officials, as well as for archives of the state. They do not in the least prove that culture, learning, and erudition were the property of all classes in Assyria.[h]

Epistolary Literature

At the same time the large number of written private documents which have been unearthed—the letters and contract tablets—show that writing was not an unusual thing among the people as a whole.

From one point of view these old letters are the most interesting form of Babylonian literature because they show better than anything else the real life of the nation. At first thought it may seem that a correspondence on clay must have been cumbersome, but most of these little letters were not so large as an ordinary envelope and some of them were only two or three inches long, and could easily be carried in the pocket. Some of them were enclosed in an outer envelope of clay which frequently contained a copy of the real document within.

In connection with the code of Khammurabi, his correspondence with one of his officials, Sin-idinnam, is particularly interesting because in these letters we find references to the same subjects which are treated of in the laws. In them all, we see Khammurabi attending to the minutest affairs of his kingdom, taking a personal interest in everything. It seems to have been a comparatively easy matter to get the king's ear. He received letters complaining of things we should perhaps consider beneath the notice of a powerful king, and he seems to have devoted careful thought to all.

The letters of Khammurabi have been edited and translated by Mr. L. W. King, of the British Museum. They have been also translated by Dr. G. Nagel[i] for a doctor's dissertation, at Berlin, and published in the *Beiträge zur Assyriologie*, vol. IV. Some of the latter's translations are given below.[a]

To Sin-idinnam say: Thus saith Khammurabi. Naram-Sin the keeper of flocks hath said: "To the leaders of the troops have our shepherd lads been given." Thus did he say. The shepherd lads of Apil-Shamash and of Naram-Sin must not be given to the troopers. Now send to Etil-hi-Marduk and his fellows that they give back the shepherd lads of Apil-Shamash and of Naram-Sin which they have taken.

To Sin-idinnam say: Thus saith Khammurabi. The whole canal was dug, but it was not dug clear into Erech, so that water does not come into the city. Also … on the bank of the Duru canal has fallen in. This labour is not too much for the people at thy command to do in three days. Directly upon receipt of this writing dig the canal with all the people at thy command, clear into the city of Erech, within three days. As soon as thou hast dug the canal, do the work which I have commanded thee.

To Sin-idinnam say: Thus saith Khammurabi. Tummumu of Nippur has announced to me as follows: "In the place Unaburu (?) I deposited seventy tons of grain in a granary (?). Avel-ilu has opened the granary and taken the grain." Thus did he tell me. See, I am sending Tummumu to thee with this. Let Avel-ilu be brought before thee. Examine their dispute. The grain belonging to Tummumu which Avel-ilu took, he shall give back to Tummumu.

To Sin-idinnam say: Thus saith Khammurabi. See, I have ordered and sent Sin-aiaba-iddina, Guzalu and Shatammu to the war. They will reach thee on the 12th day of Marshewan. When they have reached thee, do thou proceed with them. The cows and flocks of thy province, put into safe keeping. Also Nabu-malik, Ilu-naditum, Shamash-mushalim, Sin-usili, Taribum, and Idin-Ninshah shall go with thee and take part in the war.

To Sin-idinnam say: Thus saith Khammurabi. Immediately upon receipt of this letter, have all the keepers of thy temple and Ardi-Shamash, the son of Eriban, the shepherd of the Shamash temple come before thee, together with their complete account. Send them to Babylon to give their account. Let them ride day and night. Within two days they should be in Babylon.[i]

We also have examples of the private correspondence of the same period, showing the style of letter one Babylonian wrote to another. The following remarks and translations of letters are taken from a dissertation giving letters from the time of Khammurabi.[a]

The insignificant contents of some of these letters show that letter writing at that time was a general custom and the theory again and again thrusts itself forward that a comparatively regular postal service was already in existence. These letters also show how far Babylonian commerce extended in the second half of the third century before Christ. Every letter throws new light upon that far distant past and helps us to form an ever surer picture of the daily life of the old Babylonian people. Following are a few examples to give an idea of the epistolary style.

To my father say: Thus speaks Elmeshu. May Shamash and Marduk keep my father alive forever. Mayest thou, my father, be in health, mayest thou live. May the protecting deity of my father lift up the head of my father in favour. To greet my father have I written. May the prosperity of my father before Shamash and Marduk endure forever. After Sin and Ramman had spoken thy name, my father, [33] thou, my father, didst speak as follows: "As soon as I come to Der-Ammizadaduga on the Sharku canal, I will send thee, within a short space, a lamb with five mina of silver." This didst thou say, my father. My father made me expectant, but thou hast sent nothing. Now after thou, my father, hadst started out to Taribu, the queen, I sent a letter to my father. Thou, my father, hast never voluntarily sent anyone who brought (even) a silver shekel. In accordance with the … of Sin and Ramman who have blessed my father, may my father send me that for which I am eager, so will my heart not be grieved, and I will pray for my father to Shamash and Marduk.

To my lord, say: Thus speaketh Belshunu, thy slave. Since I have been confined in prison thou, my lord, hast kept me alive. What is the reason that for five months my lord has neglected me? The house in which I am confined is a house of want. Now I have sent the Mar-abulli (gate-keeper[?]) to you with a letter. I am also ill. May my lord have pity on me, send me corn and vegetables so that I may not die. Send me also a dress to cover my nakedness. Either a half shekel of silver or two mina of wool let him (Mar-abulli) bring, for my service let him bring it. Let not Mar-abulli be sent empty away. If he cometh empty, the dogs will devour me. As thou, my lord, so also every inhabitant of Sippar and Babylon knows that I am confined without guilt; not because of a *bilshu*, I have been imprisoned. Thou, my lord, didst send me beyond the river to carry oil, but the Sutu people met me and took me captive. Speak a favourable word to the servant of the king's grand vizir. Send, that I die not in the house of need. Send one *ka* of oil and five *ka* of salt. What thou didst send a short time ago was not delivered. Whatever thou sendest, send it well guarded.

To my father say: Thus saith Zimri-erah. May Shamash and Marduk give my father everlasting life. Ibi-Ninshah the younger brother of Nur-ilishu has fallen upon Nabu-atpalam and beaten him; he has also spoken insults concerning me which are not to be endured. I shall beat the young man! Wherefore has he cursed me? I have as yet said nothing to the person. I thought to myself: "I will send to my father, let him send his decision about the matter, and then I will speak to the person." Now I have sent a tablet to Nabu-atpalam, for information in this matter. Up! make a decision in this matter, send your judgment, give (?) a word.

