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SIR EDWARD COKE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

CHARLES H. RANDALL, JR.*

*"I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized."*¹

The period of English history beginning with the defeat of the Spanish Armada in 1588 and ending with revolution and the execution of Charles I, in 1649, contained events which profoundly influenced the development of English and American constitutional law. The supremacy of Parliament and the scope of the Royal prerogative,² the jurisdiction of the common law courts and of the Chancery, the power of the King to tax without the consent of the Commons, these were among the issues over which dispute raged. This period generally coincided with the long career of that brilliant and irascible lawyer and judge, Sir Edward Coke. Challenger of Kings, enemy of Sir Francis Bacon, Coke thrust himself into the center of every dispute.

These years were the crucial years in the development of the privilege against self-incrimination. The history of the privilege has been detailed in careful and scholarly articles by Dean Wigmore, Edmund Morgan and Mary Hume Maguire.³ Each of these writers

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1. ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* (Harvard University Press, Cambridge, 1955), p. 7. United States Constitution, Amendment V, states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. In *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure cases), 343 U.S. 579 (1952), the brief filed by John W. Davis and others for the steel company drew on the history of this period to argue that under the Constitution of the United States, there was no presidential prerogative power. See argument "A", headed "The Necessary Background—the Successful Struggle Against the Crown Prerogative and its Culmination in the Constitution of the United States."

3. Wigmore, *The Privilege Against Self-Incrimination, Its History*, 15 HARV. L. REV. 610 (1913); Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71 (1891); 8 WIGMORE, EVIDENCE § 2250, 2251 (3d ed., 1940);

calls attention to the contribution made by Coke while he was successively Chief Justice of the Court of Common Pleas and of the King's Bench, between 1606 and 1616.⁴

The development of the privilege has two over-lapping phases. In the first phase, the common lawyers were allied to the Puritans and Parliament in opposing the use of the oath *ex officio* by the ecclesiastical courts, and especially the Court of High Commission. These courts were actively engaged in enforcing the Reformation, except during the brief reign of Queen Mary. They were seeking out and prosecuting as heresy any deviation from the prescribed religious faith. A major instrument used by these courts was the oath *ex officio*. A person suspected of heresy would be apprehended and asked to swear to answer truly all questions put to him, and then would be asked questions concerning his beliefs. If he were careless or false in his answers, the court would punish him for heresy or for perjury.

Coke led the common lawyers in establishing that this procedure was illegal under the Law of the Land. As Chief Justice, he successfully asserted the power of the common law courts to issue writs of prohibition against the ecclesiastical courts, where the oath method was attempted by the latter.

This first phase of the history of the privilege is the subject of this paper. The second phase was the extension of the rationale of the decisions of Coke to proceedings in the common law courts themselves, and the development of the privilege in its present form. This development commenced with *John Lilburn's case*,⁵ and the abolition of the Star Chamber⁶ and the Court of High Commission⁷ in 1641. These events took place some time after Coke's death, but his statements of the law of England, in his decisions, his Reports and his great treatise, the Institutes, played an important role in bringing these events to pass.

The significance of the decisions of Coke went beyond the question of the legality of the use of the oath *ex officio* by the ecclesias-

Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Maguire, *Attack of the Common Lawyers on the Oath Ex Officio As Administered in the Ecclesiastical Courts in England*, in ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN, 199 (Cambridge, Mass., 1936).

4. Wigmore, *id.*, 15 HARV. L. REV., 621, 622; Morgan, *id.*, 7; Maguire, *id.*, 221 ff.

5. 3 How. State Trials 1315 (1637).

6. 6 Charles I, cap. 10; 7 Statutes at Large 338 (Pickering ed., Cambridge, 1762); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 173, 406, 439-441 (2d ed., Rochester, N. Y., 1936).

7. 6 Charles I, cap. 11; 7 Statutes at Large 343; Plucknett, *id.*, 173.

tical courts. It concerned the extent to which torture could be used as a method of securing proof in criminal proceedings, and the extent to which the English criminal law would be influenced by the inquisitional methods as developed in the canon law on the continent of Europe, and as early received in the secular law of those countries.⁸

The study of the development of our legal system is rewarding for its own sake. But the privilege against self-incrimination is a constitutional doctrine that can be understood only in the light cast by history.⁹ As Chief Justice Warren said in 1955:¹⁰

"The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution — and the necessities for its preservation — are to be found in the lessons of history."

As in the days of Coke, so today, the privilege is no arid doctrine of interest only to lawyers; our newspapers daily tell us of new contexts in which this old problem arises. A study of its origins, of the situations it was designed to meet, of the arguments of its proponents, cannot but give us greater perspective and insight in dealing with these present problems.

In order to lend perspective and greater meaning to the problems faced by the common law courts in dealing with the privilege after 1606, it is necessary to consider the privilege in a wider historical context — that of the use of torture in judicial proceedings. Therefore, the first part of this paper deals with the development of the

8. A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 220, 223 (1897).

9. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* (St. Paul, Minn., 1954), 252-257.

10. *Quinn v. United States*, 349 U.S. 160, 161, citing *GRISWOLD, supra*, n. 1. The *Quinn* case was the first square holding that the privilege was a limitation on the Congressional power of investigation, although the holding had been clearly foreshadowed. See Note, *Applicability of Privilege Against Self-Incrimination to Legislative Investigations*, 49 COL. L. REV. 87 (1949). History completely supports this view. As the materials herein show, the privilege against self-incrimination was born and bred in the political briar-patch.

The Chief Justice continues in the *Quinn* quotation above, "As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England." As shown in this paper, the proceedings in the Court of High Commission were as responsible as those in the Star Chamber for the English attitude toward compulsory self-incrimination. These were separate courts, contrary to the statement in *GRISWOLD, supra*, n. 1, p. 4. The Star Chamber consisted of the Privy Council, the common-law judges, and at times peers of parliament. It dealt in the main with secular criminal matters. The High Commission was composed of both ecclesiastics and laymen, and dealt with ecclesiastical offenses, especially heresy. Because heresy and sedition tended to overlap, and because both bodies used the oath *ex officio* procedure, the two courts earned the common opprobrium of employing "Star Chamber" methods of procedure.

inquisitional method of trial on the continent of Europe, and the introduction of this method into the English ecclesiastical courts.

1. *History of the oath ex officio in English ecclesiastical courts, to 1606.*

In the early 1200's, Pope Innocent III introduced several reforms into the canon law, which prevailed throughout western Christendom.¹¹ In 1215, trial by ordeal was abolished.¹² Since trial by battle was no longer permitted¹³ and trial by compurgation oaths "was already becoming little better than a farce",¹⁴ a new method of trial was needed, based upon a more rational theory of proof. This method was provided by Innocent in the inquisitional method of proof. As Wigmore points out, this method, based on careful questioning of the accused, was far more rational than the methods it replaced, which had relied mainly on the intercession of the Diety. In trial by ordeal or by battle, it had been believed that God would bring victory to the just side; and in trial by compurgation oath, or "the daring and succeeding to pronounce a formula of innocence, usually in company with oath-helpers",¹⁵ the theory was that instant punishment would fall on one who swore falsely.

As it eventually developed, the inquisitional method of trial might be commenced in any of three ways:¹⁶ (1) by an official complaint; (2) by an accusing witness, or *per famam vicinae* or *per clamoralem insinuationem*, by common report, or general rumor in the neighborhood; or, (3) by the judge *ex officio mero*, merely by nature of his office. The canon law authorities were not clear as to whether a proceeding could commence *ex officio mero* without the accusing witness or *per famam* safeguards.¹⁷ It was arguable that the *ex officio* method was legal or illegal depending on the presence or absence of common report concerning the defendant. However, the argument in the common law courts later came to concern not this matter of the legality of the method of presentment, but the legality of the oath procedure itself, in ecclesiastical courts in England.¹⁸

When summoned *ex officio*, the accused was brought before the judge, where he was forced to swear under oath to answer truly all

11. Wigmore, *supra* note 3, 614.

12. *Ibid.*

13. 2 POLLOCK & MAYLAND, *THE HISTORY OF ENGLISH LAW*, at 647 (Cambridge, Mass., 1895).

14. Wigmore, *supra* note 3, 615.

15. *Ibid.*

16. *Id.*, 616. The three methods were respectively called *Accusatio*, *Denunciatio* and *Inquisitio*.

17. *Ibid.*

18. *Ibid.*

questions put to him.¹⁹ He was interrogated in detail concerning the accusation or the suspicions of the court, and his replies were carefully taken down. He had, of course, no opportunity to examine the charges before the interrogation or to have the aid of counsel.

At the same time that this inquisitional method of trial was being introduced and developed on the continent, the new method of trial by jury was replacing the same outworn methods of trial in the common law courts in England,²⁰ that is, trial by battle, trial by ordeal, and trial by compurgation oaths. The inquisitional method soon was introduced into the secular law on the continent.²¹ The English common law alone in the Western world failed to adopt it. The new jury trial was hardy enough in its resistance to the civil law ideas so that the banished Chief Justice of England, Sir John Fortescue, could contrast it with the inquisitional method on the continent, and cite as a great advantage of the common law its being less reliant on the use of torture.²² For the inquisitional method and the civil law proceeded to formulate "an elaborate calculus of proof, assisted by admissions extracted by torture, and witnesses examined in secret."²³ The civil law developed this method from the Roman law, and from Innocent III's inquisitional technique, and in its later stages the equation of the judicial process was described thus by Beccaria:²⁴

"... the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime."

Holdsworth²⁵ and Lowell²⁶ agree that the inquisitional method and the elaborate theory of proof developed by the civil law and the succeeding codes on the continent, as contrasted with the English

19. *Ibid.*

20. I. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 139 ff. (Boston, 1927).

21. Lowell, *supra* note 8, at 223. Lowell felt that the law of France at the time he wrote (1897) was "in substance the old inquisitional process with the torture left out, and a jury somewhat inharmoniously tacked on." For a description of the legal procedure, see Lowell at 226, 227; for a narrative description of the technique, without the use of torture, see HONORE DE BALZAC, LUCIEN DE RUBEMPRE, ch. XV, and THE LAST INCARNATION OF VAUTRIN, ch. II, both quoted in WIGMORE, THE SCIENCE OF JUDICIAL PROOF, 541 ff.

