The Equity Side of the Exchequer

THE EQUITY SIDE OF THE EXCHEQUER:

Its Jurisdiction, Administration, Procedures, and Records

by

William Hamilton Bryson

Volume 1

Text

A dissertation submitted to the University of Cambridge for the
degree of Doctor of Philosophy

June 1972

Chapter

Table of Contents

Part

	vol. 1
Preface	viii
Table of Principal Abbreviations	x
Table of Statutes Cited	xiv
Chapter 1: Introduction	1
Chapter 2: The Equity Jurisdiction of the Exchequer	12
A. Definition	12
B. Origins	17
C. Relations with Other Courts	37
1. The Other High Courts at Westminster	37
2. Inferior Courts	41
3. Appeals to the House of Lords	42
D. Summary	42
Chapter 3: The Administration of the Court	45
Part 1 - The Officers	45
A. The Treasurer	45
B. The Chancellor of the Exchequer	56
C. The Barons of the Exchequer	62
1. Position	62
2. Appointment and Tenure	70
3. Termination of Office	83
D. The Examiners	92
E. The Clerks to the Barons	94
F. The King's Remembrancer	94
G. The Masters and the Accountant General	107
H. The Sworn Clerks	109
I. The Clerk of the King's Remembrancer	111
Part 2 - The Location of the Court Room	112
Part 3 - The Location of the King's Remembrancer's Office	115
Part 4 - The Location of the Records of the Court	117
Part 5 - The Language of the Court	127

Chapter 4: Procedure and Records	131
Part 1 - Pleadings	131
Section A - Bills of Complaint (Bill Books)	131 148
Section B - Process (Subpoena Books)	150 156
Section C - Appearances (Appearance Books, E.107)	157 158
Section D - Second Pleading	160
1) Answers	160
a) Answers Taken in Court	160
b) Answers Taken in the Country	165
2) Demurrers	168
3) Pleas	170
4) Disclaimers	170
Section E - Third Pleading	172
1) Exceptions	172
2) Replications	173
3) Demurrers	174
Section F - Rejoinders	175
Section G - Other Pleadings	176
Section H - Records of the Pleadings (E.111, E.112, E.193)	177
Part 2 - Evidence	180
Section A - Commissions	181
Section B - Interrogatories	189
Section C - Depositions	190
1) Barons's Depositions	190
2) Depositions by Commission	194
Part 3 - Determination of the Suit	201
Section A - Hearings (Minute Books, E.161, E.162)	201 202
Section B - Decrees (Original Decrees and Orders E.128-131) (Decree and Order Books, E.123-127)	203 204 204
Section C - Enrollment of Decrees (K.R. Memoranda Rolls, E.159)	210 211

Section D - Rehearings, Reviews, Appeals	219
Section E - Execution of Decrees	221
Chapter 5: The Suppression of the Jurisdiction	222
Bibliography	231
A. General Rules of Court	231
B. Reports of Cases	234
C. Secondary Works	238
Appendices	vol. 2
Appendix 1 - Chart Showing the Quantity of Bills Filed	4
Appendix 2 - Patents	7
A. Treasurers of the Exchequer	7
1. Seymour (1547)	7
2. Paulet (1550)	10
B. Chancellors of the Exchequer	14
1. Mildmay (1559)	14
2. Pelham (1743)	17
C. Deputy Chancellor of the Exchequer	20
1. Croke (1604)	20
D. Barons	22
1. Curson (1547)	22
2. Darnall (1548)	24
3. Saxilby (1549)	27
4. Brown (1553)	30
5. Brown (1554)	31
6. Shute (1579)	34
7. Nicholas (1654)	38
E. King's Remembrancers	39
1. Saunder (1549)	39
2. Burwell (1654)	44
F. Deputy King's Remembrancers	47
1. West (1619)	47
2. Smith (1657)	50
Appendix 3 - Oaths	54
A. Treasurers of the Exchequer	54
B. Chancellors of the Exchequer	54
C. Barons	55
D. Examiners	56
E. King's Remembrancers	57
F. Sworn Clerks	58

Appendix 4 - Lists of Officers	59
A. Judicial Officers (1547-1714)	59
B. Examiners (1624-1725)	104
C. King's Remembrancers (1714-1841)	109
D. Chart of the Fanshawe Family (1565-1716)	111
E. Sworn Clerks (1572-1841)	113
Appendix 5 - Pleadings, Etc., Before 1558	117
Montgomery v. Clopton (1465-1504)	119
R.v. Nanseglose (1509-c.1521)	123
Waleston v. Calfehill (1522)	125
Bailiffs of Huntingdon v. Earl of Kent (before 1523)	140
Bulstrode v. Wyborn (before 1526)	142
Huse v. Executors of Chubb (1505-1529)	145
Abbot of Dore v. Myle (1523-1529)	148
Miles v. Prior of Elsing Spital (before 1530)	150
Tenants of Berkhamstead v. Rector of Ashridge (1531)	155
Warneford v. Edmay (1514-1539)	167
Peck v. Church Wardens of Cokeham (before 1541)	169
Capull v. Ardern (1543-1545)	171
anon. v. Reymond (1518-1547)	184
Dullock v. Curat (1531-1547)	186
R. v. Bulmer (1531-1547)	189
Manfelde v. Wyer (1547-1549)	190
Roberts v. White (1549)	201
anon. (depositions) (1551)	215
Kemsey v. Dalton (1545-1552)	216
Randell v. Tregyon (1547-1552)	217
Scrace v. Shelley (1547-1552)	219
anon. (deposition) (1552)	221
Ramsden v. anon. (1553-1554)	222

Whalley v. Mounson (1553-1554)	224
anon. (deposition) (1554)	226
anon. (deposition) (1554)	227
Vaughan v. Twisden (1554-1555)	228
Hewet v. Lord Dacres (1557)	234
Gyfforde v. Bishop of Bangor (1557)	238
Waren v. Houndaller (1553-1558)	241
LeBucke v. Sharington (1553-1558)	243
Bell v. James (1554-1558)	245
Kirkham v. Taverner (1554-1558)	248
Tenants of Backworth v. Bannystre (1554-1558)	251
Cotton v. Hamond (1554-1558)	253
White v. Leigh (1558)	259
Mantell v. Mayor of Wickham (1558)	264
anon. v. Pryor (temp. incert.)	271
Baker v. Pyrkynson (temp. incert.)	272
Milles v. March (temp. incert.)	274
Noble v. Falke (temp. incert.)	276
Donyngton v. Bothe (fragment) (temp. incert.)	285
Madder v. anon. (fragment) (temp. incert.)	285

Preface

It is my great pleasure to begin this preface with the expression of my deepest gratitude to my supervisor, Mr. D.E.C. Yale, who suggested this topic of research to me. He has been most generous with his time and advice. I would also like to acknowledge the kind assistance of Professor G.R. Elton, Professor P.G. Stein, and Mr. T.A.M. Bishop, who helped me in many ways.

Further acknowledgement is due to Clare College, who very generously supported me as a William Senior scholar during the last two years of my work on this dissertation. Also my thanks are due to the managers of the Maitland Memorial Fund and to Christ's College for meeting the expenses of my research in the first two years.

The staffs of the University Library, Cambridge, the Public Record Office, the British Museum, the Bodleian Library, Oxford, Lincoln's Inn, the Middle Temple, and the Inner Temple libraries have been unfailingly helpful, courteous, and long-suffering in regard to the problems of my research; I am quite grateful to them all.

This dissertation is entirely my own work, and it includes nothing which is the outcome of any work done in collaboration with anyone.

The sources used for the writing of this dissertation were the exchequer archives which are now in the Public Record Office and the few printed materials which are discussed in my bibliography. The numerous footnotes throughout my work give the exact references to the sources; however, many of the footnotes are merely guides to further investigation of the points under discussion. In general this dissertation has not used the work of anyone else; it is the first work on the subject.

This dissertation is not in any way, shape, or form the same as or similar to any work which I have submitted or am currently submitting for any degree, diploma, or other qualification whatsoever at this university or at any other university.

William Hamilton Bryson

Clare College

June 1972

TABLE OF PRINCIPAL ABBREVIATIONS

- Am. Journ. Leg. Hist. - American Journal of Legal History.
- B.I.H.R. - Bulletin of the Institute of Historical Research.
- Barton, Historical Treatise - C. Barton, An Historical Treatise of a Suit in Equity (1796).
- Blackstone, Commentaries - W. Blackstone, Commentaries on the Laws of England, 4 vols. (1765-1769).
- Bohun, Practising Attorney - W. Bohun, The Practising Attorney or Lawyer's Office (1724).
- Brit. Mus. - The British Museum.
- Brooke, Abr. - R. Brooke, La Graunde Abridgement (1573).
- Brown, Compendium - W. Brown, A Compendium of the several branches of Practice in the Court of Exchequer at Westminster (1688).
- Bunb. - W. Bunbury, Reports, Court of Exchequer, reprinted in the English Reports, vol. 145.
- C. - Chancery records in the Public Record Office.
- C.P. - The high court of common pleas.
- Cal. S.P. Dom. - Calendar of State Papers, Domestic.
- Cal. Pat. Rolls - Calendar of Patent Rolls.
- Cal. Treas. Papers - Calendar of Treasury Papers.
- Camb. L. Journ. - Cambridge Law Journal.
- Ch.; Chan. - The high court of chancery.
- Co. Inst. - E. Coke, The Institutes of the Laws of England, 4 vols. (1628-1644).
- Co. Rep. - E. Coke, Reports, reprinted in the English Reports, vols. 76, 77.
- Com. Journ. - The Journals of the House of Commons.
- D.K. Rept. - Report of the Deputy Keeper of the Public Records.

- D.N.B. - Dictionary of National Biography, ed. L. Stephen and S. Lee, 2d ed. 21 vols. (1921-1922).
- Dyer - J. Dyer, Reports, reprinted in the English Reports, vol. 73.
- E. - Exchequer documents in the Public Record Office.
- E.H.R. - English Historical Review.
- Eng. Rep. - The English Reports, 176 vols.
- Ex. - The high court of exchequer.
- Ex. Cham. - The court of exchequer chamber.
- Firth and Rait - C.H. Firth and R.S. Rait, Acts and Ordinances of the Interregnum, 1642-1660, 3 vols. (1911).
- Foss, Biog. Dict. - E. Foss, Biographica Juridica: A Biographical Dictionary of the Judges of England from 1066 to 1870 (1870).
- Foss, Judges - E. Foss, Judges of England, 9 vols. (1848-1864).
- Fowler, Practice - D.B. Fowler, The Practice of the Court of Exchequer upon Proceedings in Equity, 2 vols. (1795).
- G.E.C. - G.E. Cokayne, The Complete Peerage, 2d ed. by V. Gibbs et al., 14 vols. (1910-1959).
- Genl. Rept. Rec. Comm. - General Report to the King in Council from the Honourable Board of Commissioners on The Public Records (1937).
- H.C. sess. pap. - House of Commons sessional (or parliamentary) papers [also known as the Blue Books].
- Hardr. - T. Hardres, Reports, Court of Exchequer, reprinted in the English Reports, vol. 145.
- Hil. - Hilary law term.
- Holdsworth, H.E.L. - W.S. Holdsworth, History of English Law, 16 vols. (1922-1966).
- IND. - Indexes in the Public Record Office.
- K.B. - The high court of king's bench.
- K.R. memo. roll - king's remembrancer's memoranda roll.
- L. & P. - J.S. Brewer, comp., Letters and Papers ... of the Reign of Henry VIII, 2d ed. by R.H. Brodie, 22 vols. (1920-1932).

L.Q.R. - Law Quarterly Review.

Lane - R. Lane, Reports in the Court of Exchequer, reprinted in the English Reports, vol. 145.

Leon. - W. Leonard, Reports and Cases, reprinted in the English Reports, vol. 74.

LeNeve, Knights - P. LeNeve, LeNeve's Pedigrees of the Knights ...
ed. G.W. Marshall, Harleian Soc., vol. 8 (1869).

Lords Journ. - The Journals of the House of Lords.

Mich. - Michaelmas law term.

'Min. of Ev.' - Minutes of Evidence on the Administration of Justice Bill, Lords Journals, vol. 72, app. 3, pp. 117-153 (1840).

Mitford, Pleadings - J.F. Mitford, lord Redesdale, A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill, 2d ed. (1787).

OBS. - Obsolete calendars in the Public Record Office.

Osborne, Practice - P. Osborne, The Practice of the Exchequer Court, written in 1572, printed in 1658 and wrongly attributed to T. Fanshawe.

Oxf. Bodl. - Oxford University, Bodleian Library.

P.R.O. - The Public Record Office, London.

Pasch. - Easter law term.

Plowd. - E. Plowden, Commentaries or Reports, reprinted in the English Reports, vol. 75.

PROB. - Probate records in the Public Record Office.

Repts. of Commons - Reports from Committees of the House of Commons [1715-1801] 15 vols. (1803).

S.P. - State Papers in the Public Record Office.

Sav. - J. Savile, Reports, reprinted in the English Reports, vol. 123.

Seld. Soc. - Publications of the Selden Society.

Shaw, Knights - W.A. Shaw, The Knights of England, 2 vols. (1906).

Squibb, 'A Book of All the Several Officers' - [An edition is being prepared for the Camden Series].

STAC. - Star chamber records in the Public Record Office.

Stat. Realm - The Statutes of the Realm (1225-1713) 10 vols. (Record Commission, 1810-1822).

T. - Treasury records in the Public Record Office.

Thomas, Notes - F.S. Thomas, Notes of materials for the History of Public Departments (1846).

Trin. - Trinity law term.

Turner, Epitome - S. Turner, An Epitome of the Practice on the Equity Side of the Court of Exchequer (1806).

Venn, Alumni Cantab. - J. and J.A. Venn, Alumni Cantabrigienses, 10 vols. (1922).

Wood Tit. Cas. - H. Wood, A Collection of Decrees by the Court of Exchequer in Tithe Causes, 4 vols. (1798).

Y.B. - Yearbook.

Yale L.J. - Yale Law Journal.

Yale's Nott. - Lord Notthinhams Chancery Cases, ed. D.E.C. Yale, 2 vols., Selden Society vol. 73 for 1954, and vol. 79 for 1961.

Table of Statutes Cited which Concern the Exchequer

- Stat. 12 Edw. 1 [1284]-p. 22
- Stat. 28 Edw. 1 [1300] c. 4 - p. 22
- Stat. 5 Edw. 2 [1311] c. 25 - p. 22
- Stat. 33 Hen. 8 [1541] c. 39 - pp. 29, 43
- Stat. 1 Mar. 1 [1553] st. 2, c. 10 - p. 31
- Stat. 1 Will & Mar. [1689] sess. 2, c. 2 - p. 80
- Stat. 7 & 8 Will. 3 [1696] c. 27 - p. 88
- Stat. 12 & 13 Will. 3 [1701] c. 2 - p. 82
- Stat. 1 Ann. [1702] st. 1, c. 2 - p. 88
- Stat. 4 & 5 Ann. [1705] c. 3 - p. 152
- Stat. 6 Ann. [1707] c. 41 - pp. 49, 61
- Stat. 5 Geo. 2 [1731] c. 25 - p. 156
- Stat. 1 Geo. 3 [1760] c. 23 - p. 89
- Stat. 57 Geo. 3 [1817] c. 18 - pp. 63, 224, 225
- Stat. 57 Geo. 3 [1817] c. 60 - p. 97
- Stat. 1 Geo. 4 [1820] c. 35 - pp. 107, 108, 202, 224
- Stat. 1 Geo. 4 [1820] c. 119 - p. 226
- Stat. 7 Geo. 4 [1826] c. 57 - p. 226
- Stat. 11 Geo. 4 & 1 Will. 4 [1830] c. 70 - p. 62
- Stat. 3 & 4 Will. 4 [1833] c. 41 - p. 64
- Stat. 6 & 7 Will. 4 [1836] c. 71 - p. 226
- Stat. 6 & 7 Will. 4 [1836] c. 112 - p. 64
- Stat. 5 Vict. [1841] c. 5 - pp. 94, 109, 120, 125, 228
- Stat. 5 & 6 Vict. [1842] c. 86 - p. 111
- Stat. 36 & 37 Vict. [1873] c. 66 - pp. 50, 60

CHAPTER 1 - Introduction

The equity side of the court of exchequer "is by far the most obscure of all the English jurisdictions," declared Plucknett¹. The purpose of this essay is to shed some light upon this court and to explore its jurisdiction, to introduce its staff, to discover its procedures, to explain its equity records, and perhaps to render Plucknett's statement obsolete.

Institutional history has an unfortunate tendency to dryness and remoteness, which coupled with the author's literary short-comings portends a tedious undertaking for the reader of this work. However, a reminder of the immense importance of institutional history for both the lawyer and the historian will, hopefully, overcome this initial discouragement.

Substantive law is inextricably intermingled with the procedures of the court; the practicalities of the prosecution of a lawsuit can never be neglected. Of initial and fundamental importance is that for which the petitioner prays. In practical terms this was a remedy for a grievance or a complaint; in larger terms and in the context of this study, this was the prayer for equitable relief. ^{This study} ~~It~~ demonstrates that equity was bigger than the chancery and that others besides the lord high chancellor had a hand in its development. It is true that the court of chancery was the most important court of equity, but the existence of an alternative high court of equity in the exchequer had a significant effect upon the development of equity and upon the chancery itself.

The historian must by his nature be involved with institutions since human beings exist within their institutions. He must know why these

1. T.F.T. Plucknett, Concise History of the Common Law (5th. ed. 1956) p. 185.

institutions were erected, how they effected their people, how they evolved, why they perished. Moreover, among the major sources of historical evidence for the writer on the sixteenth century and earlier are the records of the courts of law. To understand and to be able to use these records, the historian must understand the institutional procedures which produced them. This requires the study of the administration of the court, the procedures for the trial of a lawsuit, and the terms of art by which these things were expressed.²

The scope of this monograph is the equity jurisdiction of the court of exchequer. It includes only that part of the exchequer which functioned as a court of equity. It includes only the problems of equity which were unique to the court of exchequer; the development of equity in all the courts together is not the history of the equitable jurisdiction of the exchequer but rather of equity in general. The history of equity in the chancery has been well covered.³ Therefore to go into the technicalities of equity where there is no particular reference to the exchequer would be to repeat unnecessarily already available information. However, in order to describe the equity side of the exchequer, it is necessary to sketch the outline of equity in general. The differences between the exchequer and the other courts of equity will be noticed, but as to that which was common to all equity courts, the discussion will be kept to a bare minimum.

The purpose of this monograph is to place the equity side of the exchequer into its historical, institutional, and legal perspective. It is

2. See G.R. Elton, Political History (1970) chap. 3, esp. p. 108.

3. See the writings of W.J. Jones for the later part of the sixteenth century, D.E.C. Yale for the later part of the seventeenth century, and G. Spence for the eighteenth century.

to discover its administrative procedures and to determine how far its judicial procedures in the sixteenth and seventeenth centuries were the same as those of the other courts of equity. It is to produce an outline of the procedures and an introduction to the records of the jurisdiction for those who may wish to work in the same field but to dig deeper.

The major obstacle to the study of this subject has been the scarcity of commentary. The first sketchy secondary works did not appear before the mid-seventeenth century, and the only systematic treatment of the jurisdiction was Fowler's Practice of the Court of Exchequer as late as 1795. Since its suppression in 1841, nothing at all has appeared. Therefore, we are forced to use an archival approach to the subject (for the sixteenth century at least). As an archaeologist creates a model of a dinosaur from a few old bones, which he has dug up, we must try to piece together an understanding of the procedures of the court from an examination of its relics, the original documents in its archives. In fact this approach is better than relying on commentary or other secondary sources. The records are free from ignorances, negligences, prejudices, opinions, and historians' purposes. They were made and kept for reasons other than to aid the uses to which they shall now be put; this assures their impartiality as sources of historical description. The court records have been preserved intact since the accession of Elizabeth I in 1558.

The method of research to be used for the study of this court will be to examine closely everything in the archives up to 1572. This was the date of the death of the marquess of Winchester, the lord high treasurer. It is chosen because before 1580 pleadings were not dated and one can only place them within the terms of office of the treasurer, chancellor of the exchequer, and chief baron, to whom the bills were addressed. Since the exchequer equity records were not systematically kept or preserved before 1558, very little remains before this date. These

thirteen years of records provide an adequate standpoint from which to view the early equitable jurisdiction of the court. However, the jurisdiction arose at least a decade before the accession of Queen Elizabeth and the proper preservation of the court archives; therefore it is necessary to examine closely the miscellaneous documents which have survived by luck from before 1558, and so they have been transcribed in the fifth appendix to this work.

The administration and procedures of the equity side of the exchequer were not fully settled by 1572, and so it will be necessary to use extensively the records to the end of the sixteenth century. This will be done by the generous use of random samples from all counties.⁴ By the accession of James I in 1603 the jurisdiction was clearly established and flourishing. A fair amount of printed information is available from the second part of the seventeenth century; this is in the form of reported cases, rules of court, and manuals for clerks and solicitors.⁵ Since the seventeenth century was not a period of radical change in the procedure of the exchequer court, these sources are valid as general descriptions of the court in the earlier part of the century. Thus recourse to the records is less necessary, and the samples to be examined need include only several random counties at intervals of ten to twenty years.

The eighteenth century court is fully described by Fowler, and a fairly large number of cases were reported. Moreover, the equity jurisdictions of the exchequer and chancery had become almost identical, so much so that the chancery books are valid sources of information on exchequer equity procedure. Since the two courts were so close, there

4. The pleadings were filed by counties; see below, chap. 4-1-H.

5. See below in the bibliography.

is not much which needs to be discussed about this period in this monograph. The eighteenth century records have been used only to find examples of writs in English. These same types of printed materials plus several parliamentary reports describe the equity side of the exchequer in the nineteenth century.

This is enough upon the general sources of this study. The next section of this introduction will place the administration of equity into its general exchequer setting. This will be followed by notes of what will be discussed and what will not be discussed. The chapter will conclude with a summary of the courts of equity in general.

The exchequer in the eighteenth century was only one part of the royal treasury, but in the sixteenth century and earlier the exchequer and the treasury were co-extensive. The exchequer was divided into two parts: the "upper exchequer" or the "exchequer of account" and the "lower exchequer" or the "exchequer of receipt". The lower exchequer was that part which handled the cash; the upper exchequer handled the accounting of the royal revenues, who was to pay in to and receive from the lower exchequer and how much. By the sixteenth century the upper exchequer had developed several distinct and independent offices each with its own personnel. The work of three of these, the king's remembrancer's office, the lord treasurer's remembrancer's office, and the office of pleas, had engendered the power to decide legal disputes arising out of the financial affairs of the crown. Imperceptibly over the centuries these three offices had become courts of law. The office of pleas, which was under the supervision of the clerk of the pleas, handled common law cases between private parties. The other two handled revenue disputes between the monarch and a private party. The judges in all of the exchequer courts were the barons of the exchequer. How and when the equity jurisdiction of the

exchequer arose within the king's remembrancer's office will be discussed in chapter two.

Chapter three will discuss the administration of the equity court in general and its officers from 1547 to 1714 in particular. This will be supplemented by sample patents and oaths and by lists in appendices two, three, and four.

The fourth chapter will describe the procedures and records of the court and will trace a suit from its initiation to the execution of the decree. This seems a more sensible approach for a work of institutional history than attempting to discuss the subject chronologically. It involves the risk of chronological dislocations, but misunderstanding may be avoided by careful notice of the dating of the material cited in the footnotes. Institutions have a certain bureaucratic inertia, and the king's remembrancer's office was no exception. Therefore it is reasonable to suppose that, where there is no evidence to the contrary, there was no change in the procedures. And even where there was change, it was a slow change. Thus a case can be considered as evidence of the preceeding practice and of the subsequent practice, unless it states that it changed the practice or was a case of first impression.

Much will be said about the equity records of the exchequer because from them can be gathered much information about the procedures of the court. Furthermore, they can be of great value to researchers in other fields. By explaining what can or cannot be found in the archives and by showing how to get at the information by the use of indices and calendars, future inquiries will be facilitated and possibly time saved which would otherwise be wasted.

This monograph will not discuss the substantive law of equity in the exchequer. When the exchequer assumed its equity jurisdiction in the

sixteenth century, it took over the doctrines as well as the procedures of the chancery and the other courts of equity. After the exchequer equity court was firmly and fully established, the substantive doctrines developed in pari passu with chancery. When a point of importance was decided by the court in which it happened to have been brought, that decision was usually followed by the other courts of equity according to the current understanding of the principle of stare decisis. Since many more equity cases were heard in chancery than in the exchequer, there are more leading cases from the court of chancery. However, there are a proportionate number from the exchequer, such as the following. Venables' Case (1607)⁶ established the doctrine of prerogative cy pres; in Pawlett v. A.G. (1667)⁷ it was ruled that relief in equity could be had against the crown and a basic principle of equities of redemption was established. Important rulings about contribution among sureties were made in Dering v. Earl of Winchelsea (1787)⁸; Dyer v. Dyer (1788)⁹ proved to be a leading case on the doctrine of resulting trusts.

In the context of this institutional study, the lawyers hired by private parties do not appear to be important as officers of the court. Therefore a separate section in chapter three is not needed. Their participation will be noted in chapter four at those stages of the procedure in which they had functions to perform. However, a few general paragraphs here may be of interest.

6. See G.H. Jones, History of the Law of Charity (1969) pp. 76, 77.

7. Hardr. 465, 145 Eng. Rep. 550 (Ex. 1667) per Hale; see W. S. Holdsworth, 'History of Remedies against the Crown,' L. Q. R., vol. 38, pp. 141 at 280-

8. 1 Cox 318, 29 Eng. Rep. 1184, 2 Bos. & Pul. 270, 126 Eng. Rep. 1276 (Ex. 1787) per Eyre. 283 (1922)

9. 2 Cox 92, 30 Eng. Rep. 42 (Ex. 1788) per Eyre.

Barristers and solicitors had the same duties and privileges in the exchequer as they had in the other high courts at Westminster. One can assume some specialization of practice, but the true extent of it cannot be known without more research into the history of the legal profession. The senior barrister practising in the exchequer was called the postman, and the second in seniority the tubman. They were so denominated from the particular seats in court assigned to them. The postman had pre-audience of the attorney general and the solicitor general; that is, he made the first motion at the opening of court. When the chancellor of the exchequer took his seat, the tubman had pre-audience of the postman.¹⁰

In 1729 an act was passed for the purpose of controlling the solicitors in an attempt to improve the quality of the profession. This Act provided, among other things, that every solicitor be sworn in every court in which he practiced and that the oath be enrolled¹¹. It led to the beginning of the rolls of solicitors¹² and the solicitors oath roll¹³. A revenue measure was passed in 1785 putting an annual tax on solicitors; it required them to take out yearly a certificate of admission to practice, and registers of these certificates were to be kept.¹⁴

There is not much point in discussing the fees and salaries of the officers of the court except in very great detail, such that it would be inappropriate in this monograph. The amounts of the salaries alone is not very important since they were only small percentages of the economic

10. Fowler, Practice (1795) vol. 1, pp. 8, 9; Foss, Judges, vol. 9, p. 110.

11. Stat. 2 Geo. 2 [1729] c. 23, ss. 3, 4, 8, 14, 18; Stat. 14 Geo. 2 [1739] c. 13, s. 3; Stat. 22 Geo. 2 [1749] c. 46, s. 2; Stat. 30 Geo. 2 [1757] c. 19, s. 75.

12. IND. 4609 and 4610 (1729-1730, 1794-1841), formerly E.109/1 and 2.

13. E.200/1 (1772-1841); see also Lists of Attornies and Solicitors (1729) pp. 3, 4; Additional Lists of Attornies and Solicitors (1731) pp. 225-254.

14. Stat. 25 Geo. 3 [1785] c. 80, ss. 1, 4; E.108/1 is the register for the equity side of the exchequer for 1788, 1795-1841.

values of the offices. Fees were much more important, and so were the advantages of being in positions from which lucrative opportunities could be seized¹⁵. The actual income from fees to the various exchequer officials can only be guessed at; no records were ever kept. There were schedules of fees to be paid by the parties at the various stages of the litigation, so one can get a vague idea of the cost of pursuing a lawsuit. However, there were so many variables that a close estimate is not possible. Also any comparison with the costs in the other law courts would be unrewarding because what might be gained on the swing might be lost on the turn. Only a very detailed and thorough study could reach any significant results; such a treatise cannot be included here.

Since this monograph is the first attempt ever to discuss the history of the equity jurisdiction of the exchequer, it must consider the entire history of the jurisdiction from beginning to end. The study of an institution must begin with a broad, general view. If one cannot see the wide perspective, then one cannot understand the meaning or reasons for whatever might be discovered within a narrow span of time. Is a phenomenon archaic, normal, or incipient? Is it important or not? Is it part of a large scheme or merely a momentary aberration? To begin the investigation of a subject with a narrow focus which covered only ten to twenty years I should think pointless because superficial conclusions would be drawn from what could not help but be a blinkered study (by my standards as an institutional historian). It is better to have a cinema than a photograph.

It remains now only for this chapter to generalize about the history of the courts of equity so that the place therein of the equity side of the exchequer can be understood.

15. See G.E. Aylmer, The King's Servants (1961) pp. 162-165, 167, 168.

In the first part of the fifteenth century the courts of equitable jurisdiction, the chancery and the council, were using a new system of procedures and remedies to administer (in its widest sense) the common law of England. This system was originated and developed in the court of chancery; the courts which later adopted it were called courts of equity. The purpose of the courts of equity was to complement the ancient courts of common law by providing a more efficient administration of the old traditional law in those cases where the old procedures were inadequate.

The success of equity procedures resulted in their being used by every new court which was set up or which evolved after 1400. In the latter part of the fifteenth century the courts of star chamber, requests, and the duchy chamber of Lancaster evolved as courts of equity. In the first half of the sixteenth century the regional council of the marches of Wales, the council of the north, and the short-lived council of the west were modeled on the king's council at Westminster, and like it they all used equity procedures for the determining of civil suits. The counties palatine of Durham, Lancaster, and Chester developed courts of equity in this period. In the latter half of the reign of Henry VIII when the government was under the influence of Thomas Cromwell, a number of revenue courts were erected to administer the finances of the kingdom.¹⁶ These courts, the courts of wards and liveries, augmentations, first fruits and tenths, and general surveyors, appear to have been modeled upon the court of duchy chamber; they all used equity procedures.

The only exception was the common law court of great sessions of Wales. This court was established in 1543 as a part of the integration of Wales into the English system of government and judicial administration. Equitable remedies were already available in Wales.

16. See generally G. R. Elton, Tudor Revolution in Government (1962).

In the seventeenth century there took place a tremendous change in the nature of equity. From merely supplying in personam remedies and procedures to supplement the administration of the common law, it began to develop in rem procedures and its own body of substantive law which was different from that of the common law courts. This change was secured by the work of Lord Chancellor Nottingham during the reign of Charles II.¹⁷ This trend was continued in all of the eighteenth century courts of equity including the equity side of the exchequer. The momentous reforms of the courts of equity in the nineteenth century were not made until after the equity jurisdiction of the exchequer was abolished in 1841.

This is quite enough introduction; it is, of course, much easier to pose questions than to answer them. As Sir Edward Coke once said, "Questions in the exchequer are wont to be resembled to spirits, which may be raised up with much facility but suppressed or vanquished with great difficulty."¹⁸ With this caveat, let us now attempt to describe the exchequer equity court, to answer some of the questions, and to suggest where the answers to others may be found.

* * *

17. See generally the introductions of D.E.C. Yale to Lord Nottingham's Chancery Cases, Selden Society volumes 73 for 1954 and 79 for 1961, and Lord Nottingham's Treatises (1965).

18. Sutton's Hospital Case, 10 Co. Rep. 1 at 29, 77 Eng. Rep. 937 at 968 (K.B. 1612).

CHAPTER 2: The Equity Jurisdiction of the Exchequer

A. Definition

Equity was a system of curial remedies which evolved in England in the fifteenth century in the court of the lord chancellor. It was, like any other system, fundamentally a combination of the theoretical principles of justice and the practical problems of putting them into operation. The important difference between equity and common law was that the latter arose in the twelfth century when judicial administration was vastly more difficult. By the fifteenth century the art of government was much more developed, and so, although the general conceptions of justice had not changed, they could be better implemented by the officers of the crown. By the fifteenth century the courts of common law were rigidly set in their ways; as a result a new court of law was needed to take advantage of the improvements of government for the better administration of justice¹. The procedures and remedies of the court of chancery, equity, in the sixteenth century came to be administered also in the court of exchequer. How this happened is the subject of the next section of this chapter.

The mediaeval exchequer, which came to be settled at Westminster, had financial jurisdiction over all of England, Wales, and the town of Berwick-upon-Tweed. When the exchequer developed its equity side, its equity jurisdiction was, naturally, geographically co-extensive with its revenue side.

The types of cases heard were, in general, equity cases according to the usages and traditions of chancery. The early equity cases, those before 1558, were founded on a broad range of equitable grounds. The

1. See S.F.C. Milsom, Historical Foundations of the Common Law (1969) pp. 74-79.

most frequent prayer was for an injunction for quiet possession of property rights². There were several cases involving uses, trusts, wills, and decedents' estates³. Two bills of complaint sought contribution toward the payment of debts due to the crown⁴. In one case discovery of evidence was prayed;⁵ in another an injunction to suspend the collecting of fines to the crown;⁶ other bills requested subpoenas to show why rents and duties had not been paid⁷ and to return sheep which had been distrained⁸. A large proportion involved various copyhold rights of tenants of the crown⁹. A few complaints also alledged a lack of remedy at common law¹⁰.

2. E.g. *Vaughan v. Twisden* (1554-1555); *Gyfforde v. Bishop of Bangor* (1557); *Bell v. James* (1554-1558); *Cotton v. Hamond* (1554-1558); *Mantell v. Mayor of Wickham* (1558); see also *Randell v. Tregyon* (1547-1552) which prayed a subpoena in a dispute over a crown lease; these are transcribed in app. 5.
3. *E.G. Montgomery v. Clopton* (1465-1504); *Huse v. Exrs. of Chubb* (1505-1529); *R. v. Nanseglose* (1509-c. 1521); *anon. v. Reymond* (1518-1547); *R. v. Bulmer* (1531-1547); *Vaughan v. Twisden* (1554-1555); these are transcribed in app. 5.
4. *Whalley v. Mounson* (1553-1554); *Kirkham v. Taverner* (1554-1558); see app. 5.
5. *Anon. v. Pryor* (temp. incert.); see app. 5.
6. *Capull v. Ardern* (1543-1545); see app. 5.
7. *Kemsey v. Dalton* (1545-1552); see app. 5.
8. *Manfelde v. Wyer* (1547-1549); see app. 5.
9. *Bailiffs of Huntingdon v. Earl of Kent* (before 1523); *Waleston v. Calfehill* (1509-1523); *Tenants of Berkhamstead v. Rector of Ashridge* (1531); *Warneford v. Edmay* (1514-1539); *Manfelde v. Wyer* (1547-1549); *Cotton v. Hamond* (1554-1558); *Tenants of Backworth v. Bannystre* (1554-1558); see app. 5.
10. *Scrace v. Shelley* (1547-1552); *Vaughan v. Twisden* (1554-1555); *Hewet v. Lord Dacres* (1557); see app. 5.

Of the cases which can be assigned to the period 1558 to 1572, most involved disputes from royal manors¹¹ or land in which the crown had a reversionary interest¹². Most of these bills of complaint and many others from later periods refer to injuries to interests in land as "intrusions"; however, it is to be remembered that pleadings also called "bills of intrusion", which were common law actions and completely different from bills in equity, were filed on the plea and revenue sides of the court¹³. There were also several tithes disputes brought into the equity side of the exchequer during the first fourteen years of the reign of Elizabeth¹⁴. There were cases concerning the interference with the collection of customs and duties to the crown¹⁵. Three suits involved

11. E.g. *Tenants of Fardington v. Carewe*, E.112/12/38 (1565); *Harte v. Oldesworth*, E.112/15/81 (1568); *Scott v. Scott*, E.112/67/1451, E.134/13 Eliz./H.2 (1570); *Savell v. Gilliot*, E.112/51/291 (1558-1572); *Mellershe v. Hooke*, E.112/65/1036 (1558-1572).
12. E.g. *Ryes v. Corbet*, E.112/59/4 (Carmarthen) (1560-1566); *Creyke v. Rawson*, E.112/64/550 (1566); *Barker v. Ellerker*, E.112/51/242 (1571); *Countess of Pembroke v. Tankerd*, E.112/51/273 (1558-1572).
13. See E.g. *A.G. v. Walsingham*, 2 Plowd. 547, 75 Eng. Rep. 805 (Ex. 1569); *Cater's Case*, 1 Leon. 9, 74 Eng. Rep. 8 (Ex. Cham. 1583); see also J. Manning, Practice of the Court of Exchequer, Revenue Branch (1827) pp. 196-200; Guide to the Contents of the Public Record Office (1963) vol. 1, p. 59; class E.148 "informations of intrusion".
14. E.g. *Pynder v. Estost*, E.112/23/50 (1559-1566); *Barker v. Ellerker*, E.112/51/242 (1571); *Massy v. Tildesley*, E.112/21/18 (1572); *Garbraye v. Cokeburne*, E.112/23/89, E.134/14 Eliz./T.2 (1572).
15. E.g. *Aprice v. Lowberie*, E.112/26/113 (1568) (interference with the search of a boat); *Glastor v. Sekerson*, E.112/5/57 (1570) (ejectment from a rented customs house and obstruction of the exercise of duties); *Holmes v. Boloker*, E.112/40/55 (1571) (rescue of forfeited spices); *Draper v. Parnell*, E.112/26/89 (1558-1572) (wrongful seizure of goods); *Morgan v. Mathewe*, E.112/60/15 (1558-1572) (rescue of a seized ship); *Leeke v. Price*, E.112/62/5 (Pembroke) (1564-1572) (obstruction of tax collection); *Cordwainers v. Feilde*, E.112/26/81 and 82 (1565-1572) (forfeitures); *Woodwarde v. Starkey*, E.112/9/23 (1571) (violence threatened against an exchequer clerk in connection with the sheriff's account).

the cancellation of forged recognizances which had been made by a receiver general of the exchequer¹⁶, and two bills sought indemnity for payments made as surety to the crown¹⁷. In Dutton v. Dutton¹⁸ a nephew sued his uncle, the administrator of the estate of a crown debtor, upon a dispute as to who should pay the debt of the deceased to the queen.

The majority of the cases in this period could have been litigated in a court of common law; the most important class which could not was that of copyhold rights, for the extension of common law remedies to the copyholder to secure his tenure was only gradually achieved during the course of the sixteenth century. However, these cases were brought in the equity side of the court in order to invoke equity procedures and to have equitable remedies. Most of the bills of complaint prayed only a subpoena for the defendant to appear in court and ^{to} answer the bill and ended with the general request that justice be done by the court. A large minority of bills, on the other hand, prayed an injunction for some specific purpose. The availability of class actions was also frequently resorted to¹⁹.

After about 1590 the equity side of the exchequer was handling a considerable number of cases. By this date the full range of equity disputes was being brought to it: trusts, administrations of estates, mortgages, copyholds, tithes, bills for injunctions and discovery. Then

16. Stampe v. Longworth, E.112/2/36 (1561-1572); Hawter v. Longworth, E.112/36/28 (1561-1572); Barnes v. Longworth, E.112/36/30 (1561-1572).

17. Hychcok v. Dean of Norwich, E.112/29/87 (1568); Harris v. Dean of Exeter, E.112/10/7 (1558-1572).

18. E.112/5/24 and 44; E.123/4, f. 42v (1569).

19. E.g. Bowreman v. Mayor of Exeter, E.112/10/78 (1568); Tenants of Hatton v. Burgoyne, E.112/46/5 (1568); Prymrose v. Mayor of Chester, E.112/5/50 (1571); Everard v. Spener, E.112/1/40 (1558-1572); Cleburne v. Suthake, E.112/8/14 (1558-1572); Hutton v. Vauxe, E.112/8/16 (1558-1572); Berie v. Gefforde, E.112/38/23 (1566-1572).

as now it was difficult to escape taxes in one form or another, and so it was not difficult in very many instances to be able to invoke the jurisdiction of the exchequer by showing that the litigation involved to a lesser or greater degree the royal revenue²⁰.

Suits to enforce the payments of tithes, whether to parish priests or to lay impropiators, came by custom to be usually brought in the exchequer. Here there was no difficulty over invoking the exchequer jurisdiction since a tenth of the rector's income was payable annually to the crown²¹. Tithes could be the subject of actions at common law, but they seem more often to have been enforced in equity. Equity was appropriate in that there were recurrent payments and so an award of damages was not a very efficient remedy; equity could prevent a multiplicity of suits. Also equity could enjoin the specific performance of the delivery of the produce to the rector or his vicar. Moreover, there were numerous disputes as to where and when tithes were payable²².

A complaint of a private party in the king's remembrancer's office must have been a proper bill in equity; it would have been dismissed if there was an adequate remedy at the common law or if the bill wanted

20. See below, part B of this chapter.

21. Blackstone, Commentaries, vol. 3, p. 46; H. Aldridge, A Short Treatise of the History ... the Courts of Law (1835) p. 94; see also Bohun, Practising Attorney (1724) p. 292; G. Jacob, A Law Grammar (5th ed. 1775?) pp. 162, 163.

22. See the reports of exchequer tithe cases by Rayner, Gwillim, and Wood mentioned below, in the bibliography; see also Brit. Mus. MS. Add. 20, 078, ff. 99-105; H.C. sess. pap. 1817 (no. 173) vol. 16, p. 1 et seq.

equity²³. In 1590 it was ruled that no future bill in equity was to be exhibited to settle disputes over the apportionment of taxes in the form of fifteenths and tenths but that commissions ad aequaliter taxandum should be used²⁴. A bill for a sum beneath the dignity of the court could be dismissed on motion as well as demurrer²⁵.

In general, the exchequer had jurisdiction over all aspects of the king's revenues and financial rights, his income from land, fees, customs, duties, fines, etc. The exchequer court had jurisdiction over whatever was cognizable in the revenue departments of the exchequer and over anything which touched the profits of the crown²⁶. If equitable remedies were required, they were available through the king's remembrancer's office.

The nature of equity in the exchequer was no different from the equity of the chancery, but the function of exchequer equity was originally more narrow and more specific than the equitable jurisdiction of the chancellor. For the origins of equity in the exchequer we must turn to the jurisdictional functions of the court.

23. E.g. *Anon.*, 3 Leon. 204, 74 Eng. Rep. 634 (Ex. 1588) (bill founded on a penal statute); *Wikes v. A.G.*, Lane 54, 145 Eng. Rep. 294 (Ex. 1609) (the king cannot be seised to the use of another); *Thornhagh v. Hartshorn*, Bunb. 237, 145 Eng. Rep. 659 (Ex. 1727); *Tiffin v. Jackson*, Bunb. 261, 145 Eng. Rep. 667 (Ex. 1729).
24. *Bartase v. Hinds*, 4 Leon. 111, 185, 74 Eng. Rep. 764, 810 (Ex. 1590).
25. E.g. *Anon.*, Bunb. 17, 145 Eng. Rep. 579 (Ex. 1717).
26. *Cawthorne v. Campbell*, 1 Anstr. 205, 145 Eng. Rep. 846 (Ex. 1790); *Hammond's Case*, Hardr. 176, 145 Eng. Rep. 439 (Ex. 1661); *Lamb v. Gurman*, Park. 143, 145 Eng. Rep. 739 (Ex. 1751); see also *The Practick Part of the Law* (1681) p. 499. There was also the privilege of the revenue officer acting in the execution of his office: *Bereholt v. Candy*, Bunb. 34, 145 Eng. Rep. 585 (Ex. 1718); *Penny v. Bailey*, Bunb. 309, 145 Eng. Rep. 684 (Ex. 1731).

B. Origins

The first question to consider is whether it is possible to establish with any degree of precision the inception of the equity jurisdiction. When did it arise? There are pleadings or abstracts of pleadings from eight equity cases dating before 1530²⁷. It is clear that they are equity from the fact that they are in English. While they have been found in the exchequer archives, there is reasonable grounds for the suspicion that they were not filed in the exchequer by the litigants. They are all on paper rather than parchment which suggests that they are office copies²⁸; as a rule, pleadings after 1554 were not on paper. Two of the cases²⁹ are only abstracts; they may represent cases in the exchequer or they may have come to the exchequer after the execution of Huse for high treason and the dissolution of the hospital of Elsing Spital. Of the other six, three are answers³⁰ and one is a replication³¹. Are these parts of the pleadings of exchequer lawsuits, or did they come into official custody when Abbey Dore was dissolved; did the royal bailiffs of Huntingdon send their papers to their superiors at the exchequer? Two bills remain from this period. Montgomery v. Clopton (1465-1504) is in good equity form except that the prayer and concluding formalities were not copied; there is no clue as to where the original bill was filed. The subject of the dispute was a trust and the administration of an estate, which would suggest a suit in chancery; however, the husband of the complainant had been executed

27. All of the equity exchequer cases which have been found have been transcribed below, in appendix 5.

28. A small number of paper bills or petitions on paper were endorsed and filed after 1558: see below, chap. 4.

29. Huse, v. Exrs. of Chubb (1505-1529); Miles v. Prior of Elsing Spital (before 1530).

30. R. v. Nanseglose (1509-c.1521); Bulstrode v. Wyborn (before 1526); Abbot of Dore v. Myle (1523-1529).

31. Bailiffs of Huntingdon v. Earl of Kent (before 1523).

for high treason in 1463, and this suggests the exchequer. The lands in dispute may have been in the hands of the king. Waleston v. Calfehill (1509-1523) is only a bill of articles from which a proper bill of complaint was to be drafted, and thus the formalities which are so valuable in identification and dating are not given. This is the most interesting of the eight cases in that the answer, replication, and rejoinder have also survived; these too are on paper, however. The subject of the suit is the mismanagement by the bailiff of a royal manor in Shropshire; the steward of the manor was the plaintiff. Whether any or all of these cases show the existence of an equity jurisdiction in the exchequer before 1530 is problematical.

The next case in point of time, Tenants of Berkhamstead v. Rector of Ashridge (1531), may more probably be regarded as an equity exchequer case. It is found in class E.111 in two sections: the bill and replication being E.111/49/1 and 2, and the answer and rejoinder being E.111/35-B and C. The bill of articles is on paper, but the other three pleadings are engrossed on parchment. They are more or less in proper equity form, and all four pleadings were filed in court as shown by their endorsements. This is probably the first extant exchequer equity pleading, yet one suit does not make a jurisdiction.

The next set of parchment pleadings comes from the case of Capull v. Ardern (1543-1545). This consists of a bill of complaint, two schedules, answer, replication, and rejoinder, all of which are in the traditional equity form in all details. The endorsements on the last two pleadings show that they were filed in court, and the address of the complaint to the lord treasurer and the barons of the exchequer assures us that this is certainly a suit in the exchequer.

There are parchment pleadings for two other suits from the latter part of the reign of Henry VIII³² and for five cases from the reign of Edward VI³³. These first two are clearly equity but only probably exchequer. Of the latter five, Manfelde v. Wyer (1547-1549), is addressed to the duke of Somerset as lord protector; whether the plaintiff intended this bill to be handled by the council or by Somerset as lord treasurer cannot be known for certain. The endorsements show that Somerset referred it to the exchequer. Roberts v. White (1549) is clearly a relevant case since there is a commission out of the exchequer to take the depositions of witnesses. The last three cases from the reign of Edward VI consist of bills addressed to Sir Roger Cholmley, the chief baron.

Twelve equity exchequer pleadings remain from the six year reign of Mary I. They are all on parchment except one. This one, Ramsden v. anon. (1553-1554), which is on paper and now greatly decayed, was endorsed by the lord treasurer, the marquess of Winchester, with a note to the chief baron. Of the remaining eleven, there are nine bills, all of which are addressed to Winchester; the other two pleadings consist of answers only³⁴.

The survival of ^{these} ~~the~~ pleadings, which have been transcribed in Appendix Five, leads to the conclusion that the equity jurisdiction was in existence during the reign of Edward VI. On the basis of the four parchment pleadings dating from the reign of Henry VIII, one could argue for an earlier date, perhaps 1543, but there is not sufficient evidence

32. Dullock v. Curat (1531-1547); R. v. Bulmer (1531-1547).

33. Manfelde v. Wyer (1547-1549); Roberts v. White (1549); Kemsey v. Dalton (1545-1552); Randell v. Tregyon (1547-1552); Scrace v. Shelley (1547-1552).

34. Waren v. Houndaller (1553-1558); LeBucke v. Sharington (1553-1558).

There are parchment pleadings for two other suits from the latter part of the reign of Henry VIII³² and for five cases from the reign of Edward VI³³. These first two are clearly equity but only probably exchequer. Of the latter five, Manfelde v. Wyer (1547-1549), is addressed to the duke of Somerset as lord protector; whether the plaintiff intended this bill to be handled by the council or by Somerset as lord treasurer cannot be known for certain. The endorsements show that Somerset referred it to the exchequer. Roberts v. White (1549) is clearly a relevant case since there is a commission out of the exchequer to take the depositions of witnesses. The last three cases from the reign of Edward VI consist of bills addressed to Sir Roger Cholmley, the chief baron.

Twelve equity exchequer pleadings remain from the six year reign of Mary I. They are all on parchment except one. This one, Ramsden v. anon. (1553-1554), which is on paper and now greatly decayed, was endorsed by the lord treasurer, the marquess of Winchester, with a note to the chief baron. Of the remaining eleven, there are nine bills, all of which are addressed to Winchester; the other two pleadings consist of answers only³⁴.

The survival of ^{these} ~~the~~ pleadings, which have been transcribed in Appendix Five, leads to the conclusion that the equity jurisdiction was in existence during the reign of Edward VI. On the basis of the four parchment pleadings dating from the reign of Henry VIII, one could argue for an earlier date, perhaps 1543, but there is not sufficient evidence

32. Dullock v. Curat (1531-1547); R. v. Bulmer (1531-1547).

33. Manfelde v. Wyer (1547-1549); Roberts v. White (1549); Kemsey v. Dalton (1545-1552); Randell v. Tregyon (1547-1552); Scrace v. Shelley (1547-1552).

34. Waren v. Houndaller (1553-1558); LeBucke v. Sharington (1553-1558).

to establish the earlier dating and certainly not for demonstrating an inception of equity jurisdiction at any precise moment in time.

There was a gradual increase in the quantity of equity litigation in the exchequer from its beginning until the peak at the end of the seventeenth century. There exist the remains of at least four cases from the end of the reign of Henry VIII which were equity exchequer. Five cases have survived from the six and a half year reign of Edward VI, and twelve from the five and a half years of Mary. At least eighty-four bills can be identified as having been filed in the first fourteen years of the reign of Elizabeth, and 2445³⁵ have survived for the period 1558 to 1587³⁶.

In 1587 the quantity of files had become so great that the king's remembrancer's office was forced to arrange them in some way so that they could be located reasonably quickly for reference. The officers separated them by county and numbered each one; this number was then recorded in the newly opened bill books. As more bills were filed, they were added to the bundles for the appropriate county, and minutes were entered in the bill books³⁷. Thus after 1587 the files of equity pleadings in the exchequer were properly and orderly preserved. How many were lost before they were organized in 1587 cannot be known; it is most unlikely that any of the pleadings were deliberately discarded since record preservation was a long ingrained habit of the king's remembrancer's office. It is probably a matter of only a few which were mislaid before

35. This figure was computed by counting all of the bills entered in the bill books when they were first begun in 1587; before this date the minutes were made at one time in a single hand, afterwards they were entered singly as they were filed and thus there is no uniformity of handwriting: IND. 16820, 16821.

36. A casual examination of the files of pleadings, E.112, shows that the vast majority from the period 1558 to 1587 were filed after 1577.

37. See below, chap. 4.

1587 as a result of there not having been a proper archival procedure for their preservation.

The quantity of bills filed in the exchequer continued to grow³⁸. There was an annual average of 84 from 1558 to 1587 and of 33⁴ from then to the end of the reign of Elizabeth. The period of innovation came to an end around 1577, and the next five to ten years saw the settling of the clerical procedures in their final form and a huge increase in the quantity of litigation³⁹. There was an annual average of bills filed of 332 for the reign of James I and of 311 for Charles I⁴⁰. By the beginning of the seventeenth century the jurisdiction was so well established that Sir Edward Coke was unaware of its origins and suggested that it was a court of equity by prescription⁴¹. The annual average continued to grow to 456 during the Interregnum, 571 for the reign of Charles II, and so on until the peak of 739 during the time of William III and Mary II.

It may be safely deduced that the jurisdiction was established during the mid-years of the sixteenth century; the next question is, how did it arise? In the sixteenth century, the exchequer was not and never had been a court of general jurisdiction; the many common law actions which were heard there were heard only exceptionally⁴². The jurisdiction of the court rested in theory upon the "Statute of Rhuddlan" of 1284, which while denying in general the power of the court to hear suits between private parties allowed it to do so in cases involving exchequer officers. It stated that "... no plea shall be holden or pleaded in the exchequer

38. See below, chart in app. 1.

39. See below, chap. 4.

40. This slight decrease for the time of Charles I was most probably the result of the general disturbances of the government by the civil wars.

41. Co. Inst., vol. 4, p. 119 (1644).

42. See Holdsworth, H. E. L., vol. 1, pp. 234, 235.

aforesaid, unless it do specially concern us and our ministers aforesaid ..."⁴³ The prohibition without any exception was repeated by the Articuli super Cartas⁴⁴ in 1300, but it was confirmed in Parliament in 1311 that the exchequer could hear the suits of its officers, ministers, and their resident servants⁴⁵. The reason for this exception was that the normal and orderly revenue collecting functions of the exchequer would be interfered with if the officers of the exchequer could be sued in other courts. It is to be remembered that many types of actions at common law began normally with a *capias* for the arrest and imprisonment of the defendant. The officers of the other high courts at Westminster had the same privilege to sue and be sued in their own courts; these privileges, however, were based only on custom and convenience.

In the course of the fifteenth and sixteenth centuries there evolved three classes of persons privileged to sue in the exchequer: the officers of the exchequer, royal accountants, and debtors to the crown⁴⁶. It was the officers and their servants who were specifically mentioned in the ordinances, but even if they had not been, they would have been privileged by virtue of the custom which gave this privilege to the officers of the other high courts. There was no problem to allowing the privilege to the officers themselves, but disputes arose over which of their servants were privileged vicariously and through them. It appears to have been settled that it extended to those servants who were attendant upon the

43. Stat. 12 Edw. 1 [1284], Stat. Realm, vol. 1, p. 70.

44. Stat. 28 Edw. 1 [1300] c. 4, Stat. Realm, vol. 1, p. 138; Co. Inst., vol. 2, pp. 550, 551.

45. Stat. 5 Edw. 2 [1311] c. 25, Stat. Realm, vol. 1, p. 163; Rotuli Parliamentorum, vol. 1, p. 284a, no. 25.

46. *Clapham v. Lenthall*, Hardr. 365, 145 Eng. Rep. 499 (Ex. 1664).

officer while he was performing his official duties; it was ruled for example that butlers and cooks were privileged but that agricultural workers and bailiffs were not⁴⁷.

Accountants to the crown were the royal officers who had a duty to account in the exchequer for moneys received on behalf of the sovereign. In theory, if not in practice also, the accounting had to be done in person in the exchequer at Westminster. If the accountant's presence was required there as a part of the collection of the royal revenue, then he must be granted the privilege to sue and be sued there and only there⁴⁸. Once the accountant had appeared in the exchequer and made settlement of his account, he thereupon became a debtor to the crown for that sum and lost his status as an accountant⁴⁹.

The third type of exchequer privilege was that of the simple debtor to the crown. Anyone who owed money to the crown could avail himself of this general privilege. The privilege in the equity side of the court was based on precisely the same grounds as the so called quo minus allegation of the common law side. In theory the plaintiff was less able to pay his debt to the crown because the defendant was withholding money due to him. The king could sue his debtors' debtors, and so it was a reasonable extension of his prerogative to allow his debtors to sue their debtors for his ultimate gain. It furthered the collection of the royal revenues⁵⁰.

47. E.g. *Abbot v. Sutton*, Y.B. Mich. 22 Hen. 6, pl. 36, f. 19 (C.P. 1443) (dictum); *Leventhorp's Case*, Y.B. Mich. 34 Hen. 6, pl. 28, f. 15 (C.P. 1455).

48. E.g. *Forde v. N.B.*, Mich. 9 Edw. 4, pl. 20, f. 40 (C.P. 1469) (dictum); *Yong v. Clerk of the Hamper*, Y.B. Hil. 9 Edw. 4, pl. 18, f. 53, Case 67, Jenk. 131, 145 Eng. Rep. 92 (Ex. Cham. 1470); *Anon.*, 2 Bulstr. 36, 80 Eng. Rep. 939 (K.B. 1612).

49. *Clapham v. Lenthall*, Hardr. 365, 145 Eng. Rep. 499, 500 (Ex. 1664).

50. See generally, H. Wurzel, 'The Origin and Development of Quo Minus', *Yale L.J.*, vol. 49, pp. 39-64 (1939); R. Crompton, *L'Authoritie et Jurisdiction des Courts* (1594) ff. 105-109; Brown, *Compendium* (1688) pp. 1-34.

It might appear at first glance remarkable that such a comprehensive and popular jurisdiction as was that of the exchequer in the sixteenth century could be based solely on exceptions to the prohibition to its existence. Yet it must be remembered that the staff of the exchequer in the sixteenth century was large; it was one of the largest departments of the English royal administration. In addition, each officer had a retinue of personal servants; even the clerks had cooks, and the highest had households of dozens. A considerable number of royal officers from many departments, sheriffs, and customs officers were accountants in the exchequer⁵¹. This number increased greatly in the sixteenth century when the revenue courts and most revenue duties of the chamber and the wardrobe were absorbed by the exchequer. Moreover, the revenue collecting machinery was at that time generally inefficient and dilatory. Arrears might be outstanding for many years before some energetic official would get to work on them; debts would not be paid if no pressure was applied. The class of debtors to the crown was, as a result, *huge*. The copyhold tenants on the royal demesne and on the other lands in the hands of the monarch deserve special notice as debtors to the crown since their litigation occupied so much of the time of the equity side of the court in its early period. Thus the number of people who could fit themselves into one or another of these classes who were privileged to sue in the exchequer came to be considerable.

The great majority of the exchequer equity cases which have survived from the period before the accession of Elizabeth show a clear royal and financial interest so that the exchequer jurisdiction is obvious. The most

51. For the classes who were "de gremio *scaccarii*" in the 13th. century, see C. Gross, 'The Jurisdiction of the Court of Exchequer under Edward I,' *L.Q.R.*, vol. 25, pp. 138-144 (1909); in the 19th century, see G. Price, *Treatise on the Law of the Exchequer* (1830) pp. 213-217.

common basis for exchequer jurisdiction before 1558 was that one of the parties had a copyhold or leasehold from the crown and thus owed rent or that the value of royal estates was being diminished, e.g. by the use of commons by outsiders, the obstruction of a right of way, the establishment of a rival ferry⁵². There were several suits founded upon debts due to the monarch⁵³. Others involved royal duties and customs,⁵⁴ lands or lead purchased from the crown,⁵⁵ taxes⁵⁶ fines,⁵⁷ and statutory penalties.⁵⁸ Approximately the same pattern of litigation occurred in the period of 1558 to 1572. However, the suits which came from copyholders of royal lands dealt more with intrusions from outsiders and less with disputes among themselves or with the royal bailiffs. Also recourse to the exchequer for tithes disputes does not appear to have been had or used until after 1558.

The next question to be considered is whether the equity side arose as the result of general impersonal forces or whether there were great men acting as individuals who were responsible for its development. There are only a very few cases from this jurisdiction which have survived from the reign of Henry VIII. No single man was significant as an exchequer official during this reign; while some great men were connected with the exchequer, they did little there and seemingly exercised little influence on its development. In fact, during the last fifteen years of

52. *Bailiffs of Huntingdon v. Earl of Kent* (before 1523); *Waleston v. Calfehill* (1509-1523); *Tenants of Berkhamstead v. Rector of Ashridge* (1531); *Warneford v. Edmay* (1514-1539); *Manfelde v. Wyer* (1547-1549); *Randell v. Tregyon* (1547-1555); *Gyfforde v. Bishop of Bangor* (1557); *Cotton v. Hamond* (1554-1558); *Tenants of Backworth v. Bannystre* (1554-1558); *Mantell v. Mayor of Wickham* (1558); transcribed in app. 5.

