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George Jarvis Thompson

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Recommended Citation

George Jarvis Thompson, *Development of the Anglo-American Judicial System*, 17 Cornell L. Rev. 9 (1931)
Available at: <http://scholarship.law.cornell.edu/clr/vol17/iss1/1>

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THE DEVELOPMENT OF THE ANGLO-AMERICAN JUDICIAL SYSTEM*

GEORGE JARVIS THOMPSON†

PART I.

HISTORY OF THE ENGLISH COURTS TO THE JUDICATURE ACTS

There has been a wide-spread feeling in the legal profession in America during recent years that the study of the law should begin with an introduction to the environment in which the law functions and to the history and development of legal institutions. Perhaps this represents a dawning perception of the rapid reversion of modern social conditions to the static society of pre-Columbian England in consequence of the passing of the free lands in the new world a generation ago, which sounded the doom of the dynamic society incident to the "Westward Ho" movement of three centuries.¹ In response to these currents of thought this article presents in brief compass the story of the origin and development of the English courts from approximately the year 1000 A. D. to their complete reorganization under the Judicature Acts of 1873-75. To emphasize the continuity of this institutional growth through the slow evolution of the centuries much of the detail of the development of procedure and of the substantive law has necessarily been omitted. Nevertheless, even an outline record of the transformation of the folk courts of the Saxons and of the Danes into the Supreme Court of Judicature of present day England must impress one with the extent to which the substance of our general body of modern Anglo-American law is the product of those institutions in which it has been developed. A notable instance of this will be seen in the influence of the form of judicial organization upon the division of our law into the four great systems of common law, equity, admiralty and administrative law.

*Copyright, 1931, by George Jarvis Thompson. This article is Part I of a historical survey of the Anglo-American judicial system. Part I, detailing the history of the English Courts to the Judicature Acts, will be printed in the CORNELL LAW QUARTERLY in two installments. The second installment will be published in the February issue. It is expected that the succeeding parts will appear in a subsequent volume.

†Professor of Law, Cornell Law School. The author is indebted to Mr. R. G. Ramsay of the Department of English History of Cornell University for helpful comment and suggestion.

¹See Pound, Roscoe, *The New Feudalism* (1930) 16 A. B. A. J. 553; Cheadle, John B., *Government Control of Business* (1920) 20 COL. L. REV. 438, at 544.

THE ANGLO-SAXON COURTS

The Anglo-Saxon judiciary system was characterized by its decentralization. The emphasis was placed upon the local court. Historically it derived from the ancient Teutonic tribal courts, presided over by the chief surrounded by his warriors. With the advance of civilization these developed into communal courts in which the assembled landowners and freemen of the community administered the local customary law. Such a court, in the sense of an assembly of the people, was called a "gemot", and exercised legislative and administrative as well as judicial functions.² Many centuries were to elapse before the birth of our constitutional doctrine of the separation of governmental powers.

Sir Frederick Pollock has given us a good picture of these ancient courts:³

"The courts were open air meetings of the freemen who were bound to attend them, the suitors as they are called in the terms of Anglo-Norman and later mediaeval law; there was no class of professional lawyers; and there were no judges in our sense of learned persons especially appointed to preside, expound the law, and cause justice to be done; the only learning available was that of the bishops, abbots and other great ecclesiastics. This learning, indeed, was all the more available and influential because before the Norman Conquest there were no separate ecclesiastical courts in England. There were no clerks, nor apparently, any permanent officials of the popular courts; their judgments proceeded from the meeting itself, not from the presiding officer, and were regularly preserved only in the memory of the suitors."

These Anglo-Saxon courts, therefore, were not courts of record. They possessed, however, a general jurisdiction within the territory they served, whereas today, courts not of record are everywhere local courts of very limited jurisdiction.⁴

²Adams, Henry, *The Anglo-Saxon Courts of Law*, ESSAYS IN ANGLO-SAXON LAW (1876) 1, 22; I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 40-41; I HOLDSWORTH, Sir William S., HISTORY OF ENGLISH LAW (3d ed. 1922) 3; I SPENCE, George, EQUITABLE JURISDICTION (1846) 70 *et seq.* The most scholarly and authentic study of Anglo-Saxon laws is LIEBERMAN, Felix, DIE GESETZE DER ANGELSACHSEN (3 vols. 1903-16).

³Pollock, Sir Frederick, *English Law Before the Norman Conquest*, I SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 89, (1898) 14 L. Q. REV. 291. And see: I POLLOCK AND MAITLAND, *op. cit.* (*opus citatum*—the work which has been cited) note 2, at 37-41; Lefroy, *The Anglo-Saxon Period of English Law* (1917) 26 YALE L. J. 291, at 296.

⁴AMES, James Barr, LECTURES ON LEGAL HISTORY (1913) 35, *The Salic and Anglo-Saxon Courts*.

The court structure of the Anglo-Saxons dominated the judicial system for more than two centuries after the Norman Conquest in 1066. These courts were divided into two general classes—the ancient communal courts and those private courts held by a lord or by a religious foundation or a borough.

Communal Courts

There were three types of communal courts. Of these the Hundred Moot or Wapentake Gemot, which seems to have been the direct descendant of the ancient court of the assembled warriors, was the "judicial unit for ordinary affairs".⁵ It met every four weeks and sometimes fortnightly and was presided over by a reeve or alderman and an archdeacon. The lay official declared the law of the king and the ecclesiastic the law of God to the assembly, who then applied the appropriate law to the particular case.⁶ In later times a deputy of the sheriff frequently presided. Originally attendance of all freeholders and free tenants as suitors, that is, judges, was compulsory, but eventually this obligation came to be annexed to certain land tenures. Twice a year the sheriff presided over a full meeting of the Hundred known as the Sheriff's Tourn.⁷ Its chief purpose was to inquire into the Frankpledge System, that is, to see that all men were enrolled in the proper tithings (groups of ten) and that each vill (township) and Hundred had provided its frankpledge. This was a compulsory collective bail of the community to answer for misdeeds done by a member of the tithing or occurring within the Hundred if the vill or Hundred was unable to hand over the wrong-doer, or, after the Conquest, to prove Englishry of the victim.⁸

⁵I POLLOCK AND MAITLAND, *op. cit.* note 2, at 42, 556-560; VINOGRADOFF, Paul, ENGLISH SOCIETY IN THE ELEVENTH CENTURY (1908) 96-100; I HOLDSWORTH, *op. cit.* note 2, at 11, 75; PLUCKNETT, Theodore F. T., CONCISE HISTORY OF THE COMMON LAW (1929) 83-87; ROBERTSON, LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I (1925) 19, 183, 287; I THORPE, B., ANCIENT LAWS AND INSTITUTES OF ENGLAND (1840) 385-387; I STUBBS, Bishop William, CONSTITUTIONAL HISTORY OF ENGLAND (5th ed. 1891) 114; MAITLAND, Frederic William, CONSTITUTIONAL HISTORY OF ENGLAND (1911) 44-45.

⁶PLUCKNETT, *op. cit.* note 5, at 10; POUND AND PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW (3d ed. 1927) 69 *et seq.*; ROBERTSON, *op. cit.* note 5, at 235; Lefroy, *op. cit.* note 3, at 296.

⁷I HOLDSWORTH, *op. cit.* note 2, at 76 *et seq.*; COKE, Sir Edward, Lord Chief Justice, FOURTH INSTITUTES (Hargrave's ed. 1797) 259. Cf. I MAITLAND, SELECT PLEAS IN MANORIAL COURTS (2 Selden Society, 1889) xxxi.

⁸After the Conquest, to guard against the secret slaying of Normans by the English, the Norman kings presumed that every slain person was a Norman, and the fine was excused only when the hundred was able to prove "Englishry",

The great court of the Anglo-Saxons was the County Court or "Shire Moot" which was both a court of general jurisdiction and the governing body of the county.⁹ It was presided over by the sheriff and the bishop of the county until the severance of its ecclesiastical and lay jurisdictions in later times, when the sheriff alone presided. In early Anglo-Saxon days it met twice or thrice a year, but after the Conquest its meetings were held monthly or every six weeks. Historically, it was a congregation of all the freemen of the county as suitors, who constituted its judges just as in the Hundred Moot.¹⁰ By the eleventh century, however, the Shire Moot had become distinguished from the Hundred by the class of suitors attending, for the thanes and other greater freeholders had appropriated this court primarily to themselves and their causes. No longer compelled to perform the burdensome obligation of attending the Shire Moot, since it came to be sufficient if each Hundred was represented by its reeve and four freeholders, the smaller freeholders and free tenants, although not actually excluded, withdrew to their own Hundred Moot and left the greater court to greater men.¹¹ One of the former class was not permitted to sue in the Shire Moot unless he had thrice demanded his right in vain in his Hundred.¹² Under the Norman kings this great court of the Anglo-Saxons gradually lost its prestige. Within a little over a hundred years after the Conquest its criminal jurisdiction had been almost entirely transferred to the crown, and in 1278 its civil jurisdiction was diminished by the Statute of Gloucester to cases under forty shillings.¹³ A few of its ancient functions, such as the process of outlawry, remained

i. e., that the victim was an Englishman (Saxon). Presentment or proof of Englishry was abolished by 14 EDW. III, st. 1, c. 4 (1340), and with it the murder fine terminated. ROBERTSON, *op. cit.* note 5, at 239, 265; 1 MAITLAND, COLLECTED PAPERS (1911) 230, *Criminal Liability of the Hundred*; 1 HOLDSWORTH, *op. cit.* note 2, at 11, 15.

⁹1 HOLDSWORTH, *op. cit.* note 2, at 6, 69; VINOGRADOFF, *op. cit.* note 5, at 90 *et seq.*; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 532; 1 STUBBS, *op. cit.* note 5, at 128, 424; PLUCKNETT, *op. cit.* note 5, at 86 *et seq.*; Plucknett, *New Light on the Old County Court* (1929) 42 HARV. L. REV. 639; Lefroy, *op. cit.* note 3, at 296.

¹⁰1 HOLDSWORTH, *op. cit.* note 2, at 9-10; 1 TAYLOR, HANNIS, ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION (1889) 203; Adams, *op. cit.* note 2, at 5.

¹¹1 HOLDSWORTH, *op. cit.* note 2, at 9; VINOGRADOFF, *op. cit.* note 5, at 97; 1 MAITLAND, *op. cit.* note 8, at 458, *The Suitors of the County Court*; 2 MAITLAND, OUTLINES OF ENGLISH LEGAL HISTORY (1911) 426.

¹²1 THORPE, *op. cit.* note 5, at 387 (Laws of Cnut), 485 (Laws of William I); STUBBS, *op. cit.* note 5, at 129.

¹³6 EDW. I, c. 8 (1278). See MAITLAND, *op. cit.* note 7, at lvi; 1 HOLDSWORTH, *op. cit.* note 2, at 71 *et seq.* The criminal jurisdiction of the County Court was largely curtailed by the Assizes of Clarendon (1166) and of Northampton (1176).

exclusively its own until the end.¹⁴ In this crippled condition the old folk court lingered on until its abolition by the County Court Act of 1846,¹⁵ which introduced a new system of county courts. In 1867 by statute these new county courts also swallowed up the surviving remnants of the Hundred courts.¹⁶

The king and Witenagemot constituted the only royal and national court of the Anglo-Saxons.¹⁷ Like the other communal courts, it was a legislative, administrative and judicial tribunal. The king presided over this august assembly, in which the suitors were the great prelates and nobles of the realm. Here, too, the plaintiff was not permitted to seek redress unless he was a nobleman or had resorted to the Hundred and Shire Moots and had been denied justice.¹⁸ The Witenagemot was in the nature of a general governing body as that term is used in referring to the High Court of Parliament, or the General Court of Massachusetts, which consists of the governor and his council and both branches of the legislature.¹⁹ Our legislative bodies still exercise some judicial functions in trial of impeachment of public officials, trial of their own members, and formerly in divorce trials. The divorce trial of King George IV against Queen Caroline before the House of Lords in 1820 is a notorious illustration of the legislative jurisdiction over divorce.²⁰

Private Courts

The private courts may be broadly classified as seigniorial and franchise courts. The seigniorial courts were those held by a lord who exercised a private jurisdiction over his tenants, frequently only by right of land tenure.²¹ The later kings of the Anglo-Saxon hierarchy

¹⁴1 HOLDSWORTH, *op. cit.* note 2, at 8; COKE, *op. cit.* note 7, at 266.

