Development of the Anglo-American Judicial System

George Jarvis Thompson
THE DEVELOPMENT OF THE ANGLO-AMERICAN JUDICIAL SYSTEM*

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PART I

HISTORY OF THE ENGLISH COURTS TO THE JUDICATURE ACTS

b. The Prerogative Courts (Continued)

THE ECCLESIASTICAL COURTS

The "Courts Christian", or ecclesiastical courts, formed a complete judicial system which administered a law of its own, the *jus commune* (common law) of the church, or canon law. This law was based upon the Corpus Juris Canonici, which derived from the Roman Law. As we have seen, the separation of the spiritual and temporal jurisdictions of the ancient communal courts is generally credited to the famous ordinance of William the Conqueror about 1072. "[T]he

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*Hazeltine, Ecclesiastical Courts, 5 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (1931) 307; Langdell, The Development of Equity Pleading from Canon Law Procedure, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 754; Stubbs, The History of the Canon Law in England, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 248; Maitland, Canon Law in the Church of England (1898) 52, 140; 2 Maitland, op. cit. note 11, at 132, Henry II and the Criminous Clerks; Plucknett, op. cit. note 5, at 216 et seq.; 1 Stubbs, op. cit. note 5, at 308; 1 Holdsworth, op. cit. note 2, at 304 et seq., 382, 587; 1 Pollock and Maitland, op. cit. note 2, at 111 et seq.

In spite of the presence of the bishops in the Anglo-Saxon communal courts, it is probable that the pre-Conquest church had independent tribunals with exclusive cognizance of some questions pertaining to its spiritual dominion. Maukover, Felix, CONSTITUTIONAL HISTORY OF THE CHURCH OF ENGLAND (1895) 388; 1 Stubbs, op. cit. note 5, at 254; Bigelow, op. cit. note 48, at 29; Stubbs, APPENDIX TO REPORT OF ECCLESIASTICAL COURTS COMMISSION (1883) 23.

See note 48, supra. Langdell, op. cit. note 364, at 953.
Conqueror’s ordinance must be treated as the beginning of a new era. The long contested claim of William I and his successors to be the final appellate authority in the ecclesiastical judicial system, on the ground that the king was the supreme head of both the temporal and spiritual jurisdictions in his kingdom, was defeated in 1213 when King John was compelled to acknowledge the paramount authority of the pope as head of the English church in all its branches. From that time to the Reformation the ecclesiastical courts were recognized as forming within the realm an independent judicial system which derived its power from a foreign sovereign, the Roman Pope. Whether or not Henry VIII and his Parliament were correct in their protestations that in becoming the supreme head of the English church in 1533 he was but resuming the ancient prerogatives of his “most noble progenitors”, Kings of England, to govern all within his kingdom, spiritual as well as lay, it is clear that henceforth, at least, the ecclesiastical courts were prerogative courts. The ecclesiastical jurisdiction was thus brought within the royal prerogative of just...
king's grant by letters missive or letters patent, as declaratory acts of Parliament repeatedly affirmed.

All England has been divided from Anglo-Saxon times to the present into two great ecclesiastical provinces, the province of Canterbury and the province of York, each presided over by an archbishop and possessing its own complete system of spiritual courts. The judicial systems of the two provinces duplicated each other, however, and therefore they will be treated very much as a single system in this survey.

**Ecclesiastical Courts Before the Reformation**

This ecclesiastical judicial system consisted of the following courts named in their order from lowest to highest:

The Archdeacon's Court was the inferior court of the diocese, but in general it possessed an original jurisdiction practically concurrent with that of the Consistory. It also exercised supervision over local

Supremacy Acts conferred upon him the title of "only Supreme Head in Earth of the Church of England", it is clear that he and his successors remained laymen. They claimed the supreme ecclesiastical administrative authority and jurisdiction (potestas jurisdictionis) but not the power of consecration (potestas ordinis). Because the title supreme head of the English Church caused misapprehension and hostility, Elizabeth wisely adopted the non-clerical title of "supreme governor of this realm in all spiritual as well as in all temporal things."

Makower, op. cit. note 365, at 254 et seq.; Holdsworth, op. cit. note 2, at 591 et seq.; Maitland, Elizabethan Gleanings—I, 'Defender of the Faith, and so forth' (1900) 15 Eng. Hist. Rev. 120.

Under 25 Hen. VIII, c. 20, § 4 (1533), upon vacancy of a see, the king addressed a letter missive to the prior and convent or dean and chapter constituting the proper electoral body, instructing them to choose a named candidate to the vacant office; if the electors proved recalcitrant, the king by letter patent to his nominee directly installed him in office. 1 Edw. VI, c. 2 (1547) substituted the practice of direct nomination by letter patent, but 1 Eliz. c. 1 (1558) returned to the earlier method. Prothero, op. cit. note 169, at xxxvi. This practice was in violation of John's Charter of 1214, promising free elections to bishoprics, which was confirmed by Magna Carta, clause 48. Thomson, Richard, Magna Carta (1829) 417 et seq.; Maitland, op. cit. note 5, at 172.

25 Hen. VIII, c. 20, § 4 (1533); 1 Edw. VI, c. 2 (1547); 1 Eliz. c. 1 (1558).

Since the reign of the Conqueror, the Archbishop of Canterbury has been recognized as primate of England, the highest ecclesiastical of the kingdom. Makower, op. cit. note 365, at 281 et seq.

church administration. In the absence of the archdeacon it was
presided over by an "official" appointed by him.

The Consistory Court of the Bishop, or Bishop's Court, was the
general diocesan court, since the bishop, like the archbishop, was a
Judge Ordinary (judex ordinarius), that is, a judge by virtue of his
office. This court had original jurisdiction in all spiritual matters
and appellate jurisdiction over the archidiaconal courts. It was
presided over by the chancellor of the diocese, who in this capacity
acted as the bishop's "official principal" and also, as the bishop's
vicar-general, administered the business affairs of the bishopric.

The Court of the Official Principal, known in the province of
Canterbury as the Court of Arches,377 and in the province of York as
the Chancery Court of York, was the chief provincial court of the
archbishop. It possessed a general original jurisdiction in ecclesiasti-
cal matters throughout the province and an appellate jurisdiction
over the Consistory Courts therein. In Canterbury it was presided
over by the Official Principal, or Dean of Arches, and in York by the
Chancellor of that province.

The Court of Peculiars378 was a branch of the Court of Arches
exercising jurisdiction over certain parishes in the province of Canter-
bury, which were subject to the direct authority of the Archbishop
rather than to the local bishop.

There was also an archiepiscopal Court of Audience,379 which was
vested with the personal jurisdiction reserved to the archbishop over
the more important judicial and administrative affairs of the province.
He could remove any cause into this court for trial before himself.
The court became obsolete before the eighteenth century.

377"The court of arches is a court... whereof the judge is called the dean of the
arches, because he anciently held his court in the church of Saint Mary le bow,
(sancta Maria de arcubus) though all the principal spiritual courts are now holden
at doctors' commons." 3 BLACKSTONE, op. cit. note 23, at 64-65.

After the foundation of Doctors' Commons, the Court of Arches, the Pre-
rogative Court of Canterbury, the Court of the Bishop of London, and the Court
of Admiralty sat in the Common Hall of that institution. FOSTER, G. J., DOCTORS'
COMMONS (1871) 6. See note 490, infra.

378A "peculiar" was a parish or church exempt from the ordinary territorial
jurisdiction and subject to a bishop of another diocese, or to an abbot, dean or
other ecclesiastic head. 1 HOLDSWORTH, op. cit. note 2, at 6oo. Usually each
peculiar had its Peculiar Court, but the peculiars directly subject to the Arch-
bishop of Canterbury were under the jurisdiction of his Court of Peculiars at
London. The Peculiar Courts were practically abolished by 10 and 11 Vict. c. 98
(1847), but the Court of Peculiars still survives. STUBBS, op. cit. note 365, at 31.

379See especially LEADAM, op. cit. note 249, at lxxxv et seq.; STUBBS, loc. cit.
note 378.
The Prerogative Court was the great archiepiscopal court of probate and possessed jurisdiction over all testamentary matters where the deceased left *bona notabilia* (goods of a certain value) in more than one diocese of the province. Although this court was commonly referred to as the Ordinary's Court, it was normally presided over by the Official Principal or by a judge called a "Commissary" specially commissioned by the Ordinary of the Province, that is, the archbishop. To this day some of the states which made up the thirteen original colonies have a Prerogative Court or Court of Ordinary and Probate presided over by a judge called the "Ordinary".

Process issued in the name of the archbishop in the provincial courts and in the name of the bishop in the diocesan courts, rather than in the king's name, except for a short time in the reign of Edward VI.

The Roman Curia, that is, the pope, was the highest of the pre-Reformation ecclesiastical courts. It possessed both original and final appellate jurisdiction over all Christendom with power to remove a cause to itself from any inferior court at any stage of the proceedings. In most instances the case would then be sent to be tried by papal commissaries in the country in which it originated. From the fourteenth century, the papal jurisdiction over civil appeals was vested in a new court called the Rota Romana, an international body of twelve prelates. It was against this foreign assertion of supreme

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380Godolphin, *op. cit.* note 376, at 104, states that to give the Prerogative Court of Canterbury jurisdiction, the *bona notabilia* must amount to the value of £5, save in the diocese of London, where it was £10.

381In Georgia there is in each county a Court of Ordinary and Probate, over which an Ordinary presides. *Georgia Constitution* (1877) Article 6, § 6. New Jersey has a Prerogative Court held by an Ordinary or Surrogate General. *New Jersey Constitution* (1844) Article 6, §§ 1, 4.

3821 Edw. VI, c. 2 (1547), repealed by 1 Eliz. c. 1 (1558) and 8 Eliz. c. 1 (1565), according to 5 Pickering, *op. cit.* note 170, at 245. Prothero, *op. cit.* note 169, at xxxvii n., states that the statute of Edward was repealed by Mary. See 1 Holdsworth, *op. cit.* note 2, at 593.


384The membership of the Rota was drawn from Rome, Spain, France, Germany, and certain Italian cities and provinces. The court declined in importance after the sixteenth century, but in 1908 was restored as a supreme court of appeal in civil and criminal matters. It has ten judges, but usually only three sit. 3 Wigmore, John Henry, *Panorama of the World's Legal Systems* (1928) 935 et seq.; *Encyclopaedia Britannica* (11th ed., 1911) titles *Curia, Rota.*
jurisdiction that the English crown fought. Though defeated in the original contest, the crown with the aid of Parliament continued the struggle, and in the ensuing centuries by a series of great statutes, of which the most notable were the famous Praemunire Acts, the right of appeal to Rome was much curtailed.

**Ecclesiastical Courts After the Reformation**

The Reformation did not affect the general structure of the ecclesiastical courts of England. Its chief consequence was to substitute a new supreme appellate tribunal in the place of the Roman Curia.

The High Court of Delegates, instituted by Henry VIII in 1534, succeeded to the final appellate jurisdiction of the pope over the English ecclesiastical courts. The Act of 25 Henry VIII, c. 19, § 6 (1533) provided for appeal from archiepiscopal courts to the King in Chancery, and for the issuance of a commission of appeal out of Chancery under the Great Seal, appointing certain persons to hear the appeal as delegates of the king, supreme head of the church of England. This procedure was no innovation but was simply an extension of the appellate procedure in admiralty causes into the ecclesiastical system. Since a separate commission issued for each appeal, there might be several distinct tribunals of this character in session at the same time, some sitting on admiralty appeals and some on spiritual appeals, but so constantly did they sit that they came to be termed collectively 'The High Court of Delegates in Ecclesiastical and Maritime Causes.' Although the statute made final the judgment of the delegates, it was later held that the king, like the pope, possessed the power to issue a Commission of Review for a complete rehearing of the case by a newly appointed body. Such review, being an exercise of the royal prerogative of grace, could not be demanded as of right by the subject, nor was there any limit to the

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385 Makower, op. cit. note 365, at 38 et seq.; Pollock and Maitland, op. cit. note 2, at 125 et seq.; Bigelow, op. cit. note 48, at 40 et seq.; Holdsworth, op. cit. note 2, at 584, et seq.

386 See note 376, supra. See also 2 Chitty, op. cit. note 236, at 495 et seq.; Stubbs, op. cit. note 365, at 32 et seq.


388 Makower, op. cit. note 365, at 457.
number of times it could be exercised in a case. Thus was revived what had been one of the most objectionable features of the papal jurisdiction. As was to be expected, this court was abolished by Mary but was reestablished under Elizabeth, and, though quite overshadowed during the hey-day of the High Commission, it survived until 1832 when by statute its jurisdiction was vested in the Privy Council.

The court with paramount authority over ecclesiastical offenses in the post-Reformation period was an inquisitorial branch of the Council called the High Commission, established by Elizabeth (1558–1603) in the exercise of the royal prerogative, and under the broad, concurring provisions of the great Act of Supremacy of the first year of her reign. It was organized by a general commission under the royal letters patent directed to the Archbishop of Canterbury and certain other prelates, privy councillors and doctors of the civil law. The membership varied under the different commissions from seventeen to over a hundred, but eventually a quorum was fixed at three, of whom at least one must be of a certain group of the commissioners. The jurisdiction conferred by these commissions did not always extend throughout the realm. A separate commission sometimes issued for each province, or occasionally for a single diocese, but the policy of having very few commissions outstanding and of appointing the members from substantially the same group of prelates, officials and civilians led to such an essential continuity of personnel that the several bodies soon acquired the status of branches of an established court.

This august tribunal was empowered to enforce by fine and imprisonment the Acts of Supremacy and of Uniformity, and other statutes, ordinances and proclamations establishing the Church of England, to discipline the clergy and to exercise a supervision over and a jurisdiction concurrent with the courts spiritual. Like the

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397 I Holdsworth, op. cit. note 2, at 605; Makower, op. cit. note 365, at 458.

396 Coke, op. cit. note 7, at 324 et seq.; I Holdsworth, op. cit. note 2, at 605; Maitland, op. cit. note 5, at 264 et seq.; Makower, op. cit. note 365, at 261 et seq.; Prothero, op. cit. note 169, at xl et seq.; Stubbs, op. cit. note 364, at 279; Stubbs, op. cit. note 365, at 49 et seq.

395 1 Eliz. c. 1, § 18 (1558).

394 Prothero, op. cit. note 169, at xli.

393 Makower, op. cit. note 365, at 263; Prothero, op. cit. note 169, at xlv; I Holdsworth, op. cit. note 2, at 607.
Roman Curia it could remove to itself any cause within its cognizance from inferior spiritual or temporal courts at any stage of the proceedings.

The High Commission was the ecclesiastical Star Chamber, both in its relation to the Council and to the other courts of the realm. It, too, administered an efficient but arbitrary justice in causes great and small, from which there was no appeal. Deservedly popular while it served the purpose for which it was founded, its commonly exercised right to arrest on suspicion, its practice of cross-examination of the defendant on "ex officio" oath, and its excessive fines and reckless sentences to long term and life imprisonment brought upon it the same public opprobrium incurred by its great secular counterpart. It vigorously resisted the attempts of the common law courts and Chancery to keep it within its proper sphere by writs of prohibition and even by writs of habeas corpus releasing prisoners whose legal and equitable rights it had ruthlessly invaded.

The Long Parliament abolished the High Commission by a distinct statute at the same time that the Star Chamber and its satellites fell. It was not revived by the general act reestablishing the church courts at the Restoration, but in 1686 James II created a Court of Ecclesiastical Commission, using the seal and performing the functions of the old High Commission. The later Commission was abolished in 1688 and the great Bill of Rights of 1689 expressly proscribed such tribunals in the future.

The Jurisdiction of the Ecclesiastical Courts

The ecclesiastical courts possessed a spiritual and a temporal jurisdiction in matters both civil and criminal. The Conqueror's ordinance providing that causes arising under the episcopal laws should be tried in the bishop's court and making available the coercive sanction of the state to enforce its judgments, did not purport

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395 As to the scope of its jurisdiction see 1 Holdsworth, op. cit. note 2, at 609; Prothero, op. cit. note 169, at xliii. That there was no appeal of right but merely a supplication to the crown for a commission of review, see Coke, op. cit. note 7, at 341; Prothero, op. cit. note 169, at xliii, xlv; Makower, op. cit. note 365, at 458n; 1 Holdsworth, op. cit. note 2, at 608.

396 See note 142, supra, and 2 Coke, op. cit. note 30, at 609; Carter, op. cit. note 41, at 89 et seq.; 3 Blackstone, op. cit. note 23, at 112; Maitland, op. cit. note 364, at 107.

397 16 Car. I, c. 11 (1641); 1 Clarendon, op. cit. note 333, at 372; 1 Holdsworth, op. cit. note 2, at 606.

398 13 Car. II, St. 1, c. 12 (1661).

399 Trelivyan, op. cit. note 119, at 470; Makower, op. cit. note 365, at 264.
to define the respective spheres of the lay and spiritual jurisdictions.\textsuperscript{400} That was destined to be the work of the historic struggle between church and state which almost immediately followed.

The spiritual jurisdiction of the church extended to two classes of cases. The first dealt with enforcement of discipline within the church and religious orders. It covered matters both civil and criminal, as for example, suits between churchmen relating to church lands, debts between members of the clergy and such clerical offenses as heresy, simony and the like.\textsuperscript{401} But a far-reaching exception to this general jurisdiction over church property and church lands was established when the doughty Henry II succeeded in settling the English law that an advowson (the right to present a clergyman to a living) was temporal property and, therefore, beyond the reach of ecclesiastical laws or courts aside from the right of the bishop to pass upon the fitness of the presentee.\textsuperscript{402} The second class related to spiritual offenses committed by laymen, such as heresy, schism, sacrilege, non-conformity, failure to observe the ordinances of the church, to attend services or to pay first fruits and tithes.\textsuperscript{403} It was the latter class which fell primarily within the terms of the Conqueror's ordinance.

The temporal jurisdiction of the Courts Christian appears to have consisted in part of that administered in the Anglo-Saxon communal courts, in part of Norman innovations, but chiefly of that wrested from the crown prior to the fourteenth century.\textsuperscript{404} This temporal jurisdiction was divided into two branches, one criminal

\textsuperscript{400}Makower, op. cit. note 365, at 242; 1 Holdsworth, op. cit. note 2, at 587; Bigelow, op. cit. note 48, at 31.

\textsuperscript{401}Makower, op. cit. note 365, at 389 et seq., 418, 434; 1 Holdsworth, op. cit. note 2, at 619; Bigelow, op. cit. note 48, at 36 et seq.; Stubbs, op. cit. note 365, at 28 et seq.

\textsuperscript{402}Constitutions of Clarendon (1164) clause 1, which is translated in Pound and Plucknett, op. cit. note 6, at 72: “If a controversy concerning advowson and presentation to churches arise between laymen, or between laymen and clerks, or between clerks, it shall be treated of and terminated in the court of the lord king.” Maitland, op. cit. note 364, at 63, observes, “As Henry did not admit that this was an innovation it did not fall within the [his] renunciation of Avranches” (1172). On the same page he hails this victory as “the true Magna Carta of the ‘liberties of the English Church.’” He adds, “This is the foundation of all subsequent legislation against provisors,” i. e., attempts of the papacy to control presentation to the English church. If a bishopric or see became vacant, the king had the right of presentation. And see: Glanville, A Treatise on the Laws and Customs of the Kingdom of England (c. 1181) (Beaumes’ ed. 1900) 69 et seq.; Makower, op. cit. note 365, at 434.

