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The Court of Common Pleas

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The Court of Common Pleas

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For upward of five hundred years, perhaps the most important court to the average freeman in England—the court with which he had his most frequent contacts—was the Court of Common Pleas. It is often referred to as one of the common law courts, and the designation is singularly appropriate. For not only was it a court whose jurisdiction was confined to actions arising under the common law (as modified, of course, by statute), but it was a court in which a large portion of that law was developed. Like the common law, it was not born; rather it evolved, and its evolution followed the exact pattern of, and was contemporaneous with that of the common law.

We shall attempt to trace in outline form the origin of the court, its development, its form in maturity, its decline and its ultimate abolition.

I. THE KING'S COUNCIL

Since, as is generally conceded, the Court of Common Pleas is an outgrowth of the *Curia Regis*, it would perhaps be of value to consider briefly the formation, composition, and a few of the duties or privileges of that body.

The term *Curia Regis* is used in two senses. It means (1) the place where the king resided attended by the chief officials of his court and household; and (2) the supreme central court where the business of government in all its branches was transacted.[1] It is the latter meaning which is of interest to the legal and constitutional historian; and it is the meaning which will hereafter be attached to the term.

The *Curia Regis* was similar to the old Anglo-Saxon *Witan*. Both assemblies usually met three times a year, those meetings generally being held at the periods of the three church festivals of Christmas, Easter and Pentecost,[2] and their constitutions were so similar that the Anglo-Saxon chronicler has no difficulty in calling the assemblies of the *Curia Regis*, *Witans*. Notwithstanding this general similarity, the two bodies were

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[1] 1 THOMAS MADOX, HISTORY OF THE EXCHEQUER (1769) 81-82.

[2] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 32.

fundamentally different. Just as Norman feudalism differed from the incipient feudalism of the Anglo-Saxon period in the fact that the former was grounded upon a logical theory of tenure from which all the rights and duties of lords and tenants flowed,[3] so the *Curia Regis* differed from the Anglo-Saxon *Witan* by the rigid application of this same theory of tenure to the composition of this assembly. It was, like the *Curia Ducis* of Normandy,[4] composed in theory, if not of all the king's tenants-in-chief, at least of all who held *per baroniam*. As Cross states in speaking of the effects of the Norman conquest, "The old National Assembly continued to meet, usually three times a year, on Easter at Winchester, Whitsunside at Westminster, and Christmas at Gloucester. Now, however, it was called the Great Council *(Magnum Concilium)* or King's Court *(Curia Regis)*; also where it formerly consisted of Englishmen, it now consisted largely of Normans; finally, the bishops and great landed nobles came, henceforth, not by virtue of their office, but as tenants-in-chief of the Crown."[5] Among these tenants-in-chief were comprised all the officials of the government, and in addition any other persons whom the king chose to summon.[6]

The *Curia Regis* was the king's court, and of it the king was both an essential and an active member. It was therefore an itinerant court which followed the king in his progresses over England, and in his journeyings over his continental dominions. Richard of Anesty has left us a graphic account of his journeys to Normandy and Gascony, between the years 1158 and 1163, to get from the king and his *Curia* the necessary writs for the conduct of his law suit.[7] Often the king heard suitors in person,[8] and there is no doubt that Henry II's ceaseless activity kept the men who staffed his court up to their work.

We have seen that the court itself was in theory composed of the king's tenants-in-chief, the royal officials, and anyone else whom the king chose to summon. In practice we can discern two chief types of assembly. On important occasions it was a large assembly composed of all the leading landowners and officials of the country. It was such an assembly as this which inquired into the law as to the boundaries of lay and ecclesiastical jurisdiction in order to draw up the Constitutions

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[3]ADAMS, ORIGIN OF THE ENGLISH CONSTITUTION (1912) 65.

[4]"He (the Duke of Normandy) holds a court; we dare hardly as yet call it a court of his tenants-in-chief; but it is an assembly of the great men, and the great men are his vassals." 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 73.

[5]CROSS, SHORTER HISTORY OF ENGLAND AND GREAT BRITAIN (1924) 59.

[6]"The feudal law provided in no way for the attendance of the non-vassal. Yet it seems clear that the king had the right to make persons whom we cannot show to have been his vassals full members of the court." ADAMS, ORIGIN OF THE ENGLISH CONSTITUTION (1912) 61.

[7]1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 158-159.

[8]M. M. BIGELOW, PLACITA ANGLO-NORMANICA (1879) 212, 214.

of Clarendon. But probably the ordinary work of government was done by a small body of officials.[9] Of such a kind was probably the assembly which passed wakeful nights in drawing up the assize of *novel disseisin*.

It will not be necessary to trace the development of these two bodies in detail. The larger assembly, especially after the time of John, tended to become a body which criticized or opposed the government, while the smaller remained a body of officials who were the king's servants.[10] The larger body led ultimately to the present House of Lords, while the smaller remained as the administrative officials of government.

