DPhil Thesis of C.St.John-Smith at Lady Margaret Hall

The judiciary and the political use and abuse of the law by the Caroline regime 1625-1640

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I am indebted to Dr John S.Adamson of Peterhouse, Cambridge University for suggesting that early Stuart monarchs introduced elevation to the peerage as a reward for judicial service to the Crown. That prompted wider investigation of their use of incentives in this context.

Abbreviations and conventions:

Dates have not been modernised but 1 January has been taken as the beginning of each new year. In quotations modernisation of spelling has been kept to a minimum.

Case law is cited using the standard legal abbreviations, principally to named law reports. The majority are to be found in *The English Reports* (1900-32) a multi-volume collection of most printed law reports from the mid-sixteenth to the nineteenth century. Standard citation begins with the report volume number and ends with the individual report number.

APC	Acts of the Privy Council of England 1542-1631, 46 vols.
Bankes Papers	Papers of Attorney-General Sir John Bankes in the Bodleian Library, Oxford
BL	British Library, Department of Manuscripts, St Pancras, London
Bodleian	Bodleian Library, Oxford
CoRep	*Les Reports de Edward Coke* (11 parts, 1600-15 with twelfth part published posthumously in 1656 and thirteenth part published in 1659).
CSPD	Calendar of State Papers Domestic, Domestic Series, of the reign of Charles I, ed. J. Bruce (1858-97)
ER	English Reports
GA	Gloucestershire Archives, Gloucester
HALS	Hertfordshire Archives and Local Studies, Hertford

HMC	Historic Manuscripts Commission
LI	Lincoln's Inn Library, London
LPL	Lambeth Palace Library, London
MS	Manuscript
ODNB	Oxford Dictionary of National Biography
OUP	Oxford University Press
PC2	Privy Council: Registers
Rushworth	John Rushworth, *Historical Collections of Private Passages of State*, *Weighty Matters of Law*, *Remarkable Proceedings in Parliament*, 1659-1701, 8 vols. (London, 1721)
SP 14	SP 14: Secretaries of State: State Papers Domestic, James I, 1603-1640
SP 16	Secretaries of State: State Papers Domestic, Charles I
SP 46	State Papers Domestic: Supplementary
SP 63	P 63: State Paper Office: State Papers Ireland, Elizabeth I to George III, 1558-1782
State Trials	*A Complete Collection of State Trials*, 34 vols., ed. T. B. Howell (London, 1816)
TNA	The National Archives, Kew, London

Chapter 1: Introduction

The Parliamentary attack:

On 14 January 1641 articles of impeachment were presented in the House of Commons against the Lord Keeper, Sir John Finch, in relation to aspects of his conduct as chief justice of the court of Common Pleas, and in the same year articles of accusation were published in relation to six of the remaining central court judges.[1] These were Sir John Bramston, chief justice of the court of King's Bench, Sir Humphrey Davenport, chief baron of the court of Exchequer, Sir Robert Berkeley, justice of the King's Bench, Sir Edward Crawley, justice of the Common Pleas and Sir Thomas Trevor and Sir Francis Weston, both barons of the Exchequer. That was half of the central court judiciary, and the number would have been more if Sir William Jones, justice of the King's Bench, and Sir George Vernon, justice of the Common Pleas, had not died respectively on 9 and 16 December 1640. These specific allegations were part of a broader parliamentary critique of the conduct of the judiciary and the supposed political manipulation of the law by the government that dominated the early months of the Long Parliament. The behaviour of the judges was criticised explicitly in a variety of speeches. Edward Hyde, the future first earl of Clarendon, spoke on the abuses of the Council in the North Parts, the judges' conduct in *R v.Hampden*, known as the Ship Money Case, and distraint for non-payment of knighthood fines.[2] Sir Harbottle Grimston commented on how judicial decisions had turned the ownership of property into tenancy at will and Denzel Holles compared the integrity of Sir Randolph Crewe, the chief justice of King's Bench dismissed in 1626, with the perfidy of the current judges.[3] Others took issue with specific aspects of the judgements in the Ship Money Case or pointed out William Noy's contribution to these problems.[4] In addition there was implicit criticism of judicial conduct in certain decisions of the court of Star Chamber that were reversed by parliament. These included that court's ruling against the City of London in the Londonderry Plantation case in 1635

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[1] *Proceedings in the Opening Session of the Long Parliament: House of Commons*, ed. Maija Jansson, 4 vols., (Woodbridge, 2000-2), vol.2, p.4; Rushworth, vol.4, p.137; *Articles of accusation exhibited by the Commons House of Parliament* (1641).
[2] Rushworth, vol.3, pp. 1336-7, 1340-1, 1353-4.
[3] Ibid., pp. 1357,1358-9.
[4] Ibid., pp. 1339-40,1356.

and the decisions against Henry Burton, John Bastwick and William Prynne.[5] Such criticism also lay behind Edward Bagshaw's parliamentary attacks on High Commission and the judges' opinion, given in 1637, on the power of bishops to hold courts in their own names.[6]

Both strands of parliamentary criticism were encapsulated in their most threatening form by Lucius Cary, Viscount Falkland in his speech on 7 December 1640 on the Ship Money Case and in his denunciation of Finch, after the impeachment articles against him were presented.[7] Falkland began the first speech by denouncing the extra-judicial opinions on aspects of the ship money writ given by the judges before the hearing and then condemned specific aspects of the judgements for the Crown. He did not stop there but linked the judges' conduct in the case to the accusation of treason that had been made against Thomas Wentworth, the earl of Strafford by the House of Commons on 11 November 1640.[8] He urged that 'we must now be forced to think...of taking away this Judgment, and these judges together, and of regulating their Successors by their exemplary Punishment'. Noting that 'we have accused a great Person of High Treason, for intending to subvert our fundamental law, and to introduce Arbitrary government' he continued, referring to such conduct and the judges, that 'we are sure these have done it, there being no Law more fundamental than that they have already subverted, and no Government more absolute than that they have really introduced'.[9] Based on this formulation both justice Berkeley and Lord Keeper Finch were accused of having 'traiterously and wickedly...endeavoured to subvert the fundamental laws and established government of the realm of England' and were thus accused of treason on much the same basis as Strafford. In Berkeley's case this was because the words and actions of which he was accused were intended 'to alienate...his Majesties liege people from his Majestie & to set a division betwixt them'. In Finch's case it was because he had sought to 'introduce an arbitrary and tyrannical government against law' by his counsels, opinions, and actions.[10] This was the most serious offence that parliament could charge

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[5] Ibid., pp. 1053-4. Rushworth, vol.4, pp. 203, 207,

[6] Edward Bagshaw, *A Just Vindication of the Questioned Part of the reading of Edward Bagshaw Esq.*(London, 1660), pp.4-5, 32-42; Rushworth, vol.3, p.1344.

[7] *State Trials*, 3:1260-1; Rushworth, vol.4, pp. 86-88, 139-41.

[8] R.G. Asch, 'Wentworth, Thomas, first earl of Strafford (1593-1641), *ODNB* (OUP, 2004), online edn. Oct. 2009.

[9] Rushworth,vol.4, p.87.

[10] *Articles of accusation*, p.9; Rushworth, vol.4, p.136.

anyone with and, since Finch was mainly charged with matters undertaken by him as a judge, effectively put two judges in the same category of offender as Strafford, Archbishop William Laud and eventually the King himself. That indicated the level of political hostility faced by the judges at the commencement of the Long Parliament even if the treason charges were flawed for similar technical reasons as contributed to the move from such charges against Strafford to the use of attainder.[11] Finch was wise to flee to Holland on 22 December 1640. With considerable courage Berkeley stood his ground, and after arrest and a prolonged spell in prison, eventually succeeded in having the treason charge, and all others made against him other than those relating to ship money, dropped by the time of his trial in September 1643. Although convicted of those lesser offences, fined and imprisoned again, he was able to negotiate the lowering of his fine and release from prison on condition of immediate payment of a lesser sum as the enthusiasm of parliament was superseded by more pressing priorities.

Berkeley and Finch, together with the other five judges named in the articles, also faced accusations relating to lesser misdemeanours. In general these brought the accused judges within the ambit of parliamentary attacks on the influence of evil councillors around the King. Their misconduct was evidenced by allegedly unlawful legal rulings or abusive conduct in their respective courts. In total forty-five such accusations were made against the seven judges. Thirty-five of them related to issues that were, or were perceived to be, ultimately connected to revenue raising or collection. Of the remainder four related to ecclesiastical issues and two related to denials of writs of *habeas corpus*. The remaining four were specific to Finch, two relating to potentially corrupt practices, one to his conduct as Speaker in the parliament of 1629, one to his conduct at the Waltham forest eyres and one for 'incensing' the King against parliaments. The accusations related to eighteen different subjects with some of them being included in accusations against one, several or all of the relevant judges. The subjects, with the identity of the judges accused in relation to them, were as follows:

[11] On difficulties with the treason charge see 'Thomas, Wentworth, first earl of Strafford', *ODNB*.

1. Ship money: giving an opinion relating to the extension of the levy to the whole of the realm beyond the ports and maritime counties. All of the named judges accused. Finch was also alleged to have procured this opinion by threatening the other judges.[12]

2. Ship money: giving an opinion in response to a request from the King on his power to command the levy and whether he was the sole judge of the need to raise it. All of the named judges accused. Finch also alleged to have procured the opinion by threats and suppressed the dissenting opinions of justices Hutton and Croke.[13]

3. Ship money: giving judgement against Hampden. All of the named judges accused, except chief baron Davenport and chief justice Bramston. Finch accused of trying to get baron Denham to reverse his judgement in favour of Hampden.[14]

4. Ship money: statements at York assizes in 1636 endorsing the legality of the levy and claiming that all of the judges agreed. Justice Berkeley accused.[15]

5. Ship money: statements, and a ruling against an attempt to question the legality of ship money, in an action brought by Richard Chambers for false imprisonment arising from enforcement proceedings taken against him for non-payment. Justice Berkeley accused.[16]

6. Ship money: a statement in Exchequer court that the King's right to this levy could not be removed by parliament and threatening those who refused to pay. Justice Crawley accused.[17]

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[12] *Articles of accusation*, p. 3, 10, 15, 21, 30. All of Weston's charges relating to ship money are on duplicate p.25 at beginning of the articles.
[13] Ibid., p. 3, 10-11, 15-16, 21-2, 30.
[14] Ibid., pp. 4, 16, 30. For all of the charges against Finch relating to the ship money opinions and case see Rushworth, vol.4, p.137.
[15] Ibid., p. 4.
[16] Ibid.
[17] Ibid., pp.16-17.