\textsuperscript{403}Makower, op. cit. note 365, at 417 et seq.; Maitland, op. cit. note 364, at 78; 1 Holdsworth, op. cit. note 2, at 616 et seq.; 2 Pollock and Maitland, op. cit. note 2, at 546 et seq.; Stubbs, loc. cit. note 401.

\textsuperscript{404}Makower, op. cit. note 365, at 392 et seq.; Bigelow, op. cit. note 48, at 30 et seq.
and corrective, the other civil. One of the most important aspects of the criminal jurisdiction was its competence in respect to "criminous clerks". In the thirteenth century the "benefit of clergy" (privilegium cleri) had become firmly established. By this plea any cleric accused of felony other than treason and which was punishable by death or mutilation, was entitled, if a first offender, to trial and punishment in the bishop's court and according to the episcopal law since that did not inflict these extreme penalties. At first the church, but later the secular judge, determined whether the defendant who pleaded benefit of clergy was a cleric or was a person within the wide group to which that definition was at one time extended, namely, any one who could read a verse in the Bible. Pretending to read a memorized "neck-verse" in Latin soon grew to be a serious venture of defense. Beginning with Henry VII the privilege of clergy was gradually curtailed by statute. In the reign of Elizabeth it ceased to be a ground for removal of a case to the ecclesiastical forum, and thereafter survived, though on an ever decreasing scale, simply in mitigation of sentence until finally abolished by statute in 1827.


The Act of 4 Henry VII, c. 13 (1489) introduced a practice of branding on the thumb one who was convicted after pleading benefit of clergy, with "M" for murder and "T" for other crime as a means of assuring his discovery as a second offender. Later statutes required corroborative proof of such previous conviction. 4 Blackstone, op. cit. note 23, at 367; Makower, op. cit. note 365, at 415, 447; Maitland, op. cit. note 5, at 230; 3 Holdsworth, op. cit. note 2, at 299.

See notes 431, 432 and 433, infra.

1 Hale, op. cit. note 342, at 372, 379 et seq. Cf. Makower, op. cit. note 365, at 403. If the ordinary returned non legit (he does not read), and the accused felon later learned to read, the secular court might grant him benefit of clergy, even though sentence of death had been passed upon him. But the jailer who taught an accused to read was punished. 2 Hale, op. cit. note 342, at 379.

1 Pollock and Maitland, op. cit. note 2, at 445; 3 Holdsworth, op. cit. note 2, at 298 et seq.; Plucknett, op. cit. note 5, at 17, says the "neck-verse" was from the Psalms. Carter, op. cit. note 41, at 247n, cites the verse as Psalm I, v. 1. The reading privilege was abolished by the Act of 5 Anne c. 6 (1705),

3 Holdsworth, op. cit. note 2, at 299 et seq.; Makower, op. cit. note 365, at 414 et seq.; Prothero, op. cit. note 169, at xxxvii.


7 & 8 Geo. IV, c. 28 (1827) declared benefit of clergy finally abolished, and 4 &
The corrective temporal jurisdiction dealt with those misdeeds of cleric or layman peculiarly related to morals and religion, such as sexual offenses, bigamy, perjury, witchcraft and disorders affecting the church and churchmen. By a series of statutes beginning in the reign of Henry VIII and culminating in the first quarter of the nineteenth century, most of these offenses were made punishable as crimes and misdemeanors in the secular courts. In consequence the church's criminal and corrective jurisdiction fell into disuse. While technically the spiritual courts in England still retain a remnant of their old jurisdiction with respect to certain offenses, in practice they exercise it only in cases involving the clergy.

Throughout practically the whole of the Westminster epoch the temporal civil jurisdiction of the church courts dealt principally with matrimonial causes, testamentary matters and cases of defamation.
The early attempt of the canonists to withdraw from the temporal courts all cases of breach of faith (fidei laesio) even though involving a debt situation or a formal contract cognizable at common law, was checked by Henry II in the memorable Constitutions of Clarendon (1164).

Both the Writ Circumspecte Agatis (1286) which redefined the domains of spiritual and temporal justice, and the general practice thereafter, confirm the view that the spiritual courts' jurisdiction over breach of promises supported by oath or pledge of faith was not interfered with in cases where the secular procedure afforded no remedy.

The historical fact that the common law action of case sur assumpsit only began to take over the field of breach of promises as the sanctions of the church weakened in the late fourteenth and fifteenth centuries is well illustrated by the fifteenth clause, which read: "Pleas concerning debts shall be in the jurisdiction of the king, irrespective of whether they were accompanied by a pledge of faith or not." This clause is discussed in detail in various works, including Plucknett, op. cit. note 6, at 72-75; Makower, op. cit. note 365, at 467-469.

This line of cleavage was confirmed in the next reign by the statute Articuli Cleri, 9 Edward II (1307-1326), St. I (1316), which is described by Makower, op. cit. note 365, at 39, as containing "a demarcation of the competence of secular and ecclesiastical courts, couched almost in the terms of the circumspecte agatis, . . . ; beside this, it redresses a number of insignificant church grievances, without, however, sacrificing essential prerogatives of the state."

Notwithstanding the 15th constitution of Clarendon, cases of debt, as cases 'laesionis fidei,' were long tried in court Christian; the Acts of the Ripon Chapter for 1452-1506 contain 118 such cases. Accord: Pollock, op. cit. note 416, (1893) 6 Harv. L. Rev. 403, Selected Readings on the Law of Contracts (1931) 21; Pollock and Maitland, op. cit. note 2, at 128 et seq.; Makower, op. cit. note 365, at 434, 444. Cf. Ames, loc. cit. note 416; Plucknett, loc. cit. note 416.

The Statute of the Writ of Consultation (18 Edward I, 1290) expressly provided that the ecclesiastical judges should proceed with a case in spite of a writ of prohibition from the King's Courts if there was no writ to afford a remedy at law. 6 Halsbury, op. cit. note 170, at 161.
early fifteenth centuries would seem to cast a significant light upon the inter-relation of these two judicial systems in the field of contract up to that time. With the perfection of the action of special assumpsit and the development of the chancery remedy of specific performance, the ecclesiastical forum was finally compelled to surrender all its jurisdiction over broken promises.420

The most common matrimonial causes were those relating to marriage, divorce and legitimacy. The ecclesiastical courts could declare a marriage a nullity *ab initio* (from the beginning),421 but if there were a valid marriage, they could grant only a divorce *a mensa et thoro* (from table and bed), that is, a legal separation.422 In the latter case, a divorce *a vinculo matrimonii* (from the bond of marriage) or absolute divorce could only be obtained by a private act of Parliament,423 and

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421 This is termed an annulment of marriage under modern divorce procedure. Although called a divorce *a vinculo matrimonii* by the ecclesiastical courts, that was a misnomer since those courts granted this relief solely on the theory that there was never a valid marriage. MacQueen, John, *APPELLATE JURISDICTION OF THE HOUSE OF LORDS AND PRIVY COUNCIL* (1842) 466n.


423 Holdsworth, *op. cit.* note 2, at 623; Bryce, *op. cit.* note 422, at 824. The expense of such proceedings made legal divorce and remarriage impossible for the poor. Mr. Justice Maule, in imposing sentence for bigamy upon a poor man for remarrying several years after his first wife had deserted him, ironically remarked: "Prisoner, you have been convicted upon the clearest evidence of the crime of intermarrying with another woman, your lawful wife being still alive. You say your first wife left her home and young children to live in adultery with another man, and that this prosecution is an instrument of persecution and extortions on the part of the adulterer. Be it so. I am bound to tell you, however, that these facts form no defence. Every Englishman is bound to know that there is a remedy for every wrong, and I will tell you what you ought to have done. You should, on hearing of your wife's adultery, have commenced an action against the seducer, and obtained counsel and witnesses, so as to get substantial damages against the adulterer. You should then have employed a proctor and counsel in another suit in the Ecclesiastical Courts, so as to get a divorce *a mensa et thoro*. You should next have obtained a private Act of Parliament to dissolve your marriage. You might say that these proceedings would cost £1,000, and that you were not worth £100, or £10. It may be so. The law has, however, nothing to do with that. If you had taken the right course you would have escaped the serious crime of marrying another woman. The sentence of the court which I have to pronounce for this misconduct is, that you be imprisoned for one
then only after an ecclesiastical divorce followed by recovery of damages from the adulterer in an action at common law for criminal conversation.\textsuperscript{424} 

Maitland has pointed out that in England "the canonists... acquired what they hardly aspired to elsewhere: namely, an exclusive jurisdiction over testamentary causes and over the distribution of the goods of intestates."\textsuperscript{425} This included the probate of wills and the administration and distribution of decedents' personal estates.\textsuperscript{426} The real estate of a decedent passed to his heir according to the feudal principles of the common law.\textsuperscript{427} Chancery early began to infringe...
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upon this field, however, and by the eighteenth century had in prac-
tice taken over all of it except the actual probate of wills and the
grant of letters of administration.428

This ancient ecclesiastical jurisdiction over matrimonial causes
and testamentary matters continued until 1857 when it was vested in
two new secular courts—one the Court for Divorce and Matrimonial
Causes, and the other, the Court of Probate.429 The Judicature Acts
merged both courts, together with the Court of Admiralty, into the
Probate, Divorce and Admiralty Division of the High Court of
Justice.430

In 1874 it was provided that the two archbishops should nominate
a single judge of the Provincial Courts of Canterbury and York,
subject to approval by the crown, instead of each appointing a sepa-
rate judge for his own province as formerly. However, when sitting
in either province he sits as the judge of the old provincial court of

hold which could be devised as “chattels real.” The equitable “use”, first em-
ployed early in the fourteenth century, permitted the devise of the equitable title
to land and thus undermined the whole feudal structure. The Statute of Uses,
27 Hen. VIII, c. 10 (1535), had the apparent effect of preventing such devises,
and was thus one of the provocations leading to the rebellion known as the Pil-
grimage of Grace. The Statute of Wills, 32 Hen. VIII, c. 1 (1540), permitted
free devise of land held in socage tenure (a tenure free of military service), and
devise of two-thirds of the land held by knight service. In 1660, by 12 Car. II, c.
24, the feudal system was abolished, and knight service transformed into socage
tenure; thenceforth devise of real property was free. Although a will disposing
of both persona1ty and realty was probated in the ecclesiastical court, its validity
with respect to the real estate could be tested by action of ejectment in a common
law court. Digby, Kenelm Edwad, History of the Law of Real Property
(1876) 342 et seq.; Maitland, op. cit. note 143, at 34 et seq.; 3 Holdsworth, op.
cit. note 2, at 22 et seq.; Reppy and Tompkins, op. cit. note 425, at 12 et seq., 67 et
seq., 113; 1 Page, op. cit. note 425, at 13 et seq.; 2 Pollock and Maitland, op.
cit. note 2, at 329 et seq. The absurdity of the right of two distinct courts to pass
upon the validity of the same will was pointed out by Lord Chancellor Hard-
(1742), but the anomaly continued until the Court of Probate Act of 1857.
Reppy & Tompkins, op. cit. supra, 113 et seq.

428 Holdsworth, op. cit. note 2, at 629; 5 ibid. 288; Langdell, op. cit. note
170, at 155 et seq.

429 20 & 21 Vict. c. 77 (1857) transferred the testamentary jurisdiction of the
ecclesiastical courts to the Court of Probate; 20 & 21 Vict. c. 85 (1857) trans-
ferred their matrimonial jurisdiction to the Court for Divorce and Matrimonial
Causes. Makower, op. cit. note 365, at 451; 1 Holdsworth, op. cit. note 2, at
624, 630. Cf. Inderwick, op. cit. note 127, at 219. The Court of Probate, the
Court for Divorce and Matrimonial Causes, and the Court of Admiralty were
consolidated into the Probate, Divorce, and Admiralty Division of the Supreme
Court of Judicature, by the Judicature Act of 1873, 36 & 37 Vict. c. 66, § 31.

430 36 & 37 Vict. c. 66, § 31 (1873).
that province—the Court of Arches of Canterbury or the Chancery Court of York, as the case may be. It is significant of the position of the ecclesiastical courts at the close of the Westminster epoch that this judge must be a barrister at law of ten years standing or a former judge of a superior court of law or equity.  

The Sanctions of the Ecclesiastical Courts

In theory, the sanctions of the ecclesiastical courts were spiritual—the more serious of its censures being penance, deprivation of a living, degradation and, finally, excommunication. Penance might include immuration (imprisonment) for life and such restrictions as to food and clothing as might well weaken and destroy any but one of iron constitution. If the commands and decrees of the church proved unavailing against an excommunicated person for forty days, the sanction of the temporal courts could be called in by the writ de excommunicato capiendo issued out of Chancery, which directed his arrest and imprisonment until he atoned according to the clerical sentence. The old extreme censure of excommunication was to ecclesiastical law what outlawry was to the common law—it involved loss of legal protection, forfeiture of goods and other severe disabilities. By statute in 1813, these disabling penalties of excom-

PUBLIC WORSHIP REGULATION ACT, 37 & 38 Vict. c. 85 (1874). Some writers have mistaken the appointment of a single judge for the two courts for a merger of the courts. MAKOWER, op. cit. note 365, at 460.

MAKOWER, op. cit. note 365; at 437 et seq.; 1 HOLDSWORTH, op. cit. note 2, at 630 et seq.; BIGELOW, op. cit. note 48, at 70 et seq.; 1 POLLOCK AND MAITLAND, op. cit. note 2, at 444; MAITLAND, op. cit. note 364, at 166 et seq.; 2 MAITLAND, op. cit. note 11, at 395 et seq., 405, The Deacon and the Jewess.

MAKOWER, op. cit. note 365, at 191; 3 STUBBS, op. cit. note 5, at 359. The bishops possessed their own prisons: 3 STUBBS, loc. cit. supra; 3 HOLDSWORTH, op. cit. note 2, at 299; MAKOWER, op. cit. note 365, at 187; COKE, Third Institutes (Hargrave's ed. 1797) 39.

For instance, the Laws of Henry I provide: "If a priest or monk slay a man, let him lose his orders and repent for ten years, six on bread and water, and for four years let him fast three days in a week, and the rest of the time eat his own food. If a priest wound a man, let him fast for one hundred days." BIGELOW, op. cit. note 48, at 71.

LANGDELL, op. cit. note 170, at 26; 1 HOLDSWORTH, op. cit. note 2, at 630; MAKOWER, op. cit. note 365, at 242n.; COKE, op. cit. note 30, at 630 et seq. The Statute of the WRIT DE EXCOMMUNICATO CAPIENDO, 5 ELIZ. c. 23 (1563), for the better execution of that writ, recites the loss of respect for ecclesiastical censures following the Reformation. And see STUBBS, op. cit. note 364, at 277.

Hazeltine, Excommunication, 5 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (1931) 671, 677; 1 HOLDSWORTH, op. cit. note 2, at 631; 2 BACON, Matthew, ABRIDGMENT OF THE LAW (Gwillim's ed. 1807) 674 et seq.
munication were abolished and the ecclesiastical court was empowered to impose with a sentence of excommunication a penalty of not exceeding six months imprisonment. The Act did away with excommunication as a penalty for disobedience to the orders of the ecclesiastical courts, although not for other offenses, and substituted therefor arrest for contempt under a new statutory writ de contumace capiendo. Since the church could give no judgment incurring the shedding of blood, the ecclesiastical forum, after it had tried and convicted a heretic, turned him over to the temporal authorities. Thereupon, as provided by the Act of 2 Henry IV (1399-1413), a writ de haereticario comburendo (concerning the burning of a heretic) was issued to the sheriff, who proceeded to inflict the penalty of the canon law that heresy should be punished with death by burning. After the reformation, practically all prosecution for heresy was required to be by indictment in the temporal courts before the accused was handed over to the ecclesiastical courts for trial. By Act of 29 Charles II, c. 9 (1677), all capital punishment as a result of ecclesiastical censures was abolished.

**The Maritime Courts**

The maritime courts administered a cosmopolitan or international law of the sea known as the maritime law, which was a branch of the Law Merchant and more nearly related to the civil law of the continent than to the English common law. This law, still applied in

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**Notes:**

431 Holdsworth, op. cit. note 2, at 631, 632; Makower, op. cit. note 365, at 456; Maitland, op. cit. note 5, at 524.

432 53 Geo. III, c. 127 (1813).

433 The statute of 2 Hen. IV, c. 15 (1400) instructed the local authorities to burn those whom the ordinary had declared guilty of heresy, without the need for royal writ. 2 Hen. V, c. 7 (1414) provided for indictment of heretics in the King’s Bench, assizes, and quarter sessions, and trial of the accused by the ordinary. The act of Henry IV was repealed by 25 Hen. VIII, c. 14 (1533), was revived by Mary in 1554, and again repealed by Elizabeth in 1558. In the reigns of Edward VI, Elizabeth and James I, however, many heretics, having been condemned by the High Commission or by a bishop’s court, were put to death by the royal writ, de haereticario comburendo. The use of the writ without statutory authority was probably illegal. 2 Stephen, Sir James Fitzjames, History of the Criminal Law of England (1883) 446 et seq.; Coke’s opinion in 12 Coke’s Rep. 93 (1612). Contr.: 2 Burn, op. cit. note 376, at 305 et seq.; 1 Hale, op. cit. note 342, at 405; 1 Holdsworth, op. cit. note 2, at 617. The last burning of heretics in England was in 1612, over Coke’s dissent.

441 Holdsworth, op. cit. note 5, at 522, 524; 1 Holdsworth, op. cit. note 2, at 616 et seq.; Makower, op. cit. note 365, at 183, 190.

442 1 Holdsworth, op. cit. note 2, at 617; Makower, op. cit. note 365, at 190.

443 Scrutton, Roman Law Influences, 1 Select Essays in Anglo-American Legal History (1907) 208, 230; 1 Holdsworth, op. cit. note 2, at 526 et seq.; 5
admiralty causes in both England and America,\textsuperscript{443} is chiefly based on two codes:\textsuperscript{444} (1) \textit{The Laws of Oleron},\textsuperscript{445} codification of which is attributed to Queen Eleanor of Guienne (1122–1204),\textsuperscript{446} the consort of Henry II, and mother of Richard Coeur de Lion. This code became the law of the North Sea and the Atlantic Ocean. (2) \textit{The Consolato del Mare},\textsuperscript{447} a body of Mediterranean customs codified at Barcelona, Spain, which had a wide influence because of the predominance of the Mediterranean cities in the commerce of the middle ages. Much of these two codes was copied into the Black Book of the Admiralty, an

\textit{ibid.} 120 et seq.; Mears, Thomas Lambert, \textit{History of the Admiralty Jurisdiction}, 2 Select Essays in Anglo-American Legal History (1908) 321 et seq.