53. *R. v. Nanseglose* (1509-c.1521); *R. v. Bulmer* (1531-1547); *Whalley v. Mounson* (1553-1554); *Ramsden v. anon* (1553-1554); *Kirkham v. Taverner* (1554-1558).

54. *Kemsey v. Dalton* (1545-1552); *Roberts v. White* (1549); *Noble v. Falke* (temp. incert.).

55. *Bell v. James* (1554-1558); *Hewet v. Lord Dacres* (1557); *LeBucke v. Sharington* (1553-1558).

56. *Manfelde v. Wyer* (1547-1549); *Scrace v. Shelley* (1547-1552).

57. *Capull v. Ardern* (1543-1545).

58. *Dullock v. Curat* (1531-1547).

the reign, the exchequer was in something of a decline as a result of Thomas Cromwell's reorganization of the royal finances⁵⁹. It cannot be asserted on the available evidence that a single person made a conscious decision to initiate the equity side of the court, nor can its inception be attributed to statutory creation⁶⁰.

During the reigns of Edward VI and Mary, the equity jurisdiction was expanding. As has been already mentioned, there were not many bills filed, but the flow appears to have been steady. The notable exchequer personage of this period was William Paulet, marquess of Winchester, who was made lord high treasurer in 1550. This energetic and remarkable man was the only man of political importance who served the crown under Northumberland's regime during the closing years of Edward VI, under Philip and Mary, and under Elizabeth. He died in office in 1572 at a ripe old age respected by all. He was active on the equity side of the court as can be seen from his frequent endorsements of English bills throughout his treasurership. He had had a fair amount of previous experience as an equity judge as master of the wards from 1526 to 1554.⁶¹ While he brought equity expertise to the exchequer bench, and although it is highly unlikely that he discouraged the equity jurisdiction of his court, there is no evidence that he made any effort to build it up. His primary concern was the reorganization of the revenue administration of the kingdom by his department.

59. See generally, G.R. Elton, Tudor Revolution in Government (1962).

60. See below.

61. D.N.B., vol. 15, pp. 537-539; G.E.C., vol. 12, part 2, p. 758; the court of wards used English bill procedure: H.E. Bell, Introduction to ... the Court of Wards and Liveries (1953) pp. 12-15 and chap. 5.

In February 1559 Sir Walter Mildmay, a very active man, was made chancellor of the exchequer, and he held this office until his death in 1589. As has been already noted, the period of November 1558 to 1572 saw a significant increase in exchequer equity litigation, and the ten year period, 1579 to 1589, saw the most dramatic rise in the quantity of equity exchequer litigation, the organization of the equity records, and the settling of the technical points in the equity practice of the court⁶². Mildmay had studied law at Gray's Inn, and he had been a significant holder of important offices in the court of augmentations, a court of equity, before his appointment as chancellor of the exchequer⁶³. He and Winchester had worked together to reform the revenue affairs of the kingdom at the end of the reign of Edward VI⁶⁴. Moreover, the office of chancellor of the exchequer was of no real significance until Mildmay was appointed⁶⁵. The records of the court show that he was quite active as an equity judge. All of this leads to the conclusion that the rise in the popularity of the jurisdiction and the settling of its practices during the office of Mildmay cannot be taken as merely coincidental. He was, no doubt, one of the key men in the development of the equity side of the exchequer.

William Cecil, lord Burghley, was lord treasurer from 1572 until his death in 1598. He had been a barrister of note before his successes at the bar were eclipsed by his brilliant public career. Before coming to the exchequer, he had had judicial experience as an equity judge as master of the wards, an office he held from 1561 to 1598⁶⁶. Burghley's signature is frequently found endorsed on equity bills in the exchequer, 62. For the records and practice of the court, see below, chap. 4.

63. D.N.B., vol. 13, pp. 374-376; W.C. Richardson, History of the Court of Augmentations (1961) pp. 117, 118, 136, 137, 141, 155.

64. Richardson, Court of Augmentations, pp. 456, 457.

65. S.E. Lehmborg, Sir Walter Mildmay and Tudor Government (1964) pp. 49-52.

66. D.N.B., vol. 3, pp. 1315-1321.

which shows that, in spite of his duties as chief adviser to Queen Elizabeth, he still managed to attend to the cases of private petitioners in his court of exchequer.

The last significant individual to be noticed is Thomas Fanshawe who became queen's remembrancer in 1568; he died in office in 1601⁶⁷. He had been a sworn clerk and therefore was thoroughly familiar with the procedures of the queen's remembrancer's office. He was a member of the Middle Temple and a member of Parliament from 1572 to 1597. Fanshawe, as master of the office in the 1580's, must have been among the most important people in the developments of that period. If he had been an uninspired officer, it is unlikely that his office would have been able to cope with the greatly increased quantity of litigation. But on the contrary, Fanshawe was intelligent and well-organized. We find the barons frequently asking his opinion as to the administration of the exchequer⁶⁸.

By the time of the accession of Elizabeth, Winchester was an old man; he continued to be active in court until his death, but it is unlikely that he was able to sustain his former administrative initiative at the end of his long life. Burghley was quite active in the 1580's, but he had many more important things than the technicalities of equity procedure with which to concern himself. It is most likely, therefore, that the administrative reforms of this period were the result of the enthusiasm and cooperation of Mildmay and Fanshawe⁶⁹. In this period the formulae of the pleadings became standard, the endorsements became

67. See below, chap. 3, part I-F.

68. See, e.g., Savile's Reports, passim, 123 Eng. Rep.

69. They were related by marriage, Fanshawe having married Mildmay's niece; see below, chap. 3, part I-F.

regular, the answers were required to be sworn, the quantity of litigation became so great that the office was forced to introduce proper archival procedures for the orderly preservation of the pleadings and to keep bill books⁷⁰. The administrative procedures of the equity side of the court which were begun in the 1580's were intelligently established, and they served the court well until its dissolution in 1841.

Another possible impetus to the great rise in the amount of litigation beginning about 1580 was the increased prestige of the court which resulted from the new policy of appointing the barons exclusively from among the serjeants at law. This placed the judges of the exchequer on a footing of equal professional status with those of the king's bench and the common pleas⁷¹. In 1579 two of the four barons were serjeants; in 1581 there were three, and this policy was never reversed. This elevation in judicial status must have been most marked in the eyes of the legal profession, but also the presence of the barons of the exchequer at nisi prius and on circuit must have had its effect in bringing the court into more general public notice⁷².

Having discussed the positive theories of the origins of the equity side of the exchequer, it remains to notice a few of the more common misconceptions. The first error was that bills in equity were allowed by the Act of 1541⁷³. However, this Act only allowed equitable defenses to be pleaded to common law actions on behalf of the crown in the revenue

70. See below, chap. 4.

71. See below, chap. 3, part 1-C.

72. See Holdsworth, H.E.L., vol. 1, pp. 235-237.

73. Stat. 33 Hen. 8 [1541] c. 39, s. 55, Stat. Realm, vol. 3, pp. 891, 892; See Case 93, 1 Yale's Nott. 51, 1 Freem. 303, 22 Eng. Rep. 1225 (Ch. 1674) (semble); J. Manning, Practice of the Court of Exchequer, Revenue Branch (1827) p. 102.

side of the exchequer⁷⁴. This error appears to have been fed by two sources. First, there were several cases which extended the statute to include the bringing of bills in equity against the attorney general to have the advantage against the crown of the same rights which this statute allowed to be asserted as defenses⁷⁵. The other seems to have been chapter twelve of Coke's Fourth Institute (1644)⁷⁶. This chapter discusses the equity side of the exchequer, but there is also some discussion of the revenue jurisdiction of the court and of the Act of 1541. If Coke does not distinguish sufficiently clearly the equity and revenue sides of the exchequer, he does clearly state in paragraphs eight, nine, and ten that the equity jurisdiction antedates this act.

Not only does the wording of the statute fail to support the contention that this Act established the jurisdiction, but also it is unlikely that such a significant legislative act would have appeared in this form. This Act was passed to set up a new revenue court, the court of general surveyors; at the end there ^{were} ~~are~~ a few incidental sections which touched on the other revenue courts. It ^{was} ~~is~~ one of these sections added at the end which provided for the pleading of equitable defenses in exchequer suits. If parliament had intended to erect an equity court within the exchequer, it is much more likely that it would have been done by an entirely separate act. Moreover, we have at least one English bill which was filed in the exchequer before the Act was passed in 1541⁷⁷.

74. This Act was properly understood in, e.g., *A.G. v. Trallop*, Lane 51, 145 Eng. Rep. 291 (Ex. 1609).

75. E.g. *Hix v. A.G.*, Hardr. 176, 145 Eng. Rep. 439 (Ex. 1661); *Savile v. Queen Mother*, Hardr. 502, 145 Eng. Rep. 568 (Ex. 1668).

76. See e.g. J. Reeves, History of the English Law (2d ed. 1787) vol. 3, pp. 228, 229, where Coke was misunderstood and dissented from.

77. *Tenants of Berkhamstead v. Rector of Ashridge* (1531); possibly also *Bailiffs of Huntingdon v. Earl of Kent* (before 1523), *Waleston v. Calfehill* (1509-1523), *Warneford v. Edmay* (1514-1539), and others; see app. 5.

It has also been suggested that the origin of the equity jurisdiction of the exchequer is to be found in the court of augmentations⁷⁸. However, the equity side of the exchequer has been seen to antedate⁷⁹ the annexation of the court of augmentations to the exchequer in 1554⁸⁰. Also the records of the augmentations were properly kept both before and after 1554, while the equity records of the exchequer were not put in order or preserved before 1558; if the augmentations court was the origin of the equity side, then it should have been the origin of its equity archival procedures also, which does not appear to have been the case.

The final mistaken theory to be noted is the one which asserts that an original power to do equity had always existed in the exchequer and that it derived from the association of the exchequer and the curia regis in the thirteenth and fourteenth centuries⁸¹. This theory of origin seems to be based upon two errors, the first of which is that since there was always a chancellor of the exchequer, there must always have been an equity jurisdiction⁸². However, the original function of a chancellor was to have the custody of a seal, not to administer equity. The second error is that the word equity in the thirteenth century was used differently from in the fifteenth century and later. The older use of the word is to signify justice generally and broadly; the newer use is to signify those

78. W.C. Richardson, Tudor Chamber Administration 1485-1547 (1952) pp. 35, 441. However, Richardson in his History of the Court of Augmentations 1536-1554 (1961) p. 468 says only that the equity jurisdiction was increased [in quantity] by the "inheritance from the defunct Augmentations"; with this the author agrees.

79. See above.

80. Stat. 1 Mar. 1 [1553] st. 2, c. 10, Stat. Realm, vol. 4, part 1, pp. 208, 209; the articles for the annexation are printed in Osborne, Practice (1658) pp. 119-128; see also stat. 7 Edw. 6 [1552] c. 2, Stat. Realm, vol. 4, part 1, pp. 164, 165.

81. G. Price, Treatise on the Law of the Exchequer (1830) pp. 251, 252, 260-264, 295 n. 1, 451 462; H. Potter, Historical Introduction to English Law, 4th ed. by A.K.R. Kiralfy (1958) pp. 118-120.

82. Co. Inst., vol. 4, p. 119; J. Reeves, History of the English Law (2d ed. 1787) vol. 3, pp. 228, 229.

83. See above.

remedies which were administered first in the court of chancery in the fifteenth century and which were copied by the later courts of equity.

Returning to the story of the rise of the jurisdiction, it only remains to treat of the final phase of the expansion, the use of the fictive allegation of jurisdiction, which opened the court to all comers. It has been seen how the jurisdiction began in the middle of the sixteenth century and was soon greatly employed by the increasing number of privileged litigants during the last quarter of the century⁸³. There was a further increase in the quantity of litigation during the reign of James I,⁸⁴ and this continued until the outbreak of the Civil War in 1642. Until the middle of the seventeenth century, the requirement that the allegation of jurisdiction be genuine appears to have been strictly maintained⁸⁵. In fact, in at least one equity case, Ragland v. Wildgoose (1580)⁸⁶, the defendant paid the plaintiff's debt to the crown and thereby ousted the exchequer from its jurisdiction. Sir Thomas Ragland was indebted to the queen for 300 pounds; he appears to have enfeoffed Brasbridge and another with certain lands in trust either for his own use or to sell and pay off his debt; then the trustees seem to have sold the land to the defendant Wildgoose. Afterwards Ragland sued Wildgoose in the equity side of the exchequer alleging his debt to the crown as the basis of the court's jurisdiction. Before responding to the bill, the defendant paid off the plaintiff's debt to the crown thereby removing the incumbrance on his title and defeating the jurisdiction of the court. The barons held "that the cause of the privilege [to sue in the exchequer] was in respect of the debt which Sir Thomas Ragland owed to the queen, that the debt has

83. See above.

84. See app. 1.

85. E.g. Williams v. Griffin, E.126/2, f. 176v (1619).

86. Sav. 11, 123 Eng. Rep. 984 (Ex. 1580); see also Case 39, Sav. 15, 123 Eng. Rep. 986, which is the same case.

been paid, [and] the court dismisses the case, because when the cause ceases the effect ceases".⁸⁷

However, from the beginning of the Interregnum, in 1649, the allegation of the exchequer general privilege, that the plaintiff was a crown debtor, came to be used in a fictitious manner, the court disallowing all traverses of this ground of jurisdiction. Unfortunately the first cases which allowed this fiction do not appear to have been reported. This fictive jurisdiction was asserted at the beginning of each bill by adding after the plaintiff's name the following phrase: "... debtor and accountant to his majesty as by the records of this honorable court and otherwise it doth and may appear."⁸⁸ An examination of the files of the bills of complaint discloses the fact that, although this formula of jurisdiction was used occasionally during the last years of Charles I, after 1649 every equity bill after stating the plaintiff's ^{name} alleges that he was a crown debtor⁸⁹ by invariably using this rigid formula. The evidence of the records thus points with some precision to the year 1649 for the introduction of the wider jurisdiction based on the fictitious

87. "... Et pur ceo que le cause de priviledge fuit in respect del det que Sir Thomas Ragland owe al Roigne, que det est ore paye, le Court dismisse le cause, quia cessante causa cessat effectus." p. 11; "... devant ascun respons fait. Wildgoose pay le dett, et donques demand Judgment si le Court voet ouster ten' plea, entant que le cause del priviledge fuit determine, que est le dett due al Roigne. Et tenus par le Court, que sans cest reason le Court doit dismisse le cause, et issint fuit fait ..." p. 15.

88. Fowler, Practice (1795) vol. 1, p. 29; see also The Compleat Sollicitor (1666) p. 389; Bohun, Practising Attorney (1724) p. 292; The Compleat Clerk in Court (1726) p. 149; Turner, Epitome (1806) p. 2.

89. Or a debtor to the Commonwealth.

and non-traversable allegation of indebtedness to the crown.⁹⁰ The first references to the fictitious basis of the exchequer equity jurisdiction appear to be Matthew Hale writing in August 1665, "Considerations Touching the Amendment or Alteration of the Lawes,"⁹¹ and The Compleat Sollicitor (1666) p. 389.

This was perhaps the ideal moment for the exchequer to transform itself from a specialized revenue court into a general court of common law and equity. The years 1641 and 1642 had seen the demise of four busy and important courts of equity. In 1641 the court of star chamber was abolished by statute,⁹² and the equity jurisdictions of the council in the north⁹³ and the council in the marches of Wales⁹⁴ fell into abeyance when their conciliar or criminal jurisdictions were abolished by the same statute.⁹⁵ The court of requests was paralyzed in 1642 at the outbreak of civil war when the privy seal was taken to Oxford; since it could no longer issue process, it atrophied and died.⁹⁶ When the civil wars ended, the pre-war quantity of litigation resumed, but now there were four fewer equity courts. The judicial business which would have been handled by these courts went to ^{the} be chancery and the exchequer. It was at this point in time that the exchequer assumed its fictitious equity jurisdiction by refusing to allow the crown debtorship allegation to be traversed. The only equity rival⁹⁷ at this time of any significance was

90. This fits in with the tentative conclusions in regard to the exchequer common law fiction in H. Wurzel, 'The Origin and Development of Quo Minus,' Yale L.J., vol. 49, pp. 39 at 61, 64 (1939).

91. In F. Hargrave, ed., Collection of Tracts (1787) p. 278; the date is given in Brit. Mus. MS. Harl. 711, f. 187v.

92. Stat. 16 Car. 1 [1640] c. 10, s. 1, Stat. Realm, vol. 5, pp. 110, 111.

93. R.R. Reid, The King's Council in the North (1921) pp. 445-449.

94. C.A.J. Skeel, The Council in the Marches of Wales (1904) pp. 158-165; the court continued to hear equity cases until the war broke out a few months later.

95. Stat. 16 Car. 1 [1640] c. 10, ss. 2, 7, Stat. Realm, vol. 5, pp. 110, 111.

96. I.S. Leadam, ed., Select Cases in the Court of Requests, Selden Society vol. 12 (1898) pp. 1, li.

traversed. The only equity rival⁹⁷ at this time of any significance was the court of chancery, and during the Interregnum chancery was in great public disfavor. It was reviled as a court (perhaps unjustly) because the lord high chancellor, in addition to being a judge, had been a political figure of the greatest importance. The necessarily royalist politics of the chief judges of chancery had reflected odium upon their court.⁹⁸ The chancery was also at this time undergoing a bitter attack on its very existence because of its administrative abuses, particularly those of its clerical staff.⁹⁹ The chancery was on the defensive, fighting for its life; it was in no position to assert aggressive view of its general monopoly over equity disputes. To have done so would have supplied their enemies with the final bit of ammunition needed to blast them off the legal map. Although the radical and impractical schemes to abolish it failed, the chancery was in commission throughout the Interregnum, and the commissioners to hold the great seal apparently did not attack the assumption of a general equity jurisdiction by the exchequer. Perhaps it was felt desirable to have a rival or alternative equity court to diminish the power of the chancery. The proposals for law reform at this period generally ignored the exchequer.

97. The chancery courts of the counties palatine of Durham and Lancaster and the court of duchy chamber of Lancaster were unimportant in this period; the court of wards was in abeyance because its prerogative jurisdiction was defunct.

98. S.E. Prall, The Agitation for Law Reform During the Puritan Revolution 1640-1660 (1966) pp. 3, 24, 28-30, 83; D.E.C. Yale, Lord Nottingham's Treatises (1965) pp. 7-16.

99. Prall, op. cit. pp. 53, 62, 82-90, 105-109, 115; G.B. Nourse, 'Law Reform under the Commonwealth and Protectorate,' L. Q. R., vol. 75, pp. 512 at 523-527 (1959); D. Veall, The Popular Movement for Law Reform 1640-1660 (1970) pp. 33, 87, 179.

There is no evidence as to whether the decision to enlarge the equity jurisdiction of the exchequer was taken inside or outside of the exchequer or whether it was taken by judges or politicians, lawyers or soldiers. The judicial personnel of the court in 1649 furnishes no clue to this problem. The office of treasurer was vacant; the chancellor of the exchequer was in exile. John Wilde, the chief baron, who had been appointed in November 1648, had been one of the commissioners to hold the great seal from 1643 to 1646. Baron Gates, a politician, had been appointed in October 1648. The third place on the exchequer bench was vacant from August 1648 until June 1649. Baron Trevor refused reappointment after the death of Charles I, and his place was filled in June 1649. Not much is known about Thorpe and Rigby, who were appointed in June 1649.¹⁰⁰ These men were all undistinguished as judges; their role in this jurisdictional innovation cannot be truly determined from the meagre evidence which has survived.

It is interesting to note that the first important collection of equity exchequer cases, Hardres' Reports, was begun in 1655, only six years after the rise of the general jurisdiction.¹⁰¹ The first secondary work on the court of exchequer was printed in 1658; this was Osborne's Practice of the Exchequer Court, which had been composed in 1572.

The introduction of the general equity jurisdiction of the exchequer appears to have been successful from its inception. By 1660 it had been accepted by the legal profession and was not undone.

100. See chart and notes in app. 4-A.

101. Wood's Tithe Cases begin in 1650, but this is probably only a coincidence since they were not collected until the very end of the 18th century.

There is no evidence as to whether the decision to enlarge the equity jurisdiction of the exchequer was taken inside or outside of the exchequer or whether it was taken by judges or politicians, lawyers or soldiers. The judicial personnel of the court in 1649 furnishes no clue to this problem. The office of treasurer was vacant; the chancellor of the exchequer was in exile. John Wilde, the chief baron, who had been appointed in November 1648, had been one of the commissioners to hold the great seal from 1643 to 1646. Baron Gates, a politician, had been appointed in October 1648. The third place on the exchequer bench was vacant from August 1648 until June 1649. Baron Trevor refused reappointment after the death of Charles I, and his place was filled in June 1649. Not much is known about Thorpe and Rigby, who were appointed in June 1649.¹⁰⁰ These men were all undistinguished as judges; their role in this jurisdictional innovation cannot be truly determined from the meagre evidence which has survived.

It is interesting to note that the first important collection of equity exchequer cases, Hardres' Reports, was begun in 1655, only six years after the rise of the general jurisdiction.¹⁰¹ The first secondary work on the court of exchequer was printed in 1658; this was Osborne's Practice of the Exchequer Court, which had been composed in 1572.

The introduction of the general equity jurisdiction of the exchequer appears to have been successful from its inception. By 1660 it had been accepted by the legal profession and was not undone.

100. See chart and notes in app. 4-A.

101. Wood's Tithe Cases begin in 1650, but this is probably only a coincidence since they were not collected until the very end of the 18th century.

C. Relations with Other Courts

1. The Other High Courts at Westminster:

There appears to have always been an undercurrent of self-congratulating pride in the high courts of Westminster, which led to competition or suspicion of each other. Each was careful to preserve its privileges and jurisdictions (and fees) as much as possible. It led North to assert that the chancery was a higher court than the exchequer¹⁰² and Blackstone to champion the superiority of both the king's bench and the common pleas over the exchequer.¹⁰³ The exchequer claimed that, since it handled the gathering of the crown revenue, its privilege was more important than and had precedence over the privileges of all other courts.¹⁰⁴ These petty jealousies, however, did not prevent the evolution of a series of intelligent rules which satisfactorily resolved all conflicts of jurisdictional privilege among the four high courts.

The high courts of chancery, king's bench, and common pleas stood on an equal footing with the exchequer in regard to the removal of suits out of one court and into another. The writ of prohibition did not travel between them. The removal of suits was based on the various privileges of the courts which related to their jurisdictions. Privileges were of two sorts: special and general. It will be recalled that the officers of the exchequer and accountants had the benefits of the special privilege of the exchequer but that mere debtors to the crown had only a general privilege.¹⁰⁵

102. In *Earl of Newbury v. Wren*, 1 Vern. 220, 23 Eng. Rep. 427 (Ch. 1683).

103. Blackstone, *Commentaries*, vol. 3, p. 44.

104. *Carterett v. Massam*, Hardr. 316, 145 Eng. Rep. 475 (Ex. 1662) per Hale.

105. See above.

C. Relations with Other Courts

1. The Other High Courts at Westminster:

There appears to have always been an undercurrent of self-congratulating pride in the high courts of Westminster, which led to competition or suspicion of each other. Each was careful to preserve its privileges and jurisdictions (and fees) as much as possible. It led North to assert that the chancery was a higher court than the exchequer¹⁰² and Blackstone to champion the superiority of both the king's bench and the common pleas over the exchequer.¹⁰³ The exchequer claimed that, since it handled the gathering of the crown revenue, its privilege was more important than and had precedence over the privileges of all other courts.¹⁰⁴ These petty jealousies, however, did not prevent the evolution of a series of intelligent rules which satisfactorily resolved all conflicts of jurisdictional privilege among the four high courts.

The high courts of chancery, king's bench, and common pleas stood on an equal footing with the exchequer in regard to the removal of suits out of one court and into another. The writ of prohibition did not travel between them. The removal of suits was based on the various privileges of the courts which related to their jurisdictions. Privileges were of two sorts: special and general. It will be recalled that the officers of the exchequer and accountants had the benefits of the special privilege of the exchequer but that mere debtors to the crown had only a general privilege.¹⁰⁵

102. In *Earl of Newbury v. Wren*, 1 Vern. 220, 23 Eng. Rep. 427 (Ch. 1683).

103. Blackstone, Commentaries, vol. 3, p. 44.

104. *Carterett v. Massam*, Hardr. 316, 145 Eng. Rep. 475 (Ex. 1662) per Hale.

105. See above.

General privileges only gave the plaintiff the right to sue in a certain court. A general privilege could not be used by a defendant as the grounds for removing a case into another court.¹⁰⁶ Moreover, if a plaintiff had a general privilege and the defendant had a special privilege in another court, the general privilege deferred to the special, and the defendant could insist on being sued in his own court.¹⁰⁷ When both parties had special privileges but of different courts, then the court in which priority of suit was established heard the case.¹⁰⁸ The courts were not anxious to lose business in this way, and so they insisted on the general rule that this jurisdictional point be raised before a general appearance or pleading to issue.¹⁰⁹ Moreover, where there was a plurality of defendants, all of them must have been privileged for the request for removal to have prevailed.¹¹⁰

106. Hunt's Case, 3 Dyer 328, 73 Eng. Rep. 742 (C.P. 1573) (semble): a supersedeas declaring the defendant to be a debtor to the crown was not allowed.

107. E.g. Clapham v. Lenthall, Hardr. 365, 145 Eng. Rep. 499 (Ex. 1664); Castle v. Lichfield, Hardr. 505, 145 Eng. Rep. 570 (Ex. 1669); Note, 3 Salk. 281, 91 Eng. Rep. 825.

108. E.g. Baker v. Lenthall, Hardr. 117, 145 Eng. Rep. 409 (Ex. 1658); Clapham v. Lenthall, Hardr. 365, 145 Eng. Rep. 499 (Ex. 1664); Note, 3 Salk. 281, 91 Eng. Rep. 825.

109. E.g. Note, Y.B. Mich. 22 Hen. 6, pl. 9, f. 7 (C.P. 1443); Yong v. Clerk of the Hamper, Y.B. Hil. 9 Edw. 4, pl. 18, f. 53, Case 67, Jenk. 131, 145 Eng. Rep. 92 (Ex. Cham. 1470); Case 31, Dal. 36, 123 Eng. Rep. 253 (C.P. 1561); Jervas' Case, Sav. 33, 123 Eng. Rep. 996 (Ex. 1582).

110. E.g. S. v. T.B., Y.B. Mich. 34 Hen. 6, pl. 13, f. 29 (C.P. 1455); East v. Bittenson, Cary 67, 21 Eng. Rep. 36, Monro, Acta Cancellariae, p. 457 (Ch. 1578); Powle's Case, 3 Dyer 377, 73 Eng. Rep. 846, Godb. 10, 78 Eng. Rep. 6 (C.P. 1581); Vendall v. Harvey, Nels. 19 at 22, 21 Eng. Rep. 779 (Ch. 1633); D. E. C. Yale, ed., Lord Nottingham's Treatises (1965) p. 336.

The traditional method of removing suits into the exchequer was by a writ of supersedeas.¹¹¹ However, a supersedeas could not be sent to the king's bench because the pleas there were held coram rege and writs did not lie against the king¹¹²; therefore the cursitor baron took the Red Book of the Exchequer into the king's bench and asserted that the defendant was an officer or accountant in the exchequer and should be sued only there.¹¹³ The cursitor baron showed the copy of the writ of privilege which was in the Red Book, an official record, at folio 36.¹¹⁴ Thereupon the case was dismissed to the exchequer without any plea or prayer from the defendant.¹¹⁵

There were alternative methods of asserting the exchequer privilege in the seventeenth century. It could be pleaded by the defendant,¹¹⁶ or the Red Book could have been sent into the court of common pleas.¹¹⁷ However, in the eighteenth century it became customary to assert the exchequer privilege by means of an injunction out of the exchequer to the plaintiff; this was a personal order not to sue in the other court, but liberty was given to sue in the exchequer.¹¹⁸ This was a far superior procedure to the clumsy and embarrassing traditional methods of supersedeas and direct claim of jurisdiction in facie curiae.

111. E.g. *Anon.*, Y.B. Mich. 21 Hen. 6, pl. 44, f. 22 (C.P. 1442).

112. Bracton, f. 5b.

113. E.g. *Walrend v. Winroll*, Noy 40, 74 Eng. Rep. 1010 (K.B. 1601); *Guy v. Reynel*, 2 Brownl. and Golds. 266, 123 Eng. Rep. 934 (C.P. 1609) (dictum); *Anon.*, 2 Bulstr. 36, 80 Eng. Rep. 939 (K.B. 1612); *Foster v. Barrington*, 2 Sid. 164, 82 Eng. Rep. 1313, Hardr. 164, 145 Eng. Rep. 433 (K.B. 1659) (dictum); *Lampen v. Deering*, 2 Show. K.B. 299, 89 Eng. Rep. 951 (K.B. 1680).

114. E.164/2; this has been transcribed by H. Hall, The Red Book of the Exchequer (Rolls Ser. 1896) vol. 3, pp. 823, 824.

115. *Anon.*, 2 Bulstr. 36, 80 Eng. Rep. 939 (K.B. 1612).

116. E.g. *Foster v. Barrington*, 2 Sid. 164, 82 Eng. Rep. 1313, Hardr. 164, 145 Eng. Rep. 433 (K.B. 1659); *Wentworth v. Squibb*, 1 Lutw. 43, 125 Eng. Rep. 23 (C.P. 1701); *Phips v. Jackson*, 6 Mod. 305, 87 Eng. Rep. 1045 (K.B. 1705).

117. E.g. *Wentworth v. Squibb*, 1 Lutw. 43, 125 Eng. Rep. 23 (C.P. 1701); see also L. Squibb, 'A Book of All the Several Officers'.

but liberty was given to sue in the exchequer.¹¹⁸ This was a far superior procedure to the clumsy and embarrassing traditional methods of supersedeas and direct claim of jurisdiction in facie curiae.

The general rule between the two major courts of equity was that a matter finally determined in one was *res adjudicata* in the other. An exception to this rule was the case of Barnesly v. Powell (1749)^{118a} in which the court of chancery enjoined a defendant from relying on a prior exchequer decree which he had obtained fraudulently. This was a hard case, and the lord chancellor did not base his judgment upon any claims of superiority of his court. There is dictum in the case of Vendall v. Harvey (1633)^{118b} to the effect that the chancery and the exchequer both heard suits which had been determined in the other; however, no cases or examples were cited. Moreover, a search in 1670 for precedents was not able to discover any instance in which the court of chancery had tried a case which had been previously settled in the exchequer.^{118c} Occasionally, however, the chancery did allow a bill to be filed which could have been exhibited as a cross bill in a pending exchequer suit.^{118d} This may have been inefficient and expensive, and it infringed on the conventions of priority of suit, but it did not upset a final decree.

118. Cawthorne v. Campbell, 1 Anstr. 205, 145 Eng. Rep. 846 (Ex. 1790); J. Manning, Practice of the Court of Exchequer, Revenue Branch (1827) p. 191.

118a. 1 Ves. Sen. 284, 27 Eng. Rep. 1034, Ves. Sen. Supp. 143, 28 Eng. Rep. 482 (Ch. 1749).

118b. Nels. 19, 21 Eng. Rep. 779 (Ch. 1632-33).

118c. Anon., 1 Chan. Cas. 155, 22 Eng. Rep. 740 (Ch. 1670), in this case the exchequer had dismissed the bill without prejudice in law or equity.

118d. E.g. Earl of Newbury v. Wren, 1 Vern. 220, 23 Eng. Rep. 427 (Ch. 1683); Parker v. Leigh, 6 Madd. 115, 56 Eng. Rep. 1036 (V.C. 1821).

2. Inferior Courts:

The equity side of the exchequer had a general concurrent jurisdiction with the conciliar and palatine courts in equity matters. However, in any conflict between the exchequer and one of these courts, it was the exchequer which decided where the suit would be heard. If it decided to take the case, the exchequer issued a writ of prohibition to the inferior court.¹¹⁹

The exchequer overlapped the ecclesiastical courts in several areas, the most important of which was disputes over tithes. Prohibitions were thus frequently directed to the church courts.¹²⁰ Also where the admiralty courts conflicted with the exchequer, a prohibition could be had.¹²¹ The privilege of the University of Oxford to have its members sued in its own courts did not extend to oust the exchequer of any of its jurisdiction.¹²²

In two cases in the court of requests where the defendants had the privilege of the exchequer, the suits were removed by means of injunctions to the plaintiffs.¹²³

119. See *Fleetwood v. Pool*, Hardr. 171, 145 Eng. Rep. 436 (Ex. 1660) (duchy chamber); *A.G. v. Bawne*, E.123/4, f. 5 (1568) ("inhibition" to the council of the north); P. Williams, *The Council in the Marches of Wales under Elizabeth I* (1958) pp. 216, 218-221; *The Practice of the Court of Chancery of the County Palatine of Durham* (1807) pp. 8, 107.

120. E.g. *Kytnor v. Bishop of Bath and Wells*, E.123/2, f. 18 (1561); *Dethick v. White*, E.123/5, f. 283 (1576); *Beeke v. Mayne*, Sav. 30, 123 Eng. Rep. 994 (Ex. 1582); *Anon.*, Lane 39, 145 Eng. Rep. 281 (Ex. 1609); *Binsted v. Collins*, Bunb. 229, 145 Eng. Rep. 656 (Ex. 1727); *Nutkins v. Robinson*, Bunb. 247, 145 Eng. Rep. 662 (Ex. 1728); prayers for prohibitions can be seen in *Garbraye v. Cokeburne*, E.112/23/89 (1572).

121. E.g. *Berkeley v. Morrice*, Hardr. 502, 145 Eng. Rep. 569 (Ex. 1668); *Powell v. Robinson*, Bunb. 9, 145 Eng. Rep. 576 (Ex. 1716).

122. *Wilkins v. Shalcroft*, Hardr. 188, 145 Eng. Rep. 445 (Ex. 1661); *contra* *Castle v. Lichfield*, Hardr. 505, 145 Eng. Rep. 570 (Ex. 1669).

123. *Cholmeley v. Baldwin*, E.124/4, f. 71 (1607); *Duckett v. Brookesby*, E.124/27, f. 171d (1618).

3. Appeals to the House of Lords:

The possibility of appeals from suits in equity from the exchequer or the chancery did not arise until the middle of the seventeenth century. The first appeal to the House of Lords from the equity side of the exchequer was Fanshawe v. Impey (11 Dec. 1660). However, the right of the House of Lords to hear equity appeals was not settled until 1677.¹²⁴

D. Summary

Thus it appears that in the middle of the sixteenth century the court of exchequer found it desirable to grant equitable remedies in order to accommodate its officers and accountants and to facilitate the collection of the royal revenues. This was done by copying the equity procedures of the court of chancery in almost every respect.

The equity jurisdiction of the exchequer evolved within the revenue side of the court, in the king's remembrancer's office, but it did not evolve out of the revenue procedures. The revenue side of the exchequer, like the plea side, was a court of common law; it used Latin pleadings, kept a plea roll, etc. None of these common law features are found in the equity side of the court, which followed the example of chancery. However, the king's remembrancer's part of the revenue jurisdiction shared some classes of records with the equity side, e.g. the depositions, decrees and orders, and the memoranda rolls.

One of the most interesting points about the equity jurisdiction of the exchequer is that it was able to arise in this court but not in the courts of king's bench and common pleas. To begin with it must be remembered that a far greater number of persons could claim the special privileges

124. M. Hale, The Jurisdiction of the Lords House or Parliament, ed. F. Hargrave (1796) pp. xci, cxxxiv-clxv; see generally, G. Urquhart, The Experienced Solicitor in Proceedings under the Appellant Jurisdiction of the ... House of Lords (1773).

to sue and be sued in the exchequer than both of the two common law courts put together. However, this furnished only a motive to expand the exchequer jurisdiction; it did not supply a theoretical justification.

Parallels can be drawn between the courts of chancery and exchequer. The heads of the two courts, the lord high chancellor and the lord high treasurer, were the two highest lay officers of state; they both administered important branches of the royal prerogative. Another court which managed the king's prerogative and revenues, the court of duchy chamber of Lancaster, had developed an equity jurisdiction by the early sixteenth century; this may have been the example followed by the exchequer. Moreover, the regional councils and the special revenue courts, all of which antedated the equity side of the exchequer by a decade or two, used equity procedures for determining civil disputes.

These examples were, no doubt, fortified by the undercurrent of legal opinion that equity has always existed in the exchequer.¹²⁵ This was equity in the broad sense of general justice not in the narrow sense of a system of remedies. The delegation of the royal prerogative in relation to the revenue was seen to include the power to mitigate the strict rules of the revenue laws; the king was presumed to desire justice to be done to his subjects in the collection of his dues. The mental association of equity with the exchequer was reinforced by the statute of 1541,¹²⁶ which allowed defendants to plead equitable defenses in revenue actions. None of this, strictly speaking, could have been a proper foundation for the assumption by the exchequer of jurisdiction as a proper court of equity. Perhaps this is an example of the maxim communis error facit ius.

125. E.g. *A.G. v. Halling*, 15 M. and W. 687, 153 Eng. Rep. 1027 (Ex. 1846); G. Price, Treatise on the Law of the Exchequer (1830) pp. 251, 260-264, 295 n.1, 451, 462, 678, 679.

126. Stat. 33 Hen. 8 [1541] c. 39, s. 55, Stat. Realm, vol. 3, pp. 891, 892.

By the reign of Edward VI the equity jurisdiction was in existence; during the following twenty five years its growth was slow but steady; the 1580's was the time of the most dramatic of all increases in quantity, and with this great increase in popularity the exchequer was permanently established as an equity court of true significance. The quantity of litigation continued to grow throughout the seventeenth century, and the popularity of the court enabled it to assume a general jurisdiction in 1649 by means of the fiction that the plaintiff was a debtor to the crown. The general jurisdiction never rivalled that of the chancery in size or in significance. The revenue function of the exchequer remained its primary characteristic, and from this humble origin as a tax collector, it answered the call to administer equity. Like St. Matthew the exchequer rose and went on to bigger and better things.

* * *

CHAPTER 3 The Administration of the Court

Part 1 - The Officers

The personnel of the equity side of the court can be divided into judicial officers and clerical officers. The judges of the court were the treasurer, the chancellor of the exchequer, the chief baron, and the three puisne barons. At the head of the clerical staff of the court was the king's remembrancer, who was the master of the office. Under him were eight sworn clerks. Under each baron was an examiner and a clerk. In addition towards the end of the court's history, several other clerical offices were created by acts of Parliament.

This part deals primarily with the years 1550 through 1714 because this was the formative period in the establishment of the equity jurisdiction of the court. From 1714 to 1841 the developments of the various offices were not great, and therefore a summary of them will be adequate.

A. The Treasurer

The chief judicial officer of the equity side of the court of exchequer was the lord high treasurer of England¹ or the treasurer of the exchequer².

1. The lord high treasurer of Great Britain after the Act of Union, stat. 6 Ann. [1706] c. 11, Stat. Realm vol. 8, p. 566. When this statute came into effect, it was found necessary to give Godolphin a new patent for this new office: E.159/552, Trin. 6 Ann. recorda ro. 74; Thomas, Notes (1846) p. 5.
2. S.P. 14/32 part 22 (1608); S.P. 16/255 part 43 (1633); Hall, 'King's Remembrancer', S.P. 16/377 part 2 (1637?); 'The practice of the office of Pleas in the court of Exchequer,' (C. 1653-1660) Brit. Mus., MS. Harg. 151, f. 10; J.H. Adlington, The Cyclopaedia of Law (1820) p. 250; H. Aldridge, Short Treatise of the History ... of all the Courts of Law (1835) p. 93; Barton, Historical Treatise (1796) p. 29, n. 1; Blackstone, Commentaries (1768) vol. 3, p. 44; Bohun, Practising Attorney (1724) p. 292; Brown, Compendium (1688) p. 30; P. Burton, Practice of the Office of Pleas (1791) vol. 1, p. vi; Co. Inst. (1644) vol. 4, pp. 104, 109, 118; The Compleat Clerk in Court (1726) p. 149; The Compleat Solicitor (1666) pp. 368, 370, 371, 398; Fowler, Practice (1795) vol. 1, p. 6; Holdsworth, H. E. L., vol. 1, p. 241; G. Jacob, Law Grammar (5th ed. 1775?) p. 162; Osborne, Practice (1572, 1658) pp. 4, 5, 12, 151, 156, 136; The Practick Part of the Law (1681) pp. 493, 498, 506; R. Robinson, Briefe Collection of the Queenes Majesties Most High and Most Honourable Courtes of Records (1603) ed. by R.L. Rickard, Camden Miscellany, vol. 20, Camden 3rd Ser., vol. 83, p. 26 (1953); see also app. 2-A, 3-A, and 4-A.

The respective functions of these two offices has always been a matter of doubt. However, their separate existences were recognized, in the seventeenth century at least, by the two distinct titles and by the different methods of installation. The lord treasurer of England was instituted by the delivery from the king of the white staff, his symbol of office. The treasurer of the exchequer received his office by a grant by royal letters patent under the great seal and was sworn into office³ before the lord high chancellor.⁴

Since before the accession of Edward I in 1272, the patents have appointed the man to the office of "treasurer of the exchequer" with only eight exceptions.⁵ There were over one hundred patents issued to treasurers between 1272 and 1547, therefore these few exceptions are not very significant. These eight patents appointed to the office of "treasurer of England"; seven of them date from the fifteenth century.⁶

The first treasurer who is known to have received a white staff from the monarch was Winchester in 1558⁷. Coke wrote of the delivery

3. See the sample patents and the copy of the oath in appendices 2-A and 3-A.

4. W. R. Anson, The Law and Custom of the Constitution (4th ed. 1935) vol. 2, part 1, p. 188; Brown, Compendium (1688) p. 30; Co.

Inst., vol. 4, p. 104; [Somers], The Argument of the Lord Keeper Sommers on his giving Judgment in the Bankers Case Delivered in the Exchequer Chamber June 23, 1696, (1733) pp. 50, 51, also reported in 14 Howell's State Trials, pp. 1 at 64, 65 (R.v. Hornby); J. Caesar, 'A journall of the Lord high Treasurer's proceedings,' (Salisbury), Brit. Mus. MS. Lansd. 168, f. 297; Society of Antiquaries MS. 79, f. 2; the separate existence of the two offices is also recognized in 'The Course of the Exchequer on the Receipt Side' (1676-1687) Brit. Mus. MS. Add. 15898, ff. 101, 102.

5. Langstrother (1st patent) in 1469; Blount in 1464; Grey in 1463; Talbot in 1456; Boucher (1st patent) in 1455; Butler (1st patent) in 1455; Allerthorp in 1401; Brantingham (1st patent) in 1369.

6. These figures were extracted from the Calendar of Patent Rolls.

7. See Earl of Devonshire's Case, 11 Co. Rep. 89 at 91a, 77 Eng. Rep. 1266 at 1268 (1607) (dictum).

of the staff as having been traditional in his own time.⁸ A portrait of Thomas Howard, the third duke of Norfolk and treasurer from 1522 to 1546, was painted by Holbein; this painting shows Norfolk with a white staff in his hand.⁹ Thus this custom can be dated as early as 1522.¹⁰ There is no other evidence that the two offices were distinct; therefore unless new evidence is found, there is no reason to think that this distinction is earlier than the sixteenth century.

The lack of precise definition of respective function is due, no doubt, to the fact that the two offices were always exercised by the same man, and thus there was never any need to draw a line between them. This conjunction existed since before 1550, and as far as can be discovered,

no distinction was made in earlier times either.¹¹

8. Co. Inst., vol. 4, p. 104.

9. This portrait is reproduced in P. Ganz, Paintings of Hans Holbein (1950) plate 144 and pp. 250, 251; W. Waetzoldt, Hans Holbein der Juengere (1958) p. 77.

10. In addition to these two, there are accounts of the following treasurers receiving a white staff: Marlborough in 1624; Cal. S.P. Dom. [1623-1625] pp. 404, 412; Portland in 1628; Acts of the Privy Council [1628-1629] p. 33; Juxon in 1636: Cal. S.P. Dom. [1635-1636] p. 265; Clifford in 1672: Cal. S.P. Dom. [1672-1673] p. 629; Godolphin in 1702: Thomas, Notes (1846) p. 2; 'Black Book of the Exchequer' Part 2: E.36/267, ff. 4, 5, which is transcribed in Thomas, Ancient Exchequer (1848) pp. 96-98; Harley in 1711: Cal. Treas. Papers [1708-1714] vol. 4, pp. vii, viii, and 'Black Book of the Exchequer' part 2: E.36/267, f. 20v; Shrewsbury in 1714: G.M. Trevelyan, England under Queen Anne (1934) vol. 3, p. 304:

The following treasurers have been painted with a white staff in their hands: the references are to R. Strong, Tudor and Jacobean Portraits (1969)

vol. 2:

Winchester: plates 657, 658,

Burghley: plates 51-61,

Dorset: plate 124,

Salisbury: plates 541, 542,

Suffolk: plate 688,

Marlborough: plates 410, 411;

D. Piper, Catalogue of Seventeenth Century Portraits (1963):

Juxon: plate 2(d),

Southampton: plate 11(b),

Rochester: plate 17(c),

Godolphin: plate 19(a),

Harley: plate 16(a).

no distinction was made in earlier times either.¹¹

Somers in his opinion in the Bankers' Case¹² declared that the lord treasurer's office was the higher of the two and that the treasurer-ship of the exchequer was the second place in the department hierarchy. This assertion is corroborated by the different modes of institution.

The delivery of the white staff to the lord treasurer of England was the more formal. This delivery of a physical object was similar to the handing over of the great seal to the lord high chancellor of England and of the baton to the lord high admiral.¹³ It was derived from the practice of livery of seisin by the physical transfer of a twig or clod to symbolize the transfer of the real estate. This was the most ancient, the most formal and solemn method of transferring something from one person to another. In the very early times it was desirable in order to create evidence of the transfer. Such evidence must have been some physical action which was seen, understood, and describable by the unlettered witnesses. Also in the early stages of legal development when a conveyance was valid only upon the actual delivery of the thing to be conveyed, it was necessary to do something to put the transferee into possession such as delivering a part of that thing or a symbol of it. The prestige of the office was further asserted by the delivery of the white staff by the hand of the monarch himself.

11. No distinction of of office is noted in T.F. Tout, Chapters in the Administrative History of Mediaeval England (1920); B. Wilkinson, Constitutional History of England in the Fifteenth Century (1399-1485) (1964); or J.F. Baldwin, The King's Council in England During the Middle Ages (1913); In the latter half of the 13th century, they were merely two names for the same office: Tout, *op. cit.*, vol. 1, pp. 270, 297; T. Madox, History and Antiquity of the Exchequer (1711) pp. 54-55, 568-578.

12. See above, note 4 for the reference.

13. Cf. also the delivery of regalia to kings and bishops.

The lesser office, the treasurership of the exchequer, was transferred by the more modern, the more simple device of royal letters patent. It was a grant or conveyance similar to that for land, which was used at a later time when livery of seisin was no longer necessary.¹⁴ Writings were originally only evidence of a secondary importance, that is evidence of the transfer of rights; but for many reasons they became in the course of time the operative element of the transfer.

One is tempted to conjecture that the treasurership of England was the older office because its mode of installation was the more antique. However, the term "treasurer of the exchequer" seems to have been older and the more common in the period before 1400; the "of England" addition was not so much used until the end of the fifteenth century.¹⁵ The "lord" or "lord high" appellation was not introduced until the sixteenth century.¹⁶

The patents of the treasurers of the exchequer since before the accession of Edward I always granted that office to be held only during the pleasure of the crown.¹⁷ It was a tenancy at will. The treasurers were never given the option of exercising their office by deputy after the fifteenth century. The monarchy would have been very greatly weakened had such an important officer of the crown held by any other tenure. The great officers of state were the principal means in the exercise of

14. Offices were considered to be real property; this is more fully discussed under the subsection below on the tenure of the barons.

15. See the works cited above in note 11.

16. F.M. Powicke and E.B. Fryde, Handbook of British Chronology (2d ed. 1961) p. 99.

17. J.C. Sainty, 'The Tenure of Offices in the Exchequer,' E.H.R., vol. 80, pp. 449 at 451 (1965); This was modified by statute so that upon the demise of the crown the treasurer remains in office for six months unless positive action is taken to the contrary: stat. 6 Ann. [1707] c. 41, s. 8, Stat. Realm vol. 8, p. 739.

prerogative powers of government. Where such offices remained under royal control, they might retain their political powers. But the absence of such control meant that power could not be safely delegated and the office would decline into political insignificance as happened to the offices of steward, constable, and others. These offices had become hereditary in early times, and their subsequent history was that of deterioration.

The treasurer was the chief judicial officer of the court. Although he never sat in the exchequer of pleas, he had duties on the revenue and equity sides of the court.¹⁸ He had the power to issue warrants, make orders, sit in judgment, to exercise all judicial functions.¹⁹ When he was present in court, he, of course, presided. These powers remained in theory with the office to the very end.²⁰ Long after the resignation of the last treasurer in 1714, and long after it was obvious that there would never be another treasurer, references can be found of his being the head of the exchequer equity bench. One nineteenth century author goes so far as to suggest that the treasury commissioners were vested with judicial powers.²¹ While commissioners to exercise the office of lord chancellor have sat judicially, the treasury commissioners have never done so.²² Nor was it ever expected, for bills in the exchequer were never addressed to the commissioners but only to the chancellor of the exchequer and the barons when the treasury was in commission.²³ When the

18. The Compleat Sollicitor (1666) p. 371; Fleta, book 2, chap. 25 (Richardson & Sayles, ed., 1955) Seld.Soc., vol. 72, p. 131.

19. P. Burton, Practice of the Office of Pleas (1791) vol. 1, p. vi; Contra: that judgment is only given by the barons: The Compleat Sollicitor (1666) p. 371.

20. The treasurer lost his capacity as a judge by the Judicature Act, stat. 36 & 37 Vict. [1873] c. 66, s. 97.

21. G. Price, Treatise on the Law of the Exchequer (1830) pp. 36, 37.

22. Baxter, Development of the Treasury, p. 5.

23. E.g. Fowler, Practice (1795) vol. 1, p. 28; The Compleat Clerk in Court (1726) pp. 156, 157.

office of the chancellor of the exchequer was considered vacant during the Civil War and Interregnum, bills were addressed only to the barons.²⁴

The story of the lord treasurers is a large part of the story of English administrative and political history. The treasurer was the second official of the kingdom taking precedence after the royal family, the bishops, and the lord chancellor.²⁵ Towards the end of the seventeenth century and the beginning of the eighteenth the office of treasurer became politically pre-eminent. And so today the highest ministerial position, that of prime minister, remains in association with the treasury commission.

From 1550 the treasurers can be divided into chronological groups. The first of these extends to 1612, the date of the death of the earl of Salisbury. The duke of Somerset must be considered unique even though he fits within some of the generalizations which follow. The four treasurers in this period had relatively long tenures each; they were all born commoners and were raised to the peerage though they came from only middle class families. They were completely free from popular or parliamentary influence; they guided but never forced the decisions of the sovereign; they all died in office.

In this period the exchequer was co-extensive with the treasury. The exchequer had a traditional procedure and was administratively self-sufficient not requiring daily supervision from the higher officials. Thus the treasurer was free from technical details and able to advise the monarch on matters of general policy. This was done both alone and in the

24. Lords Journ., vol. 7, p. 426 [1645]; the patent of Sir Edward Hyde had been sealed after the great seal had been taken to Oxford and was thus void according to the ordinance of 1643: Firth and Rait, vol. 1, p. 341.

25. Stat. 31 Hen. 8 [1539] c. 10, Stat. Realm, vol. 3, p. 729.

council, of which he has always been a member.²⁶

After 1612, only one treasurer died in office, namely Southampton, who died in 1667. He was an unusual treasurer being one of the three since 1550 who inherited his title. The other two, Danby who was a baronet and Talbot an earl, were politically aggressive; the former was raised to the rank of marquess, the latter was created a duke. Southampton was not very important politically. He can be regarded as atypical and as coming at an unusual time; his was the first appointment to the office on the Restoration.

From 1612 to the Civil War, the average term of office was considerably shorter than before. The treasurers were less important men, but they were nevertheless actively engaged in politics. Thus dismissals were frequent. But in spite of their political manœuvring, they had time to attend occasionally at the equity court of the exchequer.²⁷ It was during this period that the only professional lawyers since 1547 were made treasurers. They were Montague and Ley, both of whom had been chief justices of the king's bench. The former held office for less than a year; the latter for only four years.

The treasury was first put into commission in 1612 following the death of Salisbury because there was no obvious successor to appoint in

26. J.F. Baldwin, The King's Council (1913) pp. 70, 73, 75, 141, 195; J.R. Dasent, ed., Acts of the Privy Council [1542-1604] (1890-1907), introduction to each volume; Holdsworth, H.E.L., vol. 1, pp. 481-484; B. Lyon, A Constitutional and Legal History of Medieval England (1960) pp. 504-508; F.W. Maitland, The Constitutional History of England (1931) pp. 91, 400; H. Nicholas, ed., Proceedings and Ordinances of the Privy Council of England (1834) vol. 1, p. iii, vol. 7, pp. viii, ix; Rot. Parl., vol. 3, p. 73 [1379-80]; A. Todd, Parliamentary Government in England (2d ed. 1892) vol. 1, p. 18; R. Virgoe, 'The Composition of the King's Council, 1437-61,' B.I.H.R., vol. 43, p. 134 (1970); G.E. Aylmer, The King's Servants (1961) p. 21.

27. In 1633 Portland heard cases every Thursday morning: S.P.16/255 part 43.

his place. This was again done in 1618 when it was found necessary to remove Suffolk for speculation. Charles I found treasury commissions expedient on two occasions. Neither James I nor Charles I kept the treasury in commission very long; it was clearly a very temporary matter in each of the four instances.

The treasury was in commission permanently during the period of the Interregnum, as was the chancery. The treasurer and the chancellor had been seen as important tools of prerogative government and Stuart administration, and it was felt that there would be a lesser threat to parliamentary government if these offices were never again entrusted to single individuals but were committed to bodies of commissioners.²⁸

1660 to 1714 was the great period of change in the treasury. The use of temporary commissions during this time can be identified with the degree of involvement of the king personally in the affairs of state. The existence of treasurers shows unsureness of lack of interest. There were treasurers during the first seven years of the reign of Charles II and the first two of James II. In the latter parts of their reigns they wished to be personally in control of the treasury; also a committee was a more difficult target for Parliament than a treasurer, such as Danby was. William III never had a treasurer but was frequently in attendance at the treasury board. Queen Anne, who had no aptitude for financial administration, delegated these duties entirely to treasurers. The one commission during her reign was a temporary expedient before the appointment of the next treasurer.

During the period 1660 to 1702, the treasury was completely transformed. The finances of the kingdom became too complicated and vast to

28. In fact the office of the lord treasurer's remembrancer was renamed the lord commissioners' remembrancer.

be handled by the exchequer, which in many ways was still a medieval institution. A new system of financial administration grew up within the treasury but outside the exchequer.²⁹ The results for the exchequer as a court of equity were that the treasurer and the chancellor of the exchequer became so involved in finance and politics that they did not have time to perform any judicial functions in the exchequer. Not only was the treasurer too busy, but he moved his office from Westminster Hall to Whitehall³⁰ in order to be closer to the council chamber and the royal court. This made it that much less convenient to attend to judicial business.³¹ There is no evidence that he performed any judicial function after the Restoration. He was not really needed; the barons could hear equity suits by themselves as they had all during the Interregnum and earlier. Moreover, the shift of financial administration from the exchequer to other departments of the treasury left the barons free to give more time to their judicial duties.

Upon the accession of the house of Hanover in 1714, the treasury was put into commission where it has remained ever since.³² As Great Britain became wealthier the control of the national finance and the treasury patronage became the key to political power, the cornerstone to every government. Therefore, when the position of prime minister arose under Sir Robert Walpole, he made himself first lord of the treasury and, with only a few exceptions, this connection has remained to the present.

29. S.B. Baxter, The Development of the Treasury, 1660-1702 (1957); D.M. Gill, 'The Treasury, 1660-1714', E.H.R., vol. 46, p. 600 (1931).
30. C.E.D. Black, 'Her Majesty's Treasury: Its History and Associations', Westminster Review, vol. 143, p. 503 (1895).
31. Baxter, Development of the Treasury (1957) pp. 6, 19-21, 23.
32. W.R. Anson, Law and Custom of the Constitution (4th ed. 1935) vol. 2, part 1, p. 189; Maitland, Constitutional History of England (1963) p. 392; F. Mowatt, 'The Treasury, Past and Present', National Review, vol. 48, p. 602 (1906); Baxter, Development of the Treasury (1957) p. 4; Thomas, Notes (1846) p. 6.

33. Halsbury, Laws of England (3d ed. 1960) vol. 4, p. 394; C.R.

with only a few exceptions, this connection has remained to the present.³³

In modern times the power of the prime minister comes from his position as head of the cabinet council, but it is by virtue of his being first lord of the treasury that he receives his salary.

The treasurer was, practically speaking, a political and financial officer. In the latter part of the sixteenth century and the first part of the seventeenth, he was able to exercise occasionally the judicial powers which were a part of his office in theory. After the Restoration in 1660, this was no longer possible nor expected. He came to devote his entire time to financial administration, which was always his most important function.

33. Halsbury, Laws of England (3d ed. 1954) vol. 7, pp. 348, 394;
C.R. Lovell, English Constitutional and Legal History (1962) p. 444.

B. The Chancellor of the Exchequer

The chancellor of the exchequer was the second judicial officer of the equity side of the court.³⁴ He presided in the absence of the treasurer,³⁵ and he exercised full judicial powers in conjunction with the other judges of the court. He had revenue duties but no judicial connection with the plea side.³⁶ Ever since 1567 when Sir Walter Mildmay was made under-treasurer of the exchequer,³⁷ these two offices have

34. S.P.16/255, part 43 (1633); Hall, 'King's Remembrancer', S.P.16/377 part 2 (1637?); 'The practice of the office of Pleas in the court of Exchequer,' (c. 1653-1660) Brit. Mus. MS. Harg. 151, f. 10; H. Aldridge, A Short Treatise of the History ... of all the Courts of Law (1835) p. 93; S.B. Baxter, The Development of the Treasury, (1660-1702) (1957) pp. 33, 34; Barton, Historical Treatise (1796) p. 29, n. 1; Blackstone, Commentaries, vol. 3, p. 44; Bohun, Practising Attorney (1724) p. 292; Brown, Compendium (1688) pp. 30, 32; P. Burton, Practice of the Office of Pleas (1791) vol. 1, p. vi; Co. Inst., vol. 4, pp. 109, 118; The Compleat Clerk in Court (1726) pp. 149, 156; The Compleat Solicitor (1666) pp. 368, 370-372, 387, 398, 402; Fowler, Practice (1795) vol. 1, pp. 6-8; Holdsworth, H.E.L., vol. 1, p. 241; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 106; G. Jacob, Law Grammar (5th ed. 1775) p. 162; Osborne, Practice (1572, 1658) pp. 20, 136, 151, 156; The Practick Part of the Law (1681) pp. 493, 494, 498, 500, 506; G. Price, Treatise on the Law of the Exchequer (1830) pp. 38-40, 54; R. Robinson, Briefe Collection of the Queenes Majesties Most High and Most Honourable Courtes of Records (1603) ed. by R.L. Rickard, Camden Miscellany, vol. 20, Camden 3rd. Ser., vol. 83 (1953) p. 26; [Somers], The Argument of the Lord Keeper Sommers on his giving judgment in the Bankers Case Delivered in the Exchequer Chamber June 23, 1696 (1733) p. 51, also in 14 Howell's State Trials 39 at 65; F.S. Thomas, Ancient Exchequer (1848) pp. 94, 101; 'The Court of Exchequer in Legal History,' Law Times, vol. 177, pp. 404 at 406 (1934); Contra: that the chancellor of the exchequer was not a judicial officer: Brit. Mus. MS. Cott. Tit. B. iv, f. 56; other copies are Brit. Mus. MS. Lansd. 151, ff. 145-148 and P.R.O.: E.369/118, ff. 12-16. See also app. 2-B, 3-B and 4-A.

