The Courts of Westminster Hall in the Eighteenth Century

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The Nova Scotia Supreme Court of 1754 was modelled on the ancient common law courts in Westminster Hall. That great gothic building was the heart of legal London. Originally completed in 1099 and remodelled about 1400, it was the seat of royal justice, and of all the procedural and substantive elements of both the common law and the principles of equity. The common law courts of King’s Bench, Common Pleas, and Exchequer coalesced as separate entities out of the early medieval curia regis, the administrative household of the King, or perhaps its exchequer, in a protracted process from the twelfth to fourteenth centuries. The parchment rolls of Common Pleas and King’s Bench survive from the end of the twelfth century, are separate by 1232, and exist in continuous runs from the third quarter of the thirteenth century. The Court of Exchequer was the last of the three common law courts to gel, out of the revenue exchequer; each of these courts had only four justices (barons in the case of Exchequer) in the eighteenth century. Chancery emerged out of the royal secretariat into a separate court with its own ‘law,’ equity, in the fifteenth century. By the mid-eighteenth century, under the influence of Lord Chancellors Nottingham (1674–82) and Hardwicke (1737–56), and of fuller reporting, equity had hardened into almost as fixed a set of remedies as those of the common law, the defects of which it allegedly supplied. This chapter is not, however, about doctrine, although the decisions of their English brethren necessarily concerned the judges of Nova Scotia. The meaning of
English 'high law' in the eighteenth century also resided in its procedure, patterns of litigation, the character of the bar and the benches, and how they were regarded by those outside Westminster Hall.  

Half a millenium of Westminster law was a revered inheritance for wealthy and many less propertied English citizens, particularly in its constitutional aspects, but the eighteenth century was also a period of vociferous criticism of the central royal courts for delay, arcane procedures, and the host of fees demanded by counsel, officers, and judges. The Hall itself was badly in need of renovation. In 1734 the courts, divided up by board partitions as they were in earlier centuries, were described as 'slovenly' in appearance; in the winter of 1739-40 tarpaulins were strung up to prevent rain from soaking Chancery and King's Bench. The roof was found to be so weak that timbers were put in place to shore it up. They remained there for eight years, until 1748, when the judges complained to the Board of Works that the props were 'an indecent sight in a Room where all the Courts of Justice sit, and which is the access to both Houses of Parliament.' Meanwhile Chancery and King's Bench were hidden behind a Gothic screen designed by William Kent, and improved in appearance. But the hall was still freezing cold in winter, and Hilary and Michaelmas terms were often misery, until in 1755 the screen was doubled in height and the courts covered over, just below the angels on the magnificent medieval hammerbeam roof.  

In 1754 Sir Dudley Ryder became lord chief justice, but the early years of the Nova Scotia court coincided largely with the chief justiceship of the most famous judge of the century, William Murray, Earl of Mansfield. From the time he took his seat in King's Bench in 1756, in the southeast corner of the hall, the growing ascendency of that court over Common Pleas accelerated. King's Bench was the greatest common law court, in any case: appeals ran to it from Common Pleas, and it controlled the process of inferior courts through the prerogative writs, notably those of certiorari and habeas corpus. By the former all proceedings in a lower court could be removed into King's Bench; by the latter, in which the writ had been improved upon by the statute of 1679, all those imprisoned in other jurisdictions (or by private persons) were brought before the judges to have the matter tested. The fact that King's Bench was open to all barristers, whereas Common Pleas was monopolized by the dying breed of serjeants-at-law, increased the popularity of Mansfield's court. His reign there, until the late 1780s, also coincided with the celebration of the genius of the common law in William Blackstone's *Commentaries on the Laws of England* (given as lec-
Mansfield made suggestions about the text, and Blackstone became briefly a puisne justice of King's Bench in 1770, before moving to Common Pleas later that year. In both the Hall and the law, the third quarter of the eighteenth century was thus a period of some new doctrine, procedural reform, architectural improvement, and a great deal of self-congratulation. The best-known legal innovations were in King's Bench. Mansfield blurred, in the eyes of many lawyers, the boundaries of equity and common law, and he influenced Blackstone's account in a similar way. He also curbed some practices of the clerks, and simplified some process. But these were minor changes in a matrix of rules, forms of process, and daily practices that we now know were being elaborated and complicated in the other courts (notably Chancery), and even in King's Bench, in a manner richly rewarding to judges and lawyers and clerks.