\textsuperscript{443} Holsdworth, \textit{op. cit.} note 2, at 559; Woodruff, Edwin H., \textit{Introduction to the Study of Law} (1898) 73; 3 Kent, Chancellor James, \textit{Commentaries on American Law} (14th ed. 1896) 13n. cites American cases decided on the authority of the Laws of Oleron.

\textsuperscript{444}It is frequently stated that the earliest maritime laws were the Rhodian Laws which originated on the Island of Rhodes in the Eastern Mediterranean about 900 B. C., but modern scholarship has questioned the historical accuracy of this view. Mears, \textit{op. cit.} note 442, at 321n. et seq. The other maritime codes which influenced the development of the law of admiralty in England are referred to by Lord Esher, Master of the Rolls, in The Gas Float Whitton No. 2, [1896] Probate 42, at 47, in discussing the subject of the origin of that law: “It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law.” Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse Towns, are of themselves any part of the Admiralty law of England . . . . But they contain many valuable principles and statements of marine practice which, together with principles found in the Digest and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their Court.” See Mears, \textit{op. cit. supra}, at 327, and 1 Holdsworth, \textit{op. cit.} note 2, at 527 et seq., 559.


\textsuperscript{446}Queen Eleanor is supposed to have established this for the benefit of her insular possession of Oleron. Some sources, however, attribute it to Richard I. Mears, \textit{op. cit.} note 442, at 325; 1 Twiss, \textit{op. cit.} note 445, at lxii.

\textsuperscript{447}1 Holdsworth, \textit{op. cit.} note 2, at 527; 5 \textit{ibid.} 35, 70 et seq.; Mears, \textit{op. cit.} note 442, at 339n.; Senior, \textit{op. cit.} note 348, at 50. It has been surmised that both the Laws of Oleron and the Maritime code in Las Siete Partidas were derived from the Consolato. Lobingier, \textit{loc. cit.} note 445.
The first courts of the sea were the primitive popular courts of the seaport towns, which were strikingly like the piepoudre courts or Law Merchant courts of the fairs. After the Conquest many sea-coast municipalities claimed the right to hold such courts by recognition in their royal charters and bitterly fought the encroaching jurisdiction of the king's courts of common law and admiralty. Eventually, all these local courts succumbed to the rising power of the royal tribunals except the admiralty court of the five channel ports, known as the Cinque Ports, which, because of their defensive importance, were permitted to retain their ancient privilege of maritime jurisdiction down to modern times. In later centuries this jurisdiction was exercised by the Lord Warden and Admiral of the Cinque Ports and covered criminal, civil, equitable and admiralty causes. His determinations were not subject to review by the superior courts of common law at Westminster but by the Privy Council.

5 Holdsworth, op. cit. note 2, at 125 et seq. The Black Book of the Admiralty, edited by Sir Travers Twiss, was published at London in 1871. It contains an excellent historical introduction.

6 Such a popular tribunal sat at Ipswich in Anglo-Saxon days. 2 Twiss, op. cit. note 445, at viii; Mears, op. cit. note 442, at 324; 1 Holdsworth, op. cit. note 2, at 531; Plucknett, op. cit. note 5, at 222.

For the piepoudre courts, see note 111, supra.

7 Holdsworth, loc. cit. note 449.

8 The name is pronounced "sink ports." The Cinque Ports were Dover, Hastings, Romney, Hythe, and Sandwich, to which were added, in the reign of Richard I, Winchelsea and Rye. Mears, op. cit. note 442, at 313; 2 Marsden, Select Pleas in the Court of Admiralty (II Selden Society, 1897) xxii et seq.; 3 Blackstone, op. cit. note 23, at 79.

9 In return for this privilege of jurisdiction the Cinque Ports were bound to provide on royal call once a year a certain number of ships of war, manned and equipped, (the number varying in different reigns), and to maintain them for fifteen days at their own expense, the king thereafter to have the use of them at his cost as long as needed. The Court of the Cinque Ports still sits and hears causes. Mears, op. cit. note 442, at 315n.; 1 Holdsworth, op. cit. note 2, at 533; 2 Marsden, loc. cit. note 451. All the other local courts of admiralty were abolished by the Municipal Reform Act, 5 & 6 Wil. IV, c. 76 (1835).

10 The Lord Warden of the Cinque Ports was also Constable of Dover Castle, which was regarded as "the key and barrier of the whole kingdom." Hale, De Portibus Maris, published in 1 Hargrave's Law Tracts (1787) 45, 113; Mears, op. cit. note 442, at 313n.

11 The civil jurisdiction, both at law and in equity, of the Cinque Ports was taken away by 18 & 19 Vict. c. 48 (1855), but the admiralty jurisdiction was preserved.

12 Appeals may be made to the Admiralty Court of the Cinque Ports in admiralty cases in county courts within the territorial jurisdiction of the Lord Warden.
The central jurisdiction over maritime affairs in the twelfth and thirteenth centuries was exercised by the Council, or by auditores specially chosen by the king for a particular case, and sometimes in the latter part of the period by the new royal courts. The captains of the royal navy, originally officers of the Cinque Ports, possessed administrative authority over their fleets. In the fourteenth century the king began to appoint admirals, who at least as early as 1357 took to exercising judicial powers. This was officially recognized by 1360, when the letters patent creating an admiral began specifically to empower him to hold pleas and to punish offenders. During the next half century there might be from one to three admirals, each of whom held a court. The grants of judicial power in the patents were vague, and the authority exercised by the admirals was correspondingly large. Two statutes of the reign of Richard II charged the admirals with usurpation of jurisdiction, and enacted that the admiralty should have no cognizance of "contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea." It was conceded, however, that the Admiral had criminal jurisdiction of murder and mayhem at sea or below the first bridges of the rivers flowing into the sea.

The High Court of Admiralty, the successor of these courts of the several admirals, dates from the early fifteenth century, when a single Lord High Admiral of England was appointed, who established a central prerogative court of marine jurisdiction at London. The Wars of the Roses so engrossed men's attention that naval matters were neglected, but with the discovery of America during the reign of

County Courts Admiralty Jurisdiction Act, 31 & 32 Vict. c. 71, § 33 (1868). Appeals from the decisions of the Lord Warden lie directly to the Privy Council. See note 647, infra.

451 Marsden, op. cit. note 176, at xvii; Holdsworth, op. cit. note 2, at 544 et seq.; Carter, op. cit. note 68, at 103.

457Inderwick, op. cit. note 121, at 97; 2 Stubbs, op. cit. note 5, at 302; Prothero, op. cit. note 169, at cxiii.

45I Holdsworth, op. cit. note 2, at 545; 1 Marsden, op. cit. note 176, at xlii; Leadam and Baldwin, op. cit. note 185, at xxviii.

45913 Rich. II, st. i, c. 5 (1389), and 15 Rich. II, c. 3 (1391). 2 Hen. IV, c. 11 (1400) gave an action on the case for double damages to one who was sued in Admiralty contrary to the statute of 13 Rich. II.

46I Marsden, op. cit. note 176, at lii et seq.; 1 Holdsworth, op. cit. note 2, at 549. Originally the High Court of Admiralty sat at Orton Key near London Bridge; when Doctors' Commons was established the court sat there. 1 Marsden, op. cit. supra, at lxxix; 1 Holdsworth, op. cit. note 2, at 547; 3 Blackstone, op. cit. note 23, at 69; Inderwick, op. cit. note 121, 100. See note 490, infra.
Henry VII, over-seas commerce was given a tremendous impetus, and in consequence the Court of Admiralty became a tribunal of increasing importance. A statute of 1540 brought within its cognizance contracts made abroad, bills of exchange and all matters relating to shipping and cargo, such as charter-parties, freight, warranties of seaworthiness, salvage and insurance. Henry VIII's patents went even further conferring jurisdiction over "any thing, matter, or cause whatsoever done, or to be done, as well upon the sea as upon sweet waters and rivers from the first bridges to the sea," statutes or royal ordinances to the contrary notwithstanding. The Court of Admiralty also administered the royal droits or perquisites of the sea—the right to flotsam, jetsam, treasure, deodands, royal fish, wrecks, etc., which were usually granted to the admiral in his patent. Owing to dissatisfaction with admiralty's punishment of piracy and murder, its criminal jurisdiction was taken away by 28 Hen. VIII, c. 15 (1536) and vested in special commissioners, practically all of whom were common law judges, with directions to try and punish the offenders according to the common law.

The Tudors enhanced the power of the court of admiralty, as they did that of the other prerogative courts, in order to strengthen their system of direct government by the crown. Under their patronage it enjoyed the dignity of a court of record, and aided by the broad extension of its jurisdiction soon became one of the great courts of the realm. The exploits of the English buccaneers on the Spanish Main

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461 Henry VII (1485-1509).
462 I Holdsworth, op. cit. note 2, at 546; I Marsden, op. cit. note 176, at lvii et seq.; Mears, op. cit. note 442, at 350; 2 Street, op. cit. note 195, at 332.
464 I Marsden, op. cit. note 176, at lix; I Holdsworth, op. cit. note 2, at 549; Mears, op. cit. note 442, at 352; Carter, op. cit. note 41, at 172.
465 Mears, op. cit. note 442, at 318; I Holdsworth, op. cit. note 2, at 559 et seq.; 2 Marsden, op. cit. note 176, at xxiv et seq. Cf. note 107, supra.
466 The Lord Chancellor named the commission, which was composed of the Admiral or his deputy, and three or four "such other substanciall persons"; these latter came in time to be always common law judges. The Act of 1536 was limited to treasons, felonies, robberies, murders and confederacies; this was extended by 39 Geo. III, c. 37 (1799) to all crimes on the high seas. In 1834 the Central Criminal Court Act, 4 & 5 Wil. IV, c. 36, § 22, transferred this jurisdiction to the court created by that statute, and by 7 & 8 Vict. c. 2 (1844) the same jurisdiction was extended to justices of oyer, terminer and gaol delivery. 1 Holdsworth, op. cit. note 2, at 551; Carter, op. cit. note 41, at 171. This transfer of jurisdiction over offenses at sea to the ordinary criminal courts by the last mentioned Act was confirmed in the Criminal Law Consolidation Acts of 1861, 24 & 25 Vict. c. 96, § 115, c. 97, § 72 and cc. 98 to 100, inclusive.
467 I Holdsworth, op. cit. note 2, at 552.
made this, indeed, the golden age of admiralty. As was to be expected, the hostility which led to the statutes of Richard II revived in the reign of Elizabeth. The common law courts at Westminster vindi- cated their jurisdiction by writs of prohibition to Admiralty based upon those statutes, while Admiralty retaliated with contempt proce- dings against litigants who resorted to its rivals. At first the prohibitions were used merely to confine the Court of Admiralty within its former limits; later they were issued to protect the jurisdiction over contracts made or transitory torts committed abroad which the common law courts had seized from admiralty by permitting the laying of a fictitious venue in England as if those contracts or wrongs had occurred in the homeland. Coke denied the status of Admiralty as a court of record, since it kept no parchment record in Latin, and, therefore, he held that it could neither fine nor imprison. Two compromises with the common law judges in 1575 and in 1632 failed to protect the admiralty jurisdiction; it was steadily curtailed by the common law. The court itself survived throughout the Civil War, during which the office of Lord High Admiral was abolished, but its business continued to be slight. In the nineteenth century, however, it was reorganized and its jurisdiction once more extended by statute. Under the Judicature Act of 1873, the Court of Admiralty

468I Holdsworth, op. cit. note 2, at 553; 2 Marsden, op. cit. note 176, at xii et seq., lxi et seq., lxv et seq.; 2 Street, op. cit. note 195, at 332; Mears, op. cit. note 442, at 360.

469I Holdsworth, op. cit. note 2, at 554; Carter, op. cit. note 41, at 174; Mears, loc. cit. note 468; Scott, Austin, Fundamentals of Procedure in Actions at Law (1922) Chap. I—Venue and Jurisdiction; Foster, Roger S., Place of Trial in Civil Actions (1930) 43 Harv. L. Rev. 1217. See note 591, infra.

470I Holdsworth, op. cit. note 2, at 553; 5 ibid. 159 et seq.; Coke, op. cit. note 7, at 135. But Admiralty and the other prerogative courts continued habitually to exercise this jurisdiction until some years after the death of Coke. 5 Holdsworth, op. cit. supra, at 160. The Admiralty was made a court of record by statute in 1861. See note 473, infra.

471Carter, op. cit. note 41, at 173 et seq.; I Holdsworth, op. cit. note 2, at 553 et seq.; 2 Marsden, op. cit. note 176, at xiv.

Coke's view of the proper admiralty jurisdiction is set forth in 12 Coke's Rep. 79 (1611), and in Coke, op. cit. note 7, at 134. In reply to Coke, Dr. Richard Zouch, once judge of the High Court of Admiralty, wrote his authoritative Jurisdiction of the Admiralty of England Asserted (1663), which may be found in Malynes, op. cit. note 445.

472Mears, op. cit. note 442, at 358 et seq.

473The Admiralty Court Acts of 1840, 3 & 4 Vict. cc. 65, 66, liberalized the procedure and increased the powers of the court. In 1854 the second Admiralty Court Act and the Merchant Shipping Act, 17 & 18 Vict. cc. 78, 104, made further procedural changes and amplified the power of the court with regard to seamen's wages and salvage. The third Admiralty Court Act, 24 & 25 Vict. c.
was merged in the Probate, Divorce and Admiralty Division of the High Court of Justice.

The Prize Court originated simply as the prize jurisdiction, as distinguished from the "instance", or ordinary jurisdiction, of the Court of Admiralty. Not until after the Reformation did it evolve as a distinct session of the admiralty court sitting for prize matters. Its distinctive character was emphasized by the practice which grew up in the eighteenth century for the king to issue a special commission to the Admiral at the outbreak of a war authorizing a judge of his court to sit as prize judge. The Prize Court exercised the authority of the Lord High Admiral to recommend the issuance of letters of marque and reprisal, to administer division of prize money and to determine the legality of captures at sea. It attained its greatest prominence under Lord Stowell, eldest brother of Lord Chancellor Eldon, during the Napoleonic Wars. He it was who in this court moulded much of our present international law relating to the wartime rights of belligerent and neutral nations at sea. In 1864 the Court of Admiralty was permanently vested with the prize jurisdiction by statute, thus obviating the old system of special commissions. Under the Judicature Acts the prize jurisdiction is now exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice.

10 (1861), gave the admiralty jurisdiction of claims for building, equipping, and repairing ships, claims for necessaries supplied to ships, claims for damage to cargo, for damage done by a ship, for salvage of life, for wages, for disbursements by a master, and claims on registered mortgages on ships. Section 13 of the Act made the Admiralty a court of record, and Section 14 declared that its decrees should have the effect of judgments at law.

HOLDSWORTH, op. cit. note 2, at 561 et seq.; FOSTER, op. cit. note 377, at 9.

Since the office of Lord High Admiral has been in commission this commission issues to the Lords Commissioners of the Admiralty. FOSTER, op. cit. note 377, at 10; HOLDSWORTH, op. cit. note 2, at 564.

Originally the Chancellor issued letters of reprisal, authorizing those who had been robbed by vessels of another nationality to recoup their losses upon any ships from that country. MARSDEN, op. cit. note 176, at xvi. Later this authority was exercised by the Council, but the Admiralty passed upon the validity of the claim for letters before the Council issued them. MARSDEN, op. cit. supra, at lxviii; 2 ibid. xviii.

HOLDSWORTH, op. cit. note 2, at 561 et seq.

William Scott, Baron Stowell, was judge of the High Court of Admiralty from 1798 to 1827. For an interesting biographical sketch of Lord Stowell, see BENTWICK, Norman, GREAT JURISTS OF THE WORLD (Continental Legal History Series, 1914) 517.

To settle any doubt on this question, the SUPREME COURT OF JUDICATURE ACT of 1873, 54 & 55 Vict. c. 53, was passed, stating that such was the effect of the Act of 1873. However, the prize jurisdiction is still distinct from the instance jurisdiction, for appeals from the former go directly to the Privy Council, whereas
The Lord High Admiral was empowered by the royal letters patent of his appointment to deputize one learned in the admiralty law to exercise as his lieutenant and judge the maritime jurisdiction of the High Court of Admiralty. From 1689 the office of Lord High Admiral has been nearly always in commission, that is confided to Lords Commissioners in Admiralty appointed to carry on its functions; since then the judge of the Court of Admiralty has been named directly by the crown and process has issued in the name of the sovereign.  

In general, the admiralty bench seems to have consisted of but this single judge although occasionally one or two additional judges appear to have been specially commissioned to sit in Admiralty. As early as the fifteenth century it became the custom for the judge of the High Court of Admiralty to be a doctor of laws and the civilians gained the exclusive right to practice before it.  

These civilians were very learned men holding degrees from the great universities of England or the continent in which only the Canon Law and the Roman Civil Law were taught. Students of the common law studied in their own special law colleges at London, called the Inns of Court, with which were associated the Inns of Chancery.  

appeals from the latter lie through the Court of Appeal to the House of Lords. See note 647, infra.  

For the teaching of the Canon Law and Roman Civil Law in the universities, and the great rivalry between the two systems, see Maitland, op. cit. note 5, at 393; Marsden, op. cit. note 176, at xlii; Maitland, op. cit. note 364, at 93; 2 Holdsworth, op. cit. note 2, at 133, 137, 141. The first university professorship of common law was the Vinerian chair, established at Oxford in 1758, first occupied by Sir William Blackstone, to whose famous commentaries on the common law we probably owe the fact that America remained a common-law country. The Downing Professorship of the Laws of England was established at Cambridge in 1800. The present Vinerian professor is Sir William S. Holdsworth.  

The civilians and their ancient learning were banished from the common law courts in the late thirteenth century, in the
church attracted the best minds to the universities to study the Canon Law, since to be eligible to preside or practice in the ecclesiastical courts one must be a canonist; and as a knowledge of the Roman Civil Law opened the way to practice and a judgeship in Admiralty and the other courts of the civilians, the candidate usually sought degrees in both the older systems of law. Cambridge, following the ancient tradition of Bologna, granted a single degree attesting proficiency in both the Canon Law and Civil Law systems,—namely, the "LL.B." or the "LL.D.", our familiar Bachelor of Laws and Doctor of Laws degrees. Strangely enough, the former is now granted for achieve-

reign of Edward I, the English Justinian. 4 HOLDSWORTH, op. cit. supra, at 230; 2 ibid. 287.

484 HOLDSWORTH, op. cit. note 2, at 231 et seq.; MAITLAND, op. cit. note 364, at 93 et seq. 4 HOLDSWORTH, op. cit. supra, at 238, lists seven spheres of practice open to civilians: the ecclesiastical courts; the region of diplomacy, where international law was becoming important; the admiralty; arbitrations ordered by the Council in cases of commercial or maritime law; cases in the Star Chamber, the Court of Requests, or Chancery, involving principles outside the common law; administrative problems of state; the courts of the Constable and Marshal (see infra) and of the Universities of Oxford and Cambridge.

