

THE INFLUENCE OF THE COMMON LAW ON THE DECLINE OF THE ECCLESIASTICAL COURTS OF THE CHURCH OF ENGLAND

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I. INTRODUCTION

[1] The Ecclesiastical Jurisdiction Measure 1963¹ established the present judicial hierarchy for the provinces of Canterbury and York of the Church of England. This hierarchy comprises Church courts at diocesan and provincial levels,² with further appeals heard by the Court for Ecclesiastical Causes Reserved³ and, in some instances only, the Judicial Committee of the Privy

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¹ The long title of the Measure is “A Measure passed by The National Assembly of the Church of England to reform and reconstruct the system of ecclesiastical courts of the Church of England, to replace with new provisions the existing enactments relating to ecclesiastical discipline, to abolish certain obsolete jurisdictions and fees, and for purposes connected therewith.”

² Consistory Courts in each diocese (under Chancellors, who may serve in more than one see), and the Arches Court and the Chancery Court of York (under the Dean of the Arches and the Auditor respectively, offices which are, however, held concurrently by the one individual). The Arches Court and the Chancery Court of York have four other judicial officers, two in holy orders appointed by the prolocutor of the Lower House of Convocation of the relevant province, and two laymen appointed by the Chairman of the House of Laity after consultation with the Lord Chancellor with respect, *inter alia*, to their judicial experience. *See* Ecclesiastical Jurisdiction Measure, 1963, §§ 3(2)(b)-(c) (Eng.).

³ Two of the five judges appointed by Her Majesty the Queen must be or have held high judicial office and have been a communicant of the Church of England. Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c.59 § 25 9 (Eng.) (defining the requirements for judicial appointees to the court for Ecclesiastical Causes Reserved). Three must be or have been diocesan bishops; Ecclesiastical Jurisdiction Measure, 1963, § 45(2) (Eng.).

Council.⁴ Final appeals from the Court for Ecclesiastical Causes Reserved, and from *ad hoc* Commissions of Convocation,⁵ are heard by Commissions of Review appointed by the Queen in Council.⁶

[2] The changes made to the judicial structure of the Church of England in 1963 were widespread, and were especially significant at the appellate level. One of the most notable of the changes was the reduction in the role of the Judicial Committee of the Privy Council. This was largely motivated by long-standing opposition from certain elements within the Church to the perceived subordination of the ecclesiastical courts to secular tribunals.⁷ This opposition was fuelled by the nineteenth century controversy over ritual and ceremonial and the legality of

⁴ Ecclesiastical Jurisdiction Measure, 1963, § 1(3)(d) (Eng.). The permanent committee of the Queen's Most Honourable Privy Council, to which appeals to the Queen are referred for hearing and judgment. This was established on permanent footing in 1833; *See* Judicial Committee Appeals Act, 1833, 3 & 4 Will. 4, c. 41, § 1 (Eng.); The Ecclesiastical Jurisdiction Measure, 1963 makes the theoretical nature of such appeals clear. "Her Majesty in Council shall have such appellate jurisdiction as is conferred on Her by this Measure." Ecclesiastical Jurisdiction Measure, 1963, § 1(3)(d) (Eng.).

⁵ These would comprise four diocesan bishops and the Dean of the Arches. Ecclesiastical Jurisdiction Measure, 1963, §§ 35, 36(a) (Eng.).

⁶ Ecclesiastical Jurisdiction Measure, 1963 § 1(3)(c) (Eng.); Revised Canons Ecclesiastical, Canon G1 para. 4. The Commissions of Review would comprise three Lords of Appeal (being communicants), and two Lords Spiritual sitting as Lords of Parliament. *See* Ecclesiastical Jurisdiction Measure, 1963, § 11(4) (Eng.).

⁷ This opposition found expression in a succession of commissions which advocated a new joint appeal court to replace the Judicial Committee of the Privy Council. REPORT OF THE ARCHBISHOPS' COMMISSION, COMMISSION ON ECCLESIASTICAL COURTS, 1883, at lvi-lviii; REPORT OF THE COMMISSION, ROYAL COMMISSION ON ECCLESIASTICAL DISCIPLINE, 1906, at 67, 77-78; REPORT OF THE ARCHBISHOPS' COMMISSION, COMMISSION ON ECCLESIASTICAL COURTS, 1926, at §§ 26-46; REPORT OF THE ARCHBISHOPS' COMMISSION, CHURCH AND STATE, 1935, at 68-71; REPORT OF THE ARCHBISHOPS' COMMISSION, THE CANON LAW OF THE CHURCH OF ENGLAND, 1947.

ornaments, most of which disputes had doctrinal implications, yet were being decided in courts which were essentially secular in nature.⁸

[3] But this preoccupation with a perceived subordination to the secular authorities distracted, it will be argued, attention from a more subtle weakness in the judicial apparatus of the Church. Although the Church had largely freed itself from subordination to secular tribunals, it was not free from the continuing influence of the parallel secular legal system. This is due to two major factors that influenced, and continue to influence, the ecclesiastical courts. The first is that, because the general law of the country establishes the Church of England,⁹ the Church courts are the Queen's courts.¹⁰ The second and arguably much more important factor is the influence of the common law and its practitioners upon the jurisprudence of the Church courts. Both of these influences will be examined in the course of this article, though the emphasis will be upon the second.

⁸ Examples include *Ridsdale v Clifton*, 2 P.D. 276 (P.C. 1877); *Liddell v Westerton*, 5 W.R. 470 (P.C. 1856). In *Ridsdale*, the correctness of the decision of the Judicial Committee was challenged in light of subsequent historical research. REPORT OF THE ROYAL COMMISSION, ROYAL COMMISSION ON ECCLESIASTICAL DISCIPLINE, 1906, Cd. 3040, para. 41.

⁹ The combined effect of the Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.); Thirty-Nine Articles of Religion, 1571, 13 Eliz., c. 12 (Eng.); Ecclesiastical Licenses Act, 1533, 25 Hen. 8, c. 21 (Eng.); Submission of the Clergy Act, 1533, 25 Hen. 8, c. 21 (Eng.); Appointment of Bishops Act, 1533, 25 Hen. 8, c. 20 (Eng.); Ecclesiastical Appeals Act, 1532, 24 Hen. 8, c. 12 (Eng.) and similar legislation.

¹⁰ The combined effect of the Supremacy of the Crown Act, 1534, 26 Hen. 8, c. 1 (Eng.); Ecclesiastical Licenses Act, 1533, 25 Hen. 8, c. 21 (Eng.); Ecclesiastical Appeals Act, 1532, 24 Hen. 8, c. 12 (Eng.) and later legislation. Once appointed, an ecclesiastical judge derives his or her authority not from their bishop, but from the law, and is charged, like in all manners to all the Queen's judges, with hearing and determining impartially causes in which the bishop or the Crown may have an interest. *Ex parte Medwin*, 1 El. & Bl. 609, 118 Eng. Rep. 566 (K.B. 1853); *Bishop of Lincoln v Smith*, 1 Vent. 3, 86 Eng. Rep. 3 (K.B. 1668).

[4] The ecclesiastical courts are a special system of courts administering the ecclesiastical law.¹¹ In a general sense ecclesiastical law means the law relating to any matter concerning the Church of England administered and enforced in any court. In a technical sense, which is the sense in which the term will be used in this article, it means the law administered by ecclesiastical courts and persons.¹²

[5] It has been customary to distinguish between ecclesiastical courts proper, and secular courts hearing Church appeals. But, to some extent this has been to make an artificial distinction.¹³ The new Court for Ecclesiastical Causes Reserved, and the Commissions of Review, may be classified as Church courts proper also, although they may include secular members. Only the Commissions of Convocation would not normally include secular judges. However, since none of these courts hear causes on matters not within the jurisdiction of the ecclesiastical law, they may be classified as ecclesiastical rather than secular courts. Even the

¹¹ Which is of predominantly canon and civil law origin, though not uninfluenced even in the earliest times by the developing common law in the King's courts. Ecclesiastical Licences Act, 1533, 24 Hen. 8, c. 21, at preamble (now mainly repealed); *Attorney-General v. Dean and Chapter of Ripon Cathedral*, 1 All E.R. 479 (Ch. D. 1945); *Caudrey's Case*, 5 Co. Rep. 1(a), 77 Eng. Rep. 1 (K.B. 1591).

¹² Alfred Denning, *The Meaning of 'Ecclesiastical Law'*, 60 *LQR* 235, 236 (1944). The end of the temporal law is to punish the outward man; that of the ecclesiastical law, being spiritual, is to reform the inward man. *Caudrey's Case*, 5 Co. Rep. 1(a), 77 Eng. Rep. 1 (K.B. 1591).

¹³ The Consistory Courts, the Arches Court, and the Chancery Court of York may be classified as the former. The Chancellor of a diocese is appointed by letters patent of the bishop (who may himself sit if he so wishes), although the Lord Chancellor must be consulted before any appointment is made. Ecclesiastical Jurisdiction Measure, 1963, § 2(1)-(2) (Eng.). The Dean of the Arches is appointed by the archbishops of Canterbury and York acting jointly, with the Queen's approval signified by warrant under the sign manual. *Id.* at § 3(2)(a); Revised Canons Ecclesiastical, Canon G3 para. 2a.

Judicial Committee of the Privy Council will transform itself into a quasi-ecclesiastical court to hear Church causes, although it is properly a secular court or tribunal.

[6] Of more importance to the evolution of the ecclesiastical law is the influence of the common lawyers, particularly those who have practised in the ecclesiastical courts since the middle of the nineteenth century, and who have profoundly affected the way in which the Church courts have operated.

[7] Although the Church law included canon law, rather than Roman civil law or the secular common law, in the absence of formal education of canonists in England after 1535,¹⁴ the civilians, or practitioners in the civil law, were, to some extent at least, the guardians of the learning of the Church courts.¹⁵ These were the practitioners in the ecclesiastical courts until the late nineteenth century. Some clerical judges were also to sit in ecclesiastical courts until at least the nineteenth century, though they may have lacked effective legal training, and their influence upon the development of the law was proportionately slight.¹⁶

¹⁴ The strict injunction issued by Henry VIII in October 1535 forbade the study of canon law in the universities. See R.H. HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND*, 152-53 (1990); P. HUGHES, *THE REFORMATION IN ENGLAND*, 239 (1963); D. R. LEADER, *THE HISTORY OF THE UNIVERSITY OF CAMBRIDGE*, 332-33 (1988). As a consequence even the civil law faculties suffered a decline; See J.L. Barton, *The Faculty of the Law*, in *THE HISTORY OF THE UNIVERSITY OF OXFORD*, iii, 271-72 (T.H. Aston ed., 1984); THOMAS FULLER, *THE HISTORY OF THE UNIVERSITY OF CAMBRIDGE*, 225 (Marmaduke Prickett & Thomas Wright eds., 1840).

¹⁵ It could also be said that the civil and canon laws were so interdependent by 1600 that they could scarcely be pulled apart: “*Ius canonicum et civile sunt adeo connexa, ut unum sine altero vix intelligi possit*”—Petrus Rebuffus, “*Tractatus de nominationibus*,” Quaest 5, no.15, in *Tractatus univerti iuris* (1584-1600), xv, part 2, fols 301-39.