22. SIR JOHN FORTESCUE, IN PRAISE OF THE LAWS OF ENGLAND [DE LAUDIBUS ANGLIÆ]; cited in Coke, II Inst., 35.

23. I. HOLDSWORTH, *op. cit. supra* note 20, at 146.

24. *Id.*, at 146, note 7, quoting Beccaria.

25. *Id.*, at 167, 168.

26. Lowell, *op. cit. supra* note 8, 224-225.

system where a jury made the final decision, were responsible for this large role played by the extraction of confessions in the continental criminal law. As Lowell puts it:

"The new inquisitional procedure, which was thoroughly in harmony with the spirit of Roman jurisprudence, was gradually adopted by the continental states, until at last prosecutions for crime were carried on almost exclusively by the judicial officers of the government; and of course they were conducted with greater and greater secrecy. Under these circumstances it is not unnatural that torture should have been used. A man who was both judge and prosecutor, and who felt almost certain of a prisoner's guilt, but could not quite prove it, was strongly tempted to fortify his opinion by forcing a confession . . . Sir James Stephen tells us that during the preparation of the Indian Code of Criminal Procedure in 1872 some discussion took place about the reasons which occasionally led native police officers to torture prisoners, when an experienced civil service officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' . . . But the thing that made the rack a regular systematic part of criminal procedure, instead of an exceptional resource, was the 'theory of proof.'

. . . Except in rare cases where the crime had been committed in the presence of two witnesses, and the still rarer ones of proof by documents or conclusive presumptions, the prisoner was stretched upon the rack; and in fact the chief effect of the doctrine of indications was to permit the use of torture."

This development of the inquisitional method on the continent, and the likelihood that it would have been paralleled in England if it had not been successfully resisted by the common lawyers, should be kept in mind as an important backdrop to the technical disputes about the jurisdiction of the ecclesiastical courts in England.²⁷ The effect of this method on the criminal law of the continent was a lasting one. Only the vigor of the common lawyers prevented its having a permanent effect upon the law of England.

When the French wife of Henry II came over to England in 1236, several churchmen came over with her.²⁸ Her uncle, Boniface, was

27. Section 4 of this paper is largely concerned with such jurisdictional disputes.

28. Wigmore, *supra* note 3, at 616 to 618.

made archbishop of Canterbury, and a Cardinal Otho also came over in 1236. These men became active in developing the church law, in England. A constitution promulgated by Cardinal Otho at a Pan-Anglican council in London in 1236, and a similar constitution from Boniface in 1272, brought the English ecclesiastical courts into line with the new canon law procedure on the continent.²⁹

Wigmore finds that the struggle that then ensued between the King and his courts and the ecclesiastics concerned only the jurisdiction of the ecclesiastical courts,³⁰ but the materials brought to bear on this problem by Maguire³¹ and Morgan³² are persuasive that from the beginning there was strong objection in England to the oath procedure itself. Thus when Robert Grosseteste, Bishop of Lincoln, in 1246 used the inquisitional methods to investigate the morals of both ecclesiastics and laymen,³³ the King issued a writ of prohibition, and when it was disregarded, he issued a writ of attachment for contempt.³⁴ Arguments were raised against the oath procedure which some four centuries later were to prove decisive. It was insisted that the procedure was contrary to the custom of the land, that it produced "intolerable vexations tending to defamation and schism, which involved men in danger of perjury by forcing them to answer on oath in regard to the secret private actions and opinions of others, wherein they might easily be mistaken."³⁵

In 1285, by the statute *Circumspecte Agatis*,³⁶ it was enacted that the King's writ of prohibition³⁷ did not lie in matters spiritual, and several questions concerning the boundaries of jurisdiction between the ecclesiastical and lay courts were answered in favor of the former. But again in 1315-16, the clergy were objecting, and they presented certain *Articuli Cleri*³⁸ to the King, asking for further restraints on the exercise of the writ of prohibition, by alleging that the lay courts were encroaching upon ecclesiastical matters. The statute *Articuli Cleri* recognized these claims, and set forth situations wherein the lay courts could not interfere by prohibition. However, at an uncertain date before the end of the reign of Edward II, the statute *Prohibitio formata de Statuto Articuli Cleri*, addressed to the ecclesi-

29. *Ibid.*

30. *Id.*, at 612, 615, note 3.

31. Maguire, *supra* note 3, at 204 ff.

32. Morgan, *supra* note 3, at 1-9.

33. Maguire, *supra* note 3, at 205.

34. *Id.*, at 206.

35. *Ibid.*

36. 13 Edw. 1, Stat. 4 (1285); I Statutes at Large 242.

37. Discussed at pages 437-8 herein.

38. 9 Edw. II, Stat. I (1315-16); I Statutes at Large 338; 2 Inst. 601.

astical officials of the diocese of Norwich, rejected the extreme claims of the ecclesiastical courts.

This *Prohibitio Formata* is called by Wigmore the *Articuli Cleri*,³⁹ which might cause some confusion. The *Articuli Cleri* of 1316 was solely concerned with the respective jurisdictions of the lay and ecclesiastical courts. The *Prohibitio* formed on that statute has a reference to the use of the oath procedure, but is also mainly concerned with the respective jurisdictional claims of the two courts. The *Prohibitio* is fairly short. After a few sentences noting that the ecclesiastical courts have been taking jurisdiction of certain causes, and prohibiting them from further cognizance of such pleas, it contains the sentence:

“Et quod non permittant quod aliqui laici in balliva sua in aliquibus locis convenient, ad aliquos recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis.”

The Statutes of the Realm translates this as follows:⁴⁰

“And they suffer not that any layman within their baliwick, come together in any places to make any such recognitions by their oaths, except in causes of matrimony and testamentary.”

Wigmore reads these two statutes as conceding fully to the ecclesiastical courts their own methods of procedure, i. e., by *ex officio* oath if they wished, where they had jurisdiction. Both Morgan and Maguire read them as giving permission to so proceed only in matrimonial and testamentary causes,⁴¹ although they had jurisdiction in other causes and could there proceed without the oath method. The latter construction is the one that finally prevailed. The meaning of this language in the *Prohibitio* became of importance later when the *ex officio* method was used to question laymen in actions of heresy.

It can be readily seen that the *ex officio* method, while not so objectionable when confined to the traditionally canonical concerns of matrimonial and testamentary matters, wherein issues were fairly narrowly defined and relatively private matters were involved, was capable of gross abuse when applied to heresy or political proceed-

39. Wigmore, *supra* note 1, at 618. The *Prohibitio Formata* is a statute of uncertain date towards the end of the reign of Edward II, and is found at I Statutes at Large, 403, in Latin. No translation is given. It is also given in Latin in 2 Inst. 600.

40. Morgan, *supra* note 3, at 4.

41. Wigmore, *supra* note 3, at 618; Morgan, *supra* note 3, at 3, 4; Maguire, *supra* note 3, at 206-7.

ings. Here were questions of great public concern, on which passionate doctrinaire beliefs were held.

During the rise of Lollardry, the ecclesiastical forces were able to induce the enactment of the famous statute *de Haeretico Comburendo*.⁴² In addition to its provision authorizing the King's writ to issue to permit the burning of a heretic, this statute forbade heretical preaching and by implication authorized the use of the *ex officio* procedure to question suspected heretical preachers. Such preachers could be arrested and detained in prison until they purged themselves according to the laws of the church, or the diocesan could:

" . . . openly and judicially proceed against such persons so arrested, . . . and determine that same business according to the canonical decrees within three months after the said arrest, any lawful impediment ceasing."

Hence this statute in permitting procedure "according to the canonical decrees" was construed to permit the *ex officio* procedure, the last four words quoted removing the restraint of the clause in the statute *Prohibitio formata* which restricted the oath procedure to causes matrimonial and testamentary.

Another statute in 1414 provided for turning over to the ecclesiastical courts persons indicted for heresy.⁴³ Thus the common law courts became active partners with the ecclesiastical courts in prosecuting heresy. These statutes remained law long after Lollardry had subsided, and they seem to have received vigorous enforcement by *ex officio* proceedings in the church courts.⁴⁴ However, in 1533 the requirements for a presentment were considerably increased. Wigmore⁴⁵ finds this statute⁴⁶ to be "the rift within the lute", the first time that the common lawyers or Parliament attempted not merely to restrict the jurisdiction, but to dictate the methods of procedure of the ecclesiastical courts, even where they admittedly had jurisdiction. The statute provided that:

" . . . every person or persons being presented or indicted of [heresy] or duly accused or detected thereof by two lawful witnesses at the least to any Ordinaries of this Realm having power to examine heresies, shall and may after every such accusation or presentment and none otherwise nor by any other

42. 2 Hen. IV, cap. 15 (1401); 2 Statutes at Large 415.

43. 2 Hen. V, cap. 7 (1414); 3 Statutes at Large 22.

44. Morgan, *supra* note 3, at 6; Wigmore, *supra* note 3, at 618.

45. Wigmore, *id.* at 618.

46. 25 Hen. VIII, cap. 14 (1533); 4 Statutes at Large 278.

means be cited convented arrested taken or apprehended by any of the said Ordinaries or any other the King's ministers and subjects who so ever."

The accused was then permitted to answer in open court to the presentment. Similarly in 1539 a statute⁴⁷ abolishing "diversity in opinions" provided procedural safeguards for the accused. However in 1554 under Mary, these statutes were repealed,⁴⁸ and the harsh statutes of Henry IV were expressly revived.