7. Ship money: rejection of self-defence plea in assault case, arising from distraint for non-payment of ship money, when the defendant asserted that his refusal to pay arose because parliament had not sanctioned the levy. Chief baron Davenport accused.[18]

8. Samuel Warner: injunction of Exchequer court staying trover and replevin actions brought by Warner to recover a ship and its tobacco cargo seized by customs farmers to enforce payment of duty. Baron Weston, chief baron Davenport and baron Trevor accused.[19]

9. Samuel Vassall: injunction of the Exchequer court staying actions brought by Vassall to recover a cargo of currants seized by customs farmers to enforce payment of imposition on that cargo. Chief baron Davenport and baron Trevor accused.[20]

10. John Rolle: injunction of Exchequer court staying replevin action brought by Rolle to recover goods seized by customs farmers to enforce payment of tonnage and poundage. Baron Trevor accused.[21]

11. Richard Chambers: injunction of Exchequer court staying replevin action brought by Chambers to recover goods seized to enforce payment of tonnage and poundage. Baron Trevor accused.[22]

12. James Maleverer: refusal by Exchequer court to relieve Maleverer from fines levied for failure to respond to a summons to receive knighthood and the issue of distraint proceedings enforcing payment of those fines. Chief baron Davenport and baron Trevor accused.[23]

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[18] Ibid., pp. 22-3.
[19] Ibid., pp.23-4, 30-1. Weston's charge is on duplicate p.26 at beginning of the articles.
[20] Ibid., pp.17-19, 27-8.
[21] Ibid., pp. 25-6.
[22] Ibid., pp. 26-7.
[23] Ibid., pp. 19-20, 28-30.

13. Prohibitions: denial of prohibitions generally with this illustrated by a dispute before an ecclesiastical court in Norwich relating to tithe claims for rental payments for houses. Justice Berkeley and chief justice Bramston accused.[24]

14. Miscellaneous issues of religious ceremonial and discipline: threatening the jury in general sessions in Hertford in 1638 for presenting the setting of the communion table 'altarwise' as an offence, advising magistrates when faced with similar presentments to follow his example and threatening or imprisoning the jurors, discouraging the indictment of a cleric in Norwich in 1633 for refusing communion and striking out similar indictments for want of prosecution. Justice Berkeley accused.[25]

15. Peter Smart: following the removal of Smart from his clerical posts by High Commission, declaring that his place as prebend was void at the local assizes in Durham in 1632 and condemning the sermon that had led to Smart's dismissal. Chief baron Davenport accused.[26]

16. Refusal of bail on *habeas corpus* applications: refusal to bail Alexander Jennings imprisoned by the Privy Council for non-payment of ship money and refusal to bail William Pargiter and Samuel Danvers imprisoned by the council for refusal to pay a monetary levy in lieu of military service against the Scots. Justice Berkeley and chief justice Bramston accused.[27]

17. Regulation of corn price: giving an opinion that corn was a victual the price of which was controlled by the statute 25 H.8 in response to a request from the Attorney-General, William Noy, thus enabling the government to sell licences for the sale of corn at different prices. Justice Berkeley accused.[28]

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[24] Ibid., pp.9, 14.
[25] Ibid., pp. 5-6.
[26] Ibid., pp. 20-1.
[27] Ibid., pp. 6-8, 11-14.
[28] Ibid., pp.1-2.

18. Soap-makers monopoly: ruling expunging some defendants' answers and interrogatories in Star Chamber court proceedings brought by Noy against John Overman and other soap-makers in relation to infringements of the soap-makers' monopoly patent. Justice Berkeley accused.[29]

Although not consistently spelt out, the essence of each of these accusations was that a ruling was made, an opinion was given or a statement was made, that the relevant judge knew, or ought to have known, was unlawful. It is therefore noticeable how little attempt was made to identify any legal authority for the assertion that these judges had so extensively and frequently erred in law. This partly arose because the accusations were formulated as part of the impeachment process, with the House of Commons setting out the case against those accused for the House of Lords to adjudicate. However they contained many general statements about how judicial decisions or opinions were contrary to the laws of the realm, the property rights of the subject, the Petition of Right or were simply unjust, without ever providing any more specific evidence that the accused judge had made a clearly incorrect decision. This underlined the fundamentally political nature of these charges and the point was not entirely lost on Falkland. He noted the awkwardness of the situation if, as was likely, the House of Lords needed legal counsel to reach a decision since the only obvious source for that was the judges themselves.[30]

The dominant political flavour was further illustrated by the accusations that were concerned with comments made by the relevant judges, rather than any formal action taken by them, and those accusations that were made against one judge when others were also implicated. As examples of the former each accusation referred to in items 4, 5 and 6 above seems to have solely comprised of remarks, by justices Berkeley and Crawley, deemed politically offensive. The position was much the same in relation to the accusation against Davenport concerning Peter Smart since the legal ruling that the prebend was void seemed incontrovertible after Smart's removal from his clerical posts by High

[29] Ibid., 2.
[30] Rushworth, vol.4, p.87.

Commission. With regard to the selectivity of certain accusations in items 5, 17 and 18, Berkeley was almost certainly not acting alone. In relation to the action brought by Chambers against Sir Edward Bromfield, the mayor of London, in 1636 for jailing Chambers, this was formally quashed by the King's Bench court. One or more of chief justice Bramston and justices Jones and Croke were almost certainly present. The King's request for an opinion on the application of statutory regulation of the price of victuals to corn was transmitted through Noy to all of the judges yet there was no indication of the other judges' views. As will be seen, when Charles asked all of the judges for an opinion he expected a response from all of them, not just one. In relation to evidential rulings in Star Chamber court proceedings it was unusual for this to come from a puisne judge acting alone. Such proceedings were usually attended by at least one of the chief justices so it is unlikely that Berkeley would have been asked for such a ruling without the endorsement of one or both of his more senior colleagues. These points illustrated a problem that ran through much of the criticism of certain Caroline judges. Differences of political principle were dressed up as breaches of the law. Berkeley, Crawley and Davenport were supposed to be impeached for failing to apply the law correctly not for controversial comments, some of which complied with Lord Keeper Coventry's express instructions to the judges to encourage ship money payments.[31] If their judicial decisions were legally accurate, or at least defensible, then the bias imputed to them by parliamentary critics turned into a purely political attack on royal advisors rather than an accurate account of improper judicial behaviour.

As part of this onslaught on the judges, and the supposedly wrongful political use of the law, a parliamentary committee, of which Hyde and Falkland were members, was formed to investigate the judges and in 1641 the courts of Star Chamber and High Commission were abolished, the judgement in the Ship Money Case was reversed by statute, the law relating to the royal forests was amended to nullify related judicial decisions and distraint of knighthood was abolished.[32] It is the purpose of this thesis to consider, as a contribution to our understanding of the nature of the Caroline government, how far this was justified.

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[31] *State Trials*, 3: 825-30, 837-8, 841-2, 845-6.
[32] Rushworth, vol.4, p.88 and vol.3, pp. 1387, 1395-6.

Historical Assessments and Thesis Argument:

Historians of the reign of Charles I up to the Long Parliament have tended to accept the parliamentary criticism of the judges at face value and view their conduct as more or less subservient to the government's political agenda. A long shadow was cast over their reputation by Clarendon's bitter claim that 'the damage and mischief cannot be expressed, that the Crown and State sustained by the deserved reproach and infamy that attended the judges, by being made use of in...acts of power', and the imputation of political bias in S.R. Gardiner's reference to 'the natural tendency of the judges to give a hard and legal form to the political ideas which were floating in their minds' and other mordant comments about their decisions.[33] Whilst less overtly hostile and condescending, modern commentators have not offered a much more detailed examination of the decisions of the judges or explanation of the means by which alleged governmental influence was exercised. Gardiner's negative assumptions were still present in the seminal work of G.Hammersley on the forest laws and H.H.Leonard on distraint of knighthood under Charles I, even if the judicial involvement was subjected to more detailed examination.[34] D.L.Keir's discussion of the Ship Money Case provided a convenient summary of the legal arguments, and the background provided by earlier levies of this type, without attempting any wider discussion of the judges' decisions.[35] The potentially promising discussion by R. Noble of judicial independence in the Ship Money Case offered little insight into the question of political influence over the Bench beyond an inconclusive review of the dismissal or suspension of certain judges by Charles I and a survey of the ages and appointment dates for the judges elevated by him.[36] Beyond noting that the younger and later appointees tended to be more favourable to prerogative powers in the Ship Money Case no further analysis was provided. More

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[33] Edward, Earl of Clarendon, *The history of the rebellion and the civil wars in England*, ed. W.D. Macray, 6 vols. (Oxford, 1888), vol.I, p. 88; S.R.Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War 1603-1642*, 10 vols. (London, 1884), vol.9, p.245. For further examples see Gardiner, *History of England*, vol. 8, pp.94-6, 103-4, 205-8, 277-280. Whilst he attacked the conduct of the more royalist judges such as Finch, Berkeley and Crawley directly, Gardiner displayed some sympathy for the difficulties faced by the judges in politically sensitive cases. However he stressed their dependency on the King and lack of constitutional nous as technically minded lawyers.

[34] G. Hammersley, 'The Revival of the Forest Laws under Charles I', *History*, 45 (1960), pp. 85-102; H.H. Leonard, 'Distraint of Knighthood: the last phase, 1625-1641', *History*, 63 (1978), pp. 23-77.

[35] D.L.Keir, 'The Case of Ship Money', *Law Quarterly Review*, 52 (1936), pp.546-74.

[36] R.L.Noble, 'Lions or Jackals? – The independence of the judges in R v. Hampden', *Stanford Law Review*, 14 (1962), pp. 711-761.

suggestive was Conrad Russell's article on the judgements of Bramston and Davenport in the Ship Money Case which examined how two judges used technical legal arguments to undermine the government's case without engaging in politically controversial discussion of royal taxation powers and parliamentary assent.[37] This described more sophisticated judicial responses to politically charged legal decisions than had been noted before.