Like other feudal councils the *Curia Regis*, using the term in the larger sense, was a legislative, an administrative, and a judicial body. It dealt with judicial cases beyond the competence of the local and church courts and with others where they failed to render justice. With the successive increases in the duties of the *Curia Regis* these duties became increasingly more burdensome, and also the various classes of duties became increasingly more technical. It was but natural that those members of the Council most capable in certain lines should be assigned to those lines. Such indeed was the case. It has already been noted that the larger assembly became involved more exclusively in legislative functions. In the smaller body the first separation seems to have been in the direction of finance and judicature.[11]

This process had its beginning as early as the reign of Henry I, but it gained momentum in the reign of Henry II. The legislation of the latter added enormously to the jurisdiction of the *Curia Regis*. As a result, the king's court acquired a wide criminal and civil jurisdiction, and wide powers of supervision over the conduct of all the local courts and officials. In the Assizes of Clarendon and Northampton Henry II asserted its exclusive jurisdiction over all serious crimes. In the ordinance of the Grand Assize and the legislation establishing the petty assizes he asserted its jurisdiction over most disputes relating to land held by free tenure; and even if a dispute relating to such land, or the services upon which such land was held was taken to a lord's court, the lord could not exercise jurisdiction without the king's writ.[12] Under the feudal system, which made landholding the basis of so many relations between man and man, this large jurisdiction over this class of cases meant the absorption by the king's court of jurisdiction over all the most important civil pleas.

All this jurisdiction was exercised through the machinery of royal

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[9]J. F. BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES (1913) 10-15.

[10]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 41.

[11]*Ibid.* 40-41.

[12]12 GLANVIL 25.

writs. But the fact that it was thus exercised did not as yet hinder its capacity for expansion. "As yet," says Maitland, "the king is no mere vendor, he is a manufacturer and can make goods to order; the day has not yet come when the invention of new writs will be hampered by the claims of a parliament; but still in Glanvil's day the *officina justitiae* has already a considerable store of ready-made wares and English law is already taking the form of a commentary upon writs."[13] Indeed, Bracton says that there should be a writ for every form of action in the king's court.[14]

As the result of this expansion of jurisdiction, the *Curia Regis* in Henry II's reign no longer confined its attention to great men and great causes. It was a tribunal where all classes of causes were tried. Indeed, the privilege of being sued only in the *Curia Regis* was occasionally granted to certain persons.[15] The popularity of royal justice is attested by the fact that litigants were willing to pay fines for writs, for pleas, for trials, for judgment, for expedition, or for delay.[16] As might be expected, most of the litigation dealt with land, but there were cases in which the amount in dispute was small; and we can see further that the volume of business done was great.[17]

The cause for the popularity of the *Curia Regis* is easy to see. In the first place, it could both compel the appearance of the defendant and enforce its judgments with all the strength of the central government. In the second place, its methods of procedure both in civil and in criminal cases were superior to those of the older courts. The jury, even at this time, was finding favor both in civil and criminal cases. Maitland tells us that "In a proprietary action for land or for advowson, the 'tenant,' the passive party, may, rejecting battle, 'put himself upon the grand assize of our lord the king,' and an inquest will then declare who has the better right."[18] In the third place, the fact that litigants could get from it writs ordering sheriffs or lords to hear cases was at any rate some security that the cases would be heard;[19] and, if they were not fairly heard, the litigant was at liberty to apply for further writs, or even to take the case before the *Curia* itself. In the fourth place, litigants secured a tribunal which was staffed by the ablest lawyers of the day.[20]

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[13] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 151.

[14] "Tot erunt formulae brevium quot genera actionum." BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES (1913) 49.

[15] BIGELOW, *op. cit. supra* note 8, 156; 1 MADOX, *op. cit. supra* note 1, 116-119.

[16] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 48.

[17] *Ibid.*

[18] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 149.

[19] *Ibid.* 158-159.

[20] At this time there was of course no legal profession in the sense in which we understand that term today. In England we do not meet the practitioner of law until about the time of the establishment of the Inns of Court, which was somewhat later than this. However, if we use the term "lawyer" as "one versed in the laws," then perhaps the statement above will not be misleading."

II. THE ITINERANT JUSTICES

The principle behind the act of sending out itinerant justices was not new. The development of those offices was but another example of that practice which must be well known to every student of English constitutional history, namely, the practice of causing an old institution to serve a new purpose. Royal commissioners were sent through the country on royal business soon after the Norman conquest. In earlier times the king himself journeyed over the country administering justice. He did not cease to do so after the conquest. But it is only after the conquest that we meet with these delegates of the *Curia Regis*. William the Conqueror used them to collect the information from which Domesday Book was compiled. We know from the Pipe Roll of the Exchequer that Henry I sent them around the country on fiscal business.[21] Even in Stephen's reign, justices traveled over the country to hear the civil and criminal pleas of the crown.[22]