By the later eighteenth century Chancery practice was the most remunerative in the Hall. More lawyers made at least some appearances there, than they did in any other court. Chancery sat in the southwest corner of the Hall, across from King's Bench in the southeast corner, and many suffering litigants sent back and forth between common law and equity in the course of a single lawsuit damned them both. But they did not think (as nineteenth-century reformers did) that putting both remedies in one court was a sure solution. In the one eighteenth-century court with both an equity and common law side, Exchequer, it was not the litigants but the specialized practitioners familiar with its obscure and unique procedures who benefited from this convenience. Such procedures were revered by the profession, and expressions of reverence for the certitude and antiquity of the common law are often inseparable from professional appreciation of the complexity and expense of its process. Many eighteenth-century common lawyers distrusted Mansfield's very minor changes to the law: James Boswell, although a Scot from a different legal tradition, greeted Lord Kenyon, Mansfield's successor, as 'a good fuller's mill to thicken and consolidate the law, which was very necessary after the loose texture which Lord Mansfield had given it.' Particularly during the period of the French and revolutionary wars (1792–1815), which began shortly after Mansfield's retirement, tradition rather than innovation was the dominant value in the highest circles of government and law. Lord Kenyon (CJB 1788–1802) and other judges made frequent reference to the antiquity and hence wisdom of the common law, and the necessity to maintain it inviolate, fixed, safe from statutory incursions, and distinct from equity. From a layman's point of view, innovation seemed to be limited to an ever-
increasing and costly complexity in litigation, growing throughout the century. It was only in the 1830s and 1840s that the judges’ patronage positions were finally bought out and they were put entirely on salary, and the prolonged process of simplifying pleadings and unnecessary charges began. Until then both the law and Westminster Hall itself continued to attract much criticism. The young John Beverley Robinson, later chief justice of Upper Canada, visiting the Hall in 1815, thought ‘everything about it seems to be tumbling into ruin – the first impression it occasions is melancholy and gloomy ...’ This was also the mood of many litigants.

Civil Litigation

Most civil litigation in England took place in borough and a few surviving county and hundred courts dating from the Middle Ages, in statutory courts of request, and in other inferior tribunals with or without juries. The borough courts of record were based on common law process, increasingly so from the early seventeenth century; courts of request, most of them the result of eighteenth-century legislation, were held by lay commissioners using broad equitable powers. Such proceedings were usually fairly quick, inexpensive, and informal: the courts of request in particular were extremely effective venues for enforcing payment of small debts. In contrast, litigation at Westminster was procedurally complex and very expensive, requiring much professional consultation. At common law, the ancient forms of action determined pleadings before simplification began in the 1830s. Each was based on a different writ, and the respective procedure and proofs were distinctive and extremely technical. Actions were real (for land), personal, or mixed. Real actions were displaced by ejectment. Personal actions were on contract or tort. The former comprised assumpsit (on a simple contract), debt (on a deed or on a simple contract), covenant (on deed alone), scire facias (on a judgment), account, and annuity. The actions in tort were trespass (of two sorts, one on real property, one on goods), case (which had become a general category in the absence of a more appropriate form of action), replevin (to recover goods unlawfully taken), trover (to recover the value of such goods), and detinue (to recover the goods, or their value, and damages.)