To the secretary of the merchants of Sippar, Iahruru speak: Thus saith Ammidatitana. The wool dealer has informed me as follows: "I have written to the secretary of the merchants of Sippar, Iahruru to send his spun wool to Babylon, but he has not sent his spun wool." Thus has he informed me. Why hast thou not

sent thy spun wool to Babylon? Since thou hast not feared to do this thing, so send—as soon as thou seest this tablet—thy spun wool to Babylon.[34]

To Appa speak: Thus saith Gimil-Marduk. May Shamash keep thee alive. I have spoken in thy behalf to the person in question and he said; "Let him come so that he may speak." And the tablets which thou didst take to examine, take them according to thy examination and come quickly.

To Etil-Shamash-iddina speak: Thus saith Avel-Ruhati. May Shamash and Ishtar keep thee alive; I am well. Humtani has given for Amti-Shamash 8⅚ *kat* and 15 *she* of silver. To Musalimma, I will give the money wherever he commands. I am going into the service of the king's daughter. I will quickly send thy desire. Send an answer to my tablet.[j]

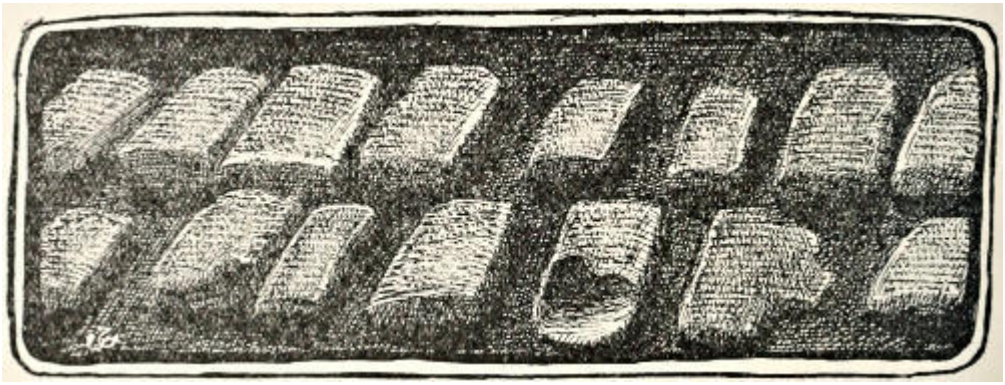
Among the large number of letters which have been preserved it has been possible to find more than one written by the same person, and, by putting these together, to get some idea of the life and character of the writer. The letters of a certain Bel-Ibni are prominent among these. They contain allusions to historical events mentioned on the monuments, thus contributing valuable details to these rather barren records of events. Bel-Ibni himself was a general in the army of Ashurbanapal. Below is a translation of one of these letters made by Dr. C. Johnston,[k] in the *Epistolary literature of the Assyrians and Babylonians* in the *Journal of the American Oriental Society*, vol. XVIII.[a]

To the lord of kings, my lord, thy servant Bel-Ibni! May Ashur, Shamash and Marduk decree length of days, health of mind and body for the lord of kings, my lord! Shuma, the son of Sham-iddina, son of Gakhal, son of Tammaritu's sister, fleeing from Elam, reached the (country of the) Dakkha. I took him under my protection and transferred him from Dakkha (hither). He is ill. As soon as he completely recovers his health, I shall send him to the king, my lord.

A messenger has come to him (with the news) that Nadan and the Pukudeans of Til … had a meeting with Nabu-bel-shumate at the city of Targibati, and they took a neutral oath to this effect: "According to agreement we shall send you whatever news we may hear." To bind the bargain (?) they purchased from him fifty head of cattle, and also said to him: "Our sheep shall come and graze in the pasture (?) among the Ubanateans, in order that you may have confidence in us." Now (I should advise that) a messenger of my lord, the king, come, and give Nadan plainly to understand as follows: "If thou sendest anything to Elam for sale, or if a single sheep gets over to the Elamite pasture (?) I will not let thee live." The king, my lord, may thoroughly rely upon my report.[k]

Professor Delitzsch in an article in the *Beiträge zur Assyriologie*, vol. I. entitled *Beiträge zur Erklärung der babylonisch-assyrischen Brieflitteratur*, has given a translation of a letter from the king to this same Bel-Ibni:

The word of the king to Bel-Ibni: May my greeting make glad thy heart! Concerning thy communication about the Pukudeans on the river Charru—In the future, whoever loves the house of his lords, shall communicate whatever he sees and hears to his lords. See! whilst thou inform me concerning the cause of thy communication.[l]



Baked Clay Tablets from the Library of Asshurbanapal at Nineveh

Some of the letters throw light on religious ceremonies, others are communications from astrologers telling whether or not the signs of the heavens are propitious for certain undertakings. There are still others from physicians telling of patients under their care. The following is translated by Dr. Johnston:[a]

To the king, my lord, thy servant, Arad-Nana! Greeting most heartily to my lord, the king! May Adar and Gula grant health of mind and body to my lord, the king. A hearty greeting to the son of the king.... With regard to the patient who has a bleeding from his nose, the Rab-mugi reports: "Yesterday, towards evening, there was much hemorrhage." Those dressings are not scientifically applied. They are placed on the alæ of the nose, oppress the breathing, and come off when there is hemorrhage. Let them be placed within the nostrils, and then the air will be kept away and the hemorrhage restrained. If it is agreeable to my lord, the king, I will go to-morrow and give instructions; (meantime) let me hear how he does.[k]

Several letters have been preserved of a certain Ishtar-duri, who appears to have lived during the reign of Sargon (722-705 B.C.), and

was perhaps identical with the eponym of the same name in the year 714. Dr. Johnston has translated a communication of his to the king:[a]

To the king, my lord, thy servant Ishtar-duri! Greeting to the king, my lord! I send forthwith to my lord, the king, in company with my messenger, the physicians Nabu-shum-iddina and Nabu-erba, of whom I spoke to the king, my lord. Let them be admitted to the presence of the king, my lord, and let the king, my lord, converse with them. I have not disclosed (to them) the true facts, but have told them nothing. As the king, my lord, commands, (so) has it been done.

Shamash-bel-uçur sends word from Der: "We have no inscriptions to place upon the temple walls." I send therefore to the king, my lord, (to ask) that one inscription be written out and sent immediately, (and that) the rest be speedily written, so that they may place them upon the temple walls.

There has been a great deal of rain, (but) the harvest is gathered. May the heart of the king, my lord, be of good cheer![k]

ART

Art occupies too prominent a position in the life of the Babylonians and Assyrians, and they have produced too much that is original and peculiar to them, for this history to pass over the question in silence. Even a mere sketch of their culture would be incomplete without it. At the same time great precaution is necessary. In the determination of the chronological succession of undated monuments so much depends on subjective valuation and æsthetic judgment that, without a long and conscientious study of the history of art, one is liable to serious error. And the determination of dates largely influences one's conception of the progress of Babylonian-Assyrian art; æsthetic judgment, one's decision concerning the character, independence, and value of this artistic effort.