These traveling emissaries of the king acted under various commissions. "Under the assizes of Clarendon and Northampton they heard criminal and civil pleas of the crown, and had in addition other duties which were administrative in character."[23] Often they acted in a fiscal capacity. Perhaps more often they were responsible for the king's information as to his feudal dues. They inquired into escheats, wardships, marriages, and aids, and into the value of lands belonging to the king as wardships or escheats.[24] "Sometimes they were commissioned only to hear possessory assizes; but generally, it would seem, their chief business was to hear both the pleas of the crown and the possessory assizes."[25] In these commissioners, whose chief or only function was judicial work, we can see the future judges of assize.[26]

It is probable that before Henry II's reign these commissions were not issued either frequently or regularly. Certainly they had no fixed circuits.[27] It was from the reign of Henry II that these justices regularly traveled around the country.[28] "In 1179, twenty-one justices were assigned to six circuits. From 1176 onwards some part of the country was regularly visited by the itinerant justices."[29] We can see that in Glanvil's

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[21] 1 WILLIAM STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND (6th ed. 1897) 443. In 1096 William II sent Wakelin, Bishop of Winchester, Randolph, the royal chaplain, and two others to Devonshire, Cornwall and Exeter "ad investiganda regalia placita." BIGELOW, *op. cit. supra* note 8, 69.

[22] 1 MADOX, *op. cit. supra* note 1, 146.

[23] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 50.

[24] *Ibid.* 50-51.

[25] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 156.

[26] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 275-276.

[27] BALDWIN, *op.cit. supra* note 9, 47-51.

[28] *Ibid.*

[29] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 50.

day the distinction between the *Curia Regis* and the itinerant justices is already well marked.[30] The frequency with which these commissions were issued seems not to have been altogether popular. Benedictus Abbas tells us Henry II learned that the people were grieved by the number of justices.[31] It would perhaps be inconvenient for a landowner who had land in many counties to be summoned before several groups of justices; and since the king was often at a distance and the justices were not always members of the *Curia Regis*, they may have used their commissions at times as instruments of oppression. At any rate the measure which Henry took to remedy the complaints which he heard was a measure of centralization. In this measure we can discern the germ of the future Court of Common Pleas.

III. THE BEGINNINGS OF THE COURT OF COMMON PLEAS

The following is the account which Benedictus Abbas gives us of the remedy which Henry "by the counsel of the wise men of his realm" applied to the complaints which he had heard of the number of justices: "He selected five men only, two clerks and three laymen, who are all of his own household. And he ordained that those five should hear all the suits of the realm, and adjudicate them, and that they should not depart from the *Curia Regis*, but should remain there to hear men's suits; provided that if any question arose among them which they could not solve, it should be reserved for the king's hearing, and should be settled as it should seem good to him and the wiser men of his realm."[32] This happened in 1178.[33] Henry's purpose was not to abolish the itinerant justices, for we see that they were still used in the next year.[34] Probably he meant to relieve the pressure of business in the *Curia Regis*, and to give a more speedy trial to those of his subjects who brought their cases to this central court.

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[30]12 GLANVIL 5, "Distinguendum est utrum concordia illa facta fuerit in capitali curia domina regis, an coram justitiis itinerantibus." SELECT PLEAS OF THE CROWN (Selden Society) xix-xxi.

[31]"Itaque dominus rex moram faciens in Anglia quaesivit de justitiis quos in Anglia constituerat, si bene et modeste tractaverunt homines regni; et cum didicisset quod terra et homines terrae nimis gravati essent ex tanta Justitiarum multitudine, quia octo decim erant numero," he devised the remedy described below. 1 BENEDICTUS ABBAS (Roll Ser.) c. 3, n. 1, 207; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 51, n. 5.

[32]"Per consilium sapientium regni sui quinque tantum elegit, duos scilicet clericos et thres laicos, et erant omnes de privata familia suia. Et statuit quod illi quinque audirent omnes clamores regni et rectum facerent, et quod a curia regis non recederent sed ibi ad audiendum clamores hominum remanerent; ita ut si aliqua quaestio inter eos veniret, quae per cos ad finem duci non posset, auditui regio praesentaretur, et sicut ei et sapientoribus regni placeret terminaretur." 1 BENEDICTUS ABBAS (Roll Ser.) 207-208; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 51.

[33]BALDWIN, *op. cit. supra* note 9, 47-51.

[34]*Supra* note 29.

The extent of this change must not be overestimated. There was not yet a distinct Court of Common Pleas. As Maitland puts it, "The king's court of John's reign shows no cleft, though it does show a well-marked line of cleavage."[35] When the king was absent or otherwise incapacitated, as in the case of the minority of Henry III, most of the judicial work seems to have been done by the Bench. When the king was present it is difficult to distinguish the Bench from the court held *coram rege*. Holdsworth remarks that "Whether the court will be the Bench or the court held *coram rege* would almost seem to depend on the accident of the king's presence."[36] The rolls of the *Curia Regis* seem to point to the same thing. There was as yet not two sets of rolls—*coram rege* and *de banco* rolls. However, it is possible to classify the cases according as they were held with or without the king's presence. The expression *coram rege* is used in the former case, while the expressions *coram justiciariis de banco* or *apud Westmonasterium* are used in the latter.[37] Nor would it seem to make any difference which branch of the court tried the case. The Bench apparently entertained all classes of pleas. A case might be transferred from one branch to the other at the suggestion of the king or the justices.[38]

