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Recommended Citation
George Jarvis Thompson, Development of the Anglo-American Judicial System, 17 Cornell L. Rev. 203 (1932)
Available at: http://scholarship.law.cornell.edu/clr/vol17/iss2/1
THE DEVELOPMENT OF THE ANGLO-AMERICAN JUDICIAL SYSTEM*

GEORGE JARVIS THOMPSON†

PART I

HISTORY OF THE ENGLISH COURTS TO THE JUDICATURE ACTS

b. The Prerogative Courts\textsuperscript{169}

In post-Conquest England, as in most primitive societies, the king as the fountain of justice and supreme administrator of the laws decided each case before him according to his royal will, exercising a prerogative or extraordinary jurisdiction much like the oriental justice of the Arabian Nights tales.\textsuperscript{170} With respect to the conquered English, the king's justice in this period was always extraordinary.

*Copyright, 1932, by George Jarvis Thompson. This article is the second installment of Part I of a historical survey of the Anglo-American judicial system. The first installment appeared in the December, 1931, issue of the CORNELL LAW QUARTERLY. It is expected that the succeeding installments of Part I will appear in subsequent issues of this volume. †Professor of Law, Cornell Law School.

\textsuperscript{169}These courts of the royal prerogative must not be confused with the two ecclesiastical "Prerogative Courts" of Canterbury and York. See infra, under Ecclesiastical Courts. The word "prerogative" is derived from the Latin "Prae rogativa", designating the privilege possessed by that Roman tribe or century which won the cast to determine the century that should vote first. The royal prerogative of Anglo-Norman times by which the king stood first among men and governmental agencies is compatible with the liberty of the subject and the supremacy of law over the king. It must not be confused with the later continental doctrine of the divine right of kings, which gained but a temporary foothold in England during the latter half of the seventeenth century. 3 MAITLAND, op. cit. note 11, at 246, The Crown as Corporation; PROTHERO, Geo. W., SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS (1913) 409 et seq.


As pointed out by ALLEN, supra, at 8 et seq., this monarchical theory was contrary to the ancient Teutonic heritage of the Anglo-Saxons by which the supreme authority rested in the freemen of the nation. The king was vested with pre-
The exercise of his judicial power was regarded as a royal boon granted because of the inadequacy or abuse of the ordinary processes of the local courts and usually in return for a substantial contribution to the royal treasury. The personal responsibility of this prerogative became so great that the king was glad to share its exercise with his Council, but in time the petitions for royal justice multiplied until they became a burden even to that body. It would seem that it was in part at least to remedy this situation that Henry II extended the king's justice to the people by making his writ available to all upon the payment of a fixed fee and by creating the system of itinerant justices endowed with much of this prerogative jurisdiction.

The existing writs were thus made writs of course (brevia de cursu) available to all as of right instead of by grace of king and Council—innovation confirmed and made a fundamental principle of constitutional law by the fortieth clause of Magna Carta.

The concept of the chief executive as the fountain of justice exercising the ancient prerogative of discretionary justice seems to have prevailed in several of the American colonies. The proprietors or governors of New Jersey, New York and South Carolina administered an extraordinary Chancery jurisdiction. Hawkins, Notes on Equity Practice in Pennsylvania (1925) 9, 11, citing Laussatt, Anthony, Jr., Essay on Equity in Pennsylvania (1825), reprinted in (1895) 1 Pa. Bar Ass'n Rep. 221, 231.

These became known as the writs of course (brevia de cursu) and were issued free to those too poor to pay for them, but made-to-order writs (brevia formata), by which the king's aid was obtained in unusual cases, continued to be very costly. Maitland, The History of the Register of Original Writs, 2 Select Essays in Anglo-American Legal History (1908) 549, at 561, 567; Maitland, op. cit. note 143, at 314 et seq.; 1 Holdsworth, op. cit. note 2, at 47; 1 Pollock and Maitland, op. cit. note 2, at 138, 150, 195; 2 Spence, op. cit. note 2, at 110 et seq.

See supra note 70. Also see Maitland, op. cit. note 143, at 3, 311, 314 et seq.

The exercise of his judicial power was regarded as a royal boon

Received powers to be exercised by him as parens patriae for the public good. And see Figgis, John Neville, The Divine Right of Kings (1914).

The statute Prerogativa Regis, 3 Halsbury, Statutes of England (1929) 53 (c. 1324), cited as 17 Edw. II (1324) Stat. 1 in 1 Pickering, Statutes (1762) 376, defined certain privileges and property rights which accrued to the king under the prerogative. Some of these attributes, such as the prerogative in the preservation of the lands of idiots and lunatics, illustrate the position of the king as parens patriae.

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As Adams, G. B., Constitutional History of England (1921) 136, says, "Closely related also, as a fundamental principle to the 'bill of rights' of our [American] constitutions, is the promise of Chapter 40 that justice shall be free and fair to all." However, Maitland, op. cit. note 143, at 308, warns that though slowly gaining ground this principle had not become recognized as such before the reign of Edward I.
ANGLO-AMERICAN JUDICIAL SYSTEM

This doctrine of vested right to justice led in time to that of the supremacy of the law. It was held that the king had abdicated his prerogative to the extent that he had delegated it to his courts, and that he could no longer grant or withhold justice in cases within their jurisdiction; nor could the judges themselves exercise this jurisdiction except in accord with the principles of the common law. But matters for which there were no writs still fell within the prerogative jurisdiction. For a time they were dealt with by creating new writs, which in turn became available to all and established precedents that went to build up the developing common law. Eventually the Council seems to have awakened to the danger consequent upon embalming all justice in strict common law precedent, and to have embarked upon a new policy of reviving and extending the king’s prerogative of justice for the sake of its discretionary character and its freedom from the doctrine of precedent. This would seem to explain the fact that all the higher royal courts established after the settlement of the three superior courts of common law at Westminster were prerogative courts. The prerogative courts, then, were those created by the king as parens patriae, in the exercise of his residuary prerogative of justice remaining after the establishment of the common law courts, for the purpose of supplementing the common law justice. Each of these new courts administered an executive justice which in its earlier days was essentially justice without law, and which later developed into an independent system of procedure and substantive law more closely related to the Roman law than to the English common law.

176 An instance of the realization of the danger of precedent as the source of custom is cited by Adams, op. cit. note 53, at 254. For the modern attitude toward precedent, see Cardozo, Benjamin N., Chief Judge of the New York Court of Appeals, Nature of the Judicial Process (1922) Lecture 4; Cardozo, Growth of the Law (1924) 105.

177 PALGRAVE, op. cit. note 100, at 4. In token of their royal origin most of these courts bore the appellation “High”, so frequently used in describing the king. 5 Holdsworth, op. cit. note 2, at 271; I Marsden, Reginald G., Select Pleas in the Court of Admiralty (6 Selden Society, 1892) 27; Burn, John S., The Star Chamber (1870) 4. Cf. 3 Blackstone, op. cit. note 23, at 131, referring to the writ of habeas corpus as a "high prerogative writ". MAITLAND, op. cit. note 143, at 2, remarks that by the time of Edward I (1272–1307): "It [common law] is contrasted with statute, with local custom, with royal prerogative."

178 MAITLAND, op. cit. note 5, at 418 et seq. And see ibid. 69, 401.

179 See Pound, Executive Justice (1907) 55 Am. L. Reg. 137; Pound, Introduction to the Philosophy of Law (1925) 113; Holdsworth, op. cit. note 2, at 398; 5 ibid. 215.

180 The most striking departure from common law procedure in the direction of the civil law is the absence of jury trial in the prerogative courts.
Because of their common origin and characteristics, the prerogative courts are classed together in this survey. Chief of such courts were the Court of Chancery, the Court of Star Chamber, the ecclesiastical courts following the Reformation, and the Court of Admiralty.

The High Court of Chancery

The High Court of Chancery (Curia Cancellariae) was held by the chancellor sitting alone. Although possessing an ancient and narrow common law jurisdiction, it became the great court of equity by succeeding to the prerogative jurisdiction of king and council to grant specific relief in extraordinary cases. In the exercise of this extraordinary jurisdiction the chancellor did not sit as a common law court but administered justice according to the principles of equity.

180 Trevelyan, op. cit. note 119, at 277, 278. Quaere, whether the High Court of Parliament should not also be classified as one of the prerogative courts. Cf. McIlwain, op. cit. note 56, at viii, 109, 119 et seq.; Coke, op. cit. note 7, at 15; Plucknett, Case and the Statute of Westminster II (1931) 31 Col. L. Rev. 778, 799. For a discussion of the jurisdiction of the House of Lords see that subject, infra.


182 Holdsworth, op. cit. note 2, at 155-156; Maitland, op. cit. note 5, at 220; Hudson, William, A Treatise of the Court of Star Chamber (c. 1625) 9 et seq., printed in 2 Hargrave, Collectanea Juridica (1792); Maine, op. cit. note 170, at 165, 190; Adams, op. cit. note 174, at 248.

183 Chitty, op. cit. note 170, at 6, 50; 1 Blackstone, op. cit. note 23, at 280; 1 Holdsworth, op. cit. note 2, at 605.

184 Holdsworth, op. cit. note 2, at 160. Other bodies administering a prerogative justice were the Court of Requests, the High Commission, the Court of Wards and Liveries, the Council of Wales and the Marches, the Council of the North, to some extent the Admiralty, and the Council Attendant on the King, subsequently the Privy Council.

185 Leadam and Baldwin, Select Cases Before the King's Council (35 Selden Society, 1918) xxxii; Maitland, op. cit. note 143, Lecture I; 1 Holdsworth, op. cit. note 2, at 399 et seq.; 1 Spence, op. cit. note 2, at 77, 328-341, 407 et seq. Also see Spence, History of Court of Chancery, 2 Select Essays in Anglo-American Legal History (1908) 219; Walsh, William P., A Treatise on Equity (1930) 12 et seq.; Keigwin, Charles A., The Origin of Equity (1930) 18 Georgetown L. J. 15, 92; Pollock, op. cit. note 170, at 180 et seq.; Adams, G. B., The Continuity of English Equity (1917) 26 Yale L. J. 550.

The Early Functions of the Chancellor

The chancellor first comes upon the judicial stage as the chief official of the Exchequer, but it appears that his other administrative functions had become sufficiently distinct to form a new department of the Curia Regis as early as 1199, when the Chancery acquired its own records—the Chancery Rolls. Even then, it was rather a "secretariat of state for all departments" than a court of justice. Since it was the chancellor's duty as Lord Keeper of the Great Seal to authenticate all state documents, he controlled the issuance of the royal writs instituting actions at law. In consequence of Henry II's popularization of the royal justice, applications for writs increased so much that before the end of the reign (1189) the chancellor was forced to establish a writ office (officina brevium), which was eventually presided over by a permanent body of subordinates learned in the law, known as the Six Clerks. It was another century (c. 1280), however, before Chancery began to give over following the king and its official staff settled down permanently at the central palace of Westminster. Although late in Edward I's reign Chancery was beginning to be referred to as a Curia, it is generally considered not to have begun to assume a judicial aspect until the following reign (Edward II, 1307-1326). By 1350 (24 Edward III) it had developed into the

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187This equitable or extraordinary jurisdiction of the Court of Chancery must be distinguished from the so-called chancery jurisdiction in the Court of Exchequer. See supra note 127.

188Cf. I Holdsworth, op. cit. note 2, at 37; and at 395, where he dates its origin as a distinct department nearly forty years later (1238) when Henry III dispensed with the baronial chancellors holding office for life and substituted a salaried official with limited powers and tenure of office. I Pollock and Maitland, op. cit. note 2, at 193, 197; I Stubbs, op. cit. note 5, at 381.

When Chancery developed into a court of ordinary and extraordinary jurisdictions, the Chancery Rolls remained in the common law side, and the equity side was consequently said by the common lawyers not to be a court of record, because it did not record its proceedings in Latin. However, the equity records kept in English were usually more informative than the Latin rolls of the various common law courts. 5 Holdsworth, op. cit. note 2, at 157 et seg.

189I Stubbs, op. cit. note 5, at 381; I Holdsworth, op. cit. note 2, at 37, 395; Tout, op. cit. note 124, at 58.

190I Holdsworth, op. cit. note 2, at 398, 421; Parkes, op. cit. note 170, at 255, 573 et seg. And see Poole, op. cit. note 118, at 61.

191Plucknett, op. cit. note 180, at 794; Tout, op. cit. note 124, at 61; I Holdsworth, op. cit. note 2, at 402n.; I Campbell, op. cit. note 143 (5th ed. 1868), at 188.