Some larger works have made more extensive efforts to redress the balance. W.J.Jones has provided the only full discussion of the Caroline judiciary.[38] It gives an essential account of the nature of the judicial function in this period and places this within the context of other government posts. Jones concluded that 'Charles I's judges were neither dishonest nor particularly subservient'.[39] But he did not examine judicial decisions in detail or consider the extent to which these demonstrated the existence of political influence in practice. In his major political history of the personal rule, Kevin Sharpe has possibly come closest to a real reconsideration of the judges' conduct by providing a range of examples of judicial resistance to royal pressure to match a concise set of examples where Charles displayed his willingness to apply such pressure.[40] Since this discussion of the judges, and his review of their conduct in the Ship Money Case, formed only a small part of a much larger narrative it is unsurprising that it does not quite lift 'the obfuscating haze of Whig myth' on this subject to the extent that Sharpe suggested. But his comment that this account of the complexity of the judges' responses to governmental demands required 'further consideration and development' was correct.[41] Wilfred Prest, Chris Brooks and Alan Cromartie have all made major contributions to understanding the legal profession and the importance of law in early seventeenth English society, including its role in the political debates of that period, although they have not systematically addressed the question of the political malleability, or otherwise, of the judges under Charles I.[42] Their work suggests that to

[37] C.Russell, 'The Ship Money Judgments of Bramston and Davenport', *English Historical Review*, 77 (1962), pp.312-18.
[38] W.J. Jones, *Politics and the Bench: the Judges and the origins of the English Civil War* (London, 1971).
[39] Ibid., p.147.
[40] K. Sharpe, *The Personal Rule of Charles I* (New Haven, 1992), pp. 661-65.
[41] Ibid., pp. 665,725.
[42] W. Prest, *The Rise of the Barristers: a Social History of the English Bar 1590-1640* (Oxford, 1986); C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: the 'Lower Branch' of the Legal Profession in Early Modern England* (Cambridge, 1986); C.W. Brooks, *Law, Politics and Society in Early Modern England*

meet Sharpe's challenge it is necessary to focus on the professional environment and connections of the judges and developments in the law itself. The latter seems especially appropriate since judges were one group in society whose pronouncements were the subject of the most meticulous records kept at the time, namely law reports and records.

The current view of the Caroline bench thus remains faintly 'Whiggish' by default. Although there has been some effort, from Gardiner onwards, to recognise the difficulties that royal demands placed on the judges the perception remains that their response was weak and could have been more effective if they had tried harder. That they were the subject of political influence and succumbed to it is taken as read without further examination. This is partly because the narrative of this period has been dominated by those judges who were regarded as champions of the common law and parliament against the government. Most prominent amongst them were Sir Edward Coke, Sir George Croke and, to a lesser extent, Sir Richard Hutton. Coke's influence on perceptions of the judiciary was, and remains, considerable for several reasons. There was his longevity at the centre of English political life as Attorney-General under Elizabeth I and James I, then as chief justice of the Common Pleas and subsequently of King's Bench until his dramatic dismissal in 1616, and finally after various attempts to regain high office, as a member of parliament. In the last capacity he was prominent in the parliaments of 1621, 1624, 1625 and 1628, emerging as a powerful critic of the government of Charles I and the architect of the Petition of Right. That, and several government moves to seize his papers and books in the period from 1632 until his death in 1634, guaranteed his political credentials amongst parliamentary critics of the judges in 1640.[43] This, and his conflicts with James I whilst he was a judge, made him a yardstick for measuring the feeble conduct of his wayward brethren on the bench after 1625. To this must be added the influence and reputation of his extensive legal publications principally comprising printed volumes of his manuscript law reports and a set of commentaries on the laws of England designated as 'Institutes'. By 1640 fifteen volumes of his law reports had been published, a large collection of pleading precedents and a commentary on the most

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(Cambridge, 2008); A. Cromartie, *The Constitutionalist Revolution: and Essay on the History of England, 1450-1642* (Cambridge, 2006).

[43] Parliament set up a special committee for the sole purpose of identifying and retrieving Coke's papers: Rushworth, vol.4, pp. 84, 144. They also sought William Noy's papers: ibid., p.84.

influential contemporary textbook on land law, 'On Tenures', by Sir Thomas Littleton. That was the first Institute and became known as 'Coke on Littleton'.[44] This erudition added immense authority and respect from all quarters of the legal profession to his political authority amongst government opponents. This formidable contemporary reputation has contributed to his prominence in current historiography where Coke has become the embodiment of the mindset of early seventeenth century common lawyers both professionally and politically. Most famously this arose in J.G.A. Pocock's discussion of the 'common law mind' and more recent responses to that work.[45] But it is also noticeable that in his ground-breaking work on English politics and ideology in the period from 1603 to 1640, J.P.Sommerville identified the Cokean common law critique of royal power as a complete and separate strand of ideology restricting such power and one of the three main ideological viewpoints that dominated the early Stuart political scene.[46] No reference is made to any royalist legal equivalent.

The problem is that Coke's behaviour and writings were complex and controversial. His conduct as Attorney-General was as zealous in defence of royal power as that of any of his successors in that office under Charles I and his performance as a judge was much more nuanced than his admirers understood.[47] More importantly his analysis of the role of judges, and the relationship between the common law and prerogative power, was strongly challenged by other eminent lawyers, such as Sir Thomas Egerton, Viscount Brackley and Sir Francis Bacon, Viscount St Alban and indeed James I himself.[48] The point is not who was correct but that emphasis on Coke obscures the strength of the legal counter-views held by eminent lawyers who were also his political rivals. To a lesser, but still important, degree the focus on the dissenting judgements given by justices Croke and Hutton in the

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[44] A.D. Boyer, 'Coke, Sir Edward (1552-1634)', *ODNB* (OUP, 2004), online edn. Jan. 2009; J.H. Baker, 'Littleton, Sir Thomas (*d.*1481)', *ODNB* (OUP, 2004),online edn. May 2007. It is hard to overstate the influence of Coke's legal publications. He is amongst the earliest authorities still regularly cited in court cases.

[45] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: a re-issue with a Retrospect* (Cambridge, 1985); Cromartie, *Constitutionalist Revolution*, p.179-233.

[46] J.P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603-1640*, 2nd edn. (London, 1999), pp.81-105.

[47] See C.M. Gray, *The Writ of Prohibition:Jurisdiction in early modern English law*, 4 vols. (Chicago, 2004) 2nd. edn. online, vol.II, pp.377-427; vol. IV, pp.101-125 on the complexities of Coke's views on one of the most controversial issues that he ruled on as chief justice, the prohibition of High Commission.

[48] L.A. Knafla, *Law and Politics in Jacobean England: the Tracts of Lord Ellesmere* (Cambridge,1977), pp.123-81; J.H.Baker, 'Egerton, Thomas, first Viscount Brackley (1540-1617)', *ODNB* (OUP., 2004), online edn. May 2015.

Ship Money Case has also diminished the extent to which the majority judgements given against Hampden have been taken seriously as valid statements of the law rather than acts of political obeisance.[49] The egregiously political statements with which chief justice Finch peppered his own judgement only exacerbated this.[50] Whilst Croke's strong legal defence of the need for parliamentary consent was undoubtedly courageous only Hutton, was inclined to follow him, out of the ten judges who gave fully reasoned judgements, and that was on the slightly different ground of the absence of evidence of imminent danger justifying the levy.[51] Croke had been a judge in the Common Pleas from 1625 until 1628 when he was transferred to King's Bench where he remained until 1641. Throughout this long career there were few other examples of prominent opposition to government policy. Concentration on the dissenters has also left open the question of how the government exercised political influence over the judges as effectively as its critics suggested. Were a few peremptory dismissals, some aggressive requests for advice from the King and the machinations of William Noy or chief justice Finch all it took to bring the judiciary to heel? Both Noble's observation of generational divisions on the bench and parliament's fascination with Noy suggest that there may have been more to it than that.

It will be argued here that the attitude and conduct of Charles I and certain of his councillors towards the judges and the law was more complex and sophisticated than their parliamentary critics recognised. Facing serious problems in his foreign policy the King, and his government, embarked upon a major revenue raising initiative without parliamentary sanction in 1626. This was what came to be simply termed the 'Forced Loan'. The failure to consult with any of the judges on the legality of this threatened to bring the process to a halt when the judges, in response to a Privy Council request, unanimously refused to take steps that might be interpreted as an endorsement of its legality. If it became known that the judges regarded the loan as unlawful there was the threat of mass refusal to pay. In addition the subsequent attempts by the government to enforce payment without allowing the issue of its legality to be raised in court forced it into the contorted response to the *habeas corpus* writ

[49] For these judgements see *State Trials*, 3: 1127-1181, 1191-1201.
[50] For comment on this see Clarendon, *History of the rebellion*, vol.I, pp. 89-90.
[51] Sharpe, *Personal Rule*, p.726. Hutton's summary of his position to Wentworth was disingenuous but consistent with the reports of his judgement.

application that arose in the Five Knights Case in 1627. That led to growing political controversy in the next parliament over prerogative powers of imprisonment and non-parliamentary taxation and those issues fed into the political pressure that culminated with the Petition of Right where a statement of law was used to paper over political cracks. For those members of the government in the thick of this with legal expertise, such as the new Lord Keeper, Sir Thomas Coventry, the benefits of better political use of the law, and the judges, when implementing potentially controversial policies must have become readily apparent.

It is thus contended that out of the political turbulence of the late 1620s there emerged a more systematic attempt to manage the law and the judges politically. There were five strands to this. The first was the recruitment of the principal government law officers, the Attorney-General and the Solicitor-General, and King's counsel extraordinary from the ranks of leading practitioners at the Bar irrespective of whether they had represented politically controversial clients or participated in parliamentary initiatives hostile to the government. The second was to use the technical expertise of such recruits to research and develop a strong body of legal authority and argument that supported royal prerogative powers and rights. This was not to promote some abstract absolutist agenda. Instead by understanding the legal scope of royal rights the government could find ways to achieve objectives such as raising revenues outside parliament, exploiting royal assets or improving the economic condition of the church that opponents would find hard to resist because they were lawful. This was done by the same use of records and precedent as was employed by lawyers acting for government opponents. The third was to appoint the chief justices from the pool of government law officers and King's counsel and use them as political managers of the courts of Common Pleas and King's Bench. As a further incentive such individuals were able to rise to the political pinnacle of the legal profession, as Lord Keeper, and receive a peerage. Occasional dismissals, demotion or humiliation served as disincentives but as the 1630s progressed this became largely unnecessary. The fourth was the use of the judges' usual role as royal advisers, and the consensual judicial culture, to bind all of the judges to joint advisory opinions that were useful for the government law officers. Puisne judges might also be expected to enter into private agreements on particular legal issues. The fifth was the

intervention of a particularly activist Privy Council in the political management of the law. This was a traditional function of the council but under Charles I unusually proactive measures seem to have been taken to promote government policies particularly in relation to religion.