The crucial importance of choosing the right action to fit the circumstances of the case (a wrong choice was usually fatal), the fact that no two could be joined in one suit, and the costly learning of special plead-
ers, increasingly employed from mid-century, to winnow the case between the parties down to a limited issue gave the professionals virtually total control of litigation. Once embarked on a suit, plaintiffs found themselves led by attorneys, solicitors, barristers, court officers, and judges, all of whom benefited from a series of procedural tollgates, many of them wholly unnecessary. A plaintiff seeking judgment on a debt could be forced to pay at some forty separate stages, most of them pretrial. Counsel on both sides exploited the fact that the four terms of the judicial year (Hilary, Easter, Trinity, and Michaelmas), within which most motions had to be made, were each of only three to five weeks’ duration; in each term, specified return days and other rules required close attention by clerks in court, attorneys, and counsel if an action was to succeed. Given these obstacles, what made a lawsuit worthwhile, particularly in debt collection (which constituted 80 per cent of the work of the common law courts, in both Westminster and Nova Scotia) was the high rate of success for plaintiffs with good evidence, and the payment of costs by the loser. The rolls of the courts were also used extensively to provide security for debts at the time credit was extended, or if doubts arose, through the use of cognovits and warrants of attorney. By agreeing to sign them, the debtor guaranteed the creditor speedy and uncomplicated collection in case of eventual default.

These various advantages accounted for a significant caseload in the central courts of the common law. In the case of King’s Bench, the original jurisdiction of the court in Middlesex, extended to out-counties through the fiction of the Bill of Middlesex, was the basis of an increasing dominance over Common Pleas and Exchequer by the eighteenth century. Estimates based on the various entries made by the clerks suggest that over 11,000 suits were begun annually in King’s Bench at mid-century; the vast majority of course never proceeded to trial. The distribution of business shifted over time, however. Common Pleas cases dropped from perhaps 16,000 in 1740 to fewer than 6,000 in 1765. Probably something over 1,000 cases began in Exchequer each year. King’s Bench was to become by far the dominant court in the later eighteenth century, as Common Pleas had been in the seventeenth.

The Mid-Century Trough

In spite of procedural and substantive innovations, particularly by Mansfield (in the use of special juries; in insurance; in commercial law), the central common law courts dealt with far less litigation than
they had a hundred years before or were to see a hundred years later. For centuries the courts had vied among themselves for business, trying to attract litigants with speedier or more convenient process. The Bill of Middlesex and writ of latitat in King's Bench and the elaboration of assumpsit were the two main earlier innovations which led eventually, from about 1750, to the domination of civil suits by King's Bench. But this was a division of a litigation pie that was only a sixth the size of that a century earlier: cases in an advanced stage in the two principal courts, King's Bench and Common Pleas, which numbered about 30,000 in the mid-seventeenth century, amounted to only about 5,000 in 1750, rising to about 10,000 in 1800. Trials, most of which took place outside London at county assizes, in the nisi prius court, had declined by the early eighteenth century to a quarter of their level at the Restoration. This enormous decline in litigation was largely mirrored in the records of other, inferior, and local courts. Only in the nineteenth century did litigation levels again reach those of the early seventeenth.

A number of explanations have been offered for the earlier rise of the litigation wave to its Elizabethan height; they are difficult to disentangle but the results affected all courts. There is a growing consensus in the literature that the subsequent precipitous decline from about the Restoration had fewer and more obvious causes. Stamp duties at the end of the seventeenth century contributed, as did perhaps the growth in the use of penal bonds, but the most important determinant was probably the greatly increased expense of litigation in the hands of the small but entrenched legal fraternity of attorneys, solicitors, barristers, and judges through the seventeenth and into the eighteenth century. Even in inferior local courts, fees increased markedly over the period of the great litigation decline. In Westminster Hall, fees were much higher in the mid-eighteenth century than they had been a century before, and all the lawyers shared in them. Among the greatest beneficiaries were the judges themselves. They controlled immense patronage in the chief clerkships and other important positions in their courts, which they usually granted to their sons and other male dependents; they shared fees from virtually every case and stage of process, directly or indirectly; and they therefore had no incentive at all to attack the cost of law at Westminster.