192I Pollock and Maitland, op. cit. note 2, at 193; Kerly, D. M., History of Equity (1890) 28; Tout, op. cit. note 124, at 31, 58, 180; Walsh, op. cit. note 185, at 15; Baldwin, op. cit. note 50, at 240-242.
Court of Chancery, destined to become one of the four great courts of original jurisdiction of the Westminster epoch.\textsuperscript{193}

A curious sequence of historical accidents made way for the establishment and dictated the character of the Court of Chancery. Even after the royal courts had ceased to exercise the extraordinary prerogative jurisdiction and had become the oracles of the strict common law, the chancellor continued to issue the writs which set those courts in motion.\textsuperscript{194} Since new writs made new rights,\textsuperscript{195} as they recognized and protected new types of interests in the royal courts, the chancellor threatened to become the real lawmaker of the realm. The Provisions of Oxford which terminated the Barons' War (1258) eliminated this disturbing possibility and vindicated the ancient practice by denying to the chancellor the right of issuing new forms of writs without the consent of the king and his small council. Such was the situation at the enactment of the famous Statute of Westminster II (13 Edw. I, 1285), the twenty-fourth chapter of which permitted the clerks in Chancery to issue new writs in cases similar (in consimili casu) to those in which writs had previously been issued, and provided that if they could not agree to issue a writ, the matter should be referred to Parliament that a writ might be framed by those learned in the law so that the king's courts should not fail to do justice in the future.\textsuperscript{196}

There has recently arisen a divergence of opinion as to the purpose of this statute and its effect upon the development of the common law courts and of Chancery. The traditional view\textsuperscript{197} has been that the

\begin{footnotesize}
\begin{enumerate}
\item Holdsworth, op. cit. note 2, at 403; Kerly, op. cit. note 192, at 28–31; Campbell, op. cit. note 191, at 212. The famous Proclamation to the Sheriffs (22 Edw. III, 1349) referring petitions of grace to the chancellor would seem confirmatory that at least by the middle of the century the chancellor was recognized in the capacity of holder of a Court of Equity. Baildon, William P., Select Cases in Chancery (10 Selden Society, 1896) xvii–xviii; Dicey, Albert Venn, The Privy Council (1887) 17; Story, op. cit. note 186, § 44n.
\item Pollock and Maitland, op. cit. note 2, at 150, 170, 196, 203; ibid. 205; Maitland, op. cit. note 143, at 3 et seq. ; I Holdsworth, op. cit. note 2, at 397 et seq.; Maitland, op. cit. note 5, at 397 et seq.
\item Plucknett, op. cit. note 180, at 786; 2 Pollock and Maitland, op. cit. note 2, at 674; Maitland, op. cit. note 143, at 300; Maitland and Montague, op. cit. note 65, at 101; 3 Street, Thomas A., Foundations of Legal Liability (1906) 248.
\item Plucknett, op. cit. note 180, at 788 et seq. The statute dealt with a multitude of subjects, for it was one of the series of great codes of Edward I by which he has earned the name of "the English Justinian". Tout, Edward the First (1893) 127 et seq.; Isaacs, Nathan, The Statutes of Edward I (1921) 19 Mich. L. Rev. 804, 814; Jenks, Edward Plantagenet, The English Justinian (1901).
\item Blackstone, op. cit. note 23, at 50–51; Reeves, op. cit. note 105, at
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\end{footnotesize}
hardship resulting from the restriction of the chancellor's writ-issuing power by the Provisions of Oxford led to a deliberate modification by the Statute of Westminster II, designed to facilitate the issuance of writs, and that the statute created, or at least caused the creation of the elastic writ of trespass on the special case, or, as it later came to be known, action on the case. But no noticeable liberalization of the writ system occurred, and writers of the orthodox school have criticised the common law courts for their failure to give effect to the apparent intent of the statute and to extend the action on the case to the field of extraordinary and discretionary relief later preempted by the chancellor. They have emphasized the similarity of the writ on the special case to the bill in equity and have argued that a liberal interpretation of the statute would have preserved the king's courts as a single judicial system administering both law and equity, as is done in most American states today, thus rendering unnecessary the creation of a separate Court of Chancery in England. And in fact this would have been a logical course of development, for the common law courts then administered much of what later came to be considered purely equitable jurisdiction.

394; 1 Spence, op. cit. note 2, Chap. 9; Ames, op. cit. note 4, at 442; Maitland, op. cit. note 143, at 345-346; 3 Street, op. cit. note 195, at 248 et seg. Cf. Baldwin, op. cit. note 50, at 238-239.

198 Maitland, op. cit. note 143, at 346; Plucknett, op. cit. note 5, at 283; 3 Street, op. cit. note 195, at 246.

193 Street, op. cit. note 195, at 53. Cf. Fairfax, J., in Y. B. 21 Edw. IV 23, pl. 6 (1481), who advised pleaders of the possibility of employing the action on the case as a means of obviating the necessity of resort to Chancery.


201 It is clear that common law and equity originated simply as elements of a single comprehensive system of royal justice. Adams, G. B., The Origin of English Equity (1916) 16 Col. L. Rev. 87, at 91; 2 Holdsworth, op. cit. note 2, at 192 et seg. 333 et seq.

202 Even the itinerant justices exercised an equitable jurisdiction arising from the fact that they too administered a prerogative justice. Professor William C. Bolland advances the theory that the bills in Eyre were the forerunners of the bills in Chancery. "This equitable jurisdiction of the Justices in Eyre is earlier than the equitable jurisdiction exercised by the Chancellor or even by the King's Council. It is the very beginning of our English Equity..." Bolland, The Year Books (1921) 57. Accord: Klingelsmith, Margaret C., Early Bills in Equity (1923) 71 U. of Pa. L. Rev. 115.

But see 1 Holdsworth, op. cit. note 2, at 336 et seg. At p. 343, Professor Holdsworth distinguishes the bills in Eyre and the later bills in Chancery and concludes that Professor George Burton Adams (op. cit. note 201, at 98) is correct
gave specific relief in the real actions, among which covenant was then classed, and employed not only the prerogative writ of prohibition but several other writs for the purpose of preventive justice, where now the equitable injunction is exclusively used.\textsuperscript{203}

On the other hand, the recent research of Professor Plucknett\textsuperscript{204} would seem to demonstrate that the traditional view of the purpose of the Statute of Westminster II, and of the origin of the action on the case, is unfounded. His study indicates that the \textit{in consimili casu} clause was not directed toward the writ-issuing power in general, but was rather in aid of a definite group of real property interests, and that the courts of the time, appreciating this, limited its application accordingly. By this theory, the purpose and effect of the statute was to extend the operation of but a few writs; to assure that cases for which no writs existed should be promptly brought to the attention of the body exercising the writ-making power; and to vest that power in the embryo legislative institution, the Parliament, rather than as of old in the king and his small council.\textsuperscript{205} From this it is argued that in saying that “the ancestor of the bill in equity is to be found, not in the bills in Eyre, but in the petitions to the Council.” \textit{Accord: Plucknett, op. cit.} note 5, at 237. It would seem that if the bills in Eyre were not ancestors of the bills in Chancery they were at least relatives of the blood. Powicke, F. M., (1915) 30 Eng. Hist. Rev. 332.

\textsuperscript{204}“Closely connected with the writs of prohibition were the writs \textit{quia timet} (because he fears), which, like the Chancery bills of the same name, aim at preventing a wrong which is threatened before it occurs.” \textit{Plucknett, op. cit.} note 5, at 236.

\textsuperscript{205}Holdsworth, \textit{op. cit.} note 2, at 246, 287, 344 \textit{et seq.}, discusses the decay of Equity in the Common Law Courts. After referring to the specific relief given in the common law courts in Bracton’s day (1250), he points out that \textit{Coke on Littleton} (1628), page 100a, named six writs designed to prevent an anticipated wrong.

“But while fully recognizing the achievements of the Chancery, let us not forget that the new tribunal built partly upon the older practice of the common law and other courts whose equitable jurisdiction it supplanted. The new tribunal did not originate English Equity, for it simply carried on the work of the older courts by developing in greater fullness and with a different machinery the equity inherent in royal justice.” Hazeltine, \textit{History of Early English Equity, Essays in Legal History} (Vinogradoff’s ed. 1913) 285. Walsh, \textit{op. cit.} note 185, Chapter I—\textit{History of Equity Prior to Chancery; Ames, op. cit. note 4, Covenant, 98; Barbour, The “Right” to Break a Contract (1917) 16 Mich. L. Rev. 106, 107, reprinted in \textit{Selected Readings on the Law of Contracts} (1931) 500, 501; Holdsworth, \textit{Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor} (1916) 26 Yale L. J. 1.

\textsuperscript{206}Plucknett, \textit{op. cit.} note 180, in support of statement in \textit{Plucknett, op. cit.} note 5, at 283.

\textsuperscript{207}The practical efficiency of this administrative technique is thus described by Professor Plucknett, \textit{op. cit.} note 180, at 796: “Henceforth the complainant was to
the Statute of Westminster II neither directly nor indirectly created the action on the case, and it is broadly intimated that case, like most of the other forms of action, was the product of common law evolution.

Professor Plucknett's theory neatly explains the obstinate fact which has puzzled the conventional historians, that when, approximately two centuries later, the common law courts did begin to extend their jurisdiction by a rapid development of the action on the case, they did not rely upon the authority of this statute. But, whether the halting progress of the common law in those centuries be due to the conservatism of the courts or to the failure of Parliament to exercise the writ-making power it had arrogated to itself, as Professor Plucknett intimates, it is generally assumed that the developing jurisdiction of the common law was prematurely arrested. The types of writs remained limited in number and in ap-

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208 Plucknett, op. cit. note 180, at 782, 798. It is significant that in Dean Ames' study of the cases by which the writ of case was gradually extended to cover the field of assumpsit, no mention is made of the statute. Ames, op. cit. note 4, Lectures 13, 14. See also 3 STREET, op. cit. note 195, at 223 et seq.

207 Although the chancellor could refuse to issue a new form of writ, the common law courts seem to have controlled the matter since as early as the time of Bracton they had obtained a veto power, in that they could declare illegal any new writ issued by the chancellor. Plucknett, op. cit. note 180, at 786, 793; MAITLAND, op. cit. note 143, at 346; MAITLAND, op. cit. note 5, at 104-105, 114, 222.

208 This consequence has been referred to as "the closed cycle of original writs" (I POLLOCK AND MAITLAND, op. cit. note 2, at 196), but it is difficult to reconcile this orthodox view with Maitland's description of the Register of Writs, which grew from a little book to a big book, perhaps fifty fold, even making due allowance for the later statutory writs. Maitland, op. cit. note 173, at 549; 3 STREET, op. cit. note 195, at 30 et seq. Professor Plucknett also seems to doubt this generally accepted view. Referring to Maitland's statement (op. cit. note 5, at 105) that "Henceforth for nearly two centuries the growth of unenacted law is very slow indeed", he says, "...[This] is difficult to reconcile with the marked contrast between the Year Books of Henry VII and the treatise of Britton. The great development of the law during this period is undeniable, and it is clear that comparatively little of the new material was of statutory origin, most of it having in fact been effected by enlarging the scope of actions on the case and their derivatives." Plucknett, op. cit. note 180, at 791n.

Maitland has also pointed out (op. cit. note 143, at 345) that the "statutory warrant" of the Statute of Westminster II did encourage marked development in the action on the case, eventually to produce Assumpsit, Trover, Case for
plication, and if a case fell outside these several generalizations of facts, the common law courts took no cognizance of it and afforded no remedy.

The Extraordinary or Equity Jurisdiction of Chancery

The disturbed state of the realm during the fourteenth and fifteenth centuries incident to the Hundred Years War with France and the Wars of the Roses accentuated the need for direct royal intervention to succor the weak and helpless from oppression by powerful nobles and their underlings. Therefore, to the chancellor, as the most powerful member of the Council next to the king himself, was delegated a measure of criminal jurisdiction to maintain the public peace and uphold the orderly administration of justice in the common law courts by wielding all the royal power against over-mighty subjects and dishonest or cowed judges. As the limitation of the writ system and the turbulence of the realm hardened the common law into its strict and narrow procedural moulds, the people turned again to the ancient extraordinary jurisdiction of king and council to supplement its deficiencies and to relieve from the harshness of its application. Since the chancellor, as head of the writ office, was in the best position to know the scope and defects of the common law jurisdiction, it became the custom to refer these petitions to him, with authority to exercise the extraordinary jurisdiction, rather than to the common law judges. It would seem that in this period the common law judges were not averse to the developing jurisdiction of the chan-

Decelt, Case for Words, e. g., Defamation, etc. 3 STREET, op. cit. note 195, at 248-250, refers to the “stimulus” of the statute upon the extension of case. Cf. Plucknett, op. cit. note 180, at 786, 796.

289 BAILDON, op. cit. note 193, at xiv; 5 HOLDsworth, op. cit. note 2, at 282, 289; ibid. 405. The Star Chamber succeeded to this criminal jurisdiction of equity in the late fifteenth century. See infra note 295.

210 Although there was in the early stages of the development of Chancery some competition with the common law equity jurisdiction, the latter was soon relinquished by the judges, apparently because they felt that the chancellor could exercise it more advantageously by way of supplementing legal justice. PLUCKNETT, op. cit. note 5, at 234; MAITLAND, op. cit. note 143, at 18, 156; 1 HOLDsworth, op. cit. note 2, at 447; 5 ibid. 215; ADAMS, op. cit. note 174, at 112. The effect of the boisterous fourteenth and fifteenth centuries upon the common law bears out Ciceró’s famous maxim: “Silent enim leges inter arma” (for the law is silent amid arms) (Pro Milone IV). Professor Holdsworth considers the fact that the common law courts had no vigorous rivals in the fourteenth and fifteenth centuries an important contributing element in the comparatively static condition of the law during that period. 2 HOLDsworth, op. cit. note 2, at 252.
cellor for they commonly sat with him or advised him. As it became the normal thing for the chancellor to pass upon these petitions, the petitioners began to address them directly to the chancellor, and gradually the Chancery became an independent prerogative tribunal—greatest of the organs of prerogative justice.

The chief reasons for the growth of this extraordinary jurisdiction of the chancellor may be summarized as follows:

1. The formality and technicality of common law pleading not only limited the scope of jurisdiction of the common law courts, as pointed out above, but rendered justice expensive and dilatory. In contrast, the early equity pleadings were informal, inexpensive and few in number.

2. The inefficiency of common law trial by jury was accentuated in the early days of Chancery, owing to the fact that this method of trial was then in transition from the jury of witnesses to the jury of impartial triers of the fact. Even as finally developed, trial by jury hampered the common law by the requirement of singleness of issue in pleading, by the narrowness of the rules of evidence, and by the restriction of jurisdiction to a simple two-sided case, terminating in a formal judgment for one side or the other. Chancery, on the other hand, dealt with complex cases involving many different conflicting interests, since it could form decrees to adjust the several rights of the various parties as against each other, although they were on the same side of the case. It also provided a procedure for discovery, whereby a party was made to produce evidence he controlled, and permitted

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211 For a century or more, however, the Chancellor's Court was really a division of the Council to which was delegated the hearing of those petitions referred to it by king and Council. It was common for the Council to endorse instructions or suggestions to the chancellor upon such petitions. Indeed, during this period it was customary for the chancellor to invite some members of the Council or some of the common law judges to sit with him in trial of cases, and his decrees were made upon their advice and consent, or subject to approval of king and Council. "It was not till 1474 that we get a case in which the Chancellor made a decree by his own authority..." 1 HOLDSWORTH, op. cit. note 2, at 404, 399 et seq., and 451; 2 ibid. 414; 4 ibid. 277; 5 ibid. 283. MAITLAND, op. cit. note 143, at 3; KERLY, op. cit. note 192, at 28–36, 38; PLUCKNETT, op. cit. note 5, at 249; WALSH, op. cit. note 185, at 15; 3 STREET, op. cit. note 195, at 31.

2121 HOLDSWORTH, op. cit. note 2, at 400.

examination of the parties as witnesses, neither of which was possible
at law.