Notwithstanding this, however, we must not minimize the importance of this line of cleavage. Looking at it in the light of subsequent history, we can see that it had at least three important consequences. In the first place, we can see in it a tribunal of limited jurisdiction as contrasted with a tribunal of large undifferentiated powers of government: and we can see that the tribunals with this limited jurisdiction were mainly, though not solely, occupied with judicial work.[39] In the second place, most of the judicial work is done by writs, which is to lead to the development of a highly technical procedure. This procedure and the substantive law applied through it will tend to become common over the whole of the kingdom.[40] In the third place, the existence of a tribunal occupied mainly in judicial matters under technical rules of procedure will lead to a very definite line of cleavage in the *Curia Regis*. There will be a tendency for those engaged in the business of that tri-

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[35]SELECT PLEAS OF THE CROWN (S. S.) xvii.

[36]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 52.

[37]*Ibid.* 53.

[38]"We may doubt whether a litigant had any reason to expect that an action begun before one division of the court would always continue to be before that division; on the contrary there are entries which seem to show that the Justices of the Bench might give the parties a day before the king, and that the king might give them a day before the Justices." SELECT PLEAS OF THE CROWN (S. S.) xvii.

[39]BALDWIN, *op cit. supra* note 9, 47-50.

[40]*Ibid.* 47-50.

bunal to confine themselves more exclusively to those duties and to leave the functions of administration to the other members.

However, this is all in the future, and before we attempt to show those changes we must divert our attention to the uprising against the tyrannous abuse by John of those large royal powers which his predecessors had used to construct a centralized system of government and a common law. The result of this insurrection was *Magna Carta* which attempted to lay down certain rules as to the manner in which the king should conduct his government. Naturally some of those regulations had to do with the king's courts which had been so rapidly expanding during the preceding half century. It is to those regulations and their effect which we shall now confine our attention.

IV. MAGNA CARTA AND THE COURT OF COMMON PLEAS

Magna Carta contains important provisions in reference to the regulation of the king's courts, but perhaps more important is the fact that the Great Charter closes one period in the history of English law and is the point of beginning of another. "It closes the period during which the law is developed by the power of the crown alone, and begins the period which will end in the establishment of a Parliament, with power to take some share in the making and development of the law."[41]

The clauses of the Charter which are of interest to us in connection with the Court of Common Pleas are the fourteenth, the seventeenth, the eighteenth, the thirty-fourth, and the fortieth. Those clauses naturally divide themselves into two main classes. In the first class are those which recognize and regulate the new machinery of justice, while the second class is made up of that clause, the thirty-fourth, which attempted to fetter the king's courts in the interests of feudalism.

The fourteenth clause is as follows:

> And for holding a common council of the Kingdom concerning the assessment of an aid otherwise than in the three cases mentioned above, or concerning the assessment of a scutage we shall cause to be summoned the archbishops, bishops, abbots, earls, and greater barons by our letters individually; and besides we shall cause to be summoned generally, by our sheriffs and bailiffs all those who hold from us in chief, for a certain day, that is at the end of forty days at least, and for a certain place; and in all the letters of that summons, we will express the cause of the summons, and when the summons has thus been given, the business shall

[41] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 54.

proceed on the appointed day, all of those who were summoned have come.[42]

This clause should be considered as an appendage to the twelfth clause providing that such aids and scutage were not to be imposed *"nisi per commune consilium regni."* It was intended to define who must be present if the king was to obtain this *"commune consilium regni."*[43] This clause was dropped from later reissues of the Charter; and it may seem at first thought to have had nothing to do with the judicial system. However, Holdsworth feels that it is "the first official recognition of the fact that the smaller official gatherings of the *Curia Regis* were something different from the larger gatherings which gave the king the *'consilium regni.'* "[44] However this may be, the fact remains that this distinction does gain prominence in the reign of Henry III and tends to differentiate the larger body, which controls the work of legislation and administration, from the body of officials which actually does the administrative and judicial work of the state.

The seventeenth clause provides that "The common pleas shall not follow our court, but shall be held in some certain place."[45] This clause would show that even in 1215 there was some idea of a court in the *Curia Regis* which was distinct from the court held *coram rege.* This division was largely, though not solely, occupied with civil pleas, and it did not follow the king. In fact it was generally held in Westminster.[46] This clause made it legally necessary that it should be a stationary court. As has been noted the Common Pleas did at first travel with the king. Later it seems to have been established at Westminster, and was not moved except by the command of the king. It was felt that the act of moving this court was an abuse by John, and this prohibition was inserted to prevent future royal caprice in the

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[42]G. B. ADAMS and H. M. STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1921) 44-45: "Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus praedictis, vel de scutagio assidendo, summoneri faciemus achiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per literas nostras; et praeterea faciemus summoneri in generali, per viceomites et ballivos nostros, omnes illos qui de nobis tenent in capite." 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 55, n. 1.