"The degree of D. C. L. or LL.D. became the necessary passport to the College of Advocates at Doctors' Commons; this requirement was however abolished in 1856." 2 MULLINGER, James Bass, UNIVERSITY OF CAMBRIDGE (1873) 127n. It should be noted that this requirement of training in the civil law was instituted after Henry VIII had forbidden the teaching of Canon Law at the Universities in 1535 and thus left the field to the Doctor of the Civil Law. STUBBS, LECTURES ON MEDIEVAL AND MODERN HISTORY (1886) 319; 1 PHILLIMORE, Sir Robert, COMMENTARIES UPON INTERNATIONAL LAW (1871) lix; MAITLAND, op. cit. note 364, at 92. With the proscription of the Canon Law in the Universities, the teaching of the Roman Civil Law practically ceased. Henry, alarmed at the prospect of a dearth of diplomats trained in this international body of law, hastily established the Regius professorships at Cambridge and Oxford to revive its teaching. 4 HOLDSWORTH, op. cit. note 2, at 42.

487 One who mastered both the Civil and the Canon Law at Bologna was known as Doctor Utriusque Juris (Doctor of Both Laws). 1 RASHDALL, Hastings, UNIVERSITIES OF EUROPE IN THE MIDDLE AGES (1895) 137m., 222; SENIOR, op. cit. note 348, at 4.

488 Cambridge originally gave the degree of Doctor Utriusque Juris (J.U.D.), but later adopted the LL.D. (Doctor Legum) and LL.B. (Baccalaureus Legum). 1 MULLINGER, James Bass, UNIVERSITY OF CAMBRIDGE (1873) 39; SENIOR, op. cit. note 348, at 31-34. Cf. MAITLAND, op. cit. note 364, at 93n. Oxford granted the separate degrees of B.C.L. and D.C.L. for the bachelor and doctor of Civil Law respectively, and in the Canon Law the degrees of Bachelor of Decrees and of Doctor of Decrees. 1 MALLET, Charles Edward, HISTORY OF THE UNIVERSITY OF OXFORD (1924) 194; 2 ibid. 85; CUBBERLY, Elwood P., READINGS IN THE HISTORY OF EDUCATION (1920) 173, from 3 RASHDALL, op. cit. note 487, at 452-5. At Cambridge the combined degrees survived the abolition of the teaching of Canon Law and are still conferred. While the Roman Law still constitutes a required and
ment in the once despised unacademic common law, while the latter has become an honorary recognition of attainment presumably equivalent to the ten years of scholarly toil required in mediaeval days to earn it. 489

Early in the sixteenth century the judges and practitioners in the civil law and the canon law founded the Association of Doctors of Laws, and this body established the famous Doctors' Commons, or college of the civilians, on the pattern of the Inns of Courts of the common lawyers. 490 After the days of Coke, the common law courts steadily gained a supremacy over their prerogative rivals by assimilating the law merchant, 491 by supplanting the canon law 492 and by replacing the clerical chancellors with common law chancellors. 493 The prerogative courts, as they came under the influence of the common law psychology, inclined more and more to case law methods of precedent and analogy instead of adhering to their ancient system of interpretation and application of the authoritative texts. 494 This important part of the work leading to the B.C.L. and D.C.L. at Oxford, those degrees are now chiefly based upon examinations in various fields of English law.

489 RASHDALL, op. cit. note 487, at 222. In the Universities of Cambridge and London, and perhaps in other British universities, the LL.D. degree is conferred both in course and as an honorary degree. The same is true of the D.C.L. degree at Oxford.

490 Although the Association of Doctors of Laws was organized about the beginning of the reign of Henry VIII (1509–1547), they did not secure their Doctors' Commons until 1568, and the Association was not incorporated until 1768. SENIOR, op. cit. note 348, at 59 et seq.; 4 HOLDSWORTH, op. cit. note 2, at 235 et seq.; FOSTER, op. cit. note 377, at 5 et seq.; 2 PHILLIMORE, ECCLESIASTICAL LAW OF THE CHURCH OF ENGLAND (1873) 1218.

Charles Dickens, in DAVID COPPERFIELD, Chap. 23 et seq., exposes the bewildering intricacy and the inefficiency and delay of Doctors' Commons procedure before the reforms of the nineteenth century.

491 The greater part of this adoption of the law merchant was the work of Lord Mansfield, Chief Justice of the King's Bench from 1756 to 1788. Scrutton, op. cit. note 58, at 7; Burdick, op. cit. note 58, at 34, 45 et seq.; PLUCKNETT, op. cit. note 5, at 228; JENKS, op. cit. note 46, at 28; 1 HOLDSWORTH, op. cit. note 2, at 572; 5 ibid. 147.

492 The continuous retreat of the ecclesiastical law before the common law is described under the discussion of the Ecclesiastical Courts, supra.

493 See note 261, supra. On the Masters in Chancery, see note 264, supra.

494 Prior to the seventeenth century the Admiralty records did not report the judicial reasoning, but merely the decision between the parties. MARSDEN, op. cit. note 451, prints only pleas and other procedural papers for the period 1547–1602. But in the seventeenth century it became customary to make more complete notes of the cases, and in the eighteenth century both the arguments of counsel and the opinions of the judge were preserved. Some of these are published in MARSDEN, op. cit. note 481, supra. The first publication of contemporary decisions for the guidance of the profession was I ROBINSON'S ADMIRALTY REPORTS (1798–1799).
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fundamental change enabled the common lawyers gradually to force their way into the ancient halls of the civilians, and the last citadel was carried when in 1858 common lawyers were admitted to practice in Admiralty. About the same time, the Doctors' Commons was sold and the college was dissolved. Although provision was made in the Judicature Act of 1873 for the admission of civil lawyers to practice in the Supreme Court of Judicature, there no longer remained in England a court, a law and a profession wholly alien to the common law.

Lesser Prerogative Courts

The military counterpart of the High Court of Admiralty was the Court Military, or Court of Chivalry, more commonly known as the Court of the Constable and Marshal. This court was originally presided over by two hereditary officials, the Lord High Constable and the Earl Marshal of England, since they were commanders of the royal army in the middle ages, but after 1521, the Earl Marshal

4SENIOR, op. cit. note 348, at 110. The ecclesiastical jurisdiction over testamentary and divorce causes had previously (1857) been vested in a Court of Probate and a Divorce Court, both of which had been thrown open to the common lawyers. The acts creating those courts also provided that the civilians might continue to practice therein and the Probate Court Act (20 & 21 Vict. c. 77, §§ 40, 41) went further by permitting the practitioners in the old court to appear as barristers at law in any court of law or equity. See also Matrimonial Causes Act of 1857, 20 & 21 Vict. c. 85, § 15.

20 & 21 Vict. c. 77, §§ 116, 117 (1857) authorized this step, and it was done the following year. 4 HOLDsworth, op. cit. note 2, at 235; FOSTER, op. cit. note 377, at 6.

36 & 37 Vict. c. 66, § 87: "From and after the commencement of this Act all persons admitted as solicitors, attorneys or proctors of or by law empowered to practice in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called Solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not been passed; and all persons who from time to time if this Act had not been passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practice in any such Courts, shall be entitled to be admitted and to be called Solicitors of the Supreme Court, ..." See also note 495, supra.

48HOLDsworth, op. cit. note 2, at 573 et seq.; 3 BLACKSTONE, op. cit. note 23, at 103 et seq.; MAITLAND, op. cit. note 5, at 266 et seq.; 1 HALE, op. cit. note 278, at 52 et seq.; COKE, op. cit. note 7, at 123; Holdsworth, Martial Law Historically Considered (1902) 18 L. Q. Rev. 117.

49"[T]hey were two great ordinary officers, anciently, in the king's army; the constable being in effect the king's general; and the marshal was employed in marshalling the king's army, and keeping the list of the officers and soldiers therein; and his certificate was the trial of those whose attendance was necessary." 1 HALE, op. cit. note 278, at 54.
sat alone, for in that year, on the execution of Stafford, Duke of Buck-
ingham, the office of Constable was forfeited to the crown.°°°

The Court of the Constable and Marshal was a prerogative court°°° administ-
ering the Roman civil law°°° so far as not contradictory to the
statutes of the realm, and possessing a military jurisdiction and a
jurisdiction in matters of chivalry. The military jurisdiction was
both civil and criminal.°°° On the civil side it embraced contracts and
all other matters touching war and deeds of arms, while on the crimi-
nal side it constituted a summary and capital punitive jurisdiction
over those guilty of infringement of army rules or of acts of rebellion
against the sovereign. As a military prize court it dealt with prison-
ers of war and captures of property by military forces.°°° In the exer-
cise of its jurisdiction of chivalry, it regulated the ancient system of
heraldry touching such matters as the right to crests and coats of arms,
the right of place and precedence, and the slander of noblemen.°°°

The common lawyers became jealous of this broad and ill defined
jurisdiction, and, as in the case of Admiralty, they secured the passage
of two statutes in the reign of Richard II (1377-1399), which declared
that no cause cognizable at common law should be tried before the
Constable and Marshal.°°° "The exercise of martial law, whereby

°°°9 Halsbury, op. cit. note 357, at 116 n.; 3 Blackstone, op. cit. note 23, at 68.
°°°I Holdsworth, op. cit. note 2, at 574, points out that an appeal was taken
from this court to the Council in Parson of Langar v. Conyngsbys (1361), in
Leadam and Baldwin, op. cit. note 185, at 47; but Coke states that the appeal
lay to the king in person. Coke, op. cit. note 7, at 125, cited in 3 Blackstone, op.
cit. note 23, at 68.
°°°5 Holdsworth, op. cit. note 2, at 15; 1 Hale, op. cit. note 278, at 52.
"... [A]lways, preparatory to an actual war, the kings of this realm, by advice
of the constable and marshal, were used to compose a book of rules and orders for
the due order and discipline of their officers and soldiers, together with certain
penalties on the offenders; and this was called martial law. We have extant in the
Black Book of the Admiralty and elsewhere several exemplars of such military
laws." 1 Hale, op. cit. supra, at 54.

Like the other civil law courts, the Court of the Constable and Marshal was
declared not to be a court of record. 3 Blackstone, op. cit. note 23, at 68, 105;
4 ibid. 268.
°°°7 Holdsworth, op. cit. note 2, at 573 et seq.; 1 Hale, op. cit. note 278, at 54.
°°°0 Holdsworth, op. cit. note 498, at 118.
°°°1 Holdsworth, op. cit. note 2, at 578 et seq.; 3 Blackstone, op. cit. note 23,
at 104 et seq.; 1 Hale, op. cit. note 278, at 53.
°°°6 Rich. II, c. 5 (1384); 13 Rich. II, st. 1, c. 2 (1389). It was enacted by 1
Hen. IV, c. 14 (1399), "That all appeals to be made of things done within the
realm, shall be tried and determined by the good laws of the realm, made and used
in the time of the King's noble progenitors; and that all appeals to be made of
things done out of the realm, shall be tried and determined before the constable
and marshal of England for the time being." Thus this court gained jurisdiction
over crimes committed abroad. 1 Hale, op. cit. note 278, at 54.
any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land," nor as to civilians even in time of war. Edward IV (1461-1483), the Tudors, and James I (1603-1625) disregarded this restriction and on several occasions brought civilians to trial and death in this military court. The Petition of Right of 1628 declared such practices to be contrary to the law of the land. By the end of the seventeenth century the criminal jurisdiction of the court had become obsolete, owing to the institution of courts martial conducted by army officers. Even earlier the common law courts had taken over the civil jurisdiction of the military courts. Its jurisdiction in matters of chivalry perished when in 1703 the Queen's Bench declared that the Marshal alone had no authority to try a case of slander of nobility. Soon after, the power to determine questions of heraldry fell into the hands of the heralds attendant upon the court. In cases of importance, however, concerning the right to some dignity or honor, the king may still delegate his prerogative to determine the question to the Court of the Marshal.

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407 Hale, op. cit. note 278, at 55, citing the case of the Earl of Kent in 15 Edw. II (1307-1326) and 1 Edw. III (1326-1377).
409 Maitland, op. cit. note 5, at 267; 1 Holdsworth, op. cit. note 2, at 575.
410 Hale, op. cit. note 2, at 55; 1 Holdsworth, op. cit. note 2, at 576.
411 1 Holdsworth, op. cit. note 2, at 577. The use of courts martial was legalized by the Annual Mutiny Acts governing the army, the first of which was passed in 1689. The Army Discipline and Regulation Act of 1879, amended in 1881, provided for courts martial and established a permanent military code. This act is brought into effect by an annual act of Parliament. Holdsworth, op. cit. note 498, at 122; Anson, Law and Custom of the Constitution (Gwyer's ed. 1922) 324 et seq.; Maitland, op. cit. note 5, at 448 et seq.
412 Blackstone, op. cit. note 23, at 103.
413 Chambers v. Jennings, 7 Modern Reports 125; 1 Holdsworth, op. cit. note 2, at 579.
414 Blackstone, op. cit. note 23, at 105; 1 Holdsworth, loc. cit. note 512; 22 Halsbury, op. cit. note 357, at 288.
415 22 Halsbury, op. cit. note 357, at 277. There is still an Earl Marshal and a Marshal's court; the office of Marshal is hereditary. Maitland, op. cit. note 5, at 266.
The Court of Wards and Liveries was one of Henry VIII's new courts established by statute in 1540 to administer the king's feudal incidents of wardship and marriage. It sat at Westminster until abolished by the Long Parliament a century later. Other lesser prerogative courts existed at various times, a number of them primarily for the conservation of royal prerogative rights, as in the case of the ancient Courts of the Forest. It is impossible in this brief survey to discuss further this class of prerogative courts, or the many lesser common law courts, like the Court of the Marshalsea, which exercised a common law jurisdiction within the verge, that is, within twelve miles of the royal palace or royal abode. A law dictionary lists ninety-three English courts as existing during the Westminster epoch, but even this enumeration is incomplete.

II. The Courts of Appellate Jurisdiction

a. Subordinate Appellate Courts

JURISDICTION IN ERROR

On the Common Law side of Westminster Hall the review of decisions from lower courts was either by a writ of false judgment or by a writ of error. It was also formally abolished by the statute which did away with feudal tenures, upon which it was founded. 12 CAR. II, c. 24 (1660); 3 BLACKSTONE, op. cit. note 23, at 258.

31ITHELDSWORTH, op. cit. note 2, at 94 et seq.; 9 HALSBURY, op. cit. note 357, at III et seq.; CARTER, op. cit. note 68, at 21 et seq.

32Strange enough, all of the numerous palace courts of the king's household were courts of the common law, employing jury trials and subject to writ of error from the House of Lords or the King's Bench. The Court of the Marshalsea held pleas of the crown, actions of debt, detinue, and trespass vi et armis arising within twelve miles of the royal presence, though in the tort actions one, and in the contract actions both of the parties must be of the king's household. 3 HEN. VII, c. 14 (1486) and 33 HEN. VIII, c. 12 (1541), which were repealed by 9 GEO. IV, c. 31 (1828), created courts with jurisdiction over crimes committed within the palace. The Palace Court, established by James I, had jurisdiction over all personal actions arising between any parties within twelve miles of the royal palace of Whitehall. The Court of the Marshalsea and the Palace Court were abolished by 12 & 13 VICT. c. 101, § 13 (1849). 1 HOLDSWORTH, op. cit. note 2, at 208 et seq.; 3 BLACKSTONE, 75 et seq.; 4 Ibid. 276; 4 STEPHEN, op. cit. note 308, at 262.

33STIMSON, Frederic J., CONCISE LAW DICTIONARY (1911) 130 et seq. 9 HALSBURY, op. cit. note 357, at 5 et seq., lists one hundred seventy-two courts in the one broad class of "borough and local courts of record," most of them now in abeyance.
The Common Pleas and the King's Bench from the time of their establishment reviewed judgments of inferior courts not of record by the various writs of false judgment. Such writs issued only to the ancient communal and seigniorial courts in which the judges were suitors. Originally, the writ put the integrity of the local court on trial. The county was likely to be fined or the lord to lose his franchise if the judgment were reversed. The decline of the local courts, coupled with the fact that no costs were recoverable on a writ of false judgment, made the resort to such writs very infrequent in later centuries. This method of review survived, however, until the Judicature Acts.

The King's Bench was the primary court for review by writ of error. As the only common law court coram rege, it exercised this their power to remove cases from inferior courts and try them de novo. Cases from inferior courts not of record could be removed at any time before judgment; cases from inferior courts of record, such as the sheriff's tourn, the courts leet and the justices' courts, could be brought up under certain statutory limitations, by writ of certiorari or habeas corpus. The writ of error originally lay only for error in law appearing on the face of the parchment record of the case. A second type of writ of error was introduced by that great code of Edward I, the Statute of Westminster II, 13 Edw. I, St. I, c. 31 (1285), which provided for review of errors in the conduct of a trial by writ of error on a bill of exceptions. The bill of exceptions was prepared by the attorney for the plaintiff in error showing the rulings of the judge at the trial and the attorney's exceptions thereto. The trial judge was required to seal the bill of exceptions to assure their authenticity. This bill was attached to the parchment record, and although it did not become a part thereof, it was removed with that record into the appellate court. The writ of error issued out of the writ-office of Chancery and ran in the name of the king to the presiding judge of the inferior court directing him to send the record of the case to the reviewing court. The plaintiff in error filed the writ and his assignments of error with the clerk of that court. Thereupon, a writ of scire facias (that you make known) issued to the defendant to answer said assignments of error which he did by the plea "In nullo est erratum," thus joining issue on the question of reversible error either in the record or the bill of exceptions. The case then came on for argument before the full bench if in the King's Bench, or before
appellate jurisdiction over the Common Pleas and all inferior courts of record. The Common Pleas shared this power to issue a writ of error to such lower courts, but it was seldom exercised as plaintiffs in error preferred to go directly to the King’s Bench and thus avoid the possibility of a double review. From the beginning of the fourteenth century to 1783 the King’s Bench also exercised jurisdiction in error over the Irish King’s Bench, and from 1543 to 1830 over the Courts of Great Sessions in Wales.

Among the changes and improvements of the great reform movement of 1830 in England not the least significant were those affecting the appellate courts. In addition to abolishing the Welsh Courts and the law courts of the County Palatine of Chester, and the creation of a new court of Exchequer Chamber, the “Law Terms Act of 1830” the Lords if in the House of Lords. Having heard the cause, the appellate court decided the disputed questions of law and remitted the case to the court from which it came (by a paper called a remittitur) for further proceedings in accord with their decision. For the procedure in error in the House of Lords, see note 570, supra.

Beginning law students are often confused in the study of appellate cases by the frequent reversal of the positions of the parties to an action from those which they occupied in the court below. This was because on error the case was regarded as a new case in a new court and the party bringing it up was called the plaintiff although he may have been the defendant below. In most American jurisdictions, although not in the federal courts, either by statute or rule of court, the parties now retain their original positions with some descriptive word or phrase following their names to indicate which is the appellant. See New York Civil Practice Act, § 561.

The history of the concurrent jurisdiction in error of the Common Pleas was reviewed in a footnote to Bruce v. Wait, I Manning & Granger I (1840). That case was the last and apparently the only instance of its actual exercise. It would seem that the fact that the Calendar of the King’s Bench was two years in arrears influenced the Common Pleas to issue a writ of error to the “Court of the Tolzey” of Bristol, an ancient court of record by prescription. On the Court of the Tolzey, see Carter, op. cit. note 41, at 257n.