The profits of the law derived mainly from attracting plaintiffs to Westminster and then milking the defendants. The average cost of the most common kind of proceeding, debt collection, was six or seven
times as great as the amount at issue. This could only be attractive to plaintiffs with strong evidence (such as a bond or other sealed instrument), who could be sure of success and who given the rule that the loser paid all costs, were themselves immune from the expense and possibly gratified by the burden on the defendant. Quantitative study of the court records has shown that this was in fact the typical case: for collection of a debt, with a high success rate by plaintiffs, both in pre-trial proceedings and in the small proportion of cases that actually went to trial.24

Some trials were held 'in banc,' before the judges at Westminster, but the great majority of civil cases were tried by nisi prius juries summoned in the counties in which the action arose. The common law judges on circuit were called justices of assize, after the name of one of the commissions by which they acted. They travelled in pairs, as they generally did in Nova Scotia before 1834, usually twice a year to most counties, throughout the country. Assizes were held in the vacations following Hilary and Trinity terms, and at each assize town one judge held the Crown court for criminal cases, the other the nisi prius court, sometimes relieving each other when one calendar was unusually long. The relative proportions of civil and criminal litigation in the high courts have not been examined in any detail, but an initial distinction is important. At nisi prius were heard not only all civil suits brought to trial, but also a few misdemeanours that had been removed into King's Bench by writ of certiorari from quarter sessions or even an earlier Crown case at assizes, and also criminal informations laid in King's Bench. In one county, Staffordshire, 195 civil cases at Westminster were entered for trial in the county at nisi prius between 1784 and 1791; in the same period, only one criminal proceeding (on an indictment removed by certiorari) – half of 1 per cent – was so entered.25 Of the 155 of these cases that actually proceeded to trial at nisi prius, 54.8 per cent were case (assumpsit), 18.1 per cent ejectment, 10.3 per cent debt, 7.1 per cent trespass, 5.2 per cent assault, 2.6 per cent covenant, and 0.6 per cent of each of replevin, trover, and criminal on certiorari.26 After the outcome of the trial was returned to Westminster Hall in a formal statement called a postea, judgment was pronounced there. There could, however, be motions in error (a writ of error in a criminal case) or for arrest of judgment or a new trial, argued at Westminster; if the last was successful, the process began again, with a new trial in the county of origin or (in the rare case of a change of venue) in another county or in Westminster Hall itself.27
Assizes brought Westminster to the provinces by means not only of the pomp of javelin men (who met the judges at the county boundary), the opening church service, and the practised rhetoric of death sentences, but also through the charge to grand jurors and a host of informal exchanges between local gentry and officials and the judges and barristers who had arrived in town by coach and on horseback. The judges announced government policy and royal proclamations, denounced sedition, drew attention to new statutes, took advice on pardons, and exhorted magistrates and gave them legal advice in the few days in which they also cleared the gaols, heard important misdemeanour cases, and listened to counsel (including the leaders of the bar, who came with them on circuit) argue their cases before the nisi prius and Crown court juries.

Criminal

Civil suits could be initiated, as we have seen, in any of the three common law courts at Westminster, to be heard by the judge there in term time (in banc), or before the nisi prius judge at assizes. Criminal trials were also heard by all the common law judges, but in two quite different ways. Best known was their role in presiding at the trial of serious criminal offences in the Crown court at assizes in the provinces, and in rough rotation at the Old Bailey in London, where high court judges sat with the recorder and aldermen. In these settings the eighteenth-century judges heard a large proportion of indictable offences. Non-capital cases were in the jurisdiction of magistrates at quarter sessions, but the small number of prosecutions in the eighteenth century allowed the judges to try many lesser felonies and misdemeanours as well, as did the Nova Scotia Supreme Court for decades after its founding. Thus, in the populous midland county of Staffordshire, the judges at assizes heard about 69 per cent of all criminal trials between 1740 and 1800, while the county bench of magistrates at quarter sessions heard only 31 per cent. Quarter sessions was preoccupied with local government; assize judges knew the criminal law.