3. The law functioned in the past, not in the present. The judgment
at law determined the rights of the respective parties as of the date
of the original writ, while in Chancery the decree spoke as of the day
of its issue. There was no recovery in an action at law for damage
done the plaintiff by the defendant after issuance of the original writ.
A new action must be brought for such further injury. 214

4. The common law courts administered a remedial justice rather
than a preventive justice. They could compensate for injuries done
but were helpless to enjoin or prevent the commission of an irre-
parable injury. Equity, however, could enjoin a threatened irrepara-
able wrong.

5. The courts of law gave only a general relief of money damages in
personal actions, whereas the chancellor could give specific relief
adapted to the needs of the instant case by ordering the defendant to
do or not do a particular thing.

6. The rigidity of the substantive common law bound it to the
development of rules from precedent and their automatic applica-
tion without regard to the moral justification in the particular case.
Frequently it happened either that the common law provided no
remedy or that some stubborn rule of the substantive law prevented
the application of the usual remedy. 215 Chancery subjected each case
to the test of good conscience and equity. 216

7. The Court of Chancery recognized and protected interests which
the common law did not, and provided equitable remedies to enforce
these equitable rights. For example, it recognized the interest of the
cestui que trust (the beneficiary) in the trust property, although the
entire legal title was vested in the trustee, and gave relief from fraud,
accident and mistake under circumstances where the law would not
tolerate such equitable claims. 217

8. A superior sanction lay behind Chancery procedure in that
recalcitrant defendants were deemed to be in contempt of king and
Council, and, therefore, subjected to the summary coercion of the

215 For example, the substantive law doctrine of feme covert, whereby a married
woman could neither be a party to a contract nor own personal property, on the
theory of the identity of her personality with that of her husband. Barbour, op.
cit. note 200, at 56.
216 Holdsworth, op. cit. note 2, at 456; 4 ibid. 281; 5 ibid. 216.
217 Barbour, op. cit. note 200, at 71 et seq.; Maitland, op. cit. note 143, at 7 et
seq., 29 et seq.; Ames, Specialty Contracts and Equitable Defenses, op. cit. note 4, at
104; Pound, Interpretations of Legal History (1923) 133.
royal executive power to quell their incipient rebellion. This \textit{in personam} enforcement of equitable decrees by imprisonment of the disobedient defendant is the real meaning of the maxim—"Equity acts \textit{in personam}.”

In the adjustment of these two great systems of law and equity, the chancellor came to possess three types of jurisdiction:

1. \textit{An exclusive equitable jurisdiction} with respect to such matters as were recognized and enforced only in equity, as, for instance, uses and trusts.

2. \textit{A concurrent jurisdiction} as to matters for which the law also provided a remedy but usually of a less efficient character. This jurisdiction was exercised where the available legal remedy was inadequate, as in the case of specific performance of certain contracts and injunctions against the commission of certain torts.

3. \textit{An auxiliary jurisdiction} in aid of legal remedies. Some examples of this jurisdiction are bills to take testimony, to preserve testimony, for discovery as to whereabouts and contents of papers on which a right or defense is based, for examination of a party before trial, and for reformation of a contract which has been written inaccurately.

The evolution of this extraordinary or equity jurisdiction of the court of Chancery began with a simple administrative delegation of the royal prerogative of justice to the Lord Chancellor, a high ecclesiastic who exercised this jurisdiction in accord with the canonical standard of justice of his time. There followed a gradual transition until it became a supplemental jurisdiction to supply the deficiencies of the common law and to prevent abuse of legal process. With the new nationalism of the reformation and its emphasis upon the king's spiritual as well as secular headship there dawns the classical view of Chancery as the court of conscience. Paradoxical as it may seem,

\begin{footnotes}
\begin{enumerate}
\item[218] "The chancellor by reason of his close connection with the Council, could act with the whole force of the executive government, enforcing his orders in the last resort by a commission of rebellion." 5 Holdsworth, \textit{op. cit.} note 2, at 286. Cf. Pound, \textit{op. cit.} note 142, at 72.
\item[219] Cf. Pound, \textit{op. cit.} note 142, at 72.
\item[220] To Cardinal Wolsey, last of the great ecclesiastical chancellors, has been attributed the separation of Chancery from the Council and the Star Chamber as a distinct court of conscience. Plucknett, \textit{op. cit.} note 5, at 246.
\end{enumerate}
\end{footnotes}
almost coincident with the introduction of secular chancellors the canon law theory of the chancellor as spiritual keeper of the king's conscience began to be emphasized to the subordination of the old primitive view of the king as the fountain of justice, and soon became the primary basis of equity jurisdiction. This attempt to rationalize the equitable jurisdiction of Chancery by subjecting it to the standard of a non-existent, idealistic royal conscience set up a fictitious objective test which furnished a juristic basis for its subsequent development. No longer was it a practical, executive justice administered at the whim of the particular chancellor. The crystal-

221 Plucknett, op. cit. note 5, at 241, says: "It is more significant that these Chancellors were in many cases not merely laymen but also common lawyers, such as Nicholas Bacon (1558-1579) and Thomas Bromley (1579-1587)." 1 Spence, op. cit. note 2, at 712, points out that the change from ecclesiastical to lay chancellors retarded the growth of equity since the latter were unfamiliar with the principles of the civil law and canon law which had guided the ecclesiastical chancellors. 5 Holdsworth, op. cit. note 2, at 222. 2 Campbell, op. cit. note 143, at 492, considers the transition inevitable and beneficial.

222 These two theories seem always to have been more or less interwoven with the underlying basis of equity jurisdiction, the emphasis simply shifting from the will of the sovereign to the idealized conscience of the same sovereign.

The accepted view today is that the classical theory of Chancery as a court of conscience is to be credited to the influence of St. Germain's Dialogue of Doctor and Student, published in English 1530, in which this old canon law theory was presented in simple language and thus popularized in the very years of the Church's fall from power. 5 Holdsworth, op. cit. note 2, at 266 et seq.; Vinogradoff, Reason and Conscience in Sixteenth Century Jurisprudence (1908) 24 L. Q. Rev. 374; Plucknett, op. cit. note 5, at 238 et seq. Dean Pound has pointed out that the accepted juristic concepts of one age normally embody the ideals of a past age quite unrelated to the realities of the age in which they function, op. cit. note 1, at 554.

223 The seventeenth century dissatisfaction with arbitrary justice which greatly influenced the formulation of guiding principles in equity was quaintly expressed by the learned common lawyer, John Selden, as reported in his Table Talk (published in 1689, Pollock's ed. 1927) 43: "Equity is A Roguish thing, for Law we have a measure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as it is larger or narrower soe is equity. Tis all one as if they should make the Standard for the measure we call A foot, to be the Chancellors foot; what an uncertain measure would this be; one Chancellor ha's a long foot another A short foot a third an indifferent foot; tis the same thing in the Chancellors Conscience." And see 5 Holdsworth, op. cit. note 2, at 336 et seq.

In 5 Holdsworth, op. cit. note 2, at 275, this process of crystallization is described: "As early as 1483 the chancellor could say that it was the 'common course' of the Chancery to grant relief in certain cases, and that it was so recorded. But when a court has acquired a 'common course' which is recorded, it soon develops fixed rules of practice, which, in their turn, gradually create fixed substantive rules. No doubt this process operated more slowly in the case of the
lization of the doctrines of equity into a system of equitable juris-
prudence, which received much impetus during the chancellorships
of Lord Nottingham (1675-1692) and Lord Hardwicke (1737-1757),
became inevitable. By the end of Lord Eldon's chancellorship
(1801-1806; 1807-1827), this long progress had culminated in a well-
defined body of substantive equitable principles and precedents, with
a distinct system of equity pleading and practice. Equity had not
been put in a straight-jacket, however, for under the better view the
new order is tempered by the retention of a wide discretion in the
chancellor, and the conscious preservation of a spirit of growth in
accord with the ancient tradition of the court of Chancery.

Chancery than in the case of the courts of common law, because, all through this
period, equity was equity— it tried to lay down the ideally just rule applicable
to the circumstances of each particular case. But the influence of the new school
of lawyer chancellors was beginning to be felt at the end of the sixteenth century.
Lambard, who, as we have seen, was a master in Chancery, notes that the
question, 'whether it be meete that the Chancellour should appoint unto himselfe
and publish to others any certain rules and limits of equity,' was one 'about the
which men both godly and learned doe varie in opinion;' and it is clear that
the opinion in favour of an affirmative answer to this question was growing in
strength. As we have seen, the Chancery Orders were beginning to lay down a
few fixed rules; and we shall see that Lambard himself thought it worth while
to make a collection of cases that seemed to him to be notable. In fact, the evi-
dence both of the records of the court and of the cases points in the same direction.
At the very beginning of the seventeenth century the records show that for the de-
cision of certain points recourse was had to precedent."

The modern problem, on which the authorities divide, is whether, in a case
falling within the established equity jurisdiction, the court may on balancing the
equities withhold equitable relief in its discretion, or whether in such a case
the equitable relief is a matter, no longer of grace, but of right. An illustrative case
is that of a continuing injury to land, for which legal damages are inadequate.
It has been suggested that to deny an injunction under such circumstances
would be unconstitutional. Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374
(1892). Many American courts, however, balance the equities and award an
injunction only in their discretion. Simmons v. City of Paterson, 60 N. J. Eq.
385, 45 Atl. 995 (1900). On the general subject see Hulbert v. California Portland
Cement Co., 161 Cal. 239, 118 Pac. 928, 38 L. R. A. (N. S.) 436 (1911); Chafee,
Zechariah, The Progress of the Law, 1919-1920 (1921) 34 Harv. L. Rev. 388, 394;
(1922) 36 Harv. L. Rev. 211; (1923) 9 Cornell Law Quarterly 63; (1927)
U. S. 660, 51 Sup. Ct. 286, 75 L. Ed. 602 (1930). On the relation of equity to
tort law, see Chafee, Does Equity Follow the Law of Torts? (1926) 75 U. of P. L.
Rev. 1. That discretion still plays its part in the courts, see Winfield, Ethics in
English Case Law (1931) 45 Harv. L. Rev. 112, 129.

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The Ordinary or Common Law Jurisdiction of Chancery

The chancellor's ordinary or common law jurisdiction, aside from his functions as administrative head of the writ office, was not definitely distinguished from the equity jurisdiction until late in the fifteenth century. This branch of Chancery was called the Latin Side because it employed the common law system of pleading, which was in Latin, and its records were enrolled on parchment as were those of the common law courts. The equity jurisdiction, on the other hand, was known as the "French Side", or later the "English Side", since the bill by which a cause was there commenced was usually written in French, the language of the royal court, until the reign of Henry V (1413-1422), when the ancient but previously infrequent "English bill" came into general use. Latin remained not only the language of the common law procedure but also of the decrees and other formal documents in equity, though not for the pleadings therein, until English was substituted by statute for all court proceedings in 1731.


HoldswoRth, op. cit. note 2, at 452; 1 Spence, op. cit. note 2, at 336; Spence, op. cit. note 185, at 234; Coke, op. cit. note 7, at 79; 3 Blackstone, op. cit. note 23, at 47 et seq.; 1 Maddock, Henry, The Principles and Practice of the High Court of Chancery (1817) Chapter I; Keigwin, op. cit. note 185, at 97; Walsh, op. cit. note 185, at 14.

HoldswoRth, op. cit. note 2, at 451. Cf. 1 ibid. 400.

Baildon, op. cit. note 193, at xiii; 2 Holdsworth, op. cit. note 2, at 480; 1 Spence, op. cit. note 2, at 348; Spence, op. cit. note 185, at 249.

4 Geo. II, c. 26 (1731). This reform would seem to have been at least a century late, to judge from Professor Winfield's account of the breakdown of the old formal languages as exhibited by a writer of 1631, who described how "a prisoner on his trial 'jecte un grund brickbat que narrowly mist' the head of the judge." Indeed, the Commonwealth had enacted a similar statute in 1650, which was repudiated on the restoration of Charles II (1660). Winfield, Percy H., Chief Sources of English Legal History (1925) 7 et seq.

It is an interesting commentary on the conservatism of the legal profession that the common law reports were not written in English until approximately the time of Coke, which was two centuries after Geoffrey Chaucer (1340-1400) began to write English poetry and John Wyclif (c. 1324-1384) translated the Bible into English, and that Latin persisted as the language of formal legal records and documents for still another century. 5 Holdsworth, op. cit. note 2, at 159 et seq.; 1 Pollock and Maitland, op. cit. note 2, at 80 et seq.

Cross, op. cit. note 49, at 201, 699. At page 201, he says: "In 1363 the Chancellor opened Parliament with a speech in English. In the previous year it had been enacted that English should be the language of the law courts, for the reason that the 'people have no knowledge nor understanding of that which is
The writ issuing function of Chancery, although usually classified as within the ordinary or common law jurisdiction, was purely administrative, as compared with the judicial functions exercised under that jurisdiction on proceedings commenced otherwise than by bill.  

It would seem that the chancellor also issued the writ of Habeas Corpus and certain other prerogative writs when the common law courts were in vacation.  

By the famous series of Habeas Corpus Acts of 1641, 1679 and 1816, the chancellor as well as the three superior courts of common law was empowered to issue this writ either in term time or vacation.  

Since all civil matters affecting the king's interest fell within this jurisdiction of Chancery, the king could sue in Chancery or in the common law courts as he preferred, even though the cause was one which would ordinarily fall exclusively within the jurisdiction of the latter courts.  

The ordinary jurisdiction for or against them—and that the court records should be in Latin. As a matter of fact, however, cases continued to be argued and reported in French till the eighteenth century; the language of the statutes was French till Henry VII; and Latin did not cease to be the language of writs, charters, and records until 1731."

In 2 HOLDSWORTH, op. cit. note 2, at 479 et seq., it is said: "Latin was the legal language of the twelfth and thirteenth centuries. It was therefore the official language of those branches of the Curia Regis, such as the Chancery and the courts of common law, which had begun to keep plea rolls at this period. The custom of an office or a department upon a matter of second rate importance, such as the language used in making up a record, is perhaps the most conservative thing on earth. Hence we find that these records continued to be drawn up in Latin until 1731." Cf. ibid. 480. See infra note 249.

There was long a dispute as to whether the chancellor possessed this power. COKE, op. cit. note 7, at 81, conceded that the chancellor could issue the writ of habeas corpus either in vacation or term time of the King's Bench.  