¹⁵9 & 10 VICT. c. 95 (1847).

¹⁶County Courts Amendment Act, 30 & 31 VICT. c. 142, § 28.

¹⁷Adams, *op. cit.* note 2, at 22; 1 STUBBS, *op. cit.* note 5, at 135, 141, 146; 1 HOLDSWORTH, *op. cit.* note 2, at 15-16; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, 40-41.

¹⁸Adams, *op. cit.* note 2, at 27; 1 HOLDSWORTH, *op. cit.* note 2, at 9.

¹⁹Rugg, Arthur P., *The General Court of Massachusetts* (1931) 11 B. U. L. REV. 1, 5. For other instances in the early American Colonies, see Reinsch, Paul S., *English Common Law in the Early American Colonies* (1899) 27, 33, reprinted in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 387, 393.

²⁰Trial of Queen Caroline (CAUSES CELEBRES SERIES, 3 vols. 1874). And see Pound, EXECUTIVE JUSTICE (1907) 55 Am. L. Reg. 137.

²¹MAITLAND, DOMESDAY BOOK AND BEYOND (1897) 80, 94; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 587; MAITLAND AND BAILDON, THE COURT BARON (4 Selden Society, 1891); Adams, *op. cit.* note 2, at 50 *et seq.*

Many lords held seigniorial courts for their tenants simply by right of relationship of landlord and tenant without any royal franchise. When these courts were

were profuse in their grants of franchises to favorite nobles, to religious foundations and to boroughs conferring the power to hold courts similar to the Hundred Moot within certain areas or over certain groups of people.²² With the expansion of the feudal system under the Normans nearly all the Hundred Moots were supplanted by these private courts, and private justice came to overshadow public justice. The most prominent of these private courts were the Court Baron, the Court Leet and the Borough Court.

The Court Baron or Court of the Manor was a seigniorial court which possessed the usual civil and criminal jurisdiction of the Hundred Moot. Although normally presided over by the lord's steward of the manor, it continued subject to the Sheriff's Tourn, in which the sheriff presided as he did in the public Hundred courts.²³ Its communal origin may be traced in the rule that unless there were a quorum of at least two freeholders to attend the manor court as suitors the right of manor ceased.²⁴ The manor court is said to have existed in two capacities—one, the true court baron in which the suitors were freeholders, and the other, the copyhold court in which the suitors were copyholders, that is, sub-tenants by custom whose tenancy was evidenced by copy of a court roll.²⁵ The Statute of Quia Emptores (because purchasers, 1290), forbidding the creating of subsidiary estates in fee (subinfeudation), prevented the further establishment of true court barons since thereafter it was impossible to have subordinate freeholders.²⁶ This ancient court of the manor was transplanted to New York and some other early American colonies, as the Statute Quia Emptores was held inapplicable, but it was not popular with the colonist, who had braved

challenged in 1274 by Quo Warranto (by what right) proceedings of Edward I, so many were in this situation that Edward was forced to compromise. Therefore it was settled by the statutes of Quo Warranto in 1290 that lords who could establish the exercise of this private jurisdiction from time immemorial, which was fixed as the commencement of the reign of Richard I (Coeur de Lion, 1189-1199), were confirmed therein as holding by prescription. 1 HOLDSWORTH, *op. cit.* note 2, at 88; MAITLAND, *op. cit.* note 7, at lxxvii.

²²VINOGRADOFF, *op. cit.* note 5, at 108 *et seq.*; MAITLAND, *op. cit.* note 21, at 80-95; TAYLOR, *op. cit.* note 10, at 207 *et seq.*; Corbett, William John, *England From A. D. 954 to the Death of Edward the Confessor* (3 CAMBRIDGE MEDIEVAL HISTORY, Chap. XV, 1924) 405 *et seq.*

²³1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 587, 594; 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769) 90 *et seq.*

²⁴MAITLAND, *op. cit.* note 7, at xlii; MAITLAND, *op. cit.* note 5, at 50; 2 BLACKSTONE, *op. cit.* note 23, at 92n.

²⁵MAITLAND, *op. cit.* note 7, at lxii; 2 BLACKSTONE, *op. cit.* note 23, at 95 *et seq.*

²⁶1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 608 n.

the wilderness to escape the old autocratic order, and soon disappeared.²⁷ A Court of Honor was the seigniorial court of the overlord of several manors to which the subordinate lords of the manor owed suit.²⁸ The County Court Act of 1846 made provision encouraging lords of courts of honor and of manor courts to surrender to the crown their ancient right of holding those courts.²⁹

The Court Leet was a franchise court of a lord or chartered borough empowered to hold view of frankpledge semi-annually within a defined territory and possessed the same jurisdiction as the Sheriff's Tourn.³⁰ It was presided over by the lord's steward of the leet, or by the mayor or provost of the borough.³¹ After the withdrawal of the criminal jurisdiction of the Hundred court, the criminal jurisdiction of the Court Leet became more prominent than its civil and administrative jurisdictions. It remained, however, a petty criminal court limited to trial of crimes less than felony, which it could punish only by fine, and to its more important function of presentment by jury. The presentment was made to the higher king's courts through the presiding officer and was either in the nature of an indictment for a felony other than treason, or of a report after investigation by the jury, much like the functions of our modern grand jury.³² When, under the Normans, the Sheriff's Tourn lost its ancient communal character and became a royal court of record because the sheriff, as the deputy of the king, presided as judge in place of the suitors, the Court Leet adopted the same procedure and also became a court of record.³³

²⁷Depeyster v. Michael, 2 Selden 477, 502 *et seq.* (N. Y. 1852); BOND, Chief Judge Carroll T., THE COURT OF APPEALS OF MARYLAND, A HISTORY (1928) 16, says: "And Captain Thomas Gerrard who maintained the court leet and court baron at St. Clement's Manor, the records of which for the years 1659 to 1672 have been preserved, appears to have been trained in the law; and he named a son Justinian." And see Johnson, John, *Old Maryland Manors*, 1 JOHNS HOPKINS UNIVERSITY HISTORICAL STUDIES (1883).

²⁸MAITLAND, *op. cit.* note 7, at xl *et seq.*; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 609. ²⁹9 & 10 VICT. c. 92, § 14 (1847).

³⁰MAITLAND, *op. cit.* note 7, at xxvii *et seq.*; 1 HOLDSWORTH, *op. cit.* note 2, at 78-81, 135; HUDSON, *Win.*, LEET JURISDICTION IN NORWICH (5 Selden Society, 1891) xvi; COKE, SECOND INSTITUTES, Magna Carta, chap. 35 (1641, Hargrave's ed. 1797) 70; COKE, *op. cit.* note 7, at 261; Preface to Part IX, COKE'S REPORTS, pars. 7-8.

³¹4 HOLDSWORTH, *op. cit.* note 2, at 128; HUDSON, *op. cit.* note 30, at xv, xxvi, points out that sometimes there were several leets in a borough, each presided over by a bailiff.

³²1 HOLDSWORTH, *op. cit.* note 2, at 76, 136 *et seq.*; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 532.

³³1 HOLDSWORTH, *op. cit.* note 2, at 78; 4 BLACKSTONE, *op. cit.* note 23, at 273.

It appears that the more populous villis or boroughs of Anglo-Saxon times had their own communal moots.³⁴ As early as King Edgar (959-975) it was ordained that the borough court should be held three times a year.³⁵ After the Conquest a new kind of borough, the chartered borough, was introduced and borough courts became franchise courts. The borough courts lost their communal character in the thirteenth century and became representative courts in the sense that they were presided over by a group of citizens as judges in the place of the old suitors. In many places this group eventually became the governing body of the city under the name of Board of Aldermen³⁶ or Common Council. In spite of an attempt a century ago to rehabilitate the surviving borough courts they have almost disappeared except in the larger cities of England.³⁷

There were other types of private courts, such as the courts appertaining to certain industries, for example, the Stannary Courts of the tin industry in Cornwall and Devon, which go back to Anglo-Saxon times but subsequently became franchise courts. These courts had jurisdiction over all matters relating to the tin miner and the dealer in tin.³⁸ The ancient universities of Oxford and Cambridge also had their own private courts for the determination of all matters affecting them and their personnel.³⁹

The Anglo-Saxon methods of trial were very primitive and consisted of trial by ordeal and trial by compurgation.⁴⁰ The plaintiff, having made his complaint orally in a fixed form of words, was required to produce a sufficient secta, or body of witnesses, to swear

³⁴I HOLDSWORTH, *op. cit.* note 2, at 132, 143; 4 BLACKSTONE, *op. cit.* note 23, at 274; HUDSON, *op. cit.* note 30, at lxxii *et seq.*

³⁵III EDGAR c. 5, § 1 (circa 965 A. D.); ROBERTSON, *op. cit.* note 5, at 27. The learned editor observes as to this passage: "The meaning of this regulation seems to be that, where the county was divided into burghal districts, meetings of those took place three times a year." *Ibid.*, at 304; MAITLAND, *op. cit.* note 21, at 185; 2 BATESON, MARY, BOROUGH CUSTOMS (21 Selden Society, 1906) cxlv *et seq.*

³⁶I POLLOCK AND MAITLAND, *op. cit.* note 2, at 638, 643-47, 658-59; I HOLDSWORTH, *op. cit.* note 2, at 139 *et seq.* For details of its jurisdiction see 2 *ibid.* 385 *et seq.*

³⁷I HOLDSWORTH, *op. cit.* note 2, at 148-151.

³⁸I HOLDSWORTH, *op. cit.* note 2, at 156 *et seq.*; COKE, *op. cit.* note 7, at 228; 3 BLACKSTONE, *op. cit.* note 23, at 79; LEWIS, GEORGE R., THE STANNARIES (3 Harvard Economic Studies, 1907) 85 *et seq.*

³⁹I HOLDSWORTH, *op. cit.* note 2, at 165 *et seq.*; COKE, *op. cit.* note 7, at 227; 3 BLACKSTONE, *op. cit.* note 23, at 83; 4 *ibid.* 277.

⁴⁰2 POLLOCK AND MAITLAND, *op. cit.* note 2, at 602; LEFROY, *op. cit.* note 3, at 299. See Tarde, Gabriel, *Evolution of Procedure in Primitive and Ancient Legal Institutions*, 2 EVOLUTION OF LAW SERIES (1915) 691 *et seq.* I HOLDSWORTH, *op. cit.* note 2, at 299, 301-305; 2 *ibid.* 107, 171, 195; MAITLAND, *op. cit.* note 5, at 115.

to their belief in the credibility of his claim.⁴¹ If this was satisfactory, the defendant then made the customary formal denial. The court thereupon adjudged that one party should make proof, and named the method of trial, which was usually by compurgation. In Anglo-Saxon times compurgation seems to have been awarded to either the plaintiff or the defendant in the discretion of the court, but normally it was the latter who had to make proof. He did this by swearing to the truth of his plea, and if he could secure a certain number of neighbors, called oath-helpers, who would swear to the same effect, or later, merely that they believed he had sworn the truth, he was exonerated.⁴² This method of trial long ago disappeared in criminal cases but remained available to the defendant in the *contractu* actions of debt on simple contract, *detinue* and account until well into the nineteenth century.⁴³ Trial by ordeal was reserved for the more heinous criminal cases or for persons of notoriously bad character, like our fourth offenders.⁴⁴ The Normans introduced trial by battle and this was soon adopted in the "English courts", as the communal courts came to be known after the Conquest.⁴⁵

THE ANGLO-NORMAN COURTS

The outstanding feature of the Anglo-Norman court system was its gradual centralization into a unified judiciary system for the whole realm. The Anglo-Norman courts were the king's courts and administered a common customary law, which came to be known as "the custom of the realm", and eventually developed into our English Common Law.⁴⁶ William the Conqueror (William I, 1066-1087) did

⁴¹1 HOLDSWORTH, *op. cit.* note 2, at 300; 2 POLLOCK AND MAITLAND, *op. cit.* note 2, at 606 *et seq.*; CARTER, A. T., HISTORY OF ENGLISH LEGAL INSTITUTIONS (1902) 213.