The statute of 23 Geo. III, c. 28 (1783) transferred this jurisdiction in error to the Irish House of Lords.

This jurisdiction vanished in 1830 with the Welsh courts.

This act is referred to as the Law Terms Act because it altered the dates for the holding of the quarterly terms of the superior courts of common law at Westminster, although its other provisions mentioned in the text were historically of far greater importance. On the terms of court see note 246, supra.
stripped the King's Bench of its jurisdiction in error over the Common Pleas, and provided that all writs of error to the three superior courts of common law of Westminster should be returnable to the new Exchequer Chamber. The power of the King's Bench and Common Pleas to review by writ of error judgments of inferior courts of record continued until the Judicature Acts.581

The King's Bench exercised its jurisdiction in error over inferior courts in criminal as well as in civil causes.592 It should be noted, however, that whereas from early times the writ of error issued of right in civil cases, it could be obtained in criminal cases only by the king's grace until 1705, when a majority of the judges declared it issued \textit{ex debito justitiae} (as an obligation of justice, that is, "of right") in misdemeanors; but it still remained of grace in treason and felony.593 Owing to this limitation of the jurisdiction in error in criminal cases, the trial judges long ago developed a procedure of informal review by reserving doubtful points of law for discussion with fellow judges before imposing sentence.594

In 1848595 this practice became the basis for the creation of the Court for Crown Cases Reserved, consisting of all the common law judges of England.596 Five judges constituted a quorum, provided there was a chief justice of one of the three superior courts of common law among them to preside, but any one of them might require a case to be referred to the entire bench.

There were several tribunals of intermediate appellate jurisdiction

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581\ Holdsworth, \textit{op. cit.} note 2, at 222; 2 Chitty, \textit{loc. cit. note} 522; Carter, \textit{op. cit.} note 68, at 58. For the Common Pleas, see note 527, supra.
592\ Holdsworth, \textit{op. cit.} note 2, at 212 et seq.; Maitland, \textit{op. cit.} note 5, at 134; Carter, \textit{op. cit.} note 41, at 88.
593\ Regina v. Paty, 2 Salk. 503. For the earlier law, see the Rioters' Case, 1 Vern. 175 (1683). The subject is summarized by Lord Mansfield in Rex v. Wilkes, 4 Burr. 2527, 2550 et seq. (1770). And see 1 Holdsworth, \textit{op. cit.} note 2, at 215.
594\ Holdsworth, \textit{op. cit.} note 2, at 217. 1 Stephen, \textit{op. cit.} note 439, at 311, says: "The question reserved was argued before the judges by counsel, not in a court of justice but at Serjeant's Inn of which all the judges were members. If they thought that the prisoner had been improperly convicted he received a free pardon. If not, the sentence was executed or judgment was passed. No judgment was delivered and no reasons were given in such cases, the whole proceeding being of an informal kind."
595\ 11 & 12 Vict. c. 78. This court survived the Judicature Acts, but the \textit{Judicature Act of 1873}, § 47, required that the Lord Chief Justice of England be one of the quorum of five judges. The Court for Crown Cases Reserved was abolished by the \textit{Criminal Appeal Act, 7 Edw. VII, c. 23 (1907)}.
596\ Stephen, \textit{op. cit.} note 439, at 312, refers to all the judges of England who made up this court as fifteen in number. They numbered twelve at the time of Slade's Case at the opening of the seventeenth century.
between the common law courts at Westminster and the House of Lords, each designated the Court of Exchequer Chamber. The practice of informal review of reserved questions of criminal law discussed above was simply a new application of a custom which appeared in the late thirteenth century whereby the judges of any one of the superior courts of common law might in their discretion, after hearing a case which they deemed of great public importance and turning on a doubtful point of law, adjourn to the Exchequer Chamber in Westminster Hall for argument before all the judges and barons of England.\textsuperscript{537} That august assembly having declared its view of the law involved, the court in which the case originated entered judgment in accord therewith. This practice continued into the seventeenth century.\textsuperscript{538}

The first Court of Exchequer Chamber, which was erected in 1357\textsuperscript{539} to solve the vexed question of the jurisdiction in error over the Exchequer, was undoubtedly patterned upon this unofficial tribunal. The Exchequer was just coming to be recognized as a common law court when in 1338 the King’s Bench issued a writ of error to it, as in the case of the Common Pleas, but the Barons refused to hand up the record and certified their reasons to the king.\textsuperscript{540} The new court of Exchequer Chamber was empowered to review by writ of error judgments from the common law side of the Exchequer.\textsuperscript{541} Its judges were the Chancellor (or Lord Keeper) and the Lord Treasurer of England, with the justices of the two Benches acting as advisers.

The second Court of Exchequer Chamber was established in 1585 by the famous statute of 27 Elizabeth (1558–1603)\textsuperscript{542} to review errors of the King’s Bench in civil actions originating there not touching the crown. Before that the jurisdiction in error over the King’s Bench was vested in the House of Lords,\textsuperscript{543} but the infrequency of

\textsuperscript{531} Holdsworth, op. cit. note 2, at 242; Coke, op. cit. note 7, at 106, 110, 119; 3 Blackstone, op. cit. note 23, at 56.
\textsuperscript{532} Slade’s Case, 4 Coke’s Rep. 92b (1602) was twice argued by express command of Queen Elizabeth before all the judges of England. In the Case of Ship Money, 3 Howell’s State Trials 825 (1637), the judges, assembled in the Star Chamber to receive their instructions from the Lord Chancellor before going on circuit, gave the king an advisory opinion affirming the legality of the ship money tax. The subsequent proceedings against John Hampden in the Court of the Exchequer to compel payment of the tax were adjourned to the Exchequer Chamber for argument before all the judges of England, and they again upheld the tax.
\textsuperscript{533} 31 Edw. III, St. 1, c. 12. Tout, op. cit. note 124, at 57.
\textsuperscript{540} Pike, Introduction to Year Books, 14 Edw. III (1888) xxii et seq.; 1 Holdsworth, op. cit. note 2, at 243; Carter, op. cit. note 68, at 58.
\textsuperscript{541} Pike, op. cit. note 528, at 294; Coke, op. cit. note 7, at 105.
\textsuperscript{542} 27 Eliz. c. 8 (1585). The Act provided for review of the judgments of the
Parliaments under the Tudors practically deprived litigants of that remedy. The members of this second court were the judges of the Common Pleas and of the Exchequer, or any six of them. In 1830 a third Court of Exchequer Chamber was created by a statutory consolidation of the two old Courts of Exchequer Chamber, which had functioned side by side for centuries, into a single new intermediate court of error bearing the ancient name. This new Court of Exchequer Chamber was vested with complete jurisdiction in error over all three of the superior courts of common law. The system of manning the second Court of Exchequer Chamber was extended to the new court by providing that in each case the court should consist of the judges of the two superior common law courts whose judgment was not under review. This last Court of Exchequer Chamber perished in the overthrow of the ancient common law judicial system by the Judicature Acts of 1873–1875.

### Jurisdiction on Appeal

The review of final orders and decrees in the prerogative courts was by appeal, a procedure derived from the civil law. An appeal differed from the writ of error in carrying to the higher court for review the facts as well as the equity or law of the case. This distinction arose from the difference in method of trial, for in the prerogative courts cases were tried by a judge without a jury, and, therefore, it was felt that the judge-made findings of fact should be reviewed by the appellate court. Originally appeals also differed from writs of error in that they were not available as of right but only by royal grace. After the House of Lords extended its appellate jurisdiction over appeals from the chancellor, petitions for such appeals came to be granted as of course and eventually as of right. It is significant that the general progress of appellate procedure during the past century has been to substitute for the common law writ of error and the prerogative appeal the statutory appeal as a single method of review for all cases.

King’s Bench in actions of “debt, detinue, covenant, account, action upon the case, ejections firmae, or trespass, first commenced or to be first commenced there, (other than such only where the Queen’s majesty shall be party).”

See note 586, infra.

This was by the Law Terms Act, 11 Geo. IV & 1 Wil. IV, c. 70 (1830).

Daniell, Edmund R., Pleading and Practice of the High Court of Chancery (4th Am. ed. 1871) 1491; 3 Blackstone, op. cit. note 23, at 455. And see notes 549 and 571 infra.

The Court of Chancery at Westminster had no appellate jurisdiction over other courts of equity, such as the Irish Chancery and the Chancery courts of the counties palatine.\(^5\) There was no provision for appeals from Chancery in Tudor England except by petition to the king for appointment of commissioners to reconsider his chancellor’s decree, but this was practically superseded when in the latter half of the seventeenth century, as we shall see, the House of Lords extended its appellate jurisdiction over appeals in equity from all these Chancery courts.\(^5\) The chancellor, however, was given an appellate jurisdiction over the subordinate judges of his own court by statute. An act of 1730 provided for appeal to him from the orders of the Master of the Rolls,\(^5\) and similar provision was made upon the creation of vice-chancellorships in 1813 and 1841.\(^5\) Unfortunately, the burden of appeals from these several subordinate equity tribunals proved so overwhelming that the congestion in the Chancery docket was enhanced rather than alleviated by the additional judges.\(^5\)

To correct this situation, a Court of Appeal in Chancery was erected by statute in 1851,\(^5\) to hear appeals from these subordinate courts of the Master of the Rolls and of the Vice Chancellors. The Act provided for the appointment of two Lords Justices of Appeal in Chancery, and stated that the court might consist of the Lord Chancellor sitting alone as theretofore, or associating with him one of said Lords Justices, or that its jurisdiction might be exercised by the two Lords Justices sitting together apart from the chancellor.\(^5\) This court superseded the chancellor as an appellate tribunal and appeals from it went directly to the House of Lords as they formerly had from the chancellor.\(^5\) At the Judicature Acts the Court of Appeal in Chancery was replaced by the Court of Appeal of the Supreme Court of Judicature.

\(^5\)But appeals lay to the chancellor from the Courts of Great Sessions of Wales, and from the Lord Mayor's Court in London. 2 Maddock, op. cit. note 226, at 437. And see note 357, supra.
\(^5\)ADAMS, John, COMMENTARY ON THE LAW OF EQUITY (Bispham’s ed. 1868) 53, 744; 1 Holdsworth, op. cit. note 2, at 373; Pike, op. cit. note 528, at 299. And see note 571, infra.
\(^5\)3 Geo. II, c. 30.
\(^5\)53 Geo. III, c. 24; 5 Vict. c. 5. Also see note 267, supra.
\(^5\)See note 268, supra.
\(^5\)45 & 15 Vict. c. 83.
\(^5\)Section 8 of the act provided that the Lord Chancellor might request any judge of the common-law courts, or the Master of the Rolls, or the Vice-Chancellors, to assist and advise the Court of Appeal, "if any such Common Law Judge shall find it convenient to attend upon such Request."
\(^5\)See note 571, infra.
The High Court of Delegates, as previously pointed out, was the highest appellate court of the ecclesiastical judicial system, and it also heard appeals from Admiralty. This jurisdiction was vested in the Privy Council in 1832, when the High Court of Delegates was abolished, and was transferred to the Judicial Committee of that body upon its organization in the following year.

The High Court of Admiralty heard appeals from the Vice-Admiralty Courts established in various parts of the globe in the exercise of the royal prerogative of justice. This appellate jurisdiction of the High Court of Admiralty was transferred to the Judicial Committee of the Privy Council in 1833.

The Prize Commissioners constituted a tribunal analogous to the High Court of Delegates. When the Prize Court separated from the Admiralty in the seventeenth century, it became the custom for the king at the beginning of his reign to issue a general commission to the Privy Council empowerining any three councillors to determine appeals in prize cases, whether from the Prize Court or from the Vice-Admiralty Courts of the colonies. In 1748 the common law judges were included in the commission, and after the appointment of a Vice-Chancellor in 1814, he, too, was commissioned. But the Judicial Committee Act of 1833 also transferred this appellate jurisdiction to the Judicial Committee of the Privy Council.

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585For a discussion of the origin and composition of the High Court of Delegates, see supra, note 387 et seq.
586 & 3 WIL. IV, c. 92.
587 & 4 WIL. IV, c. 41. See note 645, infra.
588 CHALMERS, George, COLONIAL OPINIONS (1858) 518, 532; 3 BLACKSTONE, op. cit. note 23, at 69; the additional statement in Blackstone that the Privy Council possessed concurrent jurisdiction appears to be unsupported by authority.
589 See note 558, supra. The colonial courts exercised a "wide range of admiralty jurisdiction ... as compared with the restricted jurisdictions in England resulting from the jealousies of the common law judges there." Dutch, Charles P., reviewing Hough, Judge Charles M., REPORTS OF CASES IN THE VICE ADMIRALTY OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK, 1715-1788 (1925) in (1926) 39 HARV. L. REV. 414, 415.
590 HOLDSWORTH, op. cit. note 2, at 565; 3 BLACKSTONE, op. cit. note 23, at 69.
591 Some question was raised as to the validity of the king's commission to the judges, since they were not members of the Privy Council. Accordingly, 22 GRO. II, c. 2 (1749) affirmed the legality of the commission. The act, however, stipulated that the commissioners could not give judgment unless a majority of those present were Privy Councillors. 3 BLACKSTONE, op. cit. note 23, at 70. Cf. 1 HOLDSWORTH, op. cit. note 2, at 565 n.
592 HOLDSWORTH, loc. cit. note 561. See note 267, supra.
593 See note 558, supra.
The highest and final appellate court not only for the realm, but for all Great Britain is the House of Lords. It is more than an appellate tribunal for the Lords are still, in theory, the king in his Council in Parliament, and, as such, are vested with the entire judicial function of the High Court of Parliament, which includes a limited original criminal jurisdiction. In its early days, the High Court of Parliament shared with Chancery the administration of the extraordinary jurisdiction of grace for the vindication of law and order and in supplementing the inadequacies of the common law, which was later taken over for the most part by the Star Chamber.

Pike, op. cit. note 528, at 291 et seq., 304; Adams, op. cit. note 174, at 455; Maitland, op. cit. note 5, at 473; Holdsworth, op. cit. note 2, at 368.

The appellation, High Court of Parliament, accurately describes the medieval view that parliament in the sense of the king and his great Council was primarily the highest and final court of justice of the realm. Indeed, until the time of Elizabeth all determinations of parliament, whether in the form of legislative acts or judicial decisions, were referred to as the “judgments of parliament.” See also: ibid. 52; Pollard, A. F., The Evolution of Parliament (1920) 24, 36; Baldwin, op. cit. note 50, at 321; Smith, op. cit. note 294, at 55.

Anson, op. cit. note 510, at 383: “The appellate jurisdiction of the House of Lords is doubtless a survival of a portion of the jurisdiction of the Curia Regis, and of the time when a session of Parliament was not easily distinguished from a session of the Magnum Concilium.” See also: ibid. 52; Pollard, op. cit. note 566, at 261, 310; Maitland, op. cit. note 5, at 136, 213; Baldwin, op. cit. note 50, at 318; Hale, op. cit. note 370, at 58, 90; I Holdsworth, op. cit. note 2, at 354 et seq.; Pike, op. cit. note 528, at 289, 294; Coke’s Ninth Report (circa 1612) Preface.

The Commons, having been invited originally to meet with king and Council in Parliament merely in an advisory capacity, never secured the right of participation in the judicial function; that remained among the exclusive privileges vested in the upper house which had formed part of the King’s Council before Parliament became a distinct organ of government in the late fourteenth century. Of the Commons, Maitland, op. cit. note 5, at 245, says: “In I Hen. IV (1399) they had protested that they were not judges, and . . . they had come to the conclusion that they had no power to punish save for a contempt of their house.” See I Holdsworth, op. cit. note 2, at 362; Plucknett, op. cit. note 5, at 133; Pike, op. cit. supra, at 289. Cf. Coke, op. cit. note 7, at 23; Hargrave, Preface to Hale’s Jurisdiction of the Lord’s House (1796) lxxx et seq.; Hale, op. cit. note 370, at 103, 127 et seq.; McIlwain, op. cit. note 56, at 197 et seq.

Maitland, op. cit. note 5, at 216; I Holdsworth, op. cit. note 2, at 366; Baldwin, op. cit. note 50, at 224, 242; McIlwain, op. cit. note 56, at 117 et seq.; Hale, op. cit. note 370, at 111. But, as Lord Hale points out at page 109, after the Council took over this extraordinary jurisdiction, the House of Lords lost all power to give relief in cases not relivable in the ordinary courts of justice by reason of defect in the law.
After a conflict with the King’s Council, the Lords in Parliament late in the reign of Edward III (1326-1377) established their appellate jurisdiction over the common law courts on the ground that only a court of record could make a final judgment reversing the judgment of a court of record. This appellate jurisdiction was exercised in common law cases, both civil and criminal, by a writ of error directed to the King’s Bench, to the Exchequer Chamber, or to the

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Baldwin, op. cit. note 50, at 335; 1 Holdsworth, op. cit. note 2, at 361; Pike, op. cit. note 528, at 289; Hale, op. cit. note 370, at 96, 140. Cf. McILwain, op. cit. note 56, at 139, 234; Coke, op. cit. note 7, at 3, 4; May, Sir Thomas Erskine, Law and Usage of Parliament (1844) (7th ed. 1873) 103.

The question raised in note 180, supra, as to whether the High Court of Parliament should be included among the prerogative courts does not seem to have been specifically discussed.

Lord Hale, op. cit. note 370, at 134, says: “Though the Court of parliament be the highest court of justice yet it is an extraordinary court . . .” Unquestionably it originated as a prerogative court since it constituted the great council of the king and administered the royal prerogative justice. See note 566, supra; Hargrave, op. cit. note 567, at cxxxiii, cxxii; Pike, op. cit. note 528, at 280. As late as the declaration of parliamentary sovereignty in the Act of May 27, 1642, the High Court of Parliament is described as not only a court of judicature but also as a council. McILwain, op. cit. note 56, at 389.

When the ancient council separated into the council in parliament and the small council, and the former became a distinct court, it thereby acquired some of the characteristics of a common-law court. Since the common-law judges originally sat as members of this greater council and always remained its advisers, they seized upon the fact that it kept parliamentary rolls to recognize its supreme appellate jurisdiction as against the rival council. Thereafter the House of Lords apparently regarded itself as the protector and highest administrator of the common-law. On the other hand, its method of trial before all the lords as judges as in the ancient communal courts, and the fact that with respect to its jurisdiction of privilege it administered a law of its own known as lex et consuetudo parliamenti tend to defeat its status as a common law court. It should also be noted that the House of Lords was the only court in the classical English system which possessed appellate jurisdiction both by writ of error from the common-law courts and by appeal from the prerogative Court of Chancery, a fact which confirms its status as an extraordinary court. Indeed, it was not until 1898 that this supreme appellate tribunal decided that its own decisions on questions of law were binding on it as precedents. 1 Holdsworth, op. cit. note 2, at 375.