It is further contended that this did involve the deployment of extensive political influence over the judiciary but that most of it fell within the constitutional norms of the time and displayed a conservative respect for the law. This was not a government that ignored the law but rather one that sought to harness it to its own purposes in ways that were largely defensible. Whilst the King's peremptory tone when addressing the judges, the persistent requests for extra-judicial opinions from them and some of Finch's activities as an intermediary between the government and the bench pushed at the limits of what was acceptable the Caroline government was generally persistent, but scarcely brutal, in its application of pressure on the judges.[52] The dismissal of Sir Randolph Crewe, and suspension of Sir John Walter, in the 1620s were part of the fall-out from the political and legal struggles with parliament in that period and such dramatic reactions were not repeated. The dismissal, and subsequent reinstatement, of Sir Robert Heath in the 1630s was part of the measured managerial process already described. What made that process effective was its pervasiveness and the fact that, often due to the quality of the work done by the law officers, the government usually had the law on its side notwithstanding the view of its critics. This was not as surprising as it seems. The law was generally tender towards Crown interests and its rules of construction favoured them. A survey of sixteenth and early seventeenth century law reports shows that if royal interests became involved in a case it is almost impossible to find a ruling that went against those interests. The examples are too numerous and detailed for this to be political influence alone. It was a feature of the law and when it was further strengthened by a systematic preparation by able Crown lawyers it became all but irresistible. The judges can hardly be blamed for applying the law correctly even if it defied political preconceptions or past customs. Failure to do this would have led to dismissal for incompetence whilst any more overtly political resistance would have invited dismissal for breach of their oath to the King or worse. In fact the judges were far from malleable and would not necessarily bend to royal

[52] For examples of royal demands see Sharpe, *Personal Rule*, p.661.

demands when they felt that they were on solid legal ground. In addition to the examples provided by Sharpe there was the refusal to torture Felton, the assassin of the King's close friend George Villiers, the first Duke of Buckingham and the unsuccessful government attempts to extend the law of treason to cover written or spoken words.[53] The judges did employ stratagems to evade the political pressure with some success as will be seen. But these were probably too technical and subtle to be appreciated by their critics. The government did exercise political influence over the judges to advance its policies but what made it politically frightening was that this was done not by the crude exercise of unlawful royal power but in a legally coherent way that raised the possibility that the government might be acting within the law.

Sharpe suggested that such a thought might lie behind the despair with which the ship money judgements were greeted in 1638 but offered no further comment.[54] It will be argued here that it was the culmination of a significant change in the attitude of the Caroline government towards the use and management of the law and the judiciary that began in the late 1620s and developed fully in the 1630s prior to the Ship Money Case. For that reason that case will not be examined in detail here but will be the subject of more comment in the conclusion as an example of the earlier trends that will be considered.[55] In addition to the discussion here there is further evidence that supports aspects of this thesis in relation to prohibitions and the interpretation of Henrician statutes concerning probate and intestacy and the enforcement of sexual morality, and judicial conduct in the court of Star Chamber, that has not been possible to include due to limitations of space.

Contemporary aspects of the judicial function:

Before considering the conduct of the judges further it is worth noting various aspects of judicial office in this period, including the different functions undertaken by judges, the way in which judicial

[53] Sharpe, *Personal Rule*, pp.662-4; Rushworth, vol.1, pp.638-9. On the treason case of Hugh Pyne see D.Cressy, *Dangerous Talk: scandalous, seditious and treasonable speech in pre-modern England* (Oxford, 2010), pp.116-131 and 79 ER 703.
[54] Sharpe, *Personal Rule*, p.730.
[55] The writer of this thesis considered some relevant aspects of the Ship Money Case in C.St.John-Smith, 'The Royalist Judgements in *R v.Hampden*' (Oxford University, MStud. thesis, 2011).

decisions were taken, the active role of the Privy Council in the legal system and the judges' role in advising the council. Understanding these features is relevant because it indicates how normal judicial activities were inter-woven with the political and administrative actions of government. Political influence was both detailed and routine.

The judiciary were closely bound into the operation of government and the implementation of political decisions. This created ambiguity about the correct method of discharging their duties and what would now be regarded as serious conflicts of interest. Within early seventeenth-century English political structures officials and institutions regularly discharged a variety of functions in ways that blurred distinctions between different public duties.[56] Judges were royal officials, albeit with specialised knowledge, and performed several roles. One was as the eyes and ears of government when they went out on assize circuits providing information on the political climate that they encountered at local level. Others included the administrative functions that they discharged when on such circuits, including the selection of individual sheriffs in the counties and co-operation with local justices in the enforcement of social policies such as the Book of Orders. The addresses made to them, by the Lord Keeper, before going out on assize circuits, made the political nature of such duties explicit.[57]

Some chief justices were appointed as privy councillors in their own right although such status was not conferred automatically.[58] It was also common for judges to be appointed to sit on a wide variety of commissions dealing with sensitive political matters such as customs collection, commercial

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[56] Jones, *Politics and the Bench*, p.17.
[57] For example Coventry's instructions to the judges to encourage ship money payments: *State Trials*, 3: 825-30, 837-8, 841-2, 845-6.
[58] In the period 1625-1641 each of Sir John Finch, Sir John Bramston, Sir Edward Littleton, and Sir John Bankes was made a privy councillor in the course of their tenure as a chief justice whereas Sir Thomas Richardson, Sir Nicholas Hyde and Sir Robert Heath were not. See L.A. Knafla, 'Finch, John, Baron Finch of Fordwich (1584-1660)', *ODNB*, (OUP, 2004), online edn. Jan. 2008; C.W. Brooks, 'Bramston, Sir John, the elder (1577-1654), *ODNB*, (OUP, 2004), online edn. Sept. 2013; C.W. Brooks, 'Littleton, Edward, Baron Littleton (1589-1645)', *ODNB*, (OUP, 2004), online edn. Jan. 2008; B. Quintrell, 'Richardson, Sir Thomas (*bap.* 1569, *d.* 1635)', *ODNB*, (OUP, 2004), online edn. Jan. 2008; W.R.Prest, 'Hyde, Sir Nicholas (1572-1631)', *ODNB*, (OUP, 2004), online edn. Jan. 2008; P.E. Kopperman, 'Heath, Sir Robert (1575-1649)', *ODNB*, (OUP, 2004), online edn. 2008.

disputes, monopolies, church property or the regulation of commodity prices.[59] A judge might sit on such a body even when the matters reviewed regularly came before him in the court in which he normally sat. An example of this was the committee set up in 1626 to deal with customs collection frauds. This included the Lord Treasurer, the Chancellor of the Exchequer, the Attorney-General, all of the barons of the Exchequer and all of the judges of the Common Pleas, notwithstanding that any of them could be involved in aspects of a legal dispute over customs collection.[60] This raised another example of the blurring of roles: many government officials and privy councillors discharged judicial functions in some capacity even though they were not necessarily legally qualified or trained and they would routinely sit in judgement of matters arising from their own policy decisions. The Lord Keeper or Lord Chancellor was both an important political official, and the active head of the Chancery and Star Chamber courts. He was usually an eminent lawyer, but as the appointment of John Williams, the Bishop of Lincoln, to this post, in 1621demonstrated, this was not necessarily the case.[61] The Lord Treasurer, the Master of the Wards, the Lord Privy Seal, the Earl Marshall, the Lord Admiral and the Presidents respectively of the Council of the North Parts and the Council of Wales all acted as judges.[62] All of the privy councillors, by virtue of their status as such were entitled to sit as judges in the court of Star Chamber sometimes dealing with offences committed by persons opposed to government policies.[63]

When discharging their principal legal duties in the court structure the common law judges were participating in a system that assumed a high degree of consensus and agreement on the bench. This was in contrast to the hierarchical decision making process of modern appellate legal systems and had important implications for how the judges felt that they should function within and without the main courts of King's Bench, Common Pleas and the Exchequer. The King was the fount of justice and the central courts were his, and the judges dispensed justice as his delegates. In a commission

[59] S. Jay, 'The Advisory Role of Early English Judges', *The American Journal of Legal History*, 38 (Apr.,1994), pp. 132-3.
[60] See TNA SP 16/1/81 and Jones, *Politics and the Bench*, p.16.
[61] It was only with the accession of Elizabeth I that the appointment of a cleric to this post had become unusual. After 1558 Williams was the only one.
[62] Jones, *Politics and the Bench,* p.16.
[63] Ibid., p.16.

appointment of 1631, Charles I put it pithily when he remarked that it was 'manifest that our said justice....is originally and in Sovereignitye onlye and intyrely in ourselves'.[64] Ultimately there could be no appeal other than to the King himself. There was no express hierarchy within the different central Westminster courts and a decision made within one of them was essentially a decision of the whole bench rather than that of a particular judge. In what was a syncretistic legal system, even within the group of common law courts, there was a sense in which individual courts had special competencies. Thus so long as they kept within their respective jurisdictions 'and did not commit formal errors it would have produced unnecessary uncertainty to permit another court to say that its decisions were uncertain'.[65]

There were limited formal procedures for intervention in the business of another court. These related to disputes over jurisdiction, and errors on the face of a court's official records. The issue of intervention in relation to jurisdiction will be considered later in relation to the use of the writ of prohibition. In relation to formal errors, there was a system of review that should be distinguished from the consensual approach to judgments previously described. The basis of this system was the plea roll which was a formal record of the process in the higher courts from the issue of the initial writ through to final judgment. All courts of record were themselves subject to some form of review, by another court, of errors on such records. Even the courts that were not of record, such as seigneurial, leet or local courts, were subject to a procedure of false judgment whereby they may be compelled to compile a record for review by the court of Common Pleas. From lesser courts of record, such as borough, franchise or palatine courts, and from the court of Common Pleas, review of such errors went to the court of King's Bench. Errors in King's Bench and the court of Exchequer were the subject of their own statutory review tribunals. In 1367 a statutory tribunal, originally called the Council Chamber was set up to deal with reviews of error in the Exchequer court and this was subsequently renamed the 'Exchequer Chamber'. In 1585 another court was established by statute to perform the equivalent function for the King's Bench, and that was also called the Exchequer Chamber. From that court, and the King's Bench when hearing error proceedings, reference lay to the

[64] TNA SP 16/190/28.
[65] Baker, *An Introduction to English Legal History* (Oxford, 2007), p. 135.