35. The Compleat Solicitor (1666) p. 371.

36. See Holdsworth, H.E.L., vol. 1, pp. 239, 240.

37. Mildmay succeeded Sir John Baker as chancellor of the exchequer in 1559: E.159/340, Hil. 1 Eliz. 1 recorda ro. 75; and he succeeded Sir Richard Sackville as under-treasurer in 1567: Cal. Pat. Rolls [1566-1569] p. 137, no. 884.

always been held in conjunction by the same man. There were always separate patents, and the duties were distinct. No judicial duties were exercised by the under-treasurer as such,³⁸ and therefore nothing more need be said here about that office.

The chancellor of the exchequer was appointed by the crown by letters patent under the great seal. The appointment was for life until 1672 when Sir John Duncombe was appointed to that office to hold only during the pleasure of the crown.³⁹ This office has been held only by this less secure tenure ever since.⁴⁰ It was also the practice never to grant the office in reversion. The chancellors of the exchequer were given the option of exercising their office by deputies.⁴¹ However, since at least 1550, this has been done but once. From 1604 to 1606 George Hume, earl of Dunbar, delegated the chancellorship to Sir John Croke. This was a unique situation; Hume was one of the Scottish companions of James I who came to England with the new king. He was not experienced with English law or financial administration. Moreover, he was required by the duties of other offices to be frequently in Scotland.

From 1550 to the Civil War, the lengths of tenures were long, since the chancellors of the exchequer held for life and could not have been with ease removed against their wishes. But yet, the first two, Sir John Baker and Sir Walter Mildmay, were the only ones who died in office; all of the others resigned for one reason or another. Most resigned upon promotion to more important offices. However, only three, Portland,

38. The Compleat Sollicitor (1666) p. 372; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 106; G. Price, Treatise on the Law of the Exchequer (1830) pp. 36-38, 43; see generally J.L. Kirby, 'The Rise of the Under-Treasurer of the Exchequer,' E.H.R., vol. 72, p. 666 (1957).

39. The office was held during pleasure from 1277 to 1390, during good behaviour from 1390 to 1410, and for life (with one exception) from 1410 to 1672: J.C. Sainty, 'The Tenure of Offices in the Exchequer,' E.H.R., vol. 80, pp. 449 at 451, 452 (1965).

40. An examination of the patents themselves is confirmed by Brown, Compendium (1688) p. 32.

41. An examination of the patents from 1550 through 1714 is confirmed by H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 106, and Price, Treatise (1830) p. 38; see app. 2-C.

Cottingham, and Oxford, were promoted within the department to the office of treasurer.

During the Civil War and the Interregnum, the chancellor of the exchequer, Sir Edward Hyde, was at Oxford and in exile with the king, and thus he was unable to sit in court in the exchequer, which was at Westminster. Parliament did not recognize his appointment because it was made under the great seal after the great seal had been taken to the king at Oxford;⁴² however, they did not appoint a replacement. Hyde's grant was for life and in 1660 he was reinstated and allowed to keep the office for a year after his appointment as lord high chancellor of England.

Until the accession of William III and Mary II, the chancellors of the exchequer had all been made knights or barons, and they all had had fairly long tenures, even Sir John Duncombe and Sir John Ernle, who held during pleasure only. However, from 1689 to 1714 the tenures of the chancellors of the exchequer were relatively short, and most of the chancellors were untitled. Their precarious tenure made them more susceptible to political movements.

From 1550 to the Civil War, the chancellors of the exchequer were important administrators but of less significance as politicians. During the years 1603 to 1672, the office was used as a stepping stone to bigger and better things. From then to 1714, it was held by politicians of lesser importance who were concerned exclusively with financial administration and had no time for sitting in court to hear cases between private persons. After 1714 it was held by the most important politicians⁴³ and used to

42. Clarendon, History of the Rebellion (1704) book 8, secs. 213, 214; Firth and Rait, vol. 1, p. 341 (Ordinance of 10 Nov., 1643).

43. Price, Treatise (1830) pp. 36, 39.

keep the national finances under their control similarly to the post of first lord of the treasury. The chancellors of the exchequer were always commissioners of the treasury board.⁴⁴

Before about 1640, the chancellor of the exchequer sat fairly regularly in the exchequer's equity court. It is unclear why he ever began to sit; perhaps it was in imitation of the most important court of equity. Since the King's chancellor sat in the major court of equity, then the exchequer's chancellor should sit in its court of equity. During the terms of Thomas Cromwell, under Henry VIII, and Sir Walter Mildmay, under Elizabeth I, the office had greatly increased its prestige.⁴⁵ Before Cromwell the office was rather insignificant. During the time of Sir John Baker, 1540-1558, the bills of complaint were not uniformly addressed to the chancellor of the exchequer⁴⁶ as they were during the chancellorship of Mildmay and afterwards. Therefore, it is likely that Mildmay was the first to sit regularly in court. It must be remembered that during the sixteenth century the equitable jurisdiction of the court was still in practice ancillary to its revenue functions.

In the first part of the seventeenth century, the chancellor of the exchequer sat on Thursday mornings to hear equity suits.⁴⁷ However, the revenue duties of his office were probably still considered to be more important than his judicial ones, since he was always included in the treasury commissions.

44. W.R. Anson, Law and Custom of the Constitution (4th ed. 1935) vol. 2, part 1, p. 191; G.E. Aylmer, King's Servants (1961) p. 37; Halsbury, Laws of England (3d ed. 1954) vol. 7, p. 394; D.K. Rept., no. 25 (1864) app. 4, pp. 61-70; F.S. Thomas, Ancient Exchequer (1848) pp. 101, 102.

45. G.R. Elton, Tudor Revolution in Government (1962) pp. 114-119, 266; S.E. Lehmberg, Sir Walter Mildmay and Tudor Government (1964) p. 49; W.C. Richardson, History of the Court of Augmentations 1536-1554 (1961) p. 453.

46. See the bills transcribed in appendix 5.

47. S.P.16/255 part 43 (1633).

During the Civil War and Interregnum, the chancellor of the exchequer, Hyde, was never able to sit in court. After 1660 the chancellor of the exchequer heard cases⁴⁸ only rarely; these were usually rehearings of those cases where the barons were equally divided⁴⁹. Treasury affairs and politics took up all his time, and his role in the equity court declined. He became little more than a figurehead in the day to day meetings of the court. In 1726 the chancellor of the exchequer was referred a suit in which the barons could not agree, but he sent it back undecided.⁵⁰ The last decree⁵¹ made by a chancellor of the exchequer was that in 1735 by Sir Robert Walpole in the case of Naish v. East India Co.⁵²

Thus after about 1640, the chancellors of the exchequer had no judicial importance, practically speaking. However, up to the dissolution of the equity jurisdiction of the court in 1841, they maintained their theoretical position as judges of the court. They were sworn into office in the exchequer chamber and thereupon heard and granted a motion of course.⁵³ Moreover, to the end, all bills were addressed to the chancellor of the exchequer. Their power as judges was abolished by the Judicature Act of 1873.⁵⁴

48. E.g. R. v. Inhabitants of Rodley, Hardr. 437, 145 Eng. Rep. 536 (Ex. 1667); Sayer v. Mumford, 1 Wood Tit. Cas. 324 (Ex. 1694).

49. E.g. Trolop v. Trolop, 2 Barn. K.B. 166, 94 Eng. Rep. 425 (Ex. 1732).

50. More v. Ellis, Bunb. 205, 145 Eng. Rep. 648 (Ex. 1726).

51. C.E.D. Black, 'Her Majesty's Treasury: Its History and Associations,' Westminster Review, vol. 143, pp. 503 at 504 (1895); Fowler, Practice (2d ed. 1817) vol. 1, p. 8; F.S. Thomas, Ancient Exchequer (1848) p. 101.

52. 2 Comyns 462, 92 Eng. Rep. 1160 (Ex. 1735).

53. Fowler, Practice (2d ed. 1817) vol. 1, p. 7; H.C. sess. pap. 1822 (no. 125), vol. 11, pp. 99 at 106; G. Price, Treatise on the Law of the Exchequer (1830) pp. 39, 40.

54. Stat. 36 & 37 Vict. [1873] c. 66, s. 96.

The change in the function of the chancellor of the exchequer from a partly judicial to a wholly administrative office parallels the similar change in the office of treasurer. It was, however, more gradual because his office was never put into commission and because he was a less important person. The change is reflected in the granting of the office during pleasure,⁵⁵ instead of for life. The change was made during the reign of Charles II and was a part of his general policy of keeping the government under as close control as possible. But it was also the policy of William III not to grant offices for life where it was not necessary.⁵⁶ Secure tenure makes better judges but worse political administrators; thus as the chancellors of the exchequer became more and more administrators and less and less judges, it was appropriate that they should be treated as such in their appointments.

Of the chancellors of the exchequer between 1550 and 1714, only three had any previous legal experience. Sir Julius Caesar was highly trained and experienced in the law, and Sir John Croke was a serjeant. Hyde had made his name as a distinguished lawyer, but he was not able to devote his energies to the office of chancellor of the exchequer. Thus from the resignation of Caesar in 1614 until at least 1714, no chancellor of the exchequer brought legal expertise to his office. This suggests that it was not in practice a judicial office. After 1614 it is not surprising that they ceased to sit in the court; if they had no legal knowledge, they would not have been interested in the technicalities of equity, they would not have felt useful, and they would not have wanted to sit as judges. Moreover, it would not have furthered their political careers and ambitions.

55. This was modified by a statute which provided that the office continued for six months after the demise of the crown unless the officer was dismissed: stat. 6 Ann. [1707] c. 41, s. 8, Stat. Realm vol. 8, p. 739.
56. S.B. Baxter, Development of the Treasury, (1660-1702) (1957) p. 113; J.C. Sainty, 'The Tenure of Offices in the Exchequer,' E.H.R., vol. 80, pp. 449 at 465-467.

C. The Barons of the Exchequer

1. Position

The next judicial office to be considered is that of the barons of the exchequer, practically speaking the most important office of the court. The barons, or at least one of them, were always present as judges at hearings. The exchequer was a collegiate court, which never sat in sections. After the time of Edward IV the court was limited by tradition to only four barons.⁵⁷ However, there was no constitutional requirement that the size of the Exchequer bench be limited to this figure. In fact in 1604 Serjeant Snigge was made a fifth baron, but when Baron Sotherton died a year later, the traditional number was restored. Perhaps Sotherton was ill and no longer capable of exercising his office; he was almost eighty when Snigge was appointed. Again in 1708 a fifth baron was appointed, Sir Salathiel Lovell. In this year Baron Smith was sent to Edinburgh as temporary deputy chief baron of the Scottish exchequer. He retained his place in the English exchequer, but it was felt necessary to have four active barons at Westminster. Lovell died in office in 1713, and he was not replaced. These two instances are clearly exceptions to the traditional rule. However, in 1830 a permanent fifth baron was appointed in order to relieve the congestion of cases.⁵⁸ At the same time a fifth judge was added to the courts of king's bench and common pleas. In addition to hearing suits in equity, the barons settled revenue disputes and sat as a court of common law.

57. Foss, Biog. Dict., p. ix; Foss, Tabulae Curiales, pp. 41, 43, 45; see generally app. 2-D, 3-C, and 4-A.

58. Stat. 11 Geo. 4 & 1 Will. 4 [1830] c. 70, s. 1.

The first baron was called the chief baron.⁵⁹ In the absence of both the treasurer and the chancellor of the exchequer, it was he who presided in the equity court and answered the bar, i.e. spoke for the court.⁶⁰ When he also was absent, the second baron presided, and so on. The court could, if desperate, consist of a single baron sitting alone as it did in Trinity term, 1659.⁶¹ The second, third, and fourth barons were called puisne barons. The puisne barons in the sixteenth century were appointed to a particular place on the bench, but after the accession of James I, they were only appointed to a place and sat according to the seniority of their appointment.

Seniority was irrelevant to judicial powers and duties. The chief baron and the three puisne barons were all equal in that each had only one voice; the chief baron did not have a deciding vote. In case of an equal division among the barons, either the motion failed or there could have been a rehearing before the treasurer with or without the chancellor of the exchequer. The revenue duties, on the other hand, were allocated to favor the chief baron and the second baron.

In 1817 in order to meet the rising tide of common law actions and to dispatch more easily suits in equity, an act was passed which enabled the chief baron to sit alone to hear equity cases. And, if the chief baron were ill, the king could appoint under the sign manual another baron to sit in equity in his place.⁶² This was the only relaxation of

59. For information on the office of chief baron in the middle ages, see D.M. Broome, The Exchequer in the Reign of Edward III, 1327-1377, Ph.D. diss., Univ. of Manchester, 1922; T.F. Tout, Chapters in the Administrative History of Mediaeval England (1920) vol. 2, pp. 219, 220, vol. 3, p. 46; Foss, Judges, vol. 3, pp. 196-198, 348.

60. Osborne, Practice (1572, 1658) p. 23.

61. See e.g. Hardr. 160, 145 Eng. Rep. 431; and in 1794: Fowler, Practice (1795) vol. 2, p. 199.

62. Stat. 57 Geo. 3 [1817] c. 18, s.1.

the rule against the court sitting in sections. The purpose was to make it possible for the exchequer to hear equity and common law disputes simultaneously. Having a single judge in equity and a collegiate court for common law was obviously a copying of the other high courts of justice. The experiment was not a success. It was found necessary in 1833 to pass another act to amend the act of 1817. This second act permitted the Crown to appoint another baron to sit in equity when the chief baron was sitting on the common law side of the court, at nisi prius, or in the privy council, as well as when he was ill.⁶³ Three years later two more holes in the act of 1817 had to be patched up, and it was enacted that the other baron could sit when the chief baron was on circuit and that he could finish a suit already begun when the chief baron returned.⁶⁴ All this demonstrates a certain degree of improvisation and shows a rigidity characteristic of all of the high courts of justice in the first part of the nineteenth century. The results of these statutes was not happy; they had upset traditional habits but failed to supply a better system.⁶⁵ The difficulties which prompted these statutes seem to be linked with the abolition of the jurisdiction several years later.⁶⁶

From 1550 to 1579, there was in fact, as a matter of practice, a great difference between the chief baron and the puisne barons. This difference was in education and social status. In regard to education, it can be seen that all of the chief barons had been trained as lawyers in the Inns of Court. Of the seven, who were appointed during this period,

63. Stat. 3 & 4 Will. 4 [1833] c. 41, s. 25.

64. Stat. 6 & 7 Will. 4 [1836] c. 112.

65. For a bitter denunciation of these statutes and of parliamentary meddling, see the comments of Freshfield, M.P., in Hansard, Parl. Deb., 3d ser., vol. 49, pp. 399-408 (16 July, 1839).

66. See below, chap. 5.

five were serjeants-at-law and two were barristers-at-law. The two barristers, Bradshaw and Higham, were appointed before the accession of Elizabeth I in 1558. Thus all of Elizabeth's chief barons were serjeants. Moreover, four of them had had previous judicial experience.⁶⁷ This was totally inconsequential in regard to the powers to grant equitable remedies. However, as a matter of professional prestige it was important. Only serjeants were sent out on circuit and associated as equals with the justices of the queen's bench and the common pleas at Serjeants' Inn, where the serjeants as a class formed a professional collegiate society distinct from the Inns of Court and the lesser ranks of the legal profession.

During this same period, none of the puisne barons were appointed from the ranks of the serjeants. Four were barristers,⁶⁸ and three were former revenue officials of the exchequer.⁶⁹ The origins of three are unknown.⁷⁰ These last three were probably revenue officers also, since they are not known to have been members of any of the Inns of Court. The exchequer bench at this time was thus composed of those who had risen through the ranks of the revenue department and of moderately successful lawyers; this assured the court of both the financial and the legal experience required to settle revenue disputes.

67. Saunders, Manwood, Jeffray, and Periam.

68. Curson, Freville, Birch, and Brown; for Brown, see A.R. Ingpen, Middle Temple Bench Book (1912) p. 136.

69. Darnall, Saxilby, and Pymme; Pymme was foreign apposer: L. & P., vol. 17, p. 321, no. 556 (23); Pymme was admitted at the Middle Temple, but there is no record of his having been called to the bar: H.A.C. Sturgess, Register of Admissions to the Hon. Society of the Middle Temple (1949) vol. 1, p. 17.

70. Lord, Greek, and Muschampe.

Although the oldest, the exchequer was the least prestigious of the high courts of justice at Westminster. It was a promotion within the judiciary for a baron to become a puisne justice of either of the two benches, for a puisne justice to become chief baron, and for the chief baron to become chief justice of one of the benches. It must have been awkward when the chief baron was absent, for the presiding judge was not then a serjeant and therefore on occasion not of equal professional rank with counsel when the latter was a serjeant-at-law.

The exchequer in 1550 was neither in theory nor in practice a court of general jurisdiction. The equity court was still very much an appendage to the financial administration of the Crown. It handled only special cases involving the royal revenue, and for a plaintiff in law or equity to sue there he must have been able to show a genuine debt to the Crown or that he was privileged to sue there as a bona fide exchequer official.⁷¹ No lawsuit was yet completely detached from the royal interest.

However, there was a great upsurge in the quantity of litigation in the exchequer around 1558. Also this date marks the beginning of the change in the status of the barons of the exchequer. From 1558 onwards all of the chief barons were appointed from the ranks of the serjeants. In June 1579 Robert Shute and John Sotherton were appointed puisne barons. This month saw what in retrospect can be seen to be a momentous change. Shute was the first serjeant to be made a puisne baron, and Sotherton, who was not even a lawyer, was the last to be appointed who was not a serjeant. This change shows the need to have the exchequer court staffed with experienced lawyers to meet the rising tide of litigation. It may

71. See above and H. Wurzel, 'The Origin and Development of Quo Minus', Yale L. J., vol. 49, pp. 39-64 (1939).

also have been thought desirable to send all of the barons out on assize.⁷² It became an invariable custom that all barons must be serjeants. If it was thought desirable to appoint a barrister to the bench, he must first have been made a serjeant. This in fact frequently happened, and a barrister might be raised to the order of the coif and then to the bench within a few days.⁷³

This change marked the end of the inferiority of the exchequer court in theory. From the appointment of Shute, the patents of the barons granted the same emoluments and precedence as the justices of the two benches.⁷⁴ However, it was still considered a promotion for a puisne baron to be moved to either of the benches as a puisne justice.

Perhaps it was realized when Baron Sotherton was appointed in 1579 from among the officials of the revenue side of the exchequer that the bench should include someone with some financial expertise.⁷⁵ One became a serjeant by rising through the ranks of the legal profession; serjeants could not be expected to know both law and finance. Sotherton was a full-fledged baron, but when he died in 1605, there was no judge in the exchequer who had had any experience in revenue administration. It does not seem to have been contemplated that he was to have been replaced by a serjeant with financial training, assuming the existence of one, or by a judge with financial but no legal experience, such as himself. His replacement, Baron Snigge, had been appointed as a fifth baron the year

72. See Foss, Judges, vol. 5, pp. 409, 410, vol. 6, p. 20.

73. Holdsworth, H.E.L., vol. 5, pp. 340, 341, vol. 6, p. 478.

74. See Shute's patent below, App. 2-D-6; also anon., 'The Court of Exchequer in Legal History,' Law Times, vol. 177, pp. 404 at 406 (1934).

75. In this same year, Sotherton was admitted at Gray's Inn: J. Foster, Register of Admissions to Gray's Inn, 1521-1889, col. 54; this indicates that he had no legal education but felt the need to acquire some or at least to attempt to identify himself with the legal profession.

also have been thought desirable to send all of the barons out on assize.⁷² It became an invariable custom that all barons must be serjeants. If it was thought desirable to appoint a barrister to the bench, he must first have been made a serjeant. This in fact frequently happened, and a barrister might be raised to the order of the coif and then to the bench within a few days.⁷³

This change marked the end of the inferiority of the exchequer court in theory. From the appointment of Shute, the patents of the barons granted the same emoluments and precedence as the justices of the two benches.⁷⁴ However, it was still considered a promotion for a puisne baron to be moved to either of the benches as a puisne justice.

Perhaps it was realized when Baron Sotherton was appointed in 1579 from among the officials of the revenue side of the exchequer that the bench should include someone with some financial expertise.⁷⁵ One became a serjeant by rising through the ranks of the legal profession; serjeants could not be expected to know both law and finance. Sotherton was a full-fledged baron, but when he died in 1605, there was no judge in the exchequer who had had any experience in revenue administration. It does not seem to have been contemplated that he was to have been replaced by a serjeant with financial training, assuming the existence of one, or by a judge with financial but no legal experience, such as himself. His replacement, Baron Snigge, had been appointed as a fifth baron the year

72. See Foss, Judges, vol. 5, pp. 409, 410, vol. 6, p. 20.

73. Holdsworth, H.E.L., vol. 5, pp. 340, 341, vol. 6, p. 478.

74. See Shute's patent below, App. 2-D-6; also anon., 'The Court of Exchequer in Legal History,' Law Times, vol. 177, pp. 404 at 406 (1934).

75. In this same year, Sotherton was admitted at Gray's Inn: J. Foster, Register of Admissions to Gray's Inn, 1521-1889, col. 54; this indicates that he had no legal education but felt the need to acquire some or at least to attempt to identify himself with the legal profession.

before. Upon Sotherton's death, Snigge became fourth baron, and the traditional number of barons was restored. To fill the void of financial expertise, the office of cursitor baron was erected.

The cursitor baron was chosen from among the revenue officers of the exchequer, but he was given no judicial duties. He performed some of the financial functions of the barons and advised the ~~serjeant~~-barons as to others. His official title is not clear. In his patent he was made simply a baron of the exchequer. However, he was clearly inferior to the four other barons, whose offices went back to the twelfth century; they were from 1579 ~~forward~~ called barons of the coif.⁷⁶ This newly created officer was generally called the cursitor baron because of his familiarity with the course of the exchequer, the procedures for receiving, disbursing, and accounting for the revenues of the Crown.⁷⁷ Sometimes he was referred to as the fifth baron or the puisne baron.⁷⁸ These last two terms are no longer used because they are confusing and misleading. The first implies an equality in all but seniority with the barons of the coif, but this was not so. The second is confusing because three of the barons of the coif were puisne barons.

The reason for these two overly generous appellations is probably to be found in the cursitor barons' patents. These patents were in the same form as any of the barons' patents before 1579. From an inspection of the succession of patents through Sotherton's back into the fifteenth century, they would appear to be equal to the other barons. However, from

76. The serjeants were of the order of the coif, a complimentary appellation for their estate; they were so called because they had the privilege of wearing coifs.

77. Caveat: sometimes the fourth baron was called the cursitor baron in the sixteenth century.

78. E.g. *Lampen v. Deering*, 2 Show. K.B. 299, 89 Eng. Rep. 951 (K.B. 1680).

1579 onwards the patents of the judicial barons are different in that they appointed to the office of baron of the coif and granted increased salaries and precedence. No patent mentioned duties; that was a matter of tradition and custom. In practice the cursitor baron was merely a revenue officer; he had no judicial duties whatsoever and thus need not be further discussed.⁷⁹

The social status of the barons can be quickly dealt with. Under the last three Tudors, all of the chief barons were knights, except the first, Henry Bradshaw. None of the puisne barons were.⁸⁰ From the accession of the house of Stewart in 1603 until Parliament gained the upper hand in the Civil War in the 1640's, the proverbial inflation of honors was obvious, for all of the barons were knighted at some point or other before the end of their tenure as judges, except for Sotherton, the last of the non-serjeant barons. From the fall of Charles I to the Restoration, none of the barons were knights, except for Sir Thomas Widdrington, the last chief baron of the Interregnum, and he had been knighted in 1639. This reflects the republican attitudes of the time.

During the reigns of Charles II and James II all the barons were knights except Chief Baron Montague and Baron Bertie. From 1689 to 1714 all of the chief barons were knights, and most of the puisne barons were (four out of twelve were not). This system continued throughout the eighteenth century; in the nineteenth century the barons were always knighted upon their appointments.⁸¹ The last two chief barons before the end of the equity court in 1841 were raised to the peerage as lord Lyndhurst and lord Abinger.

79. For further information, see Foss, Judges, vol. 6, pp. 16-27, vol. 9, p. 109; E. Foss, 'On the Origin of the Title and Office of Cursitor Baron of the Exchequer,' Archaeologia, vol. 36, pp. 23-32 (1855); Proceedings of the Society of Antiquaries, vol. 3, pp. 118-123 (1856).

80. Curson may have been knighted: Shaw, Knights, vol. 2, p. 63.

81. Foss, Judges, vol. 8, p. 86.

A glance at the list of Exchequer barons might suggest the existence of nepotism in appointments, for the names of Weston, Atkyns, Montague, and others recur with more than random frequency. However, the suggestion is dispelled by a closer look. The Westons were kin, but not closer than cousins. The barons of the Atkyns family were a father and his two sons; the father was dead before either son was appointed, and the sons were on opposite sides of the political spectrum to the extent that in 1689 one was removed from his office when the other was appointed. The Montagus represented a very large family, and they were spread apart in time and kinship. Foss does not suggest anything improper in connection with their family relations. In all probability fathers who were successful lawyers encouraged their sons to follow them in their profession and gave them as good an education as possible. However, at the bar family connections can at most create opportunities; incompetence cannot be hid in an adversary system. Generally the barons appointed from these families were intelligent and creditable members of the judiciary.⁸²

2. Appointment and Tenure

The barons of the exchequer were appointed by the monarch. The appointment was by royal letters patent under the great seal, and each baron was sworn into office⁸³ by the lord high chancellor, who was the chief officer and supervisor of the judiciary. The barons were not given the option of exercising their office by a deputy.⁸⁴ This could not have been allowed for an office which involved the day to day exercise of

82. For other examples, see F. Galton, 'Hereditary Genius, The Judges of England between 1660 and 1685', Macmillan's Mag., vol. 19, p. 424 (1869); Holdsworth, H.E.L., vol. 5, pp. 341-344.

83. See the copy of the oath of office in appendix 3-C.

84. See Anon., Y.B. Trin. 9 Edw. 4, f. 30v, pl. 45 [or 46] (C.P. 1469) (dictum per Littleton).

personal discretion and which required more than mere routine clerical administration. Judges are chosen on the basis of their own personal intellect, integrity, and experience; the choice of a particular individual cannot be frustrated by allowing him to delegate his judicial functions to a deputy.⁸⁵

The tenure by which the barons held their office in the sixteenth century was quamdiu se bene gesserint, i.e. during good behaviour. They had held office with this secure tenure since the reign of Henry VI with the exception of the short reigns of Edward V and Richard III.⁸⁶ It is interesting to note that during this time the justices of the two benches held office only durante bene placito,⁸⁷ i.e. during the pleasure of the Crown. This is further evidence of the inferiority at that time of the court of exchequer to the king's bench and the common bench. The probable reason for the secure tenure of the barons is that before 1550 they were primarily revenue officials with much less prestige than the justices. The king did not feel the need to keep them on the short leash of tenure during pleasure, since they were not given very much discretion. They were not then a court of general jurisdiction for civil or criminal cases. They were less able than the other high court judges to decide constitutional issues. Therefore they were less potentially dangerous to the king.

Once a pattern of clerical administration has been set, it continues until there is some reason to change it. The chancery under-clerks would not be adventuresome and take risks by making changes in such matters of

85. The barons did delegate to examiners their duty to preside over the taking of depositions; see below.

86. Cal. Pat. Rolls [1476-1485] passim; A.F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II,' L.Q.R., vol. 66, pp. 62 at 64 (1950); C.H. McIlwain, 'The Tenure of English Judges,' Am. Pol. Sci. Rev., vol. 7, pp. 217 at 218 (1913).

87. An alternative formula was quamdiu nobis [i.e. the king] placuerint.

administrative routine as the forms of patents. Nor would it be for them to exercise much discretion; this was the responsibility of the senior officials.⁸⁸ Thus the barons' patents followed the same patterns year after year. From the fifteenth to the seventeenth centuries, the barons developed the exchequer into a court of general jurisdiction for civil actions in law and equity; they thus became more and more like the justices of the two benches. Not only had the barons greatly extended their jurisdiction by means of the procedural fictions, but also they were hearing criminal and political cases on assize. However, due to clerical inertia their tenure of office continued to be the same as their predecessors whose powers had been more restricted.

The cataclysm necessary to put practice and theory into harmony again was the refusal of Chief Baron Walter to co-operate fully with Charles I. It was decided in 1630 that Sir John Walter would have to go. So he was sent notice of the revocation of his patent in the same manner as if to one of the justices. But he pointed out that his patent was valid during good behaviour, not at the pleasure of the crown, and, that for him to be dismissed, there must be a judicial proceeding on a scire facias to him for the crown to show that he had not demeaned himself properly as a judge. The king and his advisers realized that such a proceeding was necessary, but they did not think it advisable to prosecute such an unpopular action. There was no evidence against Walter except his political independence; a sham trial would have led to an uproar. The chief baron was therefore ordered not to sit in court any further; which order he obeyed. He died several months later in office de jure if not

88. See generally G.E. Aylmer, King's Servants (1961) p. 125.

de facto.⁸⁹ From this time onwards the patents of Charles I to the barons were durante bene placito only,⁹⁰ and the tenures of the barons were in every respect the same as those of the justices of the king's bench and the common pleas.

Not only did this change fit in with the king's general policy of getting and keeping the government and administration as closely responsive to him as possible, but also it was one of the key measures of the policy of personal rule. Insecure tenure assured that the judges would be loyal to the crown; and if they were not, they could be immediately dismissed and replaced by others who were better attuned to government policies. This was a period of constitutional change; the obsolete machinery of government, which the skillful Tudors had just barely managed to keep running, could no longer be patched up, especially by the Scottish dynasty who had not yet fully assimilated English ideas. In periods of constitutional change, the judges are important because, in their daily handling of the practical problems of life, it is they who implement the constitution. In effect they are the arbiters of the constitution since they stand between the government and private people. Moreover, when Parliament had ceased to sit in the 1630's, and especially since it was unlikely that there would be another in the near future, the politicians moved their battleground from the legislature to the courts. The king, therefore, felt it desirable that this branch of the royal administration, the law courts, should be loyal to him personally and hold the views of his government.

89. Foss, Biog. Dict., p. 701; S.R. Gardiner, History of England (2d ed., 1905) vol. 7, pp. 112-114; Holdsworth, H.E.L., vol. 5, p. 351; McIlwain, 'The Tenure of English Judges,' Am. Pol. Sci. Rev., vol. 7, pp. 217 at 221 (1913).

90. I.e. the unfettered appointments of the king, which were from Davenport in 1631 through Hendon in 1639.

There was not a scarce supply of competent and conscientious lawyers who believed that the royal prerogative was in the final analysis the supreme law of the land. We must not be deceived by the partisan Whig politicians and historians into believing that the position of Charles I was so untenable constitutionally that no one could sincerely conceive it to be historically grounded or to be the best for the future of England. There were many.⁹¹

The constitution of the early seventeenth century cannot be mentioned without a word about Sir Edward Coke. He is seen by the Whigs as the first knight of the constitutional round table, the idealistic and self-sacrificing champion of traditional English freedom. He was in the vanguard of the fight for Parliamentary democracy and personal liberty.⁹² By the Jacobites he is pictured as a reactionary judge who attempted to acquire the political power to interpret and manipulate the mediaeval constitution; this would have made the judges the ultimate authority and the rulers of England. It was James I and Charles I who stood for progress in government and sought to create the modern state. Since the judges were not in fact a-political, they must have been brought under administrative control by the means of insecure tenure.⁹³

Coke had an unrivalled knowledge of the law; in court and in Parliament, he must have been formidable to his opponents and oppressive to his friends. It is an unavoidable fact that one of the results of Coke's constitutional theories would have been the placing of the ultimate

91. S.R. Gardiner, History of England, vol. 3, pp. 2-5 (1901), vol. 7, p. 361 (1905); J.P. Kenyon, Stuart Constitution (1966) pp. 90-117; J.P. Kenyon, The Stuarts (1958) p. 83; see e.g. F. Bacon, Works (Spedding ed., 1858) 'Of Judicature,' vol. 6, pp. 506-510; F. Bacon, Letters (Spedding ed., 1872) 'The Lord Keeper's Speech in the Exchequer To Sir John Denham' (1617) vol. 6, pp. 203, 204.
92. E.g. C.D. Bowen, The Lion and the Throne (1957); G.M. Trevelyan, England Under the Stuarts (21st. ed., 1961) pp. 99, 100.
93. E.g. J.C. Corson, 'Judges and Statutory Tenure in England in the Seventeenth Century', Juridical Review, vol. 42, p. 136 (1930).

interpretation of the law into his own hands. That he might have used such power for political ends is not inconceivable. However, Coke was no republican. To see him as a preacher of democracy would be anachronistic. He conceived of the proper constitutional balance as that in which the administration of the law was done by royal prerogative limited by the rights of Parliament to alter the law and circumscribed by the traditional common law, which was in the keeping of the courts. Coke was renewing the pre-Tudor constitutional struggle over the extent of the king's prerogative and the location of the final authority. The executive and the judiciary demonstrated each other's incapacity, and the legislature stepped in and took over in 1641. Coke's motives may have been unselfish; he may have been seeking to advance the common good, but arguably his vision was blurred by an unconscious quest for personal power. The results of his activities were beneficial. He renewed the struggle for civil liberties which the Tudor monarchs had been magnificently adept in avoiding to their own advantage. The constitutional changes of the sixteenth century had been both initiated and implemented by the Crown. In the seventeenth century it was Coke who regained the initiative which was to be used against the crown. He was, however, ahead of his time. Most of the lawyers during this period were supporters of the crown and of the supremacy of the royal prerogative. Moreover, there was a reaction to Coke's domineering personality and to the collapse of Parliament in 1629.

Coke, though in advance of his time in his views on the independence of the judiciary, was supported by ample mediaeval precedent. Charles I was determined to increase the efficiency of his personal rule; Unfortunately he had no thoughts about the practical results of enforcing his theoretical rights. He too was supported by ample mediaeval precedent.

In 1630 the reputable and established lawyers generally upheld the royal policy. The judges were the king's judicial servants, and it was natural that they should hold office during the king's pleasure as they always had before, except for the barons of the exchequer. Now the barons were brought into line with the general tradition.

However, Charles I harrassed the opponents of his autocracy in the courts, and they in turn attempted to use the common law against him. Sympathetic judges were clearly necessary. It was made plain to the judges by the judicious use of dismissals that the king would not tolerate an independent attitude on the bench to political matters. The judges generally complied. In fact, except for Walter, none of the barons were dismissed by King Charles.

The importance of secure judicial tenure was recognized, and the members of the Long Parliament were opposed to tenure during pleasure as a matter of general policy. On 12 January, 1641, the House of Lords presented an address to Charles I to appoint all judges to hold during good behaviour in the future,⁹⁴ and the king acceded to their request on 15 January, 1641.⁹⁵ It is interesting to note that Parliament did not attempt to have this reform in the shape of a binding statute. The royal justices were given secure tenure as a matter of grace only. It was still constitutionally permissible for the crown to appoint with any tenure it pleased. The judges held by the more secure tenure, however, until 1668.

94. Lords Journ., vol. 4, p. 130.

95. Lords Journ., vol. 4, p. 132; A.F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II', L. A. R., vol. 66, pp. 62 at 64, 65 (1950); C.H. McIlwain, 'The Tenure of English Judges', Am. Pol. Sci. Rev., vol. 7, pp. 217, at 222 (1913).

When the Long Parliament began to sit, they impeached Chief Baron Davenport and Baron Weston. They were never brought to trial, but they never sat again in court.⁹⁶ It was the policy during the entire Interregnum that the judges should hold by secure tenure. During this period there were two questionable incidents, however. When Oliver Cromwell became lord protector in 1653, he did not keep Chief Baron Wilde in office. Presumably he compared his position at that time to that of a monarch upon his accession; at the death of a monarch judicial commissions lapsed and the new king had free discretion as to his appointments.⁹⁷ In 1655 Baron Thorpe excused himself from trying certain prisoners because it went against his conscience. As a result he was removed from the bench without a trial even though he held office during good behaviour. This was the only instance of this happening in the exchequer since the equity jurisdiction was acquired. Perhaps this refusal to exercise his office would have been sufficient cause for his removal, but it was not contested and no formal legal proceedings were taken for his removal.

At this point it may be of interest to note the action of the restored Long Parliament in Hilary term, 1660. The constitutional and political position of the nation at that moment must have appeared hopelessly confused to them. They therefore re-established the judges in the courts as they were in 1653, before Cromwell became lord protector, with the judges to hold office until further order of Parliament.⁹⁸ This seems to be both a rejection of Cromwell's dictatorship and at the same time an assertion of their own existence as a parliament without a king.

96. Foss, Judges, vol. 6, pp. 298, 299, 374, 375.

97. See below.

98. See the patents of Wilde, Thorpe, and Parker: K.R. memo. roll, E.159/499, Hil. 1659/60, recorda ro. 3 and 4.

When Charles II was restored to the Throne in 1660, he continued at first the voluntary practice of appointing to the bench quamdiu se bene gesserit. Perhaps this was the result of a cautious unwillingness to make too many unpopular changes too soon. Also this was his honeymoon with the nation and everyone was in a genial and trusting mood. Moreover, Clarendon was the king's chief minister at the time, and this practice probably reflects Clarendon's ideas of constitutional monarchy.⁹⁹

Clarendon fell in 1667, and in the next year the policy of appointing judges durante bene placito was resumed.¹⁰⁰ The first baron to be appointed under the new policy was Timothy Littleton in 1670; this was the rule until the accession of William III and Mary II in 1689. It was not illegal or unconstitutional; the administration of justice was part of the royal prerogative. The king could appoint what judges he saw fit and by what tenure he chose. However, by this time the idea that the judges should be independent and politically neutral had become established. While the Stuarts and parliament were still disputing for constitutional control, the courts had been forced into the political arena. However, after 1660 parliament was obviously a permanent institution. The opinion which eventually prevailed was that the independence of the judiciary should be maintained, that it would be achieved by having the judges sit during good behaviour, and that Charles II and James II had been oppressive and reactionary in their policies to the contrary.

In 1674 a bill was introduced in the House of Commons which would have required that the judges sit during good behaviour. There is no known reason to account for the appearance of this bill. Charles II did

99. Foss, Judges, vol. 7, p. 4; Holdsworth, H.E.L., vol. 6, pp. 501, 502; J.P. Kenyon, Stuart Constitution (1966) p. 420.

100. The first judge was Justice Wilde: A.F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II,' L.Q.R., vol. 66, pp. 62 at 65. (1950).

not begin to tamper with the courts until 1676. In 1674 parliament was generally not very well disposed toward the king. The bill, however, did not meet with any great response, and it was shelved by a committee.¹⁰¹

The king was determined to have a judiciary whose loyalty to the Crown exceeded any desire for political impartiality. Not only was this his strict constitutional prerogative, but it was in fact necessary for him in his fight with parliament to have the support of the high court judges, especially now that the conciliar courts had been abolished. From 1676 to his death in 1685, particularly after 1680, Charles II manipulated the judiciary high-handedly and menacingly so that it was made quite clear that royal pleasure could be had only by subservience. The greatest single wave of dismissals took place in April, 1679. In the exchequer, for example, Baron Littleton died, and Barons Thurland and Bramston were removed; soon thereafter three of the four exchequer seats were filled with supporters of the king's policies, in whom he could place his trust. (If he were mistaken, he could remove them and try again, and this they knew.)¹⁰²

In 1680, the confidence of the nation in the judiciary was at a low ebb, but the king no doubt was pleased with it. On 20 December, 1680, the House of Commons sent an address to the Crown that the judges should hold office during good behaviour, but it was refused.¹⁰³

James II inherited a subservient bench and a policy of insecure tenure from his brother in 1685; nevertheless he found it necessary to make many changes. In 1686 there was a general re-casting of the judiciary.

101. Havighurst, art. cit., pp. 76-78; Kenyon, Stuart Constitution (1966) p. 420; A. Grey, Debates of the House of Commons, vol. 2, pp. 415-420 (13 Feb., 1674).

102. Havighurst, art. cit., pp. 230-233, 249-252; Kenyon, Stuart Constitution, p. 421; Holdsworth, H.E.L., vol. 6, p. 507.

103. Havighurst, art. cit., pp. 238, 239; Com. Journ., vol. 9, pp. 682-685 (1680); A. Grey, Debates, vol. 8, pp. 164-165, 187, 190, 197-201.

In the exchequer, Chief Baron Montagu, Baron Gregory, and Baron Nevile were removed for refusing to support the king's dispensing power. The result of the changes was a judiciary which was not only of poor quality but which suffered from weakness to the point of ineptitude and general unreliability culminating in the failure of the king's bench to convict the seven bishops in 1688.¹⁰⁴

The experiences of the reigns of Charles II and James II strengthened the movement for security of judicial tenure, but William III was not disposed to concede it. The original Bill of Rights of 1689¹⁰⁵ contained a draft clause 18 which would have required that the judges hold office during good behaviour.¹⁰⁶ However, William III would not agree to this. He only accepted the Crown with the understanding that he would not be less a king than his predecessors, that the royal prerogative would not be diminished. He would maintain his rights in theory though not always with rigorous exactitude in practice.¹⁰⁷ His words were conservative, but his actions were liberal -- in general a wise course for politicians. Moreover, the complaint against James II had not been the exercise of prerogative but rather the abuse of prerogative. In any case there could be no effective opposition to William at this time because if he went back to Holland, James II would return to England. Those who were in control had committed high treason against James by inviting William to cross

104. A.F. Havighurst, 'James II and the Twelve Men in Scarlet,' L.Q.R., vol. 69, p. 522 (1953); Kenyon, Stuart Constitution, pp. 422-424; Holdsworth, H.E.L., vol. 6, p. 510 (1924); the following is relevant but inept: A.L. Cross, 'The English Law Courts at the Close of the Revolution of 1688', Mich. L. Rev., vol. 15, p. 529 (1917).

105. Stat. 1 Will. & Mar. [1689] sess. 2, c. 2; Stat. Realm, vol. 6, pp. 142-145.

106. Com. Journ., vol. 10, pp. 17, 22 (2 and 7 Feb., 1689).

107. For the view that William III was illiberal in his views of prerogative government and of an independent judiciary, see D.A. Rubini, 'The Precarious Independence of the Judiciary, 1688-1701', L.Q.R., vol. 83, pp. 343-345 (1967).

In the exchequer, Chief Baron Montagu, Baron Gregory, and Baron Neville were removed for refusing to support the king's dispensing power. The result of the changes was a judiciary which was not only of poor quality but which suffered from weakness to the point of ineptitude and general unreliability culminating in the failure of the king's bench to convict the seven bishops in 1688.¹⁰⁴

The experiences of the reigns of Charles II and James II strengthened the movement for security of judicial tenure, but William III was not disposed to concede it. The original Bill of Rights of 1689¹⁰⁵ contained a draft clause 18 which would have required that the judges hold office during good behaviour.¹⁰⁶ However, William III would not agree to this. He only accepted the Crown with the understanding that he would not be less a king than his predecessors, that the royal prerogative would not be diminished. He would maintain his rights in theory though not always with rigorous exactitude in practice.¹⁰⁷ His words were conservative, but his actions were liberal -- in general a wise course for politicians. Moreover, the complaint against James II had not been the exercise of prerogative but rather the abuse of prerogative. In any case there could be no effective opposition to William at this time because if he went back to Holland, James II would return to England. Those who were in control had committed high treason against James by inviting William to cross

104. A.F. Havighurst, 'James II and the Twelve Men in Scarlet,' L.Q.R., vol. 69, p. 522 (1953); Kenyon, Stuart Constitution, pp. 422-424; Holdsworth, H.E.L., vol. 6, p. 510 (1924); the following is relevant but inept: A.L. Cross, 'The English Law Courts at the Close of the Revolution of 1688', Mich. L. Rev., vol. 15, p. 529 (1917).

105. Stat. 1 Will. & Mar. [1689] sess. 2, c. 2; Stat. Realm, vol. 6, pp. 142-145.

106. Com. Journ., vol. 10, pp. 17, 22 (2 and 7 Feb., 1689).

107. For the view that William III was illiberal in his views of prerogative government and of an independent judiciary, see D.A. Rubini, 'The Precarious Independence of the Judiciary, 1688-1701', L.Q.R., vol. 83, pp. 343-345 (1967).

the Channel; the Bloody Assizes could scarcely have been forgotten.¹⁰⁸

Hilary term, 1689, was not kept. James II had fled to France in December, 1688; the Throne had been declared vacant; but William and Mary had not yet accepted the Crown. Thus there were no valid judges. Needless to say, none of James's incompetent and biased judges were continued in office. Shortly after being proclaimed king, William appointed a judge for each of the high courts so that they could resume their business.¹⁰⁹ In the exchequer Baron Nevile was re-appointed but only during the pleasure of the Crown. This was just a temporary measure, however. A month later he received a new patent to hold during good behaviour, and the bench was soon filled by patents for secure tenure. The most probable reason for Nevile's re-appointment with insecure tenure at first is that it was only a temporary arrangement, while William cautiously surveyed the field before making further appointments. But also it may have been a pro forma assertion by the king of his prerogative to appoint judges with insecure tenure, since this had been just challenged, though unsuccessfully. William III, Mary II, and Anne wisely appointed all of their judges to hold quamdiu se bene gesserint and kept them out of politics.

Secure tenure in practice as a matter of grace, however, did not satisfy. In 1692 a bill¹¹⁰ passed both houses of parliament which would

108. See J.C. Corson, 'Judges and Statutory Tenure in England in the Seventeenth Century,' Juridical Review, vol. 42, pp. 136 at 145-147 (1930), this article has a strong Jacobite bias; however, it is not an unreasonable piece, especially for the period after 1660, the time of the bad (i.e. Roman Catholic) Stuarts; this was the only unforgiveable sin of the Scottish dynasty.

109. Foss, Judges, vol. 7, p. 291.

110. Lords Journ., vol. 15, pp. 83, 89, 91 (1692); Com. Journ., vol. 10, pp. 678, 685 (1692).

have required it in all cases; but it was vetoed by the king.¹¹¹

The final step was taken with the passing of the Act of ^{Settlement} ~~Steelment~~ in 1701.¹¹² On 30 July, 1700, the duke of Gloucester died. He was the only surviving child of Princess Anne, the heir presumptive to the Throne.

It became thus obvious that, unless steps were taken, the Roman Catholic half-brother of Mary II and Anne would inherit the Crown. It was then an impossibility in fact for either William III or Anne to have children. The return of the Stuart male line could not have been allowed for two reasons. Firstly, Britain could not then have endured a Roman Catholic sovereign. Secondly, James Stuart would have allied England with France. France would then have been able to conquer the Netherlands and upset the political balance of Europe. Thus would have been undone the life's mission of William III; this could not have been tolerated.

The result of this situation was an act of parliament initiated by King William III establishing the Protestant succession to the English Crown. The members of parliament recognized their opportunity to pass as a part of this act a number of measures which were unpleasant, theoretically and personally, to the king. One of these was the legislative requirement of secure judicial tenure. The acceptance of this was part of the price William III had to pay in order to keep Britain Protestant

111. Lords Journ., vol. 15, p. 92 (24 Feb. 1692); it was badly drafted and unfair to the king according to Corson, 'Judges and Statutory Tenure in England in the Seventeenth Century,' Juridical Review, vol. 42, pp. 136 at 148 (1930); see also G. Burnet, History of his Own Times (1823 ed.) vol. 4, pp. 148, 149.

112. Stat. 12 & 13 Will. 3 [1701] c. 2, s. 3, cl. 7; Stat. Realm, vol. 7, p. 637; this part of the Act of Settlement remains in force though taken off the books by a series of statutes which preclude the revival of the old regime: Statute Law Revision and Civil Procedure Act, 1881, Stat. 44 & 45 Vict. [1881] c. 59; Statute Law Revision Act, 1894, Stat. 57 & 58 Vict. [1894] c. 56; Statute Law Revision Act, 1908, Stat. 8 Edw. 7 [1908] c. 49; Statute Law Revision Act, 1927, Stat. 17 & 18 Geo. 5 [1927] c. 42; Statute Law Revision Act, 1964, Stat. 1964, c. 79; W.S. Holdsworth, 'The Constitutional Position of the Judges,' L.Q.R., vol. 48, pp. 25 at 29 (1932).

and the Netherlands free.¹¹³ It was not in fact a very bitter pill for him to swallow, because the Act of Settlement was not to take effect until both Princes Anne (later Queen Anne) and himself were dead, and then only if they died without issue. On 1 August, 1714, the Act of Settlement came into effect, and from then onwards the barons received their commissions to exercise their offices quamdiu se bene gesserint as required by this statute.

3. Termination of Office

The next matter to be considered is the termination of judicial office. Of the barons of the exchequer appointed between 1550 and 1714, almost half died in office.¹¹⁴

113. J.C. Corson, 'Judges and Statutory Tenure in England in the Seventeenth Century,' Juridical Review, vol. 42, pp. 136 at 149 (1930); the following is Jacobite propaganda: Ruvigny and Cranstoun Metcalfe, 'The Passing of the Act of Settlement,' Nineteenth Century, vol. 51, p. 305 (1902); the following two pieces are too superficial to be of value: H.L. Carson, 'The Evolution of the Independence of the Judiciary', Green Bag, vol. 26, p. 344 (1914); I.N. Tarkow, 'The Significance of the Act of Settlement in the Evolution of English Democracy', Pol. Sci. Quart., vol. 58, p. 537 (1943).

114. They are, in order of appointment and with dates of death: Curson (1547), Darnall (1549), Saxilby (1562), Bradshaw (1553), Brooke (1558), Saunders (1576), Freville (1579), Pymme (1562), Birch (1581), Lord (1566), Greek (1577), Bell (1577), Jeffray (1578), Muschampe (1579), Manwood (1592), Sotherton (1605), Flowerdew (1586), Gent (1595), Clarke (1607), Peryam (1604), Ewens (1598), Savile (1607), Snigge (1617), Altham (1617), Tanfield (1625), Heron (1609), Bromely (1627), Denham (1639), Walter (1630), J. Weston (1634), Hendon (1644), E. Atkins (1669), Gates (1650), Rigby (1650), Steele (1655), C. Turner (1675), Littleton (1675), E. Turneur (1676), R. Weston (1681), Ward (1714), Bury (1722), Smith (1726), Lovell (1713); this list includes those barons who died so soon after the death of a sovereign that there was not time to re-appoint them, and it included Chief Baron Walter who was in office de jure only.

Five other barons resigned.¹¹⁵ Most of the rest¹¹⁶ were moved to other courts as a promotion; this involved the automatic termination of their patents as barons.

When a baron was promoted to either the common pleas or the king's bench, his former office became void in law.¹¹⁷ This resulted automatically from the acceptance of the commission for the incompatible office. The theories of incompatible offices, however, seem never to have been fully developed. When Robert Blage, the king's remembrancer, was made a baron of the exchequer in 1511, it was held that his former office was void,¹¹⁸ even though he had the express permission of the king to hold the two offices simultaneously.¹¹⁹ In 1675 when the king's remembrancer, Vere Bertie, was made a baron, his former office became void in law.¹²⁰

115. They are, in order of appointment and with dates of resignation: Trevor (1649), who refused to serve without a proper royal commission; Thurland (1679) because of old age and imminent dismissal; Leeke (1679), who never sat in court though he must have accepted his appointment since his patent was enrolled, at this time the acceptance of a judicial position involved danger and disrespect; R. Atkyns (1694) and Lechmere (1700) because of old age.

116. They are, in order of appointment and with dates of promotion: Shute (1586), Clinch (1584), Fleming (1607), Vernon (1631), Lane (1645), Pepys (1654), Bridgeman (1660), Hale (1671), Rainsford (1669), Wyndham (1673), Bertie (1678), Raymond (1680), Street (1684), Wright (1685), Neville (1691), Jenner (1688), Milton (1687), T. Powell (1688), Turton (1696), J. Powell (1695), Powis (1701), Blencowe (1697), Tracy (1702), Price (1726).

117. Memo., Cro. Car. 127, 79, Eng. Rep. 711 (K.B., 1628).

118. R. v. Blage, 2 Dyer 197, 73 Eng. Rep. 436.

119. L. & P., vol. 1, part 1, p. 434, no. 804(42).

120. Fanshawe by Collins v. Aylofffe, E.126/13, f. 328 (1681) (dictum); Aylofffe v. Castleton, E.126/13, ff. 51v-53 (1678) (dictum); Castleton v. Fanshawe, E.126/15, ff. 306v at 308 (1689) (dictum).

Five other barons resigned.¹¹⁵ Most of the rest¹¹⁶ were moved to other courts as a promotion; this involved the automatic termination of their patents as barons.

When a baron was promoted to either the common pleas or the king's bench, his former office became void in law.¹¹⁷ This resulted automatically from the acceptance of the commission for the incompatible office. The theories of incompatible offices, however, seem never to have been fully developed. When Robert Blage, the king's remembrancer, was made a baron of the exchequer in 1511, it was held that his former office was void,¹¹⁸ even though he had the express permission of the king to hold the two offices simultaneously.¹¹⁹ In 1675 when the king's remembrancer, Vere Bertie, was made a baron, his former office became void in law.¹²⁰

115. They are, in order of appointment and with dates of resignation: Trevor (1649), who refused to serve without a proper royal commission; Thurland (1679) because of old age and imminent dismissal; Leeke (1679), who never sat in court though he must have accepted his appointment since his patent was enrolled, at this time the acceptance of a judicial position involved danger and disrespect; R. Atkyns (1694) and Lechmere (1700) because of old age.

116. They are, in order of appointment and with dates of promotion: Shute (1586), Clinch (1584), Fleming (1607), Vernon (1631), Lane (1645), Pepys (1654), Bridgeman (1660), Hale (1671), Rainsford (1669), Wyndham (1673), Bertie (1678), Raymond (1680), Street (1684), Wright (1685), Neville (1691), Jenner (1688), Milton (1687), T. Powell (1688), Turton (1696), J. Powell (1695), Powis (1701), Blencowe (1697), Tracy (1702), Price (1726).

117. Memo., Cro. Car. 127, 79, Eng. Rep. 711 (K.B., 1628).

118. *R. v. Blage*, 2 Dyer 197, 73 Eng. Rep. 436.

119. *L. & P.*, vol. 1, part 1, p. 434, no. 804(42).

120. Fanshawe by Collins v. Aylofffe, E.126/13, f. 328 (1681) (dictum); Aylofffe v. Castleton, E.126/13, ff. 51v-53 (1678) (dictum); Castleton v. Fanshawe, E.126/15, ff. 306v at 308 (1689) (dictum).

However, he did not have permission to hold both together. From 1483 to his death in 1486, Chief Baron Starkie was also a justice of the common pleas,¹²¹ and Richard Brooke held these same two offices in conjunction from 1526 until 1529.¹²² They both had express permission to do this,¹²³ and it was not challenged by the courts. However, Dyer states in 1558 that the reason that his patent as a justice of the common pleas was void when he became a justice of the queen's bench was that the authority of the latter to reverse the decisions of the former on writs of error rendered the two offices incompatible.¹²⁴ Baron Smith in 1708 was given special permission to keep his seat on the exchequer bench in Westminster when he was sent to Edinburgh to sit in the Scottish exchequer as chief baron to settle the affairs of that court as a consequence of the union of the two kingdoms.¹²⁵

The theory for this was probably that the acceptance of a second full time office was an abandonment of the first. An office was forfeited by non-user, or non-feasance, when the forfeiture was established in court upon a scire facias.¹²⁶ Non-user is evidence of abandonment. However, the acceptance of a judicial office was a matter of record; it did not take effect until it was enrolled in chancery. Since the fact of the second office was a matter of record, it need not be established by a trial. The abandonment of the first office was thus a matter of record, and the patentee was estopped from denying the abandonment of the first office since the patent for the second office was enrolled at his request. Therefore, the patentee was denied as a matter of law

121. Y.B. Hil. 1 Hen. 7, pl. 13, f. 10b (1486); Foss, Biog. Dict., pp. 629, 630.

122. Foss. Biog. Dict., p. 129.

123. Cal. Pat. Rolls [1485-1494] p. 9.

124. Dyer's Case, 2 Dyer 158, 73 Eng. Rep. 344 (1558).

125. Foss, Biog. Dict., p. 617.

126. See below.

to assert his earlier patent. Moreover, a latter instrument prevails over a former inconsistent one. One is tempted to conclude that in fact as well as in law the acceptance of a second appointment was an abandonment of the first position, since it is not physically possible that a man can sit simultaneously in two courts. However, the lord chancellor and the chief justice of the king's bench were required ex officio to do this in connection with the court of star chamber, which kept the regular law terms. Therefore, the incompatibility of any two offices seems to have been a matter of tradition rather than logic.

It can be surmised that, when a judge was moved from one court to another, the situation in regard to the former could be considered as an abandonment or voluntary forfeiture rather than a removal. If he did not want to leave, then he could refuse the second commission.

It is to be noted that most of the promotions of this kind occurred after the Restoration. Promotion as a recognition of services became frequent enough to appear to have been a general practice.

Judicial commissions expired upon the demise of the Crown.¹²⁷ If a judge was to continue in office, he must have received a new patent from the new monarch. In the period 1550-1714 all but nine¹²⁸ were continued in office upon the accession of the new sovereign. Of these nine, the first seven were abandoned for political motives upon the accessions of Elizabeth I, Charles II, and William III and Mary II. Elizabeth I did

127. Note, Y.B. Mich. 1 Ric. 3, pl. 3, f. 4 (1483); Note, 2 Dyer 165, 73 Eng. Rep. 359 (1558); Note, Moore (K.B.) 176, 72 Eng. Rep. 514 (1581); Note, 7 Co. Rep. 29, 77 Eng. Rep. 456 (1603); Note 121, Benloe, 79, 123 Eng. Rep. 61 (1559); Note 113, 1 And. 44, 123 Eng. Rep. 344, (1559); R.v. Foster, 1 Freem. 70, 89 Eng. Rep. 53 (Ch. 1672); Brooke, Abr., "Office," no. 25 (dictum).

128. They are, in order of appointment and with dates of expiry: Brown (1558), Higham (1558), Wilde (1653 and 1660), Thorpe (1660), Parker (1660), E. Atkyns, Jr. (1689), Rotherham (1689), Hatsell (1702), Banastre (1714).

not keep two of the four. Charles II and William and Mary understandably did not keep any of their predecessors' judges. Hatsell and Banastre were ignored by Anne and George I respectively probably because it was felt that they were rather poor judges.¹²⁹

The patents of the new monarchs which re-appointed the barons to their former places did not mention any former office; they were the same as those for initial appointments. It is interesting to note that, when Mary I married Philip of Spain and he became king of England jure uxoris, it was felt necessary to give the judges new patents even though Philip was expressly excluded from regnal powers by an act of parliament.¹³⁰

In theory the duties of the barons were personal to the monarch. They handled what was his personal or private financial affairs. Moreover, the sovereign was the "fountain of justice," and its administration was a personal delegation of his authority, which authority was a part of the royal prerogative.¹³¹ As the personal servant exercising the prerogative of and for a particular king, the relationship, like classic feudalism, ended upon the death of either party. Thus upon the demise of the Crown, all patents of the judges expired, and the courts were without jurisdiction.

Thus tenure during good behaviour was not so secure as it might have appeared at first glance. The patents to the judges never bound the successors to the Crown. Therefore, each monarch upon his succession had the opportunity to appoint to the courts in his own discretion as he thought best.

129. Foss, Biog. Dict., pp. 52, 329.

130. Stat. 1 Mar. 1 [1554] stat. 3, c. 2, ss. 2, 3, Stat. Realm, vol. 4, part 1, pp. 222 at 225; see also stat. 11 & 2 Phil. & Mar. 1 [1554] c.1, Stat. Realm, vol. 4, part 1, p. 238.

131. Blackstone, Commentaries, vol. 1, p. 267; Holdsworth, H.E.L., vol. 9, p. 414.

When a sovereign died during the legal term, there was a great disturbance to the administration of justice. The commissions of the high court judges lapsed immediately, and all judicial proceedings came to a halt because there were no longer any judges. This also caused inconvenience to the offices which handled the various royal seals because new patents had to be issued as quickly as possible.