At the close of the Westminster epoch, then, the House of Lords would seem to have been neither a prerogative court nor a common-law court but a court sui generis (of its own kind) dependent upon the sovereignty of parliament, rather than on the crown, for much of both its original and appellate jurisdiction.
common law side of Chancery. In the latter half of the seventeenth century, the House of Lords on its own initiative extended its appellate jurisdiction to cover equity cases. They were brought up by a petition of appeal from Chancery. This jurisdiction on appeal came to embrace appeals from the equity side of the Exchequer, from the Chancery Courts of the counties palatine and Ireland, and from the courts of Scotland where a modified civil law system prevails. The Lords failed, however, to vindicate their sweeping claim that they possessed inherent authority to determine all appeals from whatsoever courts, for, as we shall see, the Privy Council before the end of the Westminster epoch had established an independent appellate jurisdiction over admiralty and ecclesiastical appeals in England and over all cases in law and equity from the dominions and possessions beyond the seas. The House of Lords continues to exercise its appellate functions much the same today as it did at the close of the common law era, although it came perilously near perishing with the

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570PIKE, op. cit. note 528, at 292 et seq.; PLUCKNETT, op. cit. note 5, at 145; COKE, op. cit. note 7, at 21; 1 HOLDsworth, op. cit. note 2, at 370 et seq.; HALE, op. cit. note 370, at 124, cited in 1 HOLDsworth, op. cit. note 2, at 371; POTTER, op cit. note 90, at 76. For the procedure in error in the House of Lords see MacQueen, op. cit. note 421, at 361 et seq.; 1 HOLDsworth, op. cit. supra, at 371; HALE, op. cit. note 569, at 18 et seq.; HALE, op. cit. note 370, at 123 et seq.; 2 CHITTY, op. cit. note 236, at 597. And see note 525, supra.

The House of Lords also possessed power to grant writs of error in criminal cases, but it was seldom used: PIKE, loc. cit. supra; CARTER, op. cit. note 68, at 59; MacQueen, op. cit. supra, at 362; Hargrave, op. cit. note 567, at cxi n.

Error also lay to the King's Bench of Ireland and to the Irish House of Lords, except for the period 1783–1800, during which all appellate jurisdiction of the House of Lords over Ireland was withdrawn by statute. Beven, Thomas, Appellate Jurisdiction of the House of Lords (1901) 17 L. Q. Rev. 155, 357, at 361 et seq.; PIKE, op. cit. note 528, at 301. After 1707, error lay to the law side of the Court of Exchequer in Scotland. 2 CHITTY, op. cit. note 236, at 595.

The Lords first reversed a decree of Chancery in 1640. 1 HOLDsworth, op. cit. note 2, at 373 et seq.; PIKE, op. cit. note 528, at 295 et seq.; Hargrave, op. cit. note 567, at cxxxv et seq., clxi et seq.; HALE, op. cit. note 370, at Chap. 33.

PIKE, op. cit. note 528, at 299; 1 HOLDsworth, op. cit. note 2, at 241.

PIKE, op. cit. note 528, at 304.

STEPHEN, op. cit. note 308, at 57; 1 HOLDsworth, op. cit. note 2, at 375; Beven, loc. cit. note 570; PIKE, op. cit. note 528, at 303. Appeals from the Irish Free State now go to the Judicial Committee of the Privy Council. See note 653, infra. Appeals from North Ireland, however, still lie to the House of Lords. 1 ANSON, op. cit. note 510, at 44; JENES, op. cit. note 46, at 75.

Beven, op. cit. note 570, at 363; PIKE, op. cit. note 528, at 300.

Hargrave, op. cit. note 567, at cxxxi.

See the history of the Privy Council, infra.
celebrated courts of old at the general reorganization of the English judicial system by the Judicature Acts.578

The Lord Chancellor, who acted as speaker of the House of Lords, presided over appellate cases in the House of Lords,579 and until 1844 each member of the House was a judge, as in the ancient communal courts, whether learned in the law or not.580 In that year, the famous

575The Act of 1873 abolished the appellate jurisdiction of the House of Lords, but before that act went into effect on November 1, 1875, the abolition was postponed for a year; and by the APPELLATE JURISDICTION ACT of 1876, 39 & 40 Vict. c. 59, the appellate jurisdiction of the House of Lords was continued with certain revisions. Among other improvements, this act substituted a statutory petition of appeal for the common-law writ of error and the old petition of appeal from Chancery. 1 HOLDSWORTH, op. cit. note 2, at 643 et seq.; PIKE, op. cit. note 528, at 304 et seq.; 1 ANSON, op. cit. note 510, at 309. And see note 713 infra.

Statutory appeal has largely superseded the writ of error in America, too. See Compter, op. cit. note 547.

576The Lord Chancellor when presiding in the House of Lords, like the presiding official in the communal courts of old, had no vote as a judge unless he was also a peer. Then he voted as such in order of his rank, the roll call always being from lowest to highest. PIKE, op. cit. note 528, at 210, 354; 1 ANSON, op. cit. note 510, at 241, 385; MACQUEEN, op. cit. 421, at 23 et seq.

Originally not all of the Lords were judges. HALE, op. cit. note 370, at 156, states that in ancient times “the actual decision and determination ... was given by a select number of lords and judges, nominated by the King in parliament or at least by the king with the advice of the lords.” CARTER, op. cit. note 68, at 48, places the beginning of the later practice at the Restoration.

571 HOLDSWORTH, op. cit. note 2, at 376. HALE, op. cit. note 370, at 155, criticized this system by which persons unlearned in the law had men's estates and interests at their mercy, and judgments of learned judges given with great deliberation and advice were subject to be overthrown by a single lay vote.

The Lords at one time even assumed the right to vote by proxy in judicial cases, but the House put a stop to that in 1697 by a standing order that no proxy should thereafter be used in any judicial cause before it. 6 SELDEN, op. cit. note 426, at 1641, Judicature in Parliament; MACQUEEN, op. cit. note 421, at 26. Down to almost the middle of the nineteenth century any peer present seems to have had the right to vote on the judgment whether he had heard the case or not. In the famous O'Connell case the Lord Chancellor found it necessary to request those who had not heard the entire argument to refrain from voting. Beven, op. cit. note 570, at 369.

In the New York Court for the Trial of Impeachments and the Correction of Errors, the judges of which were chiefly senators unlearned in the law (see note 84, supra), there seems to have been no requirement that only judges who had heard the argument should participate in decisions. But beginning in 1841, the report of each case expressly states that “all the members of the court present who had heard the argument of the cause” voted. Delafield v. Illinois, 26 Wend. 192, 229 (N. Y., 1841). The Court existed from 1784 to 1846, and though sometimes as many as thirty-seven members were entitled to sit thereon, twenty-nine is said
case of Daniel O'Connell v. the Queen established that only the law lords, those holding or who had held high judicial positions, should vote as judges. This has become an established tradition and no longer do the lay lords participate in cases on appeal. The Lords do not give a judgment in the way other courts do, but each law lord orally addresses the House stating his decision on the case at bar and the reasoning upon which he bases it. The determination of the tribunal is entered in accord with the majority decision on the journal of the House as part of its proceedings.

Unfortunately, the attempt of Queen Victoria in 1856 to strengthen the law lords by elevating celebrated judges to the peerage for life was defeated when Baron Parke, the leading jurist of his day, was created Lord Wensleydale and the Lords, in their exercise of their jurisdiction of privilege, held that as a life peer he could neither sit nor vote in the House. The Appellate Jurisdiction Act of 1876, however, provided for the appointment of four Lords of Appeal in Ordinary who were expressly empowered to sit and vote among the Lords, thus assuring a distinguished bench in the supreme appellate court of the realm. That act also provided that no appeal should be heard or determined unless there were present at least three "Lords of Appeal", namely, the Lord Chancellor, the Lords of Appeal in Ordinary and such peers as held or had once held high judicial office.

to be the highest number to participate in a decision. 2 Chester, Justice Alden, Courts and Lawyers of New York (1925) 796.

Pound, Outlines of Lectures on Jurisprudence (4th ed. 1928) 57, states in an enumeration of the defects of legislative justice that "Legislators who have not heard all the evidence have habitually participated in argument and decision; and those who have not heard all the arguments have habitually taken part in the decision."

131 O'Connell v. the Queen, 11 Clark & Finnelly 155, 421 (1844). When in 1883 a lay lord attempted to vote, he was ignored. Beven, op. cit. note 570, at 370; 1 Holdsworth, op. cit. note 2, at 377.


133 The Wensleydale Peerage, 5 H. L. Cas. 958 (1856). A few months later the crown conferred upon Lord Wensleydale, the life peer, an hereditary peerage, whereupon he became entitled to sit and vote in the House of Lords. Pike, op. cit. note 528, at 378.

134 By this act the Lords of Appeal in Ordinary were made barons for life but were entitled to sit in the House of Lords only during their tenure of office. Appointments were restricted to those who had held high judicial office for two years or had practiced as barrister or advocate at least fifteen years. The right of such a life peer to sit and vote in the House of Lords was conferred for life by the Appellate Jurisdiction Act of 1887. Since 1913 there have been six Lords of Appeal in Ordinary. See note 668, infra.
The House of Lords, as we have seen, administered an original extraordinary jurisdiction both civil and criminal between subject and subject up to the time of Henry V (1413–1422). This jurisdiction was set in motion by petition to the king in his Council in Parliament. Owing to the development of the prerogative through the centralization of the governing power, first in the smaller Council about the king and then under the Tudors in the monarch himself, the parliamentary judicature lay dormant during the two centuries from 1413 to 1620.

Upon the resumption by Parliament of its judicial powers in 1621, the Lords again exercised both an original and an appellate jurisdiction in civil and criminal causes until the abolition of the House in 1649. In contrast to the monarchy, then tottering to its doom, this newly revived supreme tribunal acquired a commanding position, since upon the fall of the Star Chamber and High Commission in 1641, petitions for the extraordinary relief administered by those courts were again addressed to the House of Lords as in ancient days.

So popular did it become in dispensing this extraordinary jurisdiction that its overthrow met with strong opposition among the ranks of the victorious Puritans.

When the House of Lords was reinstated at the Restoration of 1660, it resumed the broad original as well as appellate jurisdiction it had wielded just before its fall. The Commons, however, vigorously challenged the resumption of such an extensive original jurisdiction by the Lords. In 1670 this claim of the Upper House was finally

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588 Baldwin, op. cit. note 50, at 323 et seq.; I Holdsworth, op. cit. note 2, at 359; McLnwn, op. cit. note 56, at 203 et seq.

589 The House of Lords could sit as a court only when Parliament was in session, and the Tudors summoned infrequent and brief Parliaments. MacQueen, op. cit. note 421, at 680; McLnwn, op. cit. note 56, at 131 et seq.; Potter, op. cit. note 90, at 74. By the Appellate Jurisdiction Act, 39 & 40 Vict. c. 59, § 9 (1876), it was provided that the crown might authorize the Lords of Appeal to hear appeals while Parliament was not in session.

587 Pollard, op. cit. note 566, at 309; I Holdsworth, op. cit. note 2, at 366; Maitland, op. cit. note 5, at 316; Potter, op. cit. note 90, at 75.

588 Beven, op. cit. note 570, at 166 et seq.; I Anson, op. cit. note 510, at 382; Pike, op. cit. note 528, at 281; Potter, op. cit. note 90, at 75.

The administrative courts of the Tudors had taken over much of the original jurisdiction of the Lords. As Professor Pollard says, "The petitions which had flowed in thousands to parliament were diverted to Chancery, the courts of star chamber and requests, and other departments of the council." Pollard, op. cit. note 566, at 308, citing Hargrave, op. cit. note 567, at vi; McLnwn, op. cit. note 56, at 133; I Leadam, op. cit. note 249, at xxiii–xxiv, lix–lx; Baldwin, op. cit. note 50, at 243–249.

589 Hargrave, op. cit. note 567, at lxviii et seq.
defeated with respect to original civil jurisdiction between subject and subject when the House of Lords attempted, at the request of the king, to take cognizance of the case of *Skinner v. East India Company.*

It is significant that the Commons ventured to join issue with the Lords in this case since it fell within the ancient extraordinary jurisdiction, as it involved injury to and dispossession of an East Indian island held by the plaintiff, a wrong for which the English Courts afforded no remedy because under the orthodox common law doctrine of venue it was a local action to be tried where the land lay. An indirect effect of this decision was the termination, also, of the Lords' claim to function again as a court of first instance in criminal cases against commoners. They preserved, however, their jurisdiction

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590 Hollis, Baron, The Grand Question Concerning the Judicature of the House of Peers, Stated and Argued (1669); 6 Howell's State Trials 710 (1666); Pike, op. cit. note 528, at 281; Hargrave, op. cit. note 567, at cv et seq.; 1 Holdsworth, op. cit. note 2, at 367; 1 Anson, op. cit. note 510, at 381; Beven, op. cit. note 570, at 169.

591 The East India Company petitioned the Commons for relief from this "usurpation" of original civil jurisdiction by the Lords. The Commons denied the jurisdiction of the Lords as to Skinner's allegations of injury to person and property on the ground such actions were transitory and, therefore, the ordinary courts of law afforded a remedy. They ignored the fact that Skinner had no remedy at law or in equity with respect to the injury to the real estate. Under the doctrine of venue all actions for injuries to land and immovables were "local" and had to be brought in the courts of the place where the injury occurred. Actions for injuries to the person or to moveables were "transitory" and could be brought in any court within whose territorial jurisdiction the defendant could be found and served with its process. See citation of authorities, note 469, supra.

592 The remaining criminal jurisdiction of the Lords over causes such as impeachment and privilege is not ousted simply because the defendant is a commoner. 1 Holdsworth, op. cit. note 2, at 379; 1 Anson, op. cit. note 510, at 386; Carter, op. cit. note 68, at 66.

In 1663 the Lords had imposed a fine and imprisonment beyond the sitting of Parliament upon one Fitton and a certain William Carr, for libelling Lord Gerard of Brandon. Imprisonment beyond the session of Parliament was an illegal punishment for breach of privilege: the case must, therefore, have been one of original criminal jurisdiction. The Commons protested vigorously, but chose to make an issue rather of the Skinner case, which displaced the other in popular interest. Hargrave, op. cit. note 567, at xcix et seq. In 1693 the Duchess of Grafton by petition to the Lords charged the three puisne judges of the King's Bench with crime; the justices answered to the petition that the Lords had no original jurisdiction over the cause as, being a criminal charge, it was only triable by the due course of the common law and not by this extraordinary procedure. After the case had been argued before them, the Lords "gave permission" to the Duchess to withdraw her petition. Bridgman v. Holt, Shower's Parliamentary Cases (Loveland's ed. 1876) 143 (1693); Hargrave, op. cit. supra, at clxxv et seq. This voluntary renunciation of the disputed jurisdiction by the Lords settled a grave constitutional question.
over cases of privilege, that is, those involving the validity of the creation of new peerages (with reference to the right to sit and vote) or of claims to old ones, and the right to punish contempt of their House.

The House of Lords also retains an important original criminal jurisdiction in two types of cases: (1) trial of peers for treason and felonies, and (2) trial of public officials or other subjects impeached for crime by the House of Commons. The jurisdiction of the upper house over treason and felony of peers goes back to the thirty-ninth clause of Magna Carta—that no freeman should be exiled or in any way destroyed except by lawful judgment of his peers and/or by the law of the land. With the transition from a created peerage to an hereditary peerage, this clause was construed to guarantee to an hereditary peer accused of treason or felony a trial by hereditary lords.

The procedure in such cases begins by indictment of the accused.
peer in the ordinary criminal courts and removal of the case into the House of Lords for trial by Writ of Certiorari to Review. The Lord Chancellor, as such, does not preside over these trials as he does over all other cases before the Upper House, for there was a time when he might not be of the hereditary peerage. Instead, the king appoints from among the hereditary temporal lords a Lord High Steward to preside for the occasion. Now that for two centuries it has been customary for the Lord Chancellor to be raised to the peerage on his assumption of office, he is generally appointed to preside as Lord High Steward.

If Parliament is in session, the trial is before the House of Lords as such, though technically called the Court of our Lord the King in Parliament, and all the temporal hereditary peers present are judges much as in the Curia Regis of old. If not, the trial is said to be in the Court of the Lord High Steward and he sits as sole judge of law and practice assisted by a jury of peers known as the Lords Triers. Originally, only peers specially summoned could sit as Lords Triers, the usual number being twenty-three, and their verdict must be unanimous. As this enabled the crown to obtain a packed jury, a change was made in 1696, whereby even in trials in the Lord High Steward's Court all the temporal peers are summoned, and the verdict is by majority vote of all peers present subject to the limitation that at least twelve must concur in a vote to convict.

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599 4. BLACKSTONE, op. cit. note 23, at 262; 1 HOLDSWORTH, op. cit. note 2, at 390; STEPHEN, op. cit. note 439, at 165. See note 162, supra.
600 PIKE, op. cit. note 528, at 209 et seq.; 1 HOLDSWORTH, op. cit. note 2, at 388; CARTER, op. cit. note 68, at 62.
601 POLLARD, op. cit. note 566, at 251, says: "The anomaly of having a lord chancellor to preside over a house in which he 'had no interest to give any assent or dissent' was gradually removed by the practice of creating the lord chancellor a peer, though the rule did not become invariable until after the reign of Queen Anne."
602 PIKE, op. cit. note 528, at 227, 306; 4 BLACKSTONE, op. cit. note 23, at 263; 1 MAITLAND, op. cit. note 5, at 136; 1 ANSON, op. cit. note 510, at 245; 1 HOLDSWORTH, op. cit. note 2, at 386, 389.
603 In a trial before the whole House the Lords Spiritual, while entitled to participate as judges, always withdrew before the sentence, for the canons of the Church, and the Constitutions of Clarendon, prohibited them from taking part in a judgment entailing shedding of blood, and formerly these trials for treason and felony usually involved capital punishment upon conviction. For this reason Lords Spiritual were not summoned as Lords Triers in the Court of the Lord High Steward.
604 1 HOLDSWORTH, op. cit. note 2, at 389 et seq.; CARTER, op. cit. note 68, at 62; MAITLAND, op. cit. note 5, at 170.
The second instance of survival of the Lords' original criminal jurisdiction is the trial of those persons, usually public officials, who have been impeached by the Commons for high crimes and misdemeanors. This jurisdiction extended to both peer and commoner, but though still available it has not been exercised since the impeachment of Lord Melville, in 1805. Impeachment was formerly the chief instrument by which the Commons could bring pressure upon the crown through the ministers of state, for it was a criminal prosecution neither instituted nor controlled by the king but solely by the House of Commons, which not only brought the indictment but also appeared as prosecutor before the Lords. The accused was furnished with a copy of the articles of impeachment and an opportunity to defend. The usual form of criminal trial before all the lords followed. Even though a majority voted for conviction, no sentence could be imposed unless the Commons formally demanded judgment. The crown's pardon was no bar to a trial of impeachment, but after sentence the ordinary criminal law attached and the crown could then pardon.