House of Lords, a process that was hampered by both the irregularity of the meeting of parliament, and a lack of detailed legal expertise outside the judiciary.[66] No such proceedings existed for the established equity or prerogative courts of Chancery, Star Chamber, Requests, the Council of the North and the Council of Wales, or those courts which were established under Charles I, namely the court of Chivalry and the court of the Verge. The ecclesiastical courts had their own limited appellate structure. For judges in the common law courts, and, anyone promoting the status of the common law for political purposes, the court of record and its associated error proceedings accorded the decisions of those courts a special degree of authority, a fact that contributed to friction and dispute over the status of decisions in the prerogative courts.[67]

Apart from the review of formal errors it was a feature of this system, and how judges behaved, that, when a decision was made in one of the central courts, whether on direct application or on return of a *nisi prius* verdict from the assize circuit, it was regarded as a collective decision of the judges. Accordingly there was a reluctance to give a final judgment at all, if there was a real difference of opinion on the bench. A reading of law reports of this period, where contrary arguments from the judges present were recorded, discloses that such hearings regularly concluded *et adjournatur* or *sed curia advisare vult*.[68] Sometimes the issue was revisited in a further hearing of the matter later in the same reports. Often no decision was apparently reached with the parties presumably reaching agreement between them-selves to avoid further delay. Sometimes, the reports indicated that after further consultation a decision was reached, with or without consultation with other judges from within the relevant court or from other courts. If any judge of the relevant court was absent from the bench at the hearing the judges of that court, who were present, conferred with that judge to see if a consensus view could be agreed. Where this did not succeed or it was felt that an important precedent may be set, or a difficult point of law had to be decided, a meeting would be convened in one of the Inns of Court, often Serjeant's Inn, with those judges who were available from the other main central

[66] See Baker, *Introduction to English Legal History*, pp.136-8.
[67] See, for example, the sanctions applied to Sir George Vernon and to Sir Humphrey Davenport for questioning the status of the Councils of the North and the Marches because they were not courts of record: D.X.Powell, 'Vernon, Sir George (1578-1639)', *ODNB*, (OUP., 2004), online edn. Jan. 2008 and D.X. Powell, 'Davenport, Sir Humphrey (1566-1645)', *ODNB*, (OUP., 2004).
[68] As a sample see: 79 ER 612; 79 ER 627; 79 ER 639; 79 ER 645; 79 ER 695; 79 ER 713; 79 ER 742; 79 ER 745; 79 ER 1038; 79 ER 1043; 79 ER 1049.

courts. The matter would then be re-examined with each of the judges present giving their opinion in order to reach a decision on the matter. In Croke's Reports for the reign of Charles I, there are 18 references to judicial conferences of this type of which 2 were identified as formal references to the court of Exchequer Chamber.[69] Of the remaining 16 such conferences 2 were convened by or under the supervision of the Lord Keeper[70] and 4 were convened on the order of the King or Privy Council.[71] In the remaining 10 examples the impulse for such consultation appears to have been internal to the judiciary.[72] In this way the sort of attention that is now given to cases in appellate courts was given by all of the judges in a particular court, and even those from other courts, before any judgement was given.[73]

Despite the extensive delays produced by this process, it was deeply ingrained in the practice of the professional judiciary and it had two significant consequences. Firstly it demonstrated a strong impulse towards judicial comity and consensus when rendering decisions. Whilst often professionally beneficial, if a case or issue was politically sensitive this inclination to consensus could provide a useful means to stifle or conceal dissent from the bench. This was particularly pertinent in situations where, as in relation to the giving of extra-judicial opinions to the government, the practice of the bench was less well established. Where a formal decision was to be given by a court, problems in achieving a consensus could be avoided by means of the *per curiam* judgement. This was delivered by one judge, usually the most senior, on behalf of all the judges present. It offered a number of advantages when a court was faced with the prospect of having to make a politically unwelcome decision. Gray has provided an extensive analysis of the opportunities that this tactic offered to a court in such circumstances and, in particular, cited the example of the decision by the court of King's Bench in *Darcy v. Allen* when faced with the awkward prospect of ruling on the scope of the royal prerogative in relation to the granting of monopolies, in that case relating to the production of playing

[69] 79 ER 971, 79 ER 999. In addition *R v. Hampden* was also dealt with formally in Exchequer Chamber.
[70] 79 ER 617, 79 ER 773.
[71] 79 ER 659; 79 ER 663; 79 ER 686 and 79 ER 703.
[72] 79 ER 661; 79 ER 676; 79 ER 718; 79 ER 780; 79 ER 785; 79 ER 795; 79 ER 798; 79 ER 906; 79 ER 910 and 79 ER 1023.
[73] Baker, *Introduction to English Legal History*, p. 136.

cards.[74] A *per curiam* decision, based on a narrow technical agreement, or a particular way of distinguishing the facts, avoided the public airing of judicial doubts. Having one judge speak for all demonstrated a solidarity on the bench that reflected the consensus culture and it left individual judges less exposed to blame or pressure from the government. It was unusual for such a judgement to be rendered when counsel raised complex and extensive arguments in a formal hearing, so the use of this tactic, in uncharacteristic fashion in a case with political implications, might indicate political pressure. It was similarly suggestive if one or more judges appeared to be determined to reach a decision, in the face of clear differences of opinion in a particular case, without showing the usual concern over a division of opinion.

Political Priorities and the Privy Council:

Sharpe observed that 'central to all the programmes of reform... was the principal organ of government in Caroline England: the Privy Council'.[75] This body was a more concentrated functional descendant of the larger medieval King's council and there is evidence that it developed a more rigorous administrative and managerial focus under Charles I, than it had under James I. An important aspect of this was the direct involvement of Charles himself in council business. He personally attended council meetings much more frequently than his father and took a full part in discussions.[76] From as early as 1622 he had gone to such meetings and was sworn as a councillor in that year.[77] In addition his familiarity with council business was detailed, and related to important policy decisions.[78] In addition the personal rule saw the emergence of policy priorities amongst a core group of councillors that dominated the proceedings of the council during the period from 1629 to 1640 in general, and from 1635 onwards in particular. Their preoccupations were relevant to the allegations

[74] 72 ER 830; 11 *CoRep* 84b; Gray, *Writ of Prohibition*, vol. I, pp. 87-9 and f. 48.
[75] K. Sharpe, *The Personal Rule of Charles I* (New Haven, 1992), p. 262.
[76] Ibid., p. 263 and E. R. Turner, *The Privy Council of England 1603-1714* (Baltimore, 1927), vol.1, p.102. Turner saw the frequency of personal attendance by Charles as rising to a crescendo in the period 1638-40 with the King usually averaging attendance at about one in ten meetings. There seems to be little dispute however that his 'was a far higher attendance than his father ever achieved': R.Cust, *Charles I: a Political Life*, (Harlow, 2007), p. 174.
[77] Turner, *Privy Council*, p.102-3.
[78] Cust, *Charles I*, pp. 173-4 and Sharpe, *Personal Rule*, pp. 262-72.

made later about the political bias and failings of the judiciary. Part of the evidence for this development emerges from consideration of the location of, and attendance at, council meetings.

The Privy Council transacted business from time to time in the rooms where the Star Chamber court met and promulgated orders or decrees at such meetings in the Star Chamber.[79] Unlike the court hearings such business was always conducted in private, as were all of the activities of the council. In the registers of the Privy Council, and the State Papers, throughout this period the location of council meetings was usually recorded because the council would usually meet wherever the King was located. The most common location was simply designated as 'Whitehall' with the precise location given only if the meeting was outside London. Turner noted the common reference in the council registers from 1617 to 1639, to council meetings in the Star Chamber. In view of the absence of the council records for the period from 1603 to 1613 it is not possible to see how this trend developed throughout the reign of James I, but, without attributing any reason for this, Turner noted a marked increase in the number of council meetings in the inner Star Chamber from 1633 to 1638, with this reaching a peak after 1635.[80]

Review of the State Papers in the period from 1636-9 confirms this view with two phenomena apparently occurring in parallel. The first was a marked increase in the number of Orders in Council that were being issued in the Star Chamber, by the Privy Council.[81] These were distinguished from decrees or orders of the court of Star Chamber, all of which were separately described as such, as was the remaining general business of issuing warrants and directions of the council. This appears to be the only instance where the secretary recording the meeting specifically noted a particular location in Whitehall. Most of them were designated "inner Star Chamber". As Pollard remarked there is no indication as to whether that designation had a real significance beyond indicating that such

[79] A.F. Pollard, 'Council, Star Chamber, and Privy Council under the Tudors: II The Star Chamber', *English Historical Review*, 37 (1922), pp.516-539.
[80] Turner, *Privy Council*, pp. 48-9, in particular footnote 39 for all of the register references, and p.92.
[81] The numbers are: 3 in1633-4; 3 in 1634-5; 3in 1635; 4 in 1635-6; 13 in 1636-7; 44 in 1637; 26 in 1637-8; 9 in 1638-9; 45 in 1639; 3 in 1639-40 and 1 in 1640. The years used here correspond to the yearly divisions of the *CSPD* since this phenomenon is easier to see there because of the page layout but it produces a lumpiness that derives from the calendar years ending in March. The peak periods arose in the months commencing each of the years 1637-9.

proceedings were not public since they involved council business.[82] These Orders were wide ranging yet individually precise. A sample from May 1637 showed this. It was a particularly prolific month with no less than 37 such orders being made. They covered, amongst other things, the release of detained soap oils, directions to overseers of the poor, the settlement of an election dispute, release from prison of a party to a suit alleging adultery, direction in a dispute over rights to a market, the query of a prohibition granted regarding a tithe claim, enforcement of an order for demolition of alehouses and staying litigation against the soap-makers of Westminster.[83] The second such phenomenon was an increased number of orders issued by a small group of Privy Councillors acting as referees in certain types of dispute which will be discussed further in relation to the judges and prohibitions.