These were the significant statutory materials when Elizabeth came to the throne in 1558, and by the Act of Supremacy⁴⁹ and the Act of Uniformity of Common Prayer⁵⁰ sought to firmly establish the national church. The Act of Supremacy began by asserting that all the ancient jurisdiction heretofore usurped by foreign powers was restored to the Crown. The Crown would have all spiritual jurisdiction, including the correction of "all manner or errors, heresies, schisms, abuses, offences, contempts, and enormities."⁵¹ The statute further provided: ⁵²

"And that your Highness . . . shall have full power and authority by virtue of this act, by letters patents under the great seal of England, to assign, name and authorize . . . such person or persons . . . as your Majesty . . . shall think meet, to exercise, use, occupy and execute under your Highness, . . . all manner of jurisdictions, privileges and preeminences, in any wise touching or concerning any spiritual or ecclesiastical jurisdiction . . . and to visit, reform, redress, order, correct and amend all such errors, heresies, schisms, abuses, offenses, contempts and enormities whatsoever, which by any manner of spiritual or ecclesiastical power, authority or jurisdiction, can or may lawfully be reformed, . . . to exercise, use and execute all the premises, according to the tenor and effect of the said letters patents; any matter or cause to the contrary in any wise notwithstanding."

It can be seen that this language might be interpreted by the strong ruler of England to give her considerable discretion in issuing the letters patent which it authorized, and she did so construe it. The early commissions which she granted raised no problems

47. 31 Hen. VIII, cap. 14 (1539) ; 4 Statutes at Large 468.

48. 1 & 2 P. & M., cap. 6 (1554) ; 6 Statutes at Large 32.

49. 1 Eliz., cap. 1 (1558) ; 6 Statutes at Large 107.

50. 1 Eliz., cap. 2 (1558) ; 6 Statutes at Large 117.

51. 6 Statutes at Large, at 110.

52. *Ibid.*

of the oath *ex officio*,⁵³ but the letters patent issued to Coke's friend, Archbishop Whitgift, in 1583, expressly authorized him to employ the *ex officio* procedure.⁵⁴ The Archbishop used it actively in striking at heretics, both clergy and laymen. The Catholics who were subjected to this mode of investigation could raise little effective support from any powerful source, but many Puritans also were subjected to these inquisitional examinations. They reacted strongly, and received support in Parliament. The Puritans resisted by refusal to take the oath, which would immediately halt the proceedings; by attacking the oath in letters to the Queen, the Archbishop and the Commons; by pamphleteering and by introducing bills in the Commons.⁵⁵ However, the High Commissions were not thereby induced to slacken their ardor, and they soon began to assume a regular jurisdiction and to act like regularly constituted courts.

The jurisdiction of the ordinary ecclesiastical courts and of the Court of High Commission, and the development of the latter into a permanent court holding regular sittings, is discussed below in section 4 of this paper. Here it suffices to say that the Court of High Commission, like other courts, began to assume the widest possible jurisdiction. Thus a clash with the common law courts became inevitable.

2. *The Privilege Against Self-Incrimination in the Common Law Courts, to 1606.*

In *Collier v. Collier*,⁵⁶ the Court of Common Pleas had held that in a proceeding by a wife against her husband for incontinency, the ecclesiastical court could not question the defendant by the oath *ex officio* method, but only in cases matrimonial and testamentary. The court seems to have classified the ecclesiastical action as one of defamation.⁵⁷ Coke argued that *Nemo tenetur seipsum prodere* (no one should be required to accuse himself), and a prohibition was granted against the ecclesiastical court. In the later important case of *Burrowes and others v. The High Commission*,⁵⁸ in 1616, Coke cited three cases⁵⁹ in which the common law courts had issued writs of *habeas corpus* to the High Commission to release defendants held

53. Maguire, *supra* note 3, at 214.

54. *Ibid.*; Morgan, *supra* note 3, at 7; Wigmore, *supra* note 3, at 620. See also STRYPE'S LIFE OF WHITGIFT, App. 49.

55. Wigmore, *supra* note 3, at 216.

56. 4 Leon. 194; Cro. Eliz. 201; Moore 906 (1589).

57. 4 Leon. 194, quoted on page 444 herein.

58. 3 Bulstrode's Reports 48 (1616). See pages 450-452 herein.

59. Hinde's Case, Dyer 175b; Skrogges v. Coleshill, Dyer 175a; Leigh's case, 18 Eliz.

for refusal to answer questions under oath. Skrogges was held for refusal to answer questions concerning his title to an office; Leigh for refusal to tell whether he had been present at the saying of masses; and Hyndes was suspected of usury. In each of these cases, Coke says that the defendants were released because *Nemo tenetur seipsum prodere*. Hence before 1600 the common law courts were developing the doctrine that the oath *ex officio* could not be used by the ecclesiastical courts against laymen except in matters testamentary and matrimonial.

However, in cases commenced in the common law courts, as distinguished from applications to the common law courts for writs of *habeas corpus* or prohibition against the ecclesiastical courts, there is no recognition of the privilege and no application of the canon law maxim. The early cases in Howell's State Trials, including those cited below⁶⁰ in which Coke was prosecutor for the Crown, indicate that the trial was a running argument between the prosecution, the defendant and the court. The accused was asked questions which were directly incriminating, which he was required to answer. Depositions of the accused and of witnesses were read in court, and the accused was asked questions concerning them, and made comments of his own. The important differences between these trials and those on the continent were that the common law trials were public, and that the tribunal consisted of both court and jury. The latter had the power to make the ultimate decision, and could bring their own knowledge, derived outside of court, to the decision.

The use of torture in cases in the common law courts falls naturally under two headings: the use of torture to force an accused to plead to an indictment, and its use in questioning an accused. When a prisoner refused to plead to the indictment, and "put himself upon the country", the common law did not know what to do with him.⁶¹ The strict right of the accused under the law of the land was to a trial by one of the traditional methods: by battle, by compurgation oath, or by ordeal. As indicated elsewhere,⁶² these methods had largely been displaced by the jury trial. But the accused could not be tried before a jury in a case of felony, except treason, unless by his own consent, given by his plea. As Holdsworth says,⁶³ it took the common law 500 years to arrive at the obvious answer, to impanel a jury and try him whether he consented or not. The sugges-

60. On page 435 herein.

61. II POLLOCK & MAITLAND, *op. cit. supra* note 13, at 647.

62. At page 421 herein.

63. I HOLDSWORTH, *op. cit. supra* note 20, at 154.

tion of Coke was that the refusal of the defendant to plead be treated as a plea of guilty, and this answer was finally given in 1772 by statute.⁶⁴ Not until 1827 was it enacted that a refusal to plead would result in entry of a plea of not guilty.⁶⁵

Prior to these statutes, however, the common law considered itself helpless to try the accused until the plea was entered by him. In 1275, under Edward I, it was enacted⁶⁶ that prisoners who refused to plead be put in "*prison fort et dure*". At least by 1400⁶⁷ this had by a natural progression become "*peine fort et dure*", under which rule torture was used to force a plea. The prisoner was often staked down in the open, fed bread and water on alternate days and had weights piled upon him until he consented to plead. Since if he were found guilty of felony, all his goods were forfeited to the Crown, and if he died before he pleaded his next-of-kin would get them, a prisoner had a motive for refusing to plead.

It is shown elsewhere⁶⁸ that torture was commonly used in questioning prisoners held on charges of treason. Otherwise, however, the use of torture in questioning a prisoner who had pleaded to an indictment was recognized as being against the law of the land. However torture might be used, it had no sanction in the law.

Despite statements by Sir John Fortescue and others that the use of torture was contrary to the law of the land, the conclusion is justified that before Coke's tenure on the bench there was no recognition of the principle that a party need not answer directly incriminating questions. The application of the ecclesiastical law maxim *Nemo tenetur seipsum prodere* to common law courts had not even been anticipated in the decisions in those courts.

3. *Career of Coke to his appointment as Chief Judge of the Court of Common Pleas, in 1606.*

Further to set the stage, it is necessary to review briefly the life of Sir Edward Coke, until he was appointed to the bench. Coke's life fairly coincided with an important period in the history of the privilege against self-incrimination. He was born in about 1552, some six years before the commencement of the reign of Queen Elizabeth. In the first year of Elizabeth's reign, the Act of Supremacy was passed, with important consequences for the privilege as indicated below.⁶⁹ Coke died in 1634, some three years before

64. 12 GEO. III, cap. 20 (1772); 29 Statutes at Large, II, 29.

65. 7 & 8 Geo. IV, cap. 28 (1827); 67 Statutes at Large 165.

66. 3 Edw. I, cap. 12 (1275); I Statutes at Large 83.

67. I HOLDSWORTH, *op. cit. supra* note 20, at 154.

68. On page 435 herein.

69. On pages 439, 443, 447 herein.

the events which culminated in *John Lilburn's* trial,⁷⁰ in which Lilburn asserted the privilege and was ultimately upheld.

The biographers of Coke⁷¹ present a picture of a man inordinately ambitious, even avaricious, invariably successful in attaining his goal, a painstaking scholar and prodigious worker, a cunning courtier in an age when that was the best road to advancement, and a stalwart and courageous champion of the law of England. He is a man to whom we can give unbounded admiration for his scholarly and professional attainments, to whom we can acknowledge a great debt for his contributions to English law, but in whom we can find little to love. This picture necessarily results because the only well documented episodes of his life concern his professional activities, his clashes with the today more popular Sir Francis Bacon, his constant domestic difficulties with his second wife; while in his defense are presented only his vigorous support of the common law against other courts and other legal disciplines, his important services in the House of Commons from 1621 on, including his role in winning from the King the Petition of Right, his Reports and his Institutes. These are all great professional achievements but none soften the portrait of the man. There are suggestions of domestic happiness in his marriage with his first wife, by whom he had ten children, but the details of his married life or of any close friendships he might have had are lacking. Similarly, he seems to have taken no interest in the great cultural accomplishments of Elizabethan England—no man has ever accused Sir Edward of having written the plays of Shakespeare, and it may well be that he had never seen one.⁷²

Edward Coke was born of a fine family in Norfolk, his father, Robert Coke, being a barrister of Lincoln's Inn, who after rose to the rank of Bencher.⁷³ The name Coke has been said to signify a river among the ancient Britons,⁷⁴ or to have derived from the British word "Coc", a chief;⁷⁵ but Campbell prefers to consider that it is an effort to disguise the spelling of Cook, representing the oc-

70. 3 Howell's State Trials, 1315 (1637).