Since the chief object of impeachments was to remove unpopular officials, particularly ministers of the crown, and it was often impos-

406 HATSELL, John, Precedents of Proceedings in the House of Commons (1796) 50 et seq.; 1 ANSON, op. cit. note 510, at 384 et seq.; 1 HOLDSWORTH, op. cit. note 2, at 379 et seq.; 1 STEPHEN, op. cit. note 439, at 145 et seq.; 6 SELDEN, op. cit. note 426, at 1592 et seq.; PLUCKNETT, op. cit. note 5, at 146; HALE, op. cit. note 370, at 101. The procedure in impeachment prescribed in Article One of the United States Constitution was adapted from and parallels almost exactly the familiar English practice. BURDICK, op. cit. note 623, at 85 et seq. 407 "The parliament, that is to say, the lords, had gradually abandoned all attempt to act as a court of first instance in criminal or civil cases, save when a peer was to be tried for felony or treason—but to this there was one great exception. They had entertained accusations both against peers and against commoners when preferred by the commons. Such accusations preferred by the commons to the lords came to be known as impeachments." MAITLAND, op. cit. note 5, at 215. And see CARTER, op. cit. note 68, at 65; PEKE, op. cit. note 528, at 228. Lord Melville was impeached for misconduct as Treasurer of the Navy, but he was acquitted. Fraser, J. A. Lovat, The Impeachment of Lord Melville (1913) 24 Juridical Rev. 235. The first impeachment in England occurred in 1376. PEKE, op. cit. supra, at 205; 1 HOLDSWORTH, op. cit. note 2, at 380.

408 MAITLAND, op. cit. note 5, at 215; 1 HOLDSWORTH, op. cit. note 2, at 381; 1 STEPHEN, op. cit. note 439, at 158 et seq.; PROTHERO, op. cit. note 169, at lxxv.

409 HATSELL, op. cit. note 606, at 62 et seq.; 1 ANSON, op. cit. note 510, at 385, 386; MAITLAND, loc. cit. note 607, supra; MCLWAIN, op. cit. note 56, at 187 et seq.

410 HOLDSWORTH, op. cit. note 2, at 379; 1 ANSON, op. cit. note 510, at 386.

411 It was so decided in Danby's Case, 11 HOWELL'S STATE TRIALS 599, 790 et seq. (1678-1833), and this ruling was incorporated in the ACT OF SETTLEMENT, 12 & 13 WIL. III, c. 2, § 3 (1700).

412 ANSON, loc. cit. note 610, supra.
sible to prove commission of crime, this method of criminal procedure fell into disuse in England with the advent of the cabinet system of government under which a vote of want of confidence by the Commons is immediately followed by resignation of the entire ministry. By statute an address to remove a judge has been substituted for impeachment of the judiciary.

The House of Lords also exercised a kind of original criminal jurisdiction in respect to the nefarious bill of attainder which flourished during the sixteenth and seventeenth centuries as the royal engine of political vengeance. Unlike the impeachment, it originated in the upper house, and took the form of a legislative enactment requiring concurrence of Commons, Lords and Crown. The attainted person was thus deprived of life and property by the mere passage of a statute without trial or hearing and though guilty of no act previously recognized to be a crime. To condemn without trial and perhaps for an act made a crime ex post facto is so abhorrent to the sense of justice that attainder has not been resorted to in England since 1696, although under the doctrine of parliamentary supremacy the possibility of attainder is not extinct. The bills of rights of our American constitutions expressly safeguard us from such enactments.

The House of Lords came to share with the Commons an anomalous civil jurisdiction with respect to semi-judicial private statutes. The early petitions to Parliament for extra-judicial relief in specific cases,

611 The trial of Warren Hastings, a retired governor-general of India, who was impeached on charges of corruption, extortion and misgovernment, lasted from 1788 to 1795, and terminated in an acquittal. The trial is graphically described by Lord Macaulay in his essay on Warren Hastings.

613 The doctrine of Cabinet responsibility to the Commons originated in the eighteenth century and was firmly established during the reign of Victoria. MAITLAND, op. cit. note 5, at 396 et seq.; ANSON, op. cit. note 510, at 402; HOLDSWORTH, op. cit. note 2, at 384. Cf. ADAMS, op. cit. note 174, at 289.

615 Supreme Court of Judicature Act, 15 & 16 Geo. 5, c. 49, § 12 (1) (1925): “All the judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, shall hold their offices during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament.”

Originally all the judges lost their commissions on the demise of the sovereign. 6 ANNE c. 7, § 8 (1707) provided that they should hold office for six months after the death of the crown; 1 Geo. III, c. 23 (1760), provided that they should continue in office unaffected by the demise of the sovereign. 1 HOLDSWORTH, op. cit. note 2, at 195.

614 HATSELL, op. cit. note 606, at 77 et seq.; ANSON, op. cit. note 510, at 381, 388; MAITLAND, op. cit. note 5, at 215; CARTER, op. cit. note 68, at 67; PIKE, op. cit. note 528, at 336; McILWAIN, op. cit. note 56, at 150 et seq.

617 MAITLAND, op. cit. note 5, at 319.
gradually took the form of legislative bills, usually introduced in the House of Commons to be enacted into private statutes. Among these were the bills for divorce _a vinculo matrimonii_ by special act of parliament, which were first presented in the upper house. Such a bill if passed by the Lords after a legislative hearing, was transmitted to the lower house, which might rehear the cause or take additional testimony before concurring in the act of divorce. As we have seen, both ecclesiastical and parliamentary divorce were abolished upon creation of the Court of Divorce in 1857. To this day in many types of claims the private statute remains the only way a person injured by the sovereign can get redress either in England or in the United States except so far as the sovereign has consented by general or special acts to be sued in its ordinary courts or in a permanent Court of Claims. The House of Lords participates in this type of jurisdiction in its normal legislative capacity, but, as Mc-

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618 McLlwain, op. cit. note 56, at 219; May, op. cit. note 569, at 681 et seq.; Lowell, op. cit. note 582, at 367 et seq.
619 See note 423, supra.
620 MacQueen, op. cit. note 421, at 510 et seq.
621 See note 429, supra. By 31 & 32 Vict. c. 77 (1868) an appeal lay from the Court of Divorce to the House of Lords. Holdsworth, op. cit. note 2, at 624.

Compare The English Petition of Right (petition _de droit_), or the plea of right (monstrans _de droit_), which afforded relief to the subject in spite of the doctrine of immunity of the sovereign from suit: Laski, Harold J., _Responsibility of the State in England_ (1919) 32 Harv. L. Rev. 447, 455; Blackstone, op. cit. note 23, at 243; 3 ibid. 254-257; Plunkett, op. cit. note 5, at 60.

The United States has accepted liability in the courts of the United States or abroad in an action in personam, but not in rem, with respect to merchant vessels owned by it, or by a corporation of which it holds all the shares, Title 46, U. S. C. A. §§ 742, 747. This acceptance of liability to suit in personam was extended to public vessels of the United States, such as war ships, by § 781.

The United States Court of Claims has jurisdiction only of claims arising out of contract expressed or implied in fact and not of those based upon quasi-contracts [Pearson v. U. S., 267 U. S. 423, 45 Sup. Ct. 240, 69 L. Ed. 694 (1925)] or tort.

Cf. Collins v. Commonwealth, 262 Pa. 572, 106 Atl. 229 (1919), holding that under Constitution of 1874 the state could give its consent to be sued only by general laws.
Ilwain points out, many of the rules relating to such acts indicate their essentially semi-judicial nature.\textsuperscript{124}

The pressing question of American adherence to the World Court protocol, now before our country,\textsuperscript{625} has focused attention upon the ancient function of the English common law judges in rendering advisory opinions to the House of Lords on both judicial and legislative questions.\textsuperscript{626} Originally, as we have seen, the judges sat as members of the early King’s Council and participated in its decisions.\textsuperscript{627} But later, when the right to participate in the great council in parliament became hereditary, the judges, since they acquired their positions by professional qualifications and not by blood, degenerated in power and prestige, until they became mere assistants in the exercise of its judicature, and advisers\textsuperscript{628} to the untrained nobles who had arrogated to themselves the ultimate authority of the realm on questions of law and equity.\textsuperscript{629} Though the situation in the House of Lords has been greatly improved by the provision for Lords of Appeal, the English judiciary may still be called upon for advisory opinions. Seven of the American states\textsuperscript{630} have followed this procedure by providing that the

\textsuperscript{124}ILWAIN, op. cit. note 56, at 222 et seg.

\textsuperscript{625}The fourteenth article of the League of Nations Covenant imposes upon the Permanent Court of International Justice, the so-called World Court, the duty of rendering advisory opinions to the Council of the League of Nations upon the request of that body. Moore, John Bassett, The Permanent Court of International Justice (April, 1924) International Conciliation, No. 197, 103 et seq.; Pepper, George Wharton, In the Senate (1930) 109; Hudson, Manley O., The World Court (1931) 63 et seq., 187 et seq.

The advisory opinion of the World Court, declaring illegal the Austro-German customs union, is discussed in Davis, John W., The World Court Settles the Question (Jan., 1932) 149 Atlantic Monthly 119.

\textsuperscript{626}May, op. cit. note 569, at 54, 233; MacQueen, op. cit. note 421, at 35; Maitland, op. cit. note 5, at 84; Baldwin, op. cit. note 50, at 77; Pike, op. cit. note 528, at 246; Pollard, op. cit. note 566, at 293, 294; Burdick, op. cit. note 623, at 134.

\textsuperscript{627}Baldwin, op. cit. note 50, at 77, 312; Pike, op. cit. note 528, at 47, 195, 247.

\textsuperscript{628}Pike, op. cit. note 528, at 247; 1 Holdsworth, op. cit. note 2, at 376; Pollard, op. cit. note 566, at 250; Coke, op. cit. note 7, at 4. Hale, op. cit. note 370, at 159, says of the judges: “[T]hough for many years last past they have had only voices of advice and assistance not authoritative or decisive; yet their opinions have been always the rules, whereby the Lords do or should proceed in matters of law, especially between party and party: unless the cases be so momentous, that they are not fit for the determination of judges; as in questions touching the right of succession of the crown or the privileges of parliament.”

\textsuperscript{629}Pollard, op. cit. note 566, at 308 et seq., ridicules the peers as a court of appeal. Accord: Hale, op. cit. note 370, at 158, 200; 1 Holdsworth, op. cit. note 2, at 376. Cf. Pike, op. cit. note 528, at 388 et seq.

\textsuperscript{630}Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, South Dakota. See 1 Thayer, Cases on Constitutional Law (1895) 175.
highest appellate court shall render advisory opinions to the legisla-
tive or executive departments on request, but in general such service
is rendered by the attorney-general of the state.651

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Judicial Committee of the Privy Council today exercises, as it
did at the close of the Westminster epoch, an appellate jurisdiction
not only over the Channel Islands, the Isle of Man, and the British
colonies and dependencies, but also over the ecclesiastical courts of
England and all British consular and other extraterritorial courts.652
This body, which is also known as "the Board", is probably the
greatest appellate tribunal in the history of the world. Not only does
it pass upon the validity of legislation in the far flung British Common-
wealth of Nations, but in the exercise of its world-wide jurisdiction
it is required to administer Roman-Dutch law, French law, Moham-
medan law and the English common law as adopted in the various
British dominions.653 In the words of Professor Holdsworth, "... the
Judicial Committee itself is now doing for the Empire somewhat
the same service as the Curia Regis formerly did for England."654

This appellate jurisdiction of the Privy Council over the British
possessions abroad illustrates how deeply rooted may be some of our
present day institutions. It is directly traceable to the historical
accident that the Channel Islands formed part of the duchy of Norm-
andy and were brought under the English crown by the Conquer-
or.655 They have never been regarded as part of the realm of England
but still possess their own systems of laws and courts. These islands,
therefore, appealed to the king of England as their direct overlord,
and he heard such appeals, as he did English petitions, in his Great
Council in Parliament.656 With the separation of the Smaller Coun-
cil about the king from the ancient Council in Parliament, this
jurisdiction over appeals from the possessions beyond the realm re-
mained in the crown. Until the time of the Tudors, the king at the

651 WILLOUGHBY, Westel Woodbury, THE CONSTITUTIONAL LAW OF THE
UNITED STATES (2d ed. 1929) § 18; PEPPER, op. cit. note 625, at 108.
652 2 LOWELL, op. cit. note 582, at 465; 1 HOLDSWORTH, op. cit. note 2, at 52 et
seq.; 9 HALSBURY, op. cit. note 357, at 28 et seq.
653 MAITLAND, op. cit. note 5, at 340; 2 LOWELL, op. cit. note 582, at 466; 1
HOLDSWORTH, loc. cit. note 632.
654 1 HOLDSWORTH, op. cit. note 2, at 523.
655 9 HALSBURY, op. cit. note 357, at 31; 1 HOLDSWORTH, op. cit. note 2, at 520;
Pike, op. cit. note 528, at 307.
656 MACQUEEN, op. cit. note 421, at 6, 677; 1 HOLDSWORTH, op. cit. note 2, at 520;
CARTER, op. cit. note 41, at 126.
beginning of each parliament appointed "triours" or "auditores" in parliament to hear such appeals. These triers were practically always judges of the king's courts who were also members of the Smaller or Privy Council.

The eclipse of the parliamentary judicature by the rehabilitated King's Council under the early Tudors placed such a burden of administrative detail on that body that Henry VIII formed an inner or executive branch of the Council to which we have previously referred as the "Council Attendant". This compact and efficient group of professional and experienced advisers was composed chiefly of knights and commoners, headed by a new high official, the Secretary of State, and a few of the principal crown ministers. To this Council of advisers the king transferred the exercise of his personal appellate jurisdiction over the crown possessions beyond the realm and many other important functions. About 1540 this latest and most influential branch of the Council began to assume the character of a distinct appendage to the throne and gradually it came to be known as the Privy Council as distinguished from the mediaeval Council—the concilium ordinaria. Owing to the fact that privy councillors were soon promoted to sit of right on the older Council, the two councils were popularly identified with each other and with the mediaeval privy council down to the Commonwealth. The act of 1641 which abolished the Star Chamber did not purport to take away the appellate jurisdiction of the Privy Council. In 1667, following the Restoration, a committee of the Privy Council was appointed to hear appeals from the Channel Islands and in 1696 this was extended to include appeals from any of the colonial plantations. Such appeals were granted by the king not of right but of grace in the exercise of the ancient prerogative of justice.

637MacQueen, loc. cit. note 636; Baldwin, op. cit. note 50, at 323; 10 Halsbury, op. cit. note 357, at 579n.
638See note 284, supra.
639Dicey, op. cit. note 193, at 84 et seq.; Pollard, op. cit. note 276, at 340 et seq.; 1 Holdsworth, op. cit. note 2, at 492; Baldwin, op. cit. note 50, at 446 et seq.; Beard, op. cit. note 89, at 115.
640As early as 1495, however, Henry VII had provided by Order in Council that appeals from the Channel Islands should be heard in Council. Elizabeth made similar provision in 1565. 1 Holdsworth, op. cit. note 2, at 520–521; Baldwin, op. cit. note 50, at 454. Cf. MacQueen, op. cit. note 421, at 686.
641See Hudson, op. cit. note 182, at 24, 62; Baldwin, op. cit. note 50, at 448.
642Dicey, Law of the Constitution (1915) 376; Maitland, op. cit. note 5, at 462.
643Holdsworth, op. cit. note 2, at 516, 522; 1 Blackstone, op. cit. note 23, at 231.
644Holdsworth, op. cit. note 2, at 522; Kerr, Donald, Law of the Australian Constitution (1925) 291.
The nineteenth century saw a marked development in this appellate jurisdiction of the Privy Council. When the High Court of Delegates was abolished in 1832, the Privy Council succeeded to its appellate jurisdiction over the ecclesiastical and admiralty causes.\textsuperscript{5} In 1833 the Judicial Committee of the Privy Council was created by statute, to take over the judicature of the Council, as well as the power of review formerly vested in the Admiralty and in the Commissioners in Prize Cases.\textsuperscript{6} When the Court of Admiralty was merged into the Probate, Divorce and Admiralty Division of the High Court of Justice by the Judicature Act of 1873, the Privy Council lost the review of admiralty causes, except appeals from the Prize Court.\textsuperscript{6}\textsuperscript{7}

By the Judicial Committee Act of 1844, Parliament gave statutory recognition to the prerogative authority of that committee to hear appeals from any court of justice of the British colonies and possessions.\textsuperscript{6}\textsuperscript{8} Later acts of parliament creating the various dominion governments have tended to limit such appeals to those from the highest courts of the several provinces or states of the respective dominions,\textsuperscript{6}\textsuperscript{9} or from the dominion court of final jurisdiction. In

\textsuperscript{6}\textsuperscript{2} & 3 Wil. IV, c. 92, and see notes 390, 558, \textit{supra}. In the same year the Privy Council was given power to hear appeals from England and Ireland in cases of idiocy and lunacy. 2 & 3 Wil. IV, c. 4, § 3. It had already exercised this power for a century. 1 Blackstone, \textit{op. cit.} note 23, at 231; MacQueen, \textit{op. cit.} note 421, at 753.

\textsuperscript{6}\textsuperscript{3} & 4 Wil. IV, c. 41. The effect of the statute is fully discussed in MacQueen, \textit{op. cit.} note 421, at 687 et seq. Also see: 1 Holdsworth, \textit{op. cit.} note 2, at 518; Dicey, \textit{op. cit.} note 193, at 144.

\textsuperscript{6}\textsuperscript{4} The Naval Prize Act, 27 & 28 Vict. c. 25 (1864) expressly declared that the Judicial Committee should hear appeals from the Prize Court. As a result of the Judicature Acts there was much doubt as to where appeals in prize cases lay; consequently, it was enacted by 54 & 55 Vict. c. 53 (1891) that the High Court of Justice constituted a prize court, in which prize cases were to be heard in the Probate, Divorce and Admiralty Division, from which appeals lay to the Judicial Committee, in accordance with the Naval Prize Act. In theory an appeal still lies to the Privy Council from the Admiralty Court of the Cinque Ports, for which see note 451, \textit{supra}. 9 Halsbury, \textit{op. cit.} note 357, at 28; Mears, \textit{op. cit.} note 442, at 315 n.

\textsuperscript{6}\textsuperscript{5} & 8 Vict. c. 69. Section 1 of the act concludes: "Provided also, that nothing herein contained shall be construed to extend to take away or diminish any power now by law vested in her Majesty for regulating appeals to her Majesty in council from the judgments, sentences, decrees, or orders of any courts of justice within any of her Majesty's colonies or possessions abroad."

\textsuperscript{6}\textsuperscript{6} This is not true of the Union of South Africa where leave to appeal may only be granted with respect to appeals from the highest court of the Union and not from the several colonial appellate courts. The Colonial Conferences 1907, and 1911, favored this rule denying right to appeal to the Privy Council not only
general, appeals from the provincial courts are taken as of right if they fall within the provisions of certain Orders of the King in Council but from the dominion courts only by special leave of the Judicial Committee. Australia has secured the greatest autonomy in this respect, for under its constitution there is no right to appeal to the Privy Council on constitutional questions or disputes between the Australian states except upon the certificate of the High Court of the Commonwealth. Wherever leave of the Judicial Committee is required, as in appeals from the High Court of Australia, the Supreme Court of Canada, the Supreme Court of the Irish Free State, or from the Appellate Division of the Supreme Court of the Union of South Africa, it will be granted only in cases presenting important legal questions, or affecting substantial property interests, or involving issues of public significance. While the Judicial Committee still retains its jurisdiction over criminal appeals as well as over civil appeals, there is a distinct policy against hearing such appeals unless they present questions of gross injustice or of public importance.

from courts of first instance as may be done in Quebec and in a lesser degree in Ontario, but also from the provincial courts of appeal, and the substitution therefor of appeal only from the supreme appellate court of the dominion. CAMERON, Edward Robert, THE CANADIAN CONSTITUTION (1915) 40 et seq. The Imperial Conferences of 1923, 1926 and 1930 did not make any change in this situation.