This situation was handled in the seventeenth century by the issue of a royal proclamation which continued the former judges in office until further order of the new king. Thus James I, who succeeded to the Throne on 24 March, 1603, which was out of term, issued such a proclamation on 5 April, less than a fortnight later.¹³² The judges were given their new patents shortly thereafter when it was more convenient. The puisne barons received the warrants for theirs on 14 April, and the chief baron on 26 April.¹³³ Charles I issued a similar proclamation on 28 March, 1625,¹³⁴ the day after his accession. However, new patents were for some unknown reason never issued. James II became king on 6 February, 1685, and on the next day he issued a proclamation continuing the judges in office and also issued warrants for their new patents.¹³⁵ Upon the accession of William III and Mary II, there were no proclamations of this sort, needless to say.

In 1696 in order to minimize judicial inefficiency upon the accession of a new sovereign, a statute¹³⁶ was enacted which provided that the judges would be retained in office for six months after a demise of

132. A Booke of Proclamations (1609) pp. 3-5 (a copy is in S.P.14/73); Cal. S.P. Dom. [1603-1610] p. 2.

133. See the notes to the chart in appendix 4-A.

134. S.P.45/10, no. 3; Cal. S.P. Dom. [1625, 1626] p. 1; D.K. Rept. No. 43 (1882) App., p. 1.

135. S.P.44/56, p. 165; Cal. S.P. Dom. [1685] p. 3, no. 11; T.52/10, pp. 10, 11; Cal. Treas. Books [1685-1689] vol. 8, part 1, p. 1.

136. Stat. 7 & 8 Will. 3 [1696] c. 27, s. 20, Stat. Realm, vol. 7, p. 117; explained in Stat. 1 Ann. [1702] stat. 1, c. 2, Stat. Realm, vol. 8, pp. 5, 6.

the Crown unless the new king revoked their commissions. In 1760 an act¹³⁷ was passed which declared that no judicial patent expired upon the expiration of a king. This was the climax of the history of secure judicial tenure. By this time all of the judges were required to be appointed only during good behaviour,¹³⁸ and now that commissions no longer were able to expire in the life time of the judge, it was as good as tenure for life for the "well-behaved" judge. The equity side of the exchequer was abolished long before judicial tenure was limited by a mandatory retirement age, which was not begun until 1959.¹³⁹

Those barons who were appointed to hold office during the pleasure of the Crown could be dismissed at any time and without any reason given. In fact nine of the barons of the exchequer were arbitrarily deprived of office.¹⁴⁰ One of these was Baron Thorpe, who held office during good behaviour; he was dismissed in 1655 by Oliver Cromwell without any trial at all in open disregard for the law.¹⁴¹

Although a judge may be made only by a commission, a type of letter patent, if he held by insecure tenure, he could be discharged by a simple writ under the great seal.¹⁴² It was called a "writ of ease." This accords with the general rule that an instrument can be revoked only by another of equal dignity. Writs of ease were simply notifications that the office in question had been terminated; there were no reasons given nor explanations required.

137. Stat. 1 Geo. 3 [1760] c. 23.

138. See above.

139. Judicial Pensions Act, 1959, stat. 8 Eliz. 2 [1959] c. 9, s. 2(1); R.M. Jackson, Machinery of Justice in England (4th ed. 1964) pp. 264, 265.

140. They are, in order of appointment and with dates of dismissal; Davenport (1641), R. Weston (1645), Thorpe (1655), W. Montagu (1686), Bramston (1679), Gregory (1686), Nevile (1685), Heath (1688), Ingolby (1688).

141. Foss, Biog. Dict., p. 660.

142. Brooke, Abr., "Commissions," no. 18, "Judges," no. 19.

In the case of tenure during good behaviour, the proper method of terminating the office was by a trial at common law upon a scire facias to show that the officer had not properly ^{demeaned} ~~demeaned~~ himself in his office. No baron was ever given an absolute legal interest in his office; at most he had a life estate with a condition subsequent, i.e. good behaviour. The action was brought by the Crown in the court of chancery.¹⁴³ The record upon which the action was founded was the enrolled patent in chancery. Since the office was a matter of record, it could only be terminated by another thing of record, a trial in court.¹⁴⁴ It was also appropriate in that the lord chancellor was the head of the judicial establishment. Scire facias was the proper action to show any cause for declaring an office void.

The termination of an office by a trial upon a scire facias was a forfeiture for the breach of a condition of the patent. In addition to the express condition of good behaviour, there were the implied conditions of the diligent and faithful exercise of the office.¹⁴⁵ However, mere non-user was not a sufficient cause for a forfeiture, there must have been some voluntary negligence connected with the non-attendance.¹⁴⁶

143. That grants of the king can be repealed only in chancery, see *R.v. Moleins*, Y.B. Hil. 21 Edw. 3, f. 47, pl. 68 (Ch. 1347); *contra*, *R.v. Kemp*, 12 Mod. 77, 88 Eng. Rep. 1176 (K.B. 1695), *N.B.* that *Simon Fanshawe v. Charles viscount Fanshawe*, which was about the office of queen's remembrancer, was in chancery.

144. Note, 2 Dyer 198, 73 Eng. Rep. 438; *Chester's Case*, 2 Dyer 210 at 211, 73 Eng. Rep. 465 at 466 (Ch. 1562).

145. E.g. *Bailiff of Reading's Case*, Y.B. Trin. 20 Edw. 4, f. 5, pl. 4 (K.B., 1480); anon., Y.B. Hil. 2 Hen. 7, pl. 10, f. 11 (C.P. 1487); *R.v. Toly*, 2 Dyer 197, 73 Eng. Rep. 436 (1522); *R.v. Eston*, 2 Dyer 198, 73 Eng. Rep. 437 (1534); *Reynel's Case*, 9 Co. Rep. 95, 77 Eng. Rep. 871 (Ch. 1612); *R.v. Ipswich*, 2 Salk. 434, 91 Eng. Rep. 378, 2 *Ld. Raym.* 1232, 92 Eng. Rep. 313 (K.B., 1705); *R.v. Wells*, 4 Burr. 1999, 98 Eng. Rep. 41 (K.B., 1767); *Co. Lit.*, f. 233a; *W. Hawkins, Pleas of the Crown* (1716) vol. 1, chap. 66, sec. 1.

146. E.g. *Reynel's Case*, 9 Co. Rep. 95 at 99, 77 Eng. Rep. 871 at 878 (Ch. 1612); *Hawkins, Pleas of the Crown*, vol. 1, chap. 66, sec. 1.

None of the barons were in fact ever sued by scire facias, though Walter and Thorpe almost were. However, this procedure was used in the time of Queen Anne by one reversioner of the office of queen's remembrancer against another.¹⁴⁷

Chief Baron Walter was suspended by the king from the exercise of his office. However, he still held office de jure and retained his rights to the fees and perquisites of his office.

A reversion to an office was a mere expectancy,¹⁴⁸ but the office itself was an incorporeal hereditament.¹⁴⁹ If the holder of an office was ejected, he could have an assize to recover the office since he was seised of it as a free tenement.¹⁵⁰

As a counter-balance to the requirement of secure judicial tenure, the Act of Settlement provided that the sovereign may remove a judge upon an Address of both houses of parliament. But note that it is the Crown not parliament that removes and that the Crown cannot act without the consent of both houses.

It was also possible for parliament to remove judges from office upon a conviction at a trial in the House of Lords after an impeachment by the House of Commons. Chief Baron Davenport and Baron Weston were impeached by the Commons in the Long Parliament in 1641, but they were never brought to trial. However, Weston was disabled to be a judge by the House of Commons; this unusual action was no doubt the result of the troubled times.

147. Fanshawe v. Fanshawe, see below section F.

148. Co. Lit., f. 3b.

149. Blackstone, Commentaries, vol. 2, p. 36.

150. E.g. Webb's Case, 8 Co. Rep., 45, 77 Eng. Rep. 541 (C.P. 1608); Vaux v. Jefferen, 2 Dyer 114, 73 Eng. Rep. 251 (1556); Case 56, Jenk. 126, 145 Eng. Rep. 89; Bagot v. Ive, Y.B. Trin. 9 Edw. 4, f. 6, pl. 2 (K.B. 1469) (semble); Garter King of Arms' Case, Y.B. Hil. 5 Edw. 4, f. 8b, pl. 1 (K.B. 1466) (semble).

In addition there was the possibility of removal upon a quo warranto or an information in the nature of a quo warranto.¹⁵¹ by process of inquisition¹⁵² or by criminal information.¹⁵³ An act of attainder was possible. Also there existed in theory the invocation of the general inquisitorial and judicial jurisdiction of the House of Lords.¹⁵⁴ However, none of the barons of the exchequer since 1550 were subjected to any of these procedures.

D. The Examiners

The duties of the examiners were to preside over the taking of the depositions of those witnesses who were examined in Westminster.¹⁵⁵ The examiner brought the prospective witness to a baron, administered the oath, and wrote the jurat; he presided over the taking of the deposition and kept the files of the interrogatories and depositions which had been administered before him. In theory he was required to hand these files over to the king's remembrancer within two years of their taking, but the practice was for the examiner to retain them until the expiration of his office.¹⁵⁶ The reason for the reluctance to part with the records was the right of officials to make, upon the payment of a fee, copies of all documents in their custody.

151. Blackstone, Commentaries, vol. 3, pp. 262, 263, vol. 4, p. 312; Halsbury, Laws of England, vol. 11, pp. 145-151.

152. E.g. R.v. Manlove, 3 Lev. 288, 83 Eng. Rep. 693 (Ch. 1690).

153. E.g. R.v. Lady Broughton, 2 Lev. 71, 83 Eng. Rep. 455 (K.B. 1672); Savage's Case, 2 Dyer 151, 73 Eng. Rep. 329 (K.B. 1558).

154. Halsbury, Laws of England, vol. 7, pp. 340, 341.

155. For a list of examiners, see app. 4-B; for a fuller discussion of the taking of depositions, see below, chap. 4, part 2.

156. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 238-244; see also the order of 6 Nov. 1645: E.126/5, f.121.

The original practice in the sixteenth century, no doubt, was for the barons personally to preside at the taking of the town depositions in their chambers. As the tide of equity business flowed higher and higher during the reigns of Elizabeth I and James I, the barons found it necessary to delegate this duty to one of their clerks or servants who acted in their name. No judicial discretion or legal ability was required for this routine duty; it was the town equivalent of the procedures before the lay commissioners who took depositions in the country, a practice which was in existence at least as early as 1565. Also the lord high chancellor used examiners at least as early as 1500.¹⁵⁷ The result was the loss of demeanor evidence and the opportunity to suppress improper testimony at a stage when it could have been most easily corrected. However, the gain in the better use of the judges' time and energies was deemed more important by the barons, who were, no doubt,^{ill} disposed to grudge the time spent in the tedious routine of presiding over the taking of the evidence.

In 1624 it was ordered by the barons that the examiners should be sworn.¹⁵⁸ Thus from this date or possibly earlier, each baron, including the cursitor baron, is seen to have appointed an examiner who acted in his name in this matter. Constructively the examination took place before the baron himself. The examiners never kept definite hours or sat in particular places. This was the subject of adverse comment in the seventeenth century,¹⁵⁹ but in the early nineteenth century it seems to

157. W.R. Jones, Elizabethan Court of Chancery (1967) pp. 135-143; for examiners in the 17th century, see D.E.C. Yale, Lord Nottingham's Treatises (1965) pp. 59, 60, 153-158.

158. E.124/35, f. 149; see app. 3-D.

159. Oxf. Bodl. MS. Tanner 318, f. 100 (c.1633): this is not to be accepted without question since it was there stated that the examiners were unsworn; either the document is wrongly dated or the author was misinformed.

have caused no great trouble.¹⁶⁰ In 1822 the examiners held other minor offices in the exchequer concurrently. This was considered reasonable and just, since the duties of the office did not require full-time attendance nor were the fees adequate wholly to support an officer. It was a tedious job but one which required skill and integrity.¹⁶¹ When the equity jurisdiction of the court was abolished in 1841, the office of examiner was abolished as well.¹⁶²

E. The Clerks to the Barons

The clerks to the barons were their private secretaries; their primary function was to handle the judges' paper work. They organized the swearing of oaths before the barons in chambers, and they procured the necessary signatures of the barons. They had a monopoly on taking affidavits in Westminster. Each was the personal servant of his baron and received no official salary; however, they were allowed to support themselves by taking fees. The chief baron had two clerks, and each puisne baron had one.¹⁶³

F. The King's Remembrancer

The king's remembrancer was the chief clerical officer of the equity side of the court, and his office handled all exchequer bills in equity.¹⁶⁴ He was the master of the office, the exchequer equivalent to the masters

160. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 239.

161. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 238, 239.

162. Stat. 5 Vict. [1841] c. 5, s. 15.

163. H.C. Sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 222-236.

164. Bohun, Practising Attorney (1724) p. 294; Squibb, 'A Book of all the Several Officers' (1642); S.P.14/32 part 22 (1608); S.P.16/309 part 9 (c.1631 or 1635); Hall, 'King's Remembrancer' S.P.16/377 part 2 (1637?); see app. 2-E, 3-E, 4-A, and 4-C.

in chancery;¹⁶⁵ and his office, "the exchequer office," performed the same functions as the chancery six clerks office, subpoena office, register's office, affidavit office, accountant-general's office, and report office.¹⁶⁶ The king's remembrancer's side also handled revenue business;¹⁶⁷ its revenue functions, in fact, had been well established before the fourteenth century. The king's remembrancer was also known as "his majesty's remembrancer" and "the first remembrancer." (The second remembrancer was the lord treasurer's remembrancer.) During the Interregnum, he was called "the first remembrancer" or "the lord protector's remembrancer."¹⁶⁸

As master of the office, the king's remembrancer appointed the sworn clerks, but by the sixteenth century this power had become restricted by the tradition that he must appoint one of the twenty-four side clerks.¹⁶⁹ Since it was the sworn clerks who appointed the side clerks, his control over promotion and staffing was somewhat limited. The equity records were officially in his custody,¹⁷⁰ but by the seventeenth century he no longer had actual control of them; the chief usher had the keys to the record rooms, and the sworn and side clerks had managed to

165. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 113. He had the same powers as the referee in chancery: sess. pap. 1810 (no. 362) vol. 2, pp. 591 at 630.

166. Fowler, Practice (1795) vol. 1, p. 10.

167. For the revenue duties, see J.F. Willard, 'Memoranda Rolls and the Remembrancers, 1282-1350' in Essays in Medieval History Presented to T.F. Tout, ed. by A.G. Little and F.M. Powicke (1925); G.A. Bonner, Office of the King's Remembrancer in England (1930); anon., 'A Short Account of the Office of the King's Remembrancer,' L.Q.R., vol. 44, p. 35 (1928) [poor]; W.V. Ball, 'The Central Office of the Supreme Court,' Camb. L. Journ., vol. 9, p. 107 (1945); S.P.9/209 part 11 (1608).

168. E.g. Cal. S.P. Dom. [1651-1652] p. 160, no. 60; Cal. S.P. Dom. [1656-1657] p. 77.

169. See below; see also H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143; H.C. sess. pap. 1810 (no. 362) vol. 2, pp. 591 at 626.

170. Practick Part of the Law (1681) p. 495; Bohun, Practicing Attorney (1724) p. 294.

establish an exclusive right to make searches and copies of them.¹⁷¹

While these responsibilities were strictly a matter of court administration, the more important of the king's remembrancer's duties were quasi-judicial. It was to him that all references in suits in equity were sent.¹⁷² He settled disputes in the pleadings involving scandal and impertinence. Also he kept all moneys paid into court,¹⁷³ took accounts, examined certain witnesses, kept exhibits and documents brought into court. He attended the sittings of the court and took the minutes of the decrees and orders.¹⁷⁴

Notwithstanding these important responsibilities, the king's remembrancer was appointed for life¹⁷⁵ and given the power to exercise his office by a deputy. The probable reason for this is that the practice was a custom derived from the fifteenth century when the only duties of the king's remembrancer were financial and required no exercise of judicial discretion. The business of the court after it acquired its equitable jurisdiction continued to be handled with efficiency by the king's remembrancers and their deputies, and so there was no reason to change the course of the momentum of practice, habit, and tradition. The first deputy king's remembrancer, John West, was appointed in 1616 by Sir Christopher Hatton, who had just become king's remembrancer.

171. See below, part 4.

172. Rule 57: Ordines Cancellariae (1698) p. 55.

173. H.C. sess. pap. 1810-11 (no. 246) vol. 3, pp. 961 at 979-981.

174. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 113, 114; Compleat Clerk in Court (1726) p. 151; Squibb, 'A Book of all the Several Officers' (1642) Rule 30: Ordines Cancellariae (1698) p. 31; cf. the registers in chancery: Jones, Elizabethan Court of Chancery, pp. 143-149; and Yale, Lord Nottingham's Treatises, pp. 64, 150-153.

175. He held during pleasure from 1310 to 1447 with one exception, and he held for life from 1447 until the nineteenth century: J.C. Sainty, 'The Tenure of Offices in the Exchequer,' E.H.R., vol. 80, pp. 449 at 452, 453 (1965).

Hatton was never expected to exercise the office; he only held it in trust for his wife's nephew, Thomas Fanshawe, an infant. However, West was kept as deputy king's remembrancer when Fanshawe became king's remembrancer three years later.¹⁷⁶ The office was exercised by a deputy almost continuously until 1823. In this year Thomas Steele, the king's remembrancer, died, and the Act of 1817¹⁷⁷ took effect to prevent the office from being any longer exercised by a deputy. The purpose of this Act was to abolish sinecures, most of which were in other courts. A special committee which made a thorough investigation of the administration of the law courts had recommended inter alia that those offices which were exercised by deputy should be exercised in person even though they were not sinecures.¹⁷⁸ The Act provided for the extinguishing of the sinecures by forcing their owners to sell out to the government and provided that no future patent should allow an office to be exercised by a deputy. Steele died in 1823, his deputy, H.W. Vincent, was made king's remembrancer in his place,¹⁷⁹ and there were no more deputy king's remembrancers.

In 1820 the broad duties and unchecked discretion of the office were split up. After this date the king's remembrancer shared his powers and responsibilities with the newly created officers, the accountant general, the master of the court of exchequer, and the clerk of the reports.¹⁸⁰

176. See App. 2-F-1 and 4-A.

177. Stat. 57 Geo. 3 [1817] c. 60.

178. H.C. sess. pap. 1810 (no. 362) vol. 2, pp. 591 at 597; Hansard, Parl. Deb. vol. 17 (1st ser.) p. 5vii (20 June, 1810); Hansard, Parl. Deb. vol. 10 (new ser.) pp. 151, 166 (13 & 16 Feb., 1824).

179. He was appointed on 18 Dec. 1823: G.A. Bonner, Office of the King's Remembrancer in England (1930) p. 47; he was sworn on 6 Feb. 1824: M'Cle. 45, 148 Eng. Rep. 20.

180. See below, section G.

The remarkable thing about the office of the king's remembrancer is that, even though it was only granted for life, it was kept in the Fanshawe family from 1565 until 1716 when the eldest branch died out. Therefore a short digression showing how this family succeeded in staying in office may be interesting and revealing.

The first of the "dynasty" was Henry Fanshawe (d. 1568), who began as a sworn clerk in the queen's remembrancer's office and an under-chamberlain of the exchequer.¹⁸¹ On 12 December 1561, he managed to acquire a patent for the reversion to the office of queen's remembrancer upon the surrender of the same reversion, which had been previously granted to Francis Allan.¹⁸² He, no doubt, had bought out Allen's interest. Henry Fanshawe succeeded to the office according to his patent in 1565 when Thomas Saunder died. On 10 February 1567, Bernard Hampton was given the reversion to the office after Henry Fanshawe.¹⁸³

Henry Fanshawe had no sons, but his nephew, Thomas Fanshawe (d. 1601), lived with him in Warwick Lane in London and was one of the sworn clerks in his office. Henry Fanshawe on 5 July 1568, only a few months before his death, bought out Hampton's interest in his office and got the reversion for Thomas.¹⁸⁴ On 28 October 1568, Henry died and Thomas succeeded to the office of queen's remembrancer. Thomas Fanshawe was an active and competent man; it was he who really founded the fortunes of the family. Moreover, he was in office during the formative period of the equity jurisdiction and was probably the man most responsible for

181. All of the genealogical information in this section comes from H.C. Fanshawe, The History of the Fanshawe Family (1927); see also D.N.B., vol. 6, pp. 1047-1054; see also the chart in app. 4-D.

182. Cal. Pat. Rolls [1560-1563] p. 304; see also App. 4-A.

183. Cal. Pat. Rolls [1566-1569] p. 65, no. 462.

184. Cal. Pat. Rolls [1566-1569] p. 318, no. 1864; see also App. 4-A.

settling the clerical procedures of the offices and for the beginning of the preservation of the court records. He is frequently mentioned in the law reports as having given advice to the court.¹⁸⁵ He was a member of the Middle Temple and a member of Parliament in 1572, 1584, 1588, 1593, and 1597.¹⁸⁶ In 1599 he copied and commented upon Peter Osborne's tract, The Practice of the Exchequer Court (1572); this was done for lord Buckhurst, the recently appointed lord high treasurer.¹⁸⁷ Thomas Fanshawe's first wife, Mary Bouchier (d. 1578), whom he married sometime between 1566 and 1569, was the niece of Sir Walter Mildmay, the chancellor of the exchequer. Whether the exchequer connection was the result or the cause of the marriage is unclear, but certainly, once the connections had been made, Mildmay and Fanshawe must have worked together very closely both in the exchequer and in Parliament.¹⁸⁸

On 1 May 1572 the reversion of the office was granted to Christopher (later Sir Christopher) Hatton (d. 1619).¹⁸⁹ Sir Christopher Hatton, the ultimate heir of his eponymous cousin the lord high chancellor, later married Alice, one of the daughters of Thomas Fanshawe.¹⁹⁰ Thomas died in office in 1601 having neglected or failed to get a reversion for his son and heir, Henry (later Sir Henry) Fanshawe (d. 1616). However, Henry succeeded in getting a patent appointing him to the office within

185. E.g. Case 36, Sav. 14, 123 Eng. Rep. 985 (Ex. 1581); R.v. Mansfield, Sav. 25, 123 Eng. Rep. 992 (Ex. 1582); Puckering v. Fisher, Sav. 29, 123 Eng. Rep. 994 (Ex. 1582); Case 95, Sav. 45, 123 Eng. Rep. 1003 (Ex. 1583); Case 103, Sav. 49, 123 Eng. Rep. 1005 (Ex. 1583); Case 109, Sav. 52, 123 Eng. Rep. 1007 (Ex. 1583).

186. D.N.B., vol. 6, p. 1053; J. and J.A. Venn, Alumni Cantabrigienses, part 1, vol. 2, p. 120.

187. As a result the printer in 1658 mistakenly attributed the work to Fanshawe: see Bryson, "Exchequer Equity Bibliography," Am. Jour. Leg. Hist., vol. 14, pp. 333-339, 348.

188. Genealogical Memoranda Relating to the Family of Mildmay (1871) pp. 8, 12; Fanshawe, Hist. of the Fanshawe Family, p. 22.

189. Cal. Pat. Rolls [1569-1572] p. 339, no. 2451.

190. Fanshawe, Hist. of the Fanshawe Family, pp. 27, 28.

a month of his father's death.¹⁹¹

On 14 July 1604 Sir Henry procured a grant of the reversion of the office to John Fanshawe, his first cousin who was a minor clerk in the office, and to Nathaniel Duckett, a cousin and a sworn clerk. They were to hold the office after his death in trust for his minor son Thomas Fanshawe (later first viscount Fanshawe) (d. 1665). However, John Fanshawe died in late 1615 or early 1616 and Sir Henry followed him on 10 March 1616.¹⁹² It was felt desirable to rearrange the trust, and so on 21 March 1616 a grant was made to Sir Christopher Hatton with a reversion to Sir Arthur Harris, both grants being in trust for the children of the late Sir Henry Fanshawe.¹⁹³ Sir Arthur Harris was a first cousin of Thomas Fanshawe (d. 1665). The trust was necessary because an office could not be exercised by a minor.

Sir Christopher Hatton, being only the trustee of the king's remembrancer's office, performed his duties through a deputy, John West, who was one of the sworn clerks.¹⁹⁴ This was the beginning of the general employment of deputy king's remembrancers. Hatton died on 10 September 1619; Thomas Fanshawe, the beneficiary of the trust, was then of age, and so a new grant was obtained on 22 September 1619. This was to Thomas with a reversion to Harris as trustee for the children of Sir Henry Fanshawe (d. 1616), i.e. the heirs presumptive of Thomas.¹⁹⁵ Thomas did not marry until 1627. By this time the Fanshawe's had begun to look on the office of king's remembrancer more as a part of the family

191. This patent did not mention Hatton's interest, nor were any reversions granted.

192. Fanshawe, Hist. of the Fanshawe Family, pp. 50-52.

193. The date is given as 19 March 1616 in Cal. S.P. Dom. [1611-1618] p. 355, see also p. 357 (27 Mar. 1616); see App. 4-A and 4-D.

194. See App. 2-F-1 and 4-E.

195. The date is given as 17 Sept. 1619 in Cal. S.P. Dom. [1619-1623] p. 78, see also p. 82 (2 Oct. 1619); see App. 4-D.

endowment than as an occupation. The deputy received a salary which was considerably less than the profits derived from the office.

Sir Thomas Fanshawe (d. 1665) had a son, Henry, who was born in 1630 but who lived less than four months. His second son, William, was born in 1631, and Thomas, his eventual heir, was born in 1632. As a result of the enlargement of his family, Sir Thomas decided to rearrange the settlement of the office. On 9 July 1631 he received a new grant to himself with reversions first to his brother Simon (later Sir Simon) Fanshawe (d. 1680), a sworn clerk, and then to Sir George Sands.¹⁹⁶ In 1641 Sir Thomas "sold" the office to his youngest brother, Richard Fanshawe (d. 1666), who was later created a baronet. The arrangement was that Richard should be made king's remembrancer and should account for the profits of the office to Sir Thomas and if he would pay Sir Thomas 8000 pounds within seven years, then he should thereafter keep the profits for himself.¹⁹⁷ In accordance with this agreement a grant was made on 5 August 1641 to Richard Fanshawe with reversions to William (later the third baronet) Aylofffe (d. 1675) and then to Rowland Litton. William Aylofffe was a first cousin of Sir Thomas and Richard Fanshawe. The outbreak of the Civil War prevented Richard from paying the money to his brother. In 1644 Humphrey Salwey was made king's remembrancer. The loss of the office to the Fanshawes was the result of their royalist loyalties. William Aylofffe petitioned unsuccessfully in 1647 to be made king's remembrancer on the grounds that the "delinquency" of Richard Fanshawe did not invalidate his reversion.¹⁹⁸

196. T. Rymer, Foedera (3d ed. 1743) vol. 8, part 3, p. 221; Cal. S.P. Dom. [1631-1633] p. 102; see App. 4-A, 4-D, and 4-E.

197. A. Fanshawe, Memoirs of Ann Lady Fanshawe, ed. H.C. Fanshawe (1907) pp. 29, 30.

198. H.M.C. Rept. No. 6, p. 209.

Salwey also seems to have had some trouble at this time, but he managed to retain his office.¹⁹⁹

Salwey was succeeded in 1654 by Francis Burwell, and he was succeeded in 1658 by John Dodington. Dodington was not well thought of by the barons, and they required him to find a deputy before they would admit him; two days later he was sworn into office, but the barons declared that there were plenty of precedents for not admitting incompetent people to public office.²⁰⁰ It is interesting to note that no reversions were granted during the period of parliamentary control and the Interregnum. It was not until the nineteenth century, however, that reversions to offices were legally forbidden.²⁰¹

In 1660 Parliament restored the Stuarts as kings, and they restored the Fanshawes as king's remembrancers. Sir Thomas Fanshawe (d. 1665) received a new grant dated 7 August 1660 which included reversions to his son Thomas (d. 1674), then to Vere Bertie, and then to Henry Ayloffe.²⁰² Henry Ayloffe was the youngest brother of Sir William Ayloffe (d. 1675) and a cousin of the Fanshawes; he and Bertie were to hold the office as trustees for the Fanshawe family. By way of reward for his loyalties to the Stuarts and because of his hardships under Cromwell, Sir Thomas Fanshawe was created viscount Fanshawe in September 1661. He died in March 1665, and his son Thomas (d. 1674) succeeded him as viscount and as king's remembrancer.

199. See Lords Journ., vol. 9, p. 518, and vol. 10, p. 117.

200. Note, Hardr. 130, 145 Eng. Rep. 415.

201. See stat. 48 Geo. 3 [1808] c. 50; stat. 50 Geo. 3 [1810] c. 88; stat. 52 Geo. 3 [1812] c. 40.

202. Cal. S.P. Dom. [1660-1661] p. 208; see App. 4-A and 4-D.

In 1674 a series of rather complicated legal maneuvers began. In that year the second viscount Fanshawe died having made a fairly sophisticated will providing for his family out of, inter alia, the profits of the office of the king's remembrancer. Vere Bertie succeeded to the trusteeship of that office according to the patent. In the same year lady Fanshawe sued Bertie, Aylofffe, and Henry Fanshawe as executors of the will of the second viscount Fanshawe or as trustees for her jointure of 600 pounds per annum payable out of the profits of the office.²⁰³

In February 1675 Sarah lady Fanshawe, the daughter of Sir John Evelyn and the widow of Thomas second viscount Fanshawe, married George fifth viscount Castleton.²⁰⁴ Bertie resigned in June 1675 to become a baron of the exchequer, and Henry Aylofffe became king's remembrancer. Since the death of her first husband lady Castleton had been very active in the interests of her family;²⁰⁵ she succeeded by 25 November in having the office of the king's remembrancer re-settled in a very complicated way in order to provide for her minor son, Evelyn, the third viscount Fanshawe, and his heirs so that the profits of the office would continue to support the dignity of the peerage. This new patent granted a series of reversions to Henry, Charles, and Simon Fanshawe, the three uncles of the infant third viscount, in trust for him and his successors to the title; thus there was a slightly different succession provided for the legal and equitable estates in the office.²⁰⁶

203. See E.133/52/8 and E.133/52/14.

204. G.E.C., vol. 3, p. 100, vol. 5, p. 256.

205. S.P.44/46, p. 53 (10 Oct. 1675); Cal. Treas. Books, vol. 4, pp. 336, 340; Fanshawe, Hist. of the Fanshawe Family, p. 120.

206. See App. 4-A and 4-D.

In 1675 Tobias Eden, the deputy king's remembrancer, sued Charles Fanshawe, Sir Thomas Fanshawe, and Evelyn viscount Fanshawe in order to be re-instated as deputy,²⁰⁷ and he sued Bertie, the king's remembrancer, for an accounting of money due to him out of the office.²⁰⁸ In this same year the trust in favor of viscount Fanshawe was decreed in the case of Evelyn viscount Fanshawe by Sir John Evelyn, his next friend v. Sarah viscountess Fanshawe, Bertie, Henry Fanshawe, Charles Fanshawe, Sir Thomas Fanshawe, and Eden,²⁰⁹ and the king's remembrancer was ordered to make an account. This must have been a friendly suit for a decree to have been made within a year in such a tangled up business. In 1676 there began an involved and drawn out suit over the profits of the office, the accounts of the deputy to the king's remembrancer, and his accounts to the beneficiaries of the trust, all of which was further complicated by the minority of viscount Fanshawe: Evelyn viscount Fanshawe, an infant, by Henry Fanshawe his next friend v. Aylofffe, Eden, Sir Thomas Fanshawe, and Charles Fanshawe.²¹⁰ Connected with this suit was Aylofffe v. George viscount Castleton, lady Castleton, Evelyn viscount Fanshawe, Henry Fanshawe, Charles Fanshawe, Sir Thomas Fanshawe, Eden, Atkyns, and Eyres²¹¹ in which Aylofffe attempted by means of a bill of interpleader to have the deputy king's remembrancer account directly to the beneficiaries of the trust. Aylofffe exercised his office by a deputy, and, since he held it in trust, he had to account to be beneficiaries for the profits; all of this litigation must have been extremely costly, and Aylofffe, no

207. E.112/459/1193.

208. See E.133/49/28.

209. E.126/12, ff. 141v-143v, 324, 329; E.126/13, ff. 92v, 114; E.126/15, ff. 306v-310; E.133/52/13.

210. E.112/458/1138; E.112/465/1604; E.126/13, ff. 3, 37, 44v, 119, 119v, 127, 282.

211. E.126/13, ff. 38v, 51v-53.

doubt, wanted to escape the inevitable entanglements of such suits in equity in which he had no significant interest. The result of the failure of this bill was another suit in the very next year: Evelyn viscount Fanshawe by Samuel Collins his next friend v. Aylofffe.²¹² In 1687 Evelyn third viscount Fanshawe died aged eighteen, and the litigation seems to have come to an end in 1689 with the decree in the suit of George viscount Castleton and lady Castleton v. Charles viscount Fanshawe, Sir Thomas Fanshawe, Atkyns, Aylofffe, Eyres, and Eden.²¹³ This tedious exposition barely scratches the surface of this mountain of litigation over the wills and estates, trusts and accounts in connection with the office of the king's remembrancer in this fifteen year period. There were other additional suits involving the same issues but with different combinations of parties.²¹⁴

These lawsuits could well have been the model for Jarndyce v. Jarndyce.²¹⁵ But they should be understood in the context of the times. If there was a huge backlog of untried cases in the early nineteenth century chancery, this was not true of the late seventeenth century exchequer. The litigation over the family "property" of the Fanshawes merely reflected the complicated dispositions and settlements then in general use to perpetuate assets of wealth, and in the devolutions of interests the inevitable occurrences of infancies lead readily to litigation. There is no evidence that the Fanshawe family suffered from animosities; they were merely involved in elaborate schemes of settlement which from time to time necessitated resort to the courts to straighten out ensuing tangles and to cure ^{unforeseen} ~~unforseen~~ troubles.

212. E.112/465/1628; E.126/13, ff. 224, 323, 328, 329.

213. E.112/712/2061; E.126/15, ff. 306v-310.

214. A large number of office copies and bills of costs from these suits are now among the Finch-Hatton papers in the Northamptonshire Record Office.

215. See C. Dickens, Bleak House (1852, 1853).

Returning to the office of the king's remembrancer in 1687, we find Evelyn third viscount Fanshawe dead unmarried; his oldest uncle, Henry Fanshawe, had predeceased him in 1685 also without issue. The beneficial interest in the office and the viscountcy therefore passed to Charles Fanshawe. In 1708 Henry Aylofffe died, and Charles fourth viscount Fanshawe was the next reversioner in the patent.

However, Charles was a Jacobite and refused to swear the oath of allegiance to Queen Anne. He had been one of only three to speak in favor of James II in Parliament in 1689 after James had fled from England,²¹⁶ and in 1692 he had been arrested for high treason and imprisoned in the Tower of London.²¹⁷ He could not have been admitted to the office of queen's remembrancer without having sworn the oaths, and so his younger brother Simon, the next reversioner, brought a scire facias against him in chancery for his refusal to act. Charles' reversionary rights were suppressed for non-user, and Simon was put into office.²¹⁸ A suit in the exchequer ^{determined} ~~declared~~ that Charles had forfeited not only his rights to exercise the office under the patent but also his beneficial rights to the profits of the office under the trust.²¹⁹ Charles, an old bachelor, died in 1710, and Simon, also unmarried, became the fifth and last viscount Fanshawe. He died in 1716; the title became extinct, and the office of king's remembrancer went to the husband of Queen Anne's former favorite, Abigail Hill, later lady Masham.^{219a}

216. T.B. Macaulay, History of England from the Accession of James II, ed. C.H. Firth (1914) vol. 3, pp. 1275, 1276; see also G.E.C., vol. 5, p. 256.

217. Fanshawe, Hist. of the Fanshawe Family, p. 123; H.M.C. Rept. No. 71, vol. 4, p. 125, no. 236 (6 May 1692).

218. See E.159/553 Mich. 7 Ann. recorda ro. 122 in which Stevens was made custodian of the office pendente lite; the end of the litigation is recorded in E.159/554, Trin. 8 Ann. recorda ro. 48.

219. Charles viscount Fanshawe v. Simon Fanshawe, E.112/847/1441; E.112/850/1598.

219a. See E.159/558 Hil. 12 Ann. recorda ro. 8.

G. The Masters and the Accountant General

In 1820 the duties of the king's remembrancer were divided among him and two new officers by an act of Parliament.²²⁰ This act created, among other things, three new offices: two masterships and the office of the accountant general, but it provided that the accountant general was to be one of the two masters. These new officers were appointed by the chief baron from among the barristers of five years standing; they held office during good behaviour, but they were not allowed to exercise their office through a deputy. They were independent of the authority of the king's remembrancer.²²¹

The most important duties of the masters were to attend in court and take the minutes of the orders and decrees and to handle references. The accountant general handled all funds of money paid into court. These monies were required to be deposited at the Bank of England,²²² and all interest earned was to be credited to the account. Formerly, the king's remembrancer or his deputy had complete discretion as to what he did with the suitors' monies; no interest was paid, needless to say. Although it was not improper, the practice of the deputy king's remembrancer in making private arrangements with his banker in regard to these large funds was frowned upon by Parliament.²²³

These offices were set up because it was felt that the king's remembrancer was in too powerful a position. Even though he had never abused his office, the concentration of authority in one person was potentially dangerous. Also it was an immensely profitable office especially when it was considered that his duties were not particularly

220. Stat. 1 Geo. 4 [1820] c. 35, ss. 2, 17.

221. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 127-139.

222. At that time a private stock corporation.

223. H.C. sess. pap. 1810-1811 (no. 246) vol. 3, pp. 961 at 979-981.

onerous, nor did they require very much technical education. The purpose of having three men do the work of this one was to have a system of clerical checks. Now a different person entered orders from the one who took the minutes, and a different person handled the litigants' accounts. Also no clerk benefitted from interest payments on money that was not his own but of which he was merely custodian. The already well established principle of equity that a trustee was accountable to the beneficiary for all of the profits of the trust compelled belatedly the modernization of the handling of these funds.

The masters jointly appointed a clerk and the accountant general appointed a clerk both of whom were to hold office during the pleasure of their employers. These clerks performed non-discretionary functions similar to those of the king's remembrancer's clerk.²²⁴ They had a statutory right to their fees, which was a difference from their counterparts in chancery. It was felt that this gave them a certain independence from the masters who were responsible for them and for their actions.²²⁵

The act of 1820 also erected the office of the clerk of the reports.²²⁶ The purpose of setting up this office was to create a check upon the accountant general. The clerk of the reports examined and countersigned the acts of the accountant general, and he was the keeper of reports and certificates which were filed in court. He certified to the accountant general the orders of the court in regard to suitors' funds and the states of those funds.²²⁷ He seems to have been in a position of less power and less discretion than the accountant general, but he was never subordinated to him. All of these offices were abolished along with the

224. Stat. 1 Geo. 4 [1820] c. 35, s. 20; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 134, 139.

225. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 130.

226. Stat. 1 Geo. 4 [1820] c. 35, s. 21.

227. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 139, 140.

equity jurisdiction of the court in 1841.²²⁸

H. The Sworn Clerks

There were eight clerks in the king's remembrancer's office who were sworn officers of the court and held their places for life. They acted as the attornies in court for the litigants, and every party was required to ^{employ}~~employ~~ one to represent him and to handle the paper work of his case. Basically they were the exchequer counterparts of the six clerks in chancery.²²⁹ They were usually referred to as sworn clerks to distinguish them from the ordinary clerks who were mere scriveners or copyists. The senior sworn clerk held the office of first secondary. As such it was his duty to administer the oaths of office out of the Red Book, and he had the custody of various books and documents.²³⁰ The next senior sworn clerk was given the office of second secondary, which entailed no duties beyond the keeping of certain books.²³¹ Sometimes the eight sworn clerks were referred to as the two secondaries and the six sworn clerks.²³²

In addition to the eight sworn clerks, there were twenty four side clerks. Each sworn clerk had the right to appoint three side clerks; the

228. Stat. 5 Vict. [1841] c. 5, s. 15.

229. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143; The Compleat Sollicitor (1666) p. 387; Squibb, 'Book of All the Severall Offices' (1642); S.P.16/309 part 9 (c. 1631); Hall, 'King's Remembrancer' (1637 ?) S.P.16/377 part 2; see app. 3-F and 4-E.

230. These are listed in Inner Temple MS. Petit 538 no. 40, f. 178.

231. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 140-142: 'First Report on the Public Records', (July, 1800) in Reports of Commons, vol. 15, app. p. 139.

232. Fowler, Practice (1795) vol. 1, p. 9; Turner, Epitome (1806) p. 1.

sworn clerks themselves were chosen by the king's remembrancer exclusively from among the side clerks but without regard to seniority.

Each side clerk was articulated for five years to one of the sworn clerks.²³³

After he had completed this period of apprenticeship, he was put into possession of one of the side seats in the division of that particular sworn clerk, and he then practiced for himself but in that sworn clerk's name.²³⁴ The services, attendances, and fees of the side clerks were the same as those of the sworn clerks, except that they did not administer oaths nor did they read documents in court. Thus in those cases where a side clerk represented a party, both the side clerk and the sworn clerk had to be in court at the hearing. They were not in theory officials of the court and for that reason they were not sworn; being more or less servants of the sworn clerk, they put his name onto the documents of the cases which they handled.²³⁵ Therefore their names are not to be found among the court records.

The duties of the sworn and side clerks in the equity side of the court were to issue all writs, to prosecute or defend the suits of their clients, to enter, file, copy, and enroll all matters connected therewith, to attend the court at the hearing and read the documents and depositions, to attend the master on references, to draw up decrees and orders, to procure all necessary signatures. They were also responsible

233. See F. Milne, 'Some Exchequer Officials in the Eighteenth Century,' Home Counties Mag., vol. 3, p. 276 (1901); Ex parte Windus, 2 Anstr. 489, 145 Eng. Rep. 944 (Ex. 1794); Ex parte Deverell, 2 Anstr. 483, 616, 145 Eng. Rep. 942, 984 (Ex. 1794) (dictum).

234. Fowler, Practice (1795) vol. 1, pp. 9, 10; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 144, 158; Turner, Epitome (1806) pp. 1, 2; see also Northamptonshire Record Office MSS. F.H. 2163, 2213.

235. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 158; see also 'Orders to be followed and observed by the Underclekes of the office of the Remembrancer of the Exchequer made in Michaelmas terme anno domini M^l vi^C xlix^{no}' (1649): E.369/118, ff. 142-144.

under the king's remembrancer for the equity records of the court.²³⁶

The office of sworn clerk existed before the equity jurisdiction of the exchequer arose. The clerks originally handled revenue business, and they continued to do so as long as there were any revenue matters in the king's remembrancer's office.²³⁷ The year after the equity jurisdiction of the court was transferred to the chancery, the offices of the secondaries, the sworn clerks, and the side clerks were abolished by statute.²³⁸

I. The Clerk of the King's Remembrancer

The clerk of the king's remembrancer was not one of the sworn officials of the court. He was the private clerk or servant of the king's remembrancer in the same relation as the clerks of the barons, masters in the exchequer, and the chief clerks of the masters in chancery were to their respective employers. His duties were almost as broad in scope as were those of the king's remembrancer: he made copies of documents in the custody of his master, enrolled various writings, kept the king's remembrancer's paper work and records in order. Generally he assisted him in the performance of all of his duties. He did only what he was told to do within a strict master-servant relationship; he exercised no discretion. He was always removable at the will of his master, and he received fees only indirectly through the king's remembrancer.²³⁹ This latter point distinguished him from the clerks of

236. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143-158; Osborne, Practice (1572, 1658) pp. 95, 96; The Compleat Clerk in Court (1726) p. 151; Examination of W. Thompson, Lincoln's Inn MS. Misc. 310 (1820); see also Cal. Treas. Books, vol. 4, pp. 257, 258 (26 Oct. 1674); Northamptonshire Record Office MSS. F.H. 1190, 1625, 3278, 3303, 3933, 3966

237. The revenue business had diminished to almost nothing by the end of the eighteenth century.

238. Stat. 5 & 6 Vict. [1842] c. 86, s. 1.

239. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 122-126.

the barons, who received their fees directly,²⁴⁰ and the clerks of the masters, who had a statutory right to their fees.²⁴¹

In the seventeenth century, the king's remembrancers had two other personal clerks, who acted as registers in court.²⁴² They were not sworn officers but nevertheless performed the same function as the registers in chancery, i.e. the taking of the minutes of the decrees and orders.²⁴³ However, in the eighteenth century, the function of the registers was performed by the deputy king's remembrancers or, in his absence, by one of the sworn clerks.²⁴⁴

Part 2 The Location of the Court Room

The royal palace of Westminster housed all of the major courts of law including the exchequer. The court room in which the barons sat to hear cases was in the building attached to the western wall of Westminster Hall at the northern end. The route to the court was through the north door of Westminster Hall, then up the staircase which was immediately on the right; this led into the large court room called the exchequer chamber or Elizabeth's breakfasting room.²⁴⁵ Off to the side of the exchequer chamber was a smaller court room, which had been constructed in the

240. See above, section E.

241. See above, section G.

242. Squibb, 'A Book of all the Several Officers' (1642).

243. Jones, Elizabethan Court of Chancery, pp. 143-149; Yale, Lord Nottingham's Treatises, pp. 64, 150-153.

244. Fowler, Treatise (1795) vol. 2, p. 192; see also above, sections F and H, and below, Chapter 4, part 3, section A.

245. F.W. Maitland, 'From the Old Law Courts to the New,' English Illustrated Magazine, vol. 1, pp. 1 at 11 (1883), reprinted in Camb. L. Journ., vol. 8, p. 2 (1942); anon., 'Historic Courts, part IV, Westminster Hall', Law Times, vol. 219, p. 269 (1955); H. St. G. Saunders, Westminster Hall (1951) p. 286; J. Stow, Survey of the Cities of London and Westminster, ed. C.L. Kingsford (1908) vol. 2, pp. 118, 119.

corner made by Westminster Hall and the southern wall of the exchequer chamber. This smaller room was known as the inner court of the exchequer, the little exchequer court, and Queen Elizabeth's chamber.²⁴⁶

Behind the exchequer chamber to the west, were rooms which were used for the storage of records.²⁴⁷ This building, or these buildings, extended west from the main hall of Westminster Palace, near the present site of the statue of Oliver Cromwell, as far west as the east end of the chapel of Henry VII in Westminster Abbey and St. Margaret's church.²⁴⁸ In 1793 some of the record rooms were demolished, but the barons continued to sit in the exchequer chamber, which was undisturbed.²⁴⁹

In 1820 the decision was made to rebuild the law courts at Westminster.²⁵⁰ The decrepit buildings which housed the exchequer were taken down to provide a site. John Soane (later Sir John) was commissioned to do the work. He was given an impossible task. Unfortunately there was not enough space available to erect adequate court rooms to satisfy the immediate needs; moreover, future expansion was impossible. Soane's ingenuity led him to place the new court rooms between the buttresses on the western side of Westminster Hall; the courts were entered from the main hall, and the offices were behind them further to the west.²⁵¹

246. E.W. Brayley and J. Britton, History of the Ancient Palace... at Westminster (1836) p. 462; Saunders, Westminster Hall (1951) see diagram on p. 200; O.C. Williams, 'The Topography of the Old House of Commons' (1953) (a copy of this work is in the House of Lords Record Office); it was called simply "the court of exchequer" in a report of 20 July 1789, Com. Journ., vol. 44, p. 549.

247. See below, part 4.

248. F.W. Maitland, 'From the Old Law Courts to the New', article cited in note 200 above, at p. 12; Saunders, Westminster Hall (1951) see diagram on p. 200.

249. 'Report from the Select Committee to inquire into the state of the Public Records,' (1800), Reports of Commons, vol. 15, p. 140; D. Hughson, A History and Description of London (1805) vol. 4, p. 251; D. Hughson, London (1811) p. 253; for further information, see below.

250. See a letter objecting to the proposal: Gentleman's Mag., vol. 87, part 2, p. 505 (Dec. 1817).

251. For drawings and charts of this artistically controversial building, see A.T. Bolton, The Works of Sir John Soane (1924) pp. 95-101; J. Soane, Designs for Public and Private Buildings (1828) plates 11-19, 21, pp. 8-17; see also H.C. Sess pap. 1824 (no. 307) vol. 6, p. 485.

The new courts were completed by 1826, but it was soon obvious that they were inadequate.²⁵²

Within ten years the legal profession was calling for more extensive accommodation, but it was not until forty years later that it was decided to build the present law courts. In 1882, forty one years after the end of the exchequer's equity side, the courts moved from their ancient homes in Westminster Hall to new and commodious quarters in the Strand at Temple Bar.²⁵³ These new court rooms are much more convenient for the legal profession being located between the Temple and Lincoln's Inn, in the midst of the area where most lawyers and legal officials have always had their offices.

During the legal term time, the barons sat at Westminster, close to the location of the political activities of the kingdom, but ~~out~~ of term they sat in ^{the} legal quarter of London. In 1708 they were regularly holding their out of term sessions in Serjeants' Inn hall, Fleet Street.²⁵⁴ By 1713 they were sitting in the hall of the other Serjeants' Inn, which was at the lower end of Chancery Lane.²⁵⁵ A hundred years later, on 7 January 1815, the exchequer sittings after the end of term were moved to Gray's Inn hall.²⁵⁶ Gray's Inn is at the upper end of Chancery Lane,

252. Anon., 'Historic Courts, part IV, Westminster Hall', Law Times, vol. 219, pp. 269, 270 (1955); Brayley and Britton, History of the Ancient Palace ... at Westminster (1836) pp. 441, 442.

253. Maitland, 'From the Old Law Courts to the New,' article cited in note 200; shortly after it was abandoned, Soane's court building was removed.

254. E. Hatton, New View of London (1708) vol. 2, sec. 5, p. 658.

255. Reports of Bunbury, Anstruther, Cox, and Wightwick, passim, English Reports, vols. 145, 29, and 30; 9 Mod. 44, 88 Eng. Rep. 305 (1723); 1 Barn. K. B. 430, 431, 94 Eng. Rep. 289, 290 (1730); Forrest 157, 145 Eng. Rep. 1144 (1801); S. Hill, Clarke's New Law List (1805) p. 1; W. Kirkby, Rules and Orders (1794) p. 124.

256. 1 Price 225 (1st ed. 1816); 1 Price 205, 287, 145 Eng. Rep. 1378, 1405; reports of Price, vols. 2-13, and M'Clelland, passim, English Reports, vols. 145-148; G. Price, Treatise on the Law of the Exchequer (1830) p. 47.

and although it was not so convenient for the exchequer officers as Serjeants' Inn, it was much more so than the exchequer chamber at Westminster. When Serjeants' Inn was rebuilt in 1839, the hall was arranged specifically so that it could be used by the equity court of the exchequer.²⁵⁷ Whether it was in fact used by the court in the last year of its existence is not known. The volume of judicial business on the equity side was by then in such a state of decline that sittings out of term were probably not required.

Part 3 The Location of the King's Remembrancer's Office

Originally the office of the king's remembrancer was located in the old exchequer buildings attached to Westminster Hall.²⁵⁸ At the same time the king's remembrancer, no doubt, attended to much exchequer business in his own private residence.²⁵⁹ In 1665 or 1666 he built a new building to house his offices at the north-west corner of the King's Bench Walks²⁶⁰ in the Inner Temple. As a consequence, the northern end of the King's Bench Walks was afterwards also known as "Exchequer Court". This building was immediately south of the Mitre Court Buildings; the site is now occupied by the Francis Taylor Building. The original king's remembrancer's office building was destroyed in the Great Fire of September, 1666, but a new building was immediately erected on the same

257. J.H. Baker, History of the Order of Serjeants at Law, Ph.D. diss., London, 1968, p. 340.

258. See above in part 2 on the court room and below in part 4 on the location of the records.

259. Henry Fanshawe in the first decade of the seventeenth century conducted business in his house in Warwick Lane: R. Robinson, Briefe Collection of the Queenes Majesties Most High and Most Honourable Courtes of Recordes (1603), R.L. Rickard, ed., Camden Miscellany, vol. 20, Camden Society, 3rd. ser., vol. 83, p. 27 (1953).

260. In the reign of Queen Anne it was known as "Queen's Bench Walks": E. Hatton, New View of London (1708) vol. 2, p. sec. 5, p. 717.

spot.²⁶¹ The king's remembrancer's office was also called simply the "exchequer office."²⁶² The building was annihilated in the bombing which occurred on 11 January, 1941.²⁶³

The king's remembrancer's office was moved to the Temple for the greater convenience of the legal profession.²⁶⁴ The Temple was and is in the legal quarter of London, which is a mile and a quarter from Westminster Hall. The lawyers, including the court officials, worked, ate, and lived in or very near the Temple. It must have been very tedious to have to make the journey to the old office behind the exchequer chamber just to attend to routine procedural details. Also there had been a great increase of judicial business in the equity side of the court in the first part of the seventeenth century, and the deputy king's remembrancer and the clerks probably needed more space in which to work. Moreover, the court sat out of term at Serjeants' Inn and later at Gray's Inn, both of which were in the immediate vicinity. Also it is to be

261. 'Report from the Committee Appointed to View the Cottonian Library,' (1732), Reports of Commons, vol. 1, pp. 443 at 514; Index to the Records (1739) p. 2; P. Barfoot and J. Wilkes, The Universal British Directory (2d ed., 1793) vol. 1, p. 399; H.H.L. Bellot, The Inner and Middle Temple (1902) pp. 84, 143, 144; J. Browne, General Law List (1785) p. 86; T. Cockell, The Law List (1841) p. 399, gives the address as 2 Mitre Court Buildings; T. Cockell, Clarke's New Law List (1839) p. 332; D. Hughson, London (1811) vol. 4, p. 27; Thomas, Notes (1846) p. 155; S.G. Turner, 'Fire in the Temple,' Law Times, vol. 228, p. 84 (1959); J.B. Williamson, History of the Temple, London (2d ed., 1925) pp. 513, 514.
262. Fowler, Practice (1795) vol. 1, p. 10; G. Price, Attorney's Practice in the Exchequer of Pleas (1831) p. 1; Genl. Rept. Rec. Comm. (1837) p. 161; H.C. sess. Pap. 1822 (no. 125) vol. 11, pp. 99 at 144.
263. F.D. MacKinnon, The Ravages of the War in the Inner Temple (1945) p. 17 and chart; reprinted in MacKinnon, Inner Temple Papers (1948) chap. 20.
264. Fowler, Practice (1795) vol. 1, p. 10.

remembered that the office of king's remembrancer was held by the second viscount Fanshawe as a part of his family endowment and was considered by him to be only a profitable investment like a piece of land. He had become king's remembrancer in April, 1665; he was not a lawyer, nor was he interested in the office as a part of the legal system. He may have built the new office to get the exchequer clerks out of his noble household.

The rooms left behind at Westminster remained in the keeping of the king's remembrancer and were always considered as a part of his office. They were used to store the ever increasing quantity of exchequer records which were committed to his custody.

Part 4 The Location of the Records of the Court

The records of the equity side of the exchequer were in the custody of the king's remembrancer.²⁶⁵ The original permanent depository or "treasury" for these records was in the various exchequer buildings which were attached to the western side of Westminster Hall. These rooms were the nearest empty spaces to the old offices of the barons and the king's remembrancer; they were so used long before the rise of the equity jurisdiction of the court. This convenient arrangement ended when the king's remembrancer's office was moved to the Inner Temple in the seventeenth century.²⁶⁶ However, by then the quantity of the exchequer records was too great for them to be moved also. That would have involved a tremendous expense and effort, and the new office building would have had to be built larger to house them. Therefore, only the current records of

265. Genl. Rept. Rec. Comm. (1837), p. 154; Lords Journ., vol. 72, App. 5, pp. 237 at 265 (1840); see the oath of the king's remembrancer, app. 3-E; cf. stat. 1 & 2 Vict. [1838] c. 94, s. 1.

266. See above, part 3.

the court were kept in the king's remembrancer's office in the Temple; periodically the older ones of these were transferred to the record rooms at Westminster.

In the autumn of 1793 the western-most parts of these old buildings were removed in order to make the approach to both Houses of Parliament more convenient. One of the by-products of the greater comfort of the members of Parliament was a substantial decrease in the fire hazard. The exchequer records were at this time moved to other rooms within the same complex of buildings. This rearrangement of the records was done under the supervision of George Vanderzee, senior, one of the side clerks.²⁶⁷

When the law courts in Westminster Hall were remodeled in the 1820's,²⁶⁸ the old exchequer buildings were destroyed with the exception of the Stone Tower, which adjoined the entrance gate. The records in the buildings which were to be demolished for Soane's new courts were moved in 1822 into "a flimsy erection of deal boards in Westminster Hall" and into unused rooms in the Stone Tower.²⁶⁹ This shed in Westminster Hall was a temporary thing specially built to house these records; it was dark and damp and quite unfit for the purpose. Moreover, it was feared that some of the records were lost or damaged at the time of this removal since it was carried out in a manner which was very careless of security and accuracy.²⁷⁰

267. 'Reports from the Select Committee to inquire into the Public Records' (1800), Reports of Commons, vol. 15, p. 140; Com. Journ., vol. 44, pp. 548, 549 (1789); Com. Journ., vol. 48, pp. 848, 859 (1793); O.C. Williams, 'Topography of the Old House of Commons' (1953).

268. See the section on Soane's court building above, part 2.

269. OBS.755 (1822).

270. Genl. Rept. Rec. Comm. (1837) pp. 154, 155, 164.

In the spring of 1831 the King's remembrancer requested and recommended to the treasury commissioners that the records should be moved to a better location, and they granted him permission to do so. Thereupon, in the months of June through October, 1831, the records ^{were removed} from the shed and some of those in the Stone Tower to the King's Mews at Charing Cross. This transfer took place under the watchful eye of George Vanderzee, by then the second secondary. He, assisted by two side clerks, Thomas Ellis Adlington and Geroge Vanderzee, junior, then spent over a year in cleaning and arranging the records.²⁷¹ The true motivation behind this removal was not the better preservation of the records but rather to get them out of the way of the festivities upon the coronation of William IV which took place on 8 September 1831, in Westminster Hall.²⁷² The record repository in the former stables at the King's Mews were damp and generally inadequate.²⁷³

The exchequer records were within five years again found to be in the way. This time the site of the King's Mews was required for the new building of the National Gallery. This building, which the art museum still occupies, is on the north side of what is now Trafalgar Square. In April, 1835, the records were therefore moved from the King's Mews to Carlton Ride.²⁷⁴ This building was a former riding house near the stables of Carlton House. It stood at the north-east corner of the Mall.²⁷⁵ In

271. Genl. Rept. Rec. Comm. (1837) pp. 164, 165, 179, 180.

272. Thomas, Notes (1846) pp. 155, 169, 170; D.N.B., vol. 21, p. 329.

273. Anon., 'The Public Records of England,' Antiquary, n. s., vol. 1, pp. 31-34, 58-60 (1880); A. Dobson, 'Changes at Charing Cross,' English Illustrated Magazine, vol. 1, pp. 403 at 408, 409 (1884); A.C. Ewald, 'The Government Pigeon Holes,' Time, vol. 2, pp. 744 at 747, 748 (1880).

274. A.C. Ewald, 'The Government Pigeon Holes,' Time, vol. 2, pp. 744 at 748 (1880); Thomas, Notes (1846) pp. 155, 167, 169, 170.

275. London County Council, Survey of London (1940) vol. 20, 'Trafalgar square - Part 3', p. 78; G.W. Thornbury and E. Walford, Old and New London (1879) vol. 4, p. 87.

1841 when the equity jurisdiction of the exchequer was transferred to the chancery, the remainder of the equity exchequer records were sent from the Stone Tower at Westminster Hall and the king's remembrancer's office in the Temple to Carlton Ride,²⁷⁶ and the entire archive handed over to the custody of the master of the rolls.²⁷⁷ Carlton Ride was not a proper storage place, and the dangers of fire were great.²⁷⁸ It soon became over-crowded, and in 1847 the earlier memoranda rolls had to be returned to the Stone Tower for storage.²⁷⁹

In the early nineteenth century the immense historical value of the national archives was recognized by antiquaries and historians. The destruction of public records in the fire in October 1731, which burned a part of the Cottonian Library in Ashburnham House, had resulted in a report to the House of Commons,²⁸⁰ but no action was taken before the thing was forgotten. However, in the 1830's there were three very serious incidents involving the loss of public records.