71. 5 HOLDSWORTH, HISTORY OF ENGLISH LAW contains a readable and carefully documented biography; 1 CAMPBELL, LIVES OF THE CHIEF JUSTICES (London, 1849), is also very good, and draws much on contemporary sources; LYON & BLOCK, EDWARD COKE, ORACLE OF THE LAW (Boston and New York, 1929), is a somewhat fictional biography, developing the background of life in Coke's time; WOOLRYCH, LIFE OF COKE (London, 1826) is the earliest I found, but not helpful; JOHNSON, LIFE OF SIR EDWARD COKE (London, 1837) is not carefully documented, but is interesting and useful.

72. 1 CAMPBELL, LIVES OF THE CHIEF JUSTICES, 243 (London, 1849).

73. WOOLRYCH, LIFE OF COKE, 10 (London, 1826).

74. *Id.*, at 7.

75. CAMPBELL, *op. cit. supra* note 72, at 240.

cupation of the founder of the family at the time when surnames were adopted in England.⁷⁶ And Lady Hatton, Coke's second wife, seems to have shared this view, for she never took her husband's name, and always spelt and pronounced it "Cook". At any rate, the family were established gentry at the time of the birth of Edward, for it held prosperous lands in Norfolk, and only families of the gentry could afford the long and expensive education required to train a son for the bar.⁷⁷

In 1560, Coke was entered at the Free Public School in Norwich, where he was thoroughly grounded in Latin, and where he no doubt learned some of the habits of steady toil that after served him so well; for the ordinance of a similar school provided at the time that:⁷⁸

. . . the scholars shall resort to the School at six in the morning and continue there until eleven, and at one in the afternoon and continue until five.

In October, 1567, Coke went to Trinity College in Cambridge, where he probably studied Latin, Greek, logic and philosophy.⁷⁹ It is extremely unlikely that he studied any law at Cambridge, however. The Reformation had ended the study of the canon law there, but the civil law was still taught, as a preparation for the diplomatic service, or for practice in the Admiralty, the ecclesiastical courts, the Court of Requests, or in Chancery.⁸⁰ However, the civil law was studied only by students past the degree of Bachelor, and upon acquiring that degree Coke left the University.

Coke left Cambridge in 1571 to enter Clifford's Inn, an Inn of Chancery,⁸¹ and commence his legal studies. In April, 1572, he was admitted to the Middle Temple, an Inn of Court. His daily schedule was indeed a rigorous one, if Campbell is accurate:⁸²

. . . Every morning he rose at three,—in the winter season lighting his own fire. He read Bracton, Littleton, the Year Books, and the folio Abridgments of the Law, till the courts met at eight. He then went by water to Westminster, and heard cases argued till twelve, when pleas ceased for dinner. After

76. *Id.*, note at 240.

77. *Ibid.*

78. LYON & BLOCK, *EDWARD COKE, ORACLE OF THE LAW*, 13 (Boston & N. Y., 1929).

79. *Id.*, at 20.

80. *Id.*, at 21.

81. CAMPBELL, *op. cit. supra* note 72, at 241, 242.

82. *Id.*, at 242, 243.

a short repast in the Inner Temple Hall, he attended 'readings' or lectures in the afternoon, and then resumed his private studies till five, or supper-time. This meal being ended, the *moots* took place, when difficult questions of law were proposed and discussed, — if the weather was fine, in the garden by the river side; if it rained, in the covered walks near the Temple Church. Finally, he shut himself up in his chamber, and worked at his common-place book, in which he inserted, under the proper heads, all the legal information he had collected during the day. When nine o'clock struck, he retired to bed, that he might have an equal portion of sleep before and after midnight.

This schedule of rising at three and retiring at nine he seems to have kept throughout his life.

The only anecdote of Coke's years of preparation for the bar concerns as usual a professional matter; he prepared and argued before the Benchers of the Inner Temple on behalf of the students a representation that their cook had failed in his duties to provide adequate food and had broken his contract, his argument in this matter evoking much admiration.⁸³

In Easter Term of 1578, Coke was called to the bar, and again our information about his life concerns accomplishments in his profession. He earned much admiration in his manner of winning his first case, the *Lord Cromwell's case*,⁸⁴ in 1579. The Lord Cromwell had brought down from London to preach in Norfolk two preachers who taught that the Book of Common Prayer was impious and superstitious. The Vicar of the local church remonstrated with the Lord, who said to him, "Thou art a base varlet, and I like not of thee." To this the Vicar made bold reply: "It is no marvel that thou likest not of me if you like of men that maintain sedition against the Queen's proceedings." In an action for slander of a peer of the realm, Coke on behalf of the Vicar noted a defect in plaintiff's pleading, but reserved objection until a verdict had been given for the Lord. Coke then moved in arrest of judgment, citing several inaccuracies in the declaration's recital of the statute *De Scandalia Mag-natum*, upon which the action was founded, and the defendant prevailed. This incident is illustrative of Coke's lifelong love for and mastery of the niceties and technicalities of common law jurisprudence.

Coke was in the next year one of the counsel in *Shelley's Case*,⁸⁵ and made the principal arguments for the winning side in that fa-

83. *Id.*, at 243.

84. *Id.*, at 243, 244; 4 Co. Rep. 12b.

85. 1 Co. Rep. 93b (1581); CAMPBELL, *op. cit. supra* note 71, at 244.

mous case.⁸⁶ It is perhaps significant that the anecdotes which remain of Coke concern such technical accomplishments, for this ability was to stand him and the common law in good stead in resisting the *ex officio* procedure.

At any rate he prospered, both his marriage and his career adding to his carefully husbanded inheritance, and soon he was a very wealthy man. His gain in honors paralleled his increasing wealth. In 1590 he was chosen a Bencher of the Inner Temple.⁸⁷ In 1592 he became a Reader for the Inn. In the same year he was appointed Recorder for the City of London,⁸⁸ and Elizabeth chose him to be the Queen's Solicitor General. The following year, Coke was returned to Parliament from a district in Norfolk, the same year in which Francis Bacon was first returned from Middlesex. Their famous rivalry commenced soon after, for when in 1594 the position of Attorney General became vacant, Bacon, through his patron the Earl of Essex, exerted every wile to obtain it.⁸⁹ In the end, his youth and inexperience in the law prevented his succeeding, and Mr. Solicitor was appointed. Coke's professional standing and brilliant record at this time made the choice wholly proper. But whether motivated by pique at the presumptions of the young philosopher to aspire to the higher post or by jealousy of the thought of having so brilliant an adversary high in the Queen's service, Coke then successfully opposed the appointment of Bacon to the vacant Solicitorship.⁹⁰ Coke remained Attorney General until June, 1606, when James I, who had succeeded to the throne on Elizabeth's death in 1603, appointed him Chief Justice of the Court of Common Pleas.

During these eventful years Coke had several experiences of interest to our history. In 1589, he successfully argued in the Common Bench in *Collier v. Collier*,⁹¹ discussed at greater length below, for a prohibition against the ecclesiastical court which had attempted to examine the plaintiff upon his oath. The plaintiff had been sued, apparently in a court of an Ordinary (the reports say only "spiritual court") for incontinency, and Coke argued that *Nemo tenetur seipsum prodere* in such cases, that is, no one can be forced to betray himself, except in causes matrimonial or testamentary.

In 1593, when Coke became a member of Parliament for the first time, he was made Speaker of the Commons in spite of his inex-

86. CAMPBELL, *Ibid.*

87. *Id.*, at 246.

88. *Ibid.*

89. *Id.*, at 250, 251.

90. *Ibid.*

91. 4 Leon. 194; Cro. Eliz. 201; Moore 906 (1589).

perience as a legislator. He had immediate occasion as Speaker to support the Queen and her ecclesiastical courts in the fight over the administering of the oath *ex officio* by such courts. After Coke made the traditional address of self-deprecation to the Queen in accepting the post of Speaker,⁹² a member by the name of Morrice, an Attorney of the Court of Wards, moved the House touching the use by ecclesiastical judges of the Inquisition procedure, contrary to the laws of the Realm. He offered two bills, one concerning the "compelling [of subjects] upon their own oaths to accuse themselves in their own private actions, words and thoughts . . .",⁹³ the other concerning the imprisoning of subjects who refused to take the oath. He asked that the one concerning imprisonment be read, and that the other be read at a convenient time in the future. After argument on the bills, Coke as Speaker stalled further consideration, by requesting time to study them, since they contained matter of great weight, and were not easily understood. He promised the Commons:⁹⁴

. . . Wherefore if it would please you to give me leave to consider of it, I protest I will be faithful and keep it with all Secrecy.

The next day, Coke explained to the Commons that he had been summoned to the court in the afternoon after he had taken the bills, and that he had a message from the Queen to deliver to the House. He assured them that he had kept the bills with all secrecy, but upon being asked by the Queen he had had to disclose the subjects which they concerned. The Queen's message showed strong disapproval of any interference by the Parliament with her church. She had told Coke:⁹⁵

. . . It was not meant that we should meddle with matters of State and Causes Ecclesiastical . . . [Her] express Commandment is, that no Bill touching the said matters of State or reformation in Causes Ecclesiastical be exhibited.

The Queen threatened to dissolve the session of Parliament unless the matter was dropped.

That apparently ended discussion of Morrice's bills. Undoubtedly the action taken by Mr. Speaker in disclosing the contents of

92. SIR SIMONS D'EWES, JOURNAL OF THE HOUSE OF COMMONS, at 45 (London, 1682).

93. *Id.*, at 474.

94. *Id.*, at 476.

95. *Id.*, at 479.

the bills and in halting their discussion was prudent. The imperious Elizabeth would deal harshly with any difference of opinion on church matters. Some two decades later, under a weaker and less able monarch, Coke would accept in a judicial capacity a role as leader in the opposition to the oath *ex officio* which he here rejected as a legislator.