2 HALE, PLEAS OF THE CROWN (first published in 1736, 1st Am. ed. 1847) 145, considered the power limited to vacation. The famous Lord Chancellor Nottingham held for political reasons in Jenkes's Case (1676), 6 HOWELL'S STATE TRIALS (1816) 1190, 1191 that there was no precedent justifying his issuing the writ in vacation. However, Lord Eldon, after an extensive review of the authorities, overruled that decision in Crowley's Case, 2 Swanston's Rep. 1, 65 (1818). And see: 9 HOLDSWORTH, op. cit. note 2, at 116; 3 BLACKSTONE, op. cit. note 23, at 132; INDERWICK, op. cit. note 121, at 114; MADDOCK, op. cit. note 226, at 12.

211 HOLDSWORTH, op. cit. note 2, at 228.

221 HOLDSWORTH, op. cit. note 2, at 453; 1 SPENCE, op. cit. note 2, at 337; Spence, op. cit. note 185, at 235. For a general discussion of the common law side of Chancery, see 1 HOLDSWORTH, op. cit. note 2, at 452; 1 SPENCE, op. cit. note 2, at 336 et seq.; Spence, op. cit. note 185, at 234 et seq.; MAITLAND, op. cit. note 143, at 4; 3 BLACKSTONE, op. cit. note 23, at 47 et seq.; COKE, op. cit. note 7, at 79.
tion also covered the trial of cases involving ministers and officers of the royal court; the holding of pleas upon scire facias (order to show cause) for the repeal or cancellation of the king's letters-patent; and petitions of right and inquests of office where the king had been put in possession of lands or goods in prejudice of the subject's right.

The process employed on the Latin side of Chancery was usually that of the common law, that is, by writ rather than by bill. The restrictions of the Statute of Westminster II did not apply to actions instituted by the king on the common law side of his Court of Chancery. When exercising his ordinary jurisdiction, the chancellor sat as a judge administering the common law. Since he possessed no power of summoning a jury into his court, all disputes of fact which, under the common law procedure, would entitle the defendant to trial by jury had to be sent to the King's Bench for trial and judgment therein. The chancellor was not permitted to resort to his extra-

Barbour, Some Aspects of Fifteenth Century Chancery (1918) 31 Harv. L. Rev. 834, 841n., says: "There was a common-law side to the Court of Chancery of which a familiar account is given by Coke, 4 Inst. Cap. viii, 79. For the most part the proceedings were begun by common-law process, and it is generally agreed that in the exercise of this jurisdiction the Chancellor followed the law and could not advert to matters of conscience. Since Pike published the case of Hals v. Hyncley, 1 L. Quart. Rev. 443, it has been known that these proceedings sometimes began by bill, and that the defendant was brought into court by subpoena. Hence one must always be on one's guard; for a petition in the Early Chancery Proceedings may involve a case on the common-law side of the court."

And see: 1 Spence, op. cit. note 2, at 337; Spence, op. cit. note 185, at 235.

The distinction between the issuance of writs to the subject and those concerning the king's interest led to a distinction in the place where the respective types of writs were kept. Those for the subject having been originally kept in a hamper (in hanaperio) came to be issued at the Hanaper Office, while those affecting the royal interests having been formerly kept in a little bag were issued by the Petty Bag Office, and a judgment on the Common Law side was known as a judgment in the Petty Bag. 3 Blackstone, op. cit. note 23, at 49; Tout, op. cit. note 124, at 59; Maddock, op. cit. note 226, at 3.

See the Act of 11 & 12 Vict., c. 94 (1848), regulating certain positions in the office of the Petty Bag of the High Court of Chancery, and providing that most writs issued out of the Petty Bag and formerly sealed with the Great Seal should thereafter be sealed with the Chancery Common Law Seal, the same as writs out of the Hanaper. See amending Act of 12 & 13 Vict., c. 109 (1849). And see Pike, op. cit. note 230, at 722-724.

Chitty, Joseph, General Practice (1835) 406; 1 Spence, op. cit. note 2, at 337; Spence, op. cit. note 185, at 235; 3 Blackstone, op. cit. note 23, at 48; Coke, op. cit. note 7, at 80; Maitland, op. cit. note 143, at 4; Maddock, op. cit. note 226, at 3.

The situation described in the text must be distinguished from those cases within the chancellor's extraordinary jurisdiction in which an issue of fact arose of such a nature that it could be readily determined by a common law jury but
ordinary jurisdiction when sitting on the common law side of his court.221 The judicial activities of the common law side of Chancery, as distinguished from its administrative functions, were so overshadowed by the equitable duties of the chancellor that Blackstone reports that in his day this jurisdiction was practically obsolete.228

A visitatorial jurisdiction over charitable foundations of the crown, and over those private charities for which no visitor had been appointed or existed, was vested in the chancellor, as the king’s representative. He exercised this jurisdiction by issuing a commission to certain persons to inquire into the management of such charities.228

The Later History of Chancery

The increasing prominence of Chancery in the judicial system in the fifteenth and sixteenth centuries brought upon it a struggle for existence. It had a procedure of its own which, in addition to being very efficient, was simpler and less expensive than that of the common law, and it thus attracted many suitors from the common law courts.229 Moreover, its character as a court of conscience often brought it into direct contradiction with the strict rules of the common law. Near the end of the fifteenth century the chancellor began

which, because of the number of witnesses and conflict of testimony, did not lend itself to trial by written depositions, as was customary in Chancery. The chancellor then framed an issue of fact which was sent to the King’s Bench or to the Assizes for trial before a common law jury, which rendered an advisory verdict. This was transmitted to the chancellor and, if approved by him, he entered a regular decree in equity in accord with the findings of the jury. McCaskill, Oliver Le Roy, Actions and Causes of Action (1925) 34 Yale L. J. 627; 3 BLACKSTONE, op. cit. note 23, at 452.

But by statute, 12 & 13 Vict., c. 109 (1849), regulating procedure on the common law side of Chancery, it was provided that any issue of law or fact arising on that side “shall or may be” sent to one of the three superior courts of the common law for trial.

227 I. SPENCE, op. cit. note 2, at 337; KERLY, op. cit. note 192, at 55.

228 3 BLACKSTONE, op. cit. note 23, at 48; 1 HOLDSWORTH, op. cit. note 2, at 452; POTTER, op. cit. note 90, at 227. Cf. 2 CHITTY, op. cit. note 236, at 407.

229 I. BLACKSTONE, op. cit. note 23 (Lewis’ ed. 1902) 484n.; 2 MADDOCK, op. cit. note 226, at 58; 1 SPENCE, op. cit. note 2, at 336; SPENCE, op. cit. note 185, at 234. See note to Sutton’s Hospital Case (1613), 10 CORI’S REP. (Fraser’s ed. 1826) 253, at 300. Cf. powers of the Justices of the Peace relating to public charities, supra. I BLACKSTONE, op. cit. note 23, at 481, mentions the visitatorial jurisdiction of the King’s Bench over civil corporations.

228 PLUCKNETT, op. cit. note 5, at 242; 1 HOLDSWORTH, op. cit. note 2, at 458; 5 ibid. 278; POUND, op. cit. note 142, at 72; MAITLAND, op. cit. note 143, at 6; BAILDON, op. cit. note 193, at xxii; POLLOCK, op. cit. note 170, at 191. Cf. PARKES, op. cit. note 170, at 37 et seq.
to enjoin parties from maintaining actions in the law courts, or from setting up defenses at law which he considered inequitable. It will be noted that he did not undertake to issue writs of prohibition directly against the law courts, as he sometimes did against the ecclesiastical courts, but achieved a like result by enjoining plaintiffs from bringing or maintaining actions therein. Although the common law judges had lent their aid to the development of the chancellor's jurisdiction during its infancy, when its popularity and its aggressiveness began to threaten the original supremacy of their courts, they turned upon it in defense of their own jurisdiction. The great and good common lawyer, Sir Thomas More, Lord Chancellor (1529–1532), who was appointed by Henry VIII (1509–1547) following the downfall of Cardinal Wolsey, did much to reconcile the aggrieved lawyers. Early in the seventeenth century, however, the conflict was bitterly renewed by Lord Chief Justice Coke, champion of the common law, and Lord Chancellor Ellesmere (1603–1617) defender of equity. So intense became the struggle that by 1616 the administration of civil justice was brought almost to a standstill. At this juncture, the chancellor appealed to King James I (1603–1625). The king referred the question to a committee of five, composed of the celebrated Sir Francis Bacon, Attorney General and later Lord Chancellor (1617–1621), and other learned counsel. The committee found for the chancellor on the specific problem: whether the chancellor could give relief after or against a judgment at common law. Thereupon the king gave his judgment ratifying and confirming "the ancient and continued practice and presidency of our Chancery."
This vindication of Chancery perpetuated the dual system of courts of law and courts of equity peculiar to our English heritage, for, although the common lawyers renewed their claims in the revolutionary crises later in the century, the ruling was never reversed.

With its place in the judicial system firmly established, Chancery resumed its progress. For a time it maintained its efficiency and reputation. Unlike the common law courts, which functioned only in the regular court terms, the chancellor's court was always open since the king's equity must be ever available to his subjects. There was no charge for filing a petition or bill in Chancery because in theory one prayed for relief as a suppliant to whom the ordinary justice had been denied or because the remedies afforded by the ordinary courts were inadequate. A subpoena was served upon the defendant, directing him to appear under penalty of a fine and answer upon oath the complainant's bill. The chancellor heard the case without a jury.

246 Maitland, op. cit. note 143, at 10; Holdsworth, op. cit. note 2, at 463 et seq.
247 Coke, op. cit. note 7, at 81; Inderwick, op. cit. note 121, at 114; Holdsworth, op. cit. note 2, at 408.

The common law courts sat in four sessions or terms annually: the Hilary term, held in January; the Easter term, held in April and May; the Trinity term, held in May and June; the Michaelmas term, held in October and November. The terms were originally timed by the church festivals from which they took their names. The Judicature Act of 1873 abolished the ancient terms, and provided that the courts should sit at all times except during such vacations as should be fixed by order of the crown in council. By Order 63 the courts sit four times a year under the old names, but usually for somewhat longer periods, e.g., "Michaelmas Sittings" from October 12th to December 21st. See English Annual Practice, or "White Book", (1930) 1318.

248 Leadam and Baldwin, op. cit. note 185, at xxxvi; Spence, op. cit. note 2, at 368.

The poverty of the plaintiff was often the cause for his suing in Chancery. The early petitions usually concluded "for God and in the way of charity". Baildon, op. cit. note 193, at xxiii, 47.

But costs might be awarded against the plaintiff in the discretion of Chancery. Maddock, op. cit. note 226, at 416; Holdsworth, op. cit. note 2, at 403.

The bill was not required to be supported by the complainant's oath, but he might be required to give pledges for the prosecution, i.e., to secure payment of costs and to make amends to the defendant if the complaint was unfounded. Baildon, op. cit. note 193, at xxv; Maddock, op. cit. note 226, at 216; Holdsworth, op. cit. note 2, at 285. On the nature of the bill, see 9 Holdsworth, op. cit. note 2, at 335, 376 et seq.

A suit in Chancery by the crown, or one suing under the protection of the crown, was begun by information filed by the king's Attorney General or Solicitor General. Mitford, John (Lord Redesdale), Chancery Pleadings (6th Am. ed. 1849) 22, 119; Maddock, op. cit. note 226, at 135.

249 The Chancery process takes its name from the words "sub poena" (under
and decided all issues both of law and fact. His decision of causes within the equitable jurisdiction was by "decreetum est". The relief in equity not only fitted the needs of the specific case, but, as previously pointed out, was supported by the superior sanction of imprisonment of a recalcitrant defendant for contempt of the prerogative command. But on the common law side the chancellor's decision took the form of a common law judgment: "ideo consideratum est per curiam" (therefore it is considered by the court) that the plaintiff recover the appropriate legal relief, or if the judgment was for the defendant "quod eat sine die" (that he go without day). This impersonal style was employed to indicate that the common law judge, or chancellor when sitting on the Latin side, merely acted as the oracle of the law in announcing its judgment, whereas by his decree in equity the chancellor laid his personal command upon the defendant.

It was the popularity of the extraordinary jurisdiction of Chancery under the Tudors which sowed the seeds of its decay. In spite of the penalty. This name is also applied to the writ by which a witness is notified to appear and testify in a law suit. For an example of such a decree see Abbot of Shrewsbury v. Bailiffs of Shrewsbury (1504), in Leadam, I. S., Select Cases in the Star Chamber (16 Selden Society, 1902) 178. The report reads that the Lord Chancellor, and certain members of the council "decreuerunt et adjudicarunt...Et eciam decreum est." Carter, op. cit. note 68, at 95, gives another early form of the decree as "per decreum cancellarii", etc. Also see, 1 Spence, op. cit. note 2, at 389 et seq.

That the above illustration from a Star Chamber case is not inappropriate, see Dicey, op. cit. note 193, at 70: "Indeed there is little reason to suppose that in the fifteenth century persons brought before the Council and those summoned to the presence of the Chancellor came before an essentially different court."

Other examples of early proceedings in Chancery from Richard II to Elizabeth will be found in 1 Calendar of Proceedings in Chancery in Reign of Queen Elizabeth (1827), reviewed at length in (1828) 1 The Jurist 327.

Forms of judgments delivered by the chancellor on the common law side of his court are given by Pike, op. cit. note 239, at 724. That early decisions even in the equity side were commonly expressed in language much like the common law judgment, see Baildon, op. cit. note 193, at 158; Leadam and Baldwin, op. cit. note 185, at 77. On the form of the common law judgment in general, see 3 Blackstone, op. cit. note 23, at 316, 396; Stephen, op. cit. note 42 (Williston's ed. 1805, based on the 5th English edition, 1843) 125; Perry, op. cit. note 156, at 216 et seq.

The dismissal of the defendant was expressed in this quaint language because, after his appearance in answer to service of process at the commencement of the action, each time he was permitted to depart from the court he was ordered to return on a specified day. 3 Blackstone, op. cit. note 23, at 316.
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liberalization of the common law courts in the extension of the action on the case and the development of the new actions of assumpsit, Chancery was swamped with causes. As its functions gradually changed from those of a purely executive tribunal and took on more of the characteristics of a judicial tribunal, the chancellor became more and more hampered in the expedition of its business. In consequence, in the eighteenth and nineteenth centuries it took so long to get a case through Chancery, and the costs of the innumerable copies of the papers, devised to enable the multitude of clerks of Chancery to make a handsome living, were so exorbitant that the court became a by-word for procrastination, extortion and injustice. The hardship was accentuated by the operation of the maxim that once equity took jurisdiction it would give complete relief, for thereafter, no matter how great the delay, all phases of the case, including those which standing alone could have been sued on in the common law courts, were irretrievably at the mercy of the Chancery procedure.