The physical location, concentration of personnel involved and the subject matter of these activities suggested a quickening pace of Privy Council activity to enforce their policies in the period after 1635. It indicated a change of managerial style around a number of social, religious and economic aims which, at the least, met with royal approval. Again this is supported by Turner's broader observations. He noted, without comment, that 'in 1638 for the one hundred and fifty one meetings of the Council or its committees, sometimes two sessions on the same day, the Archbishop of Canterbury, the Lord Keeper, the Lord Treasurer, the Lord Privy Seal, the Treasurer and Comptroller of the Household, the two secretaries, and one or two of Charles I's confidants among the Lords of the Council attended nearly all of the meetings'.[84] As a result the council meetings in this year were effectively dominated by a group of eight to ten councillors.[85] A small group of regular attendees in the Privy Council appear to be implementing a more precisely defined agenda. Given the relationship of the Privy Council with the administration of justice and matters of private law, that had implications for all of the courts and the judges.

[82] Pollard, 'Star Chamber, and Privy Council under the Tudors', p.518.
[83] TNA SP 16/355/ 38, 39, 42, 43, 45, 49, 80 and 83.
[84] Turner, *Privy Council*, p.99.
[85] Ibid., p.99.

The Privy Council and the Administration of Justice:

In his commentary entitled "Of the Council Board or Table", Sir Edward Coke said of the Privy Council that it consulted 'of and for the publick good and the honour, defence, safety and profit of the Realm...Private Causes, lest they should hinder the publick, they leave to the Justices of the King's Courts of Justice and meddle not with them'.[86] In truth this greatly understated the degree of council involvement in legal matters. It failed to note that the Privy Council had direct jurisdiction over matters within the scope of the royal prerogative, but outside the jurisdiction of the English courts. This included disputes between foreign parties over subject matter arising within the kingdom[87] and the direct royal jurisdiction exercised over the dominions of Jersey and Guernsey [88]and the Isle of Man.[89] In such direct jurisdictions the council, in addition to often administering a different system of law, would directly control the conduct of local court officers.

In addition the overarching governmental role of the council justified their involvement in matters of private law in English courts. Whilst this was often consultative and administrative, action taken to promote political objectives was backed up with forms of coercion and involved extensive political interaction with the law and the judiciary. Coke's assertion that private causes were referred to the judges in the royal courts, whilst possibly reflecting the view of the common law, did not accord with the reality of council business under Charles I or his father, or even Elizabeth I. In addition to the participation of Privy Councillors in the court of Star Chamber and the legal processes of external royal dominions, the day to day operation of the council in this period was steeped in legal activity. It regularly fulfilled a variety of quasi-judicial functions in its own right. In this context 'quasi-judicial' refers to the assumption of roles where the council itself, or a sub-group of its members, acted in a way that imitated, or was a substitute for, the role of a court in private law suits. This could be by

[86] Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England concerning the jurisdiction of courts* (1644), p.53.
[87] W.F. Finlason, *The history, constitution and character of the Judicial Committee of the Privy Council* (London, 1878), pp.11-12.
[88] For example see letters from the Council relating to the dispute between Noel le Geict and Aron Messervy in *APC* 1629-30, pp.36-7 and 136-7.
[89] Dawson also identified examples of the Council exercising direct oversight of decisions of Irish Chancery and the Council of Wales. See J.P. Dawson, 'The Privy Council and Private Law in the Tudor and Stuart Periods: II', *Michigan Law Review*, 48 (1950), p. 644.

providing an alternative means of resolving disputes, or by regulating existing law suits in response to a request received from outside the council. The most common means of initiating these activities was the petition to the King or the council from one of the affected parties. Other sources for such referrals were individual privy councillors, judges on circuit or sheriffs, bringing a particular issue to the council's attention.

In his surveys of the involvement of the Privy Council in private law matters in the period from 1485 to 1625, Dawson identified seven areas of quasi-judicial intervention by the council. The first was direct assistance in the administration of justice by addressing issues of delay, partiality or local influence and attempts to restrict the use of prohibitions. The second was help for foreign merchants in disputes over the seizure of ships and goods. The third was the protection of royal officials and others acting on council business in the form of respite from law suits. The next three examples were the grant of protections from law suits to private individuals, the relief of debtors from creditor remedies generally and the provision of summary aid to the poor. Finally the largest category of all was the appointment by the council of arbitrators to settle disputes over a wide range of issues as part of the council's promotion of its priorities, including the maintenance of social cohesion.[90] Every one of these could involve cutting across a judge's activities by directing the judge, or a justice of the peace or sheriff, or a private individual, to discharge certain duties or desist from certain actions, to establish a commission of enquiry or present themselves to the council to explain their conduct. However the reference to arbitration, by persons designated by the council, was the remedy used most often, with the penal bond being the most common means of ensuring compliance with the arbitration proceedings. The registers of the Privy Council and the State Papers in the period 1625-41 are littered with examples of these quasi-judicial functions. They included the direct arbitration of disputes between private individuals or corporations by the council or a sub-group of councillors appointed for

[90] J.P. Dawson, 'The Privy Council and Private Law in the Tudor and Stuart Periods: I', *Michigan Law Review*, 48 (1950), pp. 393-428 and 'Privy Council and Private Law: II', pp.627-656. To get some idea of the extent of this arbitral role assumed by the Privy Council see D. Roebuck, *The Golden Age of Arbitration: Dispute Resolution under Elizabeth I*, (Oxford, 2015).

this purpose;[91] intervention to resolve matters which had led to the proliferation of multiple suits;[92] the protection of Crown officials from harassment or disputes over entitlement to their offices;[93] directing judges or courts to investigate and resolve, or advise on, disputes referred to the council,[94] and making preparatory examinations and orders for matters to be determined in the courts, particularly Star Chamber.[95]

Although the examples given are not exhaustive, and exclude the numerous protections issued, they show that these were normal facets of the Privy Council's implementation of its public policies. This was consistent with a view of the King, operating through his council, as having responsibility for all aspects of governance, including the provision of justice, by providing the right means and forum in which to resolve a dispute.[96] In relation to its interventions to help private debtors, by imposing restrictions on strict enforcement rights and insolvency settlements by composition with creditors, the council regularly sought to alter existing private law, namely that relating to the rights of creditors.[97] The activities described all involved interference in private legal rights, and the functions of the judiciary, as a matter of course. This belied Coke's wishful view of the council's quasi-judicial activity which did not accurately describe the reality of such activity in, or before, the period from 1629 to 1640. Political influence was commonplace in the professional lives and procedures of the

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[91]See: Ludlow debts case in TNA SP 16/277/45 and 48; disputes between City of London stationers and University of Cambridge in *APC* 1625-6, p. 328 and *APC* 1628-9, pp.405-7; dispute between Levant Company and Southampton town in *APC* 1628-9, pp.249-50; Kernie/FitzMorrice conveyance dispute in *A PC* 1626, pg.24; Sir John Savage and the manor of Bradley in *APC* 1627, pp.399-400; removal of royal protection in the Gerard/Drake dispute in *APC* 1627-8, pp. 345-6; inhabitants of Norwich/ Innes dispute in *APC* 1629-30, pp. 207-8; churchwardens of Shebber and the church repairs in *APC* 1630-1, pp.343-4.

[92] See: audit fees and city of Waterford in *APC* 1628-9, pp.162-3; suits between Company of Merchant Adventurers and Company of Cloth Workers in *APC* 1627-8, pp.98-9; validity of Coppinger acquittal in *APC* 1628-9, pp. 217-9.

[93] See: East Kent commissioners for sewers in *APC* 1627, pp.41-2; Ogle/Rogers impressments dispute in *APC* 1627, pp.453; Cockayne prisoner release suits in *APC* 1627, pp.340-1 and 348; complaint of New Romney against Thomas Reader in *APC* 1627, 511; yeoman of the guard's title to tenement in *APC* 1627-8, p. 437; Vermuyden's drainage works in *APC* 1628-9, p.393.

[94] See: letter to assize judges concerning dispute between Thomas Adams and William Corriston in PC 2/46/12 f.141; letter to assize judges for Kent concerning damages awarded against officers of the Cinque Ports in PC 2/ 46/12 f.14; order for apprehension and examination of Cyprian Hilton and others given to Vice-president of Council of York in PC 2/47/13 ff. 163-4; order to Earl of Bridgewater, Lord President of Wales, to determine dispute involving alleged corn export by Henry Lort, JP., before the Council of the Marches in PC 2/47/13 f.227.

[95] See: discharge of proceedings against Wentworth in PC 2/46/12 f.152; letter directing seizure of Prynne's papers in PC 2/47/13 f.148; referral of John West to High Commission in PC 2/47/13 f.217; directions of Board concerning access of Burton, Bastwick and Prynne to counsel whilst in prison in PC2/47/13 ff. 117 and 155;

[96] See W.F. Finlason, *Judicial Committee of the Privy Council*, p. 15.

[97] Dawson, 'Privy Council and Private Law: II', p.655.

judges. A case may be ended by a royal protection from suit. A judge may be directed by the council to investigate a dispute and facilitate an arbitration process for such dispute, outside the common law court in which he sat. He might receive special exhortations to ensure a fair trial for a particular litigant or directions to change the venue of the trial if local influence were suspected. He might be directed to quash or stay proceedings at any stage from the issue of a writ through to the enforcement of a judgement, for one or more suits. Finally the granting of protections against suit or a pardon or remission of penalty had the effect of interfering in legal process prospectively or retrospectively.

Such intervention was undertaken without hesitation by the council on its own authority and did not involve any formal hearing of the parties. To further government policies and protect royal interests the council engaged in detailed political scrutiny of legal procedures as a matter of course wherever it felt that this was required. The types of suits that were targeted provided a useful indication of governmental concerns and the council would cut across judicial authority and jurisdictional boundaries. Two examples illustrated just how the involvement of the council in legal proceedings worked in practice. In 1626 the council acted to defend the property interests of the Crown, on the ground that the matter involved a foreign minister of state.[98] Sir Noel Caron was a Flemish merchant and diplomat who had resided in England from around 1585 until his death in 1624. He was received at Court by James I as an ambassador for the United Provinces. His estate was of considerable value and he had died unmarried, naming Charles, then the Prince of Wales, as his heir.[99] This royal connection did not seem to deter third parties from claiming some or all of the estate. Henry Dixon commenced a suit in the court of Wards, with his wife Mary, on the basis that Mary was remotely related to Sir Noel, and thus heir to the estate.