⁴²The number of compurgators required varied with different types of cases and at different times, but was eventually fixed at eleven. STEPHEN, Sir Henry John, PRINCIPLES OF PLEADING (2d ed. 1838) xxxix, note 27; 1 HOLDSWORTH, *op. cit.* note 2, at 305 *et seq.*; 2 POLLOCK AND MAITLAND, *op. cit.* note 2, at 600 *et seq.*; 1 STUBBS, *op. cit.* note 5, at 653 *et seq.*; Lefroy, *op. cit.* note 3, at 299.

⁴³Wager of law was abolished in criminal cases in 1166 by the implied prohibition of the Assize of Clarendon; in civil cases in 1834 by 3 & 4 Wm. IV, c. 42, § 13.

⁴⁴The ordeal was virtually abolished in 1215 by the Fourth Lateran Council of the Church, which forbade the clergy to preside over the ceremony. 1 HOLDSWORTH, *op. cit.* note 2, at 310 *et seq.*; TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY (9th ed. 1929) 32; POUND AND PLUCKNETT, *op. cit.* note 6, at 136; Lefroy, *op. cit.* note 3, at 301; Pollock, *op. cit.* note 3, at 93.

⁴⁵Trial by battle survived until 1819, when it was terminated by statute (59 GEO. III, c. 46). 1 HOLDSWORTH, *op. cit.* note 2, at 308 *et seq.*

⁴⁶JENES, Edward, THE BOOK OF ENGLISH LAW (1928) 21; POUND AND PLUCKNETT, *op. cit.* note 6, at 114 *et seq.*

not abolish the traditional or local English courts.⁴⁷ He made but two significant changes in the judiciary system,—the separation of the ecclesiastical courts from the temporal courts,⁴⁸ and the substitution of the Curia Regis (sometimes called Aula Regis), or King's Court, for the ancient Witenagemot.⁴⁹

The Supreme Anglo-Norman Court

The Curia Regis or King's Court⁵⁰ remained much the same as the Witenagemot in its manifold functions as a general legislative, ex-

⁴⁷I STUBBS, *op. cit.* note 5, at 290; Adams, George Burton, *The Local King's Court in the Reign of William I* (1914) 23 YALE L. J. 490; I POLLOCK AND MAITLAND, *op. cit.* note 2, at 88.

⁴⁸This was accomplished by an undated ordinance now placed at 1072. The ordinance is set forth in Latin in STUBBS, William, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY (1890) 85, and is translated in POUND AND PLUCKNETT, *op. cit.* note 6, at 71. It read in part: "... Wherefore I command, and by royal authority decree, that no bishop or archdeacon shall any longer hold pleas pertaining to the episcopal laws in the hundred court, nor shall they bring before the judgment of secular men any case which pertains to the rule of souls; but whosoever shall be summoned, according to the episcopal laws, for any cause or for any fault, shall come to the place which the bishop shall choose or name for this purpose, and shall there answer in his cause or for his fault, and shall do right to God and his bishop not according to the hundred court, but according to the canons and the episcopal laws..."

The effect of the separation is discussed in I POLLOCK AND MAITLAND, *op. cit.* note 2, at 88 *et seq.*; I STUBBS, *op. cit.* note 5, at 307 *et seq.*; BIGELOW, HISTORY OF PROCEDURE IN ENGLAND (1880) 30 *et seq.*; 2 HOLDSWORTH, *op. cit.* note 2, at 149-150. Cf. Lichtenstein, Walter, *The Date of Separation of Ecclesiastical and Lay Jurisdiction in England* (1909) 3 ILL. L. REV. 347, who casts doubt upon the purpose and effect of the Conqueror's ordinance in separating the ecclesiastical courts from the lay courts at that time. He would fix the date of actual separation in the reign of Stephen (1135-1154). For a discussion of the ecclesiastical courts, see *infra*.

⁴⁹While, as Holdsworth points out, the Witenagemot and the Curia Regis were fundamentally different in that the composition of the latter, unlike the former, was based upon the feudal institution of land tenure, yet it seems clear, as Stubbs says, that the Conqueror made no abrupt change; that when he presided over the three great annual courts at which he wore his crown on the festivals of Christmas, Easter and Whitsuntide, at the three ancient capitals of London, Winchester and Gloucester, he purposely gave the assemblies the dual character of the ancient Witan and of the feudal court. It remained for Roger, Bishop of Salisbury, Chancellor and Justiciar of Henry I (1100-1135), to develop the Curia Regis into a new and distinct institution. I HOLDSWORTH, *op. cit.* note 2, at 32; I STUBBS, *op. cit.* note 5, at 385-387, 399, 472-481; CROSS, Arthur Lyon, HISTORY OF ENGLAND AND GREATER BRITAIN (1916) 97.

⁵⁰BALDWIN, James Fosdick, THE KING'S COUNCIL (1913) Chapter III: I STUBBS, *op. cit.* note 5, at 385, 400, 472; CARTER, *op. cit.* note 41, at 14; I HOLDSWORTH, *op. cit.* note 2, at 32, 38.

ecutive and judicial body. The strength of the ancient Teutonic heritage is demonstrated by the fact that though the Normans introduced a new political theory—the feudal system in which the king was the supreme overlord—the judgments of the Curia Regis long continued to be in form at least those of the assembled nobles and churchmen while the king merely announced the decision as head of the court. The Conqueror and his sons properly valued the added influence that the counsel and consent of the Curia gave to important measures.

The Curia Regis followed the king's person, but frequently the Grand Justiciar presided over it by royal appointment when it functioned as a judicial tribunal. It was a significant day for the king's justice when in 1099 William Rufus (William II, 1087–1100) dedicated Westminster Hall in London Town to be his central palace and the home of the Curia Regis.⁵¹ Thereafter, a Curia Regis was always to be found at Westminster during the absence of the ruler beyond the seas, as well as in the presence of the king wherever he might be, for the term came to be applied to any court held by the authority of the king.⁵² Not only did the Curia Regis function as a well-nigh omnipotent organ of government, but to meet the need of constant supervision and control it, like most governmental organizations of the time, took two general forms:⁵³

The Small or Bureaucratic Curia Regis, which was practically always in session, consisted of the chief officers of state, the officials of the king's household and those tenants in chief who were in attendance at the court. In time it came to be known as the Ordinary Council, and was in fact the normal and efficient governing agency.⁵⁴

⁵¹I POLLOCK AND MAITLAND, *op. cit.* note 2, at 95; TASWELL-LANGMEAD, *op. cit.* note 44, at 124.

⁵²"... We are tempted to use terms which are more precise than those that were current in the twelfth century. In particular we are wont to speak of *the* Curia Regis without remembering that the definite article is not in our documents. Any court held in the king's name by the king's delegates is Curia Regis." I POLLOCK AND MAITLAND, *op. cit.* note 2, at 153. And see: MAITLAND, 1 SELECT PLEAS OF THE CROWN (1 Selden Society, 1887) xii; Inderwick, Frederic A., *The Common Law Courts under Edward I*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 210. The Curia Regis may be likened to the Supreme Court of New York, which sits simultaneously in many branches throughout the state.

⁵³I HOLDSWORTH, *op. cit.* note 2, at 35–41, 55, 351–352, 356–357, 480–481; ADAMS, George Burton, ORIGIN OF THE ENGLISH CONSTITUTION (1912) 345; MAITLAND, *op. cit.* note 5, at 60–64; BALDWIN, *op. cit.* note 50, Chapter V.

⁵⁴I HOLDSWORTH, *op. cit.* note 2, at 495; 4 *ibid.* 64; Pollard, A. F., *Council, Star Chamber, and Privy Council under the Tudors* (1922) 37 ENG. HIST. REV. 337, 530–531.

The Great or Representative Curia, sometimes called the Magnum Concilium, met in early times twice or thrice yearly, or later on by special summons, when matters of wide-spread significance were to be passed upon or when the king sought to win the smaller nobles of the country at large to his support.⁵⁵ Up to the time of Edward I (1272-1307) it consisted only of the greater and lesser nobility, but that monarch, recognizing the advantage of allying himself with an increasingly powerful, wealthy and insistent middle class, called a succession of Great Curiae and invited representatives of the boroughs and counties, that is, of the country at large, to attend.⁵⁶ The calling of these burgesses and common knights or "Commons" into the larger Curia was a momentous step, for it culminated in the Model Parliaments of 1295 and 1305, which became the genesis of that great modern representative body—the Parliament of England. In those days of the beginnings of our institutions the significant thing is that the Great Curia possessed no more power nor authority than the smaller one, the inferior estates of the realm being invited primarily as a friendly overture. They were mere onlookers like gallery guests at a banquet.

We shall see how the Curia Regis, in the sense of that central assemblage around the king's person, evolved into the King and Council, and how it became the mother which gave birth not only to the Parliament but to the several courts which went to make up the great systems of the common law courts and of the prerogative courts, the latter typified by Chancery.

The jurisdiction of the Curia Regis seems to have been limited only by the king's will and the customary procedure of the communal type of court.⁵⁷ It was the great court for great men's cases, and as such it had exclusive jurisdiction over the Norman nobles and the re-

⁵⁵I STUBBS, *op. cit.* note 5, at 398-400; Preface, Part IX COKE'S REPORTS (circa 1612).

⁵⁶McILWAIN, Charles Howard, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* (1910) 21-22, says: "The famous words quoted from Justinian's Code in the writs of 1295, though they have often been over-emphasized, were not entirely an accident,—'what touches all should be approved by all.' The writs of that year to the barons called them to treat with the prelates and other nobles 'and other inhabitants of our realm'...it seems clear that at times Edward felt the need of help, financial or otherwise, from new classes of the people. In such cases they were summoned to his 'Parliament'. But Parliament could exist equally well without them. Their presence was in no sense necessary in order to give legal validity to its acts."

⁵⁷Green, Alice Stopford *The Centralization of Justice Under Henry II*, I SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 113; I STUBBS, *op. cit.* note 5, at 147, 421, 641; BIGELOW, *PLACITA ANGLO-NORMANICA* (1881) xxxv; I SPENCE, *op. cit.* note 2, at 110 *et seq.*

lation of their feudal estates to the crown and to each other. It was also the court of certain groups who were within the special protection of the king, as, for instance, the growing class of merchants and the Jews.⁵⁸ The English must first sue in their own local courts as of old, but cases could be removed therefrom to the Curia Regis upon the king's command.

There gradually grew up in the Curia Regis a simpler and more efficacious procedure than the archaic formalism of the communal courts. Matters affecting the king or his tenants in chief were brought before the royal Curia by the king's writ, addressed to the sheriff, which came to be known as the writ *praecipe quod reddat* from its opening words. It read, "*Praecipe A quod reddat B*" (command A that he render to B) the debt or land, or if he does not, summon him to appear before me or my justices at Westminster and show cause.⁵⁹ This writ assured a speedy and effective justice. The successors of the Conqueror also developed the inquest, a continental fact-finding device introduced into England by the Normans, into an institution which the Curia Regis could employ in judicial proceedings as well as for administrative purposes.⁶⁰ The inquest was a body of neighbors or men of the community who were asked to declare on oath their knowledge as to certain matters, such as ancient boundaries, family history and the like. The innovation consisted in calling an inquest of the neighbors who knew or would be likely to know the true facts in a dispute between the parties to an ordinary law suit. This was the beginning of the famous common law jury, long a body of witnesses, but destined eventually to become the impartial judges of the facts on the evidence before them.⁶¹

⁵⁸Such special groups not within the feudal system were under the direct protection of the sovereign, who commonly permitted them to have their own courts and their own laws among themselves. For example, there was the Exchequer of the Jews, created in 1198, and there was the Law Merchant with its courts. These special courts seem to have been common throughout Western Europe. Jenks, Edward, *Development of Teutonic Law*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 45; 1 HOLDSWORTH, *op. cit.* note 2, at 45; Scrutton, Sir Thomas Edward (now Lord Justice of the Court of Appeal), *General Survey of the History of the Law Merchant*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 7; Burdick, Francis M., *Contributions of the Law Merchant to the Common Law*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 34.