In term time, apart from occasional service at the Old Bailey, the only judges concerned with criminal cases were the lord chief justice and the three puisne justices who sat with him in King's Bench, the supreme court of criminal law. The criminal proceedings with which they dealt (often making new law in so doing) fell into several categories. They had an original jurisdiction in Middlesex, and therefore heard and
determined many misdemeanours, often quite minor ones, prosecuted on indictment in that county. For Middlesex and for the rest of the country, referred to in King’s Bench records as the ‘out-counties,’ the court dealt with indictments removed on certiorari from quarter sessions or assizes; there were also summary convictions before magistrates removed on certiorari; criminal informations filed ex officio by the attorney general; other criminal informations filed by the master of the Crown Office on behalf of private litigants; qui tam proceedings; and proceedings by writ of habeas corpus, which of course were important in civil as well as criminal litigation.

Criminal informations, both ex officio and ordinary ones, were important weapons for both the government and private citizens, making the prosecution of a misdemeanour expensive and speedy and removing the grand jury oversight requisite in prosecutions on indictment. Ex officio informations were exhibited as of right by the attorney general, but ‘ordinary’ criminal informations required the approbation of the judges before they could be exhibited (that is, become formal charges equivalent to an indictment); the tests that the judges applied changed over time and became an important source of law. A particular version of a criminal information, and the use of certiorari for removing, questioning, and quashing summary convictions, have been celebrated by older histories as the main instruments by which King’s Bench supervised, controlled, and punished the misbehaviour of that great mass of inferior magistrates throughout the country, the county justices of the peace and borough justices. Based on an examination of every such case in one county for the second half of the century, my own recent conclusion is that in fact the control exerted by King’s Bench was slight, hesitant, and indeed virtually non-existent for much of the country. The simple reason was that if magistrates were punished, even for egregious misbehaviour, it would be difficult to find men willing to take the post. The high court judges were therefore solicitous of magistrates, since most of the work of the criminal law (supervising constables, taking bail, committing for trial, hearing summary cases) was carried out by these unpaid inferior justices.

Attorneys, Solicitors, Barristers, and Clerks

The history of Westminster Hall is also the history of the complex bureaucracies of the courts, and of attorneys and solicitors and the special pleaders who were said to work ‘under the bar,’ as well as of the
barristers, serjeants, King's counsel, law officers of the Crown, and judges who were its most visible performers. There were also other, less noticed men: recent work on King's Bench, particularly the original jurisdiction of the court in Middlesex, shows that 'low attorneys,' many of them men with no formal legal qualifications whatsoever, offered their services on a contingent fee basis to even quite poor people. It is obvious too that perjured witnesses, particularly in criminal trials, were quite freely available for payment. But for most plaintiffs and defendants, the services of qualified legal professionals were absolutely necessary, and their fees an inevitable concomitant of 'moving the court.' Here the clerks of court were as important as the lawyers.

The fullest recent account of the role of the court bureaucracies and the bar in Westminster Hall in the eighteenth century is a damning one. The great litigation decline in England, which reached its nadir at the moment of the founding of the Nova Scotia Supreme Court, seems largely attributable to the increased cost and complexity of going to law in the preceding century. The response of the bar (and of the clerks of court) in the eighteenth was, David Lemmings shows, to serve an increasingly wealthy clientele, largely the London plutocracy, as gentry in the provinces, and lesser citizens, withdrew from litigation. Those able to pay for law were now made to pay much more, and technicalities, unnecessary motions and filings, the employment of multiple counsel, and (a point he does not mention) an increased tendency to argue cases on repeated occasions over a number of terms before judgment all greatly expanded opportunities for making fortunes at the bar. The greatest legal and judicial fortunes were amassed between the 1750s and the early nineteenth century. The winners made spectacular amounts of money and acquired peerages. The losers, including Jonathan Belcher, sought success in lesser places like Dublin and Halifax. The result, argues Lemmings, was a pronounced and deserved erosion of the place of the common law in the life of the community, the constitution, and public esteem. Only the role of a defence bar, in state trials of great constitutional significance, somewhat redeemed the profession and the courts.