Here again, as in the language, religion, and in the whole civilisation of this people the unity of the Babylonian-Assyrian race comes clearly to light. Whatever differences may exist between Babylonian and Assyrian art in the conception of detail, in certain peculiarities of technique, in the choice of subjects, at bottom they

are one. It has ever been characterised as a national school in which one and the same character prevails, so that a work of art, be it from Telloh, Babylon, Nineveh, or Kalah, at once shows its connection with it. All the differences are merely shades, changes caused by time. This is especially noticeable when one considers what material for example was used for building. In Babylonia it is difficult to obtain stone; there are no rocks there. Consequently this material, which had to be brought from a distance, and was therefore expensive, was kept like precious and other metals for the decoration of the whole, for pillars, bas-reliefs, dedicatory inscriptions, etc., or for making a firm foundation, while dried and burnt bricks were used for the buildings themselves. Among the Assyrians this difficulty did not exist. Excellent stone, which was easily worked, was found in close proximity, and the Assyrians understood how to hew and shape it. In spite of this, they imitated the Babylonian custom and used mainly bricks for their buildings. They preferred continually to repair these temples and palaces, which soon fell into ruin, or else to replace them by others, rather than to depart from the traditional mode of building of their ancestors.

The question has been raised as to whether Babylonian-Assyrian art may not perhaps have been a daughter of the Egyptian. Without doubt Assyrian art was at least influenced by it. All the ivory objects which have yet been found are plainly imitations of Egyptian motives, although they were certainly not made by Egyptians, and some of them date from the time of Asshurnazirpal. The lotus ornament also, which is so often used as a temple decoration, points to an Egyptian origin. Perhaps, however, the models were not borrowed directly from the Egyptians. Certain dishes and cups for drink-offering, which occur in Mesopotamia, as well as in western Asia and southern Europe, are plainly ornamented with Egyptian cartouches, hieroglyphics, and symbols, but in such a divergent form that no Egyptian could have made them; and these objects have the name of the artificer in Aramaic characters on the border or back. It

is thus plainly to be seen that this Egyptian fashion wandered into Assyria through the influence of Aramäen artists.

When it is acknowledged, however, that Egyptian patterns were imitated by the Assyrians at a comparatively late date, and that Egyptian motives were borrowed from her artists, it does not by any means follow that Babylonian-Assyrian art as a whole was of Egyptian origin. This could be proved only from the oldest monuments to be found in Babylonia. It was in fact believed, when the art works of Telloh first became known, that they showed a great similarity to the products of Egyptian art. They displayed the same simplicity and naïveness, the same clean-shorn heads and faces, and many other coincidences. The connoisseurs of art, however, believe differently. The similarity is great; nevertheless a careful examination shows the independence of Babylonian art in respect to Egyptian. Thus in the oldest monuments the same peculiarities, truth and strength, appear, which in the later development of art among the Assyrians were so greatly exaggerated, whereas they are wholly lacking in Egyptian figures.

A further similarity is found between the oldest pyramids in the Nile valley and the Babylonian-Assyrian Ziggurat. In the first place, however, the pyramids had a wholly different object from the Ziggurat, and, in the second place, it must not be forgotten that the Babylonian temple architecture varies greatly from the Egyptian. If there is any dependence it is not on the side of the Chaldeans; they did not borrow their art from the Egyptians. At the same time the similarities are so remarkable, especially between the old Chaldaic statues and the oldest productions of Egyptian sculpture, such as the statues of Shafra, Chufu, and Ra-em-ke, that we are compelled here, as in the case of the writing, to suppose a common stock out of which both branches grew independently and in a way peculiar to each.

The important discoveries made by the French consul, De Sarsac, at Telloh have first thrown some light on the old Chaldean art in which the whole Babylonian-Assyrian art has taken its origin. The

question as to whether the works of art found there are Semitic or non-Semitic does not concern us here. It is more probably the latter. At any rate we are here confronted with a civilisation preceding the flourishing period of the known Semitic dominion in Babylonia.[35] A temple was found there 53 by 31 metres square which shows the same fundamental plan as the later Chaldean architecture, that is, a structure of burnt on a foundation of dried brick, the corners exactly facing the points of the compass (not the side as in Egypt), a Ziggurat in the centre, the whole, as is seen from stamps on the stones, dating from the time of the priest-prince Gudra, who is known from other sources, and who rebuilt or founded this temple. Besides, a large number of larger and smaller works of art were discovered, cylinders, reliefs, bronze objects, especially statues, which had been collected either by the ruler already mentioned or by other priestly princes or kings.[h]

Before building a temple or palace, a religious ceremony took place corresponding to what we call to-day laying the corner-stone. Nabuna'id relates that in the ruins of the oldest Chaldean temples he looked for the foundation stone, the *temen* which the original kings had placed there, and that he had the good fortune to find this corner-stone, whereas several of his predecessors had excavated only in vain. In our days such cylindrical tubes have been found covered with close writing difficult to decipher, which had been placed in little niches at the corners of the foundation facing the four points of the compass. Thus at Nimrod, Rawlinson caused excavations to be carried on in one of the corners of the tower, feeling sure that he would find objects similar to those which had been met with elsewhere. He relates his discovery as follows: "At the end of half an hour a small cavity was found. 'Bring me,'" said Rawlinson to the man in charge of the digging, "'bring me the dedicatory cylinder.' The workman put his hand into the hole and showed the cylinder; those present could not believe their eyes and looked at each other in amazement. The cylinder, covered with inscriptions, then came out of the hiding-place where it had been placed probably by the hands of Nebuchadrezzar himself, and where

it had lain for twenty-nine centuries." In the fruitful excavations which he undertook at Telloh, De Sarsac made similar discoveries. "I found," said he, "at a depth of scarcely thirty centimeters under the original soil, four cubes of masonry of large bricks and bitumen, measuring eighty centimeters on each side. In the centre of these cubes was a cavity of twenty-seven centimeters by twelve and by thirty-five of depth. This cavity filled with yellow sand enclosed a statuette of bronze, representing now a man kneeling, again a woman standing, sometimes also a bull. At the foot of each statue, usually embedded in the bitumen which lined the cavity, were found two stone tablets, one white, the other black. It was the black one which usually bore an inscription in cuneiform characters, like or almost like the one carved on the figure of bronze." Moreover De Sarsac in place of statuettes found cones of clay in the shape of large nails with hemispherical heads, and having an inscription around the stem.[m]

It has been believed that three stages of development may be detected in this ancient art. To the first belong the reliefs, which represent scenes of war and burial which have not yet been satisfactorily explained, drawn very awkwardly and comparatively rough and primitive. This stage represents the infancy of art. To the second stage are counted the eight statues of Gudea and the one of Ur-ba-'u which are carved with great skill and fine artistic feeling out of hard stone, as it appears of diorite.