Again, as Attorney General for the Crown, Coke came in contact with the use of torture as a means of enforcing confessions. It was his duty to question in the Tower of London prisoners held on charges of treason, and torture was customarily used to elicit cooperation from these unhappy souls. It appears that he was not remiss in this duty,⁹⁶ although later, in his Third Institute, he stated flatly that torture was contrary to the law of England, citing Sir John Fortescue.⁹⁷ The seeming inconsistency is said by Campbell to be due to Coke's view that such procedure was lawful or permissible for the Crown in cases of treason,⁹⁸ but the language in the Institute is not consistent with this view.⁹⁹

As Attorney General, Coke conducted in a particularly brutal manner the prosecutions for treason of such famous defendants as the Earl of Essex,¹⁰⁰ Sir Walter Raleigh,¹⁰¹ Guy Fawkes¹⁰² and Charles Garnet,¹⁰³ the latter pair in connection with the "Gunpowder Plot". He also seems to have sat many times in the Star Chamber, where the oath procedure was often used. Coke refused to sit on the Court of High Commission.¹⁰⁴

In 1598, Coke married for the second time and thereby incurred the wrath of Archbishop Whitgrift, who at this time was actively engaged under the commission issued to him in 1583 in investigating the religious regularity of the Queen's subjects. Whitgrift had just "thundered . . . an anathema against irregular marriages" when Coke, at his bride's insistence, was married in violation of three marriage laws of the church. He was married outside of a church, he had no marriage license, and he did not publish the banns before his marriage.¹⁰⁵ An immediate libel issued against Coke, his father-in-law who arranged the marriage, and the priest who performed

96. CAMPBELL, *op. cit.* *supra* note 72, at 251, 252.

97. III Inst. 34, 35.

98. CAMPBELL, *op. cit.* *supra* note 72, at 252.

99. III Inst., especially at 35.

100. I How. S.T. 1333 (1600).

101. 2 How. S.T. 1 (1603).

102. 2 How. S.T. 159 (1606).

103. 2 How. S.T. 217 (1606).

104. CAMPBELL, *op. cit.* *supra* note 72, at 270.

105. *Id.*, at 253 to 257. Campbell tells of the negotiations and intrigues leading to this unfortunate marriage of convenience.

the ceremony. Coke was spared only by his making a humble submission, his dispensation stating as his excuse his "ignorance of the ecclesiastical law". Undoubtedly this language of the dispensation to the foremost lawyer of his time evoked many a chuckle in the coffee-shops of London.

On May 23, 1603, the recently crowned James I knighted his Attorney General, and on June 30, 1606, he resigned from the lucrative and politically powerful post he held and became Chief Justice of the Court of Common Pleas. From that date until his death the career of Coke is an inspiration to the legal profession. His career on the bench displayed a knowledge of the law that has never been surpassed, and judicial statesmanship of the highest order. His removal from the bench, which seemed at the time to end his active participation in the legal affairs of his day, only gave opportunity for greater honors in his contribution to the winning of the Petition of Right.

4. *Coke's Attack on the Oath ex officio, as Employed by the Court of High Commission.*

Coke could hardly have chosen a more propitious hour to be raised to the bench. Many crucial questions were pressing for decision: the relationship of the common law courts to the ecclesiastical courts; the validity of the writs of prohibition issued to the latter by the former; the nature and jurisdiction of the High Commission; the use of the *ex officio* procedure by that body; and the scope and extent of the King's prerogative. Coke dealt successively with these problems under the unifying concept of a great principle—the supremacy of the law of England.

According to this principle, the common law courts were supreme in determining from acts of Parliament and from the customs of the realm, as found in common law decisions, what the law of England was. The jurisdiction of the ecclesiastical courts was subject to determination by the courts of common law. The High Commission was authorized only by statute, the Act of Supremacy, and was limited by that act, as construed by common law courts. Writs of prohibition could issue to review the legality of the jurisdictional claims or the methods of procedure of an ecclesiastical court, High Commission or other. The King's prerogative was limited; the King himself was subject to the law of the land. For a while, Coke thought even that acts of Parliament could be reviewed by the judicial power, and if found contrary to the law of the land, could be held void.¹⁰⁶

¹⁰⁶ Dr. Bonham's case, 8 Co. Rep. 114. See Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

Coke gave these views as decisions in the Court of Common Pleas and the King's Bench, in his Reports and his Institutes, and in his arguments in the Commons. These views had a powerful immediate effect, coming from the most forceful and most learned lawyer of the age. Although they did not prevail at once, eventually most of them did prevail.

When Sir Edward Coke came to the bench, the common law courts had well-established precedents for keeping the ecclesiastical courts within their proper jurisdiction. Writs of Praemunire or of Prohibition were the instruments for that purpose. The writ of Praemunire could be issued on the application of the Crown or of a private suitor.¹⁰⁷ It was founded upon an ancient statute¹⁰⁸ and was in the nature of a criminal proceeding against any person who commenced in a papal court litigation that properly belonged to the King's courts. After the Reformation, the remedy was applied by the common law courts to suitors in the King's ecclesiastical courts.¹⁰⁹ The proceeding was called an Attaint,¹¹⁰ and was brought against the individual who had commenced in another court litigation which properly belonged to the King's courts.¹¹¹ Coke believed that the statutes of Praemunire applied not only to suitors in the King's ecclesiastical courts, but also to suitors in chancery¹¹² or the admiralty.¹¹³ The serious nature of the offense was indicated by the punishment which was prescribed. The judgment would put the defendant out of the King's protection, that is, deny to him thenceforth the ability to bring any proceedings in the King's courts of common law.¹¹⁴ He might also be imprisoned, and his goods forfeited to the Crown.¹¹⁵ Coke cites cases after the Reformation in which the writ was issued against suitors in the ecclesiastical courts.¹¹⁶

The more usual method, however, was by writ of Prohibition issued to the ecclesiastical court itself. A defendant in an ecclesiastical court could apply to a common-law court for the writ.¹¹⁷ The writ was issued by the common law judge to the ecclesiastical court,

107. Co. Litt. 120a, § 199; *Of Praemunire*, at 124, III Inst.

108. 27 Edw. III, cap. 1 (1353); 2 Statutes at Large 72.

109. Co. Litt., 120, 121.

110. *Id.*, at 121.

111. *Ibid.*

112. *Id.*, at 122. See the famous case, *Courtney v. Glanvil*, Cro. Jac. 343.

113. *Id.*, at 121.

114. *Id.*, at 126.

115. *Ibid.*

116. *Id.*, at 124.

117. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION*, 159 (Oxford, 1913).

and prohibited the ecclesiastical judge from proceeding with the case on the ground that it contained temporal matters. The common law judge then gave a hearing on the return of the writ by the suitor in the ecclesiastical court. If it were determined that the case included temporal matter, the prohibition stood, and the ecclesiastical court could proceed no further. If it was decided that there was nothing of a temporal nature in the case, a writ of Consultation was issued to the ecclesiastical court, annulling the prohibition.

A few remarks about the nature and jurisdiction of the various ecclesiastical courts are necessary here. The courts of interest to our history were the ordinary courts of the Diocese, the Peculiar¹¹⁸ and the Province, and the Court of High Commission.¹¹⁹ The former were administered by the Ordinaries, that is, the Bishop in his Diocese, the head of the church in the Peculiar, and the Archbishop in the Province. The jurisdiction of each was limited in area to the respective Diocese, Peculiar or Province. These courts claimed cognizance of a cause in two classes of actions:¹²⁰ first, where any of the persons concerned were ecclesiastics; and second, where the matter in dispute was of an ecclesiastical or spiritual nature. As examples, the spiritual courts claimed jurisdiction over marriage and divorce, testamentary matters, tithes due the clergy, and the vague area of correction of sinners. In exercising this jurisdiction, the church courts were limited by the common law courts. If the common law court had cognizance of the cause, or if the action contained temporal matter, the common law court would prohibit the spiritual court from proceeding with it even though it contained matter of spiritual or ecclesiastical nature.¹²¹

For several reasons, these ordinary ecclesiastical courts were unable to deal with the complex problem of enforcing the heresy laws introduced by the Reformation.¹²² The offenses now denominated heresy were not only offenses against the faith but were treason against the Crown. Second, these offenses were not heresy at all under the old church laws. Third, the chief offenders were churchmen; they could hardly be trusted to convict each other of heresy. For these reasons and others,¹²³ the King gave to a commission the power to prosecute heresy. At least as early as 1535,¹²⁴ such a com-

118. A church, exempt from the jurisdiction of the Diocese in which it lies.

119. The origin of the name is discussed at page 439 herein.

120. POLLOCK & MATTLAND, *op. cit. supra* note 13, at 105.

121. USHER, *op. cit. supra* note 117, at 159.

122. *Id.*, at 17.

123. *Ibid.*

124. *Id.*, at 17 and 18.

mission was created. Letters Patent were issued to Thomas Cromwell.

In 1549, in the reign of Edward I, the first general commission was issued, to a group of men consisting of ministers of state, ecclesiastics, and lawyers, both civil and common.¹²⁵ Very broad powers were given to enquire as to heretics and to examine for heresy. In 1557, under Mary, a commission was created, and its Letters Patent expressly permitted the use of the *ex officio* method of procedure.¹²⁶ The persons prosecuted by this commission were naturally different, since Mary aimed to restore the ecclesiastical supremacy of Rome, but the methods and the substance and form of the Letters Patent were largely the same.

By the Act of Supremacy,¹²⁷ Elizabeth was authorized to issue Letters Patent to enforce the provisions of that Act against heresy. Many such Letters were issued, and between 1557 and about 1580, the Court of High Commission gradually evolved. Contemporary documents called the body "the commissioners" or "the ecclesiastical commissioners" before 1570.¹²⁸ About 1570 the name "the Commission" or "the Commission Ecclesiastical" are found.¹²⁹ In 1580, it is referred to as "the High Commission", and in 1593 as "the Court of Ecclesiastical Commission".¹³⁰ Paralleling this change in the name of the institution was a change in its nature, it gradually becoming a formal body sitting regularly and claiming a regular jurisdiction.¹³¹ This history was the basis of one of the disputes between the common lawyers and the ecclesiastics concerning the origin and nature of the High Commission. The common lawyers argued that the High Commission was authorized solely by the Act of Supremacy, and dated from that Act. The ecclesiastics cited the long history from Henry VIII, and argued that the Commission was based on the King's prerogative, and could not be limited by a court of the common law.¹³²

Most of the cases in which prohibition were issued against the ordinary ecclesiastical courts involved the tenths or tithes of the produce of the English farms. These were payable to the vicars.¹³³ They were originally payable in kind, but with the growth of com-

125. *Id.*, at 20.