¹⁶ In the early nineteenth century many judges were clerics, lacking the experience and training necessary for judicial office—indeed until the Ecclesiastical Jurisdiction Measure, 1963 they simply had to be “learned in the civil and ecclesiastical laws and at least a master of arts or bachelor of law, and reasonably well practised in the course thereof.” *Canons Ecclesiastical*, 127 (1603) (revoked); see REPORT OF THE ARCHBISHOPS' COMMISSION, *THE ECCLESIASTICAL COURTS*, 1954,

[8] If there is one lesson to be learnt from the experience of the Church courts in England since the Reformation, it is that their strength depended not just upon retaining the confidence of the bishops, clergy and laity, but that without a strong cadre of professional judges and counsel “learned in the ecclesiastical law,” they fall under the increasing influence of the common law. Without these personnel, and an understanding that secular judicial procedures are not necessarily appropriate to decide religious questions, the ecclesiastical courts were condemned to satisfy few when contentious issues were decided.

[9] This article will examine the provision for pre-Reformation appeals from the provincial courts, and the nature and effect of the Reformation settlement, including the Court of High Commission, and the Court of Delegates. The settlement at the Restoration of the monarchy in 1660 will be assessed. We will then look at the later role of the Judicial Committee of the Privy Council as an ecclesiastical court, and at the newer Court for Ecclesiastical Causes Reserved, as well as the Commissions of Convocations and Commissions of Review. The common law influences on the ecclesiastical courts are then reviewed. Finally an assessment is made of the influence of counsel in the ecclesiastical courts.

II. PRE-REFORMATION APPEALS FROM THE PROVINCIAL COURTS

[10] Spiritual courts, separate from the secular, existed in England from shortly after the Norman Conquest in 1066.¹⁷ This process of separation seems to have occurred around 1072-

at 9-13. There is no requirement that an ecclesiastical judge be a cleric, though they sometimes are. The prohibition on men in holy orders being barristers largely prevented clergymen from assuming the judicial office; nor did the effective ban on them being admitted as advocates of the ecclesiastical Bar help. *See* R v. Archbishop of Canterbury, 8 East 213, 10 Eng. Rep. 323 (1807).

¹⁷ SIR WILLIAM BLACKSTONE, COMMENTARIES iii, 64-65 (1978).

76,¹⁸ although it seems to have not been a deliberate move but rather the effect of the increasing sophistication of the legal system in late Saxon England.¹⁹ But the precise identification of courts was still not easy, even at the end of Henry I's reign. *Leges Henrici Primi* (c.1118) does not distinguish between a tribunal to try lay and a tribunal to try ecclesiastical cases.²⁰ However, as a general rule, ecclesiastical jurisdiction in the immediate post-Conquest period was primarily over moral offences.²¹ In subsequent centuries the jurisdiction of the ecclesiastical courts was gradually enlarged,²² and was eventually to cover important aspects of what is now predominantly secular law. These included marriage,²³ divorce,²⁴ and succession.²⁵ Although the Church courts were to lose most of this jurisdiction to the secular courts in the nineteenth century, the influence

¹⁸ REPORT OF THE ARCHBISHOPS' COMMISSION, THE ECCLESIASTICAL COURTS, 1954, at 1.

¹⁹ REPORT OF THE ARCHBISHOPS' COMMISSION, THE ECCLESIASTICAL COURTS, 1954, at 1-22; FELIX MAKOWER, CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND 384 (1895). The late Saxon legal and fiscal systems were comparatively complex, and their efficiency was one of the principal reasons for the strength of the Norman kingship which was to follow.

²⁰ Gillian Evans, *Lanfranc, Anselm and a New Consciousness of Canon Law in England*, in ENGLISH CANON LAW 11 (Norman Doe et al. eds., 1998).

²¹ C. Morris, *William I and the Church Courts*, in ENGLISH HISTORICAL REVIEW 449-63, 451 (1967).

²² See WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW I, 614 ff. (1972).

²³ Until the Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85 (Eng.). In Ireland, ecclesiastical courts lost their matrimonial jurisdiction only under the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, 33 & 34 Vict., c. 110 (Eng.), and the jurisdiction survived until 1884 in the Isle of Man, The Diocese of the Bishop of Sodor and Man.

²⁴ Until the Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85 (Eng.).

²⁵ Until the Court of Probate Act, 1857, 20 & 21 Vict., c. 77 (Eng.). The Poor (Burials) Act, 1855, 18 & 19 Vict., c. 79 (Eng.), had the same effect in Ireland.

of the Courts-Christian upon the development of the law in these areas cannot easily be exaggerated.²⁶

[11] At least in theory both the Courts-Christian and the King's (secular) courts were supreme within their own fields. This was in an era which saw an ongoing contest throughout Christendom between the Church and secular princes. Medieval jurists were accustomed to what we might call shared sovereignty, and saw nothing amiss with the pope having a concurrent jurisdiction with temporal sovereigns,²⁷ nor with the Church exercising concurrent jurisdiction with the King. In accordance with this principle, espoused in particular by the Bologna school of canonists,²⁸ the Church courts were, and remain, as unfettered within their jurisdiction as the temporal courts within theirs.²⁹ As a general principle, no appeals lay from an ecclesiastical court to a secular court.³⁰ Appeals from the courts of the archbishops lay to the patriarch, in the west

²⁶ This leads to the civil law, and to some extent the canon law also, having a continuing influence upon the development of the common law (and even statute law) in these areas of law; THOMAS SCRUTTON, *THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 163-69* (1885).

²⁷ The pope's powers as a temporal sovereign are recognised in the Roman Catholic Code of Canon Law 1983. In practice, matters of education are dealt with through the administrative hierarchy of the Church, rather than through that of Vatican City State, the residual part of the Papal States.

²⁸ Bologna began as a law school but widened its scope to become a true *universitas litterarum*. The University of Bologna remains, probably the oldest still extant.

²⁹ *R v. Chancellor of St Edmundsbury and Ipswich Diocese*, 2 All E.R. 604 (K.B. 1947), *aff'd*, 2 All E.R. 170 (C.A. 1948).

³⁰ HOLDSWORTH, *supra* note 22, at 9. Cf. RICHARD BURN, *ECCLESIASTICAL LAW* i, 57 (1781), in which he claims there was appeal for failure of justice to the King in his court of nobles. It is instructive that the hierarchical system was copied by the King's courts from the ecclesiastical courts. THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 387-88 (1956).

the bishop of Rome. The right of English litigants to appeal to the pope dates from at least the time of King Stephen,³¹ and probably before.³²

[12] Such appeals were heard either by the pope himself, from the time of pope Gregory VII by his permanent legates, or by special delegates appointed by the pope to hear a particular cause.³³ An appeal to the papacy might omit some preliminary steps, *omisso medio*. Any appeal heard by a subordinate could be appealed to the pope himself, and even appealed from the pope to the pope “better informed.”³⁴

[13] Partly because of the *omisso medio*, but also due to the increasing jealousy of the common law courts, the right to appeal to Rome was in England long subject to restrictions by the King. For, although the church courts were supreme within their jurisdiction, precisely what that jurisdiction was could be the subject of dispute. Nor were the courts immune from contemporary political controversies, particularly those concerned with the respective roles of church and State.³⁵ Attempts were made to limit appeals to Rome, as well as original trials by papal delegates.³⁶ But appeals continued nevertheless, perhaps with the King's licence.

³¹ RICHARD BURN, ECCLESIASTICAL LAW 58 (1781). These were at the instigation of Henri de Blois, bishop of Winchester and papal legate. G.I.O. DUNCAN, THE HIGH COURT OF DELEGATES 2 (1971).

³² MAKOWER, *supra* note 19, at 225-27.

³³ Such as that of King Henry VIII and Queen Catherine of Aragon.

³⁴ MAKOWER, *supra* note 19, at 225-27.

³⁵ Indeed, until the Reformation, the Church and State were essentially indivisible, or, rather, each was an aspect of the whole. See, e.g., Thomas Glyn Watkin, *Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales*, 2 ECCLESIASTICAL LJ 110 (1990).

³⁶ For example, legislation of Edward III and Richard II; Suing in Foreign Courts Act, 1352, 27 Edw. 3 st. 1 c. 1 (Eng.); Suits in Spiritual Courts Act, 1377, 1 Ric. 2 c. 13 (Eng.).

[14] One attempt of many to limit further appeals to Rome was in the Constitution of Clarendon 1164, which gave an additional right of appeal from the primate to the King: “If the archbishop shall have failed in doing justice recourse is to be had in the last resort to our Lord the [K]ing that by his writ the controversy may be ended in the court of the archbishop, because there must be no further process without the assent of our Lord the [K]ing.”³⁷

[15] But the King did not hear the cause or adjudicate upon it in person. He merely corrected slackness or the failure to do justice *si archiepiscopus defecerit in justitia exhibenda*, and by his writ³⁸ directed that the controversy be decided in the metropolitan's court. There would then be a rehearing before the archbishop as metropolitan.³⁹

[16] The most common reason for recourse to the King (*recursus ad principem*) was delay by the Courts-Christian. But the secular power did not, as a general rule, purport itself to decide ecclesiastical questions. These were a matter for the Church, subject to correction if there was a complaint of undue delay.⁴⁰ Otherwise, the jurisprudence of the Church was in the hands of Church courts, presided over by ecclesiastical judges, and whose advocates were trained in canon and civil law rather than the secular common law of the King's courts. As such, the Church courts

³⁷ CONSTITUTION VIII, in WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 133 (1913).

³⁸ *Precepto*.

³⁹ See REPORT OF THE ARCHBISHOPS' COMMISSION, COMMISSION ON ECCLESIASTICAL COURTS, 1883, at i. The archbishop of Canterbury was metropolitan of the province of Canterbury and primate of all England, and the archbishop of York was metropolitan of the province of York and primate of England.

⁴⁰ A situation today covered by the writ of *mandamus*, available from the Queen's Bench Division. Ecclesiastical Jurisdiction Measure, 1963, § 83(2)(c) (Eng.).

were, at least to a significant degree, an intellectual island largely isolated from mainstream English common law developments, yet attuned to canon law developments on the Continent.⁴¹

III. REFORMATION SETTLEMENT

[17] The Statute of Appeals 1532⁴² took away the right to appeals to the papacy in causes testamentary and matrimonial, and in regard to the right to tithes and oblations. A final appeal was given to the archbishop of Canterbury, but in causes touching the King a further appeal was given to the Upper House of Convocation in each province.⁴³

[18] The ending of appeals to Rome was confirmed by the Act of Submission of the Clergy 1533,⁴⁴ which ended all appeals to Rome, and gave a further appeal “for lack of justice” from the archbishops to the king in chancery.⁴⁵ But, unlike the medieval *recursus ad principem*, these latter appeals were heard not by the archbishops' courts by way of rehearing, but by the King in

⁴¹ The precise nature of the legal relationship between pre-Reformation canon and common law is disputed. It is not certain, in particular, whether the canon law was binding in England *ipso facto*, or only if admitted by domestic councils or similar means. See J.W. Gray, *Canon Law in England: Some Reflections on the Stubbs-Maitland Controversy*, in *STUDIES IN CHURCH HISTORY* iii, 48 (1964).

⁴² For the Restraint of Appeals, 1532, 24 Hen 8, c. 12 (Eng.); *Parham v Templar*, 3 Phill. Ecc. 223, 241 (1821), 161 Eng. Rep. 1307.

⁴³ For the Restraint of Appeals, 1532, 24 Hen 8, c. 12 (Eng.).

⁴⁴ 25 Hen 8, c. 19 (Eng.)

⁴⁵ Petitions for default of justice originally lay to the King. But, being unable to hear all causes in person, he usually left the Council to hear and determine the matter and advise him. The Chancellor, as the principal officer, and one originally versed in the laws spiritual and temporal, later undertook this delegated task alone. See HOLDSWORTH, *supra* note 22, at i, 395-476; v, 215-338; ix, 335-408; xii, 178-330, 583-605.

person or his deputies.⁴⁶ For the first time appeals from Church courts would be heard, not by Church dignities or the pope, but by a secular judge, the King or his lay servants.

[19] The judges of the post-Reformation Church courts were still appointed by the Church hierarchy, but as the Church now was required to acknowledge that the King was “supreme Head in earth of the Church of England,”⁴⁷ they were also the King's judges. The judges of the new Church courts were laymen, recruited from the practitioners of the ecclesiastical law Bar, the civilians.⁴⁸ Now, for the first time, the Courts-Christian were also the King's courts. Where once the pope or his delegates might hear appeals, of necessity the pope now gave way to the King and his council, supreme in all questions spiritual as well as temporal. “The abolition of the papal jurisdiction in itself had little direct effect on the substantive law applied in the courts,”⁴⁹ and upon the structure of the courts.⁵⁰ Overall however, the Reformation in England may be characterised as relentlessly juridical in nature.⁵¹

⁴⁶ Re Gorham, Bishop of Exeter, ex parte Bishop of Exeter, 10 C.B. 102, 138 Eng. Rep. 41 (C. P. 1850).

⁴⁷ Act of Supremacy, 1534, 26 Hen 8, c. 1 (Eng.). Repealed by the See of Rome Act, 1554, 1 & 2 Phil. & M., c. 8 (Eng.). Confirmed by the Act of Supremacy, 1558, 1 Eliz., c. 1 (Eng.).

⁴⁸ Trained in the civil law, as well as the ecclesiastical or canon law, they were normally recruited from the Advocates of Doctors' Commons. GEORGE SQUIBB, DOCTORS' COMMONS 31 (1977). Men in holy orders (even as deacons) were ineligible for admission as advocates.

⁴⁹ HELMHOLZ, *supra* note 14, at 38.

⁵⁰ The archdeacons' courts were only finally abolished in 1963, and remained active to the late eighteenth century; Ecclesiastical Jurisdiction Measure, 1963, §§ 82(2)(a), 83 (Eng.).

⁵¹ This was, of course, an ironic twist given that papal authority had been extended and reinforced throughout Western Christendom through the work of the great lawyer-popes and the canonists and civilians.

[20] Some common lawyers advocated the abolition of ecclesiastical courts altogether. But this would have required the fusion of common and canon law, a truly monumental task. The option of abrogating the ecclesiastical laws altogether was not seriously considered. A commission was appointed to prepare a code of “the [K]ing's ecclesiastical laws of the Church of England,”⁵² but the report was shelved. The canon law therefore was to continue in force, except where it was contrary to the common or statute law, or the King's prerogative.⁵³

[21] The two jurisdictions thus existed side by side, but with the balance now weighted in favour of the common law. The law applied by the ecclesiastical courts was now regarded as part of the law of England and the (at least in later centuries) reports of relevant cases in either jurisdiction were cited in the courts exercising the other jurisdiction.⁵⁴ The ecclesiastical law was now fully a part of the laws of England, even if it was not part of the common law.⁵⁵ The

⁵² For a modern edition *see* THE REFORMATION OF THE ECCLESIASTICAL LAWS AS ATTEMPTED IN THE REIGNS OF KING HENRY VIII, KING EDWARD VI, AND QUEEN ELIZABETH (E. Cardwell ed., 1850).

⁵³ Act of Submission of the Clergy, 1533, 25 Hen 8, c. 19 (Eng.).

⁵⁴ Ecclesiastical law is part of the law of the land. The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. When a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly; and where a matter depending on ecclesiastical law finds a place in a cause properly before the temporal courts those courts similarly will ascertain for themselves the ecclesiastical law and apply it as part of the law they administer.

Attorney-General v. Dean and Chapter of Ripon Cathedral, 1 All E.R. 479 (Ch. D. 1945) (citing Mackonochie v. Lord Penzance, 6 App. Cas. 424, 446 (Eng. H.C. 1881)).

⁵⁵ The ecclesiastical law of England consists of the general principles of the *ius commune ecclesiasticum*. Foreign particular constitutions received by English councils or so recognised by English courts (secular or spiritual) as to become part of the ecclesiastical custom of the realm;

ecclesiastical courts were now overtly influenced by developments in the common law courts, and not merely obliged to consider the political or temporal consequences of spiritual judgements, as before the Reformation.

[22] The specialised nature of the jurisdiction and the survival of the civilians preserved the separate Church courts in the face of the jealousy of the common lawyers and the common law judges.⁵⁶ The settlement did not however survive intact for long, and it was that element most closely associated with the royal prerogative which was to suffer first in the seventeenth century struggle between King and commons. This was to have important consequences for the development of the ecclesiastical law.

IV. COURT OF HIGH COMMISSION

[23] It was almost inevitable in view of the impetus of conciliar control in the sixteenth century, that the Privy Council should have intervened judicially in many spiritual matters. The

and the constitutions and canons of English synods. The Submission of the Clergy Act, 1533, 25 Hen 8, c. 19 (Eng.), provided that only the canon law as it then stood was to bind the clergy and laity, and only so far as it was not contrary to common and statute law, excepting only the papal authority to alter the canon law, a power which ended later in 1533, when it was enacted that England was “an Empire governed by one supreme head and [K]ing.” Appointment of Bishops Act, 1533, 25 Hen 8, c. 20 (Eng.). New canon law could only be created by Act of Parliament, and now by Measure, under the Church of England Assembly (Powers) Act, 1919, 9 & 10 Geo. 5, c. 76 (Eng.).

⁵⁶ The influence of Erastianism thought was less pronounced than the belief of the common lawyers in their own correctness and ability to settle all matters spiritual and lay. See J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 92-95 (1979).

council was the agent of the royal supremacy, and the agent of the council was the Court of High Commission.⁵⁷

[24] The Act of Supremacy, 1534⁵⁸ recognised King Henry VIII as “supreme Head in earth of the Church of England,” and assigned to the Crown the power of ecclesiastical visitation. This was given practical effect in 1535 when Thomas Cromwell was appointed vicegerent,⁵⁹ invested with the plenitude of royal authority in ecclesiastical affairs, and directed to delegate part of it from time to time to such persons as he thought fit.⁶⁰ The first general commission replacing a single vicegerent was issued by Edward VI in 1549.⁶¹

[25] The royal powers were confirmed by the Act of Supremacy 1558⁶² which declared the Queen to be: “supreme Governor of this realm . . . as well in all spiritual or ecclesiastical things or causes as temporal,” and authorised the Crown to nominate by letters patent persons to exercise on its behalf “all manner of jurisdictions . . . touching . . . any spiritual or ecclesiastical jurisdiction . . . and to visit, reform, redress, order, correct and amend all . . . errors, heresies, schisms, abuses, offences, contempts and enormities whatsoever.”

⁵⁷ R. G. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* (1913). Usher is now known to be wrong on the origins, history and functions of the High Commission, but remains a useful reference source.

⁵⁸ 26 Hen 8, c. 1 (Eng.).

⁵⁹ From Edmund Bonner’s commission as bishop of London, 1538, *reprinted in* SIR GEOFFREY ELTON, *THE TUDOR CONSTITUTION* 367-68 (1982).

⁶⁰ Act of Supremacy 1534 (26 Hen VIII c 1).

⁶¹ DUNCAN, *supra* note 31.

⁶² 1 Eliz. C. 1 (Eng.).

[26] This approach was repeated in the *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571.⁶³ Thus the ecclesiastical commission was a device to effectively enforce the laws of the Reformation settlement and exercise some degree of control over the Church. By the Court of High Commission the authority of the Church was to be at once controlled and supplemented by that of the State. The Court exercised the pope's supreme personal jurisdiction, particularly in criminal matters.

[27] Until 1565 the work of the Court of High Commission was mainly visitorial, and its authority regarded as temporary. But the continued difficulties experienced in enforcing the settlement, the development of additional administrative functions by the commission itself, and the increasing delegation to it of ecclesiastical or semi-ecclesiastical business from the Privy Council, gave the commissioners a sufficiently permanent tenure to enable them to establish traditions and judicial forms which, in time, transformed a temporary device into a permanent, regularised prerogative court.⁶⁴

[28] In the course of its history the High Commission gradually grew in membership. There were in all 24 members in 1549,⁶⁵ 108 in 1633,⁶⁶ of which three bishops had to sit. Of these one

⁶³ Article 37, Of the Civil Magistrate, "The King's Majesty hath the chief power in this Realm of England, and other his Dominions, unto whom the chief Government of all Estates of this Realm, whether they be Ecclesiastical or civil, in all causes doth appertain, and is not, nor ought to be, subject to any foreign Jurisdiction"

⁶⁴ This is shown in the change of style of the tribunal from "High Commission" by 1570, to "Court" by 1580.

⁶⁵ Including 15 clergy, 5 Ministers of the Crown, 3 civilians, and a common lawyer. USHER, *supra* note 57, at 90.

⁶⁶ Including 46 clergy, 37 Privy Counsellors and dignitaries, 10 civilians, and 15 common lawyers. *Id.* at 255.

had to be one of the quorum, which numbered 11 in 1549,⁶⁷ and 68 in 1633.⁶⁸ There was an effective nucleus of canon lawyers, though the formal teaching of canon law in the universities was prohibited after 1535.⁶⁹

[29] The Court of High Commission was an attempt to claim for the Council a jurisdiction modelled on that exercised by the pope, of hearing a complaint at first instance, where a party was sufficiently powerful to prejudice a fair trial in the ordinary courts.⁷⁰ It also incorporated the power assumed by the early chancery of interfering with normal procedure where for some reason it appeared to have perpetuated an injustice. But the court was quickly denounced; its jurisdiction opposed by puritans, common lawyers, and common law judges alike, and was abolished in 1641.⁷¹

V. RESTORATION SETTLEMENT

⁶⁷ *Id.* at 90

⁶⁸ *Id.* at 255.

⁶⁹ The ending of the teaching of canon law in the universities did not, of course, end the study of this system of law, as the members of Doctors' Commons preserved the ancient learning.

⁷⁰ Though its jurisdiction was limited; the Elizabethan Act establishing the Court had provided that it was to regard as heresy nothing that was not expressly denounced as such in the plain words of Scripture, by the first four general councils, and by Parliament with the concurrence of the two convocations. Act of Supremacy, 1558, 1 Eliz. c. 1, § 36 (Eng.); Ecclesiastical Jurisdiction Act, 1677, 29 Chas. 2, c. 9 (Eng.); Case of Heresy 12 Co. Rep. 56, 77 Eng. Rep. 1335 (1601); SIR ROBERT PHILLIMORE, *THE ECCLESIASTICAL LAW OF THE CHURCH OF ENGLAND* i, 842 (2d Edition, Sir William Phillimore & C.F. Jemmett eds., 1895).

⁷¹ Abolition of High Commission Court Act, 1640, 16 Chas. c. 11 (Eng.); Clergy Act, 1640, 16 Chas. c. 27 (Eng.). Confirmed by Ecclesiastical Jurisdiction Act, 1661, 13 Chas. 2, st. 1, c. 12, §§ 3-4 (Eng.). It was revived briefly 1686-88, and finally suppressed by The Bill of Rights, 1688, 1 Will. & M., sess. 2, c. 2, § 1 (Eng.), which declared King James II's Court of Commissioners (under which title the Court of High Commission was revived) was illegal and pernicious.

[30] The Civil Wars of the seventeenth century ended with a general acceptance of Erastian ideology by Restoration prelates and their allies.⁷² This approach, which stressed the interdependence of Church and State in England, was not consistent with the traditional lay perception of the Church, nor was it entirely novel in clerical circles.⁷³ The desirability of a liturgical and doctrinal uniformity after a period of upheaval was expressed in the new *Prayer Book*,⁷⁴ and was for a time achieved, to a degree unmatched since.⁷⁵

[31] With the coming of King William III and Queen Mary II, the High Church understanding of the royal supremacy suffered a serious setback. Erastians saw the supremacy as that of the whole apparatus of government, carried out in the name of the Sovereign.⁷⁶ No longer could it be seen as the supremacy of the Sovereign personally—still less could this be true under the Roman Catholic King James II. The ecclesiastical law was seen as being as much a part of the

⁷² The Restoration ecclesiastical judiciary was marked by an intellectual rapprochement between church and State. ROBERT RODES, *LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND* 13 (1991). For the politics of the Restoration see ROBERT BOSHER, *THE MAKING OF THE RESTORATION CHURCH SETTLEMENT* 143-217 (1951); A Whiteman, *The Reestablishment of the Church of England, 1660-1663*, in *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* v, 111 (5th series, 1955).

⁷³ See Rt Revd Edward Stillingfleet, *Irenicum- A Weapon-Salve for the Church's Wounds or the Divine Right of Particular Forms of Church Government* ii (2d ed. 1662).

⁷⁴ BOOK OF COMMON PRAYER (1662), backed by the Act of Uniformity, 1662, 14 Chas. 2, c. 4 (Eng.).

⁷⁵ The good inherent in uniformity, in distinction to the good in any liturgical or doctrinal uniformity, was stressed in HUGH DAVIS, *DE JURE UNIFORMITATIS ECCLESISTICAE* (1669).

⁷⁶ RODES, *supra* note 72, at 5.

law of the land as the common law itself.⁷⁷ The spirit of the age was very much in favour of the Church courts and the common law courts working as part of a unified system of laws.⁷⁸

[32] Until the Civil Wars, the two systems had operated largely independently, now they were motivated by a sense of common purpose.⁷⁹ Before the Reformation the ecclesiastical courts had paid little or no attention to either common law or statute, and had accepted writs of prohibition from the Court of King's Bench only as *force majeure*.⁸⁰ The period 1533-1660 had been one of adjustment. After 1660 an intellectual rapprochement occurred. Canonists made greater use of common law precedents and statutes,⁸¹ and even the common lawyers were less inclined to deny the canonists their jurisdiction—though it was by now largely limited to testamentary and matrimonial matters.

[33] The estrangement of the bishops and clergy from their courts was in part attributable to the integration of the latter into the unified Erastian structure. But it may have had its roots in Elizabethan ecclesiastical judicial administration. The first generation after the Reformation was

⁷⁷ Rt Revd Edward Stillingfleet, *Ecclesiastical Cases, Part II*, in *WORKS* iii, 742 (1709).

⁷⁸ Judges and counsel were at pains to adjust their various precedents to this end. *See, e.g.*, *Slater v Smalebrooke*, 1 Sid. 27, 82 Eng. Rep. 1066 (1665).

⁷⁹ *RODES*, *supra* note 72, at 10-14.

⁸⁰ By 1753 the Court of Arches could recognise it as *res judicata*. *Pattern v Castleman*, 1 Lee. 387, 161 Eng. Rep. 143 (Arches 1753). The Court also decided that ecclesiastical courts would try customs according to common law rules.

⁸¹ See, for illustration, the writings of ecclesiastical lawyers of the post-Restoration period (the term canonists is probably a misnomer). JOHN AYLLIFFE, *PARERGON JURIS CANONICI ANGLICANI, OR, A COMMENTARY, BY WAY OF SUPPLEMENT TO THE CANONS AND CONSTITUTIONS OF THE CHURCH OF ENGLAND, ETC* (1727); RICHARD BURN, *ECCLESIASTICAL LAW* (1763); RT REVD EDMUND GIBSON, *CODIX JURIS ECCLESIASTICICI ANGLICANI* (1713). Within the courts themselves, a similar broad-minded approach was also clear. *DaCosta v Villareal*, 2 Strange 961, 93 Eng. Rep. 968 (1753); *Phillips v Crawley*, 1 Freeman 83, 89 Eng. Rep. 61 (1673).

less legalist, and more efficient, than the medieval canonists were. That after the Restoration was more legalist, but perhaps less central to Church life.⁸² Rather than strengthening the position of the Church courts, this had the effect of emphasising their increasingly marginal role within the Church, and their weakness when compared to the secular courts.

VI. COURT OF DELEGATES

[34] The royal supremacy remained theoretically and practically real. This was so whether this was exercised through the Church courts or lay courts, for all were the King's courts.⁸³ One post-Reformation element in this supremacy was the Court of Delegates.

[35] King Henry VIII exercised the ecclesiastical jurisdiction conferred by the Act of Supremacy 1534⁸⁴ through his vicegerent. King Edward VI exercised it through a Commission of Delegates (the Court of Delegates),⁸⁵ established under the Act of Submission of the Clergy 1533.⁸⁶

⁸² RODES, *supra* note 72, at 14.

⁸³ The combined effect of the Statute of Appeals, 1532, 24 Hen 8, c. 12 (Eng.); Ecclesiastical Licences Act, 1533, 24 Hen 8, c. 21 (Eng.); Act of Supremacy, 1534, 26 Hen 8, c. 1 (Eng.); and later legislation.

⁸⁴ Act of Supremacy, 1534, 26 Hen 8, c. 1 (Eng.).

⁸⁵ *Judices delegati*.

⁸⁶ Submission of the Clergy Act, 1533, 25 Hen 8, c. 19 (Eng.). For the history of the Court of Delegates see BLACKSTONE, COMMENTARIES, *supra* note 17, at iii, 66; HOLDSWORTH, *supra* note 22, at i, 603-05; DUNCAN, *supra* note 31.

[36] The Court of Delegates heard appeals that formerly would have been assigned to papal delegates. Its members were secular judges and civilians, appointed by the Court of Chancery⁸⁷ and, frequently, lords spiritual and temporal.⁸⁸ From the Court of Delegates appeal lay to specially appointed Commissions of Review.

[37] Unless the King was to be regarded as an ecclesiastical person,⁸⁹ these were not properly speaking ecclesiastical courts, although spiritual persons might sit in them, for they sat only as royal commissioners.

[38] The Court of Delegates was criticised on the grounds that members were appointed afresh for each cause,⁹⁰ and because it gave no reasons for its decisions,⁹¹ and did not follow a formal rule of precedent.⁹² The members were often common law judges unfamiliar with the

⁸⁷ DUNCAN, *supra* note 31.

⁸⁸ HENRY STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* iii, 432-33 (1979).

⁸⁹ The Sovereign has been held to be a canon or prebendary of St David's Cathedral, Pembrokeshire, Wales. This is clearly however the result of confusion between ownership of the temporality and personal spiritual authority. In some respects however the Sovereign may be seen as a quasi-religious person. This is seen in the ceremonial of the coronation- particularly the anointing, and in the royal robes and vestments. PERCY SCHRAMM, *THE HISTORY OF THE ENGLISH CORONATION* (1937).

⁹⁰ Some formal shape was given to the court by the Submission of the Clergy Act, 1533, 25 Hen 8, c. 19 (Eng.), and the Act of Supremacy, 1558, 1 Eliz., c. 1 (Eng.).

⁹¹ DUNCAN, *supra* note 31, at 173; *Countess of Essex v Earl of Essex*, 2 St. Tr. 786, 828 (1613).

⁹² Nor was it a court of record, a court whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony. BLACKSTONE, *COMMENTARIES*, *supra* note 17, at iii, 24. No court can fine or imprison which is not a court of record. *Godfrey's Case*, 11 Co. Rep. 42a, 43b, 77 Eng. Rep. 1199 (1614).

ecclesiastical law, or of the procedures of civil and canon law courts.⁹³ The resulting lack of continuity and uncertainty can be imagined. But more importantly, the intellectual independence of the ecclesiastical law began to be affected by the involvement of common lawyers, who represented a quite different legal tradition.

[39] The ecclesiastical judges refused to follow the decisions of the Court of Delegates, and, following a review of its operation⁹⁴ it was replaced in 1833 by the newly regularised Judicial Committee of the Privy Council.⁹⁵

VII. THE PRIVY COUNCIL AS AN ECCLESIASTICAL COURT

[40] The Judicial Committee of the Privy Council followed common law procedures, and applied precedents according to the common law doctrine of *stare decisis*.⁹⁶ It was a manifestly lay institution, and one driven by common law traditions. Doctrinal or liturgical questions did not loom large in the regular business of the Court of Delegates, and most ecclesiastical appeals involved the probate and matrimonial jurisdiction.⁹⁷ However, this jurisdiction was to be lost

⁹³ For the procedure of the court *see* DUNCAN, *supra* note 31, at 81-177.

⁹⁴ REPORT OF THE ARCHBISHOPS' COMMISSION, THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS OF ENGLAND AND WALES, 1831-32, [199], part xxiv, at 1.

⁹⁵ Judicial Committee Appeals Act, 1833, 3 & 4 Will. 4, c. 41 (Eng.).

⁹⁶ The rule that precedents set by earlier court decisions must be followed where applicable.

⁹⁷ W.L. MATHIESON, ENGLISH CHURCH REFORM, 1815-1840 156 (1928).

from the middle of the century, in time for the liturgical controversies surrounding the High Churchmen of that time.⁹⁸

[41] Although the Church Discipline Act 1840⁹⁹ had made all archbishops and bishops members of the Judicial Committee, and required their presence as assessors for an ecclesiastical appeal, they were removed by the Appellate Jurisdiction Act 1876.¹⁰⁰ Prelates were now eligible to be appointed members of the Judicial Committee, and an archbishop or the bishop of London, and four other bishops could be called as assessors for ecclesiastical causes.¹⁰¹

[42] In the 1840s a series of liturgical and doctrinal cases were decided in the Judicial Committee. In its approach to doctrine the Judicial Committee was very clear that its role was not to bear witness to any particular truth, but simply to set the limits of what was legally permissible.¹⁰² Early and famous instances of this legalist approach were *Gorham*¹⁰³ and the *Essays and Reviews* Case.¹⁰⁴

⁹⁸ Though some judgments, such as *Gorham*, were a blow to the High and Low Churches alike. RODES, *supra* note 72, at 274.

⁹⁹ 3 & 4 Vict., c. 86 (Eng.).

¹⁰⁰ 39 & 40 Vict., c. 59 (Eng.).

¹⁰¹ Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59 (Eng.); Order in Council dated 11 December 1865, Rules for Appeals in Ecclesiastical and Maritime Causes, r 3.

¹⁰² RODES, *supra* note 72, at 259.

¹⁰³ *Gorham v Bishop of Exeter*, 2 Rob. Ecc. 1, 163 Eng. Rep. 1221 (Arches, 1849); GEORGE BRODRICK AND REVD W.H. FREMANTLE, A COLLECTION OF THE JUDGMENTS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL IN ECCLESIASTICAL CASES RELATING TO DOCTRINE AND DISCIPLINE 64 (1865); JCS NIAS, *GORHAM AND THE BISHOP OF EXETER* (1951).

¹⁰⁴ *Bishop of Salisbury v Williams*, 1 New Rep. 196 (Arches, 1862); *Fendall v Wilson*, 1 New Rep. 213 (Arches, 1862); *Williams v Bishop of Salisbury*, 2 Moo. 375, 15 Eng. Rep. 943 (1863); BRODRICK & FREMANTLE, *supra* note 103, at 247.

[43] In the course of the century some obsolete jurisdictions were allowed to become defunct, and measures were taken in an attempt to improve the efficiency of the administration of the remaining jurisdiction of the ecclesiastical courts. The Public Worship Regulation Act 1874¹⁰⁵ was an ill-fated attempt to simplify procedures in liturgical cases.¹⁰⁶ It increased rather than allayed discontent, a particular resentment being that the final appellate authority was a non-ecclesiastical body.¹⁰⁷

[44] The first judge appointed under the 1874 Act, which effectively combined the offices of Dean of the Arches and Official Principal of the Chancery Court of York, was Lord Penzance. He refused to take the customary oaths of office and execute the canonical subscription that had been required for the offices now merged into his. Although he may have been legally correct, his stand did nothing to commend the legitimacy of his subsequent judgments to those who felt that only an ecclesiastical court—and one staffed by trained canonists—could decide liturgical questions.¹⁰⁸

[45] After 1884 some dissatisfaction had been expressed with appeals to the Judicial Committee of the Privy Council in its existing form.¹⁰⁹ It was not necessarily the lack of canonical

¹⁰⁵ 37 & 38 Vict., c. 85 (Eng.).

¹⁰⁶ See PTM MARSH, *THE VICTORIAN CHURCH IN DECLINE: ARCHBISHOP TAIT AND THE CHURCH OF ENGLAND 158-92* (1969).

¹⁰⁷ Though in *Pattern v Castleman*, 1 Lee. 387; 161 Eng. Rep. 143 (Arches 1753), the Arches Court held that ecclesiastical courts were to try custom according to common law rules.

¹⁰⁸ RODES, *supra* note 72, at 257; MARSH, *supra* note 106, at 229.

¹⁰⁹ W. FINLAYSON, *HISTORY, CONSTITUTION AND CHARACTER OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* (1878), gives a good statement of the objection to this tribunal. SIR LEWIS DIBDIN, *CHURCH COURTS* (1881), contains a defence.

learning of the judges in that tribunal, even its decisions, but rather the secular character of the body, and the secular means by which the judges decided the outcome, which aroused criticism.¹¹⁰ It must be said that the High Church party were at times curiously inclined to oppose the decisions even of undoubtedly ecclesiastical courts.¹¹¹ Such an attitude was not maintained without criticism.¹¹²

[46] Six commissions inquiring into Church courts were conducted from 1883 to 1952, and the recommendations of the last were enacted in 1963.¹¹³ The three most recent commissions had suggested adding clergy to the Judicial Committee of the Privy Council. In matters not concerning doctrine or ritual the commission expressed some doubt as to the need for a second appeal, beyond the provincial courts.

[47] The 1951-1954 commission on ecclesiastical courts chaired by Mr Justice Lloyd-Jacob recommended that these courts be divided into conduct cases (morality and neglect of duty), and

¹¹⁰ Rodes refutes Bowen's contention that the objectionable decisions of the Judicial Committee were attributable to the lack of canonical learning among the common judges who sat. RODES, *supra* note 72, at 286, 449n; DESMOND BOWEN, *THE IDEA OF THE VICTORIAN CHURCH* 90-96 (1968).

¹¹¹ See COKER ADAMS, *THE CHURCH AND THE LAW* (1881); EDWARD PUSEY, *UNLAW IN JUDGEMENTS OF THE JUDICIAL COMMITTEE, AND ITS REMEDIES* (1881); RICHARD ENRAGH, *MY ORDINATION OATH* (1880); W. FINLAYSON, *HISTORY, CONSTITUTION AND CHARACTER OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* (1878); MALCOLM MACCOLL, *LAWLESSNESS, SACERDOTALISM, AND RITUALISM* (1875); ALEXANDER MACKONCHIE, *FIRST PRINCIPLES VERSUS ERASTIANISM* (1876); CHARLES LINDLEY WOOD, *AN ADDRESS DELIVERED AT THE ANNUAL MEETING OF THE ENGLISH CHURCH UNION HELD IN THE FREEMASONS' TAVERN, JUNE 18, 1878* (1878); CHARLES LINDLEY WOOD, *THE JUST LIMITS OF COMPREHENSION IN THE NATIONAL CHURCH* (1878); EG Wood, *Ecclesiastical Suits*, in *ECCLESIASTICAL REFORM* (Orby Shipley ed., 1873).

¹¹² SIR LEWIS DIBDIN, *CHURCH COURTS* (1881), *ESTABLISHMENT IN ENGLAND* (1932).

¹¹³ *Ecclesiastical Jurisdiction Measure, 1963* (Eng.).

reserved cases (doctrine and ritual). The former would be heard by consistory courts and the provincial courts. The latter would be heard by a new Court of Ecclesiastical Causes Reserved. The power of the Queen in Council to hear and determine suits of *duplex querda* (the refusal by a bishop to institute to a benefice) was abolished in 1964.¹¹⁴

[48] Under the new arrangements, implemented the same year, the question of whether the Judicial Committee of the Privy Council will hear an appeal depends upon whether the matter involves a point of doctrine, ritual, or ceremonial. It hears appeals from the Arches Court, and the Chancery Court of York, except on matters of doctrine, ritual or ceremonial.¹¹⁵ If the matter does not involve a reserved cause, appeal remains from the consistory court, to the provincial court, and finally to the Judicial Committee of the Privy Council.

[49] If the Chancellor certifies that such a reserved matter is involved, then a civil or criminal case is appealed to the new Court of Ecclesiastical Causes Reserved directly from the consistory court, bypassing the provincial court. The Court of Ecclesiastical Causes Reserved also has jurisdiction to hear appeals against pastoral schemes of Pastoral Committees,¹¹⁶ and against schemes prepared by the Cathedrals Commission.¹¹⁷ Proceedings are governed by the Rules in Ecclesiastical and Maritime Causes.¹¹⁸ From the Court of Ecclesiastical Causes Reserved

¹¹⁴ Ecclesiastical Jurisdiction Measure, 1963, § 82(1) (Eng.).

¹¹⁵ Ecclesiastical Jurisdiction Measure, 1963, §§ 1(3)(b), 8(1) (Eng.); Revised Canons Ecclesiastical, Canon G1, para. 5. As of this writing, the Judicial Committee has not yet been asked to hear any such appeal.

¹¹⁶ Pastoral Measure, 1968, § 8(2) (Eng.).

¹¹⁷ Cathedrals Measure, 1963, § 3(8)-(9) (Eng.).

¹¹⁸ Order in Council 11 December 1865, as modified.

appeal lies to the new Commission of Review. The Judicial Committee of the Privy Council is excluded from the process altogether.¹¹⁹

[50] Fear of repetition of the ritual prosecutions of the nineteenth century, and a dislike for many of the decisions reached on these matters by the Judicial Committee of the Privy Council,¹²⁰ meant that the Privy Council is not now authorised to decide any matter which involves a question of Church doctrine, ritual, or ceremonial. Such matters have passed to a new court.

VIII. THE COURT FOR ECCLESIASTICAL CAUSES RESERVED

[51] When the Court for Ecclesiastical Causes Reserved was created in 1963, the Church of England gained a new court for deciding appeals in matters of doctrine, ritual or ceremonial. In keeping with the principal that the Church courts are also the Queen's courts the five judges are appointed by Her Majesty the Queen. Two must be or have held high judicial office and be a communicant of the Church of England; three must be or have been diocesan bishops.¹²¹ In

¹¹⁹ For the reasons for this exclusion, see the REPORT OF THE ARCHBISHOPS' COMMISSION, THE ECCLESIASTICAL COURTS 1954, at 23-24.

¹²⁰ Examples of such cases include *Hebbert v Purchas*, 4 C.P. 301 (L.R., 1872), and *Ridsdale v Clifton*, 2 P.D. 276 (P.C. 1877) (citing *Liddell v Westerton*, 5 W.R. 470 (P.C. 1856)). Moores Special Report, which held that only the cope (for cathedral and collegiate Church dignitaries) and the surplice were legal vestments, with a hood for deans and prebendaries. For a number of reasons these judgments were never enforced. *In Re Robinson*, *Wright v Tugwell* [1897] Ch 85, the Court of Appeal held that a post-Reformation usage may be lawful if no objection to its legality can be found, so that a warrant for the use of a black gown for preaching was found in its user for several centuries.

¹²¹ Ecclesiastical Jurisdiction Measure, 1963, § 5 (Eng.).

criminal matters there must be no less than three and no more than five advisers selected by the Dean of the Arches and Auditor¹²² from a panel of eminent theologians and liturgiologists.¹²³

[52] A complaint against a priest or deacon may be vetoed by his or her bishop, and one against a bishop by his archbishop. Before a case is heard, a preliminary enquiry by a committee decides whether there is a case to answer. In the case of a priest or deacon, the Committee of Inquiry consists of the diocesan bishop, two members of the Lower House of Convocation of the Province, and two diocesan chancellors. There are other provisions where the accused is a bishop.

[53] If the Committee allows the case to proceed, the Upper House of Convocation appoints a complainant against the accused in the Court for Ecclesiastical Causes Reserved, where the procedure resembles that of the High Court but without a jury. However, the Court sits with five advisers chosen from panels of theologians or liturgiologists.

[54] The Court has to date sat only twice, and in both cases the appeal was allowed. The first case concerned a faculty authorising an icon and candlestick introduced into a church without a faculty.¹²⁴ It was a comparatively straightforward case, and a single judgment applied a decision

¹²² The Dean of the Arches must be a barrister of ten years' standing, or high judicial office; Ecclesiastical Jurisdiction Measure, 1963, § 3(3) (Eng.); Revised Canons Ecclesiastical, Canon G3, para. 3.

¹²³ Ecclesiastical Jurisdiction Measure, 1963, § 45(2) (Eng.).

¹²⁴ *In Re St Michael and All Angels, Great Torrington*, 2 W.L.R. 857, Fam. 81 (1985). A faculty is the authorisation from a chancellor, on behalf of his or her bishop, for something to be done which the ecclesiastical law ordinary disallows, such as altering a church. The faculty jurisdiction is founded on the Ecclesiastical Licences Act 1533-1534 (25 Hen VIII c 21).

of the Court of Arches.¹²⁵ In the second case, a ten-tonne circular marble sculpture by Henry Moore was not allowed as a holy table.¹²⁶ This was a much more substantial case (literally as well as figuratively), with the hearing occupying eleven days.¹²⁷ The decision reached may not necessary have been a legally unassailable one, but it was more theological in basis than one which the Judicial Committee of the Privy Council might have reached in similar circumstances.¹²⁸ That was doubtless one of the reasons for constituting the body as it is.¹²⁹

¹²⁵ *In Re St Edburga's, Abberton*, 3 All E.R. 269 (1962). The judges were Sir Hugh Forbes (Queen's Bench judge, and a former diocesan chancellor), Rt Hon Sir Anthony Lloyd (Court of Appeal judge), the Bishop of Rochester (Rt Revd Richard Say), the Bishop of Chichester (Rt Revd Eric Kemp, a celebrated canonist), and Rt Revd Kenneth Woollcombe (former bishop of Oxford, and a leading theologian). The judgment, which followed a single hearing day, was read by Mr Justice Forbes, who presided. *In Re St Michael and All Angels, Great Torrington*, 2 W.L.R. 857, Fam. 81 (1985).

¹²⁶ As required by the Holy Table Measure, 1964 (Eng.), Canon F2, and Church of England (Worship and Doctrine) Measure, 1974 (Eng.); *In Re St Stephen's, Walbrook*, 2 All E.R. 578, Fam. 146 (1987).

¹²⁷ The judges were Rt Hon Sir Anthony Lloyd (a Court of Appeal judge, the Bishop of Rochester, the Bishop of Chichester, and Rt Revd Kenneth Woollcombe, and the Rt Hon Sir Ralph Gibson (a Court of Appeal judge who replaced Sir Hugh Forbes, who had died in the interval). *In Re St Stephen's, Walbrook*, 2 All E.R. 578, Fam. 146 (Court of Ecclesiastical Causes Reserved, 1987); RODES, *supra* note 72, at 278.

¹²⁸ The judgment was contained in speeches of three of the five judges, including the Bishop of Chichester, with the Bishop of Rochester and the Rt Revd Kenneth Woollcombe agreeing with the reasons given by Lord Justices Lloyd and Gibson, and Bishop Kemp. In the House of Lords all peers have the right to vote though the last to do so was Lord Denman in *Bradlaugh v Clarke*, 8 App Cas 354 (H.L., 1883). All members of the Judicial Committee of the Privy Council have the right to give a judgment, though prelates have not been specifically appointed members since the Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59 (Eng.).

¹²⁹ Parallels may be drawn with the famous Lincoln Judgment, when the Archbishop of Canterbury, personally hearing a cause, made greater use of historical evidence than the Judicial Committee of the Privy Council was wont to do; *Ex parte Read*, 12 P.D. 221 (1888), A.C. 644 (P.C. 1892); *Read v Bishop of Lincoln*, 14 P.D. 88, 148 (1889); GEORGE RUSSELL, EDWARD KING, BISHOP OF LONDON 132-210 (1912).

IX. COMMISSIONS OF CONVOCATION

[55] Commissions of Convocation are appointed by the Upper Houses of the two Convocations to try an archbishop or bishop.¹³⁰ Both Convocations make the appointment if an archbishop is involved.¹³¹ The Commission would comprise four diocesan bishops¹³² and the Dean of the Arches, who would preside.¹³³ Doctrine, ritual, and ceremonial are excluded from the jurisdiction of the Commissions of Convocation. Appeal would lie to a Commission of Review.

X. COMMISSIONS OF REVIEW

[56] A Commission of Review may be appointed by Her Majesty the Queen on the petition of an appellant¹³⁴ to hear appeals from the Court for Ecclesiastical Causes Reserved, and from the Commissions of Convocation.¹³⁵ This would comprise three Lords of Appeal (being communicants of the Church of England), and two Lords Spiritual sitting as Lords of Parliament.¹³⁶ If doctrine is in issue the Commission would sit with five advisers chosen from

¹³⁰ Ecclesiastical Jurisdiction Measure, 1963, § 9(2) (Eng.); Revised Canons Ecclesiastical, Canon G1, para. 2 b.

¹³¹ Ecclesiastical Jurisdiction Measure, 1963, § 9(1) (Eng.); Revised Canons Ecclesiastical, Canon G1, para. 3 b.

¹³² Ecclesiastical Jurisdiction Measure, 1963, § 35 (Eng.).

¹³³ Ecclesiastical Jurisdiction Measure, 1963, § 36(a) (Eng.).

¹³⁴ Ecclesiastical Jurisdiction Measure, 1963, § 11(1)-(2) (Eng.).

¹³⁵ Ecclesiastical Jurisdiction Measure, 1963, § 1(3)(c) (Eng.); Revised Canons Ecclesiastical, Canon G1 para. 4.

¹³⁶ Ecclesiastical Jurisdiction Measure, 1963, § 11(4) (Eng.). This requirement has not been affected thus far by the reforms to the House of Lords, as the bishops have retained their seats.

panels of theologians. Decisions of previous Commissions of Review are binding, but not those of the Judicial Committee of the Privy Council on matters of doctrine, ritual, or ceremonial.¹³⁷

The Commission of Review procedure has not yet been used.¹³⁸

[57] Like appeals to the Judicial Committee of the Privy Council, those to a Commission of Review are not strictly to a Church court. Like the Judicial Committee, the Commission of Review acts as an advisory body for the Sovereign. Though the membership of a Commission would comprise Church members, lay and clerical, it is nevertheless as much a secular as it is an ecclesiastical body. This is a consequence of the history of the Church of England, and its continued links with the secular power. Yet it need not be seen as in any way restricting the authority of the Church to regulate its own doctrine.

[58] Whilst concentrating on the perceived subordination of Church courts to secular judicial bodies, it may be said that many in the Church overlooked the less obvious, but more invidious, effect that the common law was having on the Church courts. For the Church courts have themselves chosen to adopt the rule of *stare decisis*, and to cite judgments of the common

However, further reforms are likely, and the prelates may follow the hereditary peers out of the House; House of Lords Act 1999.

¹³⁷ Ecclesiastical Jurisdiction Measure, 1963, § 48(5)-(6) (Eng.).

¹³⁸ Section 1 (3)(c) makes the ad hoc nature of the Commissions of Review quite unequivocal.

[T]here may, in accordance with the provisions in that behalf of this Measure, be appointed by Her Majesty commissioners who shall have such jurisdiction as is conferred on them by this measure with respect to the review of findings of any commission of Convocation appointed under paragraph (b) of the last foregoing subsection and paragraph (a) of this subsection, and also of the Court of Ecclesiastical Causes Reserved.

Ecclesiastical Jurisdiction Measure, 1963, § 1 (3)(c) (Eng.).

law courts. As these latter courts based their judgments solely upon the common law, the judgments of the ecclesiastical courts came to be imbued with the spirit of the common law.

XI. COMMON LAW INFLUENCES ON THE ECCLESIASTICAL COURTS

[59] Only with the reign of King Henry VIII did the ecclesiastical courts become the King's courts. But applicants could always sue for writs of prohibition¹³⁹ or *mandamus*¹⁴⁰ from the King's courts. These may still issue out of the Queen's Bench Division to restrain ecclesiastical courts from exceeding their jurisdiction, or to compel them to cease delaying hearing any matter.¹⁴¹ There is no recorded instance of a writ being issued to papal legates, though suitors have been prohibited from appealing to the pope.¹⁴² The tribunals subject to these writs are likely to include the Judicial Committee of the Privy Council. For the enforcement of their own judgments, and the maintenance of order, contempt of a consistory court would be dealt with by the High Court.¹⁴³

¹³⁹ *Circumspecte Agatis*, 1285, 13 Edw. (Eng.). This is an order to forbid an inferior court from proceeding in a cause there pending, suggesting that the cognisance of it does not belong to that court.

¹⁴⁰ Though not certiorari, as the courts are unfettered within their jurisdiction. *R v. Chancellor of St Edmundsbury and Ipswich Diocese*, 2 All E.R. 604 (K.B. 1947), *aff'd*, 2 All E.R. 170 (C.A. 1948). The order commanded that proceedings be removed from an inferior court into a superior court for review. In this respect the ecclesiastical courts were not inferior to the High Court.

¹⁴¹ This indirect control of the ecclesiastical courts was expressly preserved by the Ecclesiastical Jurisdiction Measure, 1963, § 83(2)(c) (Eng.).

¹⁴² *Mayor of London v Cox*, 2 H.L. 239, 280 (L.R., 1867) per Willes J.

¹⁴³ Ecclesiastical Jurisdiction Measure, 1963 § 81(2) (Eng.); *R v Daily Herald ex parte Bishop of Norwich*, 2 K.B. 402 (1932). The High Court enjoyed inherent jurisdiction to correct errors in lower courts.

[60] The temporal courts constrained excesses of jurisdiction by the Church courts even before the Reformation. The influence of these writs and orders since then upon the substantive ecclesiastical law has probably not been significant. What was significant was the influence of the principles of the common law.

[61] The common law was hostile at once to the prerogative and the ecclesiastical law. Both limited the scope of actions possible in the common law courts. The criminal jurisdiction of the ecclesiastical courts included heresy, adultery, incest, fornication, simony, brawling in Church, defamation,¹⁴⁴ and others. Some Tudor and Stuart legislation made secular offences of conduct that had fallen within the Church's exclusive jurisdiction.¹⁴⁵ This led to a shared jurisdiction, which in the long term proved more harmful to the ecclesiastical courts in the face of the jealousy of the common law, and the more efficient processes of the common law courts. The settlement of the Church after the disruption of the civil wars of the seventeenth century may have led to an intellectual rapprochement, but this encouraged intellectual borrowing from the common law, which was to erode the distinct identity of the ecclesiastical law.¹⁴⁶

[62] Although the ecclesiastical jurisdiction was further confined in the course of the nineteenth century, this was more a symptom than a cause of this decline. The ecclesiastical

¹⁴⁴ This was lost in 1855. Ecclesiastical Courts Act, 1855, 18 & 19 Vict., c. 41, § 1 (Eng.). In Ireland the same effect was achieved by the Ecclesiastical Courts Jurisdiction Act, 1860, 23 & 24 Vict., c. 32 (Eng.).

¹⁴⁵ Witchcraft Act, 1562, 5 Eliz., c. 16 (Eng.); Sodomy Act, 1562, 5 Eliz., c. 17 (Eng.); Fraudulent Conveyances Act, 1571, 13 Eliz., c. 5 (Eng.); Bankruptcy Act, 1571, 13 Eliz., c. 7 (Eng.); Poor Act, 1575, 18 Eliz., c. 3 (Eng.); Bigamy Act, 1603, 1 Jac. c. 11 (Eng.); Plays Act, 1605, 3 Jac., c. 21 (Eng.).

¹⁴⁶ The very term ecclesiastical law has been used to describe the laws of the Church, including those enacted by the secular State, in contrast to the canon law, which is purely ecclesiastical in nature. See Thomas Glyn Watkin, *Vestiges of Establishment* 2 ECCLESIASTICAL L.J. 110 (1990).

courts lost their power to punish laymen for brawling in 1860.¹⁴⁷ The residual criminal jurisdiction over the laity was abolished in 1963.¹⁴⁸ They retained a power to discipline clergy, and (it would seem) laymen holding office in the Church, to determine questions of doctrine and ritual, to protect Church property, and to decide civil disputes relating to ecclesiastical matters.¹⁴⁹

[63] The jurisdiction of the ecclesiastical courts was reduced in England in the nineteenth century in part because of a lack of understanding of the procedure of the ecclesiastical law.¹⁵⁰ In an 1830 report ecclesiastical courts were criticised for failing to give reasons for their decisions, and for not following a system of precedent.¹⁵¹ Yet theirs was a canon law-based system, and not bound to follow the principles or procedures of the common law.¹⁵²

¹⁴⁷ Ecclesiastical Courts Jurisdiction Act, 1860, 23 & 24 Vict., c. 32 § 1 (Eng.).

¹⁴⁸ Ecclesiastical Jurisdiction Measure, 1963 (Eng.).

¹⁴⁹ The principal activity of the Church courts is in the faculty jurisdiction. G. H. NEWSOM, *FACULTY JURISDICTION OF THE CHURCH OF ENGLAND* (2d ed. 1993).

¹⁵⁰ Though dissatisfaction with ecclesiastical courts appears to have been fairly general at that time. *Knight v Jones* (1821) Records of the Court of Delegates 8/79 (for a letter of complaint contained within the cause papers).

¹⁵¹ REPORT OF THE ARCHBISHOPS' COMMISSION, *THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS OF ENGLAND AND WALES, 1831-32*, at xxiv, 1. For the question of adjusting common law and ecclesiastical precedents see *Burgoyne v Free*, 2 Add. 405, 162 Eng. Rep. 343 (Arches 1825); *Burgoyne v Free*, 2 Hag. Ecc. 663, 162 Eng. Rep. 991 (Delegates 1830); RODES, *supra* note 72, at 11-12.

¹⁵² If there is a conflict between ecclesiastical common law and secular common law, ecclesiastical courts are not strictly bound by the latter. *In Re St Mary's, Banbury*, 2 All E.R. 611, 615 (Oxford Consistory Court 1985), per Boydell, Ch; *R v. Chancellor of St Edmundsbury and Ipswich Diocese*, 2 All E.R. 604 (K.B. 1947), *aff'd*, 2 All E.R. 170 (C.A. 1948), per Wrottesley LJ. However, ecclesiastical courts were citing common law cases from the seventeenth century; HELMHOLZ, *supra* note 14, at 188-95.

[64] It was inevitable that the Church courts themselves were to change under this pressure. In 1854 oral evidence in open court was allowed.¹⁵³ The courts were still forbidden to cite anyone outside the diocese where he or she lived, and it was not clear that the courts could even hear legal arguments in London unless the litigants lived there.¹⁵⁴ The inadequacy of powers to punish for contempt were obvious to all who used the courts.¹⁵⁵

[65] The binding force of precedent was accepted by the ecclesiastical judges in the course of the nineteenth century,¹⁵⁶ and received statutory recognition in the Ecclesiastical Jurisdiction Measure 1963.¹⁵⁷ However, the Court of the Arches is not bound by decisions of the Chancery Court of York, and vice-versa. Both are bound by their own decisions.¹⁵⁸ The Consistory Courts

¹⁵³ Ecclesiastical Courts Jurisdiction Act, 1854, 17 & 18 Vict., c. 47 (Eng.).

¹⁵⁴ *Noble v Ahier*, 11 P.D. 158 (Ch. York, 1886); *but see* RODES, *supra* note 72, at 463, note 81.

¹⁵⁵ The writ *de contumace capiendo* was obsolete. RODES, *supra* note 72, at 360. Imprisonment for contumacy was eliminated by repealing the Ecclesiastical Courts Act, 1813, 53 Geo. 3, c. 127 (Eng.).

¹⁵⁶ REPORT OF THE ARCHBISHOPS' COMMISSION, THE CANON LAW OF THE CHURCH OF ENGLAND, 1947, at 58; REPORT OF THE ARCHBISHOPS' COMMISSION, THE ECCLESIASTICAL COURTS, 1954, at 13, 27, 28. This was due, in no small part, to the influence of Sir William Scott (later Lord Stowell), as well as to the growing influence of the common lawyers.

¹⁵⁷ Ecclesiastical Jurisdiction Measure, 1963, §§ 45(3), 48(5), (6) (Eng.).

¹⁵⁸ *In Re Lapford* (Devon) Parish Church, 3 All E.R. 484 (1955); *Stephenson v Langston*, 1 Hag. Con. 379, 387 (1804) (Sir William Scott); *In Re St Mary, Tyne Dock* (No 2), 1 All E.R. 1, 8-9 (1958) (Deputy Chancellor Wigglesworth).

are bound by their own decisions,¹⁵⁹ but not by decisions of those of a consistory court in another diocese.¹⁶⁰

[66] The substance of the canon law administered by the ecclesiastical courts of the Church of England was strongly influenced by the civil law, and even the Vice-Chancellor's Court of the University of Oxford followed civil law procedures until 1854.¹⁶¹ Yet the Church courts, attacked for adhering to the procedures of the civil law (of which clerics and laymen alike were increasingly ignorant), were compelled to adopt many of the procedures of the common law courts. The common law courts no longer fought to wrest jurisdictional victories from the ecclesiastical courts, but the latter were required to surrender much of their jurisdiction to the supposedly more modern and efficient common law courts. As a consequence, the Church courts began to lose something of their intellectual connection with their canon law heritage. This loss was encouraged by the decline of the civil law practitioners in the late nineteenth century.

XII. COUNSEL IN THE ECCLESIASTICAL COURTS

[67] In all of these Church courts before the late nineteenth century the practitioners were distinct from the body of common law lawyers. The advocates were trained in the canon and civil laws at Oxford or Cambridge, obtaining the degree of DCL¹⁶² or LLD¹⁶³ respectively.¹⁶⁴ Doctors

¹⁵⁹ Rector & Churchwardens of Bishopwearmouth v Adey, 3 All E.R. 441 (1958).

¹⁶⁰ Re Rector & Churchwardens of St Nicholas, Plumstead, 1 All E.R. 298 (1961).

¹⁶¹ STATUTES, DECREES AND REGULATIONS OF THE UNIVERSITY OF OXFORD, tit. IV § xiii, at 4 (1973).

¹⁶² Doctor of Civil Law.

¹⁶³ Doctor of Laws (i.e. civil and canon).

were eligible for admission as advocates of the Court of Arches, whose Dean of the Arches admitted advocates on a rescript (mandate) of the Archbishop of Canterbury,¹⁶⁵ if they had studied the civil and canon laws for five years,¹⁶⁶ and attended the Court of Canterbury for a year¹⁶⁷. Once admitted, they were qualified to practice in the other ecclesiastical courts and civil law courts.¹⁶⁸

[68] There were never very many practitioners in the canon and civil laws, with an average of only one advocate admitted annually in the early nineteenth century, some of whom never practised.¹⁶⁹ There were rarely more than five or six active practitioners at a time, and the

¹⁶⁴ Prior to 1545 they required a degree in canon law or canon and civil law. In the sixteenth century foreign degrees sufficed, though advocates invariably also sought incorporation at Oxford or Cambridge. The last advocate with a foreign degree in civil law was Dr Julius Caesar, DCL Paris 1586. SQUIBB, *supra* note 48, at 31. After 1535 the degree was taught at English universities solely in civil law.

¹⁶⁵ Details of the method are given in *R v Archbishop of Canterbury*, 8 East 213, 10 Eng. Rep. 323 (1807).

¹⁶⁶ JOHN AYLLIFFE, *PARERGON JURIS CANONICI ANGLICANI, OR, A COMMENTARY, BY WAY OF SUPPLEMENT TO THE CANONS AND CONSTITUTIONS OF THE CHURCH OF ENGLAND*, etc 53, et seq. (1726); RICHARD BURN, *ECCLESIASTICAL LAW* i, 2-4(1781). This was later reduced to at least four, and latterly only three years. It was not unusual for would-be practitioners to study civil law at the University of Paris for two years, followed by a similar period studying canon law at the University of Bologna. *THE LAWS OF ENGLAND* xi, 503n. (1910).

¹⁶⁷ I.J. CHURCHILL, *CANTERBURY ADMINISTRATION* 451 (1933). The so-called “year of silence.”

¹⁶⁸ After the incorporation of Doctors' Commons they had to be doctors of civil law of Oxford or Cambridge. Some earlier members had lacked this latter qualification, such as Richard Zouche, 1618, who held only the BCL. SQUIBB, *supra* note 48, at 30.

¹⁶⁹ *Id.*

civilians were never a dominant force in English law, administration, or politics, unlike their common law counterparts.¹⁷⁰

[69] Advocates were appointed as judges in the archbishop's courts,¹⁷¹ the Admiralty Court, as masters of the Court of Requests, and to the Court of Chancery. King's Advocates, appointed by the Crown as leaders of the civil law Bar, were also members of Doctors' Commons. Practitioners in the canon and civil law courts served the ecclesiastical courts, the Court of Admiralty, and for arbitration involving questions of international law.¹⁷²

[70] Advocates were members of Doctors' Commons, the Association of Doctors of Laws and of the Advocates of the Church of Christ at Canterbury, which existed between c.1490 and 1858.¹⁷³ Formally established in 1511, this was a self-governing teaching body, on a similar pattern to the Inns of Court, and was governed by a council elected by the members.

¹⁷⁰ In the period 1500-1750 some 460 lawyers practised or received permission to practice in the Court of Arches. At their height there were twelve to twenty-four in practice, and a total of up to seventy. Brian Levach, *The English Civilians, 1500-1750*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 108 (Wilfred Prest ed., 1981). In 1684 there were 38 advocates "exercent" (of whom 19 were judges), in 1714 there were 35 (15 judges). EDWARD CHAMBERLAYNE, *ANGLIAE NOTITIA, OR THE SECOND PART OF THE PRESENT STATE OF ENGLAND* 289-90 (1679).

¹⁷¹ There was no real break in continuity due to the Reformation, though laymen who were doctors only of civil law were now appointed judges in the ecclesiastical courts. Ecclesiastical Jurisdiction Act, 1545, 37 Hen. 8, c. 17 (Eng.).

¹⁷² Levach, *supra* note 170, at 109. Proctors were originally members, but were gradually excluded. The last proctor was admitted 1569, and their membership was officially ended 1570. SQUIBB, *supra* note 48, at 24-25.

¹⁷³ Only laymen could be members of the society. Membership was only made compulsory in 1570, though most advocates had been members before this. Advocates in the northern province were not required to be members of Doctors' Commons, and their qualifications were also less strict. Whereas all southern advocates were doctors, advocates in York were usually merely bachelors of law. Unlike the doctors, who tended to be based in London, the northern advocates served in the consistory courts of English and Welch diocese. Levach, *supra* note 170, at 110.

[71] The advocates had a monopoly in the ecclesiastical courts and the Court of Chancery. However, at a time when pressure was on the Church courts to adopt common law procedures or be abolished, so the jurisdiction of these courts was gradually reduced. The Court of Probate Act 1857¹⁷⁴ abolished the testamentary jurisdiction of the ecclesiastical and other prerogative courts, and set up the new Court of Probate. This was open, not only to the advocates, but also to serjeants-at-law and barristers.¹⁷⁵ Advocates were given the right to practise in any court of law or equity in England as if they had been called to the Bar on the days on which they had been admitted as advocates.¹⁷⁶

[72] The Matrimonial Causes Act 1857¹⁷⁷ set up the Court of Divorce and Matrimonial Causes, and provided that all persons admitted to practise as advocates in any ecclesiastical court, and all barristers should be entitled to practise in the new court.¹⁷⁸ An Act to enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to practise in the High Court of Admiralty,¹⁷⁹ passed in 1859, ended the last surviving monopoly of the advocates, with the exception of the obsolescent High Court of Chivalry.¹⁸⁰

¹⁷⁴ 20 & 21 Vict., c. 77 (Eng.).

¹⁷⁵ The Court of Probate Act, 1857, 20 & 21 Vict., c. 77, § 40 (Eng.).

¹⁷⁶ The Court of Probate Act, 1857, 20 & 21 Vict., c. 77, § 41 (Eng.).

¹⁷⁷ 20 & 21 Vict., c. 85 (Eng.).

¹⁷⁸ Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85, § 15 (Eng.).

¹⁷⁹ 22 & 23 Vict., c. 6 (Eng.).

¹⁸⁰ This is now obsolescent, having sat only once in 250 years. *Blount's Case*, 1 Atk. 29, 26 Eng. Rep. 189 (1737); *Manchester Corp. v. Manchester Palace of Varieties Ltd.*, 2 W.L.R. 440, 1 All E.R. 387 (1955).

[73] The members of Doctors' Commons were authorised by the Act to enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to practise in the High Court of Admiralty 1859¹⁸¹ to sell their real and personal estate, and to surrender their 1768 charter.¹⁸² Upon surrender they were to be dissolved.¹⁸³ With the exclusive jurisdiction of the civil and canon law courts rapidly shrinking, recruitment of new advocates became difficult. The College did not surrender its charter and the order only became extinct however with the death of the last advocate,¹⁸⁴ Chancellor TH Tristram, DCL Oxford, who died in 1912. He had been admitted 2 November 1855, as the last Fellow of the College.¹⁸⁵

[74] With the extinction of the advocates, in both the ecclesiastical courts and the Court of Chivalry barristers are now heard by virtue of the doctrine of *ex necessitate rei*.¹⁸⁶

[75] Proctors, the equivalent of attorneys elsewhere, practised in the civil law-dominated admiralty and ecclesiastical courts.¹⁸⁷ They had much greater public exposure than advocates, and

¹⁸¹ 22 & 23 Vict., c. 6 (Eng.).