The strength which characterises the sculptural efforts of the Babylonians and especially of the Assyrians, is already manifest, although without that exaggeration of the muscles and joints which is so pronounced with the latter. Hands and feet in particular are most carefully executed. The heads are totally different from the hairy and bearded Assyrian, or even early Babylonian heads. They are perfectly clean shaven, but sometimes seemingly decked with an artificial hair arrangement or something of that sort; all just as in Egypt. In addition, an attempt to suggest the folds of draperies is seen, which we do not find among the Babylonians and Assyrians

nor the Egyptians, but only later among the Persians and Greeks. In the third so-called classic period are placed works of art of most finished execution, which show a decided advance, among which are pictures, in which beard and hair are worked out with the greatest care.

It would be exaggerated scepticism to deny that these art productions exceed in antiquity, nearly everything found in Babylonia until now. The only exception could be the beautiful cylinder of the time of Sargon I, if we assume that this monarch reigned about 3800 B.C., and that this work of art is of his time. But this is by no means established as a fact.

It can also not be denied that these creations of early Chaldaic art, although in some instances only feeble attempts, in others, however, are of such finished perfection, that in succeeding periods they were never excelled and seldom equalled.

We have here a similar case to one in Egypt, where, for instance, under the kings of the fourth dynasty, sculpture reached an eminence, which nothing of later date ever approached, and where the oldest works of art have a value which none of the Egyptian sculptures of the following centuries can claim. In both these countries therefore there is an early, surprisingly rapid development, followed by a speedy decline; where even in succeeding brilliant epochs no successful attempts to equal the results of the first florescence were ever made. Such a phenomenon is all the more striking when it is considered that these later epochs, whether in Egypt, in Babel, or in Asshur, were by no means periods of degeneration, but show, although with continual fluctuations, marked progress in literature, science, government, and general culture. It seems probable that the cause lies in the difference of race. The artists who carved the statues of King Schafra, were no more Semites than, judging from all appearances and from the facial types of the monarchs, pictured, were the sculptors who immortalised King Gudea. Later on the Egyptian population became

more and more affected by Semitic elements, and under the increasing influence of the Semites, art declined.

Not until under the Saits, who certainly were not descended from a race intermixed with Semitic blood, did art rise again to a height which recalled the palmy days of the ancient realm. Thus early Chaldaic art was the mother of that of Babylonia and Assyria, and the Semites of Babylon and Asshur proved themselves diligent students, gifted imitators, who gave to their works also the stamp of their own genius; but they were never more than students and imitators, they never produced anything original which might stand in equality by the side of early Chaldaic art. The Semitic race occupies one of the foremost positions in the history of civilisation, and is highly talented. But in architecture and sculpture it has always worked in close connection with foreign masters, and never produced anything really great by itself.[36] The further it goes from the ancient centres, where the great tradition of the former so highly developed art still lived on, the more unskilful become its productions in this field. Assyria where the Semitic blood was purer than in Babylonia, and which was certainly surpassed in art by the latter, Phœnicia, Palestine, and Arabia, are proofs of this. Only when the Semites have handed down the old tradition which they have at least preserved, to the Aryans, the Persians, and Greeks, is there an independent higher development of plastic art. Be that as it may, considered as artists, the Babylonians and Assyrians stand foremost among the Semites, but they are indebted for this to the early Chaldeans.

The character of the Babylonian-Assyrian building has remained in general about the same, from the earliest times, until the destruction of the nation. The architect, more than any other artist, is dependent upon the nature of the material at his disposal; and this in Babylonia was almost exclusively in the form of tiles of clay, either dried in the sun, or baked in the fire. The former, which were made most skilfully in Babylonia, were generally used for foundations, either by simply placing them in layers, or cementing them with wet

clay or pitch, or, as in the substructures of the Assyrian palaces, by using them while still in a moist condition, in order that under the pressure of the superstructure they might be united in one solid mass. For the covering of the walls, baked tiles were used. Enamelled or glazed bricks were used in those parts of the building which were most exposed to moisture or the changes of the weather. In Assyria where stone was not expensive this was also used as the outer coating of walls. This, however, is the only important variation which the Assyrian architects allowed themselves. Although it would have been easier for them to erect more beautiful, more pleasing, and certainly more durable buildings of stone, they were not able to rise to the attempt, although they had only to carry out and use in larger measure what had already been found in Chaldea. A short step was indeed taken in this direction.

The Babylonians already knew how to make wooden pillars or columns, probably covered with metal, and made use of them in lighter architecture, as for instance the *Naos*, or canopy over the figures of the gods. The Assyrians not only copied this, but built columns of stone, and a certain originality and gracefulness in the capitals and bases of their pillars is not to be denied. However, the column never played the same important rôle in their architecture as it does, for instance, in the Græco-Roman and even in the Egyptian. In their great buildings they clung almost servilely to the designs handed down during centuries. The question as to whether the buildings had more than one story, was formerly almost generally admitted as a fact, but it is generally denied now, and can really hardly be determined. The ruins give no positive support to either theory; but a few reliefs give representations of two-storied buildings.

Tile construction presents necessarily a certain monotony which is here accentuated by the absence of windows. To relieve this monotony, glazing, colouring, or woodwork were resorted to, in case the use of columns was excluded; sometimes more artistic measures were used, such as projecting pilasters, which in Chaldea were

somewhat crude, but richly ornamented in Assyria; also mosaics of conical form, or decorations of vases on the walls. The upper stones of the walls were decorated with battlements. The inner, as well as the outer walls, had a stone covering up to a certain height, and higher up a polychromatic layer of stucco. Ivory, and particularly bronze decorations, were much employed. In spite of all this, the impression given by Babylonian and Assyrian buildings is one of massiveness, almost clumsiness, and the decorations seem childish, paltry, and commonplace. Hence also the disproportion of length and breadth, in other words the elongated form of the rooms, whose roof not being supported by columns, had to rest on the side walls, and whose breadth depended on the length of the roof beams.

On the other hand, the almost exclusive use of tiles had this advantageous result, that it was almost imperative to make prodigal use of arch and vault construction. That the Chaldaic architects were the inventors of these constructions, with which the Etruscans were formerly erroneously credited, cannot be positively affirmed, for they are also found in Egypt, although seldom made use of there. Without doubt, however, the Babylonians and Assyrians developed them greatly and knew how to make use of them with great skill. From the false arch, which is formed by allowing each succeeding layer of stone to project over the foregoing one, to the finished arch, all kinds are represented by them. Not only were all underground canals and sewers, vaults of masonry, but all gateways ended in arches, and even the ceilings of some apartments, particularly those in the part of the palaces which seems to have been the harem were wholly or partially vaulted.

The Babylonians and Assyrians have built extensively many and great cities enclosed within mighty walls, extended palaces and peculiar temples. They cannot be enumerated here or even described in general terms.