The decline of Chancery reached its lowest point about 1827 when Lord Lyndhurst (Chancellor, 1827–1830) succeeded the celebrated Lord Eldon. The latter, in spite of his renown in the development of the jurisprudence of equity, had been too busy with the political side of his office to maintain an efficient Chancery procedure. This was the time and setting of the famous case of Jarndyce v. Jarndyce, so vividly reported by Charles Dickens in "Bleak House." While Dickens is commonly credited with having aroused public opinion

255The twentieth century is witnessing again an attempt to substitute for judicial justice, legal or equitable, new types of executive and administrative tribunals providing a less technical and more expeditious justice, such as the Public Service Commission, the Workmen’s Compensation Board, etc. Pound, *op. cit.* note 142, at 7; Pound, *Executive Justice* (1907) 55 Am. L. Reg. 137.

256Parke, *op. cit.* note 170, supplies many interesting details of its abuses. This book was reviewed at length in (1828) 1 THE JURIST 446. 9 Holdsworth, *op. cit.* note 2, at 339 et seq.


258Professor Holdsworth reminds us in his delightful little book (*op. cit.* note 255, at 9) that Dickens had been a clerk in law offices as a mere youth and at eighteen was a reporter in Doctor’s Commons and in Lord Lyndhurst’s Court.

Although Jarndyce v. Jarndyce is a fictitious case, Professor Holdsworth says (page 81): “In fact, I am sure that it would be possible to produce an edition of Bleak House, in which all Dickens’ statements could be verified by the statements of the witnesses who gave evidence before the Chancery Commission, which reported in 1826.”
and thus brought about the reform in Chancery which ensued, the fact is that the progressive elements of bench and bar in England, under the leadership of Lord Brougham (1830–1834), had done much to improve Chancery procedure before the appearance of "Bleak House" as a serial in 1852–1853. By 1831 the bankruptcy jurisdiction of Chancery had been vested in a separate tribunal; by 1833 the Masters were put on salaries and fees were regulated; by 1842 the Six and Sixty Clerks, together with a multitude of other useless officials, were abolished; and in 1852, simultaneously with the serial publication of "Bleak House", three Chancery reform statutes were passed which not only abolished the Masters in Chancery and the old fee system entirely, but made many improvements in pleading and evidence in Chancery cases. There is no doubt, however, that the novels of Dickens played an important role in bringing about the entirely new system of English courts, administering both law and equity, established by the Judicature Acts of 1873–1875.

Personnel of Chancery

As we have seen, the early chancellors were generally high ecclesiastics. The greatest exception to that rule was when Henry III in 1253, on the eve of his departure to one of his wars in France, made his beautiful and able Queen, Eleanor of Provence, Lady Keeper of the Great Seal, and she in person administered the extraordinary jurisdiction as a judge of the Curia Regis. With the downfall of the ancient church in the sixteenth century began the appointment of laymen, usually common lawyers, to the chancellorship. The last of the ecclesiastical chancellors was Bishop John Williams (1621–1625), and the last lay chancellor who was unlearned in the common

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257Holdsworth, op. cit. note 255, at 79 et seq., 113; Gest, John Marshall, The Lawyer in Literature (1913) 28 et seq.
25815 & 16 Vict., cc. 80, 86, 87 (1852).
259Holdsworth, op. cit. note 2, at 443; ibid. 375; Kerly, op. cit. note 192, at 271 et seq.; Bowen, Lord, Progress in the Administration of Justice During the Victorian Period (1887), 1 Select Essays in Anglo-American Legal History (1907) 516, 523 et seq.
260But to the men of the time these reforms came slowly. Lord Bowen, page 529, quotes Spence: "No man, as things now stand, can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary." Also see Holdsworth, op. cit. note 255, at 113.
261Inderwick, op. cit. note 121, at 182; Parkes, op. cit. note 170, at 93; 5 Holdsworth, op. cit. note 2, at 218 et seq., 226.
law was Anthony Ashley Cooper, first Earl of Shaftesbury, a notorious
politician, who held office 1672–1673.222

Until approximately the last half-century of the Westminster epoch,
Chancery was essentially a one judge court. True, from very early
times there was a Clerk or Keeper of the Rolls of Chancery, who later
came to be known as the Master of the Rolls.223 He was chief of the
twelve Masters in Chancery,224 and, until the time of Henry VIII, was
regarded merely as the chancellor's assistant, empowered to act as
judge only when the chancellor was absent or incapacitated. The
Master of the Rolls became a distinct but subordinate Chancery
judge about 1525 during the chancellorship of Cardinal Wolsey,
1515–1529. His decisions were appealable to the
chancellor.225 This
organization of Chancery, consisting of the chancellor, the Master
of the Rolls, the Masters in Chancery and the Six Clerks and their
sixty subordinate clerks, did the work of but a single judge, since the
Master of the Rolls sat when the chancellor was not sitting and for the
hearing of equity causes only.226

It was not until 1813 that provision was made for a vice-chancellor
to assist in the disposition of Chancery cases.227 With the dawn of the
industrial age a century ago, the need for efficiency and expedition in
Chancery procedure led to an imperative demand for increased

223 Campbell, op. cit. note 143, at 289; I Holdsworth, op. cit. note 2, at 411.
224 Tout, op. cit. note 124, at 59, 328, adds that by modern legislation the
authority of the Master of the Rolls has been extended to the custody of all
the records of the crown. Some writers have said that Edward I appointed a
Master of the Rolls in 1295: I Spence, op. cit. note 2, at 358n. (a); Kerly, op. cit.
ote note 192, at 27, 60. But I Holdsworth, op. cit. note 2, at 417 et seq., in dis-
cussing the origin of the office, does not mention this date. I Campbell, op. cit.
ote 191, at 151, mentions that in 1290 the Master of the Rolls was fined 1000
marks for taking bribes.
225 For an account of the Masters in Chancery see: I Spence, op. cit. note 2, at
238; Maisters of the Chauencerie, written by an anonymous Master in Chancery
in the last years of the sixteenth century, and reprinted in Hargrave's Law
Tracts (1787) 293 et seq.; Kerly, op. cit. note 192, at 59; I Holdsworth, op. cit.
ote 2, at 417 et seq.; 3 Blackstone, op. cit. note 23 (Lewis' ed.) at 55. The
Masters in Chancery were chiefly doctors of the Civil (Roman) Law until after
the Puritan Revolution. 5 Holdsworth, op. cit. note 2, at 257 et seq.
226 The judicial position of the Master of the Rolls as the general deputy of the
Chancellor was settled by Act of 3 Geo. II, c. 30 (1729). I Holdsworth, op. cit.
ote 2, at 419; Plucknett, op. cit. note 5, at 242n.; I Kerly, op. cit. note 192,
at 60, 127; Carter, op. cit. note 68, at 97.
227 Kerly, op. cit. note 192, at 127; I Foss, op. cit. note 255, at 111.
228 Parkes, op. cit. note 170, at 356 et seq. Sir Thomas Plumer became the first
vice-chancellor of England in 1814. He was succeeded in 1818 by Sir John
Leach, who became Master of the Rolls in 1827. 7 Campbell, op. cit. note 143,
at 303, 328.
personnel on the Chancery bench. As a first resort the Master of the Rolls was empowered in 1833 to sit daily to hear motions and to conduct any of the work of the court instead of being limited to the hearing of equity cases as of old. In 1841 two additional vice-chancellors were appointed. Still, as farsighted men had predicted before the appointment of the first vice-chancellor,268 the sole appellate jurisdiction vested in the chancellor continued to obstruct the administration of equity. To correct this defect a Court of Appeal in Chancery was created in 1851, consisting of two Lords Justices of Appeal and the chancellor, if he cared to sit. When the old High Court of Chancery was abolished by the Judicature Act of 1873, the Lord Chancellor and six subordinates were performing its judicial functions.269 By this act Chancery was merged into the new English judicature system as the Chancery Division of the High Court of Justice.270

Courts of Chancery were established in all the American colonies,271 but in Massachusetts and Pennsylvania the discretionary jurisdiction of the chancellor was so repugnant to the puritanical concept of a justice of law and not of men272 that those colonies early rejected both the court and its equitable jurisdiction.273 Today, all American jurisdictions recognize equity as a fundamental element in their jural system,274 although but seven states retain the separate

268 PARKES, op. cit. note 170, at 357.
269I HOLDSWORTH, op. cit. note 2, at 443; MAITLAND, op. cit. note 143, at 14; Bowen, op. cit. note 259, at 533 et seq.; KERLY, op. cit. note 192, at 275 et seq.; CARTER, op. cit. note 68, at 97.
270 MAITLAND, op. cit. note 143, at 15.
271 Wilson, Solon Dyke, Courts of Chancery in the American Colonies, 2 Select Essays in Anglo-American Legal History (1908) 779.
272POUND, op. cit. note 142, at 51, 53 et seq.
273The courts in these colonies attempted to administer equitable principles through common law courts and procedure. Not until 1836 and 1877 did Pennsylvania and Massachusetts adopt an equity jurisdiction by statute. Woodruff, Edwin H., Chancery in Massachusetts (1889) 5 L. Q. Rev. 370, reprinted and brought down to 1929, 9 B. U. L. Rev. 168; Fisher, Sidney George, Administration of Equity Through Common Law Forms in Pennsylvania (1895), 2 Select Essays in Anglo-American Legal History (1908) 810. HAWKINS, op. cit. note 170, at 9 et seq.
274Even before the famous Pennsylvania Equity Act of June 13, 1836 (P. L. 789), Chief Justice John Bannister Gibson said: "Equity is a part of our law; and I would just as willingly disturb the foundations of our common law, laid in the time of Lord Coke, as shake a principle of equity settled by Lord Talbot, Hardwicke, or Northington [Nottingham]... As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit." The Case of Torr's Estate, 2 Rawle 250, 253 (Pa. 1830). Cf. Hogsett v. Thompson, 258 Pa. 85, 101 Atl. 941 (1917), which denied the right of a court to appoint a receiver for an individual on the
Chancery courts. Not only are law and equity administered in the same courts in most American states, but the majority of those jurisdictions have followed the lead of the New York Code of Procedure of 1849 in attempting to merge legal and equitable forms of pleading and procedure. Many distinctions still prevail, however, as to right of jury trial, the nature of the substantive principles applied, and the type of relief granted.

The High Court of Star Chamber

The High Court of Star Chamber (Camera Stellata), as it was commonly known from the name of the hall in the palace at Westminster in which it usually sat, was simply the king and his council functioning primarily as a judicial body. It has been well termed the ground that "the courts of Pennsylvania do not possess general Chancery powers, but exercise only such as have been conferred upon them by statute."

Alabama, Arkansas, Delaware, Mississippi, New Jersey, Tennessee, and Vermont. In Vermont the same persons who sit as chancellors in the court of equity sit as judges in the common law courts. CLARK, Charles E., HANDBOOK OF THE LAW OF CODE PLEADING (1928) 471. Cf. WALSH, op. cit. note 185, at 39. Maryland has a separate Court of Equity in the City of Baltimore. Reiblich, Study of Judicial Administration in Maryland (1929) JOHNS HOPKINS UNIVERSITY STUDIES, Series 47, No. 2. New York until 1846 had a separate Court of Chancery, on which sat the famous Chancellor James Kent during the years 1814-1823.

"Camera Stellata" or "Chamber of Stars". The best explanation of the derivation of the name of the court appears in BALDWIN, op. cit. note 50, at 355-356. He states that a new building for the special use of the Council was erected about 1345 by Edward III (1326-1377) upon the river front next to the Exchequer within the palace grounds at Westminster, and adds: "The name 'star chamber' also appears from the very start, although for many years it was more commonly known as 'the council chamber next to the receipt of the exchequer.'... One is bound, therefore, to accept the simple and obvious meaning as was suggested long ago by Stow, that the star chamber was so called because its ceiling was decorated with stars..." Also see: CARTER, op. cit. note 68, at 78; HOLDsworth, op. cit. note 2, at 496; Scofield, Cora L., A Study of the Court of Star Chamber, 2 UNIV. OF CHICAGO DISSERTATIONS (1900) 1.

Pollard, A. F., Council, Star Chamber and Privy Council under the Tudors—II., The Star Chamber (1922) 37 ENG. HIST. REV. 516, states that the famous old Star Chamber was destroyed in the great fire of 1834; and INDERWICK, op. cit. note 121, at 172, writing in 1890, says that its site was then occupied by the Speaker's house.

There was no sharp differentiation between the functions of the Council when sitting in the Star Chamber and its broad powers as a governing body. It was this failure to sever itself completely from its ancient political functions which eventually caused its downfall. LEADAM and BALDWIN, op. cit. note 185, at xvi; LEADAM, op. cit. note 249, at xi, xlii et seq.; Hudson, op. cit. note 182, at 1-240; HOLDsworth, op. cit. note 2, at 492 et seq.; ibid. 155; BALDWIN, op. cit. note 50, at 442; Reeves, op. cit. note 105, at 146 et seq.; INDERWICK, op. cit.
"Court of Criminal Equity", "twin sister of the Court of Chancery", since it, too, was an executive court exercising most of the extraordinary jurisdiction of the prerogative of grace remaining after the branching off of Chancery. It dealt chiefly with those bills and petitions involving the due administration of justice and the maintenance of the public peace.

The need for such a court arose from the social disorganization of the realm incident to the Wars of the Roses. So serious had become the breakdown of law and order that two years before the outbreak of those wars, Parliament, alarmed by Cade's Rebellion, desisted from its long policy of resistance to the growing power of the Council and, in 1453, passed the Act of 31 Henry VI (1422-1461) c. 2. This act accorded the first statutory recognition to the summary procedure of the Council based upon its ancient jurisdiction in dealing with such flagrant breaches of the peace as great riots, extortions and oppressions. The statute proved ineffectual to restore order amid the clash of arms which ensued, and it terminated in 1461 by its own time limitation of seven years.