The first of these was the disastrous fire at Westminster in October 1834. This conflagration was started in the exchequer of receipt as the result of the careless destruction of ancient exchequer tallies.²⁸¹

276. D.K. Rept. No. 3 (1842), pp. 5, 6, 10, 12, App. I; Thomas, Notes (1846) p. 155.

277. Stat. 5 Vict. [1841] c. 5, s. 17; see also the Public Record Office Act, stat. 1 & 2 Vict. [1838] c. 94.

278. A.C. Ewald, 'The Government Pigeon Holes', Time, vol. 2, pp. 744 at 748 (1880).

279. D.K. Rept. No. 9 (1848) pp. 18, 19, App. I, p. 26; see generally Memoranda de Parlamento, ed. F.W. Maitland (Rolls Series, 1893) p. xiii.

280. 'Report from the Committee Appointed to View the Cottonian Library'. (1732), Reports of Commons, vol. 1, pp. 443-535.

281. H. St. G. Saunders, Westminster Hall (1951) pp. 297, 298.

There was great loss among the buildings on the east side of Westminster Hall including the burning of many of the records of the lower exchequer. Fortunately the fire did not spread to Westminster Hall itself or to the upper exchequer record rooms to the west.

In 1838²⁸² there was a deliberate destruction of supposedly valueless revenue records. Most of them seem to have belonged to the augmentation office. This clearing out of the old records was done by Ashburnham Bulley, a minor exchequer clerk, who did not know what he was doing. He lacked the experience and training to understand or appreciate the documents which he was employed to dispose of; he could not adequately describe them to the parliamentary commission. The documents which he disposed of were at Somerset House, and so it is not likely that any equity records were lost. Some of the records Bulley had shredded, others were sold to a fish monger; a number got into the hands of an antiquarian book seller and were sold. Frederick Devon became aware of this destruction. He recognized the value of many of these records and, after several months of diffidently intruding into other peoples' affairs, managed to have the depredations ~~stopped~~ and an inquiry made. Some of the records were recovered, but those which were shredded or had the autograph signatures torn off were lost even to private collectors. It is to be regretted that Devon was so reticent a gentleman in this matter. The irony of

282. Between 17 Mar. and 18 Dec. 1838: Hansard, Parl. Deb. (1840) 3d ser., vol. 52, pp. 1312-1316 (Lords, 23 Mar. 1838); letters, etc.: London, Times, 10 Mar. 1840, p. 5, col. 2; 12 Mar. 1840, p. 5, col. 6; 11 Apr. 1840, p. 6, col. 4; 14 Apr. 1840, p. 6, col. 6; 16 Apr. 1840, p. 7, col. 1; 17 Apr. 1840, p. 2, col. 6; 12 Aug. 1840, p. 3, col. 3; 11 Sept. 1840, p. 6, col. 1; 4 Nov. 1840, p. 4, col. 6; anon., 'The Destruction of the Exchequer Records', Notes & Queries, 1st. ser., vol. 12, p. 63 (1855); anon., 'Mutilated Exchequer Records', Notes & Queries, 2d ser., vol. 1, pp. 285, 286 (1856).

this incompetently conducted business is that the destruction took place under the exchequer authorities, the lords of the treasury, just as these ancient records were being transferred to the legal custody of the master of the rolls by the Public Record Office Act of 1838.²⁸³

Also it was in this same decade that a series of thefts of exchequer records was discovered. In the eighteenth and early nineteenth centuries, T. Martin and Craven Ord²⁸⁴ had appropriated to their private libraries various revenue documents which appealed to their antiquarian interests.²⁸⁵ The stealing of public records was felonious;²⁸⁶ however, both of the culprits were dead before they were found out.

Public and official pressure mounted for the construction of a building specially designed for the preservation and consultation of all of the public records.²⁸⁷ The government, at last, approved of the project, and between 1851 and 1856 the first part of the present Public Record

283. 'Report to the House of Lords on the Destruction and Sale of Exchequer Documents,' Lords Journ. (1840) vol. 72, App. no. 5, pp. 237-282; A. N.L. Munby, The Formation of the Phillips Library up to the Year 1840 (1954) pp. 104, 105; Oxf. Bodl. MS. Eng. Hist. b. 207.
284. Craven Ord, F.R.S., F.S.A., was one of the sworn clerks from 1780 to his death in 1832: D.N.B., vol. 14, pp. 1129-1130; see app. 4-E.
285. Evans', Catalogue of the Curious and Valuable Library of Craven Ord, Esq., sold 25-27 June 1829; Evans', Valuable Collection of Manuscripts of Craven Ord, Esq., sold 25-29 Jan. 1830; 'Reports to the House of Lords on the Destruction and Sale of Exchequer Documents,' Lords Journ. (1840) vol. 72, App. no. 5, pp. 237 at 259 (qu. 815), 271 (qu. 1127); Catalogus Librorum Manuscriptorum in Bibliotheca Philippica (1837) pp. 49-53 (nos. 3783-3868), 59, 60 (nos. 4089-4134); A.N.L. Munby, The Formation of the Phillips Library up to the Year 1840, pp. 51-53, 137, 153, 155.
286. If the record involved a judgement of any sort: stat. 8 Hen. 6 [1429] c. 12, s. 3, Stat. Realm vol. 2, p. 249; Co. Inst., vol. 3, pp. 70-73; W. Hawkins, Pleas of the Crown (6th ed. 1787) vol. 1, book 1, chap. 45; see also Jones v. Winckworth, Hardr. 111, 145 Eng. Rep. 406 (Ex. 1658) (conversion of a record); it was also contrary to the oath of a sworn clerk: see App. 3-F.
287. E.g. Thomas, Notes (1846) pp. 124-127; 'Report to the House of Lords on the Destruction and Sale of Exchequer Documents,' Lords Journ. (1840) vol. 72, App. no. 5, pp. 237 at 238; anon., 'Records and Registration,' Quarterly Review, vol. 39, pp. 41 at 66, 67 (1829); C.P. Cooper, Proposal for the Erection of a General Record Office (1832).

Office was constructed in Chancery Lane near Fleet Street.²⁸⁸ The exchequer equity records were moved there from Carlton Ride in 1858.²⁸⁹ This functionally designed building was very efficiently planned; however, the immense bulk of nineteenth century records, which was to accumulate, was not foreseen. Thus in the 1920's it was necessary to move some of the less often consulted exchequer records²⁹⁰ to the annex of the Public Record Office in Ashridge Park, Hertfordshire.

The records of the ^{equity}~~equity~~ side of the exchequer have survived virtually intact. Some miscellaneous loose pieces and a few individual volumes have been lost due to the occasional carelessness of the clerks who might from time to time have taken them to the exchequer office for various purposes but never returned them to their proper places. The general preservation of the equity records is quite remarkable good fortune, especially in the light of the losses in other departments and the constant danger of destruction until they were safely housed in 1858.

In the sixteenth century there was an embezzlement of records in the receipt of the exchequer in an attempt to destroy evidence of peculation.²⁹¹ The equity records, as other records, ^{lived in constant fear of}~~stat. constant~~ fire.²⁹² Furthermore, Westminster Hall was on the banks of the River Thames, and the possibility of floods was always present.²⁹³ The records were never kept clean. They

288. Guide to the Contents of the Public Record Office (1963) vol. 1, p. 2.

289. D.K. Rept. No. 20. (1859) pp. xiii, 21-58.

290. The pleadings (E.112), decrees 1673-1841 (E.130), orders 1664-1842 (E.131), exhibits (E.140), masters account books 1791-1842 (E.158), memoranda rolls - loose membranes (E.160), petitions 1800-1841 (E.185), solicitors' oath roll (E.200).

291. A.H. Anderson, 'Henry, Lord Stafford (1501-1563) in Local and Central Government,' E.H.R., vol. 78, pp. 225 at 234-242 (1963).

292. Com. Journ., vol. 43, p. 531 (1788), vol. 44, pp. 548, 549 (1789); see for the hazard at Carlton Ride: A.C. Ewald, 'The Government Pigeon Holes,' Time, vol. 2, pp. 744 at 748 (1880).

293. E.g. that of 1629: Hutton 108, 123 Eng. Rep. 1135; see the petition from the barons of the exchequer and the justices of the common pleas to the treasurer and chancellor of the exchequer (1565-1571), which is printed in the D.K. Rept. No. 2 (1841) App. 1, pp. 23, 24.

no doubt were eaten into by rats.²⁹⁴ Also the documents were in danger of careless handling as they were taken from the Temple to Westminster and moved about from one part of Westminster to another.²⁹⁵

Also at one stage, witnesses used the exchequer record rooms in Westminster as waiting rooms. However, in their boredom they tampered with the records of the court so that the barons had to order that the witnesses and jurors were no longer to be locked in these rooms because of the destruction to these records.²⁹⁶

Although the king's remembrancer had the official custody of the records of his office, he had lost effective control over them at least as early as the beginning of the eighteenth century. The chief usher had the keys to the rooms where they were kept,²⁹⁷ and the sworn and side clerks had established an exclusive right to make searches and copies.²⁹⁸ Moreover, if he had wanted to make any radical changes respecting them, the king's remembrancer would have had to have the permission of the treasury commissioners. Therefore, it is to be easily understood that he should not really care about the records at all; he forgot about them and let them rot in peace. Only the sworn and side clerks, assisted by the strong back of the bag bearer, handled the records.²⁹⁹ No doubt an occasional encounter with them in the record treasuries assured the dedication of the clerks to their task of making the calendars. Moreover,

294. E.g. E.163/24/31/9.

295. E.g. the careless re-storage of 1822, see above.

296. General Order of 10 Feb. 1787 in W. Kirkby, Rules and Orders (1794) p. 90.

297. 'Report from the Committee Appointed to View the Cottonian Library', (1732), Reports of Commons, vol. 1, pp. 443 at 514; Genl. Rept. Rec. Comm. (1837) p. 163.

298. Genl. Rept. Rec. Comm. (1837), return of H.W. Vincent, 26 Nov., 1832, pp. 154, 163; D.K. Rept. No. 1 (1840), pp. 52, 53, see also Northamptonshire Record Office MS. F.H. 1190.

299. 'Reports from the Select Committee' (1800), Reports of Commons, vol. 15, p. 142.

at least three of them, Adam Martin, Hutton Wood, and George Vanderzee, senior, were sufficiently interested to make indexes to the various records.³⁰⁰

George Vanderzee, senior, was particularly concerned with the exchequer records during his long career in the king's remembrancer's office. He was "one whose observations had been long attracted to matters connected with the records generally."³⁰¹ As a side clerk in 1793 he superintended the re-storing of the records when the western-most exchequer buildings were removed.³⁰² In 1801-1806 he, William Kirkby, and John Caley³⁰³ were put in charge of arranging and indexing the records of the king's remembrancer's office. They sorted out the pleadings and depositions and made calenders to the decree and order books.³⁰⁴ His name does not appear in connection with the move of 1822, which was criticised as having been carelessly and inefficiently done.³⁰⁵ Perhaps if he had been in charge, it would have gone well and would not have been the only removal to have been objected to. In 1831 he was placed in charge of the move to the King's Mews.³⁰⁶ In the next year he, his son, Adlington, and John Trickey, the bag bearer, sorted out some of the revenue documents.³⁰⁷

300. For the indexes of Martin and Wood see chapter 4, part 3-C; for Vanderzee's Index see chapter 4, part 3-B.

301. Genl. Rept. Rec. Comm. (1837) return of H.W. Vincent, 26 Nov. 1832, p. 154.

302. 'Reports from the Select Committee', (1800) Reports of Commons, pp. 140, 142; it is to be noted that Vanderzee did much more work among the records than any other clerk.

303. D.N.B., vol. 3, p. 703; A.N.L. Munby, Phillipps Studies, vol. 3, p. 98.

304. 'Commissions and Abstracts of Annual Reports of the Commissioners on the Public Records of the Kingdom' (House of Lords, 1807), pp. 8, 11, 16, 18, 20, 29.

305. See above.

306. Genl. Rept. Rec. Comm. (1837), return of H.W. Vincent, 26 Nov., 1832, pp. 154, 164, 165.

307. Genl. Rept. Rec. Comm. (1837), pp. 164, 165, 179, 180.

Vanderzee devoted his entire career to the king's remembrancer's office. He was articled or admitted as a side clerk in 1783 and sworn in 1820.³⁰⁸ He became the second secondary in 1832, first secondary in 1836, and died in 1840.³⁰⁹ He made his son, George Vanderzee, junior, one of his side clerks in 1819. In addition to his routine exchequer duties, Vanderzee made an index to the decrees from 1538 through 1675.³¹⁰ Also in 1807 he and J. Caley edited for the Record Commission Nonarum Inquisitiones in Curia Scaccarii, tempore regis Edwardi III. He was well known for his accuracy, learning, and fidelity.³¹¹

It is during periods of transfer from one place to another that records are in most danger of exposure to the hostile elements and of loss by human negligence. It is no doubt due to the diligence of George Vanderzee that these equity records remain intact today.

In theory the equity exchequer records have since the very beginning of the jurisdiction been in the legal custody of the king's remembrancers. This custody was transferred to the master of the rolls in two complementary stages. First there was the Public Record Office Act, 1838, which transferred all of the non-current records.³¹² Second was the act of 1841 which abolished the equity jurisdiction of the court; this provided for the handing over of all current books and documents.³¹³ The act of 1838 was repealed by the Public Records Act, 1958; by this latter act the legal responsibility for the records was transferred to the lord chancellor

308. F. Milne, 'Some Exchequer Officials in the Seventeenth Century,' Home Counties Mag., vol. 3, pp. 276 at 279-281.

309. See app. 4-E; his will was proved in May 1837: PROB.11/1879, f. 418.

310. IND. 16897.

311. Editor's note in *Colebrooke v. A.G.*, 7 Pri. 146, 146 Eng. Rep. 929 at 940 (Ex. 1819).

312. Stat. 1 & 2 Vict. [1838] c. 94, s. 8.

313. Stat. 5 Vict. [1841] c. 5, s. 17.

and the custody of them to the keeper of the public records.³¹⁴ Thus the equity exchequer records have always been in the proper custody of some public official.

These records of the king's remembrancer's office are public documents;³¹⁵ furthermore, this status is assured by statutory declaration.³¹⁶ ~~The~~ ^{This is crucial since the} production of a public document from the proper official custody is sufficient ^{legal} evidence of its genuineness, and it may be admitted in evidence without further proof.³¹⁷ The comparative difficulty of proving in court the authenticity of a piece of paper which is four hundred years old is obvious after a moment's thought. In addition, public documents are admissible in evidence as an exception to the hearsay rule.³¹⁸ This is particularly important since all the persons connected with the exchequer documents have been dead for centuries.

The evidentiary value of these records for the use of historians is increased by it being possible to account for the physical location and custody of the documents since they were made. The report in 1732 gave a description of the equity exchequer records.³¹⁹ They were at that time in their original location. A careful record of the subsequent

314. Public Records Act, 1958, stat. 6 & 7 Eliz. 2 [1958] c. 51, ss. 1(1) and 4(5); see also H.C. sess. pap. 1953-54 (no. 457) vol. 11, p. 457.

315. Phipson on Evidence (11th ed. 1970) pp. 1720-1723; Wigmore on Evidence (3rd ed. 1940) vol. 7, secs. 2110, 2111.

316. Public Record Office Act, 1838, stat. 1 & 2 Vict. [1838] c. 94, ss. 1, 13; Public Records Act, 1958, stat. 6 & 7 Eliz. 2 [1958] c. 51, s. 9(2).

317. Phipson on Evidence (11th ed. 1970) pp. 1632, 1651, 1652, 1720-1723; Wigmore on Evidence (3rd ed. 1940) vol. 7, secs. 2158, 2159.

318. Nokes on Evidence (3rd ed. 1962) p. 348; Wigmore on Evidence (3rd ed. 1940) vol. 5, secs. 1630 et seq.

319. 'Report from the Committee Appointed to View the Cottonian Library,' (1732), Reports of Commons, vol. 1, pp. 443 at 513, 514.

relocations was made in 1793,³²⁰ 1831,³²¹, 1835³²² and 1858.³²³ The Public Record Office, of course, is the model of diligence in keeping its class lists and shelf lists up to date. Thus the archive quality of the equity records has been preserved.³²⁴

Part 5 The Language of the Court

Originally the court conducted its business in two languages. Latin was used for the formalities: patents, writs and endorsements, formal entries in the records. All revenue and common law records had always been in Latin, the international tongue of the middle ages. The equity pleadings, the interrogatories and depositions, and the decrees and orders were in English. In fact, in the sixteenth and seventeenth centuries, bills in equity were called "English bills"; this was to distinguish them from the Latin common law bills of the revenue and plea sides of the court.

The continued use of Latin was due as much to clerical inertia as as to the desire to exclude the laity from professional mysteries. The traditional forms were copied with only the names, dates, and places substituted to accommodate each individual situation. This was easier than composing new writs or even translating the old ones; moreover, the

320. 'Reports from the Select Committee,' (1800) Reports of Commons, vol. 15, pp. 136-155.

321. Genl. Rept. Rec. Comm. (1837) report of 1832, pp. 154-194.

322. D.K. Rept. No. 2 (1841) pp. 67-69; D.K. Rept. No. 3 (1842) pp. 5, 6, 8-13, 20-24; 'Summary of Records from Carlton Ride': OBS.691.

323. D.K. Rept. No. 20 (1859) pp. 21-58.

324. For general comments on archives, see H. Jenkinson, A Manual of Archive Administration (rev. ed. 1965); see also C.P. Cooper, An Account of the Most Important Public Records (1832) chap. 2; H. Hall, Studies in English Official Historical Documents (1908).

old forms were tested, known to be efficacious, and judicially approved. It was also safer. A new form would, no doubt, have been challenged, and, if the defense were unsuccessful, the innovator would probably have been liable for damages or at least official censure. Furthermore, it never has been the temperament of or for that matter the duty of the petits fonctionnaires, who handle forms and formalities, to innovate or to exercise much discretion. On the other hand, there was a financial motive to remove their duties as far as possible from the understanding of average people and thereby to ^{protect} their monopolistic position.

The use of Latin and French in the common law courts was defended in the first part of the seventeenth century as a technical vocabulary which could not be abandoned without the loss of the concise and settled definition of English legal concepts.³²⁵ This argument, however, erroneously equates vocabulary with language.

This situation was one of the anachronisms attacked by the reformers during the Interregnum. On 22 November, 1650, an act was passed requiring that English be the only language used in the courts.³²⁶ The exchequer court records show that this act was put into practice immediately.³²⁷ The writs and ~~entires~~ are in English alone throughout the remainder of the Interregnum period. Upon the restoration of the monarchy in 1660,

325. Holdsworth, H.E.L., vol. 2, pp. 481, 482, and references cited.

326. Firth and Rait, vol. 2, pp. 455, 456; see also vol. 2, pp. 510, 511 (Act of 9 Apr. 1651). This was one of the few legal reforms that the utopians of the time were able to actually accomplish: G. Smith, 'The Reform of the Laws of England, 1640-1660,' Univ. of Toronto Quart., vol. 10, p. 469 at 479 (1941); D. Mellinkoff, The Language of the Law (1963) pp. 126-130 and works cited.

327. See also *Willis v. Bond*, Style 260, 82 Eng. Rep. 694 (K.B. 1651) and *White v. Keblewhite*, Style 261, 82 Eng. Rep. 695 (K.B. 1651) in regard to compliance in the court of the upper bench; cf. stat. 36 Edw. 3 [1362] st. 1, c. 15, Stat. Realm, vol. 1, p. 375, which was never put into effect: Mellinkoff, Language of the Law, pp. 111-114.

an act was passed which continued the "pretended act" of 1650 in force until 1 August, 1660, at which time the courts returned to their status quo ante.³²⁸

This return to the use of Latin can be explained best in the light of the emotion of the Restoration. In their enthusiasm to eradicate every bit of the Cromwellian dictatorship, the royalist Parliament discarded this beneficial measure along with the innovations they considered evil. There was also the conceptual difficulty of an act which had been passed by an assembly which strictly speaking was not a constitutional parliament and which had never received the royal assent. The results of this thoughtless reaction continued until 1733. In 1706 the Lords passed a bill which would have abolished the use of French in the law courts,³²⁹ but it foundered in the Commons.

In 1731 an act was passed which required the courts to use only the English language after 25 March, 1733.³³⁰ This act was the same in substance as the act of 1650. The motivation behind its passage was the confusing use of Latin and French in criminal proceedings, in which the

328. Stat. 12 Car. 2 [1660] c. 3, s. 4, Stat. Realm, vol. 5, p. 180; however, the form of letters patent was to be immediately the same as before according to section 8 of this act.

329. Lords Journ., vol. 18, p. 295 (1706).

330. Stat. 4 Geo. 2 [1731] c. 26, s. 1; also stat. 5 Geo. 2 [1732] c. 27. See also stat. 6 Geo. 2 [1733] c. 14, s. 5, which in effect recognized that some Latin names of writs, e.g. subpoena, capias, cannot be usefully translated due to the lack of English equivalents; such words had been absorbed into the English language, but because of their Latin origins and appearances someone might have been tempted to prosecute an action for it under the act of 1731; to preclude harassment, the clerks no doubt procured this preventive statute. Mellinkoff in The Language of the Law at page 134 states that this latter statute "emasculated" the first, but there is no evidence at all that this occurred in the exchequer; the change to the English language and the italic hand was immediate and complete throughout the records.

laity participated as jurors.³³¹ By this time the inns of court had been defunct as teaching institutions for many years;³³² thus the practicing barristers were themselves only poorly grounded in law French. Moreover, at the beginning of the eighteenth century new branches of the law were shooting out with new concepts which were English originally.³³³ Even so there were protests from the traditionalist rear guard.³³⁴

In 1879 the acts of 1731 and 1733 were repealed by the Civil Procedure Acts Repeal Act, 1879, which disburdened the collections of statutes in force of archaic material and at the same time prohibited the revival of the former practice.³³⁵ The act of 1879 has itself been repealed by the Statute Law Revision Act, 1958,³³⁶ but the revival of the use of Latin and French is prohibited by force of the Interpretation Act, 1889.³³⁷

331. Comm. Jour., vol. 21, pp. 622, 640 (1730).

332. W.S. Holdsworth, 'The Disappearance of the Educational System of the Inns of Court', Univ. of Pa. Law Rev., vol. 69, p. 201 (1921); Mellinkoff, Language of the Law, p. 132.

333. Holdsworth, H.E.L., vol. 6, pp. 571, 572 (1924).

334. Foss, Judges, vol. 8, pp. 77, 78; Mellinkoff, Language of the Law, pp. 133-135 and works cited.

335. Stat. 42 & 43 Vict. [1879] c. 59.

336. Stat. 6 & 7 Eliz. 2 [1958] c. 46, s. 1.

337. Stat. 52 & 53 Vict. [1889] c. 63, s. 38 (2) (a) and (b).

CHAPTER 4: PROCEDURE AND RECORDS

Part 1 - PleadingsSection A - Bills of Complaint

The equity bill of complaint was in the nature of a petition. It was a request addressed to the judge to hear the case and to do justice to the disputants. In the old common law courts of the common pleas and the king's bench, a lawsuit was normally initiated by the command of the king which was embodied in an original writ made out in chancery; this command ordered the sheriff to have the party against whom it was directed to appear in court where the common law judges were required to hear and decide the case.¹ Since writs did not lie against the monarch,² the only way for redress from the crown was by means of a bill of right or a petition of right exhibited in the chancery. These bills were to protect common law rights (though writs were more often used) and were in Latin; they were put in chancery because the chancellor administered the judicial aspects of the royal prerogative. These proceedings were on the common law side, the Latin side, of the court of chancery. When the equity side of the chancery arose in the fifteenth century, the pleading was done in the vernacular, which was by the end of that century English. Thus bills exhibited on the equity side of the chancery were known as English bills in contradistinction to the older Latin bills. They were completely

1. In the period immediately following the Norman conquest writs were only granted upon a petition to the king; they were delegated to the chancellor when they became too numerous to be handled by the king or the council; after about a hundred years the practice became settled, patterns of writs were formed, the procedure was institutionalized; by the end of the twelfth century there was no petition to the king or the chancellor to issue a writ; the writ was available as a matter of right from the minor chancery officials upon the payment of a fee.

2. Bracton, f. 5b.

different in form as well as substance from the Latin bills, as was equity procedure from common law procedure. The former was often referred to as procedure by English bill. The term English bill was taken by the court of exchequer when it began to use equity procedures. It was also appropriate for the exchequer because the older common law informations on the revenue and plea sides of the court were in Latin; now they could be called Latin informations as opposed to the English informations on the equity side.³ The only similarity between Latin and English bills was that they were drafted as requests rather than commands.

The English or equity bill of complaint was the first pleading in a suit in equity. When a suit was begun by the attorney general on behalf of the crown, this pleading was called an information; the king was not asking a favor of the court but was directing his court to hear the case. The opening and closing formulas were slightly different, but otherwise in form and entirely in substance, an information was exactly the same as a bill of complaint exhibited by a private party. Informations could be initiated by the attorney general upon official knowledge or at the relation of (ex relatione) a private person. This latter type of information was in the name of the attorney general but under the control of the relator and treated by the court in the same manner as a private complaint.⁴ Also a private person could exhibit an information qui tam in his own name; such an information sought to protect at the same time the rights of the crown as well his own rights.

3. Fowler, Practice (1795) vol. 1, p. 117.

4. Fowler, Practice (1795) vol. 1, pp. 117-119 citing Mitford, Pleadings in Chancery (2d ed. 1787) pp. 7, 90-92; Turner, Epitome (1806) pp. 17, 18, citing Fowler and Mitford.

These various types of information are to be found in the exchequer in the second half of the sixteenth century. Official informations by the attorney general were fairly common during the latter half of the reign of Elizabeth I.⁵ Informations were put in also by other royal officials, e.g. bailiffs of royal manors⁶ and exchequer collectors.⁷ These sought judicial action solely on behalf of the crown. These royal officials sued in their own names with only general references to the crown; the complaints were usually signed by the plaintiffs rather than by counsel. As the exchequer procedure became settled, this type of information was no longer used; if the official had no personal interest in the outcome of the suit, he sent the matter to the attorney general who thereupon prosecuted the suit in his own name. The earliest complaint which is in the form of an information ex rel. which the author has seen is dated 1609.⁸

Bills which are in substance information qui tam are not unusual in the sixteenth century. However, only a few have the English version of the qui tam formula.⁹

Thus it would seem that the use of informations in the sixteenth century exchequer was in an early and undeveloped stage. In the days of Queen Elizabeth bills of complaint, informations qui tam, and official informations were used almost interchangeably.

5. E.g. A.G. v. Bostocke, E.112/5/25 (1578); A.G. v. Beaple, E.112/10/9 (1579); A.G. v. Ruse, E.112/4/2/1 (1585); A.G. v. Englefield, E.112/2/68 (1589); A.G. v. Graunge, E.112/44/38/1 (1590).

6. E.g. Cooke v. Hawker, E.112/38/32/1 (1571); Perrott v. Crystmas, E.112/36/26 (Oxford) (1571); Perot v. Parr, E.112/1/5/1 (1581).

7. E.g. Leeke v. Price, E.112/62/5/1 (Pembroke) (1564-1572).

8. E.g. A.G. ex rel. Murray v. Musgrave, E.112/112/133 (1609).

9. E.g. Glastor v. Middleton, E.112/5/31/1 (1571); Cornewallys v. Clynkett, E.112/3/62 (1595).

When the distinctions among the types of initial pleadings had been settled in the seventeenth century, it appears that informations were used when the plaintiff accounted directly to the crown. The jurisdiction was the debt due directly to the crown; this case would have been handled on the revenue side of the court if an equitable remedy had not been needed. When the plaintiff was a farmer of royal revenues or a tenant of the monarch, he sued by bill of complaint. The jurisdiction in this case was the indirect interest of the crown in the solvency of its own debtors. Here the plaintiff was a debtor to the crown; this was the same thing as the quo minus jurisdiction of the plea side of the court, where the action would have been brought had an equitable remedy not been required. Wrongs which affected the crown directly or indirectly was the basis of the distinction between informations and bills of complaint. Common law informations had nothing to do with the equity side of the exchequer; they were for the most part informations qui tam based upon penal statutes and could be prosecuted in the revenue or the plea sides of the court.¹⁰ One must be aware of their existence because some of the records of the king's remembrancer's office¹¹ cover both the equity side of the court and also that part of the revenue side which was in the king's remembrancer's office.¹²

Bills of complaint, like all other pleadings, were engrossed on parchment. However, a small number of bills on paper are to be found among the files of the sixteenth century pleadings. The regularity of

10. There could be no suit in equity on a penal statute: Anon., 3 Leon. 204, 74 Eng. Rep. 634 (Ex. 1588).

11. E.g. the appearance books (E.107); the memoranda rolls (E.159).

12. Caveat: "bills of intrusion" might be common law actions: see above, chap. 2, n. 13.

these paper bills and the lack of other types of pleading on paper suggests that this phenomenon is more than a manifestation of the not yet settled practice of the court or the ignorance of solicitors. These paper bills were addressed only to the lord treasurer. They were not signed by counsel, but process was endorsed; perhaps prior approval of the court made approval by counsel unnecessary. They were not mere rough drafts because they were written single spaced. About half of the paper bills were not engrossed on parchment,¹³ but those that were copied were engrossed with a proper address and were occasionally expanded.¹⁴

Were these paper bills private petitions to the lord treasurer supplicating the use of his court for private suits or are they remains from the normal clerical procedures, which were kept because the fiat for process happened to be endorsed on them? Perhaps country solicitors sent paper petitions to the sworn clerks in the king's remembrancer's office, who then engrossed them on parchment and procured the signature of counsel and the fiat. The paper bill was then discarded unless there was some cause to the contrary such as the endorsement of the fiat upon it. Perhaps this was a means of conducting the pleading without coming to Westminster.¹⁵ These speculations are supported by the fact that in 1645 it was the sworn clerks who asked parliament how the bills should be addressed.¹⁶ The only reference to paper bills which has been found is an isolated remark by Fowler¹⁷ that they were to be signed by counsel. In any case, it seems clear that in the nineteenth century the parchment

13. E.g. *Clerke v. Kyste*, E.112/59/2/1 (Carmarthen) (1572); *Browne v. Colby*, E.112/42/49/1 (1580); *Nesbet v. Foster*, E.112/50/59/2 (1579); *Norris v. Gittins*, E.112/60/28/1 (1588).

14. E.g. *William v. William*, E.112/59/3 (Carmarthen) (1583); *Horner v. Jackson*, E.112/51/164/2 (1586); *Skott v. Phillips*, E.112/52/349/4 (1588); *Williams v. Humphrey*, E.112/61/26/1 (Flint) (1598).

15. In one case, *Bishop of Coventry v. Leveson*, E.112/41/2 (1572-1576), there is a paper answer, replication, and rejoinder with engrossments of the answer and replication.

16. *Lords Journ.*, vol. 7, p. 426.

17. *Practice* (1795) vol. 1, p. 36.

engrossments were made outside of the court by the plaintiff's solicitor or counsel.¹⁸ Certainly the normal procedure from the beginning of the equity jurisdiction was to engross all pleadings on parchment.

The form of the exchequer equity bill was the same as the chancery equity bill;¹⁹ there were, of course, a few slight modifications in the formalities in order to make it appropriate to the exchequer. The same basic form was used in all of the other equity courts as well.²⁰

The first part of an equity bill was the address to the judges. This was in two sections. The first section of the address was written at the top of the bill separate from the body of the complaint; in the

18. See H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 148; Lincoln's Inn, MS. Misc. 310 (1820) 2d return, 30th. ans. and 43d ans.
19. For ^{printed} ~~painted~~ examples, see J. Bayley, ed., Calendars of the Proceedings in Chancery in the Reign of Queen Elizabeth (Rec. Comm. 1827) vol. 1, pp. cxxxiii-cxlv, examples from 1550-1600, they do not contain charging or interrogating parts. G. Wrottesley and W.K. Boyd, eds., Early Chancery Proceedings, Wm. Salt Arch. Soc., N.S., vol. 7, pp. 240-293 (1904); vol. 9, pp. 1-241 (1906); vol. for 1926, pp. 59-150 (1928); vol. for 1931, pp. 121-231 (1933); vol. for 1938, pp. 3-201 (1938): examples from 1377-1509, 1558-1600.
20. For printed examples from the star chamber, see C.G. Bayne and W.H. Dunham, eds., Select Cases in the Council of Henry VII (1958) Seld. Soc. vol. 75 for 1956, pp. 123-125, 129-131, 134-136, 138-140, 151-153: Examples from 1500-1505; I.S. Leadam, ed., Select Cases in ... the Star Chamber (1911) Seld. Soc. vol. 25 for 1910, vol. 2: examples from 1509-1544; G. Bradford, ed., Proceedings in the Court of the Star Chamber in the Reigns of Henry VII and Henry VIII, Somerset Rec. Soc., vol. 27 (1911); R. Stewart-Brown, ed., Lancashire and Cheshire Cases in the Court of Star Chamber, Rec. Soc. for Lancs. and Cheshire, vol. 71 (1916): examples from 1509-1547; W. Brown, H.B. McCall, and J. Lister, eds., Yorkshire Star Chamber Proceedings, Yorks. Arch. Soc., Record Ser., vol. 41 for 1908 (1909), vol. 45 for 1910 (1911), vol. 51 for 1913 (1914), vol. 70 for 1926 (1927): examples from 1485-1547. From the court of requests: I.S. Leadam, ed., Select Cases in the Court of Requests 1497-1569 (1898) Seld. Soc. vol. 12 for 1898.

exchequer it consisted of the following standard formula: "To A.B. Lord High Treasurer of England, C.D. Chancellor of her majesty's court of Exchequer, E.F. Lord Chief Baron of the same court, and to the rest of the barons there."²¹ This formula was used from the early period of the history of the jurisdiction²² but was not used exclusively until after the office procedure was settled about 1585. Before its use became rigid and invariable, almost all variations were possible in regard to which officials might be named. In addition to the combinations possible with the persons included in the normal address, the under-treasurer, was occasionally mentioned.²³ The under-treasurer, however, had no judicial duties; after 1592 this office was always held in conjunction with the chancellorship of the exchequer.²⁴ Occasionally in the early period the address mentioned other positions held by one of these officers, e.g. that Sir Walter Mildmay was a privy councillor; these superfluities do not occur after about 1580, except that in the seventeenth and eighteenth centuries the chancellor of the exchequer is frequently mentioned as under-treasurer also: "... C.D. chancellor and under-treasurer of his majesty's court of exchequer at Westminster ..." When the office of treasurer was vacant or in commission, the bill was addressed only to the chancellor the exchequer, the lord chief baron, and the other barons.²⁵

21. The Compleat Sollicitor (1666) p. 387; The Compleat Clerk in Court (1726) p. 157; Fowler, Practice (1795) vol. 1, p. 28.

22. E.g. *Hawter v. Longworth*, E.112/36/28 (Oxford) (1561-1572).

23. E.g. *Pawlett v. Woodhouse*, E.112/29/24/1 (1564); *Stockeham v. Russell*, E.112/34/39 (1558-1566); in one bill the attorney general was included in the address: *Langrake v. Heathe*, E.112/2/37 (1567).

24. See above, chap. 3-1-B.

25. E.g. *Lord Norris v. Lord Seymour*, E.112/3/98/1 (1599) in the vacancy following the death of Burghley; for examples when the treasury was in commission, see The Compleat Clerk in Court (1726) p. 157; Fowler, Practice (1795) vol. 1, p. 28.

During the 1640's and 1650's when the offices of treasurer and chancellor of the exchequer were both considered vacant by parliament, bills were directed to the barons only.²⁶

The second section of the first part of the bill, the address, was the opening phrase of the ^{body}~~body~~ of the bill. There was no rigid formula; anything appropriate to a petition would do. The following example is

typical of the sixteenth century: "In most humble wise showeth and complaineth unto your good Lordship ..." In the seventeenth and eighteenth centuries the usual opening was "Humbly showeth unto your Honors ..." Private informations began with some such words: "Informeth in the behalf of our sovereign Lady the Queen's Majesty ..."²⁷ "In most humble wise complaining showeth and informeth ..."²⁸ "Humbly showeth unto this honorable Court..."²⁹ "Humbly sheweth and informeth your honors your humble supplyant Thomas Cornewallys Esquior gromeporther of her Majesties householde aswell for and on the behalfe of her highnes as for him selfe ..."³⁰ The following are examples of the commencement of official informations: "Humble sheweth and informeth your Lordships on her majesties behalf Edward Coke Esquire her highnes Attorney generall, ..." ³¹ "Sheweth unto and Informeth your Honours Sir Philip Yorke Knight his Majestys Attorney General for and on behalf of his Majesty ..." ³² The custom arose in the late seventeenth century to address the bills to "your lordship" if one of the judges was a peer, otherwise to "your

26. Lords Journ., vol. 7, p. 426 (1645).

27. From Wright v. Pigott, E.112/3/20/1 (1572-1576).

28. From Beeke v. Fytche, E.112/3/25 (1572-1576) (plaintiff was lessee of the crown).

29. From Taverner v. Goodrich, E.112/3/60 (1594) (plaintiff was a royal surveyor).

30. From Cornewallys v. Clynkett, E.112/3/62 (1595) (plaintiff was a lessee of the crown).

31. From A.G. v. Aunesley, E.112/3/97 (1599).

32. From A.G. v. Thurgood, E.112/1079/13/1 (1732).

honors."³³ In the sixteenth century before the barons were serjeants, they were often addressed as "your masterships,"³⁴ but this does not seem to have been a regular custom.

The second part of the bill consisted of the name of the plaintiff, his town or parish and county or borough, and his social status; occasionally his occupation was also included to aid the identification. "... your daily orator A.B. of the town of X in the county of Y esquire ..."; " ... your poor and humble suppliant A.B. of the parish of X in the county of Y gentleman ..." If the plaintiff were suing as an administrator or an executor, this would also be noted here.

After the statement of the plaintiff's name came the statement of the jurisdiction of the exchequer court. In the sixteenth century this part was not always included in the bill, but when it was, it usually stated that the plaintiff was the bailiff of a royal manor or the farmer, tenant, or lessee of the crown. In the seventeenth century, that is after 1649 when the fictional jurisdiction was established, it was here that were placed the magical, non-traversable words of jurisdiction, "... debtor and accountant to his majesty as by the records of this honorable court and otherwise it doth and may appear ..." This was a rigid formula;³⁵ and its appearance has been used as the major piece of evidence in the determination of the date of the establishment of the purely fictive exchequer equity jurisdiction. The pretence was strictly

33. The Compleat Clerk in Court (1726) p. 156.

34. E.g. in *Hewet v. Lord Dacres* (1557); *Mantell v. Mayor of Wickham* (1558); transcribed below in app. 5.

35. Fowler, Practice (1795) vol. 1, p. 29; Turner, Epitome (1806) p. 2; The Compleat Sollicitor (1666) p. 389, which is substantially the same but with minor verbal differences; Bohun, Practising Attorney (1724) p. 306, (4th ed. 1737) vol. 2, p. 238; Barton, Historical Treatise (1796) p. 30.

maintained to the very end, and it must always have been alleged that all of the plaintiffs and all of their predecessors in interest were debtors and accountants to the crown.³⁶

However, in the sixteenth century and in the first half of the seventeenth, there must have been a genuine foundation to the exchequer jurisdiction. In approximately one half of the bills filed in the sixteenth century, there was a direct statement of the grounds of the jurisdiction of the court. In the other half it was apparent from the statement of the facts of the case that the plaintiff was a debtor, officer, farmer, accountant, or tenant of the crown. If there was no genuine royal interest in the suit, it could be dismissed upon a demurrer or plea to the jurisdiction.³⁷

Following these preliminaries came the statement of the facts of the dispute upon which the claim was based. The statement of the claim was always in two sections. The first was introduced by the words "... that whereas ..."; it was a cum clause in the nature of a preamble. The second part began with " ... so it is, right honorable Lord, that ..." The first section stated the rights of the plaintiff; the second set forth the interference by the defendant with those rights. This was the stating part, the main part of the bill.

The next part of the model equity bill in chancery would be the charge of confederacy, in which the defendant was accused of riotously combining with a large number of unknown but powerful and lawless persons to intimidate the local juries so that justice could not be had at the common law. No exchequer bill filed before 1572 contained a charge of

36. See e.g. *Swan v. Porter*, Hardr. 60, 146 Eng. Rep. 380 (Ex.1656).

37. See above, chap. 2.

confederacy, nor has the author seen one from a later period. They were used in the early days of the equitable jurisdiction of the court of chancery in order to bolster the jurisdiction of that court. By 1550 they were archaic. However, Mitford, and Fowler following him, stated that this part was commonly used in the late eighteenth century though it was unnecessary.³⁸

In the fully developed bill, a charging part followed the charge of confederacy. The charging part consisted of a refutation of the defenses which the defendant might make; the purpose of this part was to enlarge the scope of discovery to include the defendant's case.³⁹ This evaded the general rule that the scope of discovery was limited to the proof of the proponent's case. However, no charging parts were put into the exchequer bills filed before 1572, and the author has not seen any from the sixteenth or seventeenth centuries. Their rise and inclusion in exchequer bills probably took place in the eighteenth century. In connection with the development and inclusion of this and the preceeding part in the bill, it should be recalled that lawyers, clerks, and exchequer officials had their fees regulated according to the length of the various documents they handled.

The next section of the standard eighteenth century complaint was the statement of the equitable nature of the bill and its propriety vis-à-vis the equity jurisdiction of the court. In the sixteenth century exchequer this section was usually not present, being absent from perhaps three quarters of the bills filed. In addition to the injustices alleged in the stating part, the plaintiff gave here the reasons why he needed

38. Mitford, Pleadings (2d ed. 1787) pp. 40, 42; Fowler, Practice (1795) vol. 1, p. 29.

39. Fowler, Practice (1795) vol. 1, pp. 29, 30, following Mitford, Pleadings (2d ed. 1787) p. 42.

to invoke the equity jurisdiction of the court. A few rare cases asserted the poverty of the plaintiff and the wealth and power of the defendant. More frequent were allegations that the defendant had deeds or charters which the plaintiff needed to prove his case. A set formula had to be used in order to show that the common law action of detinue of charters would not lie: "... your said orators do not know the certain parcells of writings neither the number or quality of the same belonging to the said messuage and tenement neither wherein they are contained in bag or box ensealed or chest locked..."⁴⁰ Another statement which was also concerned with the lack of evidence dealt with the absence of witnesses which was to be remedied by an answer under oath. The following phrase appeared in the seventeenth century and later with enough regularity to suggest that it was added in order to bolster the equity jurisdiction without any genuine reference to the actual situation: "... the witnesses that could and would prove the premisses are either dead or dwell in remote places beyond the seas ..."⁴¹ Many bills simply state here that the actions of the defendant were "... unjust and contrary to equity and good conscience..."⁴² Most of the bills in the sixteenth century omitted this section entirely and relied solely upon the existence of the equity jurisdiction which was implicit from the statement of the facts. However, there must always have been a genuine equity jurisdiction either implicitly or explicitly stated. If the bill wanted equity, it would be dismissed to the exchequer office of pleas.⁴³

40. From Wright v. Sturdye, E.112/50/82/1 (1581).

41. From Gomes v. Humphreys, E.112/588/10/1 (1685).

42. See Fowler, Practice (1795) vol. 1, p. 30, following Mitford, Pleadings (2d ed. 1787) p. 43.

43. E.g. Anon., 3 Leon. 204, 74 Eng. Rep. 634 (Ex. 1588).

The interrogating part came next. This consisted of a list of questions based on the stating and charging parts which the defendant was required to answer specifically. None of the bills filed before 1572 contained a proper interrogating part or interrogatories. However, in two cases⁴⁴ the bill was more or less in the form of interrogatories called articles which were answered seriatim. In the sixteenth century case of Noble v. Falke⁴⁵ there appears to have been sent along with the bill of complaint a separate list of "articles" or interrogatories to which the defendants and witnesses made their answer in the country; unfortunately only the answer and depositions have survived.

In the seventeenth century and later, the interrogating part was a regular part of the bill. In theory this section should not have been needed since the defendant was placed under obligation by the subpoena to answer fully to the entire bill. However, it was and is the natural tendency of defendants to give plaintiffs the least amount of information possible. If the defendant should fail to make a sufficient answer and be ordered to put in a further answer, there was no serious loss. The defendant would be put to the minor expense of paying costs to the plaintiff and fees for the further answer. In order to try to get a full and sufficient answer the first time, plaintiffs began inserting interrogatories.⁴⁶ The result was a duplication of material in both the bill and the answer, but it did make it more difficult for the defendant to evade his duty to answer sufficiently.

44. Waleston v. Calfehill (1522) and Tenants of Berkhamstead v. Rector of Ashridge (1531); see also Roberts v. White (1549); in app. 5.

45. Transcribed below in app. 5.

46. Fowler, Practice (1795) vol. 1, pp. 31-33, following Mitford, Pleadings (2d ed. 1787) pp. 43-45; N.B. that I have changed my opinion as to the origin of interrogatories as having come from Romano-canonical procedure as stated in Bryson, Interrogatories and Depositions in Va. (1969) pp. 10-12.

The bill ended with prayers for process and for relief and with a grateful flourish. The following example shows the prayer for a subpoena and for general relief and the ending of a typical bill:

"... May it therefore please your good lordships to grant unto your said poor orator the queen's majesty's most gracious writ of subpoena to be directed unto the said A.B., C.D., and E.F. commanding them and every of them at a certain day and under a certain pain to appear before your honors in this honorable court then and there to answer to the premisses and to stand to and abide such further order therein as unto your honorable lordships shall be thought meet and convenient, And your poor orator shall daily pray to God for your honorable lordships health with much increase of honor."⁴⁷

The prayer for process was a fairly standard ^{form} ~~for~~ from the beginning in the sixteenth century: " ... In tender consideration whereof it may please your good lordship to grant the queen's most gracious writ of subpoena to be directed to the said A.B. commanding him by the same personally to appear before your good Lordship in the queen's said court of exchequer at a certain day and under a certain pain therein to be limited ..." The subpoena to appear and answer, the subpoena ad respondendum, was the general process of the court and was the writ usually requested.

It was frequent that the plaintiff wanted the court to make the defendant do something or cease doing something before the case was heard and an injunction was therefore prayed. Occasionally a commission of inquiry was desired.⁴⁸ In Garbraye v. Cokeburne (1558-1572)⁴⁹ the plaintiff

47. From Hayle v. Wheler, E.112/1/18/1 and 3 (1585).

48. E.g. Lacye v. Welles, E.112/63/371 (1559-1572); Harte v. Oldesworth, E.112/15/81 (1568); Appowell v. Earl of Pembroke, E.112/29/15 (Mormouth) (1566-1572).

49. E.112/23/89/1 and 2 (1558-1572).

prayed for a prohibition to the court of arches, a subpoena, and an injunction in a dispute over tithes. The petition of Ryes v. Corbet (1560-1566)⁵⁰ was for a certiorari to the court of the marches of Wales. A writ of attachment was requested in A.G. v. Bostocke (1578)⁵¹. The attorney general in A.G. v. Ruse (1585)⁵² prayed a writ de perambulacione faciendi and a writ of subpoena in the nature of a scire facias. Other writs, no doubt, were also sought.

In many of the earlier bills, the prayer was simply for "process" or that the defendant might be "called into court." In these cases a subpoena ad respondendum was issued.

As early as the sixteenth century, one of the privileges of the peerage was that peers were summoned to court by letters missive instead of writs of subpoena.⁵³ However, the formula of the prayer for a letter missive does not seem to have been settled until the seventeenth century. The following confused example of a prayer for one requests it to be "under a certain pain", but the basic theory of letters missive was that the defendant would appear voluntarily once he had received notice of the suit; this was the honorable thing to do. Presumably the court in this case issued the letter in the standard form. This bill also gives an example of a prayer for a subpoena duces tecum, that the defendant produce something in court. " ... may it therefore please your honours the premisses considered to grant the Queen's majesty's writ of subpoena to be directed to the said Henry Earl of Sussex, or otherwise

50. E.112/59/4 (Carmarthen) (1560-1566).

51. E.112/5/25/1 (1578).

52. E.112/4/2/1 (1585).

53. For the 17th century, see Compleat Sollicitor (1666) p. 390.

by messenger or letters to command him at a certain day and under a certain pain therein to be limited, to be and personally to appear in her highness' said court of exchequer, then and there to answer the premisses as also to being with him and to show forth unto the said court the said letters patents and such other deeds charters writings escripts and muniments as he hath in his custody touching the premisses.."⁵⁴

The proper form of the prayer for a letter is as follows: "... To grant unto your orator the letter missive of your honours to be directed to the said A.B. desiring him to appear to and answer your orator's said bill, or in default thereof his Majesty's most gracious writ of subpoena.."⁵⁵

After the prayer for process was the prayer for relief. This was usually for general relief only. It was left to the court to make such order as they might think fit after having heard the case. However, it was not at all rare for the plaintiff to state also what specific action he desired the court to take; nevertheless, the prayer for general relief was always included.⁵⁶ If the defendant had been particularly aggressive, the bill might suggest that the court inflict some "condign punishment" upon him as an example to his neighbours who might themselves otherwise follow the defendant's bad example.

The bill of complaint was brought to a close by a complimentary flourish, such as "... And your Lordship's said most humble orator shall daily pray to God for the prosperous preservation of your good lordship long with increase of honor to endure." or "... And your said complainant shall daily pray to God for the preservation of your Lordship in long

54. From Countess Dowager of Sussex v. Earl of Sussex, E.112/14/68/1 (1587).

55. From Fowler, Practice (1795) vol. 1, p. 36.

56. Fowler, Practice (1795) vol. 1, p. 33, following Mitford, Pleadings (2d ed. 1787) p. 45; it is said here that the prayer for process was the last part of the bill, but this was not true in the exchequer as late as 1726: see the sample bill in The Compleat Clerk in Court (1726) pp. 157-161.

health and felicity." This final bit was not included in the official informations exhibited by the attorney general on behalf of the crown.

After about 1585, the endorsements added to the original bill of complaint were in regular form, that is the normal form which was retained until the end of the jurisdiction in 1841. The bill was signed by counsel who in theory had read it in order to certify its propriety.⁵⁷ This signature was put at the end of the text of the bill on the right. This was the traditional chancery practice,⁵⁸ but it was only irregularly followed in the exchequer in the 1550's and 1560's.⁵⁹ However, it was ordered by the court on 4 June 1573 that no process should issue on an English bill unless the bill had been signed by counsel.⁶⁰ As a result the earlier lax practice was from thenceforth rigidly adhered to, and all bills bore the signature of counsel.

At the top left corner, the sworn clerks endorsed the term, the regnal year, the day and month in which the bill was filed. Beneath this in the left hand margin was written the county of the origin of the suit, the number of the bill for that particular county and reign, and the last name or initial of the sworn clerk representing the plaintiff. All this was done when the bill was first brought into court.⁶¹ At the foot was the order for process, the fiat, which was signed by one of the judges of the court.⁶² Before about 1585 these endorsements were rather haphazard, but by the end of the decade the office procedure as to endorsements was permanently established.

57. See Fowler, Practice (1795) vol. 1, p. 36; Turner, Epitome (1806) p. 2.

58. W.J. Jones, Elizabethan Court of Chancery (1967) pp. 192, 193; D.E.C. Yale, Lord Nottingham's Treatises (1965) pp. 50, 90.

59. E.g. Whalley v. Mounson (1553-1554); Vaughan v. Twisden (1554-1555); Gyfforde v. Bishop of Bangor (1557); Mantell v. Mayor of Wickham (1558): in app. 5.

60. E.123/6, f. 28v.

61. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 148; Lincoln's Inn MS. Misc. 310, 2d return, 30th ans. (1820); Turner, Epitome (1806) p. 18.

62. See below, section B.

From 1694 to 1824 all pleadings were required to be written upon stamped parchment.⁶³ The stamps were embossed on small rectangular bits of blue or red paper and affixed to the left hand margin. These revenue stamps had no equity significance.

Exchequer bills never had pledges for their prosecution. The probable reason is that by the time the equity jurisdiction was established, the requirement of pledges for prosecution in the older equity courts was an antiquated and meaningless formality or a fiction. Since they were useless, there was no reason for the exchequer to require them.

On a few occasions, schedules⁶⁴ and deeds⁶⁵ were filed with the bill, but they were rare in the sixteenth century.

Bill Books

The bill books are contemporary calendars of all of the equity bills which were filed in the exchequer from the accession of Elizabeth I in 1558 to the end of the jurisdiction in 1841. The 34 bill books are classified by the Public Record Office as IND. 16820-16853. They are paper. They were written in Latin but in the secretary hand. The books are divided into sections, each section being a calendar of the bills from one county for one reign. The name of the monarch is stated at the beginning of each book and of each section; the county is given at the top of each page. For the sixteenth century each entry contains the bill number and the names of the plaintiff and of the defendant; then about

63. Stat. 5 & 6 Will. & Mar. [1694] c. 21, Stat. Realm, vol. 6, pp. 495, 496; repealed by stat. 5 Geo. 4 [1824] c. 41; J. Chitty, Practical Treatise on the Stamp Laws (1829) pp. 1-3.

64. E.g. *Capull v. Ardern* (1543-1545) (lists of fines) in app. 5; *Gregory v. Cleves*, E.112/12/12/2 and 3 (1582) (lists of ships and merchandise).

65. E.g. *Draycote v. Newce*, E.112/9/12 (1578).

half the time there is a very short note, two or three words, concerning the nature of the claim. From about 1631, the term and regnal year in which the bill was filed is given. In the eighteenth century the note of the nature of the claim was dropped from the minutes in the bill books. The following are two typical samples; they are taken from Elizabethan Yorkshire: "706, Ricardus Walker et Ricardus Mulgley versus Cirell Arthington"; "710, Thomas Traynholme versus Marmaducus Wilson et Williamus Wilson tangens messuagium et certas terras in Easthurlessey."⁶⁶

These books appear to have been first made in 1587. They were kept by counties probably as a result of the clerks' of the exchequer habitually thinking in terms of sheriffs' accounts which were logically kept by counties. At the beginning of the Elizabethan sections for the counties of York, Kent, Lincoln, London and Middlesex, and Monmouth is written a title: e.g. "1587/Eborum/A Repertory of such matters as have been exhibited by English Bill before the lord treasurer chancellor and barons of the exchequer in the county aforesaid." The others are the same, mutatis mutandis. The entries in the bill books for the bills filed before 1587 for a particular county are all written in a single hand. The dates of the bills were not regularly endorsed on them until about 1578. to 1583. Furthermore the bills are not now filed chronologically before about 1585 or 1587, the earlier period being completely out of order. These facts can be accounted for by the following theory of their collection, classification, and preservation.

By 1587 the equity side of the court had built up a thriving jurisdiction with the result that the large quantity of unsorted bills could be no longer managed. There were too many to search through in order to

66. IND. 16820, pp. 361, 362.

find the one needed at any moment. Therefore the decision was made to arrange and calendar the bills for easier future reference. It was impossible to arrange the files in chronological order, since most had not been endorsed, i.e. the ones before about 1580. However, it was a relatively simple thing to sort them out by counties since the plaintiff after his name at the beginning of the bill stated what county he came from; also near the beginning of the statement of the facts he would give the location of any land in dispute. Thus the county could be fairly quickly determined without having to read the entire bill. When the files had been separated into counties, the sworn clerks divided the counties among themselves for entering the piles of bills into the new bill books. Therefore the initial entries for each county are in the same hand, but after 1587 they are not. After the bill books had been set up, each sworn clerk entered the minutes of the bills of his own clients in the bill books as he put the bills on the file. (He endorsed the bill and made the entry in the bill book at the same time). Thus after this date and until 1841 there is a diversity of hands within each county in the bill books. Once these books had been begun, they were always carefully kept.

B. Process

The normal initial process of the equity side of the exchequer was the subpoena ad respondendum. This writ required the recipient, the defendant, to appear in court by a certain day and to answer the bill of complaint which had been filed against him. The subpoena was issued by the sworn clerk for the plaintiff.⁶⁷ Since it was not a returnable writ, none have been preserved in the exchequer archives. Moreover, since

67. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143; see also 1828 (nos. 156, 231) vol. 20, pp. 277, 279.

they were of no significance whatever once the defendant had made an appearance, they would not normally be preserved by individual recipients. The author has not been able to find a subpoena which was actually served on someone, but the textbooks give examples.⁶⁸

In theory the plaintiff first had his bill examined for its propriety, approved, and signed by counsel, and then he exhibited it in court. There it was, in theory, examined and approved by a judge who thereupon granted the order for process to issue. In fact, however, in the sixteenth and seventeenth centuries, the plaintiff procured the issuance of the subpoena before any bill of complaint was drafted as all; then he would exhibit his bill before the return day of the subpoena. Thus the safeguards against frivolous and vexatious suits were abandoned. In many cases the defendant appeared before the bill had been filed. This was probably more often due to negligence than unavoidable accident; but this reversed procedure could also be the facile tool of malicious litigation.

There ^{were} ~~was~~ two reasons for the possibility of the easy abuse of the procedure in which the writ proceeded the bill. First the writ stated no cause of action but was only a general summons to appear. In the second place the writ was issued automatically by the sworn clerks and, if no bill were filed, the defendant was dismissed (with costs) as a matter of course. The judges of the exchequer had no part to play in the malicious farce in which the plaintiff never intended to file any bill, and they were therefore unaware of its production. There could be several acts before the unjustly harried defendant prosecuted his own

68. See Brit. Mus. MS. Lansd. 168, f. 234 (1631); Brown, Compendium (1688) p. 459; The Compleat Clerk in Court (1726) p. 154; Fowler, Practice (1795) vol. 1, p. 133; Barton, Historical Treatise (1796) pp. 66, 67.

bill for an injunction, an expensive proposition when it had to be done only to procure peace, his natural right.

In the exchequer it appears to have been the normal procedure from the beginning to issue process before the bill was exhibited.⁶⁹ This was the standard chancery practice⁷⁰ (the model for the exchequer). The barons, like the lords chancellors, attempted to put an end to this abuse. An order of 4 June 1573⁷¹ required the bills to be signed by counsel before process be made against defendants; this naturally required bills to precede subpoenas. An order of 28 January 1580⁷² stated that no answer could be compelled unless the bill was "allowed" by one of the barons' signing the bill; thus a subpoena, which compelled an answer, should not issue before a bill was exhibited to be signed. The pretence that the bill was exhibited before process issued was always maintained. The fiat for process was endorsed and signed by a baron whenever the bill appeared. However, the exchequer rules of court acceded to the actual practice,⁷³ and the seventeenth century manuals agree that this was the established custom.⁷⁴ It was a well known abuse in the first part of the seventeenth century,⁷⁵ but it was not remedied until the passing of a statute in 1705.⁷⁶ This Act specifically required that no subpoena or other process could issue until after the bill was filed,

69. E.g. *Kytner v. Bishop of Bath and Wells*, E.123/2, f. 18 (1561); *Anon. v. Morris*, E.123/2, f. 41v (1563) where the defendant from Carmarthen appeared personally in Westminster to find no bill; *Chelmack v. Head*, E.123/2, f. 81 (1564).

70. Jones, *Elizabethan Court of Chancery* (1967) pp. 177-181, 191-192; Yale, *Lord Nottingham's Treatises* (1965) pp. 45, 46, 85; this was the chancery practice of the sixteenth century and later, but the mediaeval bill was a true petition, not a declaration of claim.

71. E.123/6, f. 28v.

72. E.123/6, f. 340v.

73. Rule 37 (1623-1630): E.369/118, f. 138; Rule 2 (1658-1660): in *Ordines Cancellariae* (1698) p. 2.

74. Osborne, *Practice* (1658) p. 138; *The Compleat Sollicitor* (1666) p. 390; *The Practick Part of the Law* (1681) p. 500.