⁵⁹CARTER, *op. cit.* note 41, at 50; 3 BLACKSTONE, *op. cit.* note 23, at 274; TSWELL-LANGMEAD, *op. cit.* note 44, at 100; 1 HOLDSWORTH, *op. cit.* note 2, at 58.

⁶⁰The Domesday Book was compiled by means of the inquest. See 1 HOLDSWORTH, *op. cit.* note 2, at 313; 1 TAYLOR, *op. cit.* note 10, at 326.

⁶¹1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 138 *et seq.*; 1 HOLDSWORTH, *op. cit.* note 2, at 312 *et seq.*; 1 TAYLOR, *op. cit.* note 10, at 325 *et seq.*; THAYER, James Bradley, PRELIMINARY TREATISE ON EVIDENCE (1898) Chap. II.

Development of Anglo-Norman Inferior Royal Courts

Even under the Conqueror and his sons, William Rufus and Henry I (1100-1135), the king frequently empowered certain church dignitaries and nobles by special commission to hold his court (a Curia Regis) for the trial of a particular case.⁶² The judgment became effective when approved by the king. Subsequently these appointments were made on a more permanent basis and those holding them were called "justiciae". When it became inconvenient for the king to administer justice for a time in certain parts of his kingdom, he created special courts presided over by designated justices to hear and determine all matters which would normally come before him. The justices were also employed in investigations of the administration of justice and of the revenues by the sheriffs of the counties. These itinerant justices on such occasions presided over the Sheriff's Tourn in the Hundred Courts and over the County Court in the place of the sheriff, or were associated with him to see that he did justice and protected the king's interest. Such early justices were not purely judicial officers but represented the king in his executive capacity as well.

Up to this point the Curia Regis and its procedure were looked upon as the king's personal prerogative—the justices, the writ and the inquest, or jury, were available alone in his court. Anyone desiring the advantage of jury trial, examination of witnesses,⁶³ or other royal procedure in cases not within the regular jurisdiction of the king's court must purchase by special arrangement the king's writ directing his justices to hear the cause in his court. The sale of the king's justice was an important source of royal revenue.⁶⁴

With the advent of the strong reign of Henry II (1154-1189), first of the Plantagenets, this special prerogative procedure was seized upon as the vehicle for extending the king's peace throughout the nation in place of the ancient peace of the local lord or local community.⁶⁵ That which had been the extraordinary procedure was

⁶²1 HOLDSWORTH, *op. cit.* note 2, at 49 *et seq.*; 1 STUBBS, *op. cit.* note 5, at 478; Adams, *op. cit.* note 47, at 490.

⁶³1 HOLDSWORTH, *op. cit.* note 2, at 303; 2 POLLOCK AND MAITLAND, *op. cit.* note 2, at 638.

⁶⁴1 HOLDSWORTH, *op. cit.* note 2, at 48, Green, *op. cit.* note 57, at 123; 1 STUBBS, *op. cit.* note 5, at 418, 508.

⁶⁵Laughlin, J. Laurence, *The Anglo-Saxon Legal Procedure*, ESSAYS IN ANGLO-SAXON LAW (1876) 271; LAMBARD, William, EIRENARCHA, OR OF THE OFFICE OF JUSTICES OF THE PEACE (1610) Book I, Chap. 2; 1 HOLDSWORTH, *op. cit.* note 2, at 47; 2 *ibid.* 174 *et seq.*; ADAMS, *op. cit.* note 53, at 87, 106, 125; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 144; MAITLAND AND MONTAGUE, SKETCH OF ENGLISH LEGAL HISTORY (1915) 63.

transformed into the usual practice by making available to the general public upon payment of a regular fee the king's writs conferring jurisdiction upon his justices to try the particular case.⁶⁶ Thus the county court was occasionally made a royal court in effect by the Writ of Justicies especially empowering the sheriff to try certain cases not within its ordinary jurisdiction, as for instance, trespass *vi et armis contra pacem domini regis* (by force and arms against the lord king's peace), or after the Statute of Gloucester (1278) pleas involving forty shillings and upwards.⁶⁷ The sheriff then sat as the king's justice and gave judgment instead of merely presiding over the ancient communal court. Henry also transformed the seigniorial courts into branches of the king's court by the famous writ of right (*breve de recto tenendo*) in the most important class of land cases. Normally, land cases were triable in the lord's court, but Henry enacted that no man need answer for his freehold without a royal writ. This new writ, unlike the praecipe, was addressed to the lord rather than to the sheriff, and commanded him to do full right in his court on pain that if he did not, the sheriff should try the case as the king's deputy. Thus the lord came to sit in his own court by the king's writ.⁶⁸ But the chief method by which Henry extended the power of his court at the expense of the local courts was to issue his writ in cases properly within the jurisdiction of those courts, and if the defendant ignored it, to treat this as contempt of the sovereign and as an excuse for trying the entire case in the Curia Regis.⁶⁹

It was the great contribution of Henry II that he carried the royal justice to the people by providing a Curia Regis in every community in addition to the ancient English courts. This was accomplished in 1166 by expanding and systematizing into an institution the itinerant justices, who, as we have seen, had been sent out from time to time as delegates of the Curia Regis to handle all sorts of royal business. These special justices were now organized into regular judicial eyres,

⁶⁶I HOLDSWORTH, *op. cit.* note 2, at 48. Adams, *op. cit.* note 53, at 110 *et seq.*; I POLLOCK AND MAITLAND, *op. cit.* note 2, at 138.

⁶⁷CARTER, *op. cit.* note 41, at 51; I HOLDSWORTH, *op. cit.* note 2, at 72, 188; 3 BLACKSTONE, *op. cit.* note 23, at 36; COKE, *op. cit.* note 7, at 266.

A related practice by which, even after the transfer to the king's courts of the jurisdiction of the county court over major crimes, the sheriff still dealt with these criminal pleas of the crown in the Tourn, was abolished by the 24th Clause of Magna Carta, and thereafter his criminal jurisdiction was limited to misdemeanors. TASWELL-LANGMEAD, *op. cit.* note 44, at 99-100; I STUBBS, *op. cit.* note 5, at 650; I HOLDSWORTH, *op. cit.* note 2, at 57.

⁶⁸I POLLOCK AND MAITLAND, *op. cit.* note 2, at 385 *et seq.*, 587; CARTER, HISTORY OF THE ENGLISH COURTS (1927) 28; 3 HOLDSWORTH, *op. cit.* note 2, at 5.

⁶⁹MAITLAND, *op. cit.* note 5, at 112. This was forbidden by Magna Carta, c. 34.

commissioned to hold pleas between subject and subject arising under Henry's famous ordinances,—the Grand Assize (to determine title to land), and the four petty assizes of Novel Disseisin (recent dispossession), Morte d'Ancestor (dispossession of an heir), Darrein Presentment (right of presentment to a benefice), and Utrum (to determine whether land was lay or church land).⁷⁰ The whole country was divided into circuits and the king's justices heard the case in the locality where it arose. On complaint of oppressions by these justices in Eyre, Henry II, in 1178, created a central court called "the Bench", which eventually became the Common Pleas, and attached it to the Curia Regis for the determination of such cases between subject and subject as were triable by the itinerant justices.⁷¹ Later, some of the justices of this central court were assigned to each circuit, presumably to harmonize the administration of the king's justice in this class of cases.⁷²

These innovations of Henry II accentuated the inefficiency of the ancient courts and they began distinctly to decline.⁷³ Their desultory procedure, their susceptibility to invidious influences and crowd psychology, and their obsolete methods of trial, based chiefly on appeal to the supernatural, were already out of harmony with the new age. Suitors endeavored in every way to escape the burden of court attendance, while litigants, as we have seen, were only too glad to get the king's own private brand of justice with its superior law and procedure. Everyone concerned, except the holder of a seigniorial or franchise court, was anxious for a change. Plaintiffs flocked to the now readily accessible justice of the king's court, where their cases were speedily brought to trial, the facts found by a jury of witnesses, the law administered by professional judges, and a judgment rendered which had behind it the sanction of the royal power. Only the ancient rule requiring the plaintiff to sue in his local court and the survival of the general civil jurisdiction of those courts saved them for another century from eclipse by the king's courts.

There grew up about this time the General Eyre,⁷⁴ a sort of itinerant

⁷⁰I STUBBS, *op. cit.* note 5, at 478, 508; I HOLDSWORTH, *op. cit.* note 2, at 327 *et seq.*; I POLLOCK AND MAITLAND, *op. cit.* note 2, at 146 *et seq.*; MAITLAND AND MONTAGUE, *op. cit.* note 65, at 53; Green, *op. cit.* note 57; JENKS, SHORT HISTORY OF ENGLISH LAW (1912) 49.

⁷¹PLUCKNETT, *op. cit.* note 5, at 127; I HOLDSWORTH, *op. cit.* note 2, at 51 *et seq.*; I STUBBS, *op. cit.* note 5, at 522.

⁷²CARTER, *op. cit.* note 41, at 39; I HOLDSWORTH, *op. cit.* note 2, at 51, 284.

⁷³MAITLAND, *op. cit.* note 7, at liii, lvii; MAITLAND, *op. cit.* note 5, at 111 *et seq.*; I HOLDSWORTH, *op. cit.* note 2, at 71 *et seq.*; 2 *ibid.* 395 *et seq.*

⁷⁴I HOLDSWORTH, *op. cit.* note 2, at 265 *et seq.*; COKE, *op. cit.* note 7, at 184.

inquisition, which visited the counties every seven years to inquire into all matters affecting the king or administration of his justice. The General Eyre superseded all other courts for it stood in the place of the king himself, and the entire community was required to attend. Its justices acted under a general commission to which was attached a list of interrogatories for which they were to seek answers. In addition, they possessed practically unlimited power of investigation into the accounts of the local officials and the administration of the local courts, with full power to institute and try cases and to assess and collect taxes, fines and amercements. They were not even bound by the general procedure of the delegated Curia Regis, since their general commission served in place of the ordinary specific writ. As was to be expected, this court above the law became so oppressive that it was hated by the people, who in the more remote counties took to the forest at its approach.⁷⁵ A new institution was growing up, known as the Assizes, which gradually replaced the ancient Eyres. Apparently sometime between 1335 and 1350 the commissions of General Eyre ceased, and thereafter "these justices itinerant by little and little vanished away."⁷⁶

The Assizes were courts held semi-annually in the shire-towns (county seats) by the King's Justices of Assize and Nisi Prius.⁷⁷ These courts took their name from that great series of statutes of Henry II, mentioned above, by which he extended the king's justice to most pleas of land, and provided itinerant justices to try all cases arising thereunder in the county where the land lay.⁷⁸ With the growth of the three superior common law courts of Westminster, the practice of sending out judges of the Common Bench (Common Pleas), along with the itinerant judges to try assize cases, was extended to the other two courts—King's Bench and Exchequer^{78a}

⁷⁵I POLLOCK AND MAITLAND, *op. cit.* note 2, at 181; I HOLDSWORTH, *op. cit.* note 2, at 271.

⁷⁶COKE, FIRST INSTITUTES (Coke on Littleton, 1628) 293b; I HOLDSWORTH, *op. cit.* note 2, at 272. CARTER, *op. cit.* note 68, at 38, points out that as late as 1346 the Commons petitioned against the continuance of the General Eyres, citing 20 EDWARD III, c. 6.

⁷⁷HOLDSWORTH, *op. cit.* note 2, at 275 *et seq.*; COKE, *op. cit.* note 7, at 158 *et seq.*

⁷⁸I HOLDSWORTH, *op. cit.* note 2, at 50 *et seq.* The 18th clause of Magna Carta also provided that the petty assizes (*i. e.*, other than the Grand Assize) should be tried in the county four times a year by two justices sent for that purpose, assisted by four knights chosen by the county. *Cf.* COKE, *op. cit.* note 30, at 23, which designates this as clause 12 and gives a different reading to it than that which appears in the original Latin copy of Magna Carta as set forth in STUBBS, SELECT CHARTERS, *op. cit.* note 48, at 298, 299, from which the above is taken.