126. *Id.*, at 21.

127. 1 Eliz., cap. 1 (1558); 6 Statutes at Large 107.

128. *USHER, op. cit. supra* note 117, at 35.

129. *Ibid.*

130. *Id.*, at 36.

131. *Id.*, at 35.

132. On page 441 herein.

133. *LYON & BLOCK, op. cit. supra* note 77, at 171 ff.

merce and industry and the increased convenience in the use of money, both the vicars and the parishioners desired a commutation of the tithes into money payments. A *modus decimendi* would be reached under which a whole village would agree to pay its small tithes, *i. e.*, those tithes other than of grain, in a set sum of money. These "small tithes", for cattle and other stock and for produce, eventually became more important in value than the tithes in grain. Further, the value of money was constantly falling. Thus, it was of great concern to the farmers to prove that a *modus* had been reached. Conversely, the church wished to return to payment in kind, or to make a new agreement at the higher price level.

Under the rule of Bancroft as Archbishop of Canterbury, the ecclesiastical courts began to assume that unimpeachable evidence was necessary to prove a commutation. Proof of an oral agreement was exceedingly difficult under the rules of the ecclesiastical courts. Thus, rather than attempt to prove a *modus* in such courts, the farmers would apply for a prohibition. The common law courts held that a *modus decimendi* was a contract, and hence was cognizable only in a common law court. Then if the vicar sued in a common law court, the farmer could claim a jury trial and could present his proofs of a *modus* to sympathetic ears.

As indicated above, the common law courts were also issuing writs of prohibition against the High Commission.¹³⁴ In 1600, the Bishops had petitioned Queen Elizabeth concerning the practice of the common law courts in granting prohibitions, and in 1605 *articuli cleri* were drawn up by Bancroft and presented to James I on behalf of the clergy of the realm. The King was asked to determine the causes over which the ordinary ecclesiastical courts and the High Commission had cognizance.¹³⁵

There was an important precedent in support of the position of the Archbishop, in *Caudrey's case*,¹³⁶ decided in the Queen's Bench in 1594. Robert Caudrey had been parson of a rectory, and was removed from this office for preaching against the Book of Common Prayer. The High Commission had determined that he should be removed, and the sentence was signed by the Bishop of London as a member of the Commission, with the consent of two other members who had sat on the matter. In 1591, Caudrey brought an action of trespass against the parson appointed by the Bishop to succeed him. The jury gave a special verdict. They found that the successor

134. On page 436 herein.

135. CAMPBELL, *op. cit. supra* note 72, at 270.

136. 5 Co. Rep. i (1591).

parson had committed a trespass only if the removal of Caudrey was unlawful. This point was argued before all the judges of the Queen's Bench.

The judges held that the Act of Supremacy did not alter the usual ecclesiastical jurisdiction of the Bishop over members of the clergy in his Diocese, and that therefore the removal was lawful. According to Coke's report of the case, apparently published in 1605, the year in which Bancroft drew up his *articuli cleri*, the judges then went on to make several important observations about the effect of the Reformation and the Act of Supremacy on the ecclesiastical courts. They said that the Act of Supremacy was not introductive of new law, but declaratory of the old.¹³⁷ Coke says:¹³⁸

. . . It was resolved by all the Judges, that the King or Queen of England for the time being may make such an ecclesiastical commission as is before mentioned, by the ancient prerogative and law of England . . .

Coke also states that the Judges held that the powers of the King of England over the body politic, clerical and lay, were plenary.

. . . And as in temporal causes, the King, by the mouth of the Judges in his courts of Justice doth judge and determine the same by the temporal laws of England: so in causes ecclesiastical and spiritual . . . (the conusance whereof belongs not to the common laws of England) the same are to be determined and decided by ecclesiastical Judges, according to the King's ecclesiastical laws of this realm: . . .

It was now argued by the ecclesiastics that if this were so, then the ecclesiastical courts and the common law courts were co-equals, and one of them could not decide the limits of the jurisdiction of the other. As stated by Archbishop Bancroft, the argument was thus:¹³⁹

The Authority of Spiritual Courts and Temporal Courts of Law flowing equally from the Crown, and it being of so great Importance to the Good of the Community that each be kept within its proper Bounds, it seems no means agreeable to that Equality of Origin and Descent, nor a Way in any Degree likely to attain that common End, that the one should be set as a Judge over the other and prescribe Bounds to it; and take to itself the cognizance of whatever matters itself shall please.

137. *Id.*, at viii.

138. *Ibid.*

139. 2 Inst. 19, quoting Bancroft.

Therefore, the ecclesiastics petitioned the King to assume the role of defining the respective jurisdictions of his courts. They asked that he prevent the common law courts from interfering by writs of prohibition with proceedings in the ecclesiastical courts. The companion question which concerned the Archbishop was whether the High Commission was a statutory court or one created by virtue of the King's prerogative.

These issues came to a head in *Nicholas Fuller's case*,¹⁴⁰ in 1607, but the actual decision in that case was inconclusive. Richard Mansel, a nonconformist minister, and Thomas Ladd, a Yarmouth merchant, had been committed by the Court of High Commission for their refusals to take the oath *ex officio*. Ladd had insisted that he first see a copy of certain answers he had given at a previous questioning, so that he might avoid being charged with perjury. Mansel insisted that he first see a copy of the charges against him. Nicholas Fuller had been a prominent common lawyer in the attacks on the ecclesiastical courts.¹⁴¹ As counsel for Mansel and Ladd, he applied to the King's Bench for writs of *habeas corpus*, and argued on the return of the writs that the High Commission had exceeded its authority. He submitted that the High Commission was an ecclesiastical court, deriving all its authority from the Act of Supremacy. This act, Fuller argued, limited the Commission to the powers that the ecclesiastical courts had possessed prior to its passage, and prior to the Act of Supremacy ecclesiastical courts had no power to fine and imprison.¹⁴²

Fuller presented his case as a broad attack on the legality of the High Commission's methods of procedure and sentence. During argument he referred to the Commission as Popish and anti-Christ, and as an instrument of suppression of true religion.¹⁴³ Shortly afterward, the High Commission arrested Fuller, and charged him with scandalous statements "to the slander of the Church . . . and to the malicious impeachment of His Majesty's authority in causes ecclesiastical."¹⁴⁴ Fuller applied to the King's Bench for a writ of prohibition.

After many proceedings¹⁴⁵ the case came on for argument before a conference of all the Justices and Barons of England. At this

140. 12 Co. Rep. 41 (1608).

141. Maguire, *supra* note 3, at 224.

142. LYON & BLOCK, *op. cit. supra* note 78, at 176.

143. *Id.*, at 176, 177.

144. *Ibid.*

145. Maguire, *op. cit. supra* note 3, at 225; Coke's report of the case gives only the legal points decided.

time, Coke was Chief Justice of the Court of Common Pleas, and undoubtedly the most influential of the common law judges. The common law judges managed to decide the case in favor of the High Commission, and thus avoid the certain ire of James I.¹⁴⁶ Yet every point of law was decided in favor of the authority of the common law courts. The holding was that the High Commission had jurisdiction to try Fuller for "Heresie, Schism and erroneous Opinions," which they immediately proceeded to do on a writ of Consultation from the court of King's Bench. Fuller was fined and imprisoned.

The decision of the judges was that the High Commission had power to try Fuller for heresy. Since the Commission purported to do no more than this, the question of the power of the Commission to try him for making slanderous statements about the Commission in a common law court was avoided by the common law judges. But the judges gave their opinion:¹⁴⁷

"2. That the Construction of the Statute 1 Eliz. cap. 1 [the Act of Supremacy] and of the Letters Patent of the High Commission in Ecclesiastical Causes founded upon the said Act, belongs to the Judges of the Common Law: For . . . their Authority and Power is given to them by Act of Parliament, and Letters Patent, the Construction of which belong to temporal Judges: . . .

3. It was resolved where there is any Question concerning what Power or Jurisdiction belongs to Ecclesiastical Judges, in any particular Case, the Determination of this belongs to the Judges of the Common Law; . . . And so the Determination of a Thing, whether it belongs to Court Christian, doth appertain to the Judges of the Common Law, and the Judges of the Common Law have Power to grant a Prohibition."

No doubt the Archbishop was well satisfied with the result of this case, and King James himself wrote Coke and thanked him profusely for thus settling the differences between the courts of common law and the High Commission.¹⁴⁸

But Coke had asserted the power of the common law courts to issue the writ of prohibition to restrict the jurisdiction of ecclesiastical courts. Coke now extended in two directions the rules which he had laid down in *Fuller's case*. He commenced to issue prohibi-

146. *Id.*, at 226.

147. 12 Co. Rep. 41, 42.

148. LYON & BLOCK, *op. cit. supra* note 78, at 178.

tions against the ecclesiastical courts directed against their methods of procedure rather than their assertions of jurisdiction. He also issued prohibitions against the High Commission, where it was intruding not on the jurisdiction of the common law courts, but upon that of the ordinary ecclesiastical courts. The former was a direct blow against the oath *ex officio*. The latter was an indirect blow, for the ordinary ecclesiastical courts could use the *ex officio* procedure only in causes matrimonial or testamentary.