When Henry VII (1485-1509), first of the Tudors, emerged as King of England at the close of these long civil wars, he faced much the same problem of establishing law and order that had confronted the great Henry II (1154-1189), first of the Plantagenets. He found his country in chaos. The common law and the common law courts by which Henry II had made supreme the king's peace throughout the realm had proved impotent to protect life and property when the royal power weakened. The people again turned to the prerogative justice, petitioning king and Council for protection and redress.
against the superior might that overawed the general courts and made trial by jury a travesty on justice. To meet this need, it was imperative that part of the Council should sit permanently at Westminster to hear these petitions and render a speedy and efficient relief. A committee of the Council was, therefore, empowered to act in this capacity. That the forces of law and order might present a united front against the marauding barons and bandits, Parliament renewed its support of the authority of the Council by passing in 1487 the famous statute known as "Pro Camera Stellata", which

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283 For an excellent description of the social condition of England about 1492 (7 Hen. VII) when Columbus discovered the New World—a pivotal date in relating our legal history to general history—see: Trevelyan, op. cit. note 119, at 251 and 272 et seq.; Cross, op. cit. note 49, at 278 et seq.; Baldwin, op. cit. note 50, at 438; 1 Leadam, op. cit. note 249, at xlv et seq., xcvi; Vance, William Reynolds, The Kansas Court of Industrial Relations with its Background (1921) 35 Yale L. J. 456, 459; Winfield, Percy H., The History of Maintenance and Chancery (1919) 35 L. Q. Rev. 50, 69.

284 Holdsworth, op. cit. note 2, at 495, points out that in this committee we have the genesis not only of the Star Chamber but also of the Privy Council: "As the Tudor scheme of government through the Council developed, a different organization of the Council and its business came into being. This new organization was grounded upon two lines of cleavage which, as the sixteenth century proceeded, gradually grew up within the Council. The first of these lines of cleavage was a distinction between the full members of the Privy Council and the ordinary members of the Council. Both these lines of cleavage had something to do with the separation of the Council acting as an executive body from the Council acting as a judicial body—between, that is, the Privy Council and the court of Star Chamber."

Pollard, op. cit. note 276, at 337, 530-531, points out the importance of distinguishing between that division of the old Council which continued to follow the king and became known as the "Council Attendant" or "Council at Court" and the Council remaining at Westminster. The Council Attendant more and more confined itself to matters of state until in 1540 Henry VIII (1509-1547) reorganized it to form the Privy Council. See also: Baldwin, op. cit. note 50, at 462; Hudson, op. cit. note 182, at 24; 4 Holdsworth, op. cit. note 2, at 64; Adams, op. cit. note 174, at 248; Potter, op. cit. note 90, at 70; 1 Hallam, op. cit. note 277, at 49.

285 Hen. VII, c. 1: "An Act giving the Court of Star Chamber Authority to punish divers Misdemeanors.

"The King our Sovereign Lord remembereth how by unlawful maintenances, giving of liveries, signs, and tokens and retainerds by indentures, promises, oaths, writings or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the not punishing of these inconveniences and by occasion of the premises nothing or little may be found by inquiry, whereby the laws of the land in execution may take effect to the increase of murders, robberies, perjuries and unsureties of all men living and losses of their lands and
confirmed the right of such a committee of the Council, including certain high officials, associating with them other specified persons, to exercise the ancient prerogative jurisdiction, and which enumerated as clearly within that power seven of the most prevalent abuses of the time.  

goods, to the great displeasure of Almighty God, Be it therefore ordained for reformation of the premises by authority of this parliament, That the Chancellor and Treasurer of England for the time being and Keeper of the King's Privy Seal or two of them, calling to them a bishop and a temporal lord of the King's most honorable Council and the two chief justices of the King's Bench and the Common Plead for the time being, or other two justices in their absence, upon bill or information put to the said Chancellor, for the King or any other, against any person for any misbehaving afore rehearsed, have authority to call before them by writ or privy seal the said misdoers and them and others by their discretion by whom the truth may be known to examine and such as they find therein defective to punish them after their demerits after the form and effect of statutes thereof made in like manner and form as they should and ought to be punished if they were thereof convict after the due order of the law."

Because the words "Pro Camera Stellata" appear on the margin of the statute, it was long thought to have created the Star Chamber as a new statutory court. So strong was this belief that Parliament expressly repealed the statute when abolishing the court in 1641. But Professor Pollard has determined that this title was inserted in the margin perhaps a century later. Pollard, op. cit. note 276, at 523. And the generally accepted view is that at most the statute merely gave parliamentary recognition and assent to the exercise by this section of the Council of the ancient prerogative jurisdiction of that body. I HOLDSWORTH, op. cit. note 2, at 494, 501 et seq.; I LEADAM, op. cit. note 249, at lvi and lxx; Scofield, op. cit. note 276, at 38 et seq.; BURN, op. cit. note 176, at 1 et seq.; COKE, op. cit. note 7, Cap. V, The Court of Star-Chamber, at 67; PROTHERO, op. cit. note 169, at ciii.

In like manner the Act of 21 Hen. VIII, c. 20 (1529) was an enabling rather than a restrictive act in that it recognized the common practice of treating the president of the Council as one of the magnates who presided over the sessions of this committee of the Council. I LEADAM, op. cit. note 249, at xii; PALGRAVE, op. cit. note 100, at 98.

Several recent authoritative writers incline to the opinion that the Act of 1487 did not relate to the Star Chamber at all but rather to a special or inner committee of the Council quite distinct from the Star Chamber; that "it was no part of Henry's design to advertise in a public court like the Star Chamber the misdemeanors of his household officials. [Therefore, the privacy of the proceedings and the absence of regular records]...Its object was to bring the more intimate offenders before a more intimate tribunal." Pollard, op. cit. note 276, at 516, 526, 520. I HOLDSWORTH, op. cit. note 2, at 495, seems to agree with this view in his statement that "When this separation became well marked the Council sitting in the Star Chamber—that is the Court of Star Chamber—did all and more than all of the work of these statutory committees, and so rendered them unnecessary." MAITLAND, op. cit. note 5, at 262, believes that the committee endured distinct from the Council at least until 1529. PLUCKNETT, op. cit. note 5, at 140, accords. This view, however, does not affect the general thesis that the
The proceedings before this committee of the Council at Westminster continued to be entitled as of old "coram rege et consilio" (before king and council) and the records show that after the statute, as before, the king frequently presided in person. In the king's absence the Lord Chancellor or Lord Keeper presided, but if he were not present, the Lord Treasurer, the Lord President of the Council or the Lord Privy Seal did so. Originally all members of the Council were eligible to act as judges, and it seems to have been customary for such of them to sit as happened to be available. With the gradual differentiation between that branch of the Council which followed the king and became known as the Council Attendant (or after 1540, the Privy Council) and the Ordinary Council (concilium ordinarium), it came to pass that privy councillors sat in the Star Chamber as of right, while the remaining judges of the court consisted of ordinary councillors and other learned persons who were specially commissioned and sworn for this service. As this committee of the Council in the Star Chamber assumed the character of a

act gave parliamentary support to the broad jurisdiction of the Council at Westminster. Pollard concedes (p. 426) that "the act was not intended to, and did not deprive the Council in the Star Chamber of its jurisdiction over similar offenses committed outside the royal household, still less to determine the personnel of that Council." This view explains the general failure to observe the provisions of the statute which has mystified students for centuries.

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Pollard, op. cit. note 276, at 537; BALDWIN, op. cit. note 50, at 450 et seq.; I HOLDSWORTH, op. cit. note 2, at 500; Scofield, op. cit. note 276, at 11 et seq., 33; I LEADAM, op. cit. note 249, at xlii. Prior to the reign of Henry VII the term "Lords of the Council" was truly descriptive, for only members of the hereditary nobility seem to have sat there. As the nobility forsook learning for arms and became ignorant, dissolute swashbucklers, it was but natural they should have turned upon each other. By their might they had seized power which they lacked the brains to wield. The attempt of such a council of hereditary magnates to rule brought on the Wars of the Roses and the fall of a dynasty. The Tudors were keen enough to see the errors of their royal predecessors in staffing the council, and it was their wisdom in introducing trained knights and commons into it which explains its rejuvenation beginning with Henry VII. The conciliarii nati (councillors by birth) gradually gave way to the appointed high official and the specially commissioned councillor.
court, its membership became somewhat more defined. There are indications of a customary quorum of councillors in the Star Chamber, the number of which varied in different reigns. Many others, however, commonly attended so that during and after the time of Henry VIII, "the presence", as it was called, frequently exceeded twenty. It would seem that the reference in the statute Pro Camera Stellata to the two chief justices of the common law as associated with the new committee of the Council was merely in recognition of their ancient function as advisers to king and Council. In later years, when the Council in the Star Chamber had evolved into a court, they seem to have become standing judges of that tribunal, as pointed out by Coke, who himself as a chief justice sat in the Star Chamber, while other common law justices were usually among those specially commissioned and sworn.

The Star Chamber possessed criminal and civil jurisdiction. It originated primarily to meet the defects of the common law in dealing with crime, for it succeeded to the old criminal jurisdiction of Chancery. As the great prerogative court of criminal jurisdiction, however, it did not hesitate to override the ordinary course of the common law in times of emergency or with respect to the offenses of too-powerful subjects and in other matters which it deemed to threaten the

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292Coke, op. cit. note 7, at 64, mentions eight judges as sitting. 4 Holdsworth, op. cit. note 2, at 65; says four constituted a quorum for general business but six were required for a judgment. Pollard, op. cit. note 276, at 525, denies that a quorum was necessary in the Star Chamber.

293Hudson, op. cit. note 182, at 36; 1 Leadam, op. cit. note 249, at xxxviii-xlv; 4 Holdsworth, op. cit. note 2, at 64; Scofield, op. cit. note 276, at 25.

294Coke, op. cit. note 7, at 62; 5 Bacon, Lord Chancellor Francis, Works (1621) (ed. 1803) 54, History of King Henry VII, seems to support Coke: "This court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons, councillors, peers, prelates, and chief justices." As Professor Holdsworth sagely observes, "There is a strong case in favour of a view in which Coke and Bacon agreed." 1 Holdsworth, op. cit. note 2, at 513. Also Leadam and Baldwin, op. cit. note 185, at xvi, refers to "an ex officio element in the justices of both benches. . . ." And see: Pollard, op. cit. note 276, at 342, 525; 1 Holdsworth, op. cit. note 2, at 500; 4 ibid. 64; 1 Leadam, op. cit. note 249, at xxxiv-xxxviii, xiv et seq., and lxx; Dicey, op. cit. note 193, at 99; Scofield, op. cit. note 276, at 10, 26, 42-43; Smith, Sir Thomas, Commonwealth of England (1565) (ed. 1589) 118; Hudson, op. cit. note 182, at 22, 52; Maitland and Montague, op. cit. note 65, at 119.

2951 Holdsworth, op. cit. note 2, at 408; 5 ibid. 214; Baldwin, op. cit. note 50, at 261; 1 Spence, op. cit. note 2, at 341, 685 et seq.; Maitland, op. cit. note 143, at 19; Trevelyan, op. cit. note 119, at 277; Pollock, The Genius of the Common Law (1912) 42. See supra note 209. Cf. Leadam and Baldwin, op. cit. note 185, at xxx, and cf, for a history of the development of this jurisdiction in the King's Council prior to the Star Chamber.
peace of the realm.\textsuperscript{286} Thus, "the Star Chamber exercised a criminal jurisdiction almost without limitation and altogether without appeal."\textsuperscript{287} The one restraint upon this arbitrary power was that it could not inflict a penalty of life or limb.\textsuperscript{288} It could try treason or felonies only as trespasses against the public peace and subject the offenders to no greater penalties than fine or imprisonment.\textsuperscript{289} In taking jurisdiction of the lesser crimes, a field which the older common law had neglected, the Star Chamber stepped into a breach in the criminal law of the time and laid the foundations for several branches of our substantive criminal law of misdemeanors, such as criminal libel, conspiracy, fraud, maintenance and forgery.\textsuperscript{290} The list of offenses recited in the enabling statutes, described above, was never regarded as a limitation upon its vague and indefinite ancient jurisdiction. In addition to crimes of violence, crimes affecting the administration of justice and the misdemeanors mentioned, it assumed jurisdiction over attempts to commit crimes, and over heresy, challenges, duels, maintenance and champerty, dissemination of false

\textsuperscript{286}Unfortunately, it sometimes overrode the common law processes in favor of the offender. 4 \textsc{Holdsworth}, \textit{op. cit.} note 2, at 86–87; 5 \textit{ibid.} 187. \textsc{Dicey}, \textit{op. cit.} note 193, at 112, thus describes one of the chief means and purposes for influencing the law courts: "In some instances the King transferred to the Star Chamber cases on which the courts were about to pronounce a decision. When this was done, it wanted but one more step for the King, as the phrase went, 'to take the matter into his own hands,' and, if he chose, pardon the offence, generally after a receipt of a large sum of money. Instances abound in Henry VII's reign, where criminals escaped justice by bribing the monarch. Entries in the minutes, such as 'the Earl of Derby, for his pardon, £6,000;' 'for the pardon of William Harper, for treasons, felonies, escapes, and other offences, 200 marks;' which occur frequently in the Star Chamber's records, tell their own tale." And see \textsc{Burn}, \textit{op. cit.} note 176, at 32 et seq.; \textsc{Maitland}, \textit{op. cit.} note 5, at 219.

\textsuperscript{287}4 \textsc{Reeves}, \textit{op. cit.} note 105, at 151; \textsc{Maitland}, \textit{op. cit.} note 143, at 19; \textsc{Spence}, \textit{op. cit.} note 2, at 341.

\textsuperscript{288}1 \textsc{Holdsworth}, \textit{op. cit.} note 2, at 59–63, 487–8, attributes this restriction to the thirty-ninth clause of Magna Carta, which provides that, "No freeman shall be taken or/and imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or/and by the law of the land." He observes (p. 488): "It is clear that this limitation of its jurisdiction over criminal cases had important effects upon the growth of English criminal law. It ensured that the most serious crimes should be tried by the ordinary procedure of the common law courts, and not by the extraordinary procedure of the Council and Star Chamber." 

\textsuperscript{289}5 \textsc{Holdsworth}, \textit{op. cit.} note 2, at 188; \textsc{Dicey}, \textit{op. cit.} note 193, at 113.