^{78a}These courts are explained *infra*, page 35 *et seq.*

—with additional commissions empowering them also to try criminal cases, until there were enough central court justices regularly to supply the circuits, thus eliminating the need for the old special itinerant judges or the justices of the general eyre.

These Courts of Assize and Nisi Prius became the great trial courts of Common Law England. They are commonly referred to as Nisi Prius Courts. This name was derived from the wording of the writ which called the jury. With the development of the writ system every case had to be brought in one of the Superior Courts at Westminster, and in theory tried there by a jury summoned from the county where the cause of action was laid. This was a great hardship on both litigants and juries (then the witnesses) so relief was provided by summoning them to appear at Westminster *nisi prius* (unless before) the return day the king's judges came into the county in question, in which event it was to be there tried by said judges. The return day was always so set that the judges of assize would arrive before that day on their usual circuits, which were made during the vacations preceding the Easter and Michaelmas Terms.⁷⁹

The two or more judges of the Superior Courts of Common Law at Westminster who went on circuit originally bore six several commissions from the king:⁸⁰

(1) The Commission of Assize, authorizing them to try the old assizes relating to dispossession of land;

(2) The Commission of Nisi Prius described above, which related to jury trial of both civil and criminal causes;

(3) The Commission of the Peace, by which they supervised justices of the peace;

(4) The Commission of Oyer and Terminer, under which they tried indictments for treason, felony and more serious misdemeanors;

(5) The Commission of General Gaol Delivery, which empowered the king's justices to try every prisoner found in gaol for any crime whatever when the judges arrived at the assize town; and

(6) The Commission of Trailbaston,⁸¹ which was directed to the suppression of trailbastons, vagabonds who at the time of the ordinance creating the commission in 1304 were very common at fairs and public gatherings and were notorious for assaulting decent citizens. Although it fell into desuetude long before the other commissions

⁷⁹3 BLACKSTONE, *op. cit.* note 23, at 58; 1 HOLDSWORTH, *op. cit.* note 2, at 278; COKE, *op. cit.* note 7, at 159.

⁸⁰3 BLACKSTONE, *op. cit.* note 23, at 58; 1 HOLDSWORTH, *op. cit.* note 2, at 273 *et seq.*

⁸¹1 HOLDSWORTH, *op. cit.* note 2, at 273; COKE, *op. cit.* note 30, at 541; COKE, *op. cit.* note 7, at 186; CARTER, *op. cit.* note 41, at 77.

were abolished,^{81a} it is of historical importance as "the connecting link between the justices in eyre and the justices of oyer and terminer."⁸²

Many of our states still have criminal courts named after these ancient assizes. For instance, in Pennsylvania serious criminal offenses are tried in the Court of Oyer, Terminer and General Gaol Delivery.

Judges of Assize could not grant an amendment of pleadings,⁸³ nor could they determine a demurrer, as that tested the sufficiency of the pleadings in law, but such matters must be passed upon by the whole court (court in banc) at Westminster, where, under the summons, the case had been originally brought *nisi prius*.

The great Statute of Westminster II (13 Edw. I, 1285) provided that the Judges of Assize should be the "King's sworn justices, associating to themselves one or two discreet knights of each county." Here we have the beginning of the system of lay judges, sometimes referred to as "wooden-head" or "flower-pot" judges, which still prevails in a number of states.⁸⁴ In New Jersey, for instance, the Court of Errors and Appeals, the highest court in the state, has several lay judges sitting on it. This was changed in England, however, by 1340, and thereafter only the common law justices of Westminster and the wearers of the coif—the King's Serjeants—might be appointed Justices of Assizes.⁸⁵

The Courts of the Justices of the Peace gradually supplanted the remaining communal and private courts. As early as the end of the twelfth century the king began to grant, in addition to the itin-

^{81a}By the Judicature Act, 1873. See I HOLDSWORTH *op. cit.* note 2, at 639.

⁸²I HOLDSWORTH, *op. cit.* note 2, at 274.

⁸³*Cf.* NEW YORK CODE OF CIVIL PROCEDURE § 723, under which the trial court could not permit a substantial amendment of the pleadings, such motions being required to be made at Special Term. Since 1921 CIVIL PRACTICE RULE 166 has empowered the trial judge to allow any amendment which the Special Term could formerly allow. *Feizi v. Second Russian Ins. Co.*, 199 App. Div. 775, 192 N. Y. Supp. 118 (1922).

⁸⁴The highest court of New York a century ago was the Court for the Trial of Impeachments and the Correction of Errors, which was presided over by the President of the Senate and thirty-three of the thirty-seven members of which were senators who were not required to be learned in the law. A similar situation existed contemporaneously in the House of Lords.

For an interesting case in Pennsylvania where the two lay judges attempted to reverse the law judge, see *Commonwealth ex rel. v. Lenhart*, 241 Pa. 129, 88 Atl. 359 (1913). And see, HAWKINS, Richard H., NOTES ON COMMON PLEAS PRACTICE (PA.) (1922) 4; I HOLDSWORTH, *op. cit.* note 2, at 281 n.

⁸⁵I HOLDSWORTH, *op. cit.* note 2, at 279; Preface to Part 10, COKE, REPORTS (*circa* 1614).

erant commission, a new commission to certain local gentry, first as keepers or conservators of the peace, and subsequently as justices of the peace. A century later, the Statute of Winchester (1285) systematized this organization. In the reign of Edward III (1326-1377) these officers, who had formerly acted merely in an administrative capacity to receive prisoners and produce them to the justices of the assizes, were empowered to associate with them men wise and learned in the law, to try felonies and trespasses against the peace and to punish the offenders.⁸⁶ Their courts were made courts of record,⁸⁷ and they became petty royal justices, sworn to support the crown and to do right and justice to rich and poor alike.⁸⁸ Soon the justices of the peace became the great organ for the extension and maintenance of the king's peace throughout the kingdom.⁸⁹ So efficient were they in the performance of these judicial functions that the king made them his direct instrumentality of local government. Statute after statute committed to them more and more of administrative details until it was quite impossible accurately to classify all their multifarious duties. They have been aptly called "judicial beasts of burden."⁹⁰

The justices of the peace exercised their jurisdiction in two types of courts, the Quarter Sessions and the Petty Sessions of the Peace.⁹¹

The Quarter Sessions of the Peace were general meetings of all the justices of the county held four times a year. At these meetings a grand jury presented indictments and the Justices of the Quarter Sessions tried by jury the more serious offenses, but determined the lesser crimes themselves and punished the convicted. Even capital felonies other than treason were brought before the Quarter Sessions⁹² until the eighteenth century, when it became customary to reserve such cases for trial at the Assizes.⁹³ In general the criminal jurisdiction of the Quarter Sessions seems to have been concurrent with

⁸⁶18 EDW. III st. 2, c. 2 (1344), and 34 EDW. III c. 1 (1360).

⁸⁷LAMBARD, *op. cit.* note 65, Book I, Chap. 13.

⁸⁸LAMBARD, *op. cit.* note 65, Book I, Chap. 2; I HOLDSWORTH, *op. cit.* note 2, at 289.

⁸⁹BEARD, Charles Austin, JUSTICE OF THE PEACE IN ENGLAND (Columbia Studies in History, Economics and Public Law, 1904) Chapter I and p. 55; HOLDSWORTH, *op. cit.* note 2, at 285; CARTER, *op. cit.* note 68, at 122; COKE, *op. cit.* note 7, at 169; MAITLAND, *op. cit.* note 5, at 207-209.

⁹⁰POTTER, Harold, INTRODUCTION TO THE HISTORY OF ENGLISH LAW (1926) 84; I HOLDSWORTH, *op. cit.* note 2, at 288; MAITLAND, *op. cit.* note 5, at 232.

⁹¹BEARD, *op. cit.* note 89, at 162; I HOLDSWORTH, *op. cit.* note 2, at 292 *et seq.*; PLUCKNETT, *op. cit.* note 5, at 135, 137.

⁹²BEARD, *op. cit.* note 89, at 162n; COKE, *op. cit.* note 85, pointing out that *Fitzherbert's Treatise on Justices of the Peace* erred in denying their jurisdiction over murder. LAMBARD, *op. cit.* note 65, Book II, Chap. 7, accords with Coke.

⁹³I HOLDSWORTH, *op. cit.* note 2, at 293; PLUCKNETT, *op. cit.* note 5, at 137.

that of the justices of assize, except as to matters expressly assigned to one or the other by statute, and the more "difficult" cases, probably so considered because of the prisoner's influence or the state of public opinion, which were required to be sent to the assizes.⁹⁴ A defendant with sufficient means or of some rank could have his case removed to the assizes by a writ of certiorari or, in Tudor or Stuart times, to the King's Council in the Star Chamber on petition. Special Sessions similar to the general sessions of the justices were sometimes required by statute to sit during the recess of the Quarter Sessions. Such sessions could also be convoked by the sheriff at the request of any two justices of the county, one of whom must be of the quorum.⁹⁵ The court of Quarter Sessions was vested with an appellate jurisdiction over the Petty Sessions.

The Petty Sessions were called at the discretion of and presided over by two or more justices for local administrative matters and trial of minor offenses.⁹⁶

The justices of the peace were usually landed gentry appointed by the Lord Chancellor, and thus directly controlled by the central government.⁹⁷ Originally some of the justices of the peace were required to be skilled in the law, and these were known as "the Quorum". The importance attributed to this group may be seen by the requirement that at least one of the two or more justices presiding over a Petty or Special Session must be of the quorum. Holdsworth points out that because of the overwhelming mass of detailed administrative duties imposed upon the justices, for the performance of which no legal knowledge was necessary, the requirement of the quorum came to be generally ignored.⁹⁸ He adds that the

⁹⁴The jurisdiction of the Quarter Sessions was superseded, however, by the Commission of General Gaol Delivery of the Justices of Assize, who took over the exclusive jurisdiction of all untried prisoners found in jail on their arrival at the assize town. I HOLDSWORTH, *op. cit.* note 2, at 293; 4 *ibid.* 142 *et seq.*; MAITLAND, *op. cit.* note 5, at 207; CARTER, *op. cit.* note 41, at 194 *et seq.*

⁹⁵LAMBARD, *op. cit.* note 65, Book IV, Chap. 20.

⁹⁶BEARD, *op. cit.* note 89, at 163; I HOLDSWORTH, *op. cit.* note 2, at 293.

⁹⁷Although Parliament favored the new order of Justices of the Peace, it petitioned Edward III to make the office elective so the justice's first loyalty would be to the local community; but the king foresaw the weakening of the central power by divided loyalty and denied the boon. The Justice of the Peace in England remains to this day an appointed official. MAITLAND, *op. cit.* note 5, at 206; I HOLDSWORTH, *op. cit.* note 2, at 286, BEARD, *op. cit.* note 89, at 42.

⁹⁸LAMBARD, *op. cit.* note 65, Book I, Chap. 9; I HOLDSWORTH, *op. cit.* note 2, at 290. BOND, *op. cit.* note 27, at 11, points out that in seventeenth century Maryland the early distinction between justices of the quorum learned in the law and other justices was maintained.

requisite legal knowledge was supplied by the clerk of the peace, who was appointed by the Custos Rotulorum (a member of the quorum and keeper of the county rolls of the peace), and was also usually the clerk of the assizes.⁹⁹ The situation was probably not as unfortunate as we are likely to assume, since most of these country gentlemen possessed a fair knowledge of the criminal and land laws.¹⁰⁰

The broadening of the administrative functions of the justice of the peace dates from the middle of the fourteenth century. Following the Black Death (1349) the famous Statute of Laborers (23 Edw. III, 1352) created new officials called Justices of Laborers and empowered them to fix wages and prices of the necessities of life. Before the end of Edward III's reign (1377), however, the two classes of petty justices were merged by the issuance of joint commissions as Justice of the Peace and Justice of Laborers. And so it came to pass that for many centuries thereafter twice a year at their Quarter Sessions the justices of each county set the rate of wages and the prices of essential commodities which should prevail in that county for the ensuing half year.¹⁰¹ The individual justices and their courts of sessions succeeded the hundred and county courts as the governing agencies of the county and its subdivisions. By innumerable statutes they were converted, as we have seen, into the great administrative organ for regulating the detailed affairs of community life. Theirs was the duty to see that the highways and bridges were kept in repair and free of marauders; to enforce the sumptuary laws directed against dressing above one's class or designed to aid home industries, such as the provisions for fish days and meat days and the wearing of woolens and other materials; to compel "sturdy beggars" to work; to

⁹⁹PLUCKNETT, *op. cit.* note 5, at 136. Also see BEARD, *op. cit.* note 89, at 157. The office of Custos Rotulorum seems to have been one of honor. "Generally the same person is appointed Lord Lieutenant and *custos rotulorum*—and it is in the latter character rather than the former that he comes to be regarded as the first among the justices." MAYTLAND, *op. cit.* note 5, at 235; 4 HOLDSWORTH, *op. cit.* note 2, at 149. And see SHAKESPEARE, William, MERRY WIVES OF WINDSOR, Act I, Scene 1.