75. See, e.g., W.J. Jones, *Politics and the Bench* (1971) doc. 17 pp. 180, 181 (from S.P.16/232 part 18 (c. 1632)).

76. Stat. 4 & 5 Ann. [1705] c. 3, s. 22, *Stat. Realm*, vol. 8, p. 460.

and it seems to have been effective at first.⁷⁷ However, by the nineteenth century, the exchequer had reverted to its old ways.⁷⁸

Letters missive⁷⁹ issued as the first process to peers in the place of subpoenas. The effect was basically the same. The difference was in the wording: the letters missive, instead of being a peremptory and threatening command, was a politely worded notification to his lordship that a bill had been filed against him in the exchequer. If the letters missive were disregarded, then a normal subpoena issued.⁸⁰

After the bill had been exhibited by the plaintiff, it was taken by the sworn clerk for the plaintiff to one of the judges of the exchequer to get his fiat for process to issue. The fiat was an order of course⁸¹ and was endorsed at the foot of the bill whether the subpoena had already been issued or not. In the eighteenth century the fiat was written out by the sworn clerk and then signed by the baron.⁸² This was most probably the earlier practice as well. In 1637 the barons agreed to split their fees equally regardless of which one of them actually signed the fiat.⁸³

Before about 1580 the practice was not clearly settled; and not all bills which were filed were endorsed with a fiat.⁸⁴ Of those which were, some fiats were not signed at all,⁸⁵ and others were signed by more than

77. See Bohun, The Practising Attorney (1724) p. [300]; The Compleat Clerk in Court (1726) pp. 152, 155.

78. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 109.

79. See samples in Brown, Compendium (1688) pp. 466, 467; Fowler, Practice (1795) vol. 1, pp. 187, 188; Barton, Historical Treatise (1796) pp. 70, 71.

80. Fowler, Practice (1795) vol. 1, p. 189.

81. Turner, Epitome (1806) p. 18.

82. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 109.

83. Order of 10 May 1637: E.125/20, f. 387v.

84. E.g. *Astrye v. Langrake*, E.112/1/8/1 (1571); *Geeve v. Raynes*, E.112/23/1/1 (1558-1572).

85. E.g. *Woodwarde v. Starkey*, E.112/9/23 (1571); *Mellershe v. Hooke*, E.112/65/1036 (1558-1572).

one judge.⁸⁶ Occasionally process was approved by the signature of a judge without any fiat having been written out.⁸⁷ After 1580 to 1584 the practice was firmly settled, and there was always thereafter a fiat signed by one judge. The following examples are typical: "xv^o Februarii 1582/83 Award proces to appeare and aunswer, returnable xv^{na} pasche";⁸⁸ "Deliberatur xxvii^o die Octobris Anno xxix^o Elizabethe Regina coram me, fiat breve de subpoena";⁸⁹ "Fiat breve de sub pena secundum formam istius petitionis."⁹⁰

From 1550 to 1600 the signatures to the fiats show that the treasurers and chancellors were active in the routine administration of the equity court. This was particularly true of Mildmay and Winchester. It is also interesting to note that, although the fiats were normally written in Latin, those of Burghley and Mildmay were in English.

The issue of the subpoena (or letters missive) was the first act of the court in any case; it was the sign that the court would hear the dispute. This was the significant moment in regard to priority of suit.⁹¹

The subpoena ordered the defendant to appear under the threat of a hundred pound penalty for refusal. This sum, however, was not leviable but only mentioned in *terrorem*.⁹² If the defendant failed to appear, he was considered to be in contempt of court, and upon the filing of an affidavit that he had been served with process, an attachment issued as a matter of course. This writ ordered the arrest of the defendant;

86. E.g. *Pyrkmere v. Bostocke*, E.112/5/33/1 (1576); *Whitney v. Page*, E.112/5/29/1 (1578).

87. E.g. *Senhouse v. Albanie*, E.112/1/29/1 (1578); *Whitney v. Leigh*, E.112/5/14/1 (1578).

88. From *Lord Graye v. Grynfeld*, E.112/3/15/1 (1583).

89. From *Mitchell v. Bowden*, E.112/3/35/1 (1587).

90. From *Morton v. West*, E.112/3/57/1 (1593).

91. *Price v. Lord Coningsby*, Bunb. 124, 145 Eng. Rep. 618 (Ex. 1722-23).

92. *Howard v. Lenthall*, Hardr. 376, 145 Eng. Rep. 505 (Ex. 1664) (dictum); Fowler, *Practice* (1795) vol. 1, p. 131.

if it could not be implemented, the plaintiff could have an alias attachment and then a pluries attachment. Then an attachment with proclamations issued, by virtue of which it was proclaimed in the county that the defendant appear and answer upon his allegiance to the crown. Finally there issued a commission of rebellion,⁹³ which declared the defendant to be a rebel to be arrested by anyone in any county; this was similar to the chancery process, and the public announcements in the county had affinities with the process upon the common law writ of outlawry.⁹⁴ According to Fowler, who was writing at the end of the eighteenth century, after the writ of attachment to the sheriff was unsuccessful, a messenger of the court was sent to arrest the defendant.⁹⁵ After the failure of a commission of rebellion, a serjeant at arms was sent to bring him into court; then a writ of sequestration⁹⁶ issued to seize his goods and hold them until his contempt had been purged.⁹⁷ The resort to sequestration by a court of equity is interesting in that it shows the barons being forced to abandon

93. For example attachments, see Brit. Mus. MS. Lansd. 168, f. 234 (1631); Fowler, Practice (1795) vol. 1, p. 142; Barton, Historical Treatise (1796) pp. 77, 78; attachments with proclamations: Brit. Mus. MS. Lansd. 168, f. 237v (1631); Fowler, Practice (1795) vol. 1, pp. 152, 153; Barton, Historical Treatise (1796) p. 82; commissions of rebellion: Brown, Compendium (1688) pp. 377, 378; Fowler, Practice (1795) vol. 1, pp. 160-162; Barton, Historical Treatise (1796) pp. 83-85.

94. Squibb, 'Brief Collection' (1642); Osborne, Practice (1658) pp. 138, 139; The Compleat Sollicitor (1666) pp. 390, 391; Rule 5, Ordines Cancellariae (1698) pp. 5, 6; Bohun, Practising Attorney (1724) pp. 295, [300]; The Compleat Clerk in Court (1726) pp. 152, 153; see Thurbane's Case, Hardr. 323, 145 Eng. Rep. 479 (Ex. 1663) (commission of rebellion) (? whether equity).

95. Fowler, Practice (1795) vol. 1, pp. 150, 151.

96. See sample in Brown, Compendium (1688) p. 363.

97. Fowler, Practice (1795) vol. 1, pp. 164-185 (sample given); Barton, Historical Treatise (1796) pp. 76-93 (sample given); Turner, Epitome (1806) pp. 96-100.

at the end the traditional in personam proceedings and to act in rem. After 1731 it was possible to have a decree pro confesso against a defendant who absconded in order to avoid service of process.⁹⁸

Subpoena Books

At some time in the seventeenth century, the clerks began entering notes of the issue of subpoenas in a book which was kept for that purpose. When the subpoena was given to the plaintiff for him to serve on the defendant, the entry was made in the subpoena book.⁹⁹

When the exchequer archives were transferred to the Public Record Office upon the suppression of the equity jurisdiction, there was a series of twelve subpoena books.¹⁰⁰ However, only the oldest has been preserved: E.216/532. This book does not declare its date, but the names of the clerks who issued the subpoenas recorded therein show that it was made in the 1650's or 1660's. There is no clue as to whether or not this book is the first subpoena book ever kept. It would be surprising if it is, because the entries in these books were the only record that a subpoena had been issued.

The king's remembrancer's subpoena books were of paper, in Latin, and in the vernacular hand. They were arranged alphabetically according to the first letter of the plaintiff's last name. Each entry consists of the initial or name of the sworn or side clerk for the plaintiff and the names of the parties. If a bill had been filed, this also was noted.

There appears to have been another set of books which recorded the subpoenas which had been issued by the king's remembrancer's office on behalf of the clerks of the exchequer office of pleas. The only

98. Stat. 5 Geo. 2 [1731] c. 25.

99. Fowler, Practice (1795) vol. 1, p. 134; Turner, Epitome (1806) p. 19.

100. D.K. Rept. No. 2 (1841) p. 67; D.K. Rept. No. 3 (1842) app. 1, p. 24; D.K. Rept. No. 20 (1859) app. p. 49.

remaining volume, now E.216/521, covers the period 1654-1657. Any other volumes which may have existed have not been preserved; presumably there were not many others because in the eighteenth century the clerks of the office of pleas began to issue subpoenas themselves.¹⁰¹ The twentieth report of the deputy keeper of the Public Record Office notes the existence of a series of twelve equity subpoena books dating from 1654 to 1841 and a two volume series of subpoena books dating from 1802 to 1815.¹⁰² These last two books have not been found. It is most unclear whether the date of 1654 in the first series refers to E.216/521. Probably these two categories ^{were} ~~were~~ made upon an insufficient examination of the books and as a result the value of these books was not realized so that only the earliest books, which date before 1660, were retained.

C. Appearances

A copy of the complaint was not served with the subpoena. Originally, in the earliest days of the equity side of the chancery, the defendant appeared in court pursuant to the subpoena; the bill was read to him; and he answered orally then and there. However, by the middle of the sixteenth century in the exchequer, as well as the chancery, the defendant made an appearance, took a copy of the bill, and put in his prepared, written answer at a later date.

From the beginning of the reign of Queen Elizabeth, the defendant appeared in court either in person or by his attorney. His ^{sworn} ~~worn~~ clerk then entered a minute of his appearance in the appearance book, gave him

101. Lincoln's Inn MS. Misc. 310 (1820) 2d return, 2d ans.

102. D.K. Rept. No. 20 (1859) app. p. 49.

a copy of the complaint, and gave him the ordinary three days to put in his answer. This was all a matter of course. The three "days" were the fifth calendar day after the appearance, the fifth day after that, and the fifth day following. If no answer had been exhibited by the last day, then a decree pro confesso would be entered in favor of the plaintiff.¹⁰³ In the seventeenth and eighteenth centuries the defendant was given eight days of course to answer, after which an attachment issued of course; if he refused to answer after having been brought into court twice upon writs of habeas corpus, then the bill was taken against him pro confesso.¹⁰⁴ If the attachment order was unsuccessful, a sequestration order would be had; if this also failed, then the bill was taken pro confesso.¹⁰⁵ It should be noted that a sequestration upon the failure to answer was not the same as one upon a failure to appear; the former was in the nature of a pledge, the latter was like a distraint.¹⁰⁶

Appearance Books (E.107)

The appearance books of the king's remembrancer's office have not very well survived the tests of time. This is surprising in that they were considered to be important records;¹⁰⁷ perhaps they were too frequently handled and some of them disintegrated. They were paper. We know that they were kept from before 1564;¹⁰⁸ however, the earliest one

103. Order of 7 Nov. 1564: E.123/3, f. 7.

104. Osborne, Practice (1658) pp. 140, 143; The Compleat Sollicitor (1666) p. 391; The Practick Part of the Law (1681) pp. 500, 501; Rules 6 and 18, Ordines Cancellariae (1698) pp. 7, 8, 19; Bohun, Practising Attorney (1724) pp. 295, [300]; The Compleat Clerk in Court (1726) pp. 162, 164; see *Howell v. Lord Coningsby*, Bunb. 219, 145 Eng. Rep. 653 (Ex. 1726).

105. Fowler, Practice (1795) vol. 1, pp. 216-243; stat. 5 Geo. 2 [1731] c. 25.

106. *Desbrow v. Crommie*, Bunb. 273, 145 Eng. Rep. 671 (Ex. 1729).

107. D.K. Rept. No. 2 (1841) pp. 67, 68.

108. See order of 7 Nov. 1564: E.123/3, f. 7.

which has survived begins with the appearances of Easter term 1588, and it can be seen that the first pages of this book are missing. In the series of 22 appearance books, which stretches from 1588 to 1841, the lacunae are many and large: 1600-1632, 1637-1666, 1675-1739, and 1756-1773.

The appearance books record appearances on the revenue side of the court as well as the equity side. The entries for equity appearances note that the defendant had appeared "per billam Anglicanum"; for revenue appearances the defendant had appeared "per recordam," the record being the king's remembrancer's memoranda roll. (The revenue side followed the common law procedures, and the memoranda rolls recorded all revenue pleadings and action taken thereupon).

The entries were written in Latin in the vernacular hand. All appearances in the king's remembrancer's office, both equity and revenue, were entered chronologically as the defendants appeared. At the top of each page was written the term, regnal year, and day of the month. Each entry gives the county in which the dispute arose, the name or initial of the defendant's sworn clerk, the name of the defendant, the reason for his appearance, and usually the name of the plaintiff also. A blank space of an inch or two was left for further entries regarding the appearance. If the defendant was given further time to answer or if he did not answer and a writ of attachment issued, a note of this was added later to the original entry. The following examples are typical: "Eborum, Babb, Cirill Arthington armigerum venit per billam Anglicanum ad sectam Walker et al.";¹⁰⁹ "Lincoln, A., Sutton Banks gentleman appears at the suite of John Porter Esquire by Bill of Complaint."¹¹⁰

In addition to their original purposes, the appearance books are useful as calendars of defendants as the bill books are ^{for} plaintiffs.

109. E.107/2, f. 54v.

110. E.107/6, f. 64.

D. Second Pleading1) Answersa) Answers Taken in Court

The normal type of response to a bill of complaint was the answer. It was engrossed on parchment and then brought to court by the defendant who thereupon swore to its veracity before one of the barons. The answer was a general pleading which could be used to set up any response to the plaintiff's complaint, but it was required to respond to the entire complaint in one way or another or it would be subject to exception on the ground of insufficiency. Equity pleading was not used or interpreted narrowly. Pleas, demurrers, and disclaimers were useful to avoid answering all of the allegations of the bill, and their use gave an air of specialization, sophistication, and elegantia, but the substantial allegations of these pleading devices could also have been made by way of an answer.¹¹¹ The advantage to the defendant of the answer was that a sworn answer which was responsive to the bill had the weight of evidence, which could be overcome only by the contrary testimony of two witnesses.¹¹² The advantage to the plaintiff was that he could discover the facts of the case and the position of the defendant and he could use the answer in evidence against the defendant.

Before 1572 defendants always responded by way of an answer.¹¹³ After this date other pleadings were resorted to in addition; however, the use of answers always greatly predominated.

111. E.g. *Payne v. Gresham*, E.112/20/41 (1583), this answer is in substance a demurrer; it is transcribed at the end of this subsection.

112. E.g. *Earl of Montague v. Earl of Bath*, 3 Chan. Cas. 55 at 123, 22 Eng. Rep. 963 at 1005 (Ch. 1693); *Keys v. Williams*, 3 Y.& C.Ex. 55 at 61, 160 Eng. Rep. 612 at 614, 7 L.J.Ex.Eq. 59 (Ex. 1838) (one witness plus pregnant circumstances); *Wigmore on Evidence* (3d ed. 1940) vol. 7, pp. 290, 291, sec. 2047.

113. The only even partial exception to this rule is *Peake v. Page*, E.112/23/64 (1570), this pleading was called simply an answer, but in substance it was a demurrer on the grounds of *res adjudicata* and an answer to the allegations of the bill.

From the earliest records of the exchequer's equitable jurisdiction, it can be seen that answers in equity had been always written down and that they quickly acquired a definite form. This pattern was followed until the end of the jurisdiction with only one noticeable change. Answers were characterized by certain rigid formulas at their beginnings and ends.

At the top of the parchment was written the title of the pleading and the names of the parties: "The answer of C.D. to the bill of complaint of A.B." Occasionally in the sixteenth century the defendant might have gratuitously added some uncomplimentary adjective referring to the bill,¹¹⁴ but this unprofessional rudeness was soon discontinued.

In the sixteenth century the answer began with an elaborate, standard denigration of the substance and motivation of the bill of complaint: "The defendant sayeth that the bill of complaint against him exhibited in this most honorable court is uncertain, untrue, and insufficient in law to be answered unto, and devised of malice to trouble [and vex] and put the said defendant to costs and charges, but all advantages of exception to the insufficiency at all times saved for full declaration and truth of the matter sayeth that ..."¹¹⁵ By the end of the seventeenth century the first part of this opening formula was omitted, and the answer began with the ritual saving of exceptions.¹¹⁶

The defendant then gave his version of the facts and circumstances of the matter in dispute. This part was introduced by some such phrase as "... but for truth answereth that ..."

114. E.g. *Peyton v. William*, E.112/6/77/4 (1587).

115. From *Missenden v. Toms*, E.112/1/22/2 (1582).

116. And so to the end: Fowler, *Practice* (2d ed. 1817) vol. 1, p. 358.

The defendant's version of the story was followed by the denial of the plaintiff's version. In this section the defendant denied specifically, seriatim et separatim, each of the plaintiff's allegations which he contested. Each denial was prefaced with the words "... without that ..." ¹¹⁷

The answer closed with the following rigid declaration and prayer: "... [and] without that that any other thing in the bill material [and effectual] alleged and in this answer not sufficiently confessed and avoided, traversed, or denied is true which he is ready to aver and prove as this honorable court will award and prayeth to be dismissed with his [reasonable] costs and charges wrongfully sustained." ¹¹⁸ After the end of the eighteenth century there was added a general denial of the entire bill just to be on the safe side. ¹¹⁹

The answer was drafted and engrossed out of court. After 1558 it was regularly signed by counsel. ¹²⁰ From 1580 onwards the answer was required to be put in under the oath of the defendant. ¹²¹ The defendant brought his answer to one of the barons and swore to its truth. The procedure for this in the early nineteenth century was as follows: if the swearing was done at Westminster, the usher obtained the baron's signature; elsewhere this was done by the baron's personal clerk. The oath was administered by the baron's clerk in the baron's presence;

117. "without that that A did ..." was a literal translation of the common law phrase "absque hoc quod ..."

118. From *Missenden v. Toms*, E.112/1/22/2 (1582).

119. See *Fowler, Practice* (1795) vol. 1, pp. 409, 410, following Mitford, *Pleadings* (1787) p. 249; this does not seem to have been done in the early 18th century: see the example in *The Compleat Clerk in Court* (1726) pp. 165-167.

120. It was only occasionally signed by counsel before 1558; see *LeBucke v. Sharington* (1553-1558) and *Cotton v. Hamond* (1554-1558) in app. 5.

121. Order of 28 Jan. 1580: E.123/6, f. 340v.

then the clerk wrote the jurat; and the baron signed it.¹²² For this fees were due to the usher, clerk, and baron. The answer was not normally signed by the defendant.¹²³

The jurat, the note of the swearing, was endorsed on the answer and signed by a baron. It was written either at the foot or at the top left; it simply stated that the answer had been sworn to and gave the date. The following sample jurats are typical: "Prestitit sacramentum xxii^{do} die Junii Anno Regno Regine Elizabethæ xxv^{to},"¹²⁴; "Jurat xv^o die Octobris Anno xxxii^o Regno Regine Elizabethæ coram me."¹²⁵

The sworn answer was then delivered to the defendant's sworn clerk in the king's remembrancer's office. He endorsed on it near the top left corner the term and regnal year and in the left hand margin the names or initials of the sworn clerks who were representing the parties. He then filed it, and an office copy was made for the plaintiff.

Until 1580 answers in the exchequer were not sworn, though they were sworn to in the courts of chancery, star chamber,¹²⁶ and requests. This was considered to be a mark of the inferiority of the court of exchequer.¹²⁷ A claim of privilege to sue in the exchequer was rejected in the chancery case of Meanell v. Fenton (1578)¹²⁸ because an answer under oath was needed but unavailable in the exchequer. Within two years it was ordered in the exchequer that all answers must be put in on the defendant's oath.¹²⁹ This change occurred at the time when the

122. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 222, 231.

123. But see Note, Bunb. 251, 145 Eng. Rep. 664 (Ex. 1728).

124. From Harcourt v. Windsor, E.112/3/16/2 (1583).

125. From Edwyn v. Bechenowe, E.112/3/47/4 (1590)

126. Jones, Elizabethan Court of Chancery (1967) p. 214.

127. Jones, Elizabethan Court of Chancery (1967) pp. 21, 343.

128. Meanell v. Fenton, Monro, Acta Cancellariae, p. 458 (Ch. 1578).

129. Order of 28 Jan. 1580: E.123/6, f. 340v.

administrative procedures of the court of exchequer were being settled, when the queen's remembrancer's office was re-organized in regard to the equity side of the court. It was no doubt based on the chancery practice. The probable reasons for the change were to bring the exchequer into line with the older, established courts of equity, to stop criticism and charges of inferior procedures, to have answers which had the weight of evidence, to discourage frivolous answers, and perhaps to increase the fees of the exchequer officers.

Whether sworn answers in the sixteenth century actually had the weight of evidence which could not be rebutted but by two witnesses to the contrary is not absolutely certain. None of the reported cases from that period addresses itself to that point. However, the first cases which do state this rule of law suggest that it was a long and well established rule, one which called for no comment, explanation, or citation of precedents.¹³⁰ Although these earliest reported cases were decided in the last quarter of the seventeenth century, they are of some evidential value upon the practice as it was a hundred years before. Wigmore was of the opinion that this rule was taken over by the equity courts from the ecclesiastical courts and was the practice in chancery from its beginning in the fifteenth century.¹³¹

As a general rule one of the privileges of the peerage was that peers answered in court not under oath but under protestation of honor as to the truth of their answer. Peers do not seem to have been sworn

130. E.g. *Wakelin v. Walthal*, 2 Chan. Cas. 8, 22 Eng. Rep. 820 (Ch. 1679); *Hobbs v. Norton*, 1 Vern. 136, 23 Eng. Rep. 370 (Ch. 1682); *Earl of Montague v. Earl of Bath*, 3 Chan. Cas. 55 at 123, 22 Eng. Rep. 963 at 1005 (Ch. 1693).

131. Wigmore on Evidence (3d ed. 1940) vol. 7, pp. 290, 291, sec. 2047; see also J.M. Gest, 'The Responsive Answer in Equity,' Am. L. Reg., vol. 52, pp. 537-575 (1904).

to their answers in the equity side of the exchequer in the sixteenth century.¹³² This rule was firmly decreed by the House of Lords in 1640.¹³³ Apparently this order was later questioned, because in 1732 the lords passed another resolution to the same effect.¹³⁴ However, a peer could waive this right and answer under oath if he so desired.¹³⁵

When the attorney general answered a bill against the crown, he did so without any oath. A corporation having no soul could make no oath, but it answered under its common seal.¹³⁶

b) Answers Taken in the Country

Although answers taken in court were normal in theory, answers taken in the country were normal in practice. When the defendant was unable to come to Westminster to put in his answer because he was ill or lived in the country, he could have a commission of dedimus potestatem to commissioners in the country in his neighbourhood to receive his answer and to take his oath. An affidavit was required if the defendant claimed to be unable to travel because of old age or illness, but not if a commission was prayed because he lived in the country.¹³⁷ In this latter case, the commission issued of course.¹³⁸ After the middle of

132. E.g. Bishop v. Lord Morley, E.112/5/13/4 (1586); see also above in Section A.

133. Order of 31 Dec. 1640: W.J. Jones, Politics and the Bench (1971) pp. 197, 198, doc. 26; G.W. Sanders, Orders in Chancery (1845) vol. 1, part 1, pp. 207, 208; see also J. Selden, 'Privilege of the Baronage of England' (1642), in Works, ed. Wilkins (1726) vol. 3, cols. 1534-1537.

134. A copy is in Fowler, Practice (1795) vol. 1, pp. 415, 416.

135. E.g. Viscount Micklethwait in Bedford Level v. Light foot, E.112/1079/10/2 (1729).

136. The Compleat Sollicitor (1666) p. 391; The Practick Part of the Law (1681) p. 501; Fowler, Practice (1795) vol. 1, p. 416.

137. Osborne, Practice (1658) p. 142; The Practick Part of the Law (1681) p. 502; Bohun, Practising Attorney (1724) p. 301; The Compleat Clerk in Court (1726) p. 162.

138. The Compleat Sollicitor (1666) p. 392.

the seventeenth century, the rule was that no one living within fifteen miles of London could have a commission without a special order of court.¹³⁹ Two commissioners were named by the sworn clerks for each party, and the plaintiff's commissioners were to be given notice of when and where the answer was to be taken.¹⁴⁰

The commission of *dedimus potestatem* was a standard form.¹⁴¹ It was on parchment and written in Latin in the official set king's remembrancer's hand. It bore the king's remembrancer's signature and was sealed with the exchequer seal. Along with the commission was sent a parchment office copy of the bill of complaint. This office copy was not signed, but the name of the counsel who signed the original bill was written on it. The fiat was not copied; but some of the other endorsements were.

The commissioners were ordered to receive the answer of the defendant, which was to be engrossed on parchment, to take his oath, and to send the answer and the writ of *dedimus potestatem* back to the court at Westminster. They usually returned the copy of the complaint as well. One commissioner from each side was sufficient to take an answer, but if the plaintiff's commissioner did not attend, then two of the defendants's commissioners could act.¹⁴² The commissioners endorsed on the back of one of the documents sent in to Westminster a note of their proceedings and a certificate of the defendant's oath. This certificate

139. Rule 6, *Ordines Cancellariae* (1698) p. 7; Bohun, *Practising Attorney*, (4th ed. 1737) vol. 2, p. 227; Fowler, *Practice* (1795) vol. 1, p. 412; Turner, *Epitome* (1806) p. 30.

140. Osborne, *Practice* (1658) p. 142; Bohun, *Practising Attorney* (4th ed. 1737) vol. 2, p. 227; Fowler, *Practice* (1795) vol. 1, pp. 418, 419.

141. See samples in Brown, *Compendium* (1688) pp. 372, 373; Fowler, *Practice* (1795) vol. 1, pp. 413, 414; Barton, *Historical Treatise* (1796) pp. 127-129.

142. Turner, *Epitome* (1806) p. 31.

was signed by all of the commissioners present. Occasionally the certificate was written on a separate piece of parchment or paper.¹⁴³

These documents were sent by a messenger back to the court. When they were received, the messenger was put under oath that he had not tampered with the documents in transit. A certificate of the delivery and the oath, the liberatur, was endorsed on one of the documents delivered, and it ^{was} usually signed by one of the barons. If the answer and other documents were delivered by one of the commissioners, no oath was necessary. The following liberaturs are typical: "Liberatur per manum Williami Mullens de Civitate Cestrie xxv^o die Januarii Anno xxvii^o Regine Elizabeth Et prestitit sacramentum."¹⁴⁴ and "Deliberatur in Curia v^{to} die Novembris Anno Regni Regine Elizabeth xxvii^o per manus et sacramentum Georgii Rotheram Armiger."¹⁴⁵

The earliest dedimus potestatem to take an answer which has so far been found in the exchequer is dated 28 November 1571.¹⁴⁶ There are three from the month of February 1580,¹⁴⁷ and from 1580 onwards they are numerous. This suggests that they were first allowed as a matter of normal practice starting in 1580.

Payne v. Gresham

1583

E.112/20/41 - parchment, 345 mm. x 120 mm. - answer

The Aunswer of Wylliam Gresham Esquier defendant unto the Byll of Complaint of Robert Payne Complaynant.

The saide defendant sayeth that the saide Byll of Complainte againste him exhibited in this honnerable Courte is altogether insufficient in Lawe

143. E.g. E.112/51/195/5 (1585); E.112/58/19-A/5 (1588); E.112/55/670/4 (1598); E.112/58/34/4 (1599).

144. From Browne v. Gamwell, E.112/5/10/5 (dorse) (1584).

145. From Hayle v. Wheler, E.112/1/18/4 (dorse) (1585).

146. E.112/51/193-A/1.

147. E.112/47/3/2; E.112/49/15/1; E.112/50/59/1.

to be Aunswered unto for that if the matters therin alledged weare true (as they are not) Then they are determinable by Action one the Case at the common Lawe & not in this Honorable Courte beinge A Courte of equitye Also the Complainant hathe not shewed in his Byll that he is anie waies indebted unto the Quenes majesty or els that he is anie Officer of this Courte or Attendaunte uppon anie Officer wherby he should be anie waies priviledged to Sue in this Courte And therfor the defendant demaundeth Judgment whether this Courte will putt him to aunswer anye further And soe most humblie praieth to be dysmissed out of this honnorable Courte with his reasonable coste and Charges in this behalf wrongefullie sustained.

/s/ w. Spatchurste

[endorsed]

Termino pasche Anno xxv^{to} Regni Elizabethe
Eborum [but now with pleadings from Kent]

Gray cum defendente

S[alway] cum querente

* * *

2) Demurrers

The demurrer was a pleading which stated that the bill of complaint need not be answered because of some legal^{147a} deficiency therein, such as the failure to state a cause of action on the part of the plaintiff or a legal duty on the part of the defendant or because of some technical discrepancy in the bill. It declared that, assuming but not admitting

147a. I.e. legal as opposed to factual, rather than legal as opposed to equitable.

the facts to be as alleged, the court for legal reasons should not decree as the plaintiff had prayed.^{147b} All answers in the exchequer began with a formal general allegation of the insufficiency of the complaint. This formula was in essence a demurrer, but the defendant then went on to answer the bill, and this formality was always ignored. A proper demurrer gave the specific reasons for the allegations of legal shortcomings and prayed dismissal without making any answer.

In equity the substantial allegations of a demurrer could be made in an "answer". Pleadings called demurrers appeared in the exchequer about 1583. Demurrers were signed by counsel, but they were not sworn to since they alleged no facts.

In the established equity procedure, it was permissible to answer to part of a bill, demur to another part, and plead to and disclaim others.¹⁴⁸ In the Elizabethan exchequer, these pleadings were sometimes used alternatively; this was allowed so long as consistency was maintained.¹⁴⁹ In Darcy v. Ballett (1593)¹⁵⁰ the defendant denied the plaintiff's title and then denied the allegations of the bill. In Haxbie v. Metcalfe (1599)¹⁵¹ the defendant "demurred" on the ground that the supposed heir was a bastard, pleaded a former grant to himself from the crown, and finally answered the complaint by giving his own version of the situation.

147b. Demurrers in equity were different from those at common law in that they were not taken conclusively against the defendant if they were overruled. At common law if a demurrer was overruled, judgment was immediately given for the plaintiff since the defendant had admitted the facts as stated in the declaration, but in equity the defendant would only be ordered to put in an answer.

148. E.g. Fyshe v. Thoroughgood, E.112/1/68/2 (1590) in which some of the defendants demurred to part of the bill and disclaimed another part; in a separate pleading they answered to other parts.

149. E.g. Wright v. Sturdye, E.112/50/82/4 (1583) (demurrer and answer); Bowlin v. Atkinson, E.112/54/547/2 (1594) (demurrer and plea).

150. E.112/44/47/2 (1593).

151. E.112/56/752/3 (1599).

Since demurrers placed in issue only points of law, they can be very useful to legal historians in describing the law and the jurisdictional limitations of the court.

3) Pleas

The plea was that pleading used when the entire defence to the complaint could be reduced to a single factual allegation. Pleas in bar, except those founded upon matter of record in the exchequer, were required to be under oath.¹⁵² Also pleas of bankruptcy must have been under oath.¹⁵³

Pleas first began to be used in the exchequer around 1580 when the procedure generally became settled. There is a plea to the jurisdiction in Wright v. Sturdye (1583).¹⁵⁴ The "answer" in Preston v. Scrivener (1590)¹⁵⁵ is in substance a plea; it alleged that the plaintiff was outlawed and therefore not competent to sue, and it did not respond to the facts set forth in the complaint. in Marbury v. Seymour (1602)¹⁵⁶ the defendant put in a "plea and answer" which was not under oath and which was in fact only a plea of the outlawry of the plaintiff.

4) Disclaimers

A disclaimer was a pleading in which the defendant stated that he had no legal rights or claims to whatever it was that the plaintiff alleged in his bill. Disclaimers were not under oath but were signed by counsel. They were never very common.

152. Osborne, Practice (1658) p. 140.

153. Joseph v. Tuckey, 2 Cox 44, 30 Eng. Rep. 21 (Ex. 1788).

154. E.112/50/82/2 (1583).

155. E.112/53/438/3 (1590).

156. E.112/1/128/2 (1602).

A good example of a pure disclaimer is in Ridgdale v. Clarke (1589).¹⁵⁷ "Disclaimers and answers" were filed in Heynes v. Sanders (1596)¹⁵⁸ and Wooton v. Bollasses (1598)¹⁵⁹. In Agarde v. Babington (1590)¹⁶⁰ one defendant put in an "answer and disclaimer" and another a "demurrer and disclaimer", but both of these pleadings are pure disclaimers in substance.

Ridgdale v. Clarke

1589

E.112/14/87/2

parchment

disclaimer

The disclaymer of Richard Clarke defendant to the bill of
Complainte of Richard Ridgdale Complainant.

The said defendant by protestacion not **confessinge** or acknowledginge
any thinge or matter in the said bill of Complainte Conteyned materiall
in lawe to be aunswered unto by this defendant to be trewe Saieth that
he this defendant at the tyme of the bill exhibited or at any tyme sithens
had not nor claymed to have nor yet hath nor claymeth to have any estate
right tytle Interest Clayme or demaunde of in or to the said two Acres
and a half of lande or Medow lyenge and beinge in Southmeade in the
highe meade in or neare Stratford Langthorne in the County of Essex in
the bill mencioned nor any parte thereof but doth utterlie disclayme
himself to have any estate tytle or interest in or to the same premisses
or any parte therof And therefore this defendant doth entend that he shall

157. E.112/14/87/2 (1589), transcribed below.

158. E.112/44/58/2 (1596).

159. E.112/44/672/6 (1598).

160. E.112/9/40/2 and 3 (1590).

not be any further Impleaded in this Honorable Courte for the matters in the bill specified and humblie prayeth to be dismissed out of this honorable Courte with his reasonable Costes and chardges for his wrongfull vexacion therein susteigned.

/s/ Tho. Owen

* * *

E. The Third Pleading

1) Exceptions

The pleading of exceptions was used to assert the insufficiency of the defendant's answer and to require a further answer. It was necessary to describe specifically the deficiencies of the answer. The exceptions were engrossed on parchment, signed by counsel, and filed in court. It was useful to the plaintiff to know what defenses the defendant was going to raise at the hearing, but it was essential to have a full, perfect, and sufficient answer when the plaintiff was relying on it to prove his own case. No exceptions appear to have been filed in the sixteenth century, but they were fairly common in the seventeenth century and afterwards.¹⁶¹ It is to be noticed in connection with the lack of exceptions in the Elizabethan period the lack of interrogating parts in complaints then. Perhaps in the earlier period, plaintiffs were less conscious of the possibilities of discovery from defendants. The new practice

161. E.g. A.G. v. Mayor of Newcastle, E.112/113/234/4 (1623); Sawyer v. Ogle, E.112/113/243/4 (1625); see also Chambers v. Robinson, Bunb. 169, 145 Eng. Rep. 635 (Ex. 1724); Wickins v. Pratt, Bunb. 246, 145 Eng. Rep. 662 (Ex. 1727-28); Anon., 2 Barn. K.B. 150, 94 Eng. Rep. 415 (Ex. 1732).

in the latter part of the sixteenth century of swearing defendants to their answers may have also concentrated attention on the utility of full answers as evidential material for the plaintiff.

When the exceptions were filed, the court would order the defendant to amend his answer or appear in court to maintain it. If the defendant lived in the country, then he must have been served with a subpoena ad faciendum meliorem responsionem.¹⁶² If upon the hearing of the exceptions, they were sustained, then the defendant would be ordered to put in a further answer or to amend his first answer. After a fourth insufficient answer, the court would grant an attachment for his contempt and commit him to prison until he made a sufficient answer.¹⁶³

2) Replications

If the plaintiff did not set the cause down for hearing upon the bill and answer, the normal third pleading was his replication. The purpose of the replication was the same as that of the answer and the rejoinder, namely to confess and avoid or to traverse the preceeding pleading. Therefore all of these pleadings follow the same general form. The plaintiff's replication must have been based upon the defendant's answer; it could not set forth new matter except by way of confession and avoidance of or a special traverse to something in the answer. Replications were very common and were used in the exchequer from the

162. Osborne, Practice (1658) pp. 140, 141; The Compleat Sollicitor (1666) pp. 391, 392.

163. Rules 15 and 16, Ordines Cancellariae (1698) pp. 16, 17; Bohun, The Practising Attorney (1724) p. 296; The Compleat Clerk in Court (1726) pp. 163, 164; Fowler, Practice (1795) vol. 2, pp. 1-24; Turner, Epitome (1806) pp. 36-40.

very beginning.¹⁶⁴ Replications were not sworn to. The plaintiff served a subpoena ad rejuvendum¹⁶⁵ on the defendant when he filed his replication unless the defendant was already obliged to answer gratis, having been in contempt or having received some favor from the court.¹⁶⁶

An unusual pleading, which was probably the result of the newness of the jurisdiction, is the "replication and joinder in demurrer" to the defendant's demurrer, which was filed in Cooke v. Cooke (1586).¹⁶⁷ In the nineteenth century most replication were pure formalities drafted and engrossed by the sworn clerks.¹⁶⁸

3) Demurrers

If the answer was by way of confession and avoidance or special traverse, the plaintiff could demur to it on the grounds that it was insufficient in law. However, they were rare in equity pleading because there were better alternatives available. The plaintiff could either except to the answer for insufficiency, or he could set the cause down for hearing on the bill and answer. But in the case of Lord Seymour v. Lambert (1600),¹⁶⁹ the plaintiff filed a "demurrer and replication to the insufficient answer."

164. E.g. Bailiffs of Huntingdon v. Earl of Kent (before 1523); Waleston v. Calfehill (1509-1523); Miles v. Prior of Elsing Spital (before 1530); Tenants of Berkhamstead v. Rector of Ashridge (1531); Peck v. Church Wardens of Cokeham (before 1541); Capull v. Ardern (1543-1545); Manfelde v. Wyer (1547-1549); Roberts v. White (1549); transcribed in app. 5.

165. See printed samples in R. Crompton, L'Authoritie et Jurisdiction des Courts (1594) ff. 107v, 108; Brown, Compendium (1688) pp. 466, 470, 471; Fowler, Practice (1795) vol. 2, p. 49; Barton, Historical Treatise (1796) pp. 149, 150.

166. Osborne, Practice (1658) p. 145; The Practick Part of the Law (1681) pp. 503, 504; The Compleat Clerk in Court (1726) pp. 171, 172; Fowler, Practice (1795) vol. 2, pp. 40-50; Turner, Epitome (1806) pp. 40, 41.

167. E.112/10/21/3 (1586).

168. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 157.

169. E.112/3/105/5 (1600).

F. Rejoinders

The rejoinder was the defendant's response to any new matter in the replication.¹⁷⁰ Thus they were normally short formal documents. However, even if there was no new matter in the replication, the defendant was required to file a rejoinder of course, which merely asserted that he would maintain his answer.¹⁷¹ It was nothing more than a formality which refuted the formalities of the replication.¹⁷²

Rejoinders served the same purposes as replications, and so they followed the same forms and rules. They were engrossed on parchment and signed by counsel but not put in under oath.

Demurrers to replications were in theory possible, but a simple one has not been found. In the early period, a "rejoinder or rather demurrer" was filed in the case of Gage v. Swifte (1582),¹⁷³ and a "demurrer and rejoinder" was filed in Graunger v. Jefferson (1596).¹⁷⁴

Laurence v. Williams

1581

E.112/1/14/4 - parchment, 300 mm. x 150 mm. - rejoinder

The Rejoyneder of Edward Williams defendent to the replication of Jeoffraie Laurence Complainante.

The said defendent sayeth That his said Aunswere is good and sufficient in the Lawe to bee aunswered unto and doth averre mayntaine and wilbee

170. For examples, see Waleston v. Calfehill (1509-1523); Miles v. Prior of Elsing Spital (before 1530); Tenants of Berkhamstead v. Rector of Ashridge (1531); Capull v. Ardern (1543-1545); in app. 5.

171. For an example, see Laurence v. Williams, E.112/1/14/4 (1581) transcribed below.

172. Osborne, Practice (1658) p. 146; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 157.

173. E.112/13/18/3 (1582).

174. E.112/55/602/7 (1596); and in Thacker v. Harpur, E.112/9/62/7 (1596).

redie to prove as this honorable courte shall award all and every matter and thinge in his said aunswere conteyned to bee just and true in sorte and manner as the same bin therin sett forth¹⁷⁵ without that that anie matter or thinge in the said replication conteyned materiall to bee rejoyned unto and by the said defendent in due sorte and manner not confessed and avoyded traversed or denied is true All and singuler which matters the said defendent doth averre and wilbee likewise reddie to prove as this honorable courte shall allso award and prayeth as in his said aunswere he hath prayed.

/s/ Worine

[endorsed]

Bedford

Graynfeld cum defendente

* * *

G. Other Pleadings

The pleading stage of a lawsuit in theory could continue indefinitely, as long as there was any new matter alleged which called for a response by a succeeding pleading. The pleading continued until every material point was in issue.¹⁷⁶ That pleading which followed the rejoinder was the sur-rejoinder; these, however, were unusual in the sixteenth

175. If new matter were to be alleged or new matter in the replication were to be denied, it would have been inserted at this point.

176. Osborne, Practice (1658) p. 146.

century.¹⁷⁷ In two Elizabethan cases the defendants put in rebutters to the plaintiffs' sur-rejoinders.¹⁷⁸ No cross bills, bills of revivor, or bills of review have been discovered in the sixteenth century exchequer, though many examples can be found from later periods.

H. Records of the Pleadings (E.111, E.112, E.193)

All of the documents of the pleading stage of a lawsuit were kept together as a file,¹⁷⁹ and when the file was complete, they were bound together with a cord which went through the upper left hand margins. Before the file was complete, the exchequer clerks appear to have kept the documents on some sort of spindle; all of the pieces of parchment have at least one hole in the upper left quarter. This hole is usually in the portion of the membrane which has the text on it; therefore it is unlikely to have been made by an earlier binding.

The few pleadings which have survived from the period before 1558, the accession of Elizabeth I, are now in class E.111 in the Public Record Office and have been transcribed below in appendix five. This was not one of the original official classes of documents made up in the king's remembrancer's office and kept in the exchequer archives at Westminster. It is a loose and miscellaneous collection of equity files and papers and various revenue documents, notes, and scraps. There is no order to this class, but there are only about 150 items in it to be looked through.

177. E.g. Whettell v. Owen, E.112/58/4/7 (1580); Price v. Mortimer, E.112/59/21/17 (Carmarthen) (1584); Richardson v. Hodgeson, E.112/50/69/4 (1585); Vernon v. Herbert, E.112/62/25/6 (Montgomery) (1594).

178. Grove v. Grove, E.112/48/11/3 (1584); and Wolde v. Harrison, E.112/44/80/6 (1601) in this last case the sur-rejoinder is by scribal error called a rebutter: E.112/44/93/3.

179. D.K. Rept. No. 2 (1841) p. 68.

The equity exchequer files of pleadings from 1558 to 1841 form class E.112; there are 2386 large portfolios of them. These files have been restored and rebound by the Public Record Office in modern times; however, they are in the same form and order now as they were in the exchequer archives before the equity jurisdiction was suppressed. The files were collected together in order by county and reign. They had been numbered when they were filed;¹⁸⁰ they were put in this order when the permanent bundles were made so that the bill books could be used as calendars. Thus for each county there is a new series of numbers for each reign, and for each monarch there is a separate series for each county. In addition there are for each reign several portfolios of miscellaneous files.

The files were originally kept in bundles of a hundred.¹⁸¹ At the beginning of the nineteenth century, George Vanderzee with two others sorted out the files which had become separated from their bundles.¹⁸² In 1842 when they were received by the Public Record Office, they were cleaned and mended and put into portfolios.¹⁸³ Each portfolio contains several hundred files, but they are still in their original order.

The problem of finding the pleadings from a particular case is partially solved by the bill books and the appearance books.¹⁸⁴ The first of these original classes of records can be used as a calendar of plaintiffs and the second for defendants. In addition there are

180. See above, section A.

181. Report of 1732 in Reports of Commons (1803) vol. 1, pp. 513, 514, 530, vol. 15, pp. 141, 142 (return of 24 Feb. 1800).

182. Annual Report of the Record Commission (1807) p. 11.

183. D.K. Rept. No. 4 (1843) p. 16.

184. See above, sections A and C.

several modern manuscript calendars in the Public Record Office. "Calendar of Miscellaneous Bills and Answers"¹⁸⁵ covers the files in the miscellaneous bundles or portfolios for all reigns. The entries are arranged according to the first letter of the plaintiffs' surnames. Each entry gives the miscellaneous number of the file, the names of the parties, the county when known, the types of pleadings and the number of membranes, and finally the original file number when known. This work is in three volumes. Another useful (though incomplete) work is "Calendars of Bills and Answers, Exchequer Queen's Remembrancer, Elizabeth, Bedford to Kent."¹⁸⁶ This volume lists all files alphabetically under the first letter of the parties' names for each county separately, e.g. all parties whose names begin with A from Bedfordshire. Each entry gives the file number, the plaintiff's name (defendants have cross references), the defendant's name, place and nature of the dispute, the types of pleading in the file, and the date. Unfortunately this calendar was only completed for the English counties alphabetically from Bedford to Kent.

The miscellaneous replications and rejoinders from all reigns have been collected into class E.193 by the Public Record Office. These pleadings here are almost all in a state of great decay, and the reason that they are not with their original files is that they cannot be easily identified. In fact most of them have had the top left corner torn off; this was where the county and date was endorsed and where they were attached to the file. Obviously they have gotten torn from their files and hopelessly separated. However, most are mere replications and rejoinders of course; these were of no substantive importance.

185. P.R.O.: Long Room, G/403-405.

186. P.R.O.: Long Room, G/406.

In general these pleadings contain much valuable evidence for the historian. The difficulty is that the pleadings were not, nor even pretended to be, impartial. The problem of finding the truth from partisan sources, however, is not impossible to solve; the judges did it in theory every time they heard a suit on the bill and answer. Taking all of the pleadings together, one can see both parties agreeing on certain statements of fact. It is possible that both sides might agree on the same distorted view of something, each believing that it will be more to his own advantage, but such a situation is unlikely and infrequent. As long as the partisan characteristics of the pleadings are kept in mind, much can be plucked from the net that is well worth holding on to.

Part 2 Evidence

The evidence in suits in equity was taken by means of written depositions. The witness was examined outside of the court room, his testimony was written down, and this deposition was read to the judges at the hearing by the sworn clerk for the party on whose behalf it was introduced.¹⁸⁷ Normally witnesses gave their depositions before one of the barons of the exchequer or his examiner; however, if a witness lived beyond the ten mile radius of London, respectable people in the country could be appointed to receive his evidence in a place convenient to his residence.¹⁸⁸ In the nineteenth century this limit was increased to fifteen miles.¹⁸⁹

187. Osborne, Practice (1658) p. 151; Bohun, Practising Attorney (4th ed. 1737) vol. 2, p. 233; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143.

188. Rule 24, Ordines Cancellariae (1698) pp. 25, 26; Fowler, Practice (1795) vol. 2, pp. 62, 63, 133; in chancery this limit was 20 miles: Barton, Historical Treatise (1796) pp. 158, 160.

189. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 238.

It was also possible with the special permission of the court to have a witness testify orally in open court, but it was not usually allowed. When this was permitted, it was for some particular bit of information rather than for a general statement of the facts of the case.

A. Commissions

No commission was necessary, of course, if the deposition was to be taken before one of the barons; a baron had the inherent authority to receive evidence in his capacity as a judge. His authority to exercise the royal prerogative of judicial action was his letter patent of appointment. However, for a private person to administer the oath to a deponent and to take his answer there must have been a delegation of royal authority in the form of a commission of *dedimus potestatem* to take the declarant's evidence.¹⁹⁰

This writ or commission ran in the name of the sovereign. It was addressed to the commissioners, of whom there were almost always four, two chosen by each side. This number does not seem to have been required by any formal rule but became conventional because of its convenience and the mechanical nature of their duties. At least as early as the seventeenth century, the procedure for their selection was upon the **nomination** of four each by both parties and the subsequent striking out of two of the proposals of the opposing party. The result was that the two nominees of each party who were the least offensive to the other party were put into the commission.¹⁹¹ In theory the commissioners were

190. See the examples at the end of this section; *Roberts v. White* (1549) and *White v. Leigh* (1558) in app. 5; Brit. Mus. MS Lansd. 168, f. 237v (1631); Brown, Compendium (1688) pp. 273, 274; Fowler, Practice (1795) vol. 2, pp. 63-65; Barton, Historical Treatise (1796) pp. 165-168.

191. The intricacies of this procedure are described in greater detail in Fowler, Practice (1795) vol. 2, pp. 61, 62; see also Osborne, Practice (1658) p. 147.

the impartial delegates of the court and not the agents for any party. In Fricker v. Moore (1730)¹⁹² the depositions were suppressed because one of the commissioners was the plaintiff's solicitor. The commission could be executed by only three or two, but its execution required the presence of at least two. In revenue matters commissions of dedimus potestatem frequently contained clauses of quorum, but this was not the practice in equity cases.¹⁹³

The commissioners were required by the writ to swear the witnesses, examine them upon the interrogatories, write down the testimony, and to send it under their seals together with the interrogatories and the commission to the barons of the exchequer by a certain date. By the end of the sixteenth century it was customary to require in the writ that the depositions be engrossed on parchment; most of the earlier depositions were on parchment even though it was not enjoined by the commission, but some were only on paper. By about 1587 there was added a provision for two weeks notice of the date and place of the execution of the commission to be given to the defendant so that he could have his commissioners, interrogatories, and witnesses present. No notice was needed for the plaintiff since he had the carriage of the commission. If the defendant had its carriage, then notice was given to the plaintiff.¹⁹⁴

From 1726 to the end of the jurisdiction, commissions included directions to the commissioners to swear themselves and their clerks or scriveners to impartiality and secrecy. A copy of these two oaths was sent along with the commission. The following examples are typical.¹⁹⁵

192. Bunb. 289, 145 Eng. Rep. 677 (Ex. 1730).

193. Wentworth v. Woodford (1565), E.134/7 & 8 Eliz./M.1/1, (E.112/3/10), a very early case, is an exception which was due to the then unsettled usages of the court.

194. Osborne, Practice (1658) p. 147; Fowler, Practice (1795) vol. 2, pp. 61, 62, 69, 70, 97.

195. From Coleman v. Barker, E.134/12 Geo.1/E.2/2 (1726); these oaths are also given in Fowler, Practice (1795) vol. 2, pp. 65-67.

The Commissioners' Oath

You shall according to the best of your skill and knowledge truly and faithfully and without partiality to any or either of the parties in this cause take the examinations and depositions of all and every witness produced and examined by virtue of the commission hereunto annexed upon the interrogatories now produced and left with you and you shall not publish disclose or make known to any person or persons whatsoever except to the clerk or clerks by you employed and sworn to secrecy in the execution of this commission the contents of all or any of the depositions of the witnesses or any of them to be taken by you and the other commissioners in the said commission named or any of them by virtue of the said commission untill publication shall pass by rule or order of the court of exchequer; So help you God.

The Clerks' Oath

You shall truly and faithfully and without partiality to any or either of the parties in this cause take and write down transcribe and engross the depositions of all and every witness and witnesses produced before and examined by the commissioners or any of them named in the commission hereunto annexed as farforth as you are directed and employed by the said commissioners or any of them to take write down or engross the said depositions or any of them and you shall not publish disclose or make known to any person or persons whatsoever the contents of all or any of the depositions of the witnesses or any of them to be taken wrote down transcribed or engrossed by you or whereto you shall have recourse or be any ways privy untill publication shall pass by rule or order of the court of exchequer; So help you God.

The commission was attested in the name of the chief baron, dated, issued by the barons, and signed by the king's remembrancer. This was a formula written out by the sworn clerk who drafted it; these officers had no personal contact with the writ. Except for these formalities and the name of the sovereign at the beginning, the *dedimus potestatem* was not a rigid formulation; as long as it was substantially in order, verbal variations were allowed and freely used.

The *dedimus potestatem* was written in Latin in the official set hand on parchment by the sworn clerk representing the party obtaining it.¹⁹⁶ This clerk also endorsed his initials on the back. From the bottom was cut a tongue which remained attached at the left hand corner. On this tag or label was written the names and addresses of the commissioners, and it was used to tie up the folded commission. The tag was kept in place by the wax which was pressed with the exchequer seal so that the commission could not be opened without tearing the tag from it. As a result none of these tags have survived, but the places from which they were torn are plainly visible. Occasionally the remains of the wax seal can be seen on the dorse.

On the dorse of the writ was a memorandum of its execution. After about 1588, and frequently before, it was always signed by the commissioners who acted under it. The following is a typical example. "Executio istius commissionis patet in quibusdam scedulis huic commissioni annexis."¹⁹⁷ The schedules referred to were the depositions themselves.

196. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 150; Lincoln's Inn MS. Misc. 310, 2d return, 3d ans. (1820).

197. From *Astrey v. Langrake*, E.134/13 Eliz./E.1/9, (E.112/1/8), (1571).

In addition to these commissions of *dedimus potestatem* to take depositions in the country, there is a class of documents in the Public Record Office called "special commissions" (E.178). These are commissions of *oyer and terminer*. They were special in that they were judicial commissions; they were delegations of authority and discretion to settle the disputes. Normal commissions only gave the power to perform routine ministerial duties. In later times the term "special commission" was used to refer to those writs of *dedimus potestatem* to take the depositions of parties. In the days when parties were incompetent to testify, it was necessary to get a special order to exhibit interrogatories to them. Such interrogatories were in the nature of a supplemental bill of discovery, and the deposition was in the nature of a further answer.¹⁹⁸

Commissions of *oyer and terminer*¹⁹⁹ were in the form of royal letters patent. They were addressed to the commissioners but were made patent at the end; they were attested to by the chief baron, issued by the barons, and signed by the king's remembrancer; in addition they contained references to the king's remembrancer's memoranda roll and to the patent roll. They gave the commissioners power not only to examine witnesses, but also to hear the parties and to end the dispute by rendering a decree. Each file normally consists of the commission, interrogatories, depositions, and certificate or decree.

In the eighteenth and nineteenth centuries all commissions were minuted in the entry book of writs (E.204) when they were issued. These writ books were first kept in 1725 and continued to be kept until 1842; they record all writs which went out of the king's remembrancer's office. Each entry gives the county, the initials of the sworn clerks, the type

198. See E.R. Daniell, Treatise on the Practice of Chancery (1840) vol. 2, pp. 458-461, 823-825.

199. A sample is given in Brown, Compendium (1688) pp. 386-388.

of writ, the names of the parties, and the date.

The following commissions of dedimus potestatem are typical samples.

Hart v. Grantham

1658

E.134/1658/M.2/1 - parchment, 255 mm. x 150 mm. - commission of
dedimus
potestatem

Richard Lord Protector of the Commonwealth of England Scotland and
Ireland and the Dominions & Territories thereunto belonging To our
welbeloved Robert Pargiter Esquire Richard Kilby Gentleman William
Playdell Gentleman and John Nicholls Gentleman Greeting Knowe yee That
wee trusting very much to the faithfulness industries and provident
circumspeccions in the managinge our affaires Have assigned you and by
these presents doe give and graunt unto you or any two or more of you
full power and authority diligently to examine all witnesses of and
upon certeine Articles or Interrogatoryes to be exhibited before you
or any two or more of you As well on the behalfe of Thomas Grantham
Francis Grantham Richard Bonner Richard Manfeild Francis Newell Thomas
Hassack and Thomas Davy defendants As on the behalfe of Timothy Hart
Clerke Plaintiff And therefore wee doe commaund you that at such day and
place or dayes and places as you or any two or more of you shall appoint
you call and cause to come before you or any two or more of you the Said
witnesses And that you or any two or more of you doe diligently examyne
those witnesses every of them by himselfe severally of & upon the
said Articles and Interrogatories upon their oathes to be taken before
you And that you doe take their examynacions and retorne them written
in parchment And when you or any two or more of you shall have soe taken
them That you or any two or more of you doe send them to the Barons of

our Exchequer at Westminster in eight dayes of St Martin next comeinge
 close sealed up under your Seales or under the Seales of any two or
 more of you togeather with the Said Interrogatories and this writt
 (Provided that the said Plaintiffs shall have tenne dayes notice of
 the day and place of your first sitting about the execution hereof,
 Provided also that noe witnesses shall be examyned on the behalfe of
 the said Plaintiff unles the said plaintiff shall first pay unto the
 Said defendants the somme of ix^s iiii^d for the halfe fee of this Commis-
 sion) Witnes Sir Thomas Widdrington Knight at Westminster the xxxth day
 of September in the yeare of our Lord 1658 By the Barons.

The Remembrancer of the Lord Protector

[dorse]

The execution of this Comission appeares in Certaine Schedules hereunto
 annexed.

/s/ Ro. Pargiter

/s/ Ric. Kilbye

/s/ Wm. Playdell

In absence of the Remembrancer

/s/ Payne

* * *

Burges v. Reeve

1699

E.13⁴/11 Will. 3/E.1/1 - parchment, 260 mm. x 140 mm. - commission
of dedimus
potestatem

Gulielmus tertius Dei gratia Anglie Scotie Francie & Hibernie Rex
fidei defensor & c Dilectis nobis Thome Lake Armigero Thome Medley
generoso Thome Jenkins Armigero & Nathaniele Moore generoso salutem
Sciatis quod nos de fidelitatibus Industrias & provideris circumspeccioni-
bus vestris in negotiis nostris agendis plurime confidentes Assignavimus
vos ac vobis plenam potestatem & auctoritatem damus & committimus per
presentem ad testes quoscunque de & super quibus Articulis sive
interrogatoribus tam ex parte Isaaci Burgis Clerici querentis quam ex
parte Johannis Reeve defendentis coram vobis aut duobus sive plurum
vestrum exhibendis sive deliberandis diligenter examinandis Ac Ideo vobis
mandamus quod ad huiusmodi diem & locum sive dies & loca quos vel
que ad hoc provideritis aut duo sive plurum vestrum provideruit testes
predictos coram vobis aut duobus sive plurum vestrum venire faciatis
evocetis ac ipsos testes & eorum quemlibet per se seperatim de &
super articulis sive interrogatoribus predictis super sacramenta sua
coram vobis aut duobus sive plurum vestrum per sancta Dei Evangelia
corporaliter prestandis diligenter examinetis aut duo sive plurum vestrum
examinent examinationesque suas recipiatis & in scripto in pergamento
redigatis & cum illo sic ceperitis eas Baronibus de Scaccario nostro
apud Westmonasterium A die Pasche proxime futuro in xv^o dies sub
sigillis vestris aut duorum sive plurum vestrum clausis mittatis aut duo
sive plurum vestrum mittant unacum Interrogatoribus predictis Et hoc breve
Proviso quod prefatus Defendens habeat premonicionem per spacium xiiii^o
dierum de die & loco prime sessionis breve circa execucionem brevis

nostri Teste Edwardo Ward milite apud Westmonasterium xiii^o die
Februarii Anno regni nostri xi^{mo} per Barones.

Aylofffe

[dorse]

R.B.

Executio istius Commissioni patet in quibusdam schedulis huic brevi
annexis.

/s/ Thomas Lake

/s/ Thomas Medley

/s/ Nathaniel Moore

/s/ Bathurst

* * *

B. Interrogatories

The interrogatories were the questions which were read to the witnesses. They were always in the same form whether equity or revenue, whether to accompany a dedimus potestatem or a commission of oyer and terminer, or to be administered in the country or before a baron. Originally they were sent to the commissioners along with the commission, but the later practice was for the party's solicitor to give them to the commissioners when he presented his witnesses.²⁰⁰ This practice assured that they would not be revealed to the other party and that

200. Fowler, Practice (1795) vol. 2, pp. 96-98.

they would not be tampered with. The commissioners were not allowed to accept a second set of interrogatories or to invent any of their own since their commission only extended to the set annexed to it or delivered when it was opened.²⁰¹

The interrogatories were engrossed on parchment by the party's lawyer. Each set began with a title at the top of the membrane:

"Interrogatories to be administered to the witnesses to be produced on the part and behalf of A.B. complainant against C.D. defendant."²⁰²

If different interrogatories were to be put to different witnesses, the title would name the persons who were to answer that set. The questions were listed in a numbered series.

In the seventeenth century it became the custom to have the interrogatories approved and signed by counsel to assure their propriety. This custom was made a requirement for those which were to be administered by one of the examiners according to an order of 17 November, 1638.²⁰³ In 1698 an order extended this requirement to all interrogatories.²⁰⁴ This saved having to suppress improper questions and answers by precluding the error from the beginning. Also in the seventeenth century the commissioners began signing the interrogatories when they received them.