[43]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 55.

[44]*Ibid.*

[45]ADAMS AND STEPHENS, *op. cit. supra* note 42, 45; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 56. "Communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco." McKechnie translates the "aliquo certo loco" as meaning "some fixed place," W. S. MCKECHNIE, MAGNA CARTA (1905) 308.

[46]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 56.

matter.[47] No town is named as the *"aliquo certo loco,"* but McKechnie feels that probably Westminster was intended.[48]

The eighteenth clause emphasized the need for the local administration of justice by delegates from the *Curia Regis* in the case of certain of these common pleas. It provided that the three possessory assizes of *novel disseisin, mort d'ancestor,* and *darrein presentment* should be tried in the counties where the cases arose;[49] and that they should be taken in each county four times a year by two justices, assisted by four knights of the county appointed by the county.[50] It is clear that this clause is the strongest possible testimony to the success of Henry II's reforms. No doubt these assizes took business from the feudal courts; but so far were the barons from wishing to see them abolished that they demanded their frequent sessions.

The fortieth clause provided that right and justice shall not be sold, denied, or delayed.[51] This clause again illustrates the fact that royal justice was popular. The complaint is that it is too dear or that it is not forthcoming. The clause did not wholly stop the evils of which it complained, as later parliamentary petitions show,[52] but probably it did something to cheapen justice, and to stop the abuses which

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[47]MCKECHNIE, MAGNA CARTA (1905) 310, 312-314.

[48]*Ibid.* 310. " 'The common place (common banke).' *Banke* is a *Saxon* word, and signifieth a bench or high seat, or a tribunall, and is properly applyed to the justices of the court of common pleas, because the justices of that court sit there as in a certaine place: * * * For the antiquity of the court of common pleas, they erre, that hold that before the statute of *Magna Charta* there was no court of common pleas. * * * And the statute of *Magna Charta* erecteth no court but giveth direction for the proper jurisdiction thereof in these words: *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco.* And properly the statute saith, *non sequantur,* for that the king's bench did in those dayes follow the king *ubicunque fuerit in Anglia,* and therefore enacteth that common pleas should be holden in a court resident in a certaine place. In the next chapter of *Magna Charta* (made at one and the same time) it is provided: *et ea, quae per eosdem (s. justiciarios itinerantes) propter difficultatem aliquorum terminari non possunt, referanter ad justiciarios nostros de banco et ibi terminentur.* And in the next to that, *Assisae de ultima praesentatione semper capiantur coram justiciariis de banco, et ibi terminentur.* Therefore it manifestly appeareth, that at the making of the statute of *Magna Charta* there were *justiciariis de banco,* which all men confesse to be the court of common pleas." 2 COKE, A COMMENTARY UPON LITTLETON (1st Am. ed. 1853) c. 3, § 96, 71b. To the same effect see J. F. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA (1894) 42, n. 1.

[49]It is interesting to note that our theories concerning the proper venue of actions involving the title to realty have not materially changed. Cf. COLO. RULES OF CIV. PROC. Rule 98(a). See also COLO. CODE OF CIV. PROC. (1935) § 25.

[50]"Recogniciones de nova disseisina, de morte antecessoris, et de ultima presentacione, non capiantur nisi in suis comitatibus et hoc modo; nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mittemus duos justiciarios per unumquemque comitatum per quatuor vices in anno, qui, cum quatuor militibus cujuslibet comitatus electis per comitatum, capiant im comitatu et in die et loco comitatus assisas predictas; * * *"

[51]"Nulli vendemus, nulli regabimus, aut differemus rectum aut justiciam."

[52]STUBBS, *op. cit. supra* note 21, 636-637.

were rampant in John's reign. Madox says, "Though fines for writs and process of law in many cases were always a part of the crown revenue, and were constantly paid * * * Yet, if my observation does not fail me, the fines which were paid for writs and process of law, were more moderate * * * than they used to be before; and, I think, the actual denial of right, and the stopping or delaying of it, which before, upon paying of money or fines used to be practiced, were * * * quite taken away, or by degrees brought into disuse."[53]

The only clause in which we can see an attempt to fetter civil justice is the thirty-fourth. That clause provides that "The writ which is called *Praecipe* shall not be given for the future to anyone concerning any tenement whereby a free man may lose his court.[54] The barons apparently did not object to the assumption by the *Curia Regis* of jurisdiction over questions of possession.[55] They did object to this assumption of jurisdiction in cases where the ownership of the land was in dispute. By means of the writ praecipe[56] addressed to the sheriff, the king ignored the feudal court of the lord and brought these cases before his court. The barons demanded that this practice should cease, and that such cases should be tried by writ of right in the lord's court. This form of writ *praecipe* therefore ceased to be issued, and tenants were obliged to bring writs of right in the courts of their lords.[57] But seigniorial justice was obviously so inferior to royal justice that as early as 1258 the nation "no longer demanded protection for seigniorial courts." It asked rather that "the royal court should be endowed with yet new and anti-feudal powers."[58] Although full effect was given to the clause,[59] before a century had elapsed means were found to evade its operation.[60]

V. THE COURT OF COMMON PLEAS SINCE MAGNA CARTA

By the end of the reign of John, the distinction between the court which was fixed at a certain place to hear common pleas, and the court which followed the king, with jurisdiction over both common pleas and pleas of the crown, was becoming fairly clear; but they were not yet completely distinct. There was not as yet two bodies of judges, each with separate duties and belonging to a separate court. The distinction

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[53]MADOX, *op. cit. supra* note 1, 455.