In response Attorney-General Sir Robert Heath brought actions in the courts of Exchequer and the Star Chamber. The first was against a feoffee of Caron's estate, on the basis that real property held by any such feoffee should escheat automatically to the Crown. The action in Star Chamber halted an attempt to 'conveye out of the kingdome some coyne and plate' which was part of Caron's personal

[98] TNA SP 16/36/99 and 16/39/79 ff.163-4.
[99] R. Anderson, 'Caron, Sir Noel de (*b*. before 1533, *d*.1624)', *ODNB*, (OUP, 2004), online edn. Jan. 2008.

estate.[100] The matter was debated by the council and it was decided that Dixon's suit should be stayed because was vexatious and without merit. The council concluded that it was established law that no-one could inherit from an alien, who had been made a denizen of the country, other than his children. The issue before the Exchequer court was referred to the Lord Treasurer, who consulted with the barons of the Exchequer, and then advised the council. The matter was then dealt with as the King required. Thus the council decided and stayed a private law suit, initiated a suit against Caron's feoffees, and both started and suspended criminal proceedings all on its own authority. The stated reason was the status of Caron as a 'public Minister of State' bringing the matter within the foreign policy remit of the council. However Caron's will, and the Exchequer escheat proceedings, indicated that the true motive was to protect royal financial interests.

Whilst the council's curtailment of private suits to protect royal rights in the Caron estate excited little political interest, the situation was different when such action protected the grant of commercial patents or monopolies. These affected wider interests than those of the immediate litigants, as the council was well aware, and were the subject of frequent parliamentary complaint. In 1615 Sir Robert Mansell, Muscovy merchant and, at that time, treasurer of the navy, acquired a monopoly of the production of glass by buying out fellow syndicate members. Mansell's monopoly was the subject of repeated attacks and criticism in parliament but, despite revocation in May 1623, it had been re-granted by the Privy Council on similar terms shortly thereafter. His monopoly survived further parliamentary attacks in 1624. It appears that both the council and parliament valued his expertise in naval finance.[101] However his monopoly had been the subject of *quo warranto* proceedings brought by one Bringer. In response, on 30 November 1626, the King referred the disputes over Mansell's monopoly to the Privy Council for determination rather than the courts. On 6 December 1626 the council considered the issue in detail and, despite Mansell having been brought before them on 14 August 1625 for his criticism of Buckingham's conduct as Lord Admiral, found in his favour in terms that were revealing of their view of the relationship between their powers and the role of the courts.[102]

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[100] TNA SP 16/39/79 f.163.
[101] A. Thrush, 'Mansell, Sir Robert (1570/1-1652)', *ODNB*, (OUP, 2004), online edition Jan.2008.
[102] TNA SP 16/41/ 37 ff. 56-7 and 'Mansell, Sir Robert', *ODNB*.

They ordered that 'all proceedings upon any *quo warranto* now depending and all other p[ro]secucions at lawe now depending against this patent be from henceforth forborne and stayed' and that Bringer or 'any other' shall not trouble the King further 'or attempt anything against this and former orders' of the council 'upon paine of punishment'.[103] This block on any legal challenge to Mansell's monopoly was clearly intended to send a wider message in relation to attacks on such grants. The council observed that they 'doe fynd it to be of dangerous consequence, farr trenching upon the prerogative of the Kinge if patents of this nature' which had been the subject of several council orders and had been 'examined' in parliament 'should nowe be referred to the strict tryall of the Comon Lawe'.[104] Accordingly the council had removed the matter from private adjudication before the courts because they saw private law suits on this subject as an affront to royal prerogative powers. Their language was an attack on the use of the law to undermine council decisions, and thus was akin to the reference to vexatious suits in the Caron matter. It is not suggested such intervention occurred in the majority of cases before the courts. Nor was it a peculiar feature of the reign of Charles I.[105] However it was not unusual and it is clear that the Privy Council saw itself as fully entitled to restrict, direct and interfere with judicial activity and that the theoretical basis for such intervention was neither precisely defined nor seriously contested by the judiciary or parliament in most cases.[106] Such political interference was just part of the environment in which the judges worked. This must be kept in mind when considering how the members of the bench saw their role and how influence might be brought to bear upon them. It was also relevant to the question of the legitimacy of such influence.

In practice the council only saw a small proportion of the business that came before the various courts, and usually preferred to refer matters to a court. Partly this was because of some inclination, as Coke suggested, not to meddle unnecessarily in private matters. But the main limitation on council

[103] TNA SP 16/41/37 f.57.
[104] Ibid.
[105] For some earlier examples see BL MS Lansdowne 68 and Dawson, 'Privy Council and Private Law: II', p.640 on issues with the Elizabethan bench over habeas corpus.
[106] The Elizabethan judges did not deny the Council's power to imprison and neither did Coke in 1615 in Brewer's Case, 81 ER 382 or Salkingstowe's Case, 81 ER 444. As a barrister James Whitelocke, and Mansell, were forced by the council to submit to it for asserting that the King had no prerogative power to 'meddle with the bodies goodes or lands of his subjects' whilst questioning the legality of a commission of enquiry into the navy, *APC* 1613-14, pp. 211-219.

intervention was the degree to which it took up scarce time and resources. One extreme example that indicated just how distracting such involvement could be was provided by the apparently endless attempts of Thomas Felton, and his son Edmond, to prove that Sir Henry Spiller had retained Crown revenues in excess of £100,000.[107] The process began in 1611, continued through virtually every intervening parliament until 1629, and involved three separate Privy Council investigations. It culminated in an answer by Lord Keeper Coventry, which stopped this process, in August 1629. No criminal offence was ever established, and no court ever became involved. However there was perceived to be enough of a public policy concern to bring the quasi-judicial function of the Privy Council to bear on this matter for eighteen years.

From time to time the Privy Council also sought to resolve legal issues deemed to be of public significance in matters where the courts were not involved. In such situations the council might seek formal advice from either or both of the chief justices or a judge with specialist knowledge, such as Sir William Jones on property or Irish matters or the chief baron of the Exchequer on a revenue issue. Sometimes all of the bench would be asked for an opinion of this type. Whilst these references always had some public policy dimension most of the time in the 1620s they were not particularly controversial. Some typical examples included the references in 1628 to the judges for advice on how to correct errors in the writs summoning the Irish parliament or the request for a ruling on the correct legal treatment of the goods of a bastard dying intestate, in the same year, to check if the Crown had a claim to them.[108] Others might be more politically sensitive, such as the ruling sought from all of the judges on whether all normal means of coercing attendance in court proceedings applied to peers.[109] However this process of taking judicial advice would turn into one of the most politically toxic issues for the judges. This was the giving of pre-emptive legal opinions on legal issues in situations where the ostensible legality was politically contested and there was no actual case with a set of known facts for the judges to rule on. The most controversial examples were on the royal power of arrest without specifying a charge, the scope of parliamentary privilege and the ship money writs. In each such case

[107] *APC* 1629-30, pp.265-7.
[108] *APC* 1628-9, pp.151, 192, 194-5; Ibid., pp.70-1, 214. For further examples see *APC* 1627, pp.453-4; *APC* 1627-8, pp.345-6; *APC* 1628-9, pp.70-1,162-3, 405-7; *APC* 1630-1, p.192.
[109] *APC* 1629-30, pp.7, 101-2.

an opinion was sought in the form of a quasi-hypothetical question without any established facts. This was what is here termed an 'extra-judicial' opinion and such opinions were sought with increasing frequency by Crown law officers from the judges under Charles I. From the perspective of those who sought to advance government policies, or royal wishes, the conventional role of the judges in giving advice to the Privy Council provided a convenient justification for expecting the judges to give such opinions. However this overlooked the difference between requiring judges to give advice on precise questions such as the construction of letters patent for a print monopoly or the form of a parliamentary summons, and attempting to extract firm opinions on 'what if' questions about politically contested issues. This procedure also pushed at the limits of another conventional aspect of judicial functions namely the consensual method of determining difficult or novel legal issues. Although the opinion procedure was arguably being used in an innovative way, the tendency to judicial comity could be exploited by using it to persuade dissenters in the minority to remain silent. The provision of such opinions to the government in relation to ship money was a prominent feature of the accusations made by parliament against the judges but the nature of the judges' dilemma when faced with royal demands was aptly illustrated by Hampden's counsel, Oliver St.John. Even he conceded in 1640 that judges were 'of the king's council by their oaths, they are bound lawfully to counsel him; that is, when their opinions are demanded, they are to deliver them according to the law'.[110]

The features of Privy Council interaction with the law, the courts and the judges discussed above showed a confident, powerful and legally sophisticated political body that was well versed in using the law to resolve potential political issues and exercising a variety of roles as overseers of the law to plug gaps in it. In addition the Caroline council were exhibiting signs of increasing determination to use such means in an effort to implement a distinct set of political policies. The intermingling of the political and legal within the judicial function, and the normal role of judges as the council's legal advisers, underlined the degree to which the political and legal spheres were completely intertwined within the normal processes of government in this period. This pointed by increments towards more controversial use of this relationship which will now be considered further.

[110] *State Trials*, 3:1276.

Chapter 2: THE JUDGES AND GOVERNMENT REVENUE RAISING

Judicial function, political controversy and Crown revenue collection

In the period from 1625 to 1640 the role of the courts in government taxation policy exemplified E.W. Ives' assertion about early modern England that 'the government of the country was effected, at all levels, through the legal system'.[111] The barons of the Exchequer, in particular, and to an increasing degree the remaining common law judges, were placed at the forefront of political controversy about royal revenue raising in this period, and the judges felt the heat of political condemnation well before it reached fever pitch in the Long Parliament. As early as July 1626 the judges were at the forefront of political exchanges over the grant of subsidies, and the government demand for payment of a benevolence as an alternative, in the immediate aftermath of the dissolution of the second parliament held under Charles I.[112] The centrality of this judicial involvement in politically explosive revenue issues then continued, almost without a break, until 1640.