C. Depositions

1) Baron's Depositions

In strict theory all depositions were to be taken before one of the barons of the exchequer. However, from the beginning of the court's

201. Fowler, Practice (1795) vol. 2, p. 98.

202. From *Wentworth v. Morton* (1572), E.134/14 Eliz./E.1/1, (E.112/51/193-A).

203. E.125/23, f. 310v.

204. Order of 18 November 1698: printed in Fowler, Practice (1795) vol. 2, p. 150.

equity jurisdiction, this rule was modified in two ways: the barons used one of their personal clerks as examiners, and when it was inconvenient for the witness to come to the baron, a commission could be had to take his deposition in the country. These relaxations of the rule were not too important because by the sixteenth century the officer who presided over the taking of depositions in equity had nothing to do which required any legal discretion. However, there was the loss to the judge of the demeanor evidence.

Depositions taken at Westminster were called "baron's depositions" as opposed to "depositions by commission." In chancery they were called "town depositions" and "country depositions." Baron's depositions though the normal ones were the less frequent because the larger part of the population lived outside of the ten mile radius of London.

The procedure for taking a deposition in Westminster began when the solicitor for one of the parties produced at the exchequer office the witness and the interrogatories upon which the examination was to take place. Alternatively the declarant could be examined on the pleadings as was the archaic chancery practice of the fifteenth century.²⁰⁵ The sworn clerk for that party took the witness and the interrogatories to one of the barons before whom the witness was then sworn. From the second half of the seventeenth century onwards, the baron then signed the jurat on the interrogatories. At this juncture the deponent, that baron's examiner, and a scrivener went off to a private room where the questions were read out singly and the deponent answered according to his knowledge and belief. The scrivener wrote down in the third person the substance of each answer.

205. For a later exchequer example, see *Glaser v. Middleton*, E.133/1/106, (E.112/5/31), (1571).

Baron's depositions were always on paper; there was little danger of their being destroyed since they had no journey to make. At the top of the page was written the title, e.g. "Depositions taken before John Byrche one of the barons of the queen's majesty's court of the exchequer the vii day of June in the seventeenth year of the reign of our sovereign lady Queen Elizabeth on the parte and behalf of Walter Pyle and others complainants against Thomas Willoughby and Alexander Wilcocks defendants as followith." The body of the deposition began with an identification of the witness: "John Fosten of the City of Coventry weaver of the age of lx years or thereabouts sworn and examined the day and year abovesaid To the first interrogatory he saith and deposeth on his oath that ..."²⁰⁶ Then followed the declarant's testimony in a series of numbered paragraphs, the answers which corresponded to the interrogatories.

The practice as to signatures was unsettled at first, but after about 1565 the deponent always signed at the end of his evidence; occasionally he also signed at the bottom of each sheet. This latter was the better practice and the prevailing one at the end. In the sixteenth century the baron signed in about half the cases, but from the beginning of the seventeenth century to the end, the baron always signed. From the end of the seventeenth century, the examiner wrote the jurat on the interrogatories and the barons signed that rather than the deposition. Thus he was not disturbed twice, once to swear the witness and afterwards to sign the paper. There were no seals on it. Since the deposition was constructively taken before the baron himself and since the examiner was not a proper exchequer official but only a personal servant of the baron, no mention of the examiner is found at all.

206. From Pyle v. Wilcocks, E.133/2/258/2 (1575).

When the examination was finished and the declarant was dismissed, the depositions and interrogatories were fastened together, with the depositions on top. An endorsement was made on the top sheet in the top left corner. Before 1588 this endorsement included the county, a number, the names of the deponents, and the nature of the dispute, e.g. "Warwick; 72; John Fosten, William Wollaston, John Sherman, Henry Wedge, and others examined touching the manors of Bynley and Braunde."²⁰⁷ After that year these endorsements were quite different; they gave the term, the regnal year, and a number: "Termino michaelis Anno Regni Regine Elizabethæ xxxiiii^o; 14."²⁰⁸ These numbers appear to have been added at a later date; they must have been references to some index or calendar which has been lost. After about 1600 endorsements of any sort are scarce and irregular.²⁰⁹

When the examination was finished, the solicitor gave notice of the names of the witnesses to the sworn clerk of the opposite party so that he might cross-examine them if he were so advised.²¹⁰

The deposition files remained in the custody of the examiner until his employer, the baron, ceased to be a judge of the exchequer. Thus it was the examiner who made publication and office copies and received all fees in connection with them. The termination of the baron's office resulted in the automatic end of the examiner's office, and the baron's depositions in the examiner's custody were then turned over to the king's remembrancer, who had the general official custody of the exchequer records.²¹¹ Baron's depositions and depositions by commission came into

207. From *Pyle v. Wilcocks*, E.133/2/258/ 2 (1575).

208. From *Knowles v. Parker*, E.133/7/1021/1 (1592).

209. For criticism of the examiners for their failure to keep proper indexes, see H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 238.

210. Fowler, *Practice* (1795) vol. 2, pp. 133-140.

211. Order of 9 Feb. 1624: E.124/35, ff. 148v, 149; Order of 10 Nov. 1649: E.125/32, f. 248; Order of 19 Nov. 1698: E.127/20, f. 328; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99, 238, 239.

being through quite different processes, took slightly different forms, and came into the exchequer record repository through separate doors; thus they have always been kept as separate archival categories. The baron's depositions are now class E.133 in the Public Record Office.

A few baron's depositions dating earlier than the accession of Elizabeth I can be found in the unofficial miscellaneous early documents.²¹² The proper collection of baron's depositions, E.133, extends from 1558 to 1841. There is a modern chronological calendar for most of those from the reign of Elizabeth I.²¹³ All of the rest have been arranged alphabetically under the plaintiff's name and calendared.²¹⁴

These records have never been very systematically kept; the examiners were not very careful in this respect. Another difficulty in using this class of documents is that the revenue and equity depositions are filed together, but there is no way of distinguishing one from the other. It is interesting to note that the revenue side of the exchequer, which followed common law procedures and employed juries, used extensively the equity device of evidence by deposition. After about 1590 the proportion of revenue depositions became much smaller.

2) Depositions by Commission

Originally depositions taken upon commissions of dedimus potestatem and those of oyer and terminer were filed together in the exchequer archives. However, for reasons which are unknown, they were separated at some time before they were delivered to the Public Record Office.²¹⁵

212. E.g. E.111/68 (1551); E.111/67 (1552); E.111/69 (1554); E.111/70 (1554) in app. 5; R.v. Maltons, E.111/44 and E.111/78 (1556) (a revenue case).

213. P.R.O.: Round Room, 11/115.

214. P.R.O.: Round Room, 11/113 and 114.

215. H.C. Maxwell Lyte, ed., List of Special Commissions, P.R.O. Lists and Indexes, No. 37 (1912) intro.; D.K. Rept. No. 4 (1843) p. 16; D.K. Rept. No. 38 (1877) app. 1, p. 1.

The files of depositions taken upon commissions of oyer and terminer were put into a category called "Special Commissions of Inquiry" which is now class E.178 in the Public Record Office. They date from 1558 to 1846; however, the vast majority are from prior to 1700.²¹⁶ These depositions appear to be almost entirely concerned with revenue and non-litigious matters, and so they need not be mentioned any further. There was no reason why private litigants in an equity dispute could not have obtained a commission of oyer and terminer had they so desired. However, a private contract to arbitrate would have been just as good but with more control for the parties and with no court fees.

Depositions upon writs of *dedimus potestatem* in the exchequer were in the same form as those in the other courts of equity. There was very little change in this form from the first which has been found in Roberts v. White (1549)²¹⁷ to the last in 1841. They are now class E.134. Also in this class of exchequer depositions are many from the revenue side of the court, both litigious and inquisitory; they are in the same form as the equity depositions.

When the commissioners or at least two of them had assembled at the pre-arranged time and place, they opened and read the commission, swore themselves and the scrivener to accuracy and secrecy, and accepted the interrogatories from the solicitors and signed them. Then they, the scrivener, and each witness separately went off in private for the taking of the deposition. The witness was sworn to tell the truth and not to reveal his answers before the depositions were published. The interrogatories were then read to him one at a time, and his answers were taken.

216. There are two printed calendars: Maxwell Lyte, ed., List of Special Commissions, P.R.O. Lists and Indexes, No. 37 (1912); D.K. Rept. No. 38 (1877) app. 1.

217. Transcribed in app. 5; other printed examples are in J.C. Cox, ed., "Derbyshire Elizabethan Depositions," Journ. of the Derbyshire Arch. and Nat. Hist. Soc., vol. 38, pp. 183-216 (1916).

down on paper by the scrivener. After all of the declarantshad been examined, the scrivener engrossed the depositions on parchment.

The deposition began with a title which was written across the top of the membrane, e.g. "Bucks.; Depositions taken at Burnham in the said County on the behalf of James Woodford gentleman defendant before us Sir Robert Drewry knight Edmund Ashfield and Thomas Fleetwood Esquires the xiith of July Anno Regni Elizabethe vii^{mo} according to certain interrogatories annexed to a commission out of the court of the exchequer to us the persons above named and to William Cadde Esquires."²¹⁸ When the interrogatories were addressed to a party, the title was slightly differently worded since the answers were in theory pleadings rather than evidence. The rest of the file was in the same form as interrogatories to witnesses. An example of one of these titles is as follows: "The Joint & Severall Answer & Examination of John Kingdom & Robert Drew to Interrogatories Administered to them in the Original Cause wherein they are Plaintiffs against John Hawkins & al. Defendants to the said John Kingdom & Robert Drew defendants in the Cross Cause wherein the said John Hawkins is plaintiff against them & others defendants depending in his Majesties Court of Exchequer at Westminster pursuant to an Order of hearing made in these Causes Bearing date the Ninth day of May in the Sixth year of King George's Reign."²¹⁹

The testimony of each separate witness began with a few words of introduction followed by his answer in numbered paragraphs corresponding to the questions: "Robert Kempe of Brawell in the County of York of the age of forty years or thereabouts sworn and examined deposeth and saith: To the first interrogatory this examinant saith that ..."²²⁰

218. From Wentworth v. Woodford, E.134/7 & 8 Eliz./M.1/3, (E.112/3/10), (1565).

219. From Kingdom v. Hawkins, E.134/10 Geo.1/E.16/3 (1724).

220. From Wentworth v. Morton, E.134/14 Eliz./E.1/2, (E.112/51/193-A), (1572).

Normally the witnesses did not sign their depositions. But occasionally they did, and some examples can be found where the names of the deponents were written after their testimony perhaps to indicate that they had signed the paper draft. At the end of the eighteenth century the witnesses signed both the draft and the engrossment.²²¹ The commissioners present always signed the engrossed depositions, and the better and later practice was to sign each membrane; they normally affixed their seals as well. In the earliest period inexperienced commissioners occasionally returned a separate certificate of their actions, as they sometimes did upon commissions to take answers in the country.

"To the Quene oure soverand Ladye and to her Majesties most honorable counsell of her highnesse courte of thexchequer.

Pleasethe your heygnes and moste honorable counsell to be advertysed that where as we have receyved your majesties commission beringe date the xx^{ti} of November Anno domini 1570 to examyne all suche wytnes or wyntenesses as Wylliam Skote of Petrell wray wythin the countye of comberland yeaman plaintiff and Thomas Skote of the same wythin the sayd countye yeamen Defendant or as ather of them shall severallye brynge before us so <to> be examyned upon Intergatoryes onely the contents wherof to oure symple knowledge we have <perused> performed and also have assyned and sealed the same under our handes and seales and enclosed the same as our certyfycathe wythe the commission and Intergatoryes ther unto anexed and have Delyvered the same unto the plentyffe to be delivered over unto your heygnes courte of thexchequer the xv^{ti} day after the feaste of Sainte Helarii in wytnes wherof we have set to our hands and seales the day and yeare above rehersed;

221. Fowler, Practice (1795) vol. 2, p. 110.

Your humble subjectes

/s/ William Skelton

/s/ Roland Vauxe

/s/ John Skelton"²²²

After the commissioners had signed, the writ, the interrogatories, and the depositions were folded up and sealed so that none of the writing showed, and the packet addressed to the court of exchequer was sent to Westminster. The paper drafts were sealed up and kept by the commissioners until publication.

When the depositions were delivered to one of the barons, that baron's personal clerk wrote on it the liberatur and administered the oath to the messenger before the baron that he had not tampered with the depositions in transit.²²³ The following are typical liberatures:

"Deliberatur per manum Christoferi Garbray de Saltfletby in Comite Lincolnie yoman xi^{mo} die Junii Anno xiiii^{mo} Regine Elizabethæ Et prestitit sacramentum"²²⁴ ; "Deliberatur in plena Curia quarto die Maii Anno xiii^{mo}

Regine Elizabethæ per manum Radi Astry Junioris generosi qui prestitit sacramentum."²²⁵ The liberatur was not signed until the reign of William

III, during and after which it was always signed by the baron before whom the oath was taken. (The only exception to this rule was Baron Sotherton, the last non-serjeant baron; he was a former exchequer functionary with a bold signature, which he seems to have enjoyed using).

The baron's clerk then delivered the depositions to the junior sworn clerk who entered a note of it in the commission book, rectius the book

222. From Scott v. Scott, E.134/13 Eliz./H.2/3, (E.112/67/1451), (1570).

223. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 231.

224. From Garbray v. Cockburn, E.134/14 Eliz./T.2/5, (E.112/23/89), (1572).

225. From Astry v. Langrake, E.134/13 Eliz./E.1/7, (E.112/1/8), (1571).

of the returns of commissions.²²⁶ The depositions were kept in the exchequer office until publication.²²⁷

When all of the witnesses had been examined and their depositions had been received by the court, an order of course was moved for their publication. Thereafter the parties were allowed to examine and take copies of the evidence. Once publication had passed, there could be no further examination of witnesses without a special order of court.²²⁸

The commission books were contemporary calendars of the executed commissions which were returned to the king's remembrancer's office. They form a series of seventeen volumes dating from 1574 to 1841,²²⁹ and they calendar all depositions in classes E.134 and E.178. They were paper until 1626, after which they were made of parchment; they were in English until 1578, after which they were in Latin, the language of the other entry books; they were in the vernacular hand throughout. At the top of each page was the term and regnal year. For each entry, in the left hand margin, there was given the county and the number of the writ received that term (thus a new series of numbers was begun each term); the minute itself gave the type of commission, its purpose, the parties, and the name of the first commissioner, e.g. "Civitas Exonensis; 2; A dedimus potestatem to Barnard drake esquire and others to enquire of certain Articles on the behaulfe of John Sandy defendant against the right honorable Ambrose Erle of Warwick Complainant"²³⁰; "Southampton; 22; Breve de dedimus potestatem ad examinandum testes inter hugonem Cuff

226. 'Rept. of the Select Committee' (1793) in Repts. of Commons (1800) vol. 15, p. 142; Fowler, Practice (1795) vol. 2, pp. 114, 115; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143.

227. For the details of the late eighteenth century practice, see Fowler, Practice (1795) vol. 2, pp. 96-120.

228. See *Orlebar v. Snead*, Bunb. 330, 145 Eng. Rep. 690 (Ex. 1733).

229. OBS. 271-287.

230. (1576), OBS. 271, f. 18.

querentem et Thomam henslowe defendentem Edwardo Barrowe et al. directa."²³¹

In 1637 the entries began to include a note of publication; in 1640 they began to give the number of schedules, i.e. the number of membranes of the interrogatories and depositions filed with the commission; in 1646 they began to give the initials or name of the sworn clerk. In the eighteenth and nineteenth centuries the date of publication is also included in the margin.

In more recent times the Public Record Office has made new calendars which are more accurate and easier to use. There are printed calendars for the depositions in E.134 from 1558 to 1760,²³² and there is a four volume manuscript calendar for the period 1760 to 1841.²³³ In addition there is a modern calendar of miscellaneous depositions taken by commission plus a two volume index to this calendar.²³⁴ These calendars have made the commission books obsolete as calendars.²³⁵ The printed calendars in the appendices to the reports of the deputy keepers are not always strictly accurate in their details; moreover, since they were made there has been a fair amount of refinement and reclassification between classes E.134 and E.178, and so these calendars are now less reliable.

An examination of the evidence of a case can often be of value to legal historians in that it sheds much light on the true facts of the dispute; it helps greatly to understand the incidents behind the pleadings. The usefulness of the theoretically impartial depositions to all other historians is even more obvious. Each set gives an incident or vignette of life in England; there are examples from all parts of England and Wales, of all sorts and conditions of men, from the sixteenth to the

231. (1575), OBS. 271, f. 108.

232. D.K. Repts. Nos. 38-42 (1877-1881).

233. P.R.O.: Long Room: G.382-385.

234. P.R.O.: Round Room: 11/110-112.

235. Other superseded calendars are OBS. 288-293, OBS. 261-263.

nineteenth centuries. Here is a fertile field, great land, from which can grow many things besides stubble and thorns.

Part 3 - The Determination of the Suit

A. Hearings

After the evidence had been taken and publication had passed, the cause was set down for hearing; this was normally done by the plaintiff, but if he failed to do so, it could be done by the defendant.²³⁶ After the cause had been set down, the party who set it down was required to serve the other party with a subpoena ad audiendum judicium²³⁷ to appear at the hearing. In 1593 it was ordered for the sake of convenience that the cases should be heard in the order in which they had been set down for trial.²³⁸

The pleadings and depositions were brought into court by the sworn clerks for the parties. They read them out,²³⁹ and the counsel for both parties thereupon argued the case. The hearing was concluded when the judges made some dispositive order after giving the reasons for their decision.

The reported cases show that from as early as the beginning of the seventeenth century the barons were concerned with precedents as guides to their judgments. In Jackson's Case (1609)²⁴⁰ the chief baron cited and followed a chancery decision in a cause involving a constructive trust.

236. Fowler, Practice (1795) vol. 2, pp. 168-172.

237. See samples in Brown, Compendium (1688) pp. 463, 464; Compleat Clerk in Court (1726) pp. 154, 155; Fowler, Practice (1795) vol. 2, pp. 173, 174; Barton, Historical Treatise (1796) pp. 186, 187.

238. Order of 10 May 1593: E.123/19, f. 198.

239. Osborne, Practice (1658) p. 151; Fowler, Practice (1795) vol. 2, p. 180; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143, 154.

240. Lane 60, 145 Eng. Rep. 299 (Ex. 1609).

In the cases of Sheriff v. Tompkins (1623)²⁴¹ and Vaughan v. Mansel (1656)²⁴² the exchequer court ordered precedents to be searched for and produced in court.²⁴³ Hardres was particularly diligent in reporting what precedents the court relied upon.²⁴⁴ Perhaps the reason that precedent was more quickly resorted to in the exchequer than in the chancery was that the barons were more accustomed to using precedents in their common law side than the chancellors. Perhaps the exchequer custom in this respect was the model followed by the chancellors in the late seventeenth century when they began citing precedents more regularly.

Each of the judges could give his opinion separately, but the final decree was pronounced by the senior judge sitting. The minutes of the decrees were taken down in the minute book by the king's remembrancer in his capacity as official register of the court; this duty was usually performed by a deputy. The minute was read orally before the next case was begun in order to be certain that it was an accurate account of the order.²⁴⁵ After 1820 the minutes were taken by one of the masters of the exchequer as required by statute.²⁴⁶

Minute Books (E.161, E.162)

There were two sets of minute books kept. The decrees and orders made by the judges sitting in court upon a full hearing of a case were

241. E.126/2, f. 270v. (1623).

242. Hardr. 67, 145 Eng. Rep. 384 (Ex. 1656).

243. I.e. precedents from the court records rather than from reported cases.

244. E.g. A.G. v. Poultny, Hardr. 403, 145 Eng. Rep. 519 (Ex. 1665); Barrington v. A.G., Hardr. 419, 145 Eng. Rep. 527 (Ex. 1665) (yearbooks cited); Walsingham v. Baker, Hardr. 49, 145 Eng. Rep. 375 (Ex. 1656) (chancery cases cited).

245. Squibb, 'Book of All the Several Officers'; Rule 30; Ordines Cancellariae (1698) p. 31; Compleat Clerk in Court (1726) p. 180; Fowler, Practice (1795) vol. 2, pp. 191-193.

246. Stat. 1 Geo. 4 [1820] c. 35, s. 17; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 127.

referred to as decrees of the court.²⁴⁷ They were minuted down in the series of 46 books which now forms class E.162; these minute books have survived from 1695 to 1841. All other orders were minuted in the other set of minute books, which were called common minute books (E.161); these have survived from 1616. The common minute books recorded interlocutory orders, which were orders of course, orders which were special in that they required notice to the other party and a hearing, orders by consent, orders made by a baron in chambers, and rules at the side bar.²⁴⁸ The common minute books were made by the sworn clerks.²⁴⁹

The forms of both sets of minute books are virtually the same. Both give the date at the top of each page; each separate entry gives the style of the case; then the minute gives the names of counsel and the order of the court. In the left hand margins the names of the judges sitting were written in E.162 and the county and the initials of the sworn clerks in E.161.

B. Decrees

After the decretal order had been pronounced by the court, the sworn clerk for the party in whose favor it was rendered drew up the decree. This was done outside of court on the basis of the minutes; therefore the decrees could not contain any reasons for the decisions. The draft decree was shown to the sworn clerk for the opposite party for his approval. If he thought that it did not fairly and accurately record the order spoken in court, the matter would be settled by the king's remembrancer or by the barons. If there were no problems of this nature, the decree was signed

247. Fowler, Practice (1795) vol. 2, pp. 195-212, 271.

248. Fowler, Practice (1795) vol. 2, pp. 271-276, 392-394.

249. D.K. Rept. No. 2 (1841) p. 69.

by the sworn clerks, from the seventeenth century onwards the king's remembrancer endorsed his intretur upon it, and it was entered into the decree books by one of the registers. If the decree was to be enrolled, it was also signed by the judges present at the hearing. The original decree and the entry books were both preserved in the exchequer as original records; the party took away an office copy, if he needed one.²⁵⁰ Although the decree books were sufficient evidence,²⁵¹ it was found more convenient to use the loose decrees.²⁵²

The original, loose decrees were on paper. They began with a short summary of the pleadings; they mentioned whether evidence was admitted and whether any previous action had been taken by the court; they concluded with the order of the judges. At the top was the date, the names of the parties, and the county; at the bottom were the names of the sworn clerks, the signatures of the judges, and the intretur of the king's remembrancer. These were copied verbatim (with all their endorsements) into the entry books of decrees, which were also paper.²⁵³

Original Decrees and Orders (E.128-131)

Decree and Order Books (E.123-127)

No original decree or order has survived from before 1580. At the end of each year (later each term), these loose decrees and orders were gathered together and bundled up inside a parchment covering. The loose

250. Fowler, Practice (1795) vol. 2, pp. 196-199; Lincoln's Inn MS. Misc. 310 (1820) 2d return, 7th ans.; H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 114, 143, 150, 156; D.K. Rept. No. 2 (1841) p. 69.

251. Genl. Rept. Rec. Comm. (1837) p. 162.

252. D.K. Rept. No. 2 (1841) p. 69.

253. For examples of decrees, see Wood's Tithe Cases, a four volume collection of decrees copied from the decree and order books.

decrees and orders were not always kept separate before 1662 but were put into the same parchment packet. These original packages of the separate decrees and orders are now in class E.128; several packages are in each modern bundle. The original decrees from 1673 to 1841 are now in class E.130; these were made up from the entries in the minute books in class E.162. The loose original orders from 1664 to 1842 are now class E.131 and correspond with the common minute books (E.161) as do the earlier orders which are in E.128. These loose decrees and orders were not as carefully preserved as they should have been, and many were separated from the packages and were lost.²⁵⁴ The decrees and orders which were taken out of their parchment packets and never returned now form the very large class of miscellaneous decrees and orders, E.129. They have been arranged chronologically by terms in modern times by the Public Record Office.

The earliest entry book of decrees and orders, E.111/56, includes entries dating between 1556 and 1558. It is in a very bad state of preservation, and so it cannot be known whether the book originally contained any earlier or later orders. From the size and general appearance of this volume, it can be identified as being from the same original exchequer class as the volumes which now make up E.123; it is probably the remains of the first entry book of orders and decrees ever kept.

The first series of entry books of the decrees and orders, now E.123, covers the reign of Queen Elizabeth. The first original decree and order book from the exchequer archival series is E.123/2, which begins around Easter term 1559. The first folios are missing so that it cannot be determined precisely when this volume was begun. This also means

254. Genl. Rept. Rec. Comm. (1837) pp. 161, 162.

that we cannot know for certain whether the first original volume in this series is E.111/56 or another book which has been lost. However, this lack of original material is made up for by two large parchment volumes. Into these were very neatly copied all material orders and decrees which were entered in the first thirteen entry books of the original series which now makes up E.123 plus the first 250 pages of the fourteenth book; these volumes are now E.123/1A and 1B. They cover the period of Hilary 1559^{to 1589} and were probably made shortly after 1589. They were not a part of the normal exchequer archives but were kept in the custody of the second secondary in the king's remembrancer's office.²⁵⁵

There were five original exchequer series of entry books, and they are now Public Record Office classes E.123 through E.127. The first three are called decree and order books; E.123 substantially covers the reign of Elizabeth (1559-1605), E.124 covers the reign of James I (1603-1625), E.125 includes the reign of Charles I and the Interregnum (1625-1661). Volumes two, three, and four of the first series follow each other in a logical manner. However, following E.123/4, which ended in the year 1571, there were kept two sets of parallel entry books. Thus entries for every term are to be found in both sets. These concurrent sets continue through classes E.124 and E.125. The classification of orders into one set of entry books from the other is not clear; however, the original orders are bundled together within E.128 with the same distinction or division. The fifth series, E.127, did not continue the double sets of books; it is called only a series of order books and covers from 1661 to 1841. Thus, to summarize, the two parallel sets of entry books of orders (and decrees) date from 1571 to 1661 and are in classes E.123, E.124, and E.125.

²⁵⁵. Repts. of Commons (1800) vol. 15, p. 139; D.K. Rept. No. 3 (1842) app. 1, p. 14; Genl. Rept. Rec. Comm. (1837) p. 158.

In Hilary term 1604 a separate series of entry books was begun for the final orders of the court which were pronounced from the bench. This class, E.126, is a single chronological set dating from 1605 to 1841. The original loose decrees which were entered here are to be found among the decrees and orders of E.128 until 1662 after which they were preserved separately from the orders in E.130. These are the final decrees which were minuted in the books in E.162, through none of these minute books have survived from before 1695.

All five series of entry books have the same layout. The decree or order was copied in full. The individual terms are in chronological order within each set of the books of each series, but the entries within each term are not. In the first twelve books of the Elizabethan period, the entries were made in a variety of hands, but after about 1587 or 1588 they were made in only one or two. This suggests that it was then that the queen's remembrancer first appointed full time deputy registers; this was the time which saw a dramatic increase in the quantity of litigation in the equity side of the court,²⁵⁶ such that more officers would have been needed to cope with the rise in business.

In the later part of the seventeenth century, the clerical procedures became more refined. The clerks numbered each loose order and decree and put them in the packages in that order; also they entered them in the entry books in that same order. The contemporary indexes, which ^{were} made to the decrees and orders, gave this number, then the county, then the style. If the decree was not entered in the same order, then the indexes added page references to the entry books or references to the numbers of the decrees entered there. Thus the original indexes calendar both the loose papers and the entry books.

256. See above, chap. 2.

There are no calendars or indexes to the minute books, but the entries are chronological. The original orders and decrees and the entry books are covered by the following assortment of official and unofficial calendars. The reign of Elizabeth is covered by two works which were made between 1801 and 1804. The first of these, which is called simply "Vanderzee's Index", was made by George Vanderzee; the first part of this calendar, IND.16897, covers the two large parchment volumes, E.123/1A and 1B. The second work, "Index to Decrees and Orders in Queen Elizabeth's Reign," is in three volumes²⁵⁷; it was compiled by William Kirkby, a side clerk, and calendars the remainder of the entry books in E.123. These four volumes of calendars for the reign of Elizabeth give the page number, county, style, and sometimes the nature of the suit.²⁵⁸

There appears to be some duplication among the calendars to the entry books for the reigns of James I and Charles I. Since none of them can be trusted to be complete and perfectly accurate, the searcher may have to consult them all. The eight volume work, "Index to Decrees and Orders," covers the period 1603 to 1649 and calendars the entries in series E.123 through E.126.²⁵⁹ This modern calendar is easy to use in that it mentions together all the entries for a particular term regardless of which series of entry books they are to be found in. It gives only the county, style, and page reference. "Exchequer King's Remembrancer's Decrees and Orders"²⁶⁰ is a four volume calendar of the first ten volumes of E.124; this only covers 1603 to 1610. It appears to give information already given in the

257. P.R.O.: Long Room: G.379-381.

258. See Repts. of the Rec. Comm. (1807) pp. 11, 16, 18, 29.

259. P.R.O.: Long Room: G.386-393.

260. P.R.O.: Long Room: G.394-397.

calendar mentioned immediately above; however, it does add the date of each entry and a short minute of the dispute. These nineteenth century calendars more or less supersede the contemporary calendars of decrees and orders, IND. 16854-16859, which cover 1631-1651.

There are no surviving contemporary calendars or modern ones to the entry books of orders from 1651 to 1671, except for the years 1658, 1659. However, with the exception of a six year gap in the 1680's, there are original calendars extant from 1671 to 1841.²⁶¹ These give the county, style, and number of the order.

The entry books of decrees pronounced in court, E.126, seem to have been more completely calendared. There is a four volume modern calendar, which covers the period 1604-1693, "Exchequer Decrees Calendar."²⁶² In addition to the usual information given, this work includes a short note of the dispute and order and the date. The original calendars to E.126 have survived from 1677 to the end of the existence of the jurisdiction.²⁶³ These two sets of calendars appear to have superseded the second part of Vanderzee's Index (IND. 16897) which covers the decree books from 1625 to 1675 and a book which covers the years 1634 to 1642 (OBS.424).

If the name of the land, manor, or town is known, there are two indexes which may be of use though neither pretends to be complete. Adam Martin's Index to Various Records (1819) refers to entry books of decrees and orders from 1558 to 1774. Hutton Wood compiled a manuscript index to the decree books according to county; this is now in the Public Record Office Round Room at 11/51.

261. IND. 16860-16861, 16867-16891.

262. P.R.O.: Long Room: G.398-401.

263. IND. 16862-16866.

C. Enrollment of Decrees

A final decree could be enrolled upon the king's remembrancer's memoranda roll. This was done only if someone requested it and paid one of the sworn clerks to do it.²⁶⁴ This step ~~had~~ no significance as to the validity of the decree; the original paper decree was sufficient evidence of the order, and the office copy was all that was needed to procure its execution. However, enrollment did aid finality in that it precluded rehearings. Nevertheless, parties did not always bother to have their decrees enrolled.

The following transcript illustrates the formalities in the roll which preceeded and followed the text of the decree.

E.159/465, mm. 264, 265

K.R. Memo. Roll, Pasch. 2 Car. 1 [1626] recorda ro. xxxviii

[minute in margin] Somerset De tenore cuiusdam ordinacionis sive decreti facti inter Thomam Bancroft generosum querentem et Georgium Houghton et Susannam Uxorem eius & Thomam Wilson et Katherinam uxorem eius defendentes hic irrotulati.

[at beginning] Compertum est in quodam libro ordinacionum sive decretorum huius Scaccarii de Anno regni domini Regis nunc Caroli Secundo viz. inter ordinaciones sive decretos de Termino Pasche folio []²⁶⁵ Ex parte Rememeratoris huius in hec verba SS Somerset SS lune octavo die maii 1626 SS Whereas

[text of decree]

[at end] Que omnia & singula ad instaciam & requisicionem prefati Thome Bancrofte generosi sub sigillo huius Scaccarii exemplificantur.

* * *

264. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 156.

265. A blank space was left for a cross reference.

This is perhaps the most appropriate place to describe the king's remembrancer's memoranda rolls (E.159). Not only were decrees of the court enrolled, but also the officers of the court had their patents of appointment enrolled here.

King's Remembrancer's Memoranda Rolls (E.159)

The king's remembrancer's memoranda rolls, or "remembrance rolls", are the official permanent records of the king's remembrancer's division of the exchequer, including the equity side of the court.²⁶⁶ The lord treasurer's remembrancer's office also had its memoranda rolls,²⁶⁷ and the office of pleas kept plea rolls,²⁶⁸ which were similar to the two series of memoranda rolls. The king's remembrancer's memoranda rolls were kept continuously in a series of 789 rolls from 1218 until 1926.²⁶⁹ They are now labeled by the Public Record Office as E.159 and E.160. The former class contains the properly made-up rolls in their original condition or restored to their original condition; the latter class contains seven bundles of miscellaneous loose and unarranged membranes.

266. Report of the Lords Committees ... to consider the Public Records (1719) pp. 52, 53, 73; The State of the Public Records of this Kingdom (1723) pp. 52, 53, 73; 'Report from the Committee to View the Cottonian Library,' (1732) Reports of Commons, vol. 1, p. 513; 'Reports from the Select Committee appointed to inquire into the state of the Public Records' (1800) Reports of Commons, vol. 15, pp. 136, 141; D.K. Rept. No. 2 (1841) p. 69; Genl. Rept. Rec. Comm. (1837) pp. 156, 177, 178; F.S. Thomas, Ancient Exchequer (1848) pp. 89, 90; for comments on the early history of the rolls, see H. Jenkinson & B.E.R. Formoy, eds., Select Cases in the Exchequer of Pleas, Seld. Soc., vol. 48 (1932) pp. xix-lxxvii; J.C. Davies, 'The Memoranda Rolls of the Exchequer to 1307,' in Essays Presented to Hilary Jenkinson, (1957).

267. E.368.

268. E.13.

269. 'Exchequer K.R. & L.T.R. Memoranda Rolls,' List and Index Society, vol. 4 (1965); Guide to the Contents of the Public Record Office (1963) vol. 1, pp. 60-62; D.K. Rept. No. 20 (1859) pp. 41-46.

The first sections of a memoranda roll record the revenue accounts and financial affairs of the king's remembrancer's office; they do not touch upon the equity court at all. The last section, the recorda section of the communia, contains basically and originally matters concerning private persons which were enrolled at the desire and expense of the private persons in order to have an official and permanent record of whatever was to be remembered. Any matters touching litigation will be found in this section. By the sixteenth century, this last section, the recorda, was by far the largest part of the roll.

By far the largest part of the recorda section was taken up by the plea rolls of the king's remembrancer's office on the revenue side, which followed the procedure of the common law courts.²⁷⁰ The rest of this section included a rather wide assortment of writings which various persons wanted to preserve. **E**quity decrees were enrolled here.

It was in this part of the memoranda rolls that all of the major officers of the exchequer enrolled their patents.²⁷² In addition to the patent there is often a note of the officer's oaths and admissions to office.

Each memoranda roll from the sixteenth century through the eighteenth century is composed of several hundred parchment strips, called membrances, which are of a uniform width of about 200 mm. and of varying lengths. The longest are about 800 mm., and they dictated the length of the made-up roll.

270. The courts of equity did not use the old fashioned plea rolls.

272. The royal letters patent appointing the exchequer officers were engrossed in the chancery and were required to be enrolled there on the patent rolls.

The basic unit of the roll was the rotulet. Normally a rotulet consisted of a single membrane of parchment; but, if the entry required more space than was afforded by both sides of the single membrane, then additional membranes were put together to form the rotulet. When more than one membrane was required to complete an entry, each membrane was numbered at the foot in arabic numerals with each rotulet beginning a new series. Normally there was only one entry for each rotulet. However, when a single clerk had a series of short entries to enroll, he might put them on a single membrane, for example new patents for the barons at the beginning of a new reign.

The rotulets were written by the sworn clerks day by day as the routine of the business of the office required.²⁷³ At the head of each was written the term, the regnal year, and the section of the memoranda roll to which it belonged. At the end of each year, one of the sworn clerks would "lay" the roll by collecting together by term all the complete rotulets and then putting them in their proper part of the roll.²⁷⁴ He then numbered the foot of each rotulet with a roman numeral, starting a new series of roman numbers for each separate part of the roll and for each term. No effort was made to put the rotulets in strictly chronological order within each term. The rotulets were laid on top of each other in a large pile and then tied together with a cord which went through holes at the head.

Normally the final roll was made up of four terms. However, this was determined in part by the amount of business done that year. For the reigns of Elizabeth I, James I, and George IV, and part of the reign of

273. H.C. sess. pap. 1822 (no. 125) vol. 11, pp. 99 at 143.

274. 'Reports from the select Committee' (1800) Reports of Commons, vol. 15, p. 142; Genl. Rept. Rec. Comm. (1837) pp. 156, 163.

George III, each roll contains the rotulets of only two terms. After about 1850, when the exchequer was in a state of great decline, several years were put together in one roll. The completed roll was wrapped lengthwise in a very long piece of heavy parchment which served as a protective cover. On this cover was written the dates of the included rotulets, but these covers are now so dirty and decayed that they are largely illegible.

Thus one or more membranes make a rotulet; the rotulets are collected termly into general sections; these sections, the recorda plus the revenue sections, compose an entire part containing all the business for a term; usually there are four consecutive parts in a final package. The word roll has been used variously to refer to the rotulet, the part composing a term, the membranes composing an entire year, and the final package. The most common usage is the last of these, and it is the one used in this book.

These final packages of parchment are a great deal easier to use than the chancery rolls which are membranes sewn head to foot and then rolled up. The exchequer memoranda rolls can be opened more or less like a book; they do not have to be unrolled. However, the memoranda rolls are very bulky and very heavy; this makes the handling of ^{them} difficult. Moreover, they are covered in dust and soot, and after using one of them so is the reader.

In the fourteenth century it was the duty of the king's remembrancer to lay the memoranda rolls.²⁷⁵ However, over the course of the centuries

275. J.F. Willard, 'Memoranda Rolls and the Remembrancers, 1282-1350', in Essays in Medieval History presented to T.F. Tout, A.G. Little and F.M. Powicke, eds. (1925) pp. 215-229; see also The Red Book of the Exchequer, ed. H. Hall (Rolls Ser. 1896) vol. 3, pp. 862-869.

this duty devolved upon the sworn clerks under the king's remembrancer; they discharged this tedious duty in rotation at the end of each year.²⁷⁶ These rolls were the most important records of the king's remembrancer's office, and they were carefully preserved so that today the entire series of 789 rolls, E.159, can be found in the Public Record Office with only 32 terms missing from 1218 to 1926; these lost sections are all between 1221 and 1277.²⁷⁷

The records of the king's remembrancer's memoranda rolls are calendared by the repertory rolls and the agenda books.²⁷⁸ These calendars were made contemporaneously with the memoranda rolls. The agenda books were made first to record the things to be done and finished. The repertories were compiled when the records in the memoranda rolls had been finished; they consist of brief notes of the contents of the records.²⁷⁹

The agenda books recorded things to be done, and were made as the rotulets were made. What it was to be done was that the litigation entered on the rolls was to be brought to a conclusion. The rotulet was begun for revenue actions when the action was commenced; the bill or writ was entered on a fresh rotulet. At the same time a minute of the entry was written in the top left margin of the rotulet and in the agenda book. When there were further pleadings and proceedings in the action, they were added onto the rotulet, but nothing further was noted in the agenda book. This procedure became a habit, and, when a clerk enrolled a patent, he automatically minuted it also in the agenda book.

276. See above, note 274.

277. J.C. Davies, 'The Memoranda Rolls of the Exchequer to 1307,' in Essays to Jenkinson (1957) App., pp. 153, 154; 'Exchequer K.R. & L.T.R. Memoranda Rolls,' List and Index Society, vol. 4 (1965).

278. Genl. Rept. Rec. Comm. (1837) p. 178, sample entries transcribed from these calendars precede the patents in appendix 2.

279. E.369/118, f. 123.

The agenda books are paper, but the repertory rolls are parchment. This leads one to the conclusion that the agenda books were originally intended only as temporary records, perhaps to last only until the repertory rolls could be made after the final memoranda roll was laid. Moreover, in the sixteenth century, the agenda books are less neat and less complete than the corresponding repertory rolls.

The 39 agenda books from Easter term, 1543, to 1884 are preserved in the Public Record Office as Indexes 17051 through 17079(2) and 6724 through 6732. The last two books of this series are called indexes to enrollments. However, official reports of the king's remembrancer to committees of the House of Commons in 1732 and 1800 state that they were in possession of agenda books from the reign of Edward I.²⁸⁰ The General Report of 1837 states that there were then 33 volumes dating from the year 25 Henry VIII.²⁸¹ This was probably a misprint for 35 Henry VIII, the date of the earliest volume now in the Public Record Office. In 1859 the Public Record Office had possession of 33 agenda books dating from 35 Henry VIII (1543) to 1835.²⁸² It is more likely that the volumes dating from 1272 to 1542 were lost before 1837 than afterwards because of the then increasing awareness of the value of the public records. Perhaps this loss occurred in the poorly supervised rearrangements of the exchequer records in 1822.²⁸³ Perhaps these lost paper agenda books had decayed into a state of worthlessness by 1837 and were deliberately discarded.

280. 'Report from the Committee to View the Cottonian Library' (1732) Reports of Commons, vol. 1, p. 513; 'Reports from the Select Committee' (1800) Reports of Commons, vol. 15, p. 142.

281. Genl. Rept. Rec. Comm. (1837) p. 178.

282. D.K. Rept. No. 20 (1859) p. 46; see also M.S. Giuseppi, Guide to the Manuscripts Preserved in the Public Record Office (1923) vol. 1, p. 98; also 'Summary of Records from Carlton Ride': OBS.691.

283. See above, chap. 3, part 4.

The agenda books are about 240 mm. by 350 mm. and average about 80 mm. in thickness. They were rebound in the nineteenth century.²⁸⁴ At the top of each page is the term and regnal year. Each entry consists of the county, rotulet number, and the minute.

The series of repertory rolls consists of 21 parchment rolls, which calendar the recorda part of the memoranda rolls from 1307 to Trinity term 1680.²⁸⁵ However, the repertory rolls were not very carefully made or preserved in the seventeenth century; there are many omissions of entire terms for these last 75 years.

The repertory rolls more or less duplicate the information of the agenda books, but they are a bit more complete, at least until the seventeenth century. The probable reason for their decline and discontinuance is that the agenda books were adequate substitutes and being in book form were easier to use.

These repertories are about 160 mm. by 850 mm. and consist of only several dozen membranes each. These rolls were made up similarly to the memoranda rolls, that is the individual membranes were laid on top of each other and bound together at the head. At the top of each membrane is found the term and regnal year. The individual entries give the county, the minute, and the number of the rotulet.

In 1800 and 1837²⁸⁶ it was reported that these calendars were so incomplete that the rolls were unusable and that they were seldom referred to. While calendars are not as easy to use as indexes, the agenda books and repertory rolls, at least for the latter half of the sixteenth century

284. D.K. Rept. No. 4 (1843) p. 17.

285. IND. 7031-7051.

286. 'Reports from the Select Committee' (1800) Reports of Commons, vol. 15, p. 145; Genl. Rept. Rec. Comm. (1837) p. 162; see also Com. Journ. (6 June 1793) vol. 48, p. 850.

and for the seventeenth century, are accurate in the references that they give. However, both series are far from complete, and both must be consulted to get the fullest information possible.

In addition to these contemporary calendars, two of the sworn clerks made indexes which include many of the entries on the rolls. Adam Martin, Index to various Repertories, Books of Orders, and Decrees, and other Records preserved in the Court of Exchequer (1819). This work refers the reader to the repertory rolls of 1272 through 1649, the agenda books from 1649 through 1760, and the equity decree and order books from 1558 through 1774. From these one can go to the rolls. Martin's Index is not complete. The entries in it are arranged alphabetically according to the name of the land, manor, or town in question. It is more useful than might appear at first glance; it is not often that the name of the land in dispute is unknown.

Martin was a side clerk from 1720 to 1752 and one of the sworn clerks in the king's remembrancer's office from 1752 through 1783²⁸⁷ and a barrister of the Inner Temple. This index was made to aid him in his work in the exchequer office; it must have made it much quicker for him to locate a decree or enrollment. In 1783 Martin's manuscript was given to the Inner Temple, and in 1819 they published it for the benefit of the legal profession.

Hutton Wood compiled an index to the decree books and the king's remembrancer's memoranda rolls. This manuscript volume is in the Public Record Office.²⁸⁸ H. Wood, the son of Richard Wood a sworn clerk, was a side clerk from 1768 to 1797 and a sworn clerk from 1797 to 1823.²⁸⁹ His

287. F. Milne, 'Some Exchequer Officials in the XVIIIth Century,' Home Counties Mag., vol. 3, pp. 276 at 278, 279 (1901); see also appendix 4-E.

288. P.R.O.: Round Room, 7/137.

289. See app. 4-E.

index notes the decrees and enrollments by county and then chronologically within the particular county.

The following is a list of printed transcripts from the king's remembrancer's memoranda rolls.

F.M. Stenton, ed., Transcripts of Charters Relating to the Gilbertine Houses, in Lincoln Record Society, vol. 18 (1922).

G. Robinson, ed., The Memoranda Roll of the King's Remembrancer for Michaelmas 1230-Trinity 1231, (E./159/10), in Pipe Roll Society, vol. 49 (N.S., Vol. 11) (1933).

H.G. Richardson, ed., The Memoranda Roll for the Michaelmas Term of the First Year of the Reign of King John, 1199-1200, in Pipe Roll Society, vol. 59 (N.S., vol. 21) (1943).

R.A. Brown, The Memoranda Roll for the Tenth Year of the Reign of King John (1207-8), in Pipe Roll Society, vol. 69 (N.S., vol. 31) (1957).

Calendar of Memoranda Rolls (Exchequer), Preserved in the Public Record Office, Michaelmas 1326 - Michaelmas 1327 (1968).

D. Rehearings, Reviews, Appeals

Rehearings and appeals were not permitted before the decree was drawn up and entered. Rehearings could be had before the decree was enrolled but not after. The decree must have been signed and enrolled before a bill of review could be filed.

Petitions for rehearings were allowed so that new evidence or further argument might be presented to the court. In 1582 it was ordered that no rehearing should be allowed on suggestion of new matter until the petitioner had paid five pounds to the court "nomine pene for troubling

the court eftsoons in the same matter."²⁹⁰ In 1731 the court decreed that from then on no application for a rehearing would be received after six months of the pronouncing of the decree, and it ordered the petitioner to deposit ten pounds upon the granting of a rehearing, which deposit would be returned if the decree was materially altered, otherwise it would be given to the other party for his costs.²⁹¹ Before 1724 rehearings were often had on the minutes only, but in that year in the case of Crosley v. Shadforth (1724)²⁹² the exchequer court ruled that the decree must be drawn up before the parties could proceed to a rehearing.

A bill of review could be brought to reverse a former decree but only for matters not previously in issue²⁹³ or for error apparent in the body of the decree.²⁹⁴ Matters of fact could not be reconsidered "for that would unravel all sorts of decrees."²⁹⁵ The seventeenth century position was relaxed in the eighteenth century, and the court allowed bills of review to be grounded upon the discovery of new matter if leave of court was obtained beforehand.²⁹⁶

The course of appeal from the equity side of the exchequer was directly to the House of Lords.²⁹⁷ The order of the lords was made an order of the exchequer upon a motion of course by the party in whose favor it was made.²⁹⁸

290. Order of 8 Feb. 1582: E.123/8, f. 112v.

291. Drake v. Hopkins, Bunb. 309, 145 Eng. Rep. 683 (Ex. 1731); Fowler, Practice (1795) vol. 2, pp. 235, 236.

292. Bunb. 142, 145 Eng. Rep. 626 (Ex. 1724).

293. Osborne, Practice (1658) pp. 155, 156; Bohun, Practising Attorney (1724) p. 305; Compleat Clerk in Court (1726) pp. 184-186.

294. Walsingham v. Baker, Hardr. 49, 145 Eng. Rep. 375 (Ex. 1656).

295. Fanshaw v. anon., Hardr. 174, 145 Eng. Rep. 438 (Ex. 1660).

296. Fowler, Practice (1795) vol. 1, pp. 94, 95, following Mitford, Pleadings (1787) pp. 78, 79.

297. The standing orders of the House of Lords are printed in Fowler, Practice (1795) vol. 2, pp. 239-251; see also above, chap. 2-C-3.

298. Fowler, Practice (1795) vol. 2, p. 251.

E. Execution of Decrees

If a party failed or refused to obey a decree of the court, upon an affidavit thereof he could be brought into court by a writ of attachment to explain his alleged contempt of the barons' order. There could be no contempt, however, until the person had been served with a copy of the decree or order under the exchequer seal.²⁹⁹ If he were found to be in contempt and continued to refuse to obey the decree, he would be committed to prison until he purged his contempt and performed the decree.³⁰⁰ In the eighteenth century the traditional in personam remedies of the equity side of the court were supplemented by the availability of commissions of sequestration and writs of venditioni exponas to seize and sell the goods of the party in contempt in order to pay to the other party the amount due under the decree.³⁰¹

* * *

At the end of one of the bill books³⁰² for the reign of George II is written:

"Law suits I'd shun with as much cautious care

As I would dens where hungry Lyons are."

299. Rule 35, Ordines Cancellariae (1698) p. 35.

300. Osborne, Practice (1658) pp. 158, 159; Rule 37, Ordines Cancellariae (1698) p. 37.

301. Fowler, Practice (1795) vol. 2, pp. 210, 213-228; Yarroth v. Seys, Bunb. 62, 145 Eng. Rep. 595 (Ex. 1720).

302. IND. 16841.

CHAPTER 5 - THE SUPPRESSION OF THE JURISDICTION

The preceeding chapters have discussed the jurisdiction, administration, and procedures of the exchequer in the sixteenth and seventeenth centuries. By 1700 the equity side of the exchequer was permanently established and its doctrines and procedures settled. In the eighteenth century the exchequer was fully accepted as an alternative jurisdiction to the chancery. As these two courts cited cases from each other as precedents, they gradually drew closer together. In addition, eighteenth century legislation treated the two courts as equals; statutes dealt with them together as "courts of equity" rather than naming them and treating them separately. As the treasury became more important, the exchequer had less and less to do with the revenue affairs of the kingdom with the result that the barons became more and more concerned with their judicial duties. The revenue jurisdiction remained, but the administrative powers and duties over the public finances ceased to be centered upon the exchequer.

There were no major changes in the court's equitable jurisdiction during the eighteenth century; there was a continuous development, but this happened in the courts of chancery and exchequer in pari passu. Since there were no unique developments in the procedure of the exchequer in this period and since the procedure for this period has already been carefully described by Fowler, it only remains to consider the events of the nineteenth century, the state of the exchequer at that time, and the causes which led to the suppression of its equitable jurisdiction.

The eighteenth century saw a decline in the yearly average of equity bills filed in the exchequer during the reign of George II. However, the quantity was still quite large; this level was maintained without significant change until the accession of Queen Victoria. By then the

end was in sight, and the volume of business quickly dried up just before the court was officially abolished in 1841.

The reasons for the unpopularity and the end of the equity side of the exchequer are not all that clear. The court was flourishing until 1835. There had been only a very slight decline in the quantity of business since the days of George II, a century before; the barons were men of good judicial caliber; their decisions were duly and properly covered by the law reporters. Perhaps the very great congestion of the court of chancery during the long tenure of Lord Eldon's chancellorship artificially stimulated the popularity of the equity side of the exchequer.

It is interesting to note that around 1810 the exchequer had become almost entirely an equity court; there was very little common law business.¹ However, by 1840 the position was largely reversed, and it was then the common law side which was the more important.²

For the first fifteen years of the nineteenth century, the equity jurisdiction of the exchequer was popular and thriving, and equity suits in general were increasing. In 1817 "in order to meet the rising tide of common law business and to more easily dispatch the equity business," a short act was passed which authorized the chief baron to sit alone to hear equity cases or, if he were ill, then another single baron might be nominated to sit in his place; his decrees were deemed to be the decrees of the entire exchequer court; while rehearings were allowed as before,

1. 'Administration of Justice Bill, Minutes of Evidence', Lords Journ., vol. 72 (1840) app. 3, pp. 117 at 138, qu. 437 (evidence of J.A.F. Simpkinton); these minutes of evidence are also in H.L. sess. pap. 1840 (no. 160.1) vol. 22, pp. 1 et seq.; they are hereafter cited as 'min. of ev.'.

2. 'Min. of ev.' p. 140, qu. 490 (Baron Alderson).

they were now required to be before the same baron who had heard the case originally so that rehearings would not turn into appeals.³ This statute did not seem particularly significant at the time; it was only a minor change which did not require commissions, hearings, debates, or public comment. However, this well-intentioned little act was the direct cause of the unpopularity of the exchequer equity court in the 1830's and of its demise in 1841. Parliament had intended to improve, not diminish, the exchequer as a court of equity; in fact in 1820 an important and carefully considered statute was enacted which re-organized the king's remembrancer's office and eliminated several glaring administrative defeats.⁴ Nevertheless, the Act of 1817 had inadvertently upset the delicate balance of the court; the aberration accelerated into reeling unpopularity and the court crashed. The legislature had meant well, but they acted without careful thought of the consequences of their legislation and the unwitting result was the end of the court.⁵

It appears from the minutes of evidence taken in 1840 on the Administration of Justice Bill⁶ that the main reason for the unpopularity and drastic decline of the equity side of the exchequer was the fact that equity cases were decided by a single judge from whom there was no effective appeal. While it was always possible to appeal to the House of Lords, that was in this period so expensive, so cumbersome, and so dilatory that the procedure was for the normal case impractical. In daily practice

3. Stat. 57 Geo. 3 [1817] c. 18, ss. 1-3.

4. Stat. 1 Geo. 4 [1820] c. 35.

5. See the comments of Freshfield, M.P., in Hansard, Parl. Deb., 3d ser., vol. 49, pp. 399-408 (16 July 1839).

6. Lords Journ., vol. 72 (1840) app. 3, pp. 117-153.

this right was illusory. It was certainly out of the question for interlocutory rulings. In the court of chancery there was an appeal or rehearing of right from the master of the rolls and after 1813 from the vice-chancellor to the lord high chancellor, who as a result spent most of his time in the 1830's hearing such appeals. However, in the exchequer, in order to keep unchanged the traditional procedures and practices, it was required by the Act of 1817⁷ that the same judge who heard a case must sit for any rehearing. The reason for this was to prevent rehearings from being used as appeals to other barons or to the court en banc; the purpose of this statute was to conserve the time of the barons not to double the time needed to hear an equity case. Some lawyers were less worried by the lack of effective appeal when the hearing was before a collegiate court of four judges.⁸ Under the old system the ruling of the court could not appear to hang upon the passion, whim, or digestion of a single man; if one judge was upset over something, there would be the other three to assure a balanced decision.

The other reason for the desire for a rehearing before a different judge or a system of easy appeal was the very great difficulty of being properly prepared for trial the first time in court. A lawyer could not always predict what evidence and arguments the opposing party would produce, and therefore he often would not have prepared his presentation adequately to rebut them. In order to overcome unfair disadvantages resulting from having been surprised by the opposing party, a rehearing was desired before a different judge who could come to the case completely unbiassed not having heard of the dispute before.⁹ A trial on the basis

7. Stat. 57 Geo. 3 [1817] c. 18, s. 3.

8. 'Min. of ev.' pp. 138, 139, qu. 437, 438 (J.A.F. Simpkinton), p. 146, qu. 709 (R. Gatty).

9. 'Min. of ev.' p. 123, qu. 108-114 (J. Wigram), p. 138, qu. 428 (E.W. Field).

of the true merits of the case, rather than on the merits of the lawyers, was desired. Equity pleadings in the early nineteenth century were no longer fulfilling their function of giving the parties proper notice as to the disputes and positions of the litigation. Although the depositions were published before the hearing, writings relied upon at the hearing were not ^{always.} Moreover, depositions were inadequate for the presenting of the testimony of witnesses because the interrogatories and cross-interrogatories were prepared beforehand by the parties and then administered in secret to the witnesses by official examiners.¹⁰ The depositions were not published until all of the evidence had been taken. As a result the framing of interrogatories was very much a matter of guess-work; moreover, it was impossible to follow up a suggestive or evasive answer. The right of cross-examination was illusory.

There were other reasons for the decline of the equity side of the exchequer in the years immediately prior to its abolition. One of the most important sources of litigation in the exchequer was tithe disputes; this dried up as a result of the Tithe Commutation Act of 1836.¹¹ Also a general use of common injunctions came to an end with the passage of the Insolvent Debtors Act,¹² which set up the court of bankruptcy. Since the jurisdiction had by this time become unpopular with the legal profession, no new kinds of business were brought to the court.¹³

The equity side of the exchequer was not favored by solicitors because the fees of the king's remembrancer's office were higher than the costs

10. See above, chap. 4, part 2.

11. Stat. 6 & 7 Will. 4 [1836] c. 71.

12. Stat. 1 Geo. 4 [1820] c. 119; stat. 7 Geo. 4 [1826] c. 57.

13. 'Min. of ev.' p. 137, qu. 421 (E.W. Field), p. 139, qu. 438 (J.A.F. Simpkinson).

of chancery; this required the solicitors to advance more money while the litigation was pending.¹⁴ The exchequer court of equity, unlike chancery, did not sit permanently; when the out of term sittings had ended, the barons including the chief baron went off on circuit, and emergency interlocutory matters could not be settled until the next term began.¹⁵ It was estimated that the court sat only sixty to seventy days in the year.¹⁶ Chancery, on the other hand, remained open both during term time and in the vacations.

The lack of strict uniformity in practice between the courts of exchequer and chancery was an annoyance, even though it was generally admitted that the exchequer procedures were superior.¹⁷ Also the physical inconvenience of the location of the exchequer court was troublesome. Almost all lawyers who specialized in equity work practiced in chancery as well as the exchequer. It was a nuisance to have the two courts

sitting in two different places; in term they sat in different parts of Westminster Hall and out of term the exchequer sat in Gray's Inn and the chancellor sat in Lincoln's Inn. Moreover, the exchequer office was located in the Inner Temple, separate from the exchequer court. Much time and energy was wasted going between one place and another. This was avoided by anyone willing to limit his practice to the court of chancery,

14. 'Min. of ev.' p. 128, qu. 227 (S. Sharpe), p. 132, qu. 312, 315, 316, p. 133, qu. 360 (J.H. Koe), pp. 145, 146, qu. 644, 650-685 (R. Gatty), p. 149, qu. 796 (E. Weatherall).

15. 'Min. of ev.' p. 127, qu. 206, 210-214 (S. Sharpe), p. 142, qu. 523 (C. Bowyer).

16. 'Min. of ev.' p. 117, qu. 1 (L. Shadwell), p. 133, qu. 335, 336 (J.H. Koe); for only 50 days a year: p. 137, qu. 419 (E.W. Field); for only 9 days in each term: p. 140, qu. 490 (Baron Alderson).

17. 'Min. of ev.' p. 124, qu. 141 (R.T. Kindersley), p. 126, qu. 206 (S. Sharpe), p. 142, qu. 527, 528 (C. Bowyer), pp. 146, 147, qu. 717, 718, 744, 749 (E. Weatherall).

which was and always had been the most important court of equity.¹⁸

In the 1830's the equity lawyers deserted the exchequer in favor of the chancery. This is overwhelming evidence of the weakness of the exchequer equity court at this time, especially when it is remembered that in chancery the delay between the setting down of a cause for hearing and the hearing itself was three years; this was tantamount to a denial of justice. There was no backlog in the exchequer whatsoever.¹⁹ It might seem incredible that the equity jurisdiction of the exchequer should have been abolished under such circumstances and upon the advice of the legal profession, but so it was. It seems difficult to avoid the conclusion that the abolition of the jurisdiction was inspired by motives of professional convenience rather than the interests of the litigating public.

The discussions about the usefulness of the equity side of the exchequer was only one of many others on equity in general which led to the Act of 1841.²⁰ The prime purpose of this statute was the reformation of the court of chancery; it was only incidental to a larger scheme to improve the administration of equity that the equitable jurisdiction of the exchequer was suppressed. The legal profession was virtually unanimous that it would be more efficient and more convenient to have equity administered in a single court; the result was the abolition of the equity side of the court of exchequer. There was neither opposition nor regret.

18. 'Min. of ev.' pp. 129, 130, qu. 238, 245 (J. Wigram), p. 132, qu. 318, 319 (J.H. Koe), p. 138, qu. 426, 432 (E.W. Field), p. 139, qu. 438 (J.A.F. Simpkinton), p. 141, qu. 498 (Baron Alderson), p. 142, qu. 521, 528 (C. Bowyer), p. 145, qu. 633-640 (R. Gatty).