[54]ADAMS AND STEPHENS, *op. cit. supra* note 42, 47. "Breve quod vocatur *Precipe* de cetero non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam.

[55]MAGNA CARTA § 18.

[56]For this writ see 1 HOLDSWORTH, HISTORY OF ENGLISH LAW app. V.

[57]3 *Ibid.* 3-29.

[58]1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 203.

[59]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 59.

[60]For the methods by which this result was accomplished, see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 3-29.

would almost seem to depend on the accident of there being a king to follow. During the minority of Henry III, there being no king to follow, and the king's presence not as yet being a legal fiction, there was only one court, the Common Pleas, and this court tried all of the cases.[61] In 1224, when Henry reached his majority, two courts again appeared.

The distinction between the two courts is further marked by the fact that from 1224[62] onward they recorded their proceedings on separate rolls.[63] The rolls of the court held in the presence of the king were called *Rotuli placitorum coram rege,* while those of the Common Pleas were called *Rotuli placitorum de banco.*[64] McKechnie feels that if any date may be set for the complete separation, it must be that date at which the two sets of rolls were begun.[65]

We have noted how in earlier times there seems to have been no distinction made as to the classes of pleas which were to be tried in either branch of the court.[66] As early as 1237 we are able to see a change. In that year a reported case shows that G. Marescallus was summoned to warrant the title to certain manors which the king was claiming against John Marescallus. He pleaded that this was a common plea, and could not therefore be heard *coram rege* in the court which followed the king. The court held that this was not a common plea because it touched the person of the king and crown.[67]

The position of the Chief Justiciar, that great officer of state who was a politician and a soldier as well as, or perhaps more than, a creator and administrator of the law, fell into disuse after 1265.[68] As early as 1272 a separate chief justice was appointed for the Common Pleas,[69] and Holdsworth says that "From that date the separation was complete."[70]

However, even in Edward I's reign it is not always possible to distinguish the court to which the different judges belong, and the jurisdiction of the court was not then in all points the same as that which it afterwards possessed—"the special competence of each court is only vaguely defined.[71] But it is a court which has a separate set of rolls;

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[61]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 195.

[62]McKechnie states that the separate rolls were begun in 1234. MCKECHNIE, *op. cit. supra* note 45, 314.

[63]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 196.

[64]MCKECHNIE, *op. cit. supra* note 45, 314-315.

[65]*Ibid.*

[66]*Supra* note 36.

[67]BRACTON'S NOTE BOOK (MAITLAND, 1887) case 1220.

[68]*The Common Law Courts as Established Under Edward I,* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 212.

[69]1 CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND (1873) 73.

[70]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 196.

[71]BRACTON'S NOTE BOOK (MAITLAND, 1887) 56.

it has a separate chief justice; and it is inferior to the court which follows the king, since error lies from it to the court *coram rege*. Fleta mentions the *"banco apud Westm'"* as a separate court,[72] and Edward I, in 1300, expressly declared that the hearing of common pleas in the Exchequer or elsewhere out of the Common Bench, was contrary to the provisions of the Great Charter.[73] Lord Campbell states that by the reign of Edward I, "our judicial institutions were firmly established on the basis on which, with very little alteration, they have remained to the present day."[74]

Magna Carta provided, as we have seen, that the court should sit *"aliquo certo loco."*[75] Westminster was probably intended,[76] and the court in fact usually sat there; but it occasionally sat elsewhere. "In 1337 and 1392 it was at York, in 1544 it was at St. Albans, and in 1581 it was at Hertford."[77] It seems also to have been held at Winchester, at Gloucester, at Windsor, and at Lincoln.[78] In the case of Edward III, "when complaint was made that the Bench *'est errant de Countee en Countee per tout le Roialme',"* he refused to deprive himself of the power to order the Bench to sit where he pleased;[79] and the power is clearly assumed to exist in a statute of 1328.[80]

VI. JUDGES

The early judges of England were almost without exception clerics. Indeed, we might say that holy orders were almost essential to any important judicial office of state,[81] and this condition persisted through the early part of the thirteenth century.[82] After that time, however, the ecclesiastics were gradually replaced by men who had made their careers at the bar.[83] The clergy continued to hold a monopoly on the study of civil and canon law; but laymen were being drawn to the common law. They organized themselves into societies known as Inns of Court, and it is from these Inns that the future judges were drawn.[84] At the beginning of the reign of Edward I, that sovereign appointed laymen Chief Justices for both the King's Bench and the Common Pleas;[85] but the

[72] 2 FLETA, COMMENTARIUS JURIS ANGLICANI (1647) c. 2.
[73] 28 EDW. I.
[74] 1 CAMPBELL, *op. cit. supra* note 69, 71.
[75] *Supra* note 45.
[76] *Supra* note 48.
[77] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 196-197.
[78] DILLON, *op. cit. supra* note 48, 42, n. 1.
[79] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 197.
[80] 2 EDW. III, c. 2.
[81] 1 CAMPBELL, *op. cit. supra* note 69, 1-70.
[82] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 197.
[83] *Ibid.*
[84] 1 CAMPBELL, *op. cit. supra* note 69, 73.
[85] *Ibid.*

belief that the characters of *causidicus* and *clericus* must be united persisted to such an extent as to oblige the Chief Justice of the King's Bench to become a canon of St. Paul's in order to further his success.[86] However, with the exception of Hervey of Staunton, who became Chief Justice in 1326, no clerical judge was appointed after 1316.[87]

On March 8, 1268, Robert de Brus, the grandfather of the later and perhaps more famous Robert Bruce, King of Scotland, was by Henry III appointed *Capitatis Justiciarius ad placita coram Rege tenenda,* the modern designation of the Chief Justice of the King's Bench.[88] Dugdale places his name at the head of a new list of judges, who have exercised only judicial functions.[89] This restriction seems to have resulted, not from any legislative enactment, but rather from an "understanding that the person who presided was no longer to interfere in military affairs or in the government of the kingdom."[90]

In 1272, Edward I appointed Thomas de Weyland Chief Justice of the Common Pleas at the rather insignificant salary of sixty marks a year.[91] A small pittance was allowed with which to purchase robes, and industry was stimulated by fees on the causes tried.[92] The Chief Justice, presumably because of the smallness of the salary, seems to have resorted to irregular practices for the purpose of increasing his sustenance, and we are told that "he left a name often quoted as a reproach to the Bench."[93]

By 1316 the order of serjeants-at-law had been formed.[94] This order consisted of the leading practitioners who were promoted to membership by the crown.[95] When the practice of drawing judges from the clergy ceased, it was but natural that those officials should be drawn from this order. Indeed, in a short time judges were drawn solely from this group.[96] This practice probably had its beginning in the Common

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[86]*Ibid.*

[87]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 197.

[88]1 CAMPBELL, *op. cit supra* note 69, 65-68.

[89]*Ibid.* 65.

[90]*Ibid.*

[91]1 CAMPBELL, *op. cit. supra* note 69, 73; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 196. Inderwick, *The Common Law Courts as Established Under Edward I,* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 211, states that one Thomas de Muleton was appointed Chief Justice of the "Common Bench" in 1235, "being the first Chief Justice of either of the Courts of Common Law." I have been unable to verify this statement.

[92]1 CAMPBELL, *op. cit. supra* note 69, 73.

[93]1 CAMPBELL, *op. cit. supra* note 69, 79.

[94]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 197. "It was to conceal the want of clerical tonsure that the sergeants-at-law * * * adopted the *coif,* or black velvet cap, which became the badge of their order." 1 CAMPBELL, *op. cit. supra* note 69, 73, n. 1.

[95]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 197.

[96]*Ibid.*

Pleas. By the fourteenth century, it had extended to the King's Bench, and by the sixteenth century, to the Exchequer,[97] By this time the practice had become somewhat of a form; and it "became the custom to make any lawyer, whom it was destined to raise to the bench, a serjeant-at-law, merely that he might be made a judge."[98] The rule was not altered until the Judicature Act of 1873.[99]

The early judges held their offices during the royal pleasure, and this rule apparently was followed for several centuries.[100] However, in the ACT OF SETTLEMENT[101] it was provided that judges should hold office *"quamdiu se bene gesserint"*; but that it should be lawful for the crown to remove them on an address by the two houses of parliament. They continued to vacate their offices at the demise of the crown. In the reign of Anne, it was provided that they should hold their offices for a space of six months after the demise of the crown,[102] and in 1760 a statute was enacted providing that tenure of judges should be unaffected by the demise of the crown.[103]

VII. JURISDICTION

We may group the jurisdiction of the Court of Common Pleas under four heads:

(1) It had, like other courts of common law, exclusive jurisdiction over its own officials or other persons privileged to sue and be sued before it.[104]

(2) It had jurisdiction to supervise or correct the errors of the older local courts. Cases were transferred to it by the writ of *pone*[105] from the county court, the hundred court, or the court baron;[106] and by various writs of *recordari facias, accedas ad hundredum*, or *accedas ad curiam*, and was able to correct the judgments of these courts.[107] However, these courts gradually fell into disuse, and their places were taken by the justices of the peace. There was serious doubt as to the power of the Common Pleas to review the judgments of these justices. Moreover, the advantage to be derived from bringing error to the Common Pleas was small, since it was possible for the party defeated to obtain a second