The first major encounter was the fierce argument that developed between the judges and the King over the legality of the Forced Loan in October and November 1626 which led to the dismissal of the chief justice Crewe.[113] The legality of that means of revenue raising then influenced public perceptions of judicial conduct in relation to arguments over the *habeas corpus* proceedings concerning a group of loan refusers, in July 1627, known as the Five Knights' Case.[114] The government's need to apply pressure on those who refused to pay a levy that might lack legal

[111] E.W. Ives, *The Common Lawyers of Pre-Reformation England* (Cambridge, 1983), p.9.
[112] R. Cust, *The Forced Loan and English Politics 1626-1628* (Oxford, 1987), p.96.
[113] *The Diary of Sir Richard Hutton 1614-1639 with Related Texts*, ed. W.R.Prest (Selden Society, Supplementary Series, vol.9, 1991), p.66.
[114] The extensive bibliography and primary source material for this case, and the surrounding political furore, is conveniently summarised in Brooks, *Law, Politics and Society*, pp.169-177. For the political controversy in parliament and the testimony of the judges see in particular *Proceedings in Parliament 1628*, eds. M.F. Keeler, M.J. Cole and W.B. Bidwell, 6 vols.(London and New Haven, 1977-84), vol.ii, pp.152, 203-4 and 212; vol.v, pp. 204-5 and 229-30. For additional discussion of the relationship between the purported attempt of the Crown to establish the decision of the court as a useful precedent for prerogative powers of imprisonment and the Petition of Right see J.Guy, 'The origins of the Petition of Right reconsidered', *Historical Journal*, 25 (1982), pp. 289-312 and the riposte to this in M. Kishlansky, 'Tyranny denied: Charles I, Attorney-General Heath, and the Five Knights case', *Historical Journal*, 42 (1999), pp.55-83. The case is also referred to as Darnell's case. This only adds to the confusing nomenclature because, although Darnell was originally the initial *habeas corpus* applicant, he withdrew his case before the hearing of the main proceedings which occurred on the subsequent *alias habeas corpus* initiated at the behest of Attorney-General Heath. Those proceedings only involved four knights excluding Darnell. See Kishlansky, 'Tyranny denied', p. 61.

justification raised the political importance of the case. Just how far this could push the judiciary onto the political stage was shown by the extensive parliamentary debates in March 1628 over the issues that the case raised.[115] The politicised questions surrounding prerogative imprisonment powers, and *habeas corpus*, led to the extensive use of extrajudicial legal opinions. All of this derived from shortcomings in handling the question of the legality of the Forced Loan and the effect of this on the government's ability to enforce payment. As will be discussed, this was a pivotal moment since the Caroline government learned from experience and refined their methods for securing judicial endorsement of their policies.

Two other revenue issues led to an even more serious confrontation between the government and parliament and more political criticism of the role of the judiciary. The implications were almost revolutionary and they contributed to the political decisions that led to the indefinite suspension of parliament that is known as the Personal Rule.[116] These were the royal entitlement to impositions on commodities, and the duties known as tonnage and poundage. In the context of increasingly heated discussion of foreign policy, government incompetence in military expeditions and the role of the Duke of Buckingham, Charles I was frustrated by the inability of three successive parliaments, from 1625 to 1629, to focus on his revenue needs and in particular their apparent unwillingness to grant him the right to levy tonnage and poundage for life. This was something that was given customarily to a sovereign in the first parliament of each monarch's reign. Parliamentary reluctance to do this looked like a calculated insult and Charles came to suspect that this reticence amounted to a tactic to ensure the continuation of parliaments.[117] His determination to continue to collect these revenues led to increasing resistance, particularly from various prominent merchants such as Richard Chambers, Samuel Vassell and the MP John Rolle. They claimed that their right to refuse payment derived from the failure of parliament to assent to such duties. Eventually this dispute followed the same trajectory

[115] See Kishlansky, 'Tyranny denied', pp.62-9 for a full account of the cogent explanation, given by the King's Bench judges to the House of Lords, of their reasoning in the Five Knights Case that also showed how they carefully sought to navigate between encroaching on prerogative power and avoiding confrontation with parliament. In that case their caution appeared to succeed in deflecting political criticism.
[116] C. Russell, *Parliaments and English Politics, 1621-1629* (Oxford, 1979), pp.415-416 and L.J. Reeve, 'The Arguments in King's Bench in 1629 concerning the imprisonment of John Selden and other members of the House of Commons', *Journal of British Studies*,25 (1986), pp.264-8.
[117] W.J. Jones, *Politics and the Bench*, pp.74-5.

as that which had occurred in relation to the Forced Loan with even more dramatic consequences. The judiciary became embroiled in a similar way. The exasperated King declared that he did not need parliamentary assent to collect these duties and parliament responded with a remonstrance dated 25 June 1628 stating that the collection of such duties was a breach of liberty of the subject and contrary to the Petition of Right. Charles prorogued parliament the next day and these events strengthened what was in effect a tax strike. When parliament reconvened in January 1629 the situation deteriorated further in relation to these revenue issues as they became entangled in increasingly strident parliamentary criticism of royal religious policy. The judiciary were now directly attacked in relation to the collection of the controversial duties. This was done by Sir John Eliot in comments that included the judiciary within a broad political attack on royal advisors, and separately in specific attacks on the conduct of the court of Exchequer. The latter arose from that court's role in preventing those who had refused to pay either impositions on specific commodities or tonnage and poundage from recovering, by actions of *replevin* before the court, goods seized by royal customs farmers and their officers in order to recover the sums due for such levies.[118] The stakes were raised when the King made it entirely clear that he and his government stuck by his Lord Treasurer, Richard Weston, the first earl of Portland, his customs officers and the barons of the Exchequer on all aspects of this issue.[119]

In an increasingly febrile atmosphere Charles adjourned parliament by proclamation on 2 March 1629. However this was disrupted by the speaker of the House of Commons, Sir John Finch, being forcibly detained in his seat by Eliot, John Selden, William Strode and others whilst the House passed a protestation in three parts.[120] The first attacked innovations in religion. The other two related to tonnage and poundage. The first declared that 'whosoever shall counsel or advise the taking and levying of the Subsidies of Tunnage and Poundage... or shall be an Actor or Instrument therein, shall be...a capital Enemy to the Kingdom and Commonwealth'. This was aimed at the barons of the Exchequer, as well as the financial officers of the Crown, and it meant that the conduct of the barons,

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[118] Ibid., pp.76-7; *Autobiography of Sir John Bramston, KB, of Skreens in the hundred of Chelmsford* (Camden Soc., Old Series, vol.32, 1845), p.59; Rushworth, vol.1, pp.654-5.
[119] Rushworth, vol.1, p.659.
[120] Brooks, *Law, Politics and Society*,p.180.

in relation to this levy, remained unfinished business that was revisited by parliament in 1640. The final part of the protestation attempted to continue the tax strike in relation to tonnage and poundage by pronouncing that 'any Merchant or person' who 'shall voluntarily yield or pay' that levy shall be 'a Betrayer of the Liberties of England' and also a capital enemy of the kingdom.[121]

On 11 March 1629, the day after the King had formally dissolved his fourth parliament, Eliot and certain of his fellow protesters in the House of Commons were summoned before the Privy Council and required to give an account of their behaviour in parliament. When they refused to discuss such matters on the grounds that their conduct was protected by parliamentary privilege, they were imprisoned in the Tower. Then in an extreme reprise of the course of events surrounding the enforcement of the Forced Loan through the courts the judges of all of the main Westminster courts were drawn into this matter through a series of extrajudicial opinions sought by the King and Attorney-General Heath in relation to possible offences committed by the protesters, the extent of their parliamentary privilege, and finally through prolonged *habeas corpus* proceedings to secure their release from imprisonment. All of this culminated in the prosecution in the court of King's Bench of Eliot, Denzil Holles and Benjamin Valentine for sedition, in the form of plotting to create division between the king and his subjects, and the Star Chamber prosecution of Walter Long for having been elected, and acting, as MP for Bath whilst still being sheriff of Wiltshire.[122] The legality of taxation had placed the judges at the centre of the most serious political crisis of the reign of Charles I prior to the outbreak of hostilities with the Scots in 1639. It heralded the period of the personal rule and the suspension of parliament. The fall-out from this took another judicial scalp when the chief baron, Sir John Walter, was indefinitely suspended from his function as a judge from 22 October 1629 until his death on 18 November 1630.[123]

The significance of the role of the judges and the law in all of these events was not lost on the King and the Privy Council. They developed a range of more or less sophisticated ways of obtaining high

[121] Rushworth, vol.1, p.660.
[122] Bramston, *Autobiography*, pp.57-9. For the action against Eliot, Holles and Valentine see Brooks, *Law,Politics and Society*, pp.181-5.
[123] Brooks, *Law, Politics and Society*, p.183.

quality legal expertise to support and justify their policies, and secure judicial co-operation. This process was forged and started in the revenue related disputes with parliament in the 1620s and continued until 1640. The tactics and the rhetoric of the opponents of royal taxation powers demonstrated the importance of legal argument in justifying what were largely political issues about the scope of prerogative powers in this area. The whole nexus between the legality of the Forced Loan, the imprisonment powers contested in the Five Knights Case, and other parliamentary grievances over such matters as martial law, and the negotiation of the Petition of Right, provided the royal government with a concrete example of exactly how a legal statement could be used apparently to resolve major political divisions. In response to the potentially irreconcilable political dilemma identified by Sir Francis Ashley over the Five Knights Case and *habeas corpus*, in his speech to the House of Lords in 1628, highlighting the tension between need for prerogative powers as an integral part of effective government and the subject's property rights, Sir Edward Coke proposed a restatement of *Magna Carta* that begged as many questions as it answered.[124] This was even more of a gloss on the relevant political problems than the carefully elliptical answers provided to Charles I by the entire bench of judges, in response to the barrage of questions posed to them by the Crown in relation to the Five Knights Case, and subsequently regarding the conduct of Eliot and his companions.[125] It is thus unsurprising that the King eventually decided to accept the Petition of Right. If this is what the political nation wanted then, armed with the authority of the judiciary, he and his government could provide consistent legal justification for their actions.

Charles and his government understood the pivotal role of the judges in this situation. In his speech on the prorogation of parliament on 26 June 1628, where he sought to clarify how the Petition had not diminished the royal prerogative, Charles had commanded 'you all that are here to take notice...but especially, you my Lords Judges, for to you only under me belongs the interpretation of laws; for none of the House of Commons joint or separate...have any power either to make or declare a law

[124] For an explanation of the connection between these issues and the Petition of Right see Brooks, *Law,Politics and Society*,pp. 174-177.
[125] See Bramston, *Autobiography*, pp.48-57 for a nearly contemporaneous account of those questions and the answers given.

without my consent'.[126] Whilst at one level a statement of royal power, this reasserted the role of the judges as arbiters of the law to the exclusion of all others and hinted at how that position may be legitimately harnessed to protect royal authority. In the declaration, dated 10 March 1629, of his reasons for dissolving parliament, the King took exception to the political attacks made upon his judges by parliament and made it clear that his judges 'are not accomptable to the House of Commons'.[127] These statements exhibited a strong vein of conservative affront at the presumption of those who mounted political challