Canon Law in American Jurisdictions

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It is a far cry from the twelfth century quarrel of Henry the Second and Thomas a Becket about jurisdiction over criminal clerics to the days of twentieth century America. Yet we find an echo of that famous controversy and its consequences so late as the year 1909, when the Act of Congress containing the words "benefit of clergy" was repealed. Back of this contest rises the picturesque figure of Rollo, first of the Normans, a very practical individual whose conversion to Christianity was not so thorough as to displace his belief in the old gods of the Northland, for when he felt the approach of death (about a century before the birth of William the Conqueror), he offered human sacrifices to Thor and Odin, as well as gifts of gold to the Church. In his life-time, Rollo had accorded official recognition of the autonomy of the ecclesiastical courts; and, if the writer's surmise is correct, this action gave rise to at least one of the historic sources of the systems of probate and divorce law in Anglo-Saxon jurisprudence. Rollo's descendant, William the Conqueror, an exemplar of the Norman genius for organization, in the course of consolidating his English conquests effected most of his changes by means of Continental clergymen, whom he substituted for the Anglo-Saxon bishops whom he ousted from their sees. Many of the new officials, such as Lanfranc, the graduate of Pavia, were lawyers rather than theologians; and, in general, the new bishops have been described as men versed in the jurisprudence of Hildebrand's revival and the Roman procedure of the Theodosian Code.

When opportunity presented itself, which was about the year 1070, William I, by an ordinance in the nature of an executive order, separated the ecclesiastical and temporal judges, who thitherto had sat together, and assigned to the former jurisdiction over matters "quae ad regimen animarum pertin-
ent," thus following the system which he had inherited in Normandy as a descendant of the polytheistic Rollo. Heretofore the bishops had done most of the judicial work pertaining to matters of ecclesiastical cognizance; but on the separation of the courts the dioceses were broken up into archdeaconries, and archdeacons who had been trained in Continental universities took over the new courts. By all accounts the new system does not seem to have worked well, at first; but Theobald, Archbishop of Canterbury (1139-1169), who had studied the revived Justinian Code and Digest, and who had written handbooks of procedure, introduced Vacarius as a teacher of civil law at Oxford in 1149. King Stephen expelled Vacarius, but could not undo the work accomplished by that great teacher. In 1151 Gratian completed his *Decretum* or "Concordance of discordant canons," and thus laid the foundations of the *jus commune ecclesiasticum* of Western Europe. A few years previously (about the year 1118, A. D.) the compiler of *Leges Henrici* borrowed many passages from Burchard of Worms or some other canonist in an effort to integrate his collection. All of this was prior to the gradual fusion of the coutumes, West Saxon, Dane-law, Mercian and others into the common law of England, a system which is said to have borrowed its very name from *jus commune* of the canon law, although the term did not come into general use before the days of Edward the First.

There is a wide-spread feeling that the common law is a purely indigenous product; but it is submitted that the system is of complex origin, although of local development, and that some of its doctrines which are still extant, have been derived from or influenced by the canon law (*imperio rationis* if not *ratione imperii*), especially in the field of maxims, many of which are found in Sexte under the title *regulae*. An abortive start towards the development of a common law was made when Henry the First designated certain members of the *curia regis* to sit occasionally in the county courts as itinerant justices, but Stephen failed to follow this practice, and in addition permitted appeals from the spiritual courts to the Roman see. Henry the Second, a French prince of tremendous energy (he ruled the greater part of France in addition to England) revived the system of *justiciari itinerantes*, or justices of eyre, and made the inquest (which grew by imperceptible degrees into the modern jury) a regular part of civil procedure. He attempted to restore the relative position of State and Church to what it had been in the days of William the Conqueror and his legal adviser, Archbishop Lanfranc. In furtherance of this effort the king procured the passage of the Constitutions of Clarendon, which gave the royal justices and not the church courts the say

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6Pollock & Maitland's History of English Law, I, 117 (2d, 1898 ed.).
6There is such a variety of ways of citing Corpus Juris Canonici, that the average reader would find it easiest to consult the additions, which like that of 1584, refer to column and line in their indices, whenever he may have occasion to look up a question of the old canon law.
as to disputed questions of jurisdiction. Thereafter the contest for jurisdic-
tion, each side seemingly acting upon the adage *boni judicis est ampliare
jurisdictionem,* was between Canterbury and Westminster; but in the political
struggle between Church and State, prelates were frequently found to be
champions of the Nation, for Lanfranc and Langton were not alone among
the clergy who took sides with the temporal power: and a glance at the statute
books shows that the bishops and abbots, who were members of Parliament,
joined in the enactment of much legislation which asserted the supremacy of
the State. Even a Becket assented to the Constitutions of Clarendon, al-
though he subsequently attempted to repudiate his agreement. Furthermore,
we should not overlook the fact that many bishops and other clergy played an
important part in the development of the law of the king’s courts from the
days of Bracton to the end of the Middle Ages. That a prelate as a royal
official might take a different view of a legal question from that which might
appear to him as a bishop or archdeacon, is no more surprising than that there
were certain divergences of view on points of constitutional law between Mr.
Secretary Chase and the same gentleman as Mr. Chief Justice Chase.

After the murder of Thomas a Becket, jurisdiction over criminal clerks
was conceded to the Courts Christian by a concordat between Henry II and
a papal legate in the year 1176. In January of the same year, there issued
the Assize of Northampton which was a re-enactment of the Assize of Claren-
don with the addition of new clauses, one of which originated or confirmed
the assize of *mort d’ancestor,* while other clauses defined the pleas, criminal
and civil, to be reserved for hearing by the royal justices. The Court of
King’s Bench, which curbed the activities of the ecclesiastical courts as well
as those of many temporal courts, has been derived from a small inner tri-
bunal which Henry created in re-organizing the *curia regis.* About the year
1189, Glanville, the justiciar (whose secretary was the famous Hubert
Walter, subsequently a justice of the *curia regis,* Archbishop of Canterbury,
etc.), wrote the first book of English law, in form a book of legal procedure.
In this celebrated work, we find that there already existed a powerful instru-
mentality in the writ of prohibition, whereby the royal courts were enabled to
check expansive tendencies of the ecclesiastical courts, and eventually to
absorb vast bodies of law which had originated in the Courts Christian.
Henry’s successor, Richard the Lion-Hearted, spent most of the period of his
reign outside of England. There is very little to note about this reign apart

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8 There is an adverse criticism of the misleading maxim *boni judicis est ampliare,* made by Lord Mansfield in *Rex v. Phillips,* 1 Burr. 292, 304 (Eng. 1757).

9 We should not forget that Bracton, the first-known writer to cite precedents, and the judges whose decisions he used as authorities were clergymen.

10 Antiquarians and others interested in this by-path may find traces of the benefit of clergy plea derived from this concordat, in a few American cases, such as: *State v. Carroll,* 27 N. C. 139 (1844); *Com. v. Gable,* 7 S. & R. 422 (Pa. 1821); *State v. Bosse,* 8 Rich. 276 (S. C. 1835); *Com. v. Posey,* 4 Call. 109 (Va. 1787).
from the facts that, "legal memory" dated from his coronation, September 3, 1189; the courts of common pleas originated about this time; and the plea rolls date their beginning from the 6th year of his reign (1195).

In the following reign, much of the fundamental law of English-speaking jurisdictions originated or assumed definite form, for the outcome of the political struggles of that shifty monarch, King John, had a lasting effect upon the law and constitution of England. As is well known by the most casual reader of English history, in 1215, the prelates and magnates forced the king to sign Magna Carta. This document was confirmed a number of times afterwards. The most important version in American eyes is that of Henry the Third, portions of which were received in some jurisdictions as part of their local law. In the course of time the lex terrae principle became embedded in the formula "due process of law" in many state constitutions as well as in the Fifth and Fourteenth Amendments of the United States Constitution. Like many American state constitutions the Charter was a medley of fundamental law and "police" statutes. Its heterogeneous character is shown by such miscellaneous provisions as those concerning dower and the widow's "quarantine," as well as the one fixing the Court of Common Pleas at Westminster. By an evolutionary interpretation the right to trial by jury was secured. The Church was not overlooked, for it was provided that the "English Church should be free and her liberties inviolate."

John's successor, Henry the Third, has been referred to by Dante as a commonplace individual; but his name is of especial interest to students of American legal history, when we recall that the earliest English statutes which became common law in some of our States, date from his reign, and bear his name. Next to the re-issued version of Magna Carta of February 11th, 1225, one of the most far-reaching, in its effect, of the enactments which bear the name of this powerful ruler, was the Statute of Merton, which recorded the refusal of the barons to adopt the civil law and canon law rule of legitimation. The influence of the emphatic stand there taken is said

119 Hen. III. (1225).
12Cf. 3 Binn. 495 (Pa. 1808); 1 Brevard, Pub. Stat. Law of South Carolina, tit. 70 (1814).
13The phrase "ecclesia Anglicana" has been variantly translated "Church of England" and "Church in England" in sectarian controversy; but the law French references to the Church, as found in the statute books, are generally made in the form "seint eglise Dengleterre." Cf. The Statute of Provisors, 25 Edw. III, stat. 4, (1350-1), 6 Complete Statutes of England, 311 (1929). The accepted legal view in England is that the Church of England has been a continuous body since early Anglo-Saxon times. See Marshal v. Graham (1907) 2 K. B. 112, 126.
14Cf. Swift v. Tousey, 5 Ind. 196 (1854); O'Ferrall v. Simplot, 4 Iowa 381 (1857); 3 Binn. 595 (Pa. 1808); 1 Brevard, Pub. Stat. Law of South Carolina, tit. 70 (1814).
1620 Hen. III, c. 9 (1236).
to have been an important factor in checking the reception of Roman law by the courts of common law;" but the current was eventually deflected into the jurisdiction of the canon-law trained chancellors, who, in the course of establishing the equitable jurisdiction of chancery, made unhesitating resort to the Corpus Juris and to the Roman elements in the canon law for the elucidation of principles in cases referred to the Chancellor as keeper of the king's conscience as well as in the solution of problems arising in the exercise of the royal prerogative of grace. We have been assured that in questions which arose where the canon law doctrine was deemed ethically superior to that of the civil law, the canon law principle was adopted. In fact, much of the law of trusts and legacies was developed in equity by borrowings from the canon law as well as from the Roman law. One of the greatest reforms in the history of the common law was the discontinuance of trial by ordeal which took place in the reign of Henry III. It is directly attributable to the action of the Fourth Lateran Council, which, in the year 1215; forbade clergymen to participate in such trials. Of necessity the royal tribunals were compelled to substitute trial by jury in criminal cases, church law having deprived them of the indispensable assistance of clergymen in the ritualistic part of the ceremonial; and the subsequent conduct of jury trials developed the unique law of evidence of the Anglo-American system of jurisprudence. Another important contribution to the improvement of English law was made by Bracton's works De Legibus et Consuetudinibus Angliae and the Note Book. In the course of restating the national law the accomplished archdeacon used Glanville, Justinian, the Decretum and Decretals of Canon Law, and the commentaries of various canonists to throw light upon the principles evolved by his researches. Through Fitzherbert, Littleton and Coke, the writings of Bracton have exerted a powerful influence in shaping the common law of modern times. Possibly the most potent of all of the great jurist's deductions is the principle embodied in his phrase "a similibus procedere ad similia," which is said to go back to the Digest of Justinian and is firmly rooted in modern law. Bracton has been said to be the father of the case system; but his child must have led a precarious existence in its early years, if we are to attach any significance to the statement of an English judge in the year 1327, that the king had commanded that the royal judges administer law and justice in accordance with what had been done in similar cases.

17Pomeroy, Eq. Juris. sect. 20 (1918 ed.).
18Amos, Hist. of the Civil Law, 434 (1883).
20Bracton, f. 1 b.
21D. 1. 3. 12.
22Cf. Hodges v. New England Screw Co., 1 R. I. 312, 356 (1850); Jacob v. State, 22 Tenn. 493, 515 (1842). This doctrine seems to be the basis of the maxim pari ratio ine, eadem est lex.
The reign of Henry's successor, Edward the First, has been described by Bishop Stubbs as an age of definition. Henry de Bracton's systematic exposition of the law of England—"the best treatment of the entire body of the common law before the time of Blackstone"—inspired great work by the judges and lawyers of this period. At the same time the legislation of Edward's day, not only restated much law and cleared away some archaic provisions, but, in addition, outlined some expansive principles which have proved their worth for many generations. One of the most fertile of the many statutes of this era, and probably the most important law ever enacted in England, was the provision for writs "in Consimili Casu," which is the source of vast bodies of doctrine in the law of torts, contracts and quasi-contracts. Many commentators have criticized the judges of England for not interpreting the act so as to authorize courts of common law to function as courts of equity by means of the writ of trespass on the case. But, as pointed out by that very modest genius, the late Dean Ames, the fundamental differences between actions in rem and actions in personam, between compensation for wrong and restitution of the status quo, distinguish the failure (if it be a failure) to utilize the power; which, on the other hand, is said to have been availed of by John Waltham, bishop of Salisbury and chancellor to Richard II, in the invention of the writ of subpoena in equity, "by a strained interpretation" of the statute, in order to make the feoffee to use accountable to his cestui que use. Although Edward had a great lawyer and prelate as chancellor in the person of Robert Burnell, bishop of Bath and Wells, and a competent legal adviser in the civilian Accursi, who inherited some of the talent of a famous father, there were frequent controversies between Crown and Canterbury, or, as picturesquely phrased in Pollard's "Evolution of Parliament," a conflict between the regnum and the sacredotium.

The never-ceasing border warfare of the ecclesiastical judges and the royal judges over the boundaries of their respective jurisdictions gave rise to some important legislation in attempted settlement of these disputes. One enactment, the Statute of the Writ of Circumspecte Agatis, provided that the Courts Christian were not to be interfered with in matters merely spiritual. A curious requirement of this writ or statute (writ in form and statute in effect) was that "Defamation shall be tried in a Spiritual Court where money is not demanded," coupled with a general provision that a writ of prohibition should issue against a pecuniary penance for sins. This legislation was partly declaratory, for ecclesiastical courts had no power to award money.

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24 Ames, Lectures on Legal History, 31 (1913 ed.).
26 Ames, op. cit., supra note 24 at 443-444.
27 III Bk. Com. 51.
28 State. 13 Edw. I (1285); 6 Halsbury, Complete Statutes of England, 158 (1929).
29 Cf. Burn, Eccl. Law, 50 (1845 ed.).
A few years later the Statute of the Writ of Consultation\textsuperscript{30} was enacted, which protected the ecclesiastical courts against unfair encroachment, by allowing a writ of appeal against prohibitions, which was termed a writ of consultation.

During this era of mental activity, the ecclesiastical lawyers engaged in a contest of wits with parliament. First, the canonists evaded the prohibition against alienation of the Statute \textit{De Religiosis}\textsuperscript{31} by collusive suits. Parliament replied by chapter 32 of the Statute of Westminster II,\textsuperscript{32} with a provision authorizing inquiry into the demandant’s title; and followed this in chapter 3 of the Statute of \textit{Quia Emptores}.\textsuperscript{33} by excluding alienation in mortmain. Undismayed by these setbacks, the decretists employed uses to evade the inability of religious houses to accept gifts of land. This facility of evasion was not coped with successfully until it was abolished by the Statute subjecting uses to the statutes of mortmain.\textsuperscript{34} In addition to defining the respective jurisdictions of the ecclesiastical and the common law courts, considerable attention was directed towards reforming the law of decedents estates.\textsuperscript{35} Thus, for example, executors were given a remedy to sue for an account in the royal courts.\textsuperscript{36} Chapter 19 of the same statute directed the ordinary (bishop) to pay the creditors of an intestate, so far as the goods would extend, as if he, the ordinary, were an executor.\textsuperscript{37} Meanwhile, there was a partial and very gradual infiltration of canon law and religious ideas into the common law. Sunday became \textit{dies non juridici} by a canon of the Church incorporated into the common law.\textsuperscript{38} The ancient doctrine of \textit{mens rea}, which traces back to the so-called \textit{Leges Henrici Primi},\textsuperscript{39} had an historic antecedent in the writings of St. Augustine.\textsuperscript{40} The important doctrine of judicial notice, the tremendous potentiality of which was demonstrated by

\textsuperscript{32}13 Edw. I (1285).
\textsuperscript{33}18 Edw. I (1290).
\textsuperscript{34}Stat. Rich. II, c. 5 (1391).
\textsuperscript{35}These reformatory statutes have been accepted as law in many American jurisdictions. Cf. McKean, \textit{British Statutes in American Jurisdictions}, 78 U. Pa. L. Rev. 195 (1929).
\textsuperscript{36}Stat. 13 Edw. I., c. 23 (1285).
\textsuperscript{37}Stat. 13 Edw. I. c. 19 (1285). The statute, 31 Edw. III, stat. 1, c. 11 (1357), extended this remedy to administrators, and in addition, provided that the ordinary should depute the next and most lawful friends of the intestate to “administer and dispose for the soul of the dead,” and to sue and be sued. \textit{Holcombe v. Phelps}. 16 Conn. 127, 135 (1844); \textit{Ellmaker’s Estate}, 4 Watts 34. 38 (Pa. 1833). This last-mentioned statute was amended by Statute 21 Hen. VIII, c. 5 (1529), to give a right of administration to the widow or next of kin.
\textsuperscript{38}Story \textit{v. Elliot}. 8 Cow. 27 (N. Y. 1827); Swann \textit{v. Broom}, Burr. 1595, 1599 (Eng. 1764).
\textsuperscript{39}c. 5, 28 (c. 1118).
\textsuperscript{40}Levitt, \textit{The Origin of Mens Rea}, 17 Ill. L. Rev. 117, n. 1 (1922).
the brilliant Mr. Justice Brandeis, before his elevation to the bench, has been traced back to the civil and the common law. The “exceptions” (now termed “challenges”) against jurors in courts of common law were originally the same as those against witnesses in the Courts Christian, according to Glanville. Furthermore, as previously noted, it is a matter of common observation that a number of canon law maxims have seeped into the common law, especially during the period in which the Decretals or Five Books of Gregory IX, and the Sextus Decretalium or Sexte of Boniface VIII, made their appearance. These rules of logic, of justice, of convenience and of policy (mostly designated regulae juris in the old Corpus Juris Canonici) were practically identical in form in the canon law and common law systems—much closer in fact than either was to the passages in Justinian to which painstaking writers often ascribe specific maxims of the common law. Often adversely criticised by those who properly object to the employment of such aphorisms as algebraic formulas, these portable statements of legal doctrine, dubbed “legal short-hand” by the late Sir John Salmond, have done yeoman service when intelligently employed and not mechanically applied in the decision of numerous hard-fought cases.

Occasionally it has been asserted that privilege against self-incrimination is of canon law provenance, but modern research discountenances this view. As a matter of fact, the inquisitorial procedure of equity is said by very able writers to have been borrowed from ecclesiastical practice, and even in the realm of public law we find the “Star Chamber Statute” authorizing the examination of an accused under oath. At a much later time, that of the Restoration of Charles the Second, we find an act of Parliament which forbade the ecclesiastical courts to administer an oath to any one in order to force him to confess the commission of a crime—legislation which introduced a policy that, in the course of time, became a fundamental principle of common law, and an important doctrine of American constitutional law. In all probability the constitutional principle forbidding the trial of criminal cases without confrontation of the adverse witnesses is due to Biblical influence. It may surprise many students, and possibly some members

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47In essence, the privilege of exemption from compulsory self-incrimination is a rule of evidence and not a part of due process of law according to the decision in the case of Twining v. New Jersey, 211 U. S. 78, 106 (1908).
of the bar, to find that the "common law marriage" of a number of jurisdictions is in accord with the canon law of Western Europe as it existed prior to a change effected by the Council of Trent in 1563, which impressed a sacerdotal view. Many generations previously, Alexander III, a decretist, law teacher and law commentator before he occupied the papal throne, and one of the greatest canon lawyers in history, wrote a decretal to an English bishop sustaining the validity of marriage without a priest or religious ceremony. Not only has this doctrine of the gifted Pope been accepted in many common law jurisdictions, but it also took root in the old province of Louisiana, during the Spanish regime, two centuries after the legislation of the Council of Trent.

While it has been asserted with great frequency that temporal law is "unmoral," this generalization is not without its exceptions. "Usury" was frowned upon as an indulgence of the sin of avarice; and interest was illegal at common law as well as by canon law. In times past there have been acts of Parliament dealing with what is usually the domain of religious bodies. For example, we find the unworkable statute of Edward III, which seems to be directed against the sin of gluttony, by regulating what a man shall eat. Puritanic legislation, based upon the old concept of Alexander of Hale that law exists to cope with sin, has had its precedents in such statutes as 13 Eliz. declaring that "all usury (interest) * * * is sin," and an enactment in the reign of Queen Elizabeth's successor dealing with the "sin of drunkenness."

The efficacy of such laws, if we are to believe the teachings of history and experience, is largely dependent upon the current mores of the community in which their enforcement is attempted. As an illustration, the old law against charging or collecting interest was easily evaded by various devices, such as a covenant, a confession of judgment, or a lease of a term of years. The present-day "aim of the law is not to punish sins, but * * * to prevent certain external results," and in this connection it is amazing to realize the vigorous survival of the cy-pres doctrine in our day and generation; for that principle originated in a pre-Reformation concept that charity is an expiation of sin, and that one kind of charity would effect the same end as another. The doctrine is an anomaly under modern conditions in that it leads courts to make a will for a testator, which is hardly a proper exercise of judicial func-

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80C., 3, x., 43.
81See the scholarly opinion of Mr. Justice Buchanan in the case of Patton v. Cities of Philadelphia and New Orleans, 1 La. Ann. 98, 104 (1846).
82National Bank of Commerce v. Mechanics' National Bank, 94 U. S. 437 (1876); Lowe v. Waller, 2 Burr. 736, 740 (Eng. 1781); Bac. Abridg. Tit. Usury (1876 ed.).
83Stat. 10 Edw. III, c. 3 (1336).
84Longman, History of the Life and Times of Edward the Third, I, 83 (1869).
85C. 8 (1570).
86 Jac. I, c. 5 (1607).
87Attorney General v. Downing, Wilm. 1, 32 (Eng. 1767).
tions according to modern ideas of fitness and policy. Furthermore, as Vice-Chancellor Stevenson, of New Jersey, once remarked in the course of an able discussion of the cy-pres doctrine, "A thing, which is next or nearest to another thing, is plainly another thing." It would save much thankless labor on the part of courts, and would prevent much shocking competition among charitable institutions, if the subject of unworkable charitable bequests were dealt with by adequate legislation—not a difficult task when we realize how many charitable functions are exercised by governmental public welfare institutions. In this class of cases, as well as in many other instances where legal anomalies are of alien origin, the reasoning of Lord Hardwicke, when he refused to extend the doctrine of gifts mortis causa, might be resorted to with advantage. Surely law should conform to the needs of its day, and unsuitable rules ought not to be enforced in a changed environment for no better reason than a dry-as-dust antiquarianism; and if there be any merit in the cosmopolitan principle cessante ratione legis, cessat ipsa lex, even a long series of decisions does not always have binding authority where changed conditions require harmonious re-adjustment.

The system of equity, which became supplementary to that administered in the courts of common law, was developed in its early stages by a long line of ecclesiastics who occupied the position of Lord High Chancellor. It would be natural to surmise that these officials were influenced by canon law ideas.

89Ward v. Turner, 2 Ves. Sr. 431 (Eng. 1752), Cf. Michener v. Dale, 23 Pa. 59, 63 (1854). Both Ward v. Turner and Michener v. Dale evince the Anglo-American feeling against the expansion of rules received from the civil law. Probably the same unwillingness exists today, whenever a court is asked to expand a rule derived from the kindred system of the canon law.

Of course there is no disposition to join in some present-day (or present-moment) attacks upon current wisdom of ancient origin, by the above reference to dry-as-dust antiquarianism. We do not discard the principle of the wheel because it was probably familiar to Tilglath-Pileser the First; and most of us are alive to the fact that a time-tested legal principle may be old without being antiquated or outmoded. At any rate, few modern courts would reject relevant material in aid of a decision solely because of the antiquity of a reference. For example, the Supreme Court of Illinois, in the case of Biwer v. Martin, 294 Ill. 488, 128 N. E. 518 (1920), did not hesitate to delve into the doctrine of lineal warranty as it stood prior to the Statute of Quia Emptores, 18 Edw. I, c. 1 (1289-90), in order to determine the effect of a warranty deed. In like manner, Lord Davey, in the Privy Council case of Kieffer v. Le Seminaire de Quebec, (1903) A. C. 85, 96, 97, traced back from an article in the Quebec Code through a corresponding section in the Code Napoleon to a passage in Pothier on which that section was founded, by means of which a quotation from the Digest of Justinian was discovered which proved to be the ultimate source of the law to be interpreted. So also, Lord Justice Bowen, in the case of Dashwood v. Magniac. (1891) 3 Ch. 306, 362, on a question whether certain conduct of a life-tenant constituted waste, boldly consulted the Digest of Justinian, as well as Voet, the Code Napoleon and other civil law writings, saying: "In a case which is necessarily novel it is desirable to refer to the law of usufruct, on which the English law of waste is to a great extent based."

and we have been assured by the late Sir Paul Vinogradoff that there was a noteworthy indirect reception of the canon law in early English Equity. Furthermore, as pointed out by Lord Halsbury, in matters not ordinarily dealt with at common law, equity was free to resort to new sources of law, and the Roman law and canon law were resorted to for assistance. As is the case with many other institutions which arose in mediaeval times, the origin and the early development of the equity side of the Court of Chancery are veiled in obscurity; and, consequently, authorities differ widely as to the time when the court took permanent form. The jurisdiction began within the Council, but by almost imperceptible degrees a usage developed of referring to the chancellor complaints addressed to the king petitioning for remedies beyond the scope of the common law. The cleavage or fission from the King's Council was, in all probability, accelerated by the enormous volume of litigation in the reign of Edward the Third, which has been referred to by Pike, and is clearly marked by the Acts of Parliament, 14 Edw. III, c. 5 (1340) mentioning Chancery as among the royal courts, and 36 Edw. III, stat. 1, c. 9 (1362) authorizing relief in Chancery in certain cases. Executive action as well as legislation furthered the severance of equity jurisdiction from the Council, notably a royal writ of Edward III, in 1348, which confirmed a previous permissive jurisdiction of chancery by ordering that all such matters as were "of Grace" should be referred to and disposed of by the Chancellor or the Keeper of the Privy Seal. It may be inferred that the equity business of Chancery increased very rapidly in the days of Edward's successor, Richard the Second, for it was then deemed advisable to enact a statute authorizing the imposition of heavy damages for the bringing of false claims in that court. To a very great extent the rules and principles of equity practice were derived from the canon law through the English ecclesiastical courts, though modified and adapted by chancery as occasion demanded. In addition, as noticed by Dean Ames, certain analogies of the

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64Baldon, Select Cases in Chancery, A. D. 1364 to 1471, p. xlv (Selden Soc. 1896). Cf. Story, Eq. Juris. sec. 49 (1918 ed.).
65Pike, Year Books Edward III, years xii and xiii, p. cxii.
67Stat. 7 Rich. II, c. 6 (1394).
68Hutson v. Jordan, 1 Ware 385, 389 (U. S. D. C. Me. 1837). Cf.: Hamilton, The Civil Law and the Common Law, 36 Harv. L. Rev. 180, 182 (1922); Kent, Com. 546; Kýrly, An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery, 44 (1890); Langdell, A Summary of Equity Pleading, 1, 16 (1883 ed.), A Brief Survey of Equity Jurisdiction, 26, 97-98 (1908 ed.), and Discovery under the Judicature Acts, 11 Harv. L. Rev. 137, 138 (1897); Maitland, Equity, 5 (1908 ed.); 1 Pomeroy, op. cit. supra note 66, sects. 55, 56.
common law were followed by the equity courts in dealing with uses. Inquisitorial and so ecclesiastical was the procedure of the Chancellor, acting in personam, that in the year 1415 the House of Commons complained that, in Chancery, the "examination and oath of the parties (to litigation) is according to the form of the civil law and the Law of Holy Church in subversion of the common law." The term "grace," contained in Edward the Third's writ of the year 1348, had reference to matters requiring special indulgence or provision. It was soon transmuted into the term "conscience," which we find in subsequently reported cases; but the general subject of equity was often referred to in the marginal headings of the old editions of the year books under the title "Subpoena."

For a long time the term "equity," as had been previously the case with the phrase "common law," was very slow in making its way into the terminology of English jurisprudence—a fact which adds to the difficulties of those who search for early cases in equity. Frequently, as already remarked, the topic was indexed under the title "Subpoena" or "Conscience." Even so late as the days of Brooke's Abridgment, we find the subject under the heading, "Conscience, & Subpoena & Injunction." At one period of its existence, the Court of Chancery had a common law or Latin side, and an equity or English side; and in at least one reported case, we find the chancellor referring to himself as "judge temporal," on the common law side, and "judge de conscience," on the equity side. The designation of the common law as "temporal" is at least a slight indication that the contrasted equity side was deemed ecclesiastical in principle; and soon afterwards we find the chancellor giving a remedy "car Deus est procurator fatuorum." About this time the word "equity" appeared in the famous instructions of Edward the Fourth (1461-1483), directed to Kirkham upon the appointment of the latter as Master of Rolls, which directions were as follows:

"The King willed and commanded * * * that all manner of matters

69Op. cit. supra note 24, at p. 239.
70Rot. Parl. 84 (3 Hen. V, pt. 2, 46, No. 23)—Holmes' translation: (This objection is said to have been pressed with great frequency. See 1 Bouvier L. Dict. 1058 (3d ed.) ).
71Note 66 supra.
72The modern view is that "when a suitor has brought his cause freely within the rules of equity jurisdiction, the relief he asks is demandable ex debito justitiae, and needs not be implored ex gratia." Sullivan v. Steel Co., 208 Pa. 540, 555 (1904).
73E. g., Y. Bk. 9 Edw. IV, 14.9 (1469).
74Brooke, Abridg. fol. 162 (1586 ed.).
75Maitland, op. cit. supra note 66, at p. 4.
76Y. Bk. 8 Edw. IV, 6 (1468).
77Y. Bk. 8 Edw. IV, 4 (1468). This view of the outspoken "judge de conscience" was reflected in more modern language by the Supreme Court of the United States, in the case of McIntire v. Pryor, 173 U. S. 38, 59 (1889), wherein an attempted defence of laches was rejected, upon a showing of great fraud.
to be examined and discussed in the Court of Chancery should be directed and determined according to equity and conscience, and to the old course and laudable custom of the same court, so that if any difficulty or question of law happen to arise, that he herein take the advice and counsel of some of the King's Justices, so that right and justice may be duly ministered to every man.”

This is a very early instance of an employment of the modern generic term “equity.” It is noticeable that the older term “conscience” still survives; and, in addition, it may be observed that the forward-looking instructions contain the germ of the subsequently developed rule of precedents in equity, in the passage where they mention “the old course and laudable custom of the court.”