HUGHES, Hector, NATIONAL SOVEREIGNTY AND JUDICIAL AUTONOMY IN THE BRITISH COMMONWEALTH OF NATIONS (1931) 20 et seq.; KEITH, Arthur Berriedale, SOVEREIGNTY OF THE BRITISH DOMINIONS (1929) 256; MOORE, W. Harrison, COMMONWEALTH OF AUSTRALIA (1902) 249 et seq.; WHEELER, Gerald John, CONFEDERATION LAW OF CANADA (1896) 396. Admiralty appeals are the only ones which lie of right from the Supreme Court of Canada to the Privy Council.

1 CAMERON, op. cit. note 649, at 23.

KERR, op. cit. note 644, at 294; KEITH, loc. cit. note 650; MOORE, op. cit. note 650, at 247; 1 HOLDSWORTH, op. cit. note 2, at 522.

2 KEITH, loc. cit. note 650; MOORE, loc. cit. note 651; 1 CAMERON, op. cit. note 649, at 22.

Irish Free State Constitution, Article 66; 5 Halsbury, op. cit. note 170, at 648; KEITH, op. cit. note 650, at 59.

KEITH, op. cit. note 650, at 257, says that the Judicial Committee has granted very few appeals from South Africa, owing to the difficulty the Committee has in reviewing Roman Dutch law.

The right to appeal from New Zealand and Newfoundland is likewise without legal restriction, but is rarely exercised. KEITH, loc. cit. supra.

Prince v. Gagnon, 8 App. Cas. 103 (1883); 1 HOLDSWORTH, op. cit. note 2, at 523; MOORE, op. cit. note 650, at 249.

Nadan v. The King [1926] A. C. 482, also reported in 2 CAMERON, op. cit. note 649, at 400; Arnold v. the King-Emperor [1914] A. C. 644; Armstrong v. The King, 30 T. L. R. 215 (1913); 10 Halsbury, op. cit. note 357, at 531; KEITH, op. cit. note 650, at 256; 1 HOLDSWORTH, op. cit. note 2, at 523.
Appeals to the Privy Council take the form of appeals to His Majesty the King in Council. Since in theory the Judicial Committee is not a court, it does not hand down a judgment of its own, but simply reports to the King in Council, advising that the appeal in the particular case be allowed or dismissed. Thereupon this is made the final action of the King in Council by his Majesty’s so adjudging in his own name. The Committee also differs from the House of Lords in not being bound by its own precedents, at least with respect to opinions given ex parte (in non-contested cases), and also in announcing its decisions without disclosure as to dissents.

The King in Council, as feudal sovereign, exercises original jurisdiction over cases involving royal grants to lands in overseas possessions and over disputes between colonies or dependencies of the crown. For the past century the crown has exercised this original prerogative jurisdiction by referring such cases to the Judicial Committee pursuant to provision therefor in the Act of 1833. The most recent instance of original judicature is In re Labrador Boundary, in which the Judicial Committee determined that under various statutes, orders in council, and royal proclamations the coast of Labrador belonged to the Colony of Newfoundland rather than to the Province of Quebec.

The jurisdiction of the Privy Council was exercised prior to 1833 by small committees of the Council composed chiefly of those members who had held high judicial office. The increasing importance of the colonial litigation demanded a more systematic organization of what was in truth the colonial court of last resort. To meet this
need the Act of 1833 established the Judicial Committee of the Council as a permanent committee of appeal and carefully defined its membership. Under that Act the Committee included the Lord President of the Council, and those members who held or had held high judicial office, with power in the crown to direct the attendance of the judges of the superior courts. Four members of the Committee were to constitute a quorum. Subsequent legislation empowered the crown to appoint four paid members of the Board from among the judges of the superior courts, but the four Lords of Appeal in Ordinary in the House of Lords later succeeded by statute to these paid judgeships. Just after the close of the Westminster epoch it seemed likely that the two great branches of English appellate judiciary, since they were manned by practically the same personnel, would merge into a single supreme appellate court, for the law lords of Parliament were usually privy councillors and, as such, members of the Judicial Committee of the Council. The turn of the century, however, witnessed the beginning of a new development in the opposite direction. By a series of parliamentary enactments, the Board has gradually been made representative of the world-wide
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British Commonwealth of Nations over which it exercises appellate jurisdiction, by provision for appointment to it of judges of certain high courts of India, Australia, Canada, Newfoundland, New Zealand and the Union for South Africa, who are also members of the Privy Council. The Judicial Committee of the Privy Council has thus developed into a great international tribunal heading a judicial system quite distinct from that of England.

REORGANIZATION OF THE JUDICIAL SYSTEM

The nineteenth century witnessed the most extensive revision of the judicial system and its procedure in English history. The substantive law, the separate systems of law and equity, the procedure in the courts, and the courts themselves had been, as we have seen, the outgrowth of the successive stages in a developing civilization, and with the advent of the industrial era their antiquated, expensive and faulty administration of justice became intolerable. The time was ripe for stupendous change. It was the dawn of that half century of utilitarian reform, which Professor Dicey termed "The Period of Benthamism or Individualism", an iconoclastic reaction against the historical conventions and institutions which tended to hamper the exercise of the individual free will and which found expression in the great reform movement of 1830. "In letters, in science, in trade and industry, there was on all hands consciousness of fresh vigour, and expectation of great results." Jeremy Bentham's vehement attacks upon courts, law and lawyers had aroused public opinion, but it was the famous speech of Brougham in the House of Commons in 1828 depicting the manifest inadequacies and injustice of the existing judicial system and its procedure, which gave

672Dicey, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century (1905) 63.
674Pollock, op. cit. note 673, at 344.
675Dillon, John Forrest, Bentham's Influence in the Reforms of the Nineteenth Century, 1 Select Essays in Anglo-American Legal History (1907) 492; Dicey, loc. cit. note 672; Hepburn, op. cit. note 673, at 71 et seq. Bentham (1748-1832) lived to see the launching of the movement which was destined to bring to the English people that functional justice for which he had fought almost alone more than half a century.
definite impetus to the reform movement and aligned with its leaders of bench and bar. The immediate response was the appointment of several royal commissions, the most important of which was the Common Law Commission made up of four judges and five outstanding lawyers. During the six years beginning with 1829 it issued annual reports which then and later formed the basis of significant legislative and judicial progress.

The first great accomplishment was the humanization of the criminal law and its administration through the efforts of political radicals and progressive members of the profession, whereby the number of capital crimes on the books was reduced from the astounding total of more than two hundred to four. The real property law, too, was simplified and rationalized. A harsh and anomalous situation was corrected when Lord Campbell's Act of 1846 created a right of action for negligence causing death and vested it in the personal representative of the decedent. Another outstanding humanitarian achievement of this century of progress was the passage of the Debtors Act of 1869, abolishing imprisonment for debt, the shadow of which had hung over the poor and unfortunate for centuries.

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678 Holdsworth, op. cit. notes 2, at 635.

679 Poland, Sir Harry B., Changes in Criminal Law and Procedure Since 1800, A CENTURY OF LAW REFORM (1901) 43, 46; Dicey, op. cit. note 672, at 29; Trevelyan, op. cit. note 119, at 626.


Samuel Warren's novel, Ten Thousand a Year (1854), satirizing the fictions and technicality of an action for ejectment, did for property law reform what Dickens' Bleak House did for Chancery.


681 The Fatal Accidents Act, 9 & 10 Vict. c. 93. Such an action was unknown at common law. The act provides that the executor or administrator may sue for the benefit of the wife, husband, child or parent of the deceased. This act has been widely copied in American jurisdictions, e.g., N.Y. CONS. LAWS, c. 13 (Decedent's Estate Law) §130.
ANGLO-AMERICAN JUDICIAL SYSTEM

...turies. But there was no continuous effort toward thoroughgoing reformation of the substantive law; the real objective became more and more the reorganization of the courts and their procedure.

Spasmodic attempts were made to patch up the most obvious defects in the traditional system by such legislation as the Law Terms Act of 1830, abolishing the separate courts of Wales and substituting the English judicial system, but attention was chiefly focused on procedural reform in the general belief that this would suffice without radical alteration of the courts themselves. When it came to interfering with judicial procedure, however, Parliament showed a reluctance to dictate to the courts. To avoid any doubt of the power of the judges of the Superior Courts at Westminster under their ancient rule-making power to effect the necessary procedural reforms, Parliament in 1833 delegated to them the task of amending by rules of court the system of common law pleading and, thus encouraged, they took upon themselves the revision of practice as well. The result was the famous Rules of Hilary Term, 1834, designed to simplify pleading and practice at common law. Unfortunately,
this experiment, though sound in principle, was largely defeated because the reactionary elements in the profession exploited the emphasis given by the rules to special pleading, while they attacked other changes under the doctrine that a statute or rule in derogation of the common law is to be strictly construed. The consequence was greater technicality in pleading than ever before.687

Though temporarily retarded in the reform of common law procedure, the forces of the new era made progress in other fields. In a second challenging speech in the House of Commons in 1830,688 Brougham advocated a comprehensive system of local courts on the model suggested by Bentham. To secure them became one of the primary objectives of the movement. This objective was achieved in 1846 when the new system of County Courts, having a jurisdiction under £20,699 supplanted the many local Courts of Requests, or Courts of Conscience, then existing in the towns and cities of the realm and brought an inexpensive and convenient justice to the outlying counties.690 The system then instituted has become a model for small cause courts throughout the English common law world.

Stimulated by the sweeping changes effected in New York by the adoption of the Field Code of Procedure in 1848,691 which substituted for the old dual system of courts of law and equity, with their distinctive procedures, a single court administering both law and equity by a common simplified system of procedure, the Common Law Com-

plaintiff's alleged cause of action. In other words, the plaintiff would have no notice of the true nature of the defense until it was too late to prepare to meet it. This provision reduced the general issue to a mere denial of breach of duty or of the injurious act alleged. Williston, Samuel, Preface to Stephen, op. cit. note 251, at iii. CLARK, Dean Charles E., CODE PLEADING (1928) 15n., says the Hilary Rules "were largely drawn by Stephen, the great exponent of special pleading", who, as pointed out in note 677, was a member of the Common Law Commission.

Whittier, Clarke B., Notice Pleading (1918) 31 Harv. L. Rev. 501, 507; 9 Holdenworth, op. cit. note 2, at 324; Hepburn, op. cit. note 673, at 77.

For a celebrated satire of special pleading under the Hilary Rules, see Hays, Serjeant George, CROGATE'S CASE, A DIALOGUE IN YE SHADES ON SPECIAL PLEADING REFORM (1854), reprinted in 9 Holdenworth, op. cit. note 2, at 417, and summarized in Pollock, op. cit. note 295, at 27 et seq.

2 Brougham, op. cit. note 676, at 489.


On the Courts of Requests, see note 358, supra. Each Court of Requests was created by a special act of Parliament; in 1800 there were fifty-four such courts in England. Odgers, op. cit. note 689, at 239; cf. Cross, op. cit. note 677, at 3730. There were hundreds of miscellaneous local courts which survived the act. Cross, loc. cit. supra; cf. note 29, supra.

Hepburn, op. cit. note 673, at 174 et seq.
mission renewed its efforts. Its reports of 1851 and 1853 still recommended extensive adjustments in procedure, however, rather than abolition of the traditional judicial organization. These recommendations were embodied in a series of Common Law Procedure Acts of 1852, 1854 and 1860,\textsuperscript{692} which, among other liberal innovations, abolished special demurrers,\textsuperscript{693} struck out the historical verbiage of the old forms of action, made broad provision for joinder of "causes of action of whatever kind"\textsuperscript{694} and rocked the old system to its foundations by empowering courts of law to grant injunctions and recognize certain equitable defenses in actions before them.\textsuperscript{695} The law of evidence was also rationalized by another series of acts permitting the parties to an action at law and their spouses, and other interested persons to testify.\textsuperscript{695}

A corresponding movement was taking place on the Chancery side of Westminster Hall.\textsuperscript{697} The creation of the Court of Appeal in

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\item[692] 15 & 16 Vict. c. 76; 17 & 18 Vict. c. 125; 23 & 24 Vict. c. 126. *Hepburn, op. cit.* note 673, at 177 et seq.
\item[693] A special demurrer was a paper used to attack an opponent's pleading for defects in the form in which it was drawn, and was called "special" because it pointed out expressly the particular defect at which it was aimed. It gave a great opportunity for delay and chicanery. The common law general demurrer, on the other hand, simply raised the issue of the legal sufficiency of the opponent's pleading on its face. These old demurrers have now been superseded by motions in England, New York and most other jurisdictions.
\item[694] 15 & 16 Vict. c. 76, §41 (1852). But the statute excepted the action of replevin (to recover possession of a chattel) and the action of ejectment (to recover possession of land) and provided that even though two causes of action were joined, the judge might, when expedient, direct separate trial of the causes.
\item[695] 17 & 18 Vict. c. 125, §79 (1854): "In all cases of Breach of Contract or other Injury, where the Party injured is entitled to maintain and has brought an action, he may, in like Case and Manner as hereinbefore provided with respect to Mandamus, claim a Writ of Injunction . . ." Equitable defenses were provided for in §§83-85 ibid.
\item[697] Bentham had pointedly criticized the existing rules of evidence in his *Rationale of Judicial Evidence*. Extensive reform of those rules occurred in the course of the century. *Lord Denman's Act*, 6 & 7 Vict. c. 85 (1843), permitted persons previously incapacitated because of crime or interest to testify; *Brougham's Evidence Act*, 14 & 15 Vict. c. 99 (1851), made the parties themselves competent witnesses; *The Evidence Amendment Act*, 16 & 17 Vict. c. 83 (1853), rendered the testimony of the spouse of a party admissible in civil actions; and *The Criminal Evidence Act*, 61 & 62 Vict. c. 36 (1898), removed the disability of one spouse to testify in defense of the other in a criminal case. Several other statutes during the century made the rules of evidence more logical and more useful.
\item[698] The first improvements in Chancery practice were along the lines of the Hilary Rules at Law. They began in 1841 with Lord Chancellor Cottenham's
Chancery in 1851 and the abolition of the Masters in Chancery in 1852 have been previously described. An act was also passed in 1852 on recommendation of the Chancery Procedure Commission introducing in the Court of Chancery oral examination of witnesses instead of examination solely by written interrogatories and written depositions as formerly. The real modernization of the court began, however, with the Chancery Amendment Act of 1858, which empowered the Court of Chancery to award damages in certain cases, and to impanel a jury for the purpose of assessing damages or trying questions of fact before that court itself. The Chancery Regulation Act of 1862 continued this development by requiring that Chancery should not withhold its equitable remedies in matters within its jurisdiction until legal title or some question of fact should be determined at law, but should itself determine "every question of law or fact cognizable in a court of common law" on which the right to the equitable relief or remedy depended. These acts, conferring upon Chancery powers hitherto possessed only by a common law court, carried further the fusion of the systems of equity and common law: it was now inevitable that the courts, too, should merge.

Other factors were also paving the way toward centralization of the superior judicature of the realm. The most important branches of the ecclesiastical jurisdiction had been transferred in 1857 to the newly created superior Courts of Probate and of Divorce and Matrimonial Causes, and in 1861, the Court of Admiralty had been restored to its earlier position of a superior court with an enlarged jurisdiction. It was the provision for a common judge to sit in these three superior courts of diverse jurisdiction that indicated the

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Orders of Court, designed to shorten the course of a suit. Then followed the Consolidated Orders of Lord Chancellor Lyndhurst in 1845; these were further liberalized by Lord Cottenham in 1850. Hare, Thomas, Preface to Hare's CHANCERY REP. (1853) viii et seq. There was a revision of the Consolidated Orders in 1860. Hare, op. cit. note 697, at xiii. This commission was the first to include laymen, two of whom were added to it upon special petition of Parliament. Hare, op. cit. supra, at x; Sunderland, Edson R., The English Struggle for Procedural Reform (1926) 39 HARV. L. REV. 725, 741. Thereafter it became the practice in England to include non-lawyers on such commissions; the present New York Administration of Justice Commission includes judges, lawyers, educators, legislators and business men. (1931) 3 N. Y. BAR ASS'N BULL. 389. And Sunderland, op. cit. supra, at 741, 742.

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See notes 258, 269, and 553, supra.

See notes 258, 269, and 553, supra.

See note 429, supra.

See note 473, supra.
basic trend toward a unified judiciary.\textsuperscript{706} The public dissatisfaction with the old system of many independent courts of special or overlapping jurisdiction in the closing days of the Westminster epoch was also aggravated by the fact that aside from the superior courts of common law and the Chancellor's own court at Westminster, the other superior and subordinate courts, and their offices and chambers, were scattered all over London and many of them in cramped and disreputable quarters.\textsuperscript{707}  
The final phase of the classical judicial system of England opened with the report of the Royal Judicature Commission in 1869,\textsuperscript{708} which declared that "the first step towards meeting and surmounting the evils complained of would be the consolidation of all the courts of law and equity into one court, in which should be vested all the jurisdiction exercisable by each and all the courts so consolidated."\textsuperscript{709} The common law judges and the chancellors of the time united in support of the proposal.\textsuperscript{710} Indeed, it was Lord Chancellor Selborne who introduced into Parliament the Judicature Act of 1873,\textsuperscript{711} while his successor in office and political opponent, Lord Chancellor Cairns, sponsored the supplemental Judicature Act of 1875.\textsuperscript{712} Both acts became effective on the same day, November 1, 1875.\textsuperscript{713} These two great statutes swept away the venerable system and substituted the Supreme Court of Judicature consisting of the High Court of Justice and the Court of Appeal. The High Court of Justice is the superior court of original civil and criminal jurisdiction, and sits in three
divisions: (1) the King's Bench Division, possessing the jurisdiction of the common law courts of King's Bench, Common Pleas and Exchequer;\footnote{The Act of 1873 created separate divisions bearing the names Common Pleas Division and Exchequer Division, but these were merged with the King's Bench Division in 1881. See note 166, supra.} (2) the Chancery Division, replacing the High Court of Chancery; and (3) the Probate, Divorce and Admiralty Division, representing the admiralty and much of the ecclesiastical jurisdiction of old.\footnote{The present system is described in ODGERS, op. cit. note 357; I HOLDSWORTH, op. cit. note 2, at 638 et seg.} The Court of Appeal has supplanted the Exchequer Chamber as the intermediate appellate court.

The present English courts, though created by statute, were dictated by history. He is a wise lawyer who knows the history of the law and the institutions in which it has been moulded, for there are times in great cases when, as Mr. Justice Holmes observed in an opinion but a decade ago, "A page of history is worth a volume of logic."\footnote{New York Trust Co. v. Eisner, 256 U. S. 345, 349, 41 Sup. Ct. 506 (1921).}