A few important points, however, may be touched upon. In the first place it must be noticed that, while in Egypt the monumental buildings were tombs and temples, in Babylon and Asshur they were

mainly palaces. Although no pains nor expense were spared in the erection of the temples, they were smaller than the palaces, of which they were in some cases certainly annexes.

The tombs were constructed with great care, in order to guard against the rapid decay of the corpses, yet the inhabitants of Mesopotamia never reached the same degree of perfection in the embalming of bodies as the Egyptians: they were also fitted out with everything that, according to their faith, was necessary for the dead, but they were piled upon each other, and thus excluded from view. Art was not expended upon them; on the other hand, however, all known means of art were used to decorate the residences of the kings and the earthly habitations of the gods in the most splendid and sumptuous manner. Their size increased continually. The early Chaldaic palace discovered at Telloh, had an area of only 53 meters long by 31 broad; the so-called Wasevas at Warka (Erech) was 200 meters long by 150 broad; the palace of Sargon II at Dur-Sharrukin covered an area of about 10 hectares, and contained 30 open courts and more than 200 apartments. Under the Sargonids the rooms also became larger. One in the palace of Sennacherib was almost as long as the entire palace at Telloh, *i.e.*, 46 meters long by 12 wide. Another in the palace of Esarhaddon, which was intended to be 15 meters by 12 meters, remained unfinished, probably on account of the difficulty of construction. The palace of Asshurbanapal was of somewhat smaller, though still magnificent proportions. The great palace of Nebuchadrezzar II, consisting of the old palace of his father and a new one constructed by him and joined to the old, has not yet been sufficiently explored, but according to the descriptions, must have surpassed in splendour, if not in size, all those of his predecessors. All palaces were constructed on the same plan, and contained separate living apartments for the king and his court, for his wives, for the lower court officials, and, as it appears, also a temple with various sanctuaries and a tower.

Too little is as yet known of the Babylonian-Assyrian temples to judge with any certainty of their style of architecture. Here and there, remains of temples have been found, but it has not yet been

proved that the buildings designated as temples were really devoted to religious purposes. Most of the temples seem to have been small, at any rate not intended for large assemblages. The altar stood outside and consequently the religious services must usually have taken place there.

Every large town had many temples but always only one Ziggurat. This constituted only one part of the principal temple, albeit the most prominent one. There were various kinds of such towers, of three or more, sometimes seven stories, which were attainable by a single inclined plane encircling the whole building, or a double one rising on two sides of it. The ground plan was a perfect square in some, in others a parallelogram; all rested, however, on a massive substructure, and seem to have been crowned with a small sanctuary.

Although these principal temples, including the Ziggurat, were not of equal extent with the royal palaces, they were nevertheless imposing buildings, and the towers in particular were erected with much care and at great expense. It would be wrong to conclude from this ratio of temples and palaces that the Assyrians were less religious and more servile than the Egyptians, who, entirely dominated as they were by the dogma of immortality, lavished more care on the tombs of the dead kings than on the habitations of the living ones. The valuable decorations and sculptures which the Assyrians and Babylonians gave to their gods prove their pious tendency. In reality the whole palace was a sacred edifice in which the representative of the deity lived on earth with and beside his god.

The aid which architecture received from other arts has already been briefly mentioned. There are still a few particulars to be noticed in regard to this point. The Assyrians as well as the Babylonians were skilful workers in bronze. Proofs of this are the bronze door-sill 1½ meters long, found at Borsippa, whose decorations of rosettes and squares are in very good taste, and particularly the bronze gates at Balawat, belonging to the 9th

century B.C., which are masterpieces of their kind, and a great number of other remains.

Painting was also employed to decorate the exterior as well as the interior of walls. Ornaments and figures were painted with great skill on stucco, *al fresco* in such a case, or on tiles which were afterwards glazed. These tiles were sometimes joined to make one picture. In what remains of such work it is shown that painting had attained quite an eminence in Babylon and Asshur. Drawing and grouping are often very successful, and the treatment has often a certain breadth. These paintings are also important because it is seen from them how much conventionality prevailed in Assyrian sculpture. In painting there is nothing of that exaggerated muscularity nor of the almost clumsy strength of the sculptured figures. Beard and hair are not as stiffly curled as in the sculptures, but hang more loosely and naturally.[h] A beautiful example of glazed tiling has recently been excavated by the Deutsche Orient Gesellschaft at Babylon. It is in the so-called Procession street leading from Babylon to Borsippa; on either side of the street were walls faced with coloured tiles representing a stately procession of lions and other animals, very artistically drawn.[a]

Sculpture, more than painting, was employed in decorating buildings, the works of which covered the greater part of the palace walls, and ornamented the gateways, courts, terraces, and apartments. The material which the sculptor used in Chaldea was usually valuable stone difficult to procure, such as basalt, dolorite, diorite; in Assyria, generally a commoner, more easily worked species, such as alabaster and sandstone. The difference of material naturally influenced the work itself. Figures of cast bronze are also often found.

The inscriptions of the Babylonian kings often speak of columns erected in honour of the gods, of which some were made of solid gold or silver, others only coated with precious metal, and the Assyrian kings also mention such dedications. Naturally the columns of precious metal have not survived, but a great number of stone

pillars have been found. It may be chance, that the greater number of statues in the round are from Babylon, the greater number of bas-reliefs from Assyria. The objects of these surviving sculptures are mainly of a religious or historical character. But rarely does a representation of the domestic life of the monarch or other social circles appear.

Only once is a banquet pictured, that of king Asshurbanapal and his queen. Otherwise no women, except captives, appear in the reliefs. On the whole little tendency is shown to represent female beauty and grace, as compared with the Egyptians and especially with the Greeks. The nude female figure is seldom pictured, and if so, in a repulsively realistic form, as in the small figures of the mother goddess. Cheerful or comic scenes, which are not wanting even in Egyptian reliefs and vignettes, are never found here. Hasty conclusions, however, should not be drawn from this, and it should not be forgotten, that most of the surviving reliefs are from the palaces, few from the temples, still fewer from the tombs, and none at all from private residences. This is doubtless one of the reasons why representations of domestic or private life are so scarce. In fact, in a few of the tombs reliefs have been found whose subjects recall favourite representations in those of Egypt. Most prevalent certainly, are those scenes relating to religious and public life.