The sacerdotal fashion in which the chancellors sometimes determined cases, after discussion with common law judges, is well illustrated by a yearbook case, in which one of two co-executors had released a debt and thus reduced the assets of his testator’s estate to such an extent as to render it impossible to carry out the testamentary intent. The common law judges were of the opinion that there was no legal remedy but that a case was presented for equitable relief, whereupon the chancellor decided that an executor who fraudulently misapplies goods and does not make restitution “will be damned in Hell,” and that to give a remedy for such a state of things is in accordance with conscience. In the course of time it was recognized that “conscience must always be grounded upon some law,” which was followed by “The Father of Equity” when he stated the concept of “Conscience” in chancery to be “civilis et politica.” Sir Thomas More’s couplet was still more specific:

“Three things are to be judges in court of Conscience! Covin (fraud), Accident and breach of Confidence.”

About the time when the ecclesiastical courts became the king’s court, there arose a principle of uniformity, in conformity to which Chancery followed very closely the doctrines of the ecclesiastical courts with legacies;

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78 Kerly, op. cit. supra note 68, pp. 60, 61.
79 Van Senden et al. v. O’Brien, 58 Fed. (2d) 689 (1932); Sharp v. Harrison, 1 Ch. 502, 509 (Eng. 1922).
80 Cf. Fry v. Porter, 1 Mod. 300, 397 (Eng. 1670).
81 Y. Bk. 4 Hen. VII, 4-5 (1488) Marg. ref. “Subpoena.”
83 Lord Nottingham, in Cook v. Fountain, 1 Swanst. 600 (Eng. 1676).
84 Cf.: Caudrey’s Case, 5 Co. Rep. 1 (Eng. 1591); Pinfold v. Kide, 2 Show. 396 (Eng. 1684).
85 Harvey v. Aston, 1 Atk. 361, 380 (Eng. 1737); Reynish v. Martin, 3 Atk. 330 (Eng. 1746); Franco v. Alvares, 3 Atk. 342, 346 (Eng. 1746); Scott v. Tyler, 2 Bro. C. C. 431, 487 (Eng. 1788); Hurst v. Beach, 5 Madd. 216, 351, 360 (Eng. 1819).
and in like manner adopted common law principles respecting devises.66 The same principle of uniformity has given rise to a doctrine that rules of property established in equity (including those derived from the canon law) should be followed by a court of common law.67 It has likewise led to an extensive adoption of other equitable doctrines by courts of common law, especially in the field of commercial law. As a supplementary system the jurisdiction of equity not only extends to checking the abuse of common law rights, but its power may also be invoked to prevent the fraudulent use of a statute.68 The best tribute to the many merits of English equity is the confidence with which most American courts have adopted that system, where unchecked by statutory limitations or restrictions as to the form, manner and extent to which equity power may be exercised.69

The preceding notes have been directed largely towards outlining the effect that the English Church law has had in the development of common law and equity. Even prior to the time when that branch of English jurisprudence became the King's Ecclesiastical Law60 (a blend of civil, canon, common and statute law), courts of common law took judicial notice of Church law when relevant to the determination of controversies in which the royal courts had jurisdiction.91 For example, the distinction between a corporation and its members, which was a canon law doctrine long before it was recognized in common law,92 was given due effect as to ecclesiastical corporations in common law courts.93

Very few kings honored the pledge of Magna Carta that the Church of England should be free, and the numerous statutes of provisors enacted by Parliament to prevent the diversion of Church revenues to foreigners, as well as the statutes of Praemunire94 against trying cases in a foreign court, were

66Harvey v. Aston, supra note 85; Regnish v. Martin, supra note 85; Sayer v. Masterman, Ambler 344 (Eng. 1757).
68Wight v. Guthrie, 81 N. J. Eq. 271, 276 (1913).
70Termed "canon law" throughout this article, in order to prevent confusion with the topic, "By-laws of Voluntary Religious Associations," now termed "Ecclesiastical Law," in modern indexes.
71Brooke, Abridg. tit. Quare Impedit 12, fol. 168 (1568 ed.).
72The origin of this doctrinal fiction has been ascribed to the genius of Innocent IV (pontificate, 1243-1254). Borchard, Governmental Responsibility in Tort, VI, 36 Yale L. Rev. 1, 6 n. 11 (1926). That the doctrine was not recognized in early common law as applicable to temporal or lay corporations is shown by a case reported in Y. Bk. 17 & 18 Edw. III 70 (1343).
73Y. Bk. 18 & 19 Edw. III 74 (1344).
74See Shakespeare, Henry VIII, Act III, Scene 2, for an outline of the writ of praemunire.
frequently suspended by an exercise of the royal power of dispensation for purposes of barter. This power of dispensation, which covered every kind of law spiritual and temporal, written and unwritten (except that which pertained to matters mala in se at common law), existed until abrogated by the Bill of Rights; and today "the High Court of Parliament alone can render a positive law inoperative." As previously remarked, a very early check upon ecclesiastical jurisdiction was afforded by the writ of prohibition, which is said to be as old as the common law itself. Blackstone's reference to this writ as one directed to inferior courts is a very strong indication of the relative standing of the royal courts and the Courts Christian, which is set forth more specifically in a passage in Bacon's Abridgment stating that "ecclesiastical courts are subject to the control of the king's temporal courts when they exceed their jurisdiction;" yet, as pointed out by Bishop Stubbs, except in cases of collision with national law, the general legislation of Western Christendom, whether by Pope or Council, was accepted as a matter of course; and, as a matter of historic fact, more than one decretal was addressed to English bishops. In short, the canon law prevailed in England only so far as it was actually received with such extensions and limitations as have been imposed by necessity, expediency or public policy, and subject at all times to national law, where properly invoked.

The frequently quoted passage in the Friar's Tale of Chaucer (c. 1390), about the jurisdiction of the ecclesiastical courts in matters "Of diffamacioune of testaments, of contracts etc." might lead a casual observer to surmise that much of the law of libel and slander and contracts was developed in the Church courts; but this was far from being the case. Pleas concerning the debts of the laity could not be tried by such courts according

97Bac. Abridg. tit. Prerogative.
98Stat. 1 W. & M., Sess. 2, c. 2 (1689); 3 Complete Stats. of Eng. p. 154 (1929 ed.); Anson, Law and Custom of the Constitution, 301, 302 (1892 ed.).
100See Y. Bk. 2 Hen. IV, 10 (1400): Condict & Polmer's Case, Godb. 163 (Eng. 1610); Shotter v. Friend, 2 Salk. 547 (Eng. 1689).
102Stubbs, Const. Hist. of Eng., III, c. xix (1890).
103Note 50 Supra. See also Burns, Eccles. Law, I, p. xxi (1845 ed.).
to Glanville, nor could cases of defamation be tried in a spiritual court where money was demanded. For a long time this principle seems to have been honored in the breach rather than in the observance, for it became necessary for Parliament to enact a remedial statute requiring that copies of the libels in spiritual courts should be duly delivered because "... divers of the King's liege people (were) daily cited before spiritual judges to answer of things which touch... debt, trespasses, covenants, and other things whereof the cognisance pertained to the court of our lord the King..."