\textsuperscript{290}5 \textsc{Holdsworth}, \textit{op. cit.} note 2, at 197 et seq.; 1 \textit{ibid.} 504 et seq.; \textsc{Pound}, \textit{op. cit.} note 142, at 122; \textsc{Dicey}, \textit{op. cit.} note 193, at 105 et seq.; \textsc{Bal\textsc{d\textsc{w}i\textsc{n}}, \textit{op. cit.} note 50, at 271 et seq.; \textsc{Hudson}, \textit{op. cit.} note 182, at 65–113; \textsc{Coke}, \textit{op. cit.} note 7, at 63.
and seditious rumors, contempt of public authorities,\textsuperscript{301} violation of royal proclamations,\textsuperscript{302} and all other acts which it deemed inimical to public welfare.\textsuperscript{303} It also maintained a stringent supervision over common law juries, frequently fining and imprisoning them for verdicts obviously contrary to the evidence, and thus made the jury once more an efficient instrument in the administration of justice.\textsuperscript{304}

On the civil side the Star Chamber exercised a wide jurisdiction so long as there was need of a summary executive justice to supplement the common law courts for the protection of the poor and "un-mighty" in their civil rights. With the reestablishment of law and

\textsuperscript{301}In \textit{Merry Wives of Windsor}, Shakespeare plays upon this feature of Star Chamber jurisdiction:

"Shal. Sir Hugh, persuade me not; I will make a star-chamber matter of it; if he were twenty Sir John Falstaffs, he shall not abuse Robert Shallow, Esquire.

Slen. In the county of Gloster, justice of peace and Coram.

Shal. Ay, cousin Slender, and Custalorum.

Slen. Ay, and Ratolorum, too; and a gentleman born, master parson, who writes himself Armigero; in any bill, warrant, quittance, or obligation, Armigero."

\textsuperscript{302}The power of the king to issue proclamations having the force and effect of law also rested upon the ancient prerogative. Nor was this lost sight of in the enactment of the famous Statute of Proclamations, 31 Hen. VIII, c. 8 (1540) designed, like the Statute \textit{Pro Camera Stellata}, to reconcile the people to a great extension of government by the prerogative incident to the religious reestablishment. This Act confirmed the right of the king with the advice of a majority of his Council to issue ordinances and proclamations having the force of an act of Parliament. That the repeal of the act in 1547 (1 Edw. VI [1547-1553] c. 12) did not affect the prerogative authority of royal proclamations is seen from their continued use and from the fact that, as Scofield, \textit{(op. cit. note 276, at 48) points out, "'contemners of the royal pleasure and command'...were the special prey of the Star Chamber." Also see Port, Frederick J., \textit{Administrative Law} (1929) 42."


\textsuperscript{304}Plucknett, \textit{op. cit. note 5}, at 111-114, and see note 342, \textit{infra}; 1 Holdsworth, \textit{op. cit. note 2}, at 343 et seq.; Potter, \textit{op. cit. note 90}, at 71. The old remedy of attainder of a petty jury for misbehavior, found by a grand jury upon review of the same evidence, with its severe punishments had become ineffective. The reason was that after the jurors became triers of the fact, rather than witnesses, it was found almost impossible to get a grand jury to attain them. Consequently, the Star Chamber took over the supervision of the jury to assure true verdicts. Although long obsolete, the attainder was not abolished by statute until 1825. 1 Holdsworth, \textit{op. cit. note 2}, at 343; Thayer, \textit{op. cit. note 61}, at 149 et seq.
order, much of this remedial jurisdiction was absorbed by Chancery in exchange for its old semi-criminal jurisdiction.305 Thereafter, the Star Chamber's civil jurisdiction was based chiefly upon its traditional protection of the commercial and maritime rights of foreigners,306 the enforcement of the right of the king's almoner to the forfeited goods of a felo de se (a suicide) or to deodands,307 or upon its vague and indefinite authority over acts contrary to the public welfare. In the latter capacity of custos morum (guardian of the mores of the time) it set itself up to be a censor of good morals and conservator of the established order.308 Under this broad power it brought within its grasp all sorts of private controversies, ranging from such ecclesiastical causes as matrimonial disputes309 and testamentary contests310 to the most trivial personal matters, as settling a quarrel between neighbors, fining wealthy London families who did not observe the custom of taking a place in the country for the summer, or collecting a tailor's bill.311 Nor did it hesitate to step in and compel a fair composition by the creditors of an insolvent but honest tradesman.312 For the most part this was a concurrent jurisdiction with the courts of common law, the ecclesiastical courts and the admiralty court.315

305See supra note 295.
3065 Holdsworth, op. cit. note 2, at 137; Hudson, op. cit. note 182, at 52; Baldwin, op. cit. note 50, at 272 et seq.; Leadam and Baldwin, op. cit. note 185, at xxxcii.
307The gift of such forfeits by royal charter were termed the king's alms. "... The almoner recovereth only what is detained, or the value, or something in lieu thereof, as the court shall think fit, without fine or punishment." Hudson, op. cit. note 182, at 57, 137. See the description of royal prerogatives and droits under the Coroner's Court, supra.
309I Holdsworth, op. cit. note 2, at 507; Dicey, op. cit. note 193, at 111. About 1618 Lady Hatton, second wife of the celebrated Sir Edward Coke, Lord Chief Justice, charged him in the Star Chamber with riot for having abducted their fourteen-year-old daughter by violence in order to secure her marriage to Sir John Villiers, brother of the Duke of Buckingham, favorite of King James I. 5 Holdsworth, op. cit. note 2, at 443; Burn, op. cit. note 176, at 85. Cf. Lyon and Block, Edward Coke, Oracle of the Law (1929) 246.
310Hudson, op. cit. note 182, at 56; 1 Holdsworth, op. cit. note 2, at 507.
311I Holdsworth, op. cit. note 2, at 506; Dicey, op. cit. note 193, at 105 et seq.; Burn, op. cit. note 176, Preface; 5 Bacon, op. cit. note 294, at 186.
312I Holdsworth, op. cit. note 2, at 504.
313I Holdsworth, op. cit. note 2, at 504; 4 ibid. 274-275; Hudson, op. cit. note 182, at 19, 214-215; 4 Coke, op. cit. note 7, at 63; Smith, op. cit. note 294, at 120; Prothero, op. cit. note 169, at cvii.
Still another aspect of the Star Chamber, which is of especial importance to us today, was its function as a central administrative board or commission. In this capacity it regulated corporations, labor, printing and other trades, and the supply and prices of staples, such as grain, meat, butter, cheese, etc., much as our state public service commissions regulate public utilities and the Federal Trade Commission at Washington umpires big business.

Closely associated with this administrative side of the “public jurisdiction” of the Star Chamber was its supervision of the judiciary in the administration of local justice. An important feature of this supervision was an address by the Lord Chancellor or other high official of this court to the assembled justices of the common law on the eve of their departure to hold the Assizes. The court also called periodic convocations of the justices of the peace for admonition on the discharge of their duties.

The Star Chamber sat on stated days for the public hearing of cases, usually two or three times a week, during the regular terms of the law courts. Its procedure was set in motion in civil matters by an informal bill or petition, much as in Chancery, and in criminal cases by an information or suggestion presented to the court by the attorney-general. The latter acted sometimes on his own initiative, sometimes on that of the court, but normally on the relation of a

314Holdsworth, op. cit. note 2, at 67 et seq.; Pound, op. cit. note 142, at 68; Pound, op. cit. note 178, at 134; Pollock, op. cit. note 295, at 42 et seq.
315Hudson, op. cit. note 182, at 54, 121; Holdsworth, op. cit. note 2, at 506; 4 ibid. 347, 381; 5 ibid. 137; Price, William H., The English Patents of Monopoly (1906) 43, 120, 126. The corporation of that day was not the general business instrument we know. The few corporations there were enjoyed special monopolies and, therefore, were closely watched.
316Hudson, op. cit. note 182, at 54. Scofield, op. cit. note 276, at 52 et seq.; 5 Holdsworth, op. cit. note 2, at 208; Vance, op. cit. note 283, at 456 et seq.
317Leadam, op. cit. note 249, (25 Selden Society, 1910) at xxi et seq., contains an extensive survey of this branch of the administrative jurisdiction of the Star Chamber. 4 Holdsworth, op. cit. note 2, at 351 et seq.; Scofield, op. cit. note 276, at 54.
318The jurisdiction of the Star Chamber is sometimes classified into “public jurisdiction” and “private jurisdiction”. Its public jurisdiction included the criminal jurisdiction, the regulatory administrative jurisdiction, the supervisory jurisdiction over the administration of justice, and the survival of its ancient governmental functions. 1 Holdsworth, op. cit. note 2, at 504 et seq.; Hudson, op. cit. note 182, at 52, 62, 107, 113.
319Holdsworth, op. cit. note 2, at 75–78, 83 et seq.; Hudson, op. cit. note 182, at 53; Scofield, op. cit. note 276, at 56, 58; Beard, op. cit. note 89, at 118 et seq.
person who claimed knowledge of the facts.\textsuperscript{321} In the “ordinary procedure”, which was used in cases having no special public interest, process did not issue until after the filing of the bill or information.\textsuperscript{322} Even on process by bill under this procedure, the defendant who failed to answer the plaintiff’s bill was committed to prison. If he persisted in not answering, the bill was taken \textit{pro confesso} and he was punished.\textsuperscript{323}

In cases regarded as involving the welfare of the state, the accused was subjected to what Hudson describes as “an extraordinary kind of proceeding, more short and more expeditious, which is called \textit{ore tenus}.”\textsuperscript{324} Under this process the accused was arrested by a pursuivant or messenger of the court and was privately examined.\textsuperscript{325} Hudson tells us that if he denied the accusation, the court could not proceed against him \textit{ore tenus}, but, “If he confessed the offense, freely and voluntarily, without constraint, then may he be brought

\textsuperscript{321}Hudson, \textit{op. cit.} note 182, at 126, says: “I must begin with the inception of every suit, which is either by some particular person’s complaint, or by the curious eye of the state and king’s council prying into the inconveniences and mischiefs which abound in the Commonwealth.” 4 \textsc{blackstone}, \textit{op. cit.} note 23, at 309–310, asserts that prosecution of criminal causes by information or suggestion filed on record by the proper official was as ancient as the common law itself. This method of criminal prosecution was limited to misdemeanors; prosecution for felony had to be by indictment of a grand jury, that is, its finding on oath by the proper official was as ancient as the common law itself. \textit{And see:} 9 \textsc{holdswoth}, \textit{op. cit.} note 2, at 236 \textit{et seq.}; \textsc{carter}, \textit{op. cit.} note 68, at 84 \textit{et seq.}; \textsc{scofield, \textit{op. cit.} note 276, at 73.}

\textsuperscript{322}This was the practice described in the statute \textit{Pro Camera Stellata}, for which see note 285, \textit{supra}. The process was usually by subpoena, but might be by letters missive or writ under the Privy Seal. 1 \textsc{leadam, \textit{op. cit.} note 249, at xxi}; Hudson, \textit{op. cit.} note 182, at 142; 5 \textsc{holdswoth, \textit{op. cit.} note 2, at 161, 178.

\textsuperscript{323}Hudson, \textit{op. cit.} note 182, at 168; \textsc{scofield, \textit{op. cit.} note 276, at 75; \textsc{dicey, \textit{op. cit.} note 193, at 103.}

\textsuperscript{324}Hudson, \textit{op. cit.} note 182, at 127. He admits this procedure was much blamed as seeming to oppose the Magna Carta and the enabling acts, “by reason there is no judicial proceeding nor complaint exhibited whereunto the party charged to be an offender hath space given him to answer, or liberty to advise with counsel...yet in case of necessity, the lawful use of this course of proceeding would appear as fair to the eye of justice as any other whatsoever.” \textit{And see:} 1 \textsc{leadam, \textit{op. cit.} note 249, at lxvii}; 5 \textsc{holdswoth, \textit{op. cit.} note 2, at 165–166; \textsc{scofield, \textit{op. cit.} note 276, at 76; \textsc{dicey, \textit{op. cit.} note 193, at 102.}

\textsuperscript{325}Indeed, under this extraordinary procedure the members of the Council in the Star Chamber assumed the right to arrest citizens on information or suggestion made to them personally instead of as a body, and on their own initiative. \textsc{dicey, \textit{op. cit.} note 193, at 116. \textit{See protest of the common law judges (1591) against such arrests of subjects for pursuing their legal remedies.} \textsc{prothero, \textit{op. cit.} note 169, at 446; 1 \textsc{holdswoth, \textit{op. cit.} note 2, at 509; 1 \textsc{hallam, \textit{op. cit.} note 277, at 234.}
to the bar; at which time his confession is showed him; and if he acknowledge it, then who can doubt but that the court may justly proceed *ex ore suo* [on his own word], and give judgment against him. This great apologist for the Star Chamber admits, however, that this 'extraordinary procedure' was frequently carried to excess and warns that since 'this course of proceeding is an exuberancy of prerogative' it should be kept scrupulously within its proper bounds. Unfortunately, it was precisely this which was not done. Drunk with the arrogant power of the prerogative, the Star Chamber introduced much of the inquisitorial procedure then prevalent in the criminal courts of the absolute monarchies of the continent.

Although the common law forbade resort to torture, the king under his prerogative could by personal letter or through his Council authorize its use in matters affecting the state. This concession was seized upon by the court, and, as it developed ingenuity in discerning matters of state in almost any case, the extraordinary procedure thus became the ordinary procedure. Putting prisoners and witnesses on the rack grew to be a common practice. Since in England, as under the civil law, the nobility were held to be exempt from torture, the employment of this gruesome practice by the Council took the appearance of class oppression and made the Star Chamber doubly odious to the rising commons. Furthermore, all prisoners in the Star Chamber, like those charged with treason or felony in the King's Bench, were denied counsel, and for a long period even the right to present witnesses in their defense. The rule against self-incrimination was unknown and the ordinary rules of evidence were wholly disregarded. The very judges trying the case took the part of prosecutors, not only cross-examining the accused in the most

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vicious manner but commonly resorting to violent personal abuse
in the course of the trial. Their unseemly levity and vituperative
remarks when imposing sentence have left an indelible impression of
abhorrence upon all English peoples. Even with respect to the
ordinary procedure of the court, Holdsworth points out that “in the
obligation of the defendant to answer and to submit to interrogatories
on oath, in the secrecy of the examination of both defendants and
witnesses and in the manner of hearing the case on written evidence,
we can see continental influences.”