In the treatment of these objects, truth is often sacrificed to certain conventionalities. Thus for instance the Lamassi and Shedi, the man-headed lions and bulls have five legs, in order that they may always present four to the eye, whether viewed from the front or the side; the heads are usually represented in profile with the eyes in full face, but sometimes in full face, although the image presents a side view to the beholder, which was also customary in Egypt; so also, the stiff curling of the hair and beard is unnatural. Apparently no attempt had ever been made in Egypt to make portraits of historical personages, and the individual differences of rank and condition can only be recognised by objects of secondary importance. There is, however, still some doubt upon this point. There is indeed a great uniformity, but an attempt at least to

differentiate facial traits cannot be overlooked. Ignoring all accessories, the features differ among kings and higher courtiers on the one hand, and lower men-at-arms on the other, among men and eunuchs, among adults and youths. Wherever the artists of Mesopotamia were not limited by conventionality,—notably in the representation of animals,—they have surpassed in accuracy, in truth and strength of representation all other nations of antiquity, the Greeks hardly excepted. This is particularly true of the representation of native animals, yet foreign ones were treated with great skill, although the delineation of these betrays less practice. Even in the picturing of therianthropic deities, they remain as true to nature as possible, and with much taste and tact allow the human attributes of the figure to predominate. Wherever it is possible to partially or wholly break away from tradition, their talent is displayed in a manner truly marvellous. Their only prominent fault is their exaggerated realism, which shows itself not only in the monstrous drawing of muscles and joints, but also in the disgusting details of the nude figures of Astarte.

Too little of the sculpture of the new Babylonian realm has been preserved to allow judgment of the state of art during this period. The well known carving of Nebuchadrezzar II on a cameo would force us to have a very high opinion of it, if convincing reasons did not argue that, although genuine, it is the work of a foreign, probably a Cyprian, artist.

There is no doubt that the art of music was cultivated among the Babylonians and Assyrians, since the reliefs show musicians very frequently, at religious festivals, at triumphal greetings of the victorious king and at festivities. They play singly or in concert, and also accompany singing. The musical instruments are of various kinds, and the musicians, who are sometimes very daintily attired, are not always eunuchs, and are of different ages.

On the whole it must be conceded, that the Assyrio-Babylonian nation was artistically inclined and that it cultivated various branches of art with talent and success. If they, the Assyrians in particular,

had been able to free themselves from tradition, they might have surpassed their predecessors and teachers. They practised art, however, not for itself alone, but as a means of glorifying the gods or the kings, and the historical reliefs at least, are for the greater part nothing more than illustrations to the inscriptions, a sort of war-report in pictures. They were not an artistic people like the Greeks. Still they have produced more and better results in this respect, than all other nations of their race put together. And although in some special instances they may have been excelled by the Egyptians, in others they are far in advance of them. The Assyrians, following the example of the Babylonians, showed their artistic talents also in the productions of their industries; art and industry were with them closely related.

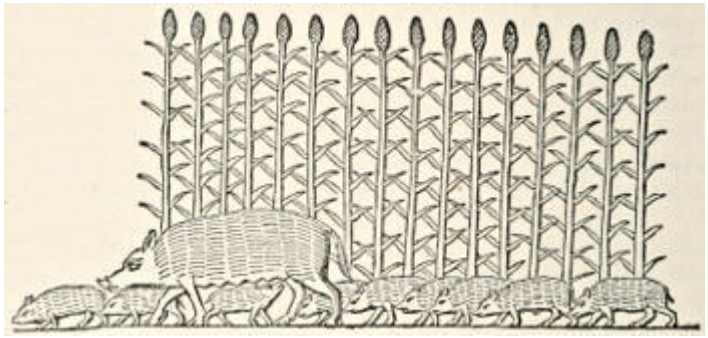
Among the productions to be considered here are primarily the hundreds of seals, which are still in preservation, and whose number will not seem so surprising when it is remembered that every Babylonian and Assyrian of quality had his private seal. In early times these were always, and in later times generally, cylinders, pierced through the centre, to be worn around the neck suspended from a cord. The impression was made by rolling them over moist clay. After the eighth century conical and half-spherical seals appear. These cylinders are made of many different materials, at first, of easily carved, later of harder, material, such as porphyry, basalt, ferruginous marble, serpentine, syenite and hematite. After that, semi-precious stones were used, jasper, agate, onyx, chalcedony, rock-crystal, garnet, etc. In the oldest stones the pictured objects were rather suggested by indentations and strokes, than actually executed and carved; but gradually a great skilfulness was attained, and there are beautiful cuttings in the hard stones also. The execution varied greatly of course, not only in proportion to the talent of the artist, but also according to the rank and wealth of the person who gave the commission. The subjects chosen are mostly of a religious nature, the adoration of a goddess, an offering of sacrifice, various emblems such as winged animals, sun, moon, and stars, and very frequently the tree of life, in whose shadow stand

two persons, or which is guarded by two genii. Under the new Babylonian dominion and under the Achamenides, glyptics as an art declined rapidly.

Ceramic art seems not to have occupied a very lofty position in Babylonia at first. Clay vases and utensils, during a long period made by hand, are crude and inartistic in earliest times. Gradually with the introduction of the potter's wheel, however, they become more graceful in form, and towards the end of the Assyrian period are enamelled and decorated with patterns painted in colours. However, Babylonian ceramic art cannot compete with that of Greece, although it surpasses that of Egypt. Glass has not been found in large quantities, to be sure, but quite advanced progress had been made in its manufacture. The Assyrians and Babylonians showed particular skill in the working of metals. Bronze, a mixture of copper and tin, was known to them in the earliest times. They had a knowledge of iron earlier than the Egyptians, and certainly made much greater use of it. Gold objects are commoner than those of silver, and lead is seldom used. Ornaments, such as bracelets, ear-rings, and necklaces are usually cast of precious metal and often inlaid with pearls. It may be taken as a proof of highly advanced culture that they used not only spoons, but forks, a luxury introduced into Europe only at the close of the Middle Ages, and that toilet articles, such as combs, pins, etc., were ornamented with the greatest care and skill.

The Assyrians were also more skilled in mechanics than the Egyptians and were not inferior to them in agriculture. Two reliefs, one Assyrian, the other Egyptian, give us an opportunity to compare how each nation overcame the difficulties attending the moving and putting in place of their enormous collossi of stone. It is shown that the Assyrians knew the use of the lever, which the Egyptians did not, and that they took much greater precautions against upsetting the collossi. How the Babylonians and Assyrians, like the Egyptians and Chinese, made use of irrigation is well known. On the same tablets with the records of their deeds of war, the rulers often spoke of the laying out of canals, the regulating and deepening of the river beds

"enduring waters for the enduring use of town and country," and associated their own names with them. On account of the higher altitude of their country than that of their southern brethren, the Assyrians had to surmount greater difficulties in achieving such works, but this did not deter them from rivalry with them. One canal leading from the Upper Zab and one of its tributaries, irrigated the region between this river and the Tigris, and also supplied the capital, Kalah, with drinking water.