¹⁰⁰On the effect of the institution of justice of the peace in developing the class of country gentlemen who became the backbone of English society, see PALGRAVE, Sir Francis, ORIGINAL AUTHORITY OF THE KING'S COUNCIL (1834) 105; 1 HOLDSWORTH, *op. cit.* note 2, at 291.

¹⁰¹The Statutes of Laborers, 5 ELIZ. c. 4 (1562) and 2 JAC. I, c. 6 (1604), also provided a system of wage regulation.

See ROBERTS, George, SOCIAL HISTORY OF THE SOUTHERN COUNTIES OF ENGLAND (1856) 205 *et seq.* for the wage list for the years 1444 and 1633, and *ibid.* 194 for price-fixing by local authorities.

ferret out heresies and fomentation of rebellion; to license ale houses; and to regulate the public services and charitable institutions of the day.¹⁰²

It is to the honor of the country gentlemen of England that they rendered this onerous public service with little or no financial remuneration. In the early days the justice of the peace was allowed meager fees, but for the greater part of his history, he not only received no fee or salary but paid handsomely for his *Dedimus Potestatem*, (we have conferred the authority), that is, his commission of appointment.¹⁰³ This is of interest to us because the question of remuneration of the justice of the peace in old England has recently assumed importance in American constitutional law.¹⁰⁴ This great institution was transplanted to America, and the office of justice of the peace is still to be found in most of our states, although sadly diminished from its ancient dignity both in power and prestige. A number of states have named inferior criminal trial courts for the periodic meetings of the justices. Pennsylvania, for example, has a criminal court called the Court of Quarter Sessions for the trial of misdemeanors, while New York has the Court of General Sessions of the Peace in and for the City of New York, and the Court of Special Sessions in the City of New York.

The Coroner's Court¹⁰⁵ (court of the coronator or keeper of the pleas of the crown) was probably another of the innovations of Henry II, although it is first directly mentioned in the Articles of the Eyre of 1194 (5 Richard I, 1189-1199). This court was a court of record, and it was the coroner's duty to enforce those pleas of the crown which sought to protect the king's prerogative right to chattels

¹⁰²BEARD, *op. cit.* note 89, at 58 *et seq.*; I HOLDSWORTH, *op. cit.* note 2, at 288 *et seq.*; 4 *ibid.* 139 *et seq.*

¹⁰³I HOLDSWORTH, *op. cit.* note 2, at 289; LAMBARD, *op. cit.* note 65, Book III, Chap. 4.

¹⁰⁴In *Tumey v. Ohio*, 273 U. S. 510, 47 Sup. Ct. 437 (1927), Taft, C. J., held that since historically the justice of the peace served without remuneration and the English law jealously guarded against the justice's having an interest in the outcome of a case before him, it was a denial of due process of law under the Fourteenth Amendment to the United States Constitution where a prisoner was convicted and fined by a justice of the peace whose fee was by law a share of the fine.

¹⁰⁵I HOLDSWORTH, *op. cit.* note 2, at 82 *et seq.*; GROSS, Charles, SELECT CORONERS' ROLLS (9 Selden Society, 1895) xiv-xxxvi; CARTER, *op. cit.* note 41, at 188 *et seq.*; I REEVES, John, HISTORY OF ENGLISH LAW (1783—Finlason's ed. 1867) 466 *et seq.*; 2 *ibid.* 51 *et seq.*; I BLACKSTONE, *op. cit.* note 23, at 348; COKE, *op. cit.* note 7, at 270 *et seq.* The great statute defining the authority and duties of the coroner is the Statute De Officio Coronatoris, 4 EDW. I, Stat. 2 (1276).

royal and to certain forfeitures.¹⁰⁶ For this purpose he summoned an inquest to ascertain whether there had accrued to the king any unreported wrecks, royal fish, treasure trove, or deodands in the neighborhood,¹⁰⁷ or to inquire into homicide or other untimely death of a human being on view of the body, and to determine where possible who were the guilty parties. His interest in such deaths arose primarily from the fact that all the goods and chattels of a murderer or suicide were forfeited to the king, and even if the perpetrator of a murder could not be discovered, the hundred, as we have seen, had to pay a fine which went to enrich the royal revenues.¹⁰⁸ The entire record of the inquisition was required to be certified by the coroner to the King's Bench or to the justices of the assizes for further proceedings. It is in this last capacity as an agency to investigate violent or suspicious deaths that the coroner's court survives in England and in most of our states.¹⁰⁹

There were four coroners in each county, who, at least from 1194, were elected for life by the suitors of the county court. The office of coroner seems to have been created by the king as a means of controlling the cupidity of the sheriff. To this day, both in England and in most of the American jurisdictions, including New York, the coroner has the power of arresting the sheriff if the latter misbehaves, and stands as alternate for him if he is disqualified because he is a party to a case or for other reasons.¹¹⁰

¹⁰⁶Clause 24 of Magna Carta forbade coroners as well as sheriffs to hold pleas of the crown: from this some writers have concluded that the coroner previously conducted such criminal trials himself. GROSS, *op. cit.* note 105, at xvi; 1 HOLDSWORTH, *op. cit.* note 2, at 83. Maitland, however, disagreed. 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 534.

¹⁰⁷"Royal fish" were whales and sturgeon, and, according to some authorities, porpoises, caught near or cast upon the shore. A "deodand" was a chattel which directly caused the accidental death of a human being. "Treasure trove" (found treasure) was money or gold or silver, plate or bullion, hidden in the earth or other private place, whose owner was unknown. Such chattels were called royal because perquisites of the crown under the royal prerogative. 1 BLACKSTONE, *op. cit.* note 23, at 290 *et seq.*; and see BOUVIER, JOHN, LAW DICTIONARY (Rawle's ed. 1914) tit. Fish Royal; MARSDEN, Reginald G., 2 SELECT PLEAS IN THE COURT OF ADMIRALTY (11 Selden Society, 1897) xxix.

¹⁰⁸See note 8, *supra*.

¹⁰⁹The English coroner still inquires into the discovery of treasure trove. In Massachusetts, on the other hand, the office of coroner has been abolished and the coroner's chief modern duty has been vested in a "medical examiner". MASS. GEN. LAWS (1921) Chap. 38.

¹¹⁰1 BLACKSTONE, *op. cit.* note 23, at 349; COKE, *op. cit.* note 7, at 271; 1 HOLDSWORTH, *op. cit.* note 2, at 86. See N. Y. CONS. LAWS, c. 11 (COUNTY LAW) §§ 187, 196-199, and N. Y. CIVIL PRACTICE ACT § 1560.

The Court of Piepoudre, or Piepowder (the dusty foot court),¹¹¹ which Blackstone called "the lowest, and at the same time most expeditious court of justice known to the law of England," stands out today as one of the most important of the numerous ancient courts of inferior jurisdiction. It was a temporary and transitory court of record of summary jurisdiction, usually held in connection with fairs and markets, although such courts might also be held by custom or prescription in villis or boroughs.¹¹² Where the fair was a franchise of some lord, the court was held by the lord's steward. As in the old communal courts, the judgments were given by the assembled merchants who knew the customs.¹¹³ Its jurisdiction extended to both civil and criminal matters which arose at the fair and of which complaint was made on the day of injury, when those involved were immediately brought before it and the case tried.¹¹⁴ It was not a common law court but a court of the Law Merchant, and administered the special law of merchants which prevailed throughout western Europe.¹¹⁵ While noted for its speedy, informal and inexpensive administration of justice, it was really not a small cause court. The foreign traders who predominated at the great fairs of the time could not risk the peculiarities, delays and prejudice of native law and native courts, but submitted all disputes both great and small to this chance assembly of their brother merchants. This ancient court of the fairs became practically obsolete when the common law assimilated the law merchant in the seventeenth and eighteenth centuries.¹¹⁶ The Piepowder Court has become the model on which those who are today seeking to reform the administration of justice to the poor in the United States are endeavoring to build a modern system of small cause courts.¹¹⁷

¹¹¹COKE, *op. cit.* note 7, at 272, calls this court "Curia Pedis pulverisati" (court of the dusty foot). 3 BLACKSTONE, *op. cit.* note 23, at 32; *ibid.* (Jones' ed. 1915) 33n.; GROSS, 1 SELECT CASES CONCERNING THE LAW MERCHANT (23 Selden Society, 1908) at xvi *et seq.*

¹¹²COKE, *op. cit.* note 7, at 272; Goodson v. Duffield, Croke's Jacobus 313 (1613). CARTER, *op. cit.* note 41, at 257, refers to the then existing Piepoudre Court of Bristol, England.

¹¹³CARTER, *op. cit.* note 41, at 256; 1 HOLDSWORTH, *op. cit.* note 2, at 539.

¹¹⁴COKE, *op. cit.* note 7, at 272.

¹¹⁵1 HOLDSWORTH, *op. cit.* note 2, Chap. 3; 8 *ibid.* Chap. 4; Scrutton, *op. cit.* note 58, at 7; Burdick, *op. cit.* note 58, at 34.

¹¹⁶1 HOLDSWORTH, *op. cit.* note 2, at 539; GROSS, *op. cit.* note 111, at xix.

¹¹⁷SCHRAMM, Gustav L., PIEDPOUDRE COURTS—A STUDY OF THE SMALL CLAIM LITIGANT IN THE PITTSBURGH DISTRICT (1928) 4, reviewed by R. H. Smith, (1928) 14 CORNELL LAW QUARTERLY 121; SMITH, Reginald Heber, JUSTICE AND THE POOR (1919), Chapter VIII.

THE ENGLISH JUDICATURE SYSTEM NEAR THE END OF THE
WESTMINSTER EPOCH (1099-1883)

The Curia Regis, although it followed the king, as we have seen, normally sat at Westminster Hall after the dedication of that famous edifice of law in 1099, since that was the principal palace of the early kings of England.¹¹⁸ It was natural, therefore, that the several courts which gradually evolved from that powerful tribunal should take their places beside it in what has been well termed "the spacious nursery of the English Common Law,"¹¹⁹ where they continued to sit until well within the memory of men now living.¹²⁰ True, this long residence at Westminster (1099-1883), which for convenience may be called the Westminster epoch, extends a decade beyond the life of the great courts whose history we are studying, and embraces the interesting beginnings of the new statutory system that took their place.¹²¹ This paper, however, will treat only of the development and maturity of the classic English judiciary system¹²² as it existed just prior to its complete reorganization by the Judicature Acts of 1873-1875.¹²³

¹¹⁸POOLE, Reginald L., *THE EXCHEQUER IN THE TWELFTH CENTURY* (1912) 176.

¹¹⁹TREVELYAN, George Macaulay, *HISTORY OF ENGLAND* (1926) 130n.