¹⁸² Act to Enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to Practice in the High Court of Admiralty, 1859, 22 & 23 Vict., c. 6, § 116 (Eng.).

¹⁸³ Act to Enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to Practice in the High Court of Admiralty, 1859, 22 & 23 Vict., c. 6, § 117 (Eng.).

¹⁸⁴ R v Hughes, 7 B. & C. 708, 717; 108 Eng. Rep. 888 (1828).

¹⁸⁵ The corporation ceased to be collegiate on the death in 1904 of Dr Jenner-Fust, admitted 1835; WHO WAS WHO, 1897-1916 378 (Adam & Charles Black eds., 1953).

¹⁸⁶ Mouncey v Robinson, 37 L.J. Ecc. 8 (1867); cf. Manchester Corporation v Manchester Palace of Varieties Ltd., W.L.R. 440, 449 (Ct. of Chivalry 1955) (per Lord Goddard).

¹⁸⁷ Like the attorneys, they were *domini litis* rather than merely spokesmen. Obicini v Bligh, 8 Bing. 335, 352 (1832) (per Tindal, CJ). They were ultimately housed in Doctors' Commons. Prior to 1570, when membership of Doctors' Commons was made compulsory for advocates,

spent more time in court. Whilst doctors of laws never practised as proctors, some proctors were bachelors, and some were non-graduates.¹⁸⁸ Proctors were admitted to the Court of Arches.¹⁸⁹ They were also admitted by the patent of a bishop, to practice in the consistory court of the dioceses.

[76] The proctors also gradually became extinct as a separate order, as there was insufficient work for a separate profession. In 1857 the Court of Probate Act¹⁹⁰ took away the proctors monopoly of probate work,¹⁹¹ and gave them the right to be admitted as solicitors.¹⁹² The Matrimonial Causes Act 1857 allowed all attorneys and solicitors to practise in the new Court of Divorce and Matrimonial Causes.¹⁹³ An 1859 Act enabled attorneys and solicitors to practise in the High Court of Admiralty,¹⁹⁴ and the Solicitors Act 1877 conferred rights on

some proctors had been members. J.H. Baker, *The English Legal Profession 1450-1550*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 24 (Wilfred Prest ed., 1981).

¹⁸⁸ Levach, *supra* note 170, at 110. The period of articles required was seven years. HARRY KIRK, *PORTRAIT OF A PROFESSION: A HISTORY OF THE SOLICITOR'S PROFESSION, 1100 TO THE PRESENT DAY* 20 (1976).

¹⁸⁹ The procedure is explained in *R v. Archbishop of Canterbury*, 8 East 213, 10 Eng. Rep. 323 (1807).

¹⁹⁰ They were never very numerous, there being some ten in practise in the Court of Arches, another eight in York, and smaller numbers at other consistory courts. The number was limited in 1696 to 34, with additional supernumeraries. KIRK, *supra* note 188, at 20. In 1707 there were 24 proctors, of whom only 7 practised in the Court of Chivalry. In 1737 there were only 14 proctors, and only 4 by 1756. EDWARD CHAMBERLAYNE, *ANGLIAE NOTITIA, OR THE SECOND PART OF THE PRESENT STATE OF ENGLAND* 168, 183 (1679); GEORGE SQUIBB, *THE HIGH COURT OF CHIVALRY: A STUDY OF THE CIVIL LAW IN ENGLAND* 118 (1959); JOHN CHAMBERLAYNE, *MAGNAE BRITANNIAE NOTITIA* (1718).

¹⁹¹ Court of Probate Act, 1857, 20 & 21 Vict., c. 77, § 42 (Eng.).

¹⁹² Court of Probate Act, 1857, 20 & 21 Vict., c. 77, § 43 (Eng.).

¹⁹³ Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85, § 15 (Eng.).

solicitors to appear in ecclesiastical courts.¹⁹⁵ In 1873 all solicitors, attorneys and proctors became solicitors of the Supreme Court. The term proctor is occasionally still used informally in probate and admiralty courts, and is still commonly used to describe solicitors involved in proceedings in the ecclesiastical courts.

[77] The consequence of the decline of the ecclesiastical law profession, caused by a reduction in business in civil and canon law courts, itself contributed to a further decline in understanding of the intellectual separateness of the Church courts.¹⁹⁶ The problems of the absence of an exclusively ecclesiastical law Bar and Bench were to influence the evolution of the Church courts in the nineteenth and twentieth centuries. The lack of a separate profession increased the tendency for the law and practice of lay and spiritual courts to approximate more closely, and this, in turn, has tended still more to differentiate English ecclesiastical law from ecclesiastical law in other parts of Christendom, particularly Roman Catholic.

XIII. CONCLUSION

[78] The Church courts are the Queen's courts.¹⁹⁷ This has become less significant as the balance of the settlement has changed, and the Church has become more independent. The role of

¹⁹⁴ 22 & 23 Vict., c 6 (Eng.).

¹⁹⁵ Sec. 17; Now the Solicitors Act, 1957, § 2(1)(d) (Eng.).

¹⁹⁶ The valuable library of Doctors' Commons was sold 1861.

¹⁹⁷ In Erastian terminological understanding, dominant since the Revolution of 1688, this supremacy was of the monarch as head of State, rather than personally. The idea that it was a personal supremacy of the monarch was not even mooted again until the time of Victoria. SIR LEWIS DIBDIN, *CHURCH COURTS* (1881), *ESTABLISHMENT IN ENGLAND* 51-52 (1932). This position has been much misunderstood since, particular in the Church overseas.

purely secular courts in ecclesiastical causes has declined.¹⁹⁸ The changes made in 1963 to the judiciary of the Church of England saw a reduction in the role of the Judicial Committee of the Privy Council in the ecclesiastical jurisdiction. But while the Church may have weakened one consequence of the establishment, they have permitted, indeed encouraged, a more serious undermining of their independence.

[79] The influence of the common law has had an increasing effect, which has accelerated since the decline of Doctors' Commons in the middle of the nineteenth century. Concentrating on the perceived misfortune of having lay courts decide Church causes obscured the more serious, insidious influence, which the common law was having. The clergy and laity were as much culpable as anyone; they called for certainty, for precedents to be cited and followed. The influence of the common law has compelled the ecclesiastical courts to adopt principles of binding precedent.¹⁹⁹

[80] At times in the early nineteenth century many judges were clerics, lacking the experience and training necessary for judicial office. The ecclesiastical judges are now required to have legal qualifications,²⁰⁰ though not specifically knowledge of canon law.²⁰¹

¹⁹⁸ Strictly speaking, no secular court was part of the hierarchy at any stage, the Judicial Committee of the Privy Council being merely advisers to the Queen in Counsel. *See* The Ecclesiastical Jurisdiction Measure, 1963, § 1(3)(d) (Eng.).

¹⁹⁹ Both provincial courts are bound by decisions of the Judicial Committee of the Privy Council, though the Court for Ecclesiastical Causes Reserved and Commissions of Review are not bound by decisions of the Judicial Committee on matters of doctrine, ritual, and ceremonial. Ecclesiastical Jurisdiction Measure, 1963, § 48(6) (Eng.).

²⁰⁰ The Chancellor is appointed by letters patent of the Bishop, to be the Official Principal and Vicar-General of the bishop, who may himself sit if he so wishes. The Chancellor must be over 30 years of age, a lawyer of seven years' standing or one who has held high judicial office, and a communicant of the Church. Appointment is only after consultation with the Lord Chancellor, and the Dean of the Arches and Auditor. Ecclesiastical Jurisdiction Measure, 1963, § 2(1)-(2)

[81] The loss of jurisdiction in the course of the nineteenth century was a consequence of the intellectual weakness into which the ecclesiastical law had sunk. This was encouraged by the common law. This was not, as in the sixteenth century, by directly confronting the Church courts. It was rather by working in conjunction with the Church courts. Until the Civil Wars the two systems had operated largely independently, now they were motivated by a sense of common purpose. Co-operation led to the intellectual assimilation of the jurisprudence of Church courts and common law courts. This, and the increasingly limited business conducted in such courts, was to lead to the loss of a professional Bar.²⁰²

[82] The future, however, is not at all bleak. The ecclesiastical lawyer may once more be on the rise. The Ecclesiastical Law Society was established in 1987 with a view to the education of office bearers, practitioners in ecclesiastical courts and others; the enlargement of knowledge of ecclesiastical law among laity and clergy of the Anglican Communion; and assistance in matters of ecclesiastical law to the General Synod, Convocations, bishops, and Church dignitaries.²⁰³

(Eng.). The Chancellor is *oculus episcopi* and has second rank in the diocese, save the precedence of the Dean within his cathedral. See JOHN GODOLPHIN, *REPERTORIUM CANONICUM, OR AN ABRIDGEMENT OF THE ECCLESIASTICAL LAW OF THE REALM, CONSISTENT WITH THE TEMPORAL, ETC* 85 (1678).

²⁰¹ Ecclesiastical judges were required to have a degree in canon law until 1545, though canon law had not been taught in English universities since 1535. Ecclesiastical Jurisdiction Act, 1545, 37 Hen 8, c. 17 (Eng.). Thereafter they only had the doctorate in civil law. REPORT OF THE ARCHBISHOPS' COMMISSION, *THE CANON LAW OF THE CHURCH OF ENGLAND*, 1947, at 52.

²⁰² In the Roman Catholic Church, priests study canon law for a year, as part of their training. The canon law (and the wider ecclesiastical law) in the Church of England has a narrower scope and coverage, and therefore it is perhaps not surprising that it rarely found a significant place in vocational training. But, even allowing for this, there was, until quite recently, little effort taken to produce a body of trained canonists or ecclesiastical lawyers since the demise of Doctors' Commons.

²⁰³ The University of Wales at Cardiff has offered for some years a LLM degree in canon law. This is designed for legal practitioners but also for others such as clergy who may have cause to

[83] With the revision of the canons of the Church of England, new legislative machinery, and the example of the Roman Catholic canon law, which has recently undergone a major revision and consolidation, there is a need for a new profession of ecclesiastical lawyers, trained in the common law, but able to apply their skills in the Church courts. The new society seems well able to encourage the revival of ecclesiastical law in the Church of England in particular.²⁰⁴

[84] The dis-establishment of the Church in Wales led to a reappraisal of the place of law within the Church; such a reappraisal seems possible in England without dis-establishment. For it was not the Reformation subordination of the Church courts to the authority of the Crown which weakened them, but the subsequent loss of intellectual vigour and independence. This independence was recently been re-asserted in the judgment of the Court of Ecclesiastical Causes Reserved in *In re St Stephen's, Walbrook*,²⁰⁵ not in its being any less an element of the establishment, but in its less legalist, more theological decision-making.²⁰⁶

resort to the ecclesiastical law. Despite the title, the degree is not confined to the canon law *per se*, but covers ecclesiastical law in its wider definition.

²⁰⁴ There has been much recent work towards a systematic jurisprudence, notably including NORMAN DOE, *CANON LAW IN THE ANGLICAN COMMUNION* (1998).

²⁰⁵ Fam. 146 (1987).

²⁰⁶ That canon law and theology are distinct though interrelated is important. Teodoro Jiménez Urresti, *Canon Law and Theology: Two Different Sciences* 8 (3) CONCILIUM 10 (1967).