BAS-RELIEF OF WILD SOW AND YOUNG AMONG REEDS

(Layard)

Sennacherib did something similar for Nineveh, which together with its environs was completely dependent upon rain. He had a network of canals constructed, which were fed, partly by the Khushur, and partly by the small mountain brooks of the Accad and Tash mountains. Here also two objects were attained, to furnish Nineveh with good drinking water, and to make the surrounding country fruitful; for the king had it all planted with many kinds of plants, among which was the vine. Floriculture was also much encouraged by the kings of Babylon and Asshur. They admired beautiful parks in which strange foreign animals were bred and nurtured. Marduk-bel-iddin, king of Bit-Yakin, apparently the same who at one time overcame Babylon, owned sixty-seven vegetable gardens and six parks of which a catalogue still exists, although he was constantly at war or guarding against the vengeance of the Assyrians.[h]

ASSYRIAN ART

But the world-historic relations of Mesopotamian art are best brought out by a study of the later and more perfectly preserved examples of Assyrian craftsmanship. It was the Assyrian who borrowed more directly from the Egyptian in developing his art, and who passed on artistic impulses to the Persians on the one hand, and to the Greeks on the other. The question to what extent the Assyrians were themselves influenced by the Mycenæan art of early Greece is one regarding which students of the subject are not agreed, and which we need not enter upon here.[a]

It is impossible to examine the monuments of Assyria without being convinced that the people who raised them had acquired a skill in sculpture and painting, and a knowledge of design and even composition, indicating an advanced state of civilisation. It is very remarkable that the most ancient ruins show this knowledge in the greatest perfection attained by the Assyrians. The bas-relief representing the lion hunt, now in the British Museum, is a good illustration of the earliest school of Assyrian art yet known. It far exceeds the sculptures of Khorsabad, Kuyunjik, or the later palaces of Nimrud, in the vigour of the treatment, the elegance of the forms, and in what the French aptly term *mouvement*. At the same time it is eminently distinguished from them by the evident attempt at composition—by the artistical arrangement of the groups. The sculptors who worked at Khorsabad and Kuyunjik had perhaps acquired more skill in handling their tools. Their work is frequently superior to that of the earlier artists in delicacy of execution—in the details of the features, for instance—and in the boldness of the relief; but the slightest acquaintance with Assyrian monuments will show that they were greatly inferior to their ancestors in the higher branches of art—in the treatment of a subject and in beauty and variety of form. This decline of art, after suddenly attaining its greatest perfection in its earliest stage, is a fact presented by almost every people, ancient and modern, with which we are acquainted. In Egypt the most ancient monuments display the purest forms and the most elegant decorations. A rapid retrogression, after a certain period, is apparent, and the state of art serves to indicate

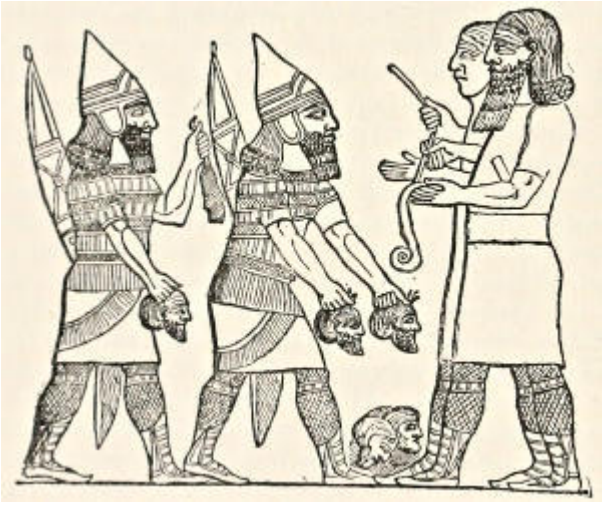
approximately the epoch of most of her remains. In the history of Greek and Roman art this sudden rise and rapid fall are equally well known. Even changes in royal dynasties have had an influence upon art, as a glance at monuments of that part of the East of which we are specially treating will show. Thus the sculpture of Persia, as that of Assyria, was in its best state at the time of the earliest monarchs, and gradually declined until the fall of the empire. After the Greek invasion it revived under the first kings of the Arsacid branch, Greek taste still exercising an influence over the Iranian provinces. How rapidly art degenerated to the most barbarous forms, the medals and monuments of the later Arsacids abundantly prove. When the Sassanians restored the old Persian monarchy and introduced the ancient religion and sacred ceremonies of the empire, art again appears to have received a momentary impulse. The coins, gems, and rock sculptures of the first kings of this dynasty are distinguished by considerable elegance, and spirit of design, and beauty of form. But the decay was as rapid under them as it had been under their predecessors. Even before the Chosroes raised the glory and power of the empire to its highest pitch, art was fast degenerating. By the time of Yezdigird it had become even more rude and barbarous than in the last days of the Arsacids.

This decline in art may be accounted for by supposing that, in the infancy of a people, or after the occurrence of any great event having a very decided influence upon their manners, their religion, or their political state, nature was the chief, if not the only, object of study. When a certain proficiency had been attained, and no violent changes took place to shake the established order of things, the artist, instead of endeavouring to imitate that which he saw in nature, received as correct delineations the works of his predecessors, and made them his types and his models. In some countries, as in Egypt, religion may have contributed to this result. Whilst the imagination, as well as the hand, was fettered by prejudices, and even by laws, or whilst indolence or ignorance led to the mere servile copying of what had been done before, it may easily be conceived how rapidly a deviation from correctness of form

would take place. As each transmitted the errors of those who had preceded him, and added to them himself, it is not wonderful if, ere long, the whole became one great error. It is to be feared that this prescriptive love of imitation has exercised no less influence on modern art than it did upon the arts of the ancients.

As the earliest specimens of Assyrian art which we possess are the best, it is natural to conclude that either there are other monuments still undiscovered which would tend to show a gradual progression, or that such monuments did once exist, but have long since perished; otherwise it must be inferred that those who raised the most ancient Assyrian edifice derived their knowledge directly from another people, or merely imitated what they had seen in a foreign land. Some are inclined to look upon the style and character of these early sculptures as purely Egyptian. But there is such a disparity in the mode of treatment and in the execution, that the Egyptian origin of Assyrian art appears to me to be a question open to considerable doubt. That which they have in common would mark the first efforts of any people of a certain intellectual order to imitate nature. The want of relative proportions in the figures and the ignorance of perspective—the full eye in the side face and the bodies of the dead scattered above or below the principal figures—are as characteristic of all early productions of art as they are of the rude attempts at delineation of children. It is only in the later monuments of Nineveh that we find evident and direct traces of Egyptian influence: as in the sitting sphinxes and ivories of Nimrud, and in the lotus-shaped ornaments of Khorsabad and Kuyunjik; perhaps also in the custom which then prevailed of inserting the name of the king, or of the castle, upon or immediately above their sculptured representations. Neither the ornaments of the earliest palace of Nimrud, nor the costumes, nor the elaborate nature of the embroideries upon the robes, with the groups of human figures and animals, nor the mythological symbols, are of an Egyptian character; they show a very different taste and style.