Judges and Politics and Law

Blackstone and other contemporary celebrants of the glory of English law contrasted the courts of Westminster Hall with the despotic power of Star Chamber and the other conciliar courts abolished in the 1640s.
They lauded the learned probity of the Hanoverian bench, whose independence from the whims of the Crown, guaranteed by a few words in the Act of Settlement (1701), they argued had ended the corruption and ignorance manifested by the Stuart judges of the later seventeenth century. This achievement was in fact the culmination of a half-century of higher expectations of probity, and constitutional independence, of the judges. Yet the claim of judicial independence in the eighteenth century must be substantially qualified. Of course, the chancellor sat in his court in Westminster Hall, in the House of Lords as principal representative of the government, and in Cabinet; his brother, the Master of the Rolls, could and often did hold a Commons seat, a great convenience to the administration. But several historians have also pointed out that both the notion of independence from political pressure and innocence of other forms of interest were weak because of more general structural characteristics of the bar and bench. Wilfrid Prest argues that gifts and other improper inducements were virtually unknown by the eighteenth century, as judicial salaries and public expectations of probity increased. At the same time, however, judges continued to give advice to private litigants, and, as we have seen, controlled large patronage networks in their courts and profited directly from fees. The attack on legal delay and costs therefore directly implicated them, particularly as the chief justices almost always appointed their immediate family members to the immensely profitable leading clerkships in the courts, the duties of which were all performed by low-paid deputies.

Most important, in the 1760s and 1790s the judges were identified by critics of government as the creatures of the administration, the charge that had been so incendiary under the late Stuarts. From the mid-1760s the Wilkites accused the bench of subverting the rights of jurors in seditious libel cases, and of carrying the malign purposes of the government directly from the council chamber to the seat of justice, notably when Lord Chief Justice Mansfield sat simultaneously in Cabinet and on King’s Bench, first from 1757 to 1760 in the administration of Newcastle and Pitt; he remained an active privy counsellor for almost eight years altogether. Judicial independence from royal and ministerial pressure was compromised as well because appointment to the bench, and notably to the chief justiceships, almost always required prior loyal service as a law officer of the Crown in Parliament. Mansfield’s stint in Cabinet, briefly as chancellor of the Exchequer from April 1757, then without office until April 1763, when he resigned from Cabinet with Bute’s administration, was an unusually open acknowl-
edgment of the well-understood political significance of the chief justices. As a member of the House of Lords, and as an adviser to the King and Cabinet, he defended government policy towards the American colonists and other burning issues. He also drafted legislation and sponsored it in the Lords while chief justice, a practice not challenged until the nineteenth century.

If the chief justices were political (and Mansfield’s role at the heart of government is matched by Hardwicke’s, even before he was chancellor), they were occasionally on opposite sides of important issues. Perhaps the clearest example is the enmity of Chief Justice Charles Pratt of Common Pleas (later Lord Camden), whose tenure there in 1762–6 overlapped with the early years of Mansfield’s reign in King’s Bench. In the huge constitutional controversies aroused and sustained by John Wilkes and his supporters, Pratt was heavily engaged on the side of the critics of government and showered with gifts and testimonials for his opposition to the administration and to Mansfield. He was widely believed to have shared in the writing of one of the most vitriolic published attacks on Mansfield. But Camden, who continued to agitate on constitutional issues long after he left the bench, and indeed until the end of his life (in 1792, supporting the Libel Act), was an exception. By the end of the century, in the state trials of Jacobins, popular supporters of the French revolution and advocates of democracy, it was Thomas Erskine and other defence counsel who persuaded jurors to acquit. The judges, in contrast, resisted all arguments that seditious libel was not theirs to define and deplored the lack of convictions. In the early nineteenth century, judges like Simon LeBlanc (JKB 1799–1816) and Alexander Thomson (B 1784–1814, CB 1814–17) were handpicked by government to ensure that large numbers of death sentences were passed and carried out on Luddites; some other members of the bench had been too lenient. The chief justices and lord chancellors remained the staunchest supporters of the death penalty in England until the 1830s.