Wigmore and Mary Hume Maguire agree that the prohibitions which Coke issued against the church courts on the ground that their procedure was illegal dealt the crucial blow to the oath *ex officio* and to the High Commission.¹⁴⁹ Perhaps Coke was led to this course by his successful argument in *Collier v. Collier*,¹⁵⁰ in 1589. Every lawyer is aware of the persuasiveness to himself of an argument he has successfully urged in litigation. The most detailed report of this case is in Croke, under the name *Cullier v. Cullier*,¹⁵¹ and reads in its entirety:

"They were sued in the spiritual court for incontinency, and the Judges there would examine them upon their oath if they did it.—But because *nemo tenetur prodere seipsum* in such cases of defamation, but only in causes testamentary and matrimonial, where no discredit can be to the party by his oath, Coke prayed a prohibition; and it was granted."

Leonard's report of the case¹⁵² suggests that the result was less conclusive. It reads in full:

"Between Collier and Collier the Case was, That the Plaintiff was Sued for Incontinence in the Spiritual Court, and there they would have him answer upon his oath if he ever had Carnal Knowledge of such a Woman; upon which he prayed a Prohibition: *Et nemo tenetur seipsum prodere*: But the Court would advise of it."

This case was no doubt brought in one of the courts of the Ordinary, rather than in the Court of High Commission. In the first place, there is no mention that it was in the High Commission in any of the extant reports. No reporter would omit this significant fact. Second, no contemporary documents indicate the objection

149. Wigmore, *supra* note 3, 14 HARV. L. REV. 622; Maguire, *op. cit. supra* note 3, at 221.

150. 4 Leon. 194; Cro. Eliz. 201; Moore 906 (1589).

151. Cro. Eliz. 201.

152. 4 Leon. 194.

that would surely have arisen from the Commission at that date if the common law court had made such a decision. Third, the case was brought by a party, and not on the court's own motion. The High Commission was developing such an original jurisdiction, but indications are that it had not yet become a regular practice.¹⁵³ Coke's reliance therefore was on the 1315-16 statute *Prohibitio formata de Statuto Articuli Cleri*.¹⁵⁴

At any rate, in 1607, the same year in which *Fuller's case* was decided, the Lords of the Council at Whitehall, on a motion of the Commons, asked the two Chief Justices of the common law courts, Coke and Popham, "in what Cases the Ordinary may examine any person *ex officio* upon oath."¹⁵⁵ The judges answered:¹⁵⁶

"1. That the Ordinary cannot constrain any Man Ecclesiastical or Temporal, to swear generally to answer to such Interrogatories as shall be administered unto them; but ought to deliver to him the Articles upon which he is to be examined, to the Intent that he may know whether he ought by the Law to answer to them; . . .

2. No Man Ecclesiastical or Temporal shall be examined upon secret Thoughts of his Heart, or of his Secret Opinion: But something ought to be objected against him what he hath spoken or done; No Lay-men may be examined *ex officio*, except in two Causes, and that was grounded upon great Reason; for Lay-men for the most part are not lettered, wherefore they may easily be inveigled and intrapped, and principally in *Heresy* and Errors of Faith . . .

. . . And the Reason that the Ecclesiastical Judge shall examine them in these two Cases, is for this, that Contracts of Matrimony, and the Estates of the Dead are many Times Secret; . . ."

Concerning the oath *ex officio*, the judges said:¹⁵⁷ "for as a Civilian said, that this was *Inventio Diaboli ad destruendas miserorum animas ad infernum* [The invention of the Devil to destroy miserable souls in hell]." And quoting from the provisions of a prohibition in the register of Writs, the judges said that the oath procedure was¹⁵⁸ "against the Custom of the Realm, which has been

153. USHER, *op. cit. supra* note 117, at 95-101.

154. Edw. II (date uncertain); 2 Statutes at Large 416. Discussed on page 424 herein.

155. 12 Co. Rep. 26 (1607).

156. *Id.*, at 26.

157. *Ibid.*

158. *Id.*, at 27.

'Time out of Mind . . .'

Following this doctrine, the common law courts continued to use the writ of prohibition to limit the ecclesiastical courts. Bancroft again urged, as he had in his *Articuli Cleri* of 1605, that where a jurisdictional dispute arose between common law and ecclesiastical courts, the King himself should decide.¹⁵⁹ The King ordered that the matter should be argued before him, personally. In *Prohibitions del Roy*,¹⁶⁰ a classic document in English constitutional history, Coke relates the proceedings that then took place. He tells us:¹⁶¹

" . . . And the Archbishop said, that this was clear in Divinity, that such Authority, belongs to the King, by the Word of God in the Scripture. To which it was answered by me, in the Presence, and with the clear Consent of all the Justices of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal . . . or betwixt Party and Party . . . but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custom of England . . . no Man shall be put to answer without Presentment before the Justices, Matter of Record, or by Due Process, or by Writ Original, according to the Ancient Law of the Land: . . . then the King said, that he thought the Law was founded upon Reason, and that he and others had Reason, as well as the Judges; To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature, but his Majesty was not learned in the Laws of his Realm of England, and Causes which concern the Life, or Inheritance or Goods, or Fortunes of his Subjects, they are not to be decided by natural Reason, but by the artificial Reason and Judgment of Law, which Law is an Act which requires long study and Experience, before That a Man can attain to the Cognizance of it; and that the Law was the Golden Met-wand and Measure to try the Causes of the Subjects; and which protected his Majesty in Safety and Peace: With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; to which I said, that *Bracton* saith, *Quod Rex non debet esse sub homine, sed Deo & Lege* [that the King is not under any man, but under God and the Law]."

159. 12 Co. Rep. 63.

160. *Ibid.*

161. *Id.*, at 63 to 65.

Coke's account of these proceedings may be somewhat more favorable to himself than the facts warrant.¹⁶² A contemporary letter indicates that James severely rebuked him for his boldness.¹⁶³ Nonetheless, the incident was of extreme importance, for the events of that day were undoubtedly related throughout London, since the issues involved were of great import to common and ecclesiastical lawyers and to the public.

Despite the King's displeasure, Coke continued to extend the rules he had laid down in *Fuller's case*. As indicated above,¹⁶⁴ he extended the doctrine of that case, first to restrict the methods of procedure in ecclesiastical courts. In *Allan Ball's case*,¹⁶⁵ in 1609, he asserted the power of common law courts to restrict the methods of procedure in the High Commission. Speaking for the court *en banc*, he held that the Commission could not send a Pursuivant, an attendant of the court, to arrest a person subject to its jurisdiction. The High Commission claimed power from the Act of Supremacy and the Letters Patent to do so. Coke ruled that they must proceed by citation, according to old ecclesiastical law. "For the statute 1 El. [the Act of Supremacy] did not give them any such Authority to arrest the Body of any subject upon Surmise; . . ." Coke also said that such an arrest by a pursuivant would be tortious, and hence that if the prisoner resisted and killed the pursuivant, it would not be murder. The decision in the case Coke put on the broadest grounds, carefully specifying the procedure which the High Commission must follow, and stating:¹⁶⁶

"[they must not] arrest him by a Pursuivant before any Answer or Default made; and this will be against the statute of Magna Charta, and all the Ancient Statutes . . ."

The decision must really have rankled the Archbishop. Here were cases over which the common law courts admittedly had no jurisdiction. Likewise, it was admitted that the ecclesiastical courts did have jurisdiction. Yet, the common law courts were testing the legality of the ecclesiastical proceedings by common law standards.

The second way in which Coke extended the writ of prohibition was to employ it to forbid the High Commission to proceed in any cause within the jurisdiction of the ordinary ecclesiastical courts. One

162. Usher, 18 English Historical Review 664.

163. Quoted in CAMPBELL, *op. cit. supra* note 72, at 272; quoting from LODGE'S ILLUSTRATIONS, iii, 564.

164. At page 443 herein.

165. 12 Co. Rep. 49 (1609).

166. *Id.*, at 49.

such case reported by Coke is *Marmaduke Langdale's case*.¹⁶⁷ He held that a suit by Langdale's wife in the High Commission for maintenance and support could be prohibited, because the action belonged to the Court of the Ordinary. One technical objection to the issuance of a writ of prohibition, which Coke summarily dismissed, was that the Court of Common Pleas had no jurisdiction to issue a prohibition because a husband could not sue his wife in a common law court.¹⁶⁸

Another interesting case was *Edward's case*,¹⁶⁹ also in 1609. The High Commission had proceeded against Edwards for divers scandalous remarks disgracing the reputation of one Dr. Walton as a doctor and as an Oxford graduate. The prohibition was granted by Coke on two grounds: that the matter and persons involved were temporal; and that, if the action were founded on defamation, it should be tried before the Ordinary. To assign the cause to the Ordinary instead of to the High Commission was an effective method of assuring that the inquisitional method would not be used. The High Commission claimed the right to use the oath only because its Letters Patent were based on the Royal prerogative. Thus it argued that the provisions of the *Prohibitio Formata* were not applicable to its proceedings. But the common law courts could issue prohibitions against the ordinary ecclesiastical courts to prevent their use of the oath, without calling into question the King's prerogative.

Coke next extremely offended the King on a question even nearer to the Royal prerogative than the prohibitions. In 1610, he was sent for to attend the King's Council, which included the Lord Chancellor, the Lord Treasurer, the Lord Privy Seal, and the Chancellor of the Dutchy. Also present were the Attorney General, the Solicitor and the Recorder. At this time, the Solicitor was the now fast rising Francis Bacon. Coke was asked for an advisory opinion upholding the right of the King, under his prerogative, to issue a Proclamation prohibiting the use of wheat to make starch, and another Proclamation forbidding any new construction around the city of London. The advisory opinion was necessary to answer a complaint which James had received from the Commons concerning his frequent assertion of his prerogative through the issuance of proclamations. These questions had been referred to the King as Grievances, and the address of the Commons to the King had been read

167. 12 Co. Rep. 58 (1609).

168. *Ibid.*

169. 13 Co. Rep. 9 (1609).

by Sir Francis Bacon.¹⁷⁰ Although Bacon was high in the King's favor at this time, and although the address was most carefully worded, the King at once recognized that his prerogative was challenged. The King had answered the Commons that he would confer with his Privy Council and with his judges, and do what was right. Now he clearly expected the Chief Justice of his Court of Common Pleas to give an opinion supporting his claim.