The principal distinction between Assyrian and Egyptian art appears to be that in the one conventional forms were much more



Bas-relief of Scribes writing down the Number of Heads of the Slain

(Layard)

strictly adhered to than in the other. The angular mode of treatment, so conspicuous in Egyptian monuments, even in the delineation of every object, is not perceivable in those of Assyria. Had the arts of the two countries been derived from the same source—or had one been imitated from the other—they would both surely have displayed the same striking peculiarity. The Assyrians, less fettered, sought to imitate nature more closely, however rude and unsuccessful their attempts may have been; and this is proved by the constant endeavour to show the muscles, veins, and anatomical proportions of the human figure.

We must not lose sight of the assertion of Moses of Chorene—derived no doubt from ancient traditions, if not from direct historical evidence—that when Ninus founded the Assyrian Empire, a people far advanced in civilisation and in the knowledge of the arts and sciences, whose works the conquerors endeavoured to destroy, were already in possession of the country. Who that people may have been, we cannot now even conjecture. The same mystery hangs over the origin of the arts in Egypt and in Assyria. They may have been derived, before the introduction of any conventional forms, from a common source—from a people whose very name, and the proofs of whose former existence, may have perished even before tradition begins.

The monuments of Assyria furnish us with very important data, as to the origin of many branches of art, subsequently brought to the highest perfection in Asia Minor and Greece. I conceive the Assyrian influence on Asia Minor to have been twofold. In the first place,

direct, during the time of the greatest prosperity of the Assyrian monarchy or empire, when, as it has been shown, the power of its kings extended over that country; in the second, indirect, through Persia, after the destruction of Nineveh. Of the influence exercised upon the arts of western Asia, during the early occupation of the Assyrians, few traces have hitherto been discovered, unless the remarkable monuments on the site of ancient Pteria, or Pterium, belong to this period. The evident connection between the divinities and sacred emblems worshipped in various parts of Asia Minor, and those of Assyria will be hereafter particularly pointed out. The Assyrian origin of these monuments, and of these religious symbols, once admitted, we shall have no difficulty in recognising the influence of Assyria on the arts and customs of Asia Minor. The antiquities of that country, prior to a well-known period, the Persian occupation, have been but little investigated. Few remains of an earlier epoch have yet been discovered. That such remains do exist, perhaps buried under ground, I have little doubt. It is most probable that, as we have additional materials for inquiry, we shall be still more convinced of this Assyrian influence, pointed out by Herodotus, when he declares the founder of the kingdom of Lydia to have been a descendant of Ninus, and by other authors, who mention the Syrian, or Assyrian, descent of many nations of Asia Minor.

But the second, or indirect, period of this influence is very fully and completely illustrated by the monuments of Asia Minor, of the time of the Persian domination. The known connection between these monuments and the archaic forms of Greek art renders this part of the inquiry both important and interesting. The Xanthian marbles, acquired for England by Sir Charles Fellows, and now in the British Museum, are remarkable illustrations of the threefold connection between Assyria and Persia, Persia and Asia Minor, and Asia Minor and Greece. Were those marbles properly arranged, and placed in chronological order, they would afford a most useful lesson, and would enable even a superficial observer to trace the gradual progress of art from its primitive rudeness to the most classic conceptions of the Greek sculptor. Not that he would find

either style, the pure Assyrian or the Greek, in its greatest perfection; but he would be able to see how a closer imitation of nature, a gradual refinement of taste and additional study, had converted the hard and rigid lines of the Assyrians into the flowing draperies and classic forms of the highest order of art.

I have termed this second period that of *indirect* influence, because the arts did not then penetrate directly into Asia Minor from Assyria, but were conveyed thither through the Persians. The Assyrian Empire had already existed for centuries, and had exercised the supreme power over Asia, before it was disputed by the kingdoms of Persia and Media, united under one monarch. The Persians were probably a rude people, possessing neither a literature nor arts of their own, but deriving what they had from their civilised neighbours. We have no earlier specimen of Persian writing than the inscription containing the name of Cyrus, on the ruins supposed to be those of his tomb, at Murghaub [Pasargarda]; nor any earlier remains of Persian art than the buildings and sculptures of Persepolis, and other monuments to be attributed beyond a question to the kings of the Achæmenian dynasty. It has already been shown that the writing of the Persians was imitated from the Assyrians, and it can as easily be proved that their sculptures were derived from the same source. The monuments of Persepolis establish this beyond a doubt. They exhibit precisely the same mode of treatment, the same forms, the same peculiarities in the arrangement of the bas-reliefs against the walls, the same entrances formed by gigantic winged animals with human heads, and, finally, the same religious emblems. Had this identity been displayed in one instance alone, we might have attributed it to chance, or to mere casual intercourse; but when it pervades the whole system, we can scarcely doubt that one was a close copy, an imitation, of the other. That the peculiar characteristics of the Persepolitan sculptures were derived from the monuments of the second Assyrian dynasty—that is, from those of the latest Assyrian period—can be proved by the similarity of shape in the ornaments and in the costume of many of the figures. Thus, the head-dress of the winged monsters forming the portals is lofty,

squared, and richly ornamented at the top, resembling those of Khorsabad and Kuyunjik, and differing from the round, unornamented cap of the older figures at Nimrud.

The processions of warriors, captives, and tribute-bearers at Persepolis are in every respect similar to those on the walls of Nimrud and Khorsabad; we have the same mode of treatment in the figures, the same way of portraying the eyes and hair. The Persian artist introduced folds into the draperies; but, with this exception, he certainly did not improve upon his Assyrian model. On the contrary, his work is greatly inferior to it in the general arrangement of the groups and in the elegance of the details.

From whence the Persians obtained the column and other architectural ornaments used at Persepolis, it may be more difficult to determine. We have seen that the column was not unknown to the later Assyrians, although it does not appear to have been employed in the construction of their palaces. The Persians, therefore, may have partly derived their knowledge from them; and partly, perhaps principally, from the Egyptians, whom, before the foundation of Persepolis, they had already conquered. It will be observed that the capitals of their columns frequently assume the shape of Assyrian religious types, the bull for instance; whilst other portions of them nearly resemble in the form of their ornaments, though not in their proportions, those of Egypt.

The Persians introduced into Asia Minor the arts and religion which they received from the Assyrians. Thus the Harpy Tomb and the monument usually attributed to Harpagus at Xanthus, and other still earlier remains, show all the peculiarities of the sculpture of Persepolis, and at the same time that gradual progress in the mode of treatment—the introduction of action and sentiment, and a knowledge of anatomy—which marks the distinction between Asiatic and Greek art. Whilst there was a manifest improvement in the disposition of the draperies and in the delineation of the human form, we still remark, even in the latest works of the Persian period

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