Defamation, being sin, was of ecclesiastical cognisance, dealt with by the Church, as was its custom in other cases of sin pro custodia morum of the community, and pro salute animae of the delinquent. Even so recently as the days of Henry the Seventh it was held that defamation is a spiritual offense. Although Justice Fairfax had urged counsel to make greater use of the action on the case, it took a long time for the courts of common law to recognize defamation as a tort; but in a special class of cases those guilty of defaming important personages were liable in damages as well as to criminal punishment in proceedings brought under the acts of Parliament entitled Scandalum magnatum. Eventual recognition of the availability of the writ of trespass on the case led to the development of the law of libel and slander in courts of common law. A pioneer case was one which in the year 1535 or 1536 laid down the principle that if a calumny charges an offense cognizable only in the Ecclesiastical courts, no action of case lay in the common law courts; if the offence imputed was one punishable only in the common law courts, the aspersions were actionable in the common law courts exclusively; but if the acts ascribed were punishable in both courts, then the choice of jurisdiction was optional. The subsequently expanding jurisdiction of the courts of common law in matters of defamation eventually crowded the Church courts off the field: but the judges soon felt this new business to be very irksome, and Sir Edward Coke, in particular, announced in the case of Crofts v. Brown, that no more favor would be given to actions upon the case for words than required by necessity, for the reason that such suits had become "too frequent." Much hair-splitting ensued, which engendered many anomalies, some of which have been cured by modern legislation. As previously remarked, the Courts Christian, in matters of sin, acted pro salute animae of the transgressor. This jurisdiction slowly perished while the royal courts, the Star Cham-

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105 Glanv. lib. x. c. xii.
107 Stat. 2 Hen. V., stat. 1. c. 3 (1414); 6 Complete Statutes of England, 166 (1929 ed.).
109 Y. Bk. 21 Edw. IV, 22, 23 (1481).
110 Statutes: 3 Edw. I, c. 34 (1275); 2 Rich. II, c. 5 (1378); 12 Rich. II, c. 11 (1388).
111 Y. Bk. 27 Hen. VIII, f. 14.
112 3 Bulstr. 167 (Eng. 1616).
ber, and in turn the Court of King’s Bench, assumed the role of custos morum of the community and punished acts of a general immoral tendency or contra bonos mores, so that eventually the common law expanded its jurisdiction so as to cover any acts attended with pernicious consequences, obviously injurious to public morals, or tending to the prejudice of the community.118 Finally, in the Nineteenth century, the jurisdiction of ecclesiastical courts for dealing with the sins of the laity lapsed through the old civil law principle of repeal by desuetude.119 In the Middle Ages the law of contracts was very limited, being practically restricted to “deeds” or “grants,” as contracts under seal were designated, or acknowledgments in court. So early as the days of Glanville the courts of common law prohibited the ecclesiastical courts from taking cognizance of temporal contracts; consequently, it seems strange that the royal courts did not take jurisdiction of executory contracts prior to the invention of the action of assumpsit; but, after all, the dominant influences were the landed interests, and there were many communal and seigniorial courts with customals permitting dealings with many subjects, such as deeds, wills, defamation, etc., blissfully regardless of courts spiritual and the royal courts.118 Probably very little of our law of contracts derives from the canon law, apart from the equitable principle of consideration traced by the late Sir John Salmond to a decretal.118

It is natural to anticipate that the Reformation would bring about alterations in the composition of the Ecclesiastical courts, and this was effected by the Statute 37 Hen. VIII, c. 17 (1545), opening these courts to doctors of civil law, whether married or not. Thereafter ecclesiastical lawyers were termed civilians, and, in the reports, the law of the courts spiritual was frequently termed “civil law.” A few years previously a declaratory statute117 sanctioned the Canon Law so far as it was not inconsistent with the “Laws, Statutes, and Customs of the Realm, or to the Damage or Hurt of the King’s Prerogative Royal.” Another important statute118 restricted the degrees within which marriage was prohibited to those laid down in the Eighteenth chapter of Leviticus. As this law was enacted prior to the settlement of Jamestown, it is conceived that it may be law in some of the American jurisdict-

118State v. Doud, 7 Conn. 384 (1829); Com. v. Harrington, 3 Pick. 26 (Mass. 1825); Updegraph v. Com., 11 S. & R. 394, 409 (Pa. 1824); Sir Charles Sedley’s Case, 17 State Trials 15 (1663); R. v. Taylor, 3 Keble 407 (1676); King v. Curl, 2 Stra. 788, 791 (1714).
117Cf. Phillimore v. Machen, L. R. 1 P. D. 481, 487 (Eng. 1876).
118Maitland & Baildon, The Court Baron, Vol. 4 Seld. Soc. (1891); Bateson, Borough Customs, Vols. 18 & 21 Seld. Soc. (1904 & 1906); Hemmone, Burgage Tenure in Mediaeval England, 130 (1914); Gross, The Mediaeval Law of Intestacy, 18 Harv. L. Rev. 120, 130 (1904).
110Stat. 25 Hen. VIII, c. 19, sec. 7 (1533).
111Stat. 32 Hen. VIII, c. 22 sects. 2 & 3 (1541); revived by Stat. 1 Eliz. c. 1, sec. 3 (1559).
tions which include acts of parliament as part of their common law. The marriage laws were still of a complicated nature, for it is recorded in history that the learned Sir Edward Coke pleaded ignorance of the law for three infractions thereof committed in the course of his second marriage. There never was a divorce in England, in the sense of dissolution of marriage for subsequent causes, save by act of Parliament, until the institution of the Court for Divorce and Matrimonial causes in 1857. Annulments, such as the so-called divorce of Henry VIII, were for canonical causes, such as consanguinity, in which sentence of nullity could be pronounced by a spiritual court during the life of both parties: or civil disabilities, such as pre-marriage, which could be dealt with by a competent court at any time. The fable that in England the king is head of the Church is as persistent as the numerous mis-citations of the case of Britt v. Rigden by commentators and other writers who quote an overruled argument of counsel as the decision of a court. A century after the reign of the gross Henry the Eighth, the ecclesiastical courts passed through a total eclipse. Almost needless to say, this was during the days of the Commonwealth, when the Church of England was proscribed under the epithet of "prelacy;" even possession of a Book of Common Prayer being treated as a criminal offence by Cromwell's government. Afterwards there was much important legislation bearing the name of Charles the Second, one of the most humane statutes being that by which the abominable writ de haeretico comburendo was abolished.