19. 'Min. of ev.' pp. 120, 121, qu. 58, 69, 73, 86 (J. Wigram), pp. 127, 128, qu. 202, 216 (S. Sharpe), p. 132, qu. 295-300, 318 (J.H. Koe), p. 137, qu. 409 (E.W. Field), p. 140, qu. 491 (Baron Alderson), p. 144, qu. 607, 608 (R. Gatty).

20. Stat. 5 Vict. [1841] c. 5.

It is unfortunate that we have no substantial evidence as to why the jurisdiction arose in the sixteenth century and that we must resort to speculation to suggest an answer. In that century and for the next fifty years, those who came into the exchequer for justice were officers, servants, or debtors of the crown or of the court. Perhaps they felt that there was a community of interest between themselves and their judges. The barons *knew* them personally if they were de gremio scaccarii. If they were debtors or accountants of the crown, then the barons might lean in their direction since they, the barons, *had* sworn, among other things, to augment the financial interests of the monarch. This is not to suggest in the least that this sort of partiality ever existed in practice for we have no evidence at all of any perversion of justice by the exchequer bench. However, the opportunities of a jurisdiction based on privilege of the court naturally presented attractions to plaintiffs and their professional advisers. Crown interests and the expectations of petitioning plaintiffs coincided. These would have been the subconscious thoughts of the forum shopping lawyer who brought his client into the exchequer.

By the middle of the seventeenth century, the exchequer bench was losing its appearance as a revenue institution, and by the beginning of the eighteenth century the treasury had assumed the vast majority of the revenue functions of the state. One can reasonably suppose that the exchequer expanded its jurisdiction during the Interregnum, when its rivals were in disgrace, in order to supply the new need for another general court of equity. In the eighteenth century the equity side of the court continued to flourish probably because the legal profession desired an alternative to the court of chancery. This was not a century of great change within the legal system, and the exchequer, now seen

primarily as only one of the four high courts of justice at Westminster, continued undisturbed in the possession of the wider jurisdiction it had acquired in the latter half of the previous century.

The Victorian age was a period of great changes in the administration of English justice. It was a time of simplifying the jurisdictions and economizing the procedures. In the latter part of the nineteenth century this was taken to the logical conclusions of abolishing the ancient high courts of justice and of merging the administration of common law and equity. However, by the second quarter of the nineteenth century the winds of change had begun to blow. The reasons for the suppression of the equitable jurisdiction of the exchequer were debated in public, and thus we can understand with some confidence of accuracy these pressures by which the jurisdiction was blown away by one of the first squalls of what later grew into a hurricane of legal reform.

BIBLIOGRAPHY

A. General Rules of Court

When a new point of procedure arose or a novel situation was encountered, the barons of the exchequer laid down a new rule of practice, a general order, for the purpose of regulating future cases. Such "legislation" on court procedure was and is an inherent power of a court of law. These general rules in the exchequer were or should have been entered in the order books as they were pronounced. Occasionally they might be codified and passed around to guide the legal profession in the handling of exchequer cases. Two such collections have been found.

These collections were not entered in the decree and order books, although some of the individual rules may have been. It is unclear whether these rules as published are collections of old rules or newly promulgated codes of rules. Probably they came into existence as the latter since they are reasonably comprehensive.

The first set of exchequer equity rules in point of time is that entitled 'The Course of Proceedings upon English Bills.' It exists in three manuscript copies.¹ The copy in the Public Record Office seems to be the oldest of these three; it has at the end a list of the exchequer sworn clerks, and from this list it is possible to date these rules between 1623 and 1630. The Oxford Bodleian manuscript Rawl. C. 786 was made after 1677; Rawl. D. 709 is a fair copy, perhaps of Rawl. C. 786.

The next collection of rules is 'Proceedings by Bill and Answer.'² Basically this is a much revised version of the previously mentioned set

1. P.R.O.: E.369/118, ff. 138-140; Oxf. Bodl. MSS. Rawl. C.786, ff. 3-4v, and Rawl. D.709, pp. 5-7.

2. Brit. Mus. MS. Add. 36108, ff. 12v-14.

of rules. Some rules were copied verbatim; some were enlarged; and some new rules were added. While this manuscript was made in 1725, the rules are much older dating probably between 1640 and 1660.

The most complete set of rules was promulgated between June 1658 and January 1660: "Orders and rules of proceeding in the office of his highness' remembrancer of his court of exchequer at Westminster which the right honorable Sir Thomas Widdrington knight chief baron of the same court Robert Nicholas, John Parker, and Roger Hill the other barons of the said court have thought fit at present to ordain and publish for the better and more speedy carrying on the business in that office." This clearly is a code of rules and not a collection. I have found five manuscript copies of these rules.³ A later manuscript edition of these rules⁴ includes four additional rules. The title has been altered in two respects: "his highness" referring to the lord protector was changed to "his majesty" referring to the king, and the barons' names were changed to Edward Atkyns, Jenner, Heath, and Milton. Thus, while the British Museum manuscript book dates from 1725, the rules were re-issued between April, 1686, and April, 1687. These rules have been printed and appeared in the following books.

Ordines Cancellariae: being Orders of the High Court of Chancery from the first Year of Charles I to Hilary Term, 1697 ... Rules and Orders of the Court of Exchequer (1698), pp. 1-56 at end of volume [Wing 0.415; Brit. Mus. 1479. aa.21; Middle Temple 7.B; Library of Congress, Jefferson, Law 136].

3. P.R.O.: E.163/19/17, ff. 7-19; Brit. Mus. MSS. Add. 45130B, Harl. 6050; Oxf. Bodl. MSS. Rawl. C.786, ff. 5v-9v, and Rawl. D.709, pp. 10-15.
4. Brit. Mus. MS. Add. 36108, ff. 15-21, and Oxf. Bodl. MS. Rawl. D.709, pp. 30-33; a 19th century copy is Lincoln's Inn MS. Misc. 232. Two or three other copies are listed in the Cata. Libr. MSS. Bibl. Philippica (1837) p. 145, no. 9170, sold at Sotheby's: 21 Mar. 1895, sales cata. p. 57, lot 321; p. 155, no. 9714; and p. 159, no. 9959, sold at Sotheby's on 10 June 1896, sales cata. p. 89, lot 505.

Ordo Curiae, Rules and Orders in Chancery, from 1 Car. 1 to Hilary Term, 1698, (2d ed. 1712) [see W.H. and L.F. Maxwell, Legal Bibliography, London: Sweet & Maxwell, 2d ed. 1955, vol. 1, p. 343; I have not been able to find a copy of this edition].

The Rules and Orders of the High Court of Chancery Examined by the Original Orders To which are added, the Rules and Orders of the Court of Exchequer (3d ed. 1724), pp. 1 - 25 at end of volume [Brit. Mus. 510, b.6; Library of Congress, Jefferson, Law 137].

Rules and Orders of the High Court of Chancery for Regulating the Practice of the said Court ... also Rules and Orders of the Court of Exchequer ... (4th ed. 1739), pp. 1-21 at end of volume [Brit. Mus. 883. f.18(1); Library of Congress, Jefferson, Law 138].

Rules and Orders of the Court of Exchequer Relative to the Equity Court, the Office of Pleas, and the Revenue (1766), pp. 1-31 [Brit. Mus. 510.d.3; Harvard Law School Library].

Rules and Orders of the Court of Exchequer as to the Equity Side, Office of Pleas, and Revenue (1778), pp. 1-15 [Harvard Law School Library].

William Kirkby, Rules and Orders of the Court of Exchequer relative to the practice of the King's Remembrancer's Office ... (1794) [Brit. Mus. 510.e.16(1); Cambridge Univ. Lib. PB.11.132; Lincoln's Inn 130.b].

Some of the miscellaneous general rules which were promulgated on the spur of the moment have found their way into print. Rules and Orders (1766), pp. 31-42, has some of these rules from 1689 to 1736. Kirkby in 1794 gave, after the code of rules, a few miscellaneous ones dating from 1692 to 1794. Fifteen from 1772 to 1794 were included in the two following collections.

Thomas Moore, An Accurate Collection of the Rules and Orders of The Courts of Chancery, King's Bench, Common Pleas, and Exchequer,

to Michaelmas Term, 1794 (n.d.), pp. 131-144 [15 rules from 1772-1794; copies in Cambridge Univ. Lib. S250.d.79.2 and Lincoln's Inn 122.c].

A Complete Collection of the Rules and Orders of the Courts of Chancery, King's Bench, Common Pleas, and Exchequer up to Michaelmas Term, 1796 (1796), pp. 199-203 [same as Moore but omits one rule by inadvertence; a copy is in Lincoln's Inn 133.b].

Finally Fowler's Practice of the Court of Exchequer (1795) has various general rules quoted throughout his text, and Younge and Collyer's Reports (1st ed., 1840), vol. 3, pp. i-vi (second pagination), has fifteen rules, which were promulgated in 1839.

B. Reports of Cases

This section of the bibliography, which deals with the reported cases, mentions primarily the printed reports because the manuscripts are not well catalogued and as a result they are not immediately accessible. Dr. J.H. Baker is of the opinion that it is unlikely that there are any unprinted manuscripts of equity exchequer cases from the sixteenth century, since in his extensive research in this field he has seen none. This is not surprising in light of the fact that the jurisdiction was then such a novelty.

In the sixteenth and seventeenth centuries, the manuscript reports which were printed were by no means always the best reports in existence. Frequently a book seller simply printed whatever he could lay his hands on. Manuscripts which were somehow connected with well-known legal figures were in demand because they were easier to sell. Often manuscripts were ascribed, correctly or incorrectly, to famous judges and lawyers who were dead and could not therefore deny authorship or dispute the

accuracy of the edition.⁵ There may be some good seventeenth century exchequer reports in existence which have not been printed, but if so they have not been yet discovered. There are some manuscript reports which, in covering all of the courts, include a few exchequer equity cases, but the quantity of cases is quite small.

The only significant general collections of printed exchequer equity cases before the last decade of the eighteenth century are those of Hardres, Gilbert, and Bunbury.⁶ Hardres'⁷ reports are full and quite useful; about half of the cases are from the equity side of the court, and they cover the exchequer from 1655 to 1669. In the reports of Chief Baron Gilbert,⁸ a substantial section, pages 191 through 232, includes equity cases. These cases date from 1722 to 1726 and coincide with his tenure on the exchequer bench.⁹ Bunbury¹⁰ was a practitioner in the court of exchequer from at least 1713 to 1741, the period his reports cover. About half of his cases are equity ones; they are fairly short but comprehensible. The manuscript reports of Chief Baron Dodd¹¹ fill the gap between Hardres and Bunbury; Dodd reported 72 cases from 1688 to 1713.

Savile, Lane, Freeman, and Parker give only a few equity exchequer cases;¹² Barnardiston (King's Bench Reports), Comyns (volume 2), and Cox¹³ average about two dozen cases each. Obviously none of these are systematic

5. J.H. Baker, Introduction to English Legal History (1971) pp. 108-110; Holdsworth, H.E.L., vol. 5, pp. 357-369; J.W. Wallace, Reporters (4th ed. 1882) pp. 15-18 and passim.
6. English Reports, vols. 145 and 25.
7. Wallace, Reporters, pp. 291-294; D.N.B., vol. 24, p. 347.
8. D.N.B., vol. 7, pp. 1204, 1205; Foss, Biog. Dict., pp. 300, 301.
9. Caveat: this volume is not to be confused with Gilbert's Cases in Law and Equity (1760) which is greatly inferior and in addition has no equity cases; see Wallace, Reporters, pp. 417, 418, 502, 503.
10. Wallace, Reporters, pp. 419, 420.
11. Brit. Mus. MS. Harg. 70, ff. 55-66.
12. English Reports, vols. 123, 145 and 89.
13. English Reports, vols. 94, 92, 29, and 30.

in their coverage of exchequer equity; they probably only reported cases which they argued there or heard when they happened to be present in court that day or thought were particularly important. It is interesting to note that Baron Savile and Chief Baron Parker did not include a significant number of equity cases. This is not surprising of Sir John Savile's reports since he sat during the early part of the history of the jurisdiction, from 1598 to 1607, and his reports cover the period 1579-1594.¹⁴ However, Sir Thomas Parker was a judge in the exchequer from 1738 to 1740 and 1742 to 1772¹⁵ when the equity side of the exchequer was flourishing. As a reporter he was concerned only with revenue matters.

It is noteworthy that there were no specialized equity exchequer reports until the end of the eighteenth century.¹⁶ Perhaps there was a lack of concern for equity precedents. However, since the cases reported by Hardres in the latter half of the seventeenth century cite freely precedents from both chancery and exchequer, one is led to the conjecture that the available chancery reports supplied the need.

After 1790 and until the jurisdiction was suppressed in 1841, exchequer equity cases were fully reported. The professional reports, Anstruther, Forrest, Wightwick, Price, M'Clelland, M'Clelland and Younge, and Younge and Jervis have a great many such cases. J. Wilson (Exchequer Reports), Daniell, Younge, and Younge and Collyer (Exchequer Reports) are totally equity exchequer cases.¹⁷

14. Wallace, Reporters, pp. 197, 198; D.N.B., vol. 17, pp. 860-861; see App. 4-A.

15. Wallace, Reporters, p. 442; D.N.B., vol. 15, p. 282; Foss, Biog. Dict., pp. 501, 502.

16. D.E.C. Yale, Lord Nottingham's Treatises (1965) p. 16, note 2.

17. English Reports, vols. 145 through 148, 159, 160.

In addition to these general reports, there are three sets of reports which specialized in tithe cases, most of which were heard on the equity side of the court. Since these tithe reports have not been re-printed, they will be considered in greater detail even though they are not of greater value than the general reports.

John Rayner, Cases at Large concerning Tithes, 3 vols., London, 1783. Rayner's tithe cases date from 1575 to 1782, but most are from the eighteenth century. They are all equity cases, and most are exchequer; they were collected from the previously printed reports and from manuscript reports, Dodd's manuscripts in particular. Rayner gives a very long introduction on the history of tithes and has elaborate apparatus. To the printed cases which he copied, he added notes from manuscripts and occasionally his own comments. Thus his reported cases have a greater depth than the same cases reported elsewhere. Rayner should be used where possible; it is only unfortunate that his reports have not been reprinted.

Henry Gwillim, A Collection of Acts and Records of Parliament, with Reports of Cases argued and determined in the Courts of Law and Equity respecting Tithes, 4 vols., London, 1801; 2d ed. by Charles Ellis, 4 vols., London, 1825. The cases here collected and reported date from 1224 to 1824 and come from all courts. Most of the cases are taken from other printed reports, but a fair number have been copied from the unprinted manuscript reports of Calthorpe, Turner, Bridgeman, Dodd, Joddrell, Eyre, and Skynner, and from the exchequer books of equity decrees. Over half of the cases reported come from the equity side of the exchequer.

Hutton Wood,¹⁸ A Collection of Decrees by the Court of Exchequer in Tithe Causes, from the Usurpation to the Present Time, 4 vols., London, 1798-1799. This work contains copies from the exchequer records of most of

18. See App. 4-E.

the final equity decrees in tithe cases from 1650 to 1797; there is a list at the end of the fourth volume of those decrees which were not reported. The decrees begin with an abstract of the pleadings, then there may be a formal note of any argument or reference, and finally the formal decretal order is given. This work is of limited value compared to proper law reports because the formal decree of the court never contained any reasons for the decision. However, where the case has been reported elsewhere, Wood's decrees form a useful supplement. Moreover, for most of these cases no proper report was ever made, and this information is better than nothing.

C. Secondary Works

The secondary bibliography of the equity side of the court has been dealt with elsewhere,¹⁹ and so it is only necessary to list here the relevant works with but brief comments on their value. This section of the bibliography can be divided into three parts: descriptions of the duties of the exchequer officers, practice manuals for clerks, and treatises for lawyers.

The essays which describe the duties of the officers are in manuscript form only except for the largest and the ^{best:} P. Osborne,²⁰ The Practice of the Exchequer Court (1572, 1658).²¹ This tract, which was formerly attributed to Thomas Fanshawe, describes in fair detail the duties of the

19. Bryson, 'Exchequer Equity Bibliography', Am. Jour. Leg. Hist., vol. 14, pp. 333-348 (1970).

20. D.N.B., vol. 14, p. 1186.

21. This work is discussed in more detail in Am. Jour. Leg. Hist., vol. 14, pp. 333-339, 348; Wing, F 420; six other manuscript copies have been discovered: Oxf. Bodl. MS. Rawl.C.180, Univ. Coll. Oxf. MS. 126, Brit. Mus. MSS. Lansd. 649, f.8, and Harl. 5169, House of Lords Library Truro Exch. MS., ff. 48-74, Duchy of Cornwall Record Office fol. MS., ff. 96-133.

officials of both the upper and the lower exchequer. Its contemporary value and popularity is attested to not only by the fact of its having been printed but also by its wide circulation in manuscript. The next work is very interesting even though it does not mention the judges of the court: L. Squibb, A Book of All the Several Officers of the Exchequer (1642).²² The last is a quite short anonymous piece; it does not add much to our knowledge of the exchequer as a law court: A Brief Collection of the Principal Under-Officers.²³ The precise purpose of these essays is not clear, but obviously they were not designed to aid lawyers or litigants. Probably they were made in order to introduce the department to newcomers to the exchequer staff, most probably new treasurers and chancellors of the exchequer.

The second part of this section includes several printed practice manuals which have sections on the equity side of the exchequer. They each have short sections describing the duties of the judges and of the king's remembrancer; then they give brief descriptions of the equity practice of the court. The better manuals also supply sample forms. One of the better of these is W. Brown, comp., A Compendium of the Several Branches of Practice in the Court of Exchequer (1688).²⁴ This work consists of a short essay by William Byrde entitled 'A Discourse of the Court of the Exchequer'²⁵ plus a very generous collection of forms and examples. This book was re-

22. Am. Jour. Leg. Hist., vol. 14, pp. 339, 340; an edition of this tract is being prepared for the Camden Miscellany.

23. Am. Jour. Leg. Hist., vol. 14, pp. 340, 341; another copy has been found in P.R.O.: E.369/118, ff. 91-102.

24. Am. Jour. Leg. Hist., vol. 14, pp. 341-343; Wing, B 5084; National Union Catalog Pre-1956 Imprints: NB 0867248.

25. Byrde's essay relied in part on R. Crompton, L'Autoritie et Jurisdiction des Courts (1594) ff. 105-112; other manuscript copies of Byrde's essay have been found in P.R.O.: E.369/118, ff. 21-50, and Duchy of Cornwall Record Office fol. MS.

issued in 1699²⁶ and in 1725²⁷ under the title The Practice in the Court of Exchequer at Westminster.

The appendix to Osborne's Practice of the Exchequer Court (1572 , 1658) is an early seventeenth century essay entitled 'Of English Bills and the proceedings thereupon in the Exchequer.'²⁸ This work is far more systematic than Byrde's essay, and it was largely copied by the other books which follow: The Compleat Sollicitor (1666);²⁹ The Practick Part of the Law (1676);³⁰ W. Bohun, The Practising Attorney (1724);³¹ The Compleat Clerk in Court (1726).³² These manuals appear to have been compiled for the use of attorneys and their clients. Although they are not elaborate treatises, they are very useful to the modern researcher.

The treatises which appeared at the end of the eighteenth century mark the culmination of the development of the literature prepared for practitioners in the exchequer.³³ They seem to have been written for the use of barristers to aid them when arguing motions and when presenting their cases at the final hearing. The largest and by far the best is D.B. Fowler,³⁴ The Practice of the Court of Exchequer upon Proceedings in Equity (1795), 2 vols. This book is of general use to anyone concerned with the equity side of the exchequer. The first part follows very closely Mitford's Treatise on the Pleadings in Suits in the Court of Chancery by English Bill (1780); however, the differences between the two courts are clearly pointed

26. Wing, B 5093.

27. NB 0867271.

28. A manuscript copy of this has been found in P.R.O.: E.369/118, ff. 148-154; however, there is no clue there as to authorship or date.

29. Am. Jour. Leg. Hist., vol. 14, pp. 344, 345; Wing, C 5655-57; NC 0600681.

30. Wing, P 3138-46; the earlier editions do not give much information on the exchequer.

31. NB 0600557.

32. NC 0600468.

33. Am. Jour. Leg. Hist., vol. 14, pp. 346, 347.

34. See App. 4-E.

out. C. Barton,³⁵ An Historical Treatise of a Suit in Equity (1796)³⁶ is useful in that it discusses the courts of exchequer and chancery simultaneously. S. Turner, An Epitome of the Practice of the Equity Side of the Court of Exchequer (1806) supplies some technical information and gives some additional precedents which are not found in the older works.

35. D.N.B., vol. 3, p. 342.

36. NB 0164564.

Exchequer Equity Bibliography

by WILLIAM HAMILTON BRYSON*

This essay is concerned with the secondary bibliography of the equity jurisdiction of the Court of Exchequer. It forms the preliminary inquiry of a general study of the history of this jurisdiction. This bibliography is in essay form because a list would not adequately explain the comparative significance of the various works. Moreover, the titles of the works are frequently misleading; some of the earlier ones have been attributed to the wrong author, and the relationships among them have never before been sorted out. Finally, this is the only place where all of these related works have been brought together; the existing bibliographies are incomplete primarily for the reason that they were compiled from an examination of the titles only and not of the contents of the works. This same criticism can be made of the indices of the manuscript collections, most of which were made by scholars who had no legal background. While every care has been exercised in the search for entries for this bibliography, there is no telling what may be discovered tomorrow. Therefore, with this preliminary caveat, let us proceed to the books.

The material arranges itself into four sections. The first group consists of manuscripts concerning the duties of the various Exchequer officers; they date from about 1570 to 1670. The second group contains several printed books which were first published between 1652 and 1726; each has a section on equity procedure in the Court of Exchequer. They seem to have been written as manuals for clerks and students. The third part is a list of three substantial treatises which were first printed between 1795 and 1806. The final section covers the modern period and is the smallest and the most disappointing for the investigator. This is the section which would have included relevant works of legal history, if there were any.

One of the more intriguing books was the one printed in 1658 and attributed to Thomas Fanshawe. [Peter Osborne], *The Practice of the Exchequer Court, with its severall offices and officers. Being a short narration of the power and duty of each single person in his severall place. Written at the request of the Lord Buckhurst, sometime Lord treasurer of England. By Sir*

* Research Student, Clare College, Cambridge University.

Exchequer Equity Bibliography

by WILLIAM HAMILTON BRYSON*

This essay is concerned with the secondary bibliography of the equity jurisdiction of the Court of Exchequer. It forms the preliminary inquiry of a general study of the history of this jurisdiction. This bibliography is in essay form because a list would not adequately explain the comparative significance of the various works. Moreover, the titles of the works are frequently misleading; some of the earlier ones have been attributed to the wrong author, and the relationships among them have never before been sorted out. Finally, this is the only place where all of these related works have been brought together; the existing bibliographies are incomplete primarily for the reason that they were compiled from an examination of the titles only and not of the contents of the works. This same criticism can be made of the indices of the manuscript collections, most of which were made by scholars who had no legal background. While every care has been exercised in the search for entries for this bibliography, there is no telling what may be discovered tomorrow. Therefore, with this preliminary caveat, let us proceed to the books.

The material arranges itself into four sections. The first group consists of manuscripts concerning the duties of the various Exchequer officers; they date from about 1570 to 1670. The second group contains several printed books which were first published between 1652 and 1726; each has a section on equity procedure in the Court of Exchequer. They seem to have been written as manuals for clerks and students. The third part is a list of three substantial treatises which were first printed between 1795 and 1806. The final section covers the modern period and is the smallest and the most disappointing for the investigator. This is the section which would have included relevant works of legal history, if there were any.

One of the more intriguing books was the one printed in 1658 and attributed to Thomas Fanshawe. [Peter Osborne], *The Practice of the Exchequer Court, with its severall offices and officers. Being a short narration of the power and duty of each single person in his severall place. Written at the request of the Lord Buckhurst, sometime Lord treasurer of England. By Sir*

* Research Student, Clare College, Cambridge University.

T.[homas] F.[anshawe] *Whereunto are added the rules and orders of proceedings by English bill*, London, 1658. The addition concerning English bills will be considered in the next section because it has no connection with the main body of the work; it is not included in any of the manuscripts and probably was written at a later date. A cursory search reveals the existence of twenty-five manuscript copies of this treatise.¹ The printed book and most of the manuscripts contain descriptions of the duties of all of the officers of the Exchequer plus the articles or directions of Queen Mary I for uniting the Court of Augmentations and the Court of First Fruits and Tenths to the Court of Exchequer. The first officer discussed is the Lord High Treasurer. This discussion is in the form of alternating statements and comments or "answers" thereon; the rest of the officers are described in simple paragraph form without any commentary or reply.

As indicated above, the editor in 1658 made an error in assigning the authorship of the manuscript to Thomas Fanshawe, the King's Remembrancer,² instead of Peter Osborne, the Lord Treasurer's Remembrancer.³ Obviously the editor relied on a later copy of the work; Osborne's original manuscript, which was sent on 9 October, 1572, to Burghley, has not been discovered. Based upon a sort of colophon in Brit. Mus. ms. Lansd. 171 f. 431, Dr. R. B. Outhwaite has demonstrated clearly that the treatise was written by Osborne and that quite apart from the positive attribu-

1. British Museum mss.: Eg. 3369, Lansd. 171 f. 408, Lansd. 253 f. 493, Lansd. 626, Add. 22591 f. 151, Add. 36081 f. 13, Harg. 278 f. 174, Harg. 209(A), Harg. 209(B); London Borough of Barking Libraries (Fanshawe Papers): Valence House ms. M.51, Valence House ms. M.54(B); Temple Univ. Library ms. (no. 3 in DeRicci's *Census*, supp.); Oxford Univ. Bodleian Library mss.: Rawl. D.713, Carte 122, Ashm. 856 f. 271; Cambridge Univ. Library: Gg.2.7; Trinity College, Dublin, Library mss.: 853, 854; Public Record Office: E.369/131, S.P. 14/193 part 26; Lincoln's Inn: Maynard 59(19); Inner Temple: Petyt no. 515 vol. 9; Folger Shakespeare Library mss.: V.b.64, V.b.71; Northamptonshire Record Office ms. F.H.31.

2. Fanshawe was the King's Remembrancer from 1568 until 1601, a member of the Middle Temple, and a member of Parliament in 1572, 1584, 1588, 1593, 1597. *Dictionary of National Biography*, vol. 18, p. 189, *sub nom.* Fanshawe, Thomas (1530?-1601); J. and J. A. Venn, *Alumni Cantabrigienses*, Part. 1, vol. 2, p. 120. H. C. Fanshawe, *History of the Fanshawe Family*, Newcastle-upon-Tyne, 1927, pp. 20-26.

3. Osborne was the Lord Treasurer's Remembrancer from 1552 until 1592, a barrister of Lincoln's Inn, and a member of Parliament in 1562, 1571, 1572, 1584, 1588. *Dictionary of National Biography*, vol. 42, p. 292, *sub nom.* Osborne, Peter (1521-1592); J. and J. A. Venn, *Alumni Cantabrigienses*, Part 1, vol. 3, p. 285; *Calendar of Patent Rolls, 1550-1553*, p. 312.

tion it is unlikely that it could have been written by Thomas Fanshawe.⁴ This same manuscript supplies the proper date of 1572, the year in which Burghley was made Treasurer; Buckhurst was made Treasurer in 1599. Dr. Outhwaite's deductions are corroborated by Brit. Mus. ms. Eg. 3369, which states at the beginning "This booke was writt at the desire of my Lord Treasurer Burleigh, by Peter Osborn Esquire, Treasurers Remembrancer of the Exchequer of Chicksands in the County of Bedford Anno Domini, 1572."⁵ This manuscript includes at the beginning a list of Exchequer officers in 1572; it refers to the *Queen's Remembrancer*, *Queen's Attorney*, etc.⁶ It does not include the articles about the Court of Augmentations or the Court of First Fruits and Tenths. But the most important feature of this manuscript is that it has only the statements of the duties of the office of Treasurer; there are not any "answers"; these must have been added later. This is the only manuscript which attributes the work to Osborne, and, except for Valence House ms. M.54(B), the only one which does not have Fanshawe's answers. Therefore, this manuscript must be the closest in content, which we have, to the original. It is clear that Brit. Mus. ms. Eg. 3369 is not the original because the second part of this manuscript book is a treatise dated 1598 and is in the same hand. It seems reasonable to suppose that both were copied sometime after 1598.

The next item in the developing manuscript tradition is Valence House ms. M.54(B). As mentioned above, this is the only other manuscript which does not have Fanshawe's answers. However, it does add a list of Exchequer officers in 1599, which follows the same form as the 1572 list. This manuscript is among the Fanshawe papers at Valence House in Essex, the seat of the Fanshawe family for several centuries. It is quite possible that this copy was part of Thomas Fanshawe's preparation of the copy for Lord Buckhurst.

In close association with this copy but of slightly later making is Brit. Mus. ms. Lansd. 171. The title of this last mentioned manuscript states that it was written by Fanshawe for Lord Buckhurst, the Lord High Treasurer. Therefore this copy was made after Fanshawe had presented the copy with his answers to Lord

4. R. B. Outhwaite, "A Note on *The Practice of the Exchequer Court, With its severall Offices and Officers*; by Sir T. F.," *English Historical Review*, vol. 81, p. 337 (1966).

5. This manuscript is described in *Historical Manuscripts Commission Report No. 11*, Part 7, p. 40 (1888).

6. The only other manuscripts which have this list and refer to the queen rather than the king are Brit. Mus. ms. Lansd. 171 and Valence House ms. M.54(B).

Buckhurst. As previously stated, these two have in common with Brit. Mus. ms. Eg. 3369 but with none of the others, the list of the 1572 officers, the 1572 "endorsement" at the end and the references to the queen's officers. The references to the queen date these two as before her death on 24 March, 1603. Sir Thomas Sackville, Lord Buckhurst, was made Treasurer on 15 May, 1599,⁷ therefore these two copies were made between 1599 and 1603. Fanshawe's answers were probably composed in 1599, the year Lord Buckhurst was made Treasurer and the date of the second list of Exchequer officers. In any case, the answers must have been written before 1601, the date of Fanshawe's death.

The fourth stage of the development contains Oxford Bodl. ms. Rawl. D. 713 and the Temple Univ. ms. These two differ from the earlier ones by their omissions of the lists of officers and their references having been changed to the king. This dates them after 1603. They differ from the ones not yet mentioned and the 1658 book by their inclusion of a chapter describing the duties of the clerks in the Lord Treasurer's Remembrancer's Office, which dates them earlier. These two and the two in the preceding paragraph do not follow any pattern as to the inclusion of the articles in regard to the Courts of Augmentations and of First Fruits and Tenths, so no conclusions can be drawn from this variation.

The other manuscripts and the printed book⁸ all have the answers of Fanshawe, the references to the king, and the articles for uniting the Courts of Augmentations and of First Fruits and Tenths to the Exchequer. They all omit the section on the clerks of the Lord Treasurer's Remembrancer's Office.

The titles of the manuscripts also furnish some insight as to the relationships among them. The title of Brit. Mus. ms. Eg. 3369, the earliest, is "What every of the said Officers at this day usually doth by his said office." The fact that Valence House ms. M.54(B) is almost the same and Brit. Mus. ms. Lansd. 171 is only an expanded variation corroborates the conclusion that these two are the closest to Brit. Mus. ms. Eg. 3369. The fact that the title of this manuscript is one of the two most simple confirms the suggestion that it is the oldest survivor. Brit. Mus. ms. Add. 22591 and Folger V.b.71 also have variants of this title. It is interesting to notice that Brit. Mus. ms. Eg. 3369, ms. Add. 22591, and Valence House ms. M.54(B) are

7. He was not created earl of Dorset until 1604; this is further evidence for the date of these manuscripts, since he is referred to as lord Buckhurst in all of them.

8. See section F in the outline *infra*. The printed edition of 1658 adds the part on English bills, which will be discussed later since it is not in any of the manuscripts.

the only manuscripts which do not mention Fanshawe or Lord Buckhurst in their titles; all of the others do. Thus it is easy to understand how the 1658 printer thought Fanshawe to have been the author.

The other manuscripts can be divided into two categories distinguished by whether they imply that Fanshawe wrote only the answers about the Treasurer's office or that he wrote the entire thing. A typical title from the first group is that of Brit. Mus. ms. Lansd. 253, "An answer made by Mr. Fanshawe or rather a declaration of his opinion touching those Articles beginning here as followeth concerning the Lord Treasurers office and this answer was made at the request of the Lord Buckhurst. What every one of the Court of Exchequer doe by vertue of his office."⁹ The best example from the second group is Trinity Coll., Dublin, ms. 854, "A short compendium or brief declaration of what every officer of his Majesty's Court of Exchequer ought to do by virtue of his office as also the articles of the uniting of the late court of Augmentations and Revenues of the Crown and the late court of First Fruits and Tenths, to the court of Exchequer at Westminster, written at the request of the Right Honourable the Lord Treasurer Buckhurst by Mr. Fanshawe with a declaration of his opinion concerning the same."¹⁰ This distinction between the manuscripts is not absolutely rigid; it is a distinction of suggestions or rather of our inferences. The titles of the manuscripts vary slightly among themselves within each category.

However, the division shows an unconscious growth and development in the titles and in the manuscript tradition of the tract. It indicates clearly that Thomas Fanshawe himself did not ever claim to be the author of anything more than the "answers" to the first chapter or to be a knight but that the editor in 1658 made these errors innocently due to his copying one of the later manuscript versions. In seventeenth-century legal publications printers were not infrequently careless over attribution of authorship. Many law books were printed without any mention of the author at all. Others, such as this, gave only the author's initials. Printers printed any manuscript they could find which they thought would sell; people used verbatim entire sections of other works in their own; books were

9. The other manuscripts in this category are Brit. Mus. mss. Lansd. 171, Harg. 209(A), Harg. 278, Add. 36081; P.R.O.: E.369/131, S.P.14/193 part 26; Oxford, Bodl. mss.: Carte 122, Ashm. 856; Valence House ms. M.51; Temple Univ. ms.

10. The other manuscripts in this category are Trinity College, Dublin, ms. 853; Lincoln's Inn Maynard 59(19); Inner Temple Petyt no. 515, vol. 9; Cambridge Univ. Lib. Gg.2.7; Brit. Mus. ms.: Lansd. 626.

written as joint efforts.¹¹ The idea of literary property was only beginning to develop fitfully during this period.¹²

The relationships among the manuscripts can be more easily seen in outline form.

- A. (1572 original—unknown)
- B. Brit. Mus. ms. Eg. 3369
- C. Valence House ms. M.54(B)
- D. Brit. Mus. ms. Lansd. 171 f. 408
- E. Oxford Univ. Bodl. ms. Rawl.D.713
Temple Univ. ms.
- F. (others distinguished by title only)
 - 1. Brit. Mus. ms. Add. 22591 f. 151
Folger Shakespeare Library ms. V.b.71
 - 2. Brit. Mus. ms. Lansd. 253 f. 493
Brit. Mus. ms. Harg. 209(A)
Brit. Mus. ms. Harg. 278 f. 174
Brit. Mus. ms. Add. 36081 f. 13
P.R.O.: E. 369/131
P.R.O.: S.P. 14/193 part 26
Oxford Univ. Bodl. ms. Carte 122
Oxford Univ. Bodl. ms. Ashm. 856 f. 271
Valence House ms. M.51
 - 3. Trinity Coll., Dublin, ms. 854
Trinity Coll., Dublin, ms. 853
Lincoln's Inn ms. Maynard 59(19)
Inner Temple ms. Petyt no. 515, vol. 9
Cambridge Univ. Library ms. Gg.2.7
Brit. Mus. ms. Lansd. 626
 - 4. (miscellaneous)
Brit. Mus. ms. Harg. 209(B)
Folger Shakespeare Library ms. V.b.64
Northamptonshire Record Office ms. F.H.31
printed edition of 1658

1599-1603

after 1603

It cannot be determined which manuscript was copied from which. However, it can be stated as a probability that one was the progenitor of its group because the others preserved its additions and omissions, and also that one copied one from a preceding group. It

11. See J. W. Wallace, *Reporters*, 4th ed. Boston, 1882, pp. 7-24; W. S. Holdsworth, *History of English Law*, London, 1924, vol. 5, pp. 365-387, vol. 6, pp. 604, 617-619, App. 4, pp. 683-699.

12. Holdsworth, *op. cit.*, vol. 6, pp. 364-379.

is interesting to note the large number of copies of this treatise which have survived. It is not and never has been a particularly valuable work, and there is no reason to think that anyone made a special effort to preserve it; there were probably many more copies which have been lost over the centuries. At least one copy, Brit. Mus. ms. Add. 36081,¹³ and probably others were made after the treatise was printed. The probable explanation for this and for the large number made over all is that the apprentice clerks in the Exchequer were required to copy it as a learning exercise. We know that in the seventeenth century and later they were required to do a five-year apprenticeship before being allowed to practice,¹⁴ and it is quite possible that this was a means of teaching them and keeping them from idleness. Another possibility is that they were made for the use of newly appointed senior officials. In the seventeenth century the treasurers and chancellors of the Exchequer were primarily successful politicians, whose experience at the Exchequer was limited. Also the barons were by then recruited from Serjeants' Inn and thus were unfamiliar with the financial aspect of the court. These officers would require some sort of introduction to the technicalities of the Exchequer.

The next work to be considered has never been printed in any form. Lawrence Squibb, *A Booke of all the severall officers of the Court of the Exchequer, together with the names of the present officers, in whose guift, and how admitted, with a briefe Collection of what is doon by each Officer According to the State of the Exchequer at this day. January, 1641*. At the time this short essay was written Lawrence Squibb held a reversion to one of the four offices of Teller of the Exchequer.¹⁵

This piece is primarily a list of the lesser officers of the Exchequer with brief descriptions of their duties. Its major value is the description of the office and responsibilities of the King's Remembrancer, which comes first and is considerably more complete than those for the others. Of the thirteen manuscripts¹⁶

13. This manuscript is dated 1700.

14. Northamptonshire Record Office mss. F.H.2163 and F.H.2213 (1674); Fowler, *Practice of the Court of Exchequer*, London, 1795, vol. 1, pp. 9, 10; Turner, *Epitome of the Equity Side of the Exchequer*, London, 1806, p. 1; Lincoln's Inn ms. Misc. 310, 2d return, 18th answer (1820).

15. He had held lesser offices in the Exchequer for some time; in 1632 he was in the employment of the Chancellor of the Exchequer and later was an officer for cards and dice. He also had close relatives who held exchequer posts. See *Calendar of State Papers* for 1632 onwards, *passim*.

16. Public Record Office: S.P. 16/488 part 103, A.O. 16/196; London Borough of Barking Libraries (Fanshawe Papers): Valence House ms.

which have been discovered so far, the one at the Public Record Office is a draft of the original. This manuscript is the shortest; numerous paragraphs were added later. It is the only one which mentions the author; apparently the later copyists were not concerned. Finally this manuscript, with two exceptions,¹⁷ is the only to give the proper date of "1641", which is the date all of the listed officers were serving together in the Exchequer. By the modern calendar this would be 1642; in the seventeenth century the legal year started on the twenty-fifth of March.

The next oldest surviving manuscript of this work is Brit. Mus. ms. Add. 30216, which is dated 1692. This and four others¹⁸ which follow it, are copies of the original work but with the names of the officers of 1692 substituted. They are more complete than the original draft in the Public Record Office, but they do not contain an error in the twelfth paragraph, which is found in all the other manuscripts, i.e. the miscopying of "intrusions" as "instructions". Also they add a paragraph explaining that Henry Ayloff held the office of King's Remembrancer in trust for Lord Fanshawe. Otherwise, there are no significant differences in the substance of the 1692 work from the 1642 work in its final form. The remaining copies¹⁹ were made after 1712 from an original which was made before the 1692 version. Brit. Mus. ms. Add. 38419 was made after 1764. It is interesting to note that so many copies were made at such late dates. The lists of the majority were at least twenty years out of date when they were copied. The sketches of the duties of the officers were much less complete than others which had found their way into print.

There is one other manuscript tract which must be mentioned for the sake of completeness. *A briefe Collection of the Principal Under-Officers & Clerkes appertayninge to your Majesties Exchequer commonly kept at Westmynster, with a lyke Declaration aswell of their severall functions, fees, rewards, and allowances of auncient time accustomed, as also wythin whose guift the same byne, when they become voyde.*²⁰ This is an anonymous sixteenth or

M.54(A), Valence House ms. M.54(C); Lincoln's Inn ms. Hill 86; London Univ. Library ms. 57; British Museum mss.: Harl. 3278, Eg. 2436, Stowe 327 f. 19, Add. 24689 f. 14; Add. 30216, Add. 38419; Oxford Univ. Bodleian Library ms. Rawl. C.715.

17. Valence House ms. M.54(C) and Oxford Bodl. ms. Rawl. C.715.

18. Brit. Mus. mss. Add. 24689, Add. 38419, and Stowe 327; and P.R.O.: A.O. 16/196.

19. Valence House ms. M.54(A); Valence House ms. M.54(C); Lincoln's Inn ms. Hill 86; London Univ. Lib. ms. 57; Brit. Mus. mss. Harl. 3278, Eg. 2436; Oxford Bodl. ms. Rawl. C.715.

20. British Museum mss.: Harl. 830 f. 218, Lansd. 151 f. 150, Lansd. 171 f. 315, Add. 4572 f. 28, Add. 38008; Oxford Univ. Bodleian Library ms. Carte 122 f. 62; Lincoln's Inn ms. Hill 87; London Univ. Library ms. 9.

seventeenth century work which gives a few sentences of sketchy information about the lesser officers of the Exchequer and concludes with a list of abuses in the revenue side of the court.²¹ The light shed on the equity side is minimal. The *Dialogue of the Exchequer*²² discusses only briefly the officers in the mediaeval period; but since the equity side of the court had not appeared by the time this work was written, it is of no help.

The second part of this bibliography is a consideration of several printed books which have sections or chapters on the procedure of the equity side of the Exchequer. This information is much more enlightening than the scanty glimpses given as part of descriptions of officers and their duties.

The first book on the law of the Court of Exchequer is a collection of paragraphs culled from the most important sources of English law: the yearbooks, the statutes, Coke, Dyer, Brooke, Fitzherbert, Plowden, *et al.* [William Byrde], *A Compendium of the several branches of Practice in the Court of Exchequer at Westminster, viz. 1. His majesties Revenue. 2. Proceedings by English Bill. 3. Actions at Law brought in the Office of Pleas; with Commissions, Injunctions, and other Process and Pleadings relating thereunto*, London, 1688; 1689; 1692. This treatise has heretofore been attributed to William Brown, a clerk of the Court of Common Pleas. Brown, however, did not write the text. He printed Byrde's short manuscript treatise on the Exchequer, gathered together an extensive collection of samples and forms, and wrote an elaborate dedication and preface. He signed the dedication and preface, but his name does not appear on the title-page. It is quite possible that he copied a manuscript which did not attribute the authorship to anyone. In his preface, Brown does not claim that he wrote the book but only that he "collected" the material for it. Judging by his numerous other publications, this seems reasonable and in character. Though a minor officer in the Court of Common Pleas, he set loose a flood of form books and practice manuals for all of the high courts at Westminster. He was more a compiler than an author.

The compendium part, the first forty-nine pages, is the section which is of greater interest. Five manuscripts²³ of this part have

21. For more information on the section on revenue abuses, see S. Jack and R. S. Schofield, "Four Early Tudor Financial Memoranda," *Bulletin of the Institute of Historical Research*, vol. 34, p. 189 (1963). This article dates the earlier version of this tract as c. 1520 and the later version as after 1554.

22. *The Course of the Exchequer*, by Richard, son of Nigel, trans. by C. Johnson, London, 1950.

23. Trinity College, Dublin, ms. 854 f. 84; British Museum mss.: Harl. 1303, Harg. 168 f. 219, Add. 48063 f. 119; Oxford Univ. Bodleian Library ms. Perrott 7 f. 89.

been found so far. Of these the most interesting is Trinity College, Dublin, ms. 854, which is intitled "A Discours Of the Courte of the Exchequer Collected by William Byrde sometymes of Grayes Inne Esquyer."²⁴ This title is the authority for attributing the authorship of this first part of Brown's compilation to Byrde. If Byrde only made the copy at Trinity College, Dublin, then it is unlikely that the word "collected" would have been used. The work, moreover, is more a collection than anything else, a collection of cases out of the older books. Almost every paragraph is concluded by the citation of authority.

The exact date of the *Compendium* or *Discourse* is not clear; no help is to be had from the manuscripts themselves. The earliest possible date is 1615 since there are references to the eleventh volume of Coke's *Reports*. Since there is a reference to "King James", this indicates that it was written before 1685 when James II became king. However, due to the diligent use of works dating from 1615 and the several decades before and due to the complete absence of anything which appeared afterward, it would seem that it was written very shortly after 1615. If this is so, then it makes it less likely that Brown was the author because Brown did not publish his first thing until 1671,²⁵ and his last work appeared as late as 1704.²⁶

It is possible that the copyist wrote down William "Byrde" in place of William "Brown". However, Byrde is described as being of Gray's Inn and an esquire. In Brown's books he is described as a mere gentleman. Also it is not likely that a clerk would have been a barrister. This is not absolute proof. It is possible that the copyist was in error on this point also, but the probabilities diminish with each additional possibility of error.

The earlier two manuscripts are Trinity College, Dublin, ms. 854 and Brit. Mus. ms. Harl. 1303. These two are the only ones which have the citations to authorities throughout the entire work and the only ones which give as the sample subpoena, a subpoena ad jungendum.²⁷ The latter manuscript is clearly a copy; therefore, if either is the original, it must be the former. But, of course, the former may be a copy also. Either of these two could have been the manuscript which Brown used, because he has the citations all the way through. Also, Brown copied the sample subpoena ad jungendum, but he placed it in the second part of his book with the

24. The other four manuscripts are entitled simply "The Court of the Exchequer."

25. *Formulae bene Placitandi*.

26. *Privilegia Parliamentaria*.

27. The sample subpoena was taken from Crompton's *L'Autoritie et Iurisdiction des Courts*, London, 1594.

other samples, examples, and forms. Moreover, in the manuscripts there is a short paragraph with a witty quotation from the "*Hospital Case*."²⁸ This bit is an appendage at the end of the two earliest manuscript copies; it is at the beginning of the other three but omitted from Brown's book. It is much more likely to have been omitted had it been at the end than at the beginning of the manuscript being copied.

The other three manuscripts²⁹ are sufficiently similar to constitute a group. They all have the same title, the *Hospital Case* at the beginning, and the lack of citations in the first half of the work. In addition, these three have changed the sample subpoena to a subpoena ad respondendum, which is more logical if only a single sample is to be given.

The printed book must have been a successful venture because it went through many subsequent printings. The reprint of 1699 was advertised as a second edition, but it was not. There were no changes made; the only thing new was the title-page and title. *The Practise of his Majesties Court of Exchequer at Westminster, as to proceedings in Equity by English Bill, parallel to the course used in the High Court of Chancery: containing Precedents of the most exact and authentick Forms of Bills, Answers, Bills and Demurrers, Interlocutory Orders, Commissions, Injunctions, Affidavits, Interrogatories: and such other Process and Pleadings as have been drawn by the most learned, able, and experienced, Council Clerks and Practitioners; and approved of by the said Court for more than 35 years last past. The Second Edition*, London, 1699; 1703. The last reprint appeared in 1725 under a new title. *The Practice in the Court of Exchequer, at Westminster, In its several Branches, viz. 1. His Majesties Revenue, 2. Proceedings by English Bill, 3. Actions at Law brought in the Office of Pleas. With Commissions, Injunctions, and other Process and Pleadings relating thereunto. By W. Brown, Gent. The Second Edition*, London, 1725.

Byrde's discourse is not a logically complete treatise. It is only a collection of cases, statutes, and commentaries. However, there is much valuable material here, particularly on the question of jurisdiction. It is concerned primarily with the revenue side of the court.

William West, *Symboleographie*, 1627, Part 2, ff. 291-310, has some sample exchequer equity pleadings, but there are no comments thereon.

28. "Questions in the Exchequer are wont to be resembled to Spirits, which may be raised up with much facility, but suppressed or vanquished with great difficultie." *Sutton's Hospital Case*, 10 Rep. 1 at 29, 77 Eng. Rep. 937 at 968 (K.B., 1612). Although it may appear otherwise, the court is not being compared to a ward for alcoholics.

29. Brit. Mus. mss.Harg. 168, Add. 48063; Oxford Bodl. ms. Perrott 7.

The first work to treat the subject systematically was the appendage to the *Practice of the Exchequer Court* (1658) entitled "Of English Bills and the proceedings thereupon in the Exchequer."³⁰ Since none of the manuscripts include this 25-page essay, there is no reason to think that either Osborne or Fanshawe wrote it. In fact, there is not the slightest clue as to who did write it. It was no doubt written a decade or so earlier than its publication because there are two references (pages 143 and 144) to the existence of the Court of Star Chamber; this dates its composition before 1640. This essay is an original piece of work, which discusses briefly the procedure of the equity side of the Exchequer from a paragraph on jurisdiction and one on subpoenas to final decrees and final process. There are no references to authority of any sort; it is perhaps the work of one personally experienced in exchequer practice.

This anonymous addition to the printed edition of Osborne's treatise was copied as part of the Exchequer section of an anonymous practitioners' manual in 1666. *The Compleat Sollicitor, Performing His Duty: and Teaching his Clyent to run through and manage his own Business, As well in His Majesties Superior Courts at Westminster: As in the Mayors Court, Court of Hustings, and other Inferior Courts, both in the City of London, and elsewhere*, London, 1666; 1668; 1671; 1672; 1683; 1700. The chapter on the Exchequer is about forty pages long. There is a paragraph on the origin of the Exchequer, which is amusing. Then follows about twenty pages describing the officers and their duties. The rest of the chapter is a reprint of the 1658 edition with an occasional addition. However, the references to the Star Chamber are omitted.

The 1658 appendage on English bills was also copied by another seventeenth century practice manual. *The Practick Part of the Law: Shewing the office of an Attorney, And a guide for Solicitors In the Courts of the Chancery, King's-Bench, Common-Pleas, and Exchequer, with the manner of their Proceedings in any Action Real, Personal, or Mixt (from the Original to the Execution) in all Courts; with the exact Fees of all Officers and Ministers of those Courts*. . . ., London, 1676; 1681; 1695; 1702; 1711; 1724. This book is sometimes referred to as "The Compleat Attorney and Solicitor." It was first published in 1652, and declared itself to have been "composed and collected by G. T. of Staples Inne and T. P. of Barnards Inne." The work was reprinted in 1653, 1654, 1656, 1658, 1659, 1660, and 1666, but T and P were no longer mentioned. These first seven printings are rather uninteresting because there is only a colorless five-page note on the Exchequer. However, the 1676 revision and the subsequent reprints and editions contain an adaptation

30. See above.

of the essay which appeared in 1658. The greater part of it was copied by the 1676 edition, but several paragraphs and sentences were left out probably out of carelessness. The references to the Star Chamber were omitted. At the beginning is a new description of the court officials, and at the end is a list of their fees.

This chapter of the *Practick Part of the Law* was in turn copied by another manual. [William Bohun], *The Practising Attorney; or, Lawyer's Office: containing, The Business of an Attorney in All its Branches. viz. I. The Practice of the Courts of King's-Bench and Common Pleas . . . II. Proceedings of the High Courts of Chancery and Exchequer, from the Leading Process the Subpoena to the final Order or Decree, Interspers'd with great Variety of Bills, Answers, Replications, Rejoinders, &c. III. The Attorney's Practice in Conveyancing . . . IV. Of Court-Keeping . . .*, London, 1724; 1726; 2 vols. 1732; 1737. Bohun was called to the bar of the Middle Temple in 1705³¹ and was the author of numerous other legal handbooks. Bohun's work is not a mere copy as the others are. While sometimes he copies entire paragraphs, he frequently rephrases, and he adds a considerable amount of information. He also gives a few pages of general rules of court and has about fifteen pages of sample pleadings.

The final item in this section is another anonymous practice manual, but unlike the others it had only one edition. *The Compleat Clerk in Court; or, Practising Solicitor, In all our Courts. containing, I. The Chancery Clerk . . . II. The Exchequer Clerk, setting forth the Solicitor's Practice by English Bill and Answer, and in the Office of Pleas, in the Exchequer. III. The King's Bench Clerk . . . IV. The Common Pleas Clerk . . .*, London, 1726. It is odd that this volume should not have been reprinted because it is greatly superior to all those which had gone before; so much so that it can be considered the transition between the practice manuals and the treatises which will be discussed in the next section. This book copies bits of Bohun and the *Compleat Sollicitor* (1666), but it adds a great deal. It is like the older works in that there are no references to authority; but the coverage of the subject is much more complete and detailed. The text is strewn with sample processes, pleadings, and orders.

Following the 1737 edition of Bohun's *Practising Attorney*, there was a period of almost sixty years during which nothing at all was printed on the subject.³² This rather long gap is probably due

31. H. A. C. Sturgess, *Register of Admissions to the Honourable Society of the Middle Temple*, London, 1949, vol. 1, p. 249. R. Watt, *Bibliotheca Britannica*, Edinburgh, 1824, vol. 1, p. 128.

32. There was, however, published in this interval a quite substantial treatise on the Irish Exchequer. Gorges Edmond Howard, *Treatise on the Rules and Practice of the Equity Side of the Exchequer in Ireland*,

to a general availability of the several editions of the various manuals. Also there were numerous treatises on equity in the Court of Chancery. In 1795 there appeared the most detailed and complete work of all on the equity jurisdiction of the Exchequer. David Burton Fowler, *The Practice of the Court of Exchequer upon Proceedings in Equity*, 2 vols., London, 1795; 2d ed., 1817. Fowler from 1760 to 1827 was one of the sworn clerks in the office of the King's Remembrancer,³³ the office which handled all suits in equity in the Exchequer. In the second edition it is stated that there are "considerable additions", but in fact the only difference between the two editions is the inclusion of a few recent cases as examples. The second edition adds nothing of significance but omits the long appendix of sample bills of costs.

Fowler's treatise is quite elementary and very complete; he explains in detail all of the aspects of equity procedure as it was applied in the Exchequer. There are numerous sample forms, general rules of court, and examples from unpublished Exchequer cases.

In the next year, after the appearance of the first edition of Fowler's treatise, a single volume work was published on the equity procedure of the courts of Chancery and Exchequer. Charles Barton, *An Historical Treatise of a Suit in Equity; in which is attempted A Scientific Deduction of the Proceedings used on the Equity Sides of the Courts of Chancery and Exchequer, from the Commencement of the Suit to the Decree and Appeal; with Occasional Remarks on their Import and Efficacy; and An Introductory Discourse on the Rise and Progress of the Equitable Jurisdiction of those Courts*, London, 1796. This book was written the year after the author was called to the bar at the Inner Temple.³⁴ It is the only one which considers both courts equally and at the same time; this makes it quite easy to note the minor variations in practice and procedure between them. Barton supplies many sample forms throughout his text. However, the historical "introductory discourse" is disappointing.

The last practice manual on the subject was written by a solicitor. Samuel Turner, *An epitome of the practice of the equity*

2 vols., Dublin, 1760. Howard discusses the subject alphabetically from "Abatement" to "Witnesses"; he cites as authority cases decided in the English courts of Chancery and Exchequer, and he includes an appendix of general rules of court for the Irish practice. Although this work is considerably more elaborate than any of its predecessors in England or Ireland, it was probably not the model for Fowler since Fowler did not follow his method of arrangement of the subject matter.

33. *The Court and City Register*, London, 1759, 1760; *The Royal Kalendar*, London, 1827, 1828.

34. *Dictionary of National Biography*, vol. 3, p. 342, *sub nom.* Barton, Charles (1768-1843).

side of the Court of Exchequer, comprehending all the material authorities upon points of practice from the commencement of the suit to the decree, London, 1806. Turner borrows regularly from Fowler, but he gives due credit. The chief value of this volume is the appendix of forms and the numerous lists of one-sentence digests of cases, which are scattered throughout the book under the appropriate subject headings. Ten years later, the second edition of Fowler's treatise appeared, and this was the last thing on the subject. By 1825 the popularity of the equity jurisdiction of the Exchequer was greatly declining,³⁵ and in 1841 it was abolished.³⁶

Fowler, Barton, and Turner cite as authority and without discrimination cases from both the Chancery and the Exchequer courts. Also they frequently refer to Mitford's classic treatise on chancery pleading.³⁷ This leads to the conclusion that the procedures of the two high courts of equity were basically the same. Also it is notable that there were no separate treatises on the substance of the equity of the Exchequer; this indicates that it too was the same as the Chancery. It would be interesting to know precisely the relationship between these two courts, whether one took the initiative in developing the law and practice of equity or whether they developed *in pari passu*, but much further study must be done before anything more can be said.

Before continuing to the modern period, one small book, which has one short chapter on the subject, must be mentioned in passing. Henry Aldridge, *A Short Treatise of the History and Antiquities and Jurisdiction of all the Courts of Law, equity, ecclesiastical, military, university, copyhold, and other courts of Justice*, London, 1835. Also there was the parliamentary "Report of the Commissioners on the Duties, Salaries and Emoluments, in Courts of Justice" in 1822.³⁸ This report describes in detail the duties of all of the officers of the court and furnishes much information on the clerical procedures and the records of the court.

Since the demise of the equity jurisdiction of the court, there have been only two books to appear which touch upon the subject at all. Emyr Gwynne Jones, comp., *Exchequer Proceedings (Equity) Concerning Wales, Henry VIII—Elizabeth, Abstracts of Bills and Inventory of Further Proceedings*, Board of Celtic Studies, Uni-

35. "Administration of Justice Bill, Minutes of Evidence," *Journals of the House of Lords*, vol. 72 (appendix vol.), 1840 sess., App. No. 3, pp. 117-153.

36. Stat. 5 Vict. [1841] c. 5, s.1.

37. John Freeman Mitford, Lord Redesdale, *Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*, London, 1780.

38. HC Parliamentary Papers, 1822 (125) xi, 99.

versity of Wales, History and Law Series, No. 4, Cardiff, 1939. Thomas Ieuan Jeffreys Jones, comp., *Exchequer Proceedings Concerning Wales*, in tempore James I, *Abstracts of Bills and Inventory of Further Proceedings*, Board of Celtic Studies, University of Wales, History and Law Series, No. 15, Cardiff, 1955. As their titles indicate, these works are successive compilations of abstracts of the equity cases which arose in Wales up to 1625. In fact very little remains before the reign of Queen Elizabeth I. These two books have brief, non-technical prefaces, but unfortunately their indices refer only to persons and places. The bodies of the books can be used as calendars which give the nature of the dispute and the references to all the pleadings, depositions, decrees, and orders. Although these books are limited to the Welsh counties, there is no reason to think that they are not typical of any primarily rural British shire. Thus they provide an impartially and logically selected sample of Exchequer equity cases for the period.

This study suggests that the time lag between the developments of the court and the descriptions thereof was considerable. The manuscripts mentioned in the first section describe the offices, most of which were flourishing in the early part of the sixteenth century. The manuals of the latter part of the seventeenth century describe in rough outline the procedure which had been used since the time of Elizabeth I. The treatises of the late eighteenth century set out in detail the rules which had been settled by Lord Nottingham and others a hundred years earlier. Perhaps this reflects the conservatism of the legal profession; nothing can be established except by long usage. The fourth section of this essay shows the longest gap of all: that between the demise of the jurisdiction and the writing of its history. Although the gap widens daily, steps are being taken to stop it.

Another manuscript copy of Osborne's treatise has been found since the type has been set. It is British Museum MS. Harl. 5176, ff. 52-76. This copy is divided into two distinct parts. The first is entitled "The Offices & Officers of the Court of Exchequer at Westminster & of whose guift they bee." It is only a list of offices with a note of who had the right of appointment. The second part is "What every of the said Officers at this day usually doth by his said Office"; this is the treatise. This copy does not have Fanshawe's answers nor the address and date at the end; it includes the section on the clerks of the lord treasurer's remembrancer's office; it refers to the king. Therefore, it would appear to be among the earlier copies.