This fact is one of the many which distinguished the role of the high court judges in England from those in Nova Scotia. The comparisons that arise in the chapters of this book are many, and suggestive, although any overall comparison must be a complex one. In Nova Scotia, legislation had done more than in any other British North American colony to ameliorate the capital code, a source of satisfaction and pride to men like Beamish Murdoch. Although colonial judges were important men, sitting in executive and legislative councils, they arguably never enjoyed the political dominance of their English brethren. Nor, it appears from
the immensely interesting research now in progress, was high law in Nova Scotia ever as extortionate, plutocratic, and complacent as it was in the courts of Westminster Hall. Moreover, other British high courts probably substantially influenced that of Nova Scotia, in ways now being explored. The American-born Jonathan Belcher’s experience was gained mostly in Dublin, and in spite of the constitutional dominance of the English high courts, and the intimate connections and advice between the English and Irish benches, the nature of justice in Ireland was distinctive in many ways.\(^4\) Scotland’s own common law, overlaid and intermixed with civilian influences, was celebrated by its greatest institutional writers in the eighteenth century and had not yet begun to succumb to the English influences increasingly imposed on it by the legislature and the House of Lords in the nineteenth. The literature and the learning of the Court of Session and the High Court of Justiciary came with many Scots to the British colonies. The influences of both Ireland and Scotland, probably less in doctrine than in practice and administration, invite further research. Much more, of course, is now known of the continuing and distinctive influences from other parts of North America on Nova Scotian legislation and practice, and its own indigenous spirit of invention. But like all the colonies that became Canada, eighteenth-century Nova Scotian judges looked, of constitutional necessity, and often filial piety, to the courts of Westminster Hall. They were the font and origin of both common law and equity.

NOTES

1 The restructuring of 1764 emphasized this fact. See Cahill and Phillips, this volume.
5 Ibid., 5:390.
6 W. Blackstone, *Commentaries on the Laws of England*, 12th ed. (London, 1793–5), 3:110, 130–2, 264. The other prerogative or extraordinary writs were mandamus (to compel the performance of a duty), procedendo (from Chancery, to compel an inferior court to proceed to judgment), quo warranto (to inquire by what authority an office was exercised), and prohibition (to restrain an inferior court within its jurisdiction). Prohibition in some cases could be got from the other superior courts or chancery, and statutory habeas corpus under 31 Chas. II c. 2 (1679) was issuable in Common Pleas, although it rarely was: a notable instance, when King's Bench probably would not have done so, occurred in the case of Wilkes (below). It became issuable in all the courts by 56 Geo III c. 100 (1816).


9 Ibid., 183.

10 Ibid., 177.


Most real and mixed actions were abolished by the Real Property Limitation Act (1833), s. 36; the process was completed by the Judicature Acts of 1873-5. For a summary of the nineteenth-century reforms, see A.H. Manchester, *A Modern Legal History of England and Wales* (London: Butterworths 1980), chaps. 6 and 12.


C.W. Francis, 'Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840,' *Northwestern University Law Review* 80 (1986): 859. Francis makes the tollgate comparison and is the source for the statistics in this and the next paragraph (appendix 2 at 910, appendix 5 at 913, rounded percentages for the year 1740). Real actions could only be tried in Common Pleas.