¹²⁰Bowen, Lord, *Progress in the Administration of Justice During the Victorian Period*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 516, 541; 1 HOLDSWORTH, *op. cit.* note 2, at 648 *et seq.*

¹²¹The Superior Courts of Westminster and all other royal courts of civil jurisdiction, except the House of Lords, the Privy Council and the County and Municipal Courts, moved in January, 1883, to a new central palace of justice in London, known as the Royal Courts of Justice or the Law Courts Building. This splendid edifice, which cost nearly £1,000,000, was formally opened on December 4, 1882, when all the judges of England with the Lord Chancellor at their head followed the Queen from historic Westminster to the new hall; but the courts did not begin to function there until the opening of the January term, January 11, 1883. The Criminal Courts now occupy a fine building of their own on the site of the "Old Bailey" prison. BESANT, Sir Walter, *LONDON IN THE NINETEENTH CENTURY* (1909) 142; Inderwick, Frederic A., *THE KING'S PEACE* (1895) 233; Leaming, Thomas, *A PHILADELPHIA LAWYER IN THE LONDON COURTS* (2d ed. 1912) 1, 131 *et seq.*

¹²²Although we are here describing what is in reality the judicial system of the developed common law, it seems unwise to designate it as the common law juridical system, for, as in the centuries past, our common law system still goes on developing, and from the vantage point of a thousand years hence even the innovations of the Judicature Acts will appear simply as an interesting phase in that greater age-old evolution.

¹²³36 & 37 VICT. c. 66 (1873); 38 & 39 VICT. c. 77 (1875). The Act of 1873 became effective November 2, 1874.

I. *The Central Courts of Original Jurisdiction*a. *The Three Superior Courts of the Common Law*

The Court of Exchequer (*Curia Scaccarii*) originated in the reign of Henry I (1100-1135) as the revenue department of the Curia Regis and was the first of the common law courts of Westminster to become a distinct tribunal, which it did sometime before 1118. By 1179 a book had appeared describing its procedure.¹²⁴ The court took its name from the great table around which it met, and which was laid out in checkerboard squares for convenience in counting the revenues.¹²⁵ Originally, it was the central royal tax board rather than a common law court. When it developed into a court it administered a type of law of its own—an admixture of law, equity and executive duties, primarily designed to make effective its jurisdiction in relation to the royal revenues. By the fifteenth century, however, it began to administer both law and equity separately.¹²⁶ The Chancery side of the court was held in the room called the Exchequer Chamber at Westminster¹²⁷ and continued down to 1842, when it was transferred to the Court of Chancery.¹²⁸ On the law side it early extended its jurisdiction into the field of the common pleas by a fictitious use of the Writ Quominus.¹²⁹ A person desiring to sue in the Exchequer on any matter other than a plea of land¹³⁰ could allege that he was a debtor of the king; that the defendant had injured him, and, therefore, he was less able to pay the king. Since this fiction was not allowed to be denied, the case was deemed to raise a

¹²⁴This book was the *DIALOGUS DE SCACCARIO* by Richard, Son of Nigel, Treasurer of England and Bishop of London. On the origin of the court, see: Introduction to Hughes, Crump and Johnson's edition of the *DIALOGUS DE SCACCARIO* (1902) 13 *et seq.*; POOLE, *op. cit.* note 118, at 40, 57, 174; I HOLDSWORTH, *op. cit.* note 2, at 42-43, 231 *et seq.*; I POLLOCK AND MAITLAND, *op. cit.* note 2, at 109, 161; CARTER, *op. cit.* note 68, at 16; I STUBBS, *op. cit.* note 5, at 474; TASWELL-LANGMEAD, *op. cit.* note 44, at 124; BALDWIN, *op. cit.* note 50, at 41. Tout, T. F., *The Place of the Reign of Henry II in English History* (1914) 43 *et seq.*, 330.

¹²⁵3 BLACKSTONE, *op. cit.* note 23, at 44; Introduction to *DIALOGUS DE SCACCARIO*, *op. cit.* note 124, at 38 *et seq.*; MAITLAND, *op. cit.* note 5, at 63.

¹²⁶I HOLDSWORTH, *op. cit.* note 2, at 242.

¹²⁷PLUCKNETT, *op. cit.* note 5, at 126; 3 BLACKSTONE, *op. cit.* note 23, at 44; COKE, *op. cit.* note 7, at 117, entitles a chapter "The Court of Equity in the Exchequer Chamber." Also see *ibid.* 109.

¹²⁸I HOLDSWORTH, *op. cit.* note 2, at 242.

¹²⁹*Quo minus sufficiens existit* ("By which the less sufficient exists" [to pay his taxes], or, as more commonly translated, "By which he is less able" [to pay his taxes]). 3 BLACKSTONE, *op. cit.* note 23, at 45; CARTER, *op. cit.* note 68, at 52; I HOLDSWORTH, *op. cit.* note 2, at 240.

¹³⁰The Common Pleas retained its ancient exclusive jurisdiction over all questions of land. See page 37, *infra*.

question of revenue and, therefore, to be within the Exchequer jurisdiction.¹³¹ The Exchequer was presided over by a Chief Baron and three puisne (puny) barons.

The Court of Common Pleas (*Communia Placita*), originally called "the Bench" or "Common Bench", seems to have been created by Henry II when, in 1178, he designated five judges to accompany his court for the trial of cases between subject and subject.¹³² It began as a kind of central itinerant court, for by the terms of its creation, it was required not to depart from the King's Court, which, as we have seen, followed the peregrinations of the sovereign. If questions arose which the judges could not solve, they were to refer the matter to King and Council.¹³³ During the thirteenth century the Common Bench gradually lost its itinerant character in obedience to the seventeenth clause of Magna Carta, which provided that the Common Pleas should no longer follow the Curia Regis but should be held in one place.¹³⁴ Not until 1224, however, when Henry III (1216-1272) took the reins of government upon attaining his majority, did the Common Pleas emerge as a distinct court having its own separate records called the "De Banco Rolls".¹³⁵ Thus, the Common Pleas came to be the second of the superior courts to sit permanently at Westminster.

Coke describes the Common Pleas as "the lock and key of the common law."¹³⁶ Not only did it try the same type of common pleas as did the itinerant justices, but, as previously stated, some justices from this central court accompanied each circuit or eyre to harmonize the king's justice in this class of cases.¹³⁷ As has been well said, "the establishment of a [this] central court, with its itinerant satellites, produced the Common Law."¹³⁸

¹³¹I HOLDSWORTH, *op. cit.* note 2, at 240, stating that this device for suing in the Exchequer instead of the Common Pleas was invented as early as 1345-46 to prevent the defendant from waging his law. 3 BLACKSTONE, *op. cit.* note 23, at 45, 286; CARTER, *op. cit.* note 68, at 52; PLUCKNETT, *op. cit.* note 5, at 145.

¹³²PLUCKNETT, *op. cit.* note 5, at 127-128; Adams, G. B., *The Origin of the English Courts of Common Law* (1921) 30 YALE L. J. 798; I HOLDSWORTH, *op. cit.* note 2, at 51-53; BALDWIN, *op. cit.* note 50, at 49; I POLLOCK AND MAITLAND, *op. cit.* note 2, at 198; MAITLAND, *op. cit.* note 52, at xii *et seq.* Cf. POOLE, *op. cit.* note 118, at 179 *et seq.*

¹³³See note 132, *supra*.

¹³⁴I STUBBS, *op. cit.* note 48, at 299; I HOLDSWORTH, *op. cit.* note 2, at 196; I STUBBS, *op. cit.* note 5, at 575.

¹³⁵PLUCKNETT, *op. cit.* note 5, at 129; I HOLDSWORTH, *op. cit.* note 2, at 195-196.

¹³⁶COKE, *op. cit.* note 7, at 98.

¹³⁷Inderwick, *op. cit.* note 52, at 210.

¹³⁸CARTER, *op. cit.* note 68, at 39.

The Common Pleas was the great court of original jurisdiction between subject and subject in civil actions, both real and personal. Eventually, the other two great common law courts, Exchequer and King's Bench, by the use of legal fictions, secured concurrent jurisdiction as to personal actions, but the Common Pleas retained its exclusive jurisdiction of pleas of land to the end.¹³⁹

In its early days the Common Pleas exercised a supervisory jurisdiction over the ancient local courts with power to remove cases to itself from such courts and to correct by various writs false judgments and other abuses therein.¹⁴⁰ As the old communal courts became practically obsolete, this jurisdiction declined. Early in the seventeenth century, the Common Pleas, under the leadership of Lord Chief Justice Coke, championed the cause of the common law against the encroachment of the prerogative courts. To carry on the struggle it assumed under color of its general jurisdiction the power to issue writs of prohibition and habeas corpus with respect to cases pending in those courts.¹⁴¹ Dean Pound cites an instance in 1612 of the exercise of this jurisdiction by the Common Pleas to prohibit the High Commission, the prerogative ecclesiastical court, from infringing upon the domain of the common law by the arrest of a citizen in violation of his common law rights.¹⁴² Lord Chancellor Ellesmere won the epic conflict of jurisdictions for Chancery in 1616,¹⁴³ but the common law triumphed over its other most prominent adversaries, the Star Chamber and the High Commission, before the middle of the century. This assumed jurisdiction later fell into disuse with the increase in the power of the King's Bench over inferior

¹³⁹I HOLDSWORTH, *op. cit.* note 2, at 198 *et seq.*; 3 BLACKSTONE, *op. cit.* note 23, at 40. An exception existed with respect to the jurisdiction of the King's Bench over the assize of novel disseisin in the county in which the court sat. See page 39, *infra*.

¹⁴⁰I HOLDSWORTH, *op. cit.* note 2, at 200. Removal of causes from the local courts to Common Pleas was by Writ Pone and not by Certiorari to Review.

¹⁴¹For a discussion of the prerogative writs, including the writ of prohibition and the writ of habeas corpus, see page 40, *infra*. I HOLDSWORTH, *op. cit.* note 2, at 202. COKE, *op. cit.* note 7, at 99, where he says that this jurisdiction could be exercised without an original writ "for the common law which in those cases is a prohibition in itself stands instead of an original [writ]."

¹⁴²POUND, Roscoe, Dean of Harvard University Law School, *THE SPIRIT OF THE COMMON LAW* (1921) 60.

¹⁴³2 Campbell, Sir John, *LIVES OF THE LORD CHANCELLORS* (3d ed. 1848) 259, *Life of Lord Ellesmere*, MAITLAND, *EQUITY* (1929) 9. The Court of Admiralty, which will be discussed in the next installment of this article, also survived the attacks of Lord Chief Justice Coke.

tribunals, and over the issuance of prerogative writs incident to the downfall of the Star Chamber.¹⁴⁴

The Common Pleas was the court which raised the few barristers chosen annually to the enviable rank of Serjeant-at-law and member of the ancient Order of the Coif, as the fraternity of serjeants organized about 1300 was called. The judges of the superior courts of the common law and of the assizes were selected exclusively from the members of the Coif, and until the Judicature Acts the Serjeants enjoyed a monopoly of practice before the Common Pleas. The Order of the Coif did not long survive the abolition of the Common Law Courts.¹⁴⁵

A separate chief justice was appointed for the Common Pleas in 1272, and thereafter the court consisted of the chief justice and three or four puisne justices.¹⁴⁶

The popularity of the Court of Common Pleas in Puritan England and its connotation of democracy in the minds of the people have made it the popular name for courts of original jurisdiction in the United States.¹⁴⁷

The King's Bench (Queen's Bench, under a female sovereign) succeeded to the *coram rege* jurisdiction of the Curia Regis upon the appointment of a Chief Justice to preside over it about 1268.¹⁴⁸ The records of pleas *coram rege* were separated from the records of the Common Bench and of the King and Council under the title "Coram Rege Rolls" at the time the "De Banco Rolls" of the Common Pleas were created in 1224.¹⁴⁹ A few years later litigation before the king

¹⁴⁴See discussion under the Court of Star Chamber, *infra*.

¹⁴⁵The decline of the Order of the Coif was coincident with an increased liberality in the nineteenth century in granting the superior dignity of King's (or Queen's) Counsel by royal patent to leading members of the bar. Lord Justice Lindley was the last barrister to be made a Serjeant-at-law. The name of this ancient and honorable order has been revived in America in the Order of the Coif, the honorary legal fraternity. PULLING, Serjeant Alexander, ORDER OF THE COIF (1884); I HOLDSWORTH, *op. cit.* note 2, at 197; 2 *ibid.* 486 *et seq.*; COKE, *op. cit.* note 7, at 72. And see ENCYCLOPAEDIA BRITANNICA (14th ed. 1930) tit. Lindley, Sir Nathaniel.