The arbitrary infliction of cruel and unusual punishments by the
Star Chamber also smacked of the absolutism of the continent. Although, as pointed out above, it was prohibited from inflicting
sentences depriving of life or limb, its indiscriminate use of other
penalties, after it had served its purpose by reestablishing law and
order, has left a hateful remembrance of arbitrary administration of
justice. Even on the civil side it enforced its judgments by unlimited
imprisonment for contempt, while on the criminal side the im-
position of staggering fines, both for revenue and in terrorem, and
both counsel and witnesses. A vivid description of such a trial in the King’s
Bench will be found in Smith, op. cit. note 294, Chap. 25.

Nowhere has this tyrannical action of the judges been more vividly portrayed
than by the Earl of Clarendon, the royalist historian of the Rebellion, who quotes
the ancient wisdom of Thucydides (lib. 1, c. 77) that “men are much more pas-
sionate for injustice than for violence.” I CLARENDON, HISTORY OF THE RE-
BELLION (1702) (Macray’s ed. 1888) 86 et seq. And see Burn, op. cit. note 176,
at 135.

Holdsworth, op. cit. note 2, at 144.

Hudson, op. cit. note 182, at 225 refers to this and describes a famous case:
“Sometimes the punishment is by the wisdom of the court invented in some new
manner for new offences; as for Traske, who raised Judaism up from death, and
forbade the eating of swine’s flesh, he was sentenced to be fed with swine’s flesh
when he was in prison.” For other instances, see Carter, op. cit. note 68, at 86.

Hudson, op. cit. note 182, at 122; 6 Holdsworth, op. cit. note 2, at 34, 39, 54.

The Stuarts resorted to Henry VII’s abuse of the power of the prerogative
to collect revenue by huge fines imposed by the Star Chamber under the guise
of administration of the criminal law. Also, cases of treason and felony were
sometimes removed by King and Council into the Star Chamber pending trial
in the common law court of King’s Bench and further proceedings there were
barred by a writ of prohibition. The king would then grant a pardon, meaning
life and liberty to the prisoner, for an enormous fine. Sometimes this power was
exercised to favor powerful nobles. Fines estreated to the Exchequer and were
levied and collected like judgment debts. Unfortunately, sometimes the king
made a gift of a fine to some courtier, and under the Stuarts the informer was
given a share of the fine. Hudson, op. cit. note 182, at 224, says a fine was always
accompanied by sentence to imprisonment in order to assure payment of the fine.
Also see: Scofield, op. cit. note 276, at 77–79; Dicey, op. cit. note 193, at 112;

Hudson, op. cit. note 182, at 36, 224; 1 Holdsworth, op. cit. note 2, at 506.
the casual sentencing to imprisonment for life and other harsh and unusual punishments, inflicted upon women as well as men, "such as the pillory, nailing or cutting off the ears, branding, whipping, slitting the nose, wearing in public places papers indicating the offense committed, riding around Westminster Hall with face to the horse's tail, and marching the convicted through the streets clad only in his shirt, made it the dread of every subject.

To add to its obloquy the Star Chamber as early as the reign of Mary (1553–1558) began to prostitute its extraordinary jurisdiction over common law juries by coercing them to bring in verdicts of guilty in political and other state cases, even though contrary to the evidence, on penalty of exorbitant fines and imprisonment should they acquit the accused. The pages of history afford no finer examples of upright manhood than the fortitude with which some juries, knowing what was before them, acquitted high political prisoners rather than become parties to taking the life of an innocent man, and withstood the Star Chamber's utmost punishment rather than retract their verdict.

33Dicey, op. cit. note 193, at 125; Carter, op. cit. note 68, at 88; Burn, op. cit. note 176, at 116, 129; I Hallam, op. cit. note 277, at 426.
34Hudson, op. cit. note 182, at 224; Coke, op. cit. note 7, at 65; Scofield, op. cit. note 276, at 77.
35Burn, op. cit. note 176, at 47.
36Thayer, op. cit. note 61, at 162 et seq.; I Holdsworth, op. cit. note 2, at 343–344; Scofield, op. cit. note 276, at 45; Smith, op. cit. note 294, Book III, Chap. 1,111; Plucknett, op. cit. note 5, at 113 et seq.; Blackstone, op. cit. note 23, at 361. Upon the abolition of the Star Chamber the common law criminal courts claimed and exercised till 1670 its jurisdiction for punishing dishonest or recalcitrant juries. In the famous Bushell's Case (Vaughan 135, s. c. 6 Howell's State Trials 999), the jurors, having been fined and imprisoned by the Sessions Court of Old Bailey for acquitting the Quakers, William Penn, the founder of Pennsylvania, and William Mead, on a charge of taking part in an unlawful assembly, were discharged on habeas corpus issued by the Common Pleas. By the famous opinion of Vaughan, C. J., in that case the character of jurors as judges of the facts was vindicated and punishment of jurors for their verdicts was finally ended. See Thayer, op. cit. note 61, at 166; I Holdsworth, op. cit. note 2, at 345.

It had been customary also for justices of the peace and justices of Assize to fine grand juries for not bringing indictments as directed. The danger of this practice to the cherished liberties of the free Englishman is pointed out by Lord Chief Justice Hale, 2 History of Pleas of the Crown (first printed 1736) (Stokes and Ingersoll, 1st Am. ed. 1847) *159 et seq.

37The punishment meted out to the jury which acquitted Sir Nicholas Throckmorton of treason upon his own masterly defense, since as usual in such cases he was denied counsel, has become historic. The jurors were immediately imprisoned on announcing their verdict April 17, 1554. Sometime later four weaker members confessed their error and were released. The other eight remained in prison until October 26th, when they were brought before the Council in the Star
The Council in the Star Chamber, which had come into existence to preserve the liberties of the poor and unmighty at a time when the common law and the common law courts failed them, and which had served so well that for centuries it was hailed, in the words of Coke, "the most honorable court, (our Parliament excepted) that is in the Christian world, . . ." thus degenerated under the Stuarts into a political and inquisitorial tribunal which to this day stands out in English constitutional history as the epitome of all that is abhorrent to the genius of English institutions. As prosecutor, judge, jury and executioner all in one, it became such an engine of royal tyranny that it was one of the chief causes of the Puritan Rebellion.

In 1641 the Long Parliament abolished the Star Chamber and its two chief satellites—the Council of Wales and the Marches, and the Council of the North. The supplemental jurisdiction of the Star Chamber, such as its jurisdiction over misdemeanors, over juries, and as custos morum, reverted into the court of King's Bench, which to the end of the Westminster epoch remained the great court for crown cases, that is, those involving injuries to the state and the public welfare. With the passing of these prerogative courts of crimi-

Chamber and asked to admit their wrong. Instead, they stoutly declared they had found according to their consciences and as honest men, whereupon they were remanded to prison. The foreman and another were fined £2000 each, while the remaining six were each fined 1000 marks. On December 12th, five were released on paying £220 each, and on December 21st the last three paid £60 apiece and went home. That the Council eventually relented, may be due to the fact that the royal vengeance visited upon this jury proved so effective that Sir John Throckmorton, a brother, by this time had been convicted by another jury on the same evidence and executed. 1 Howell's State Trials 870, 902; Thayer, op. cit. note 61, at 163; 1 Holdsworth, op. cit. note 2, at 344.

Coke, op. cit. note 7, at 65. For other eulogies of the court see: Hudson, op. cit. note 182, at 22; 1 Holdsworth, op. cit. note 2, at 507; 5 Bacon, op. cit. note 294, at 290.

Many of our modern administrative tribunals, such as the public service commissions, possess similar incompatible powers, relieved only by the right of review for arbitrary abuse of those powers and consequent violation of the protection of the Fourteenth Amendment to the Federal Constitution. Thompson, G. J., The Next Step in Public Utility Regulation (1922) 28 W. Va. L. Q. 253, 262-263.

16 Car. I (1625–1649) c. 10, which received the assent of the king July 15, 1641. It provided that the court should cease to function on the first day of August, 1641. See: 1 Clarendon, op. cit. note 333, at 374–375; 1 Holdsworth, op. cit. note 2, at 515; 6 ibid. 112; Maitland, op. cit. note 5, at 311; 4 Stephen, op. cit. note 306, at 315.

Palgrave, op. cit. note 100, at 111; 8 Holdsworth, op. cit. note 2, at 306, 407; 4 Blackstone, op. cit. note 23, at 266.
nal jurisdiction the official infliction of torture also disappeared.348
So ended the old order amid events which marked the dawn of the modern era of constitutional representative government.349

THE COUNCILS OF THE BORDERS

The Council of Wales and the Marches350 seems to have taken definite form when Edward IV (1461-1483) first created a President and Council of the Marches to govern Wales and the bordering English counties, which were still in a lawless state. Like the Anglo-Saxon courts, this Council was a governmental, administrative and judicial body, and proved to be a most efficient instrument for the reestablishment of the king's peace on that turbulent frontier. Shortly after the union of England and Wales in 1536, it was recognized by the Act of 1543,351 as a prerogative court, with such jurisdiction as the king might confer. It exercised a prerogative jurisdiction similar to that of the Star Chamber and an extensive equitable and common law jurisdiction as well, the latter concurrent with that of the Welsh courts. In fact, its criminal jurisdiction exceeded that of the Star Chamber, for it was empowered to try the offenses of treason and felony and inflict the death penalty.352 Although it fell with the Star Chamber, to which it was subordinate, it was revived with its equitable and common law jurisdictions on the Restoration of Charles II in 1660, only to be finally vanquished by statute in 1689 in the aftermath of the "Glorious Revolution" of 1688 which dethroned James II (1685-1689).353

The Council of the North354 was an outgrowth of an organization
created by Henry VII for the maintenance of law and order in the restless counties on the Scottish border. It was reorganized with a Lord President at its head on the pattern of the older Council of Wales and the Marches by Henry VIII in 1537, following the suppression of the northern revolt known as the Pilgrimage of Grace. This little Star Chamber of the North exercised approximately the broad jurisdiction of the Council of Wales and the Marches, and in a similarly efficient manner. As we have seen, it shared the fate of most of the other prerogative courts.

Among the other courts whose Star Chamber jurisdiction was abolished by the Act of 1641 was the Court of the Duchy Chamber of Lancaster and the Court of Exchequer of the County Palatine of Chester. The counties palatine received this title from the fact that, owing to the difficulty of maintaining order in those border counties, the crown early vested the ruling lords with the most extensive prerogative powers—the power of pardon, of appointing judges, of issuing process, and of keeping the peace. By the Act of 1536, Henry VIII regained for the crown the power of appointment of judges and the pardoning power. Thereafter, also, writs were required to issue in the king's name but were tested (attested) in the name of the lord of the county palatine. The palatinate counties had their own complete system of courts. The courts of the Palatinate of Chester and of the royal franchise of Ely were extinguished by statute prior to the Judicature Act of 1873. That act abolished the Common Pleas Courts of the surviving counties palatine, but the Chancery Court of the County Palatine of Lancaster and the Chancery Court of the County Palatine of Durham still survive as ancient prerogative courts.

The Court of Requests was a prerogative court presided over by the Lord Keeper of the Privy Seal, and was also known as the Court
of Whitehall from the room in which it sat at Westminster. It was established without statute or ordinance as a standing committee of the Council by Henry VII about 1493. As a committee of the Privy Council it undertook to supplement the work of the committee sitting in the Star Chamber in the maintenance of law and order, but when the Star Chamber came to function more efficiently the jurisdiction of the Court of Requests became almost wholly civil. It heard claims for royal boons, suits by the king’s servants, and the petitions of poor men for extraordinary relief. It was the court most ready to entertain suits by plaintiffs in forma pauperis (in the character of a person sworn not to be worth £5), and as the poor man’s court of equity it achieved great popularity. Cardinal Wolsey divided the court into two branches—one sitting permanently at Westminster, which later consisted of two Masters of Requests Extraordinary; the other consisting of two Masters Ordinary who attended the king’s person. After Henry VIII’s reign the Masters of Requests ceased to be councillors and the committee became a court distinct from the Council. Like the Star Chamber it employed the privy seal process, as distinguished from the great seal process of chancery. As a prerogative court, it incurred the enmity of the common law courts, which, after 1599, repeatedly declared it illegal. While not mentioned in the


The King’s Court of Requests should not be confused with the municipal small cause courts also called Courts of Requests, such as those at London, Bristol and other cities. LEADAM, op. cit. note 358, at liii; 3 BLACKSTONE, op. cit. note 23, at 81.

The Ordinance of 1390 (13 RICHARD II, 1377–1399) distributing the work of the Council by providing that matters of “greater charge” should be determined by the Lord Chancellor and certain members, but that bills of “lesser charge” should be heard by the Lord Privy Seal and such of the Council as should be present at the time, has been thought by PALGRAVE, op. cit. note 100, at 79, to be the source from which the authority of the Lord Keeper’s Court of Requests derived. It may well be that this function of the Lord Keeper with his “more or less shifting committee of an itinerant Council,” as LEADAM, op. cit. note 358, at xi, describes it, suggested to Henry VII the establishment of the permanent committee of the Council under the same magnate. And see: 1 HOLDSWORTH, op. cit. note 2, at 413; LEADAM, op. cit. note 358, at ix–xii, xxxv; BALDWIN, op. cit. note 50, at 259, 284; Pollard, op. cit. note 276, at 341, 535.

LEADAM, op. cit. note 358, at xii–xv, xxvii; 1 HOLDSWORTH, op. cit. note 2, at 413; 3 BLACKSTONE, op. cit. note 23, at 400.

LEADAM, op. cit. note 358, at xciii; 1 HOLDSWORTH, op. cit. note 2, at 413; POTTER, op. cit. note 90, at 68.

COKE, op. cit. note 7, at 97 et seq.; LEADAM, op. cit. note 358, at xxii et seq.; 1
statute which abolished the Star Chamber, the Court of Requests virtually fell with that court whose process it shared, and ceased to function in 1642. 363

(To be continued)

HOLDSWORTH, op. cit. note 2, at 414; CARTER, op. cit. note 68, at 100. As early as 1590, the Common Pleas began to issue writs of prohibition against this court. See supra note 243.

363 LEADAM, op. cit. note 358, at xlvi et seq.; 1 HOLDSWORTH, op. cit. note 2, at 415; CARTER, op. cit. note 68, at 101; 3 BLACKSTONE, op. cit. note 23, at 50.