It has been asserted with great positiveness that "the canon law is no part of American municipal law." True it is that the titular spiritual jurisdiction of the Bishop of London over the American Colonies was too unsubstantial to admit of any formal establishment of ecclesiastical courts; and at least one colony (the Province of Pennsylvania) took as a model for its courts of probate the temporal Court of Orphans of the City of London:

120Waller's Appeal, 70 Pa. 392 (1872), Sharwood, J.
121Benton v. Benton, 1 Day 111, 116 (Conn. 1803); Powell v. Powell, 18 Kan. 371, 379 (1887); Thomas v. Thomas, 13 Neb. 81, 82 (1886); Dare v. Dare, 52 N. J. Eq., 195 (1893); Barnes v. Barnes, 28 Vt. 41 (1855).
122Stat. 26 Hen. VIII, c. 1 (1534) declaring that the King of England was head of the Church was repealed by Stat. 1 & 2 P. & M. c. 8 sec. 4 (1554), and by Stat. 1 Eliz. c. 1, sec. 4 (1559). "Elizabeth did not assume nor have her successors assumed the title 'Head of the Church,'" Maitland, The Constitutional History of England, 512 (1926).
123Plowd. 343a (Eng. 1568); McKean, The Presumption of Legal Knowledge, 12 St. Louis Law Rev. 96, 105-107 (1927).
125Andrews, American Law, I, 207 (1908 ed.).
126There was no Anglican bishop in America prior to the year 1787, and, paradoxically enough, the first bishop was consecrated by Scotchmen.
127Hawkins, Orphans Court Practice, 2 (1914). For an excellent summary of the powers, functions and jurisdiction of the Court of Orphans of London, consult Woods, Institute, 540-541 (1763 ed.).
but at the same time we find dim reminders of the old Courts Christian in such
designations as "surrogate," "prerogative court," and "ordinary," which sur-
vive in a few states. In all English-speaking jurisdictions the burden is upon
him who asserts that any particular provision of the old Corpus Juris Canonici
is in force in a temporal court, for we probably inherit the old rule that the
canon law yields to the common law and to the statute law. If it be estab-
lished that a canon law rule is of binding authority, the present-day tendency
would be to give it a restrictive interpretation. Where a canon law doctrine
is considered of persuasive value in the solution of a jural problem, its applic-
ability would depend largely upon consideration of the ancient but by no
means decrepit principle, Equum et bonum est lex legum.

In American jurisdictions there are at least two angles of approach in
dealing with the law of the old Ecclesiastical Courts of England. One view
is that it is part of the common law. Another view is that such law is of
assistance, but not of the authoritative weight of English common law and
equity. Probably all American jurisdictions would resort to the decisions of
the old canon law courts of England, when questions arise as to the conno-
tation of technical terms derived by statute from English ecclesiastical law,
for:

"All law is a compromise between the past and the present, be-
tween tradition and convenience. Hence pure analysis, since it deals
with the present only, can never fully explain any legal system."

130Bauman v. Bauman, 18 Ark. 320, 330 (1857) resemble; Jeans v. Jeans, 2 Harr. 38 (Del. 1835); Blewitt v. Nicholson, 2 Fla. 200, 204. (1848) resemble; Head v. Head, 2 Kelley, 191, 202 (Ga. 1847); Morgan v. Ireland, 1 Ida. 786, 787 (1880); Eisenburg v. Eisenburg, 33 Ind. App. 69, 71 (1904) resemble; Harrison v. State, 22 Md. 468, 483 (1863) resemble; Peters v. Peters, 62 Mass. 529, 536 (1851) resemble; Cowden v. Dobyns, 5 Sm. & M. 82, 90 (Miss. 1845); Wuest v. Wuest, 17 Nev. 217 (1882) resemble; Quiney v. Quiney, 10 N. H. 272, 294 (1839); Morgan v. Dodge, 44 N. H. 255, 258 (1862); Carris v. Carris, 9 C. E. Green, 516, 520 (N. J. 1873); In re Hodnett, 65 N. J. Eq. 329, 337 (1903); 1 Bradf. Rep. p. xxvi (N. Y. 1868) resemble; Brick's Estate, 15 Abb. Pr. 12, 15 (N. Y. 1868) resemble; Crump v. Morgan, 38 N. C. 91, 98 (1843); Reaves v. Reaves, note 128 supra; Jones v. Jones, 12 S. C. 623, 627 (1860) resemble; Nogees v. Nogees, 7 Tex. 538, 543 (1852) resemble; Cast v. Cast, 1 Utah 112, 123 (1873); Coghill v. Coghill, 2 Hen. & Munf. 467, 511 (Va. 1808) resemble; Bronson v. Burnett, 1 Chand. 136, 140 (Wis. 1849) resemble. 
131Shaw v. Shaw, 17 Conn. 189, 194 (1845); Robbins v. Robbins, 140 Mass. 528 (1866); Hodges v. Hodges, 22 N. Mex. 192 (1916); Matchin v. Matchin, 6 Pa. 332, 338 (1847); Dandridge v. Lyon, Wyeth. 123, 125 (Va. 1791); Johnson v. Johnson, 4 Wts. 135, 141 (1855) resemble.
132Bryce, Studies in History and Jurisprudence, I 616 (1901).
In other words, there are at least three factors in determining the law of any subject at any given time and place: historic tradition, environmental conditions and current public policy. In the near future it may be that especial stress will be laid upon the doctrine of Lord Herschel, that "in laying down a proposition it is necessary to keep in mind the consequences, and not only its operation in the particular case," and the further requirement that "the law must be moulded by adapting it on established principles to the changing conditions which social development involves." Generally speaking, within the orbit of its jurisdiction, a modern probate court has the powers of the old English ecclesiastical courts together with a few of those possessed by a court of chancery; while a modern divorce court exercises many of the powers of the old Courts Christian, together with some of the authority of the High Court of Parliament which it, as well as a number of American legislatures, has had in regard to the dissolution of matrimonial unions.