¹⁴⁶3 BLACKSTONE, *op. cit.* note 23, at 40; I HOLDSWORTH, *op. cit.* note 2, at 196.

¹⁴⁷Connecticut, Maryland, New Jersey, Ohio, Pennsylvania and South Carolina have courts of Common Pleas, which are courts of general jurisdiction corresponding to the Supreme Court of New York.

¹⁴⁸I POLLOCK AND MAITLAND, *op. cit.* note 2, at 204; I HOLDSWORTH, *op. cit.* note 2, at 204; BALDWIN, *op. cit.* note 50, at 54, 62 *et seq.*; COKE, *op. cit.* note 7, at 70; Adams, *op. cit.* note 132, at 805 *et seq.*

¹⁴⁹During the minority of Henry III, even the *coram rege* cases were heard before the king's justices at Westminster, since it was considered that under the law the king could not administer justice in person until he became of age.

had so increased with the extension of the Writ of Trespass that the task of hearing these cases was delegated to certain qualified members of the Curia Regis, who were designated "The Justices assigned for the holding of pleas before the King himself." With the appointment of its own chief justice, this group became a professional court, but it was not until late in the next century that it settled down as one of the great courts of Westminster.¹⁵⁰ Though, in theory, the king presided in person over the King's Bench, it was held as early as the reign of Henry VI (1422-1461) that since the king had by his laws delegated his judicial power over pleas *coram rege* to this court, he had thereby relinquished the right to give judgment in any cause therein, and so Lord Chief Justice Coke advised James I (1603-1625).¹⁵¹ The original jurisdiction *coram rege* of the King's Bench covered important pleas of the crown, civil causes involving force or in which the king was plaintiff, replevin and assizes of novel disseisin in the same county in which the court sat.¹⁵² It was the great criminal court of Westminster. Its judges attended the assizes to try the *nisi prius* criminal cases as Judges of Oyer, Terminer and General Gaol Delivery.¹⁵³ After the seventeenth century, all capital cases were tried at the assizes by judges of the King's Bench.¹⁵⁴

Its original civil jurisdiction covered trespass and other injuries alleged to have been committed *vi et armis contra pacem domini regis*, including Case for fraud and deceit.¹⁵⁵ Later, by a fictitious use of the Writ Latitat, it extended its jurisdiction over other personal actions concurrently with the Court of Common Pleas. This was done by permitting a plaintiff who wished to sue on debt, detinue, covenant or account to begin his action by a Bill of Middlesex alleging a tres-

These cases were described as held "coram consilio nostro", "coram H. de Burgo justiciario" and the like. 1 HOLDSWORTH, *op. cit.* note 2, at 196, 204; 1 POLLOCK AND MAITLAND, *op. cit.* note 2, at 198.

¹⁵⁰1 HOLDSWORTH, *op. cit.* note 2, at 204, 207; CARTER, *op. cit.* note 68, at 50; PLUCKNETT, *op. cit.* note 5, at 128.

¹⁵¹Prohibitions del Roy, 12 Coke's Reports 63 (1608). Here Lord Coke narrates this interview, saying the king was much offended. POUND, *op. cit.* note 142; 1 HOLDSWORTH, *op. cit.* note 2, at 207.

¹⁵²Hale, Lord Chief Justice, *Concerning the Courts of King's Bench and Common Pleas* (circa 1655), printed in HARGRAVE, FRANCIS, *LAW TRACTS* (1787) 360-361; COKE, *op. cit.* note 7, at 71-72; 1 HOLDSWORTH, *op. cit.* note 2, at 212 *et seq.*, 218-219.

¹⁵³1 HOLDSWORTH, *op. cit.* note 2, at 212 *et seq.*; COKE, *op. cit.* note 7, at 73; 3 BLACKSTONE, *op. cit.* note 23, at 265, 269.

¹⁵⁴See page 28, *supra*.

¹⁵⁵3 BLACKSTONE, *op. cit.* note 23, at 42; 1 HOLDSWORTH, *op. cit.* note 2, at 218 *et seq.*; Hale, *op. cit.* note 152, at 362, 363; COKE, *op. cit.* note 7, at 71.

pass. Thereupon the sheriff of Middlesex County, in which Westminster lay, was directed to arrest the defendant. If he succeeded, the defendant was delivered into the custody of the Marshal of the Court of the Marshalsea, who acted as custodian of defendants for the King's Bench. The rule was then applied that once the King's Bench got the defendant in its custody, it could allow any action to be maintained against him in that court. Therefore, the plaintiff was allowed to file a new complaint setting forth the true action, as, for example, debt. If the sheriff of Middlesex made a return that he could not find the defendant, the court issued the famous Writ *Latitat* to the sheriff of the county where the defendant was, stating that he was there hiding and scurrying about (*latitat et discurrit*), and directing his apprehension and delivery to the Marshal. Once in custody of the Marshal, the defendant was allowed bail, but the court, thus having acquired jurisdiction, proceeded as before to permit the real claim for debt to be pleaded against him.¹⁵⁶ These fictitious processes of the law courts of Westminster were abolished by the Uniformity of Process Act in 1832, but the concurrent jurisdiction which had thus been established continued.¹⁵⁷

Coke tells us of still another way in which the King's Bench snatched jurisdiction in civil actions from the Common Pleas. If a case came before the King's Bench in the exercise of its appellate jurisdiction, and a new trial became necessary, that court would go ahead and try the case although such a case could not have been brought before it as an original matter. For example, if the Common Pleas in a real (land) action abated the original writ because it was defective, and on error the King's Bench sustained its validity, the King's Bench then proceeded to try the case on that original writ.¹⁵⁸

The King's Bench, as successor to the *coram rege* jurisdiction, exercised supervision over the conduct of other courts and of officials by means of the "Prerogative Writs", so-called because issued in the king's name, under his sovereign prerogative.¹⁵⁹ These ancient writs,

¹⁵⁶Hale, *op. cit.* note 152, at 366 *et seq.*; COKE, *op. cit.* note 7, at 71-72, 76; PERRY, R. ROSS, COMMON LAW PLEADING (1897) 153. CARTER, *op. cit.* note 68, at 52 *et seq.* gives a good summary of the unseemly scramble for jurisdiction among the three superior courts of common law. Also see, Anonymous, *Jurisdiction of the King's Bench over Wales by Process of Latitat* (1745), printed in HARGRAVE, LAW TRACTS (1787) 379 *et seq.*

¹⁵⁷2 WM. IV c. 39 (1832); 1 HOLDSWORTH, *op. cit.* note 2, at 222, 240; CARTER, *op. cit.* note 68, at 55. ¹⁵⁸COKE, *op. cit.* note 7, at 72.

¹⁵⁹1 HOLDSWORTH, *op. cit.* note 2, at 226 *et seq.*; CARTER, *op. cit.* note 68, at 55; 3 BLACKSTONE, *op. cit.* note 23, at 42; COKE, *op. cit.* note 7, at 71. Cf. Common

now generally known as state writs, since issued in the name of the state, are still in common use in America.¹⁶⁰ Upon the adoption of the New York Civil Practice Act of 1920, the designation of many of these "writs" was changed to "orders", although otherwise the historical names were generally retained.¹⁶¹ The chief of these were:¹⁶² (a) Writ of Mandamus, commanding an official or court to perform his or its public duty; (b) Writ of Prohibition, restraining a court from exceeding its jurisdiction; (c) Writ of Certiorari to Review, by which a case could be removed from an inferior court into the King's Bench for trial; (d) Writ of Certiorari to Inquire into Detention of persons held in custody on non-bailable offenses; (e) Writ of Habeas Corpus to inquire into legality of imprisonment on a bailable charge, or into the detention of any person by another: for example, a husband could thus obtain custody of his wife from recalcitrant parents who withheld her from him;¹⁶³ and (f) Writ of Quo Warranto, requiring a public officer or public or private corporation to show by what authority he or it functions.¹⁶⁴

Pleas' jurisdiction to issue the prerogative writs of prohibition and habeas corpus, page 37, *supra*.

¹⁶⁰At Common Law the prerogative writs were entitled "*Rex ex relatione* [on the information of] *Jones v. Smith*". In New York they read, "The People of the State of New York *ex rel. Jones v. Smith*"; in Pennsylvania, "The Commonwealth of Pennsylvania *ex rel. Jones v. Smith*". Some states style proceedings for prerogative writs "*Jones v. Smith*", or whatever the names of the parties may be, as in any private case, *e. g.*, *Fischer v. City of Charleston*, 17 W. Va. 595 (1881). The new orders in New York are entitled "In the Matter of the Application of John Jones".

In federal practice the petition for the ancient writs is entitled, *In re Jones, Ex parte Jones*, or, *Jones, Petitioner, v. Smith*; *e. g.*, *Ex parte Hobbs*, 280 U. S. 168 (1929).

¹⁶¹The Writ of Habeas Corpus and the Writ of Certiorari to Inquire into Detention remain as of old in New York, since it would require a constitutional amendment to change their names or functions. For form of these writs see NEW YORK CIVIL PRACTICE ACT, §§ 1237 and 1238.

¹⁶²For a detailed description of the prerogative writs in general see: 3 BLACKSTONE, *op. cit.* note 23, at 110 *et seq.*, 262 *et seq.*; HIGH, James L., EXTRAORDINARY LEGAL REMEDIES (2d ed. 1884); I FIERO, J. Newton, PARTICULAR ACTIONS AND PROCEEDINGS (4th ed. 1922) 179 *et seq.*; 2 *ibid.* 1611 *et seq.*; 1863 *et seq.*; 3 *ibid.* 2730 *et seq.* See Hazeltine, H. D., *Early History of English Equity*, ESSAYS IN LEGAL HISTORY (1913) 277 *et seq.* for historical sketch of development of Writ of Prohibition.

¹⁶³9 HOLDSWORTH, *op. cit.* note 2, at 108 *et seq.*, 124; 3 BLACKSTONE, *op. cit.* note 23, (Lewis' ed. 1902) 1133, note 83; SCHOULER, James, MARRIAGE AND DOMESTIC RELATIONS (6th ed. 1921) 77; Jenks, *The Story of the Habeas Corpus*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 531.

¹⁶⁴3 BLACKSTONE, *op. cit.* note 23, at 262 *et seq.*; 1 *ibid.* 485; 4 *ibid.* 441; HIGH, *op. cit.* note 162, §591 *et seq.* New York abolished this writ by the CODE OF PRO-

The Court of King's Bench consisted of the Chief Justice and three or four puisne judges.¹⁶⁵

By the Judicature Act of 1873 the jurisdiction formerly possessed by the three superior courts of the common law at Westminster was at first vested in three divisions of the new High Court of Justice, bearing the same names as the old courts; but in 1881, pursuant to express reservation in the original act, these three divisions were merged by an Order in Council into a single King's Bench Division.¹⁶⁶ The jurisdiction of many American courts, including the Supreme Court of New York, the court of original jurisdiction in the state, is expressly defined to be that possessed by these three central courts of the common law in England.¹⁶⁷ Truly, to paraphrase Maitland's famous epigram on the forms of action, though the common law courts of Westminster are dead, "they still rule us from their graves."¹⁶⁸

(To be concluded in the February issue)

CEASURE § 428 (CODE OF CIVIL PROCEDURE § 1983), and substituted an action by the people for usurpation of office, franchise or corporate right. NEW YORK CIVIL PRACTICE ACT, §§ 1208 *et seq.*, 1571; 3 FIERO, *op. cit.* note 162, at 2730 *et seq.*

¹⁶⁵3 BLACKSTONE, *op. cit.* note 23, at 40.

¹⁶⁶1 HOLDSWORTH, *op. cit.* note 2, at 640.

¹⁶⁷Hanna v. Mitchell, 202 App. Div. 504, 196 N. Y. Supp. 43 (1922), *aff'd*, 235 N. Y. 534, 139 N. E. 724 (1923).

¹⁶⁸MAITLAND, *op. cit.* note 143, at 296.