J. Cockburn, *A History of English Assizes, 1558-1914* (Cambridge: Cambridge University Press 1972), chap. 7, and tables 3 and 4, at 138-9. Cockburn, at 143, lauds the 'rapidity with which assizes processed civil actions in an age notorious for the slowness of civil litigation,' but this assessment ignores pre- and post-trial proceedings at Westminster, the source of most delay and expense. Actual trials were rare for this reason: see below. 'Nisi prius,' a term originating in the medieval writs of venire for juries to attend by a certain day, referred to the fact that the trial was to be held at Westminster 'unless before' that day it was held before an assize judge on circuit in the county where the suit arose. Such trials were said to be at nisi prius.

See the work of Champion and Muldrew, cited above, note 14.

The fullest treatment is still Brooks, 'Litigation and Society.'

Lemmings, *Professors, passim,* summarizes the literature; his own findings strongly support the primacy of fees as the principal cause. See also C. Churches, 'Business at Law: Retrieving Commercial Disputes from Eighteenth-Century Chancery,' *Historical Journal* 43 (2000): 937-54.

D. Duman, *The Judicial Bench in England 1727-1785: The Reshaping of a Professional Elite* (London: Royal Historical Society 1982), provides estimates; Francis, 'Practice,' gives a breakdown of the fee structure as well as diagramming the right of appointment to offices, and summarizing the attack on patronage in the nineteenth century. To take one example at the end of the century: Lord Kenyon, as Chief Justice of King's Bench, received £4,000 a year and appointed to offices in King's Bench worth about £15,000 a year; those appointed were his sons Lloyd (1775-1800) as filazer and George
(1776–1855, second baron) as joint chief clerk. In 1804 Lord Ellenborough appointed Kenyon’s youngest son Thomas (1780–) as filazer, and in 1810 shared the post of custos breviurn, now in his possession, with George, now second Baron Kenyon. Members of the family still occupied several very remunerative posts in the mid-1830s. Hay, ‘Lloyd Kenyon,’ *Oxford Dictionary of National Biography.*

24 Francis, ‘Practice.’


26 On certiorari, see below, ‘Criminal.’

27 For some instances of misdemeanours on certiorari see Hay, ‘The State and the Market.’


30 On nisi prius cases in London see Oldham, *Mansfield Manuscripts,* 1:109, 118.


32 Hay, ‘Legislation, Magistrates, and Judges.’

33 Ruth Paley deals with this aspect of King’s Bench in forthcoming work.

34 Criminal informations allowed prosecutions for serious misdemeanour without indictment; those filed by the attorney general were termed ex officio informations. The first kind was abolished by the Administration of Justice (Miscellaneous Provisions) Act (1938), 1 & 2 Geo. VI, c. 63. Qui tam proceedings, or penal actions, gave a portion of the penalty, usually half, to the ‘common informer;’ such cases were often heard by magistrates, but could be brought in the high courts. For the use of habeas corpus in marital disputes, see E. Foyster, ‘At the Limits of Liberty: Married Women and Confinement in Eighteenth-Century England,’ *Continuity and Change* 17 (2002): 39–62. Proceedings in Staffordshire for all these categories are reproduced in Hay, *Crown Side Cases.*


36 Paley, forthcoming work.

37 Duman, *Judicial Bench in England; Lemmings, Professors,* passim and especially chap. 8. Lemming’s argument that Old Bailey work raised the esteem
of the profession is cast in doubt by the detailed work of Allyson N. May, *The Bar and the Old Bailey* (Chapel Hill: University of North Carolina Press, 2003). Lemming’s evidence on fees and complaints is very congruent with the patterns of litigation analyzed by Francis, although he does not cite his work.

39 Ibid., 93.
42 Followed on only one further occasion, by Lord Ellenborough between February 1806 and March 1807, to much criticism: see R.A. Melikan, ‘The Judge and the Talents: an Episode in the History of Cabinet Government,’ *Parliamentary History* 18 (1999): 131–43. Mansfield also held the seals of the Exchequer again for a few months in 1767, a traditional role of the lord chief justice during transitions between administrations, as he had for three months in 1757: *DNB*.
44 Hay, ‘Scandalizing.’
45 Hay, ‘Simon LeBlanc,’ *New DNB*.