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[97]*Ibid.*
[98]*Ibid.*
[99]36 & 37 VICT. c. 66, § 8.
[100]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 195.
[101]12 & 13 WILL. III, c. 2, § 3.
[102]6 ANNE c. 7, § 8.
[103]1 GEO. III, c. 23.
[104]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 203.
[105]For an example of this writ, see 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, app. VII.
[106]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 200.
[107]*Ibid.* 201.

writ of error to the King's Bench. For this reason suitors generally brought error directly to the higher court,[108] and thus the question still remained doubtful. However, in 1841, the court asserted its jurisdiction in such cases,[109] and that decision was approved in a later case in the King's Bench.[110]

(3) In the seventeenth century the court acquired a general jurisdiction to issue two of the prerogative writs—the writ of prohibition and the writ of *habeas corpus*.[111] There was some controversy as to how far the right to issue the latter writ extended, but this was settled by the HABEAS CORPUS AMENDMENT ACT[112] of 1679, which gave a general jurisdiction to issue this writ to all three of the common law courts.

(4) By far the most important branch of jurisdiction was that which was exercised over common pleas—that is over actions between subject and subject. This court was the only one of the courts of common law where real actions and the older personal actions of debt, detinue, account, and covenant could be tried.[113] Furthermore, it could not lose its jurisdiction except by express words in a charter, covenant, or other instrument granting this jurisdiction to another court.[114] This monopoly lasted until the abolition of these actions in 1833-1873.[115] However, long before their formal abolition, the King's Bench and the Exchequer, by means of fictions, had encroached upon the exclusive and concurrent jurisdiction of the Common Pleas over mixed and personal actions.[116] At first this encroachment was relatively unimportant because most of the more important and lucrative actions were those affecting realty, and of these the Common Pleas still had exclusive jurisdiction.[117] Furthermore, the fact that the court was stationary attracted a large and capable bar, and therefore tended to increase the business.[118] In 1309 there was so much business that Edward II ordered that it should sit in two divisions.[119] Coke writes that this court is the "lock and key of the common law; for herein only can real actions, that is actions which concern the right of freehold or the realty, be originally brought; and all other or personal pleas between man and man are likewise here determined; though in most of them the king's bench has also a concurrent

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[108] *Ibid.*
[109] Bruce v. Wait, 1 Man. & G. 1.
[110] Darlow v. Shuttleworth, 1 K. B. 725 (1902).
[111] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 202.
[112] 31 CHAS. II, c. 2, § 3.
[113] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 198.
[114] *Ibid.*
[115] 3 & 4 WILL. IV, c. 27, § 36; 23 & 24 VICT. c. 126, § 26 (real actions); 38 & 39 VICT., c. 77, Sched. i (all forms of actions).
[116] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 219-221.
[117] *Ibid.* 198.
[118] *Ibid.*
[119] *Ibid.* 198-199.

authority."[120] In a like manner the Year Books show that during the Middle Ages, by far the greater amount of litigation was conducted in the Common Pleas.[121]

From the sixteenth century on, however, we note a change. The old real actions were ceasing to be of such great importance. Furthermore, both the old real and the old personal actions were exceedingly technical, and the plaintiff lost if he were so unfortunate as to choose the wrong writ.[122] The action of ejectment was coming into use, and since this was a form of trespass, it could be tried equally well in the King's Bench.[123] Likewise the older personal actions were being superseded by a variety of forms of trespass on the case, and these could also be tried in the King's Bench. In addition, an action could be tried more cheaply in the King's Bench, and the plaintiff was less apt to be annoyed by delays.[124] Hale writes that the King's Bench was the "nursery of young professors," while the Common Pleas was merely the "place of practice of serjeants."[125] The Common Pleas tried to meet this competition with cheaper and better processes, and by adopting the fictions of the King's Bench, but was only partially successful, and in the nineteenth century the King's Bench still held the lion's share of the business.[126] Then by the JUDICATURE ACT of 1873[127] the court was abolished, and its jurisdiction, as well as that of the King's Bench, the Exchequer, the Chancery and others, was taken over by the new High Court of Justice with its various sections.

The Court of Common Pleas was gone, but its work was done.

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[120] 3 BL. COMM. *40.
[121] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 199.
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] "Between the years 1823 and 1827 there were begun in the King's Bench 281,109 actions, in the Common Pleas 80,158, and in the Exchequer 27,197." 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 200. n. 8.
[127] 36 & 37, VICT. c. 66.

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Members of the Denver Bar Association Who Have Lost Their Lives in the Service of the United Nations

Alvin Rosenbaum, First Lieutenant, United States Army Air Forces, August 2, 1943.

The Neighborhood Law Office Plan

BY RAYNOR M. GARDINER*

The Neighborhood Law Office plan has had a great deal of publicity during the last few years. As far as I know, Philadelphia is the only place where the low cost or neighborhood plan has been tried. The experiment is still continuing and it is too soon to tell just how it will come out.

The idea of a chain of offices on the outskirts of a city, giving advice at a low fixed fee, sounds attractive. I am cynical enough to

*General Counsel of the Boston Legal Aid Society in the BAR BULLETIN of the Bar Association of the City of Boston.