Under the heading *Proclamations* in his Reports,¹⁷¹ Coke relates his version of what occurred. Except for Coke himself, "all concluded that it should be necessary at that time to confirm the King's prerogative . . ."¹⁷² He asked time to confer with the other judges, since he knew no precedent to support the claim. To the argument of the Lord Chancellor that every precedent had first a commencement, Coke answered that there was need of great consideration "to provide that this be not against the Law of the Land: . . ."¹⁷³

Time to consider the cases was permitted. Coke conferred with Popham, then Chief Judge of the King's Bench, and with the Chief Baron and Baron Altham of the Court of Exchequer. The conclusion of the judges was unequivocal and was a strong assertion of the supremacy of the law:¹⁷⁴

" . . . that the King by his Proclamation cannot create any offense which was not an offense before, for then he may alter the Law of the Land by his Proclamation in a high Point; for if he may create an Offense where none is, upon that ensues Fine and Imprisonment; Also the Law of England is divided into three Parts, Common Law, Statute Law, and Custom; but the King's Proclamation is none of them: . . .

Also it was resolved, that the King hath no Prerogative, but that which the Law of the Land allows him."

Sir Francis Bacon at this time conceived the idea that the promotion of Coke to the position of Chief Justice of the King's Bench would advance the interests both of James I and of Bacon himself. Bacon expected thereby to become Attorney General. He therefore presented to the King the suggestion that the promotion of Coke would render him "obsequious" because Coke would then think himself near a place on the Privy Council.¹⁷⁵ Bacon also argued that

170. SPEDDING, *LIFE AND LETTERS OF SIR FRANCIS BACON*, iv., 202. (London, 1869).

171. 12 Co. Rep. 74 (1610).

172. *Ibid.*

173. *Id.*, at 75.

174. *Id.*, at 76.

175. SPEDDING, *op. cit. supra* note 170, at 381.

the promotion would "be thought abroad a kind of discipline to him for opposing himself to the King's causes",¹⁷⁶ and thus would have a salutary effect upon other judges. The position of Chief Justice of the King's Bench was far less profitable than the comparable post in the Common Pleas.

The King agreed to the proposal, and in November, 1613, Coke sat on the King's Bench. Coke was also raised to the Privy Council, and Bacon's ambition to be Attorney General was gratified. But Bacon proved far from being an accurate judge of Coke's character in his predictions to the King. Coke resisted the claims of the King's prerogative as effectively from his new post as he had from his old.

Coke came to the King's Bench in time to hear argument in the cases of *John Burrowes, Will. Cox, Dyton and others v. The High Commission*,¹⁷⁷ also called *Dighton v. Holt*. This case, decided finally in 1616, brought the legality of the use of the oath *ex officio* by the High Commission again in question. The defendants brought *habeas corpus* for their release from detention by the High Commission for their refusal to take the oath. On the return of the writ, counsel for the relators, Serjeant Finch, argued that the return was bad, because the commitment was for their refusal to take the oath. They could not be forced to answer interrogatories on matters concerning penal laws, "whereas they ought not to be compelled to answer upon oath, and thereby to accuse themselves."¹⁷⁸ Finch showed that in the return there were questions which might be directly incriminating, such as the question, "Whether he had stolen a surplice out of the Church, or not."¹⁷⁹ Coke said that it was clear that by the 1401 statute of Henry IV¹⁸⁰ that laymen could be examined upon their oath, but this was repealed by the statute of Henry VIII, in 1533.¹⁸¹ After the latter statute, said Coke, laymen could not be examined on their oath, except in matters matrimonial or testamentary.

Both Finch and Coke cited the cases from the reign of Queen Elizabeth¹⁸² in which the common law courts had granted petitions of *habeas corpus* to release defendants from the ordinary ecclesiastical courts. These cases Coke showed involved the use of the oath *ex officio* to question laymen concerning ecclesiastical offenses. The

176. *Id.*, at 382.

177. 3 Bulstrode 48 (1616).

178. *Id.*, at 49.

179. *Ibid.*

180. Discussed on page 425 herein.

181. Discussed on page 426 herein.

182. *Hinde's case*, Dyer 175b; *Skrogges v. Coleshill*, Dyer 175a; Leigh's case, 18 Eliz.

court and counsel seemed to agree that the cases applied here, but the petition was not granted. The case was twice adjourned, and then Coke conferred with the members of the High Commission, while the defendants remained in prison.

After some nine months, the case was moved again.¹⁸³ Coke found that the procedure of the High Commission was illegal for two reasons. First the defendants were charged with reforming the Book of Common Prayer, and this would be an offense against the Act of Uniformity of Common Prayer,¹⁸⁴ passed in the first year of Elizabeth. This was a penal statute, and the party could not be examined upon his oath concerning violations of it. Second, the party must be presented with a copy of the Articles, to allow the party to determine whether the matter was within the jurisdiction of the High Commission and to prepare his answers. Thereupon, Coke ordered the release of the prisoners on bail, until the next term of court, the prisoners to conform themselves to the Act of Uniformity in the meantime.¹⁸⁵

Upon the next hearing of the case, the prisoners were asked whether they would conform themselves, according to the Law of the Church. They refused to answer to the satisfaction of the court, and were then committed again to the custody of the High Commission. As in *Fuller's case*, the defendants won their arguments on the law but lost the case. Coke explains the case as follows:¹⁸⁶

" . . . The reason, upon the first return of our Opinions, for their delivery, was, because they were committed, upon the Statute of 1 Eliz. [the Act of Uniformity] for refusing to answer upon Oath . . . ; but it is not so here now, this being for heresy, . . . and they have as good power and authority, to commit for such causes, as any Court hath."

Despite the fact that the court upheld the High Commission, the decision of Coke that the Commission could not use the oath *ex officio* except in causes matrimonial or testamentary prevailed. No further cases arise in which suitors appealed to the common law courts to restrain the ecclesiastical courts in their use of this procedure. This is due in some measure to the fact that in 1610, Archbishop Bancroft had died and been succeeded by the milder and more reasonable Archbishop Abbot.¹⁸⁷ Under Abbot, the ecclesiastical

183. 3 Bulstrode, 50.

184. 1 Eliz., cap. 1 (1558) ; 6 Statutes at Large 207.

185. 3 Bulstrode, 50.

186. *Id.*, at 55.

187. SIR JOHN OLDMIXON, HISTORY OF ENGLAND DURING THE REIGNS OF THE ROYAL HOUSE OF STUART, 33 (London, 1733).

courts acquiesced in the rulings made by Coke in the various hearings of the *Burrowes* case. Thus successfully ended the struggle of the common lawyers against the oath as employed by the church courts.

Coke was not yet finished in his struggle against the extreme assertion of the King's prerogative, however. In the great case of *Commendams*,¹⁸⁸ Coke again alienated the King. An action of *Quare Impedit* had been brought by Colt and Glover against the Bishop of Coventry. Plaintiffs claimed the right to appoint a cleric to a certain church, basing the claim upon a grant. The Bishop defended on the ground that he had been appointed in *Commendam*¹⁸⁹ by the King. At the trial of the case in the Exchequer, before all the common law judges, counsel for the plaintiff argued that the King had no power to grant an ecclesiastical preferment. The Bishop of Winchester had expressly attended court to see that no such argument was permitted by the common law judges, since the King's prerogative was concerned.

When Winchester informed the King, the latter was advised by Sir Francis Bacon that a writ of *de non prosequendo rege inconsulto* might be issued by the Chancellor to the common law judges, halting all proceedings until the court consulted with the King.¹⁹⁰ This writ could issue if a case concerned the King's prerogative. Since the action was a civil proceeding between private parties, however, it was not clear that the writ would be honored, and the King instead had Bacon write Coke saying that the King's pleasure was that the action be stayed.

Coke persuaded the common law judges to hear and decide the case, and judgment was given for the plaintiff. Coke and the other judges then sent an explanatory letter to the King, but James was not satisfied. Coke then summoned all the judges to appear before the King and ask his pardon. Thereupon, after discussion, the King thought the judges were humbled, and put to them the question:¹⁹¹

"In a case where the King believes his prerogative or interest concerned, and requires the Judges to attend him for their advice, ought they not to stay the proceedings till his Majesty has consulted them?"

All the judges except Coke answered in the affirmative. The Chief Justice of England said:¹⁹²

188. Hobart, 197.

189. *Id.*, at 199.

190. CAMPBELL, *op. cit.* *supra* note 72, at 285, 286.

191. *Id.*, at 285, 286.

192. *Id.*, at 286.

"When the case happens, I shall do that which shall be fit for a judge to do."

The King dismissed the judges with the remark, that the judges should keep the limits of their several courts, and not suffer his prerogative to be wounded.¹⁹³ He was not so bold as to punish Coke at this time. However, Coke's career as a judge was now in great jeopardy. He further aggravated the King by his insistence that the dispensing of patronage posts in the King's Bench was a right of the Chief Justice, and rejected the King's candidate for chief clerk. On November 16, 1616, Coke was removed from the bench, on the frivolous charge of having committed a breach of his duty while he was Attorney General many years previous.¹⁹⁴ So at the age of sixty-six, Coke seemed to retire into obscurity, only to emerge more triumphant than ever some years later, when he made an important contribution to winning from the King the Petition of Right.

But so far as our history is concerned, the work of Coke was completed. It was now firmly established that the common law courts could through the writs of prohibition and *habeas corpus* prevent the ecclesiastical courts, including the High Commission, from using the oath *ex officio* as a method of questioning suspects. The task of extending these decisions of Coke to proceedings in the common law courts remained. When the Parliament on the petition of John Lilburn voted that the action of the Star Chamber in punishing Lilburn for refusing to take the oath was "illegal and against the liberty of the subject," the privilege was established as a part of the common law.¹⁹⁵ The Puritans and other settlers brought the doctrine to the colonies, and in 1791 it became enshrined in the fundamental law of the new Republic.¹⁹⁶

193. *Ibid.*

194. *Id.*, at 287 ff.

195. 3 How. S.T. 137 (1637); GRISWOLD, *supra* note 1, pp. 3 to 7.

196. U. S. Constitution, Fifth Amendment, see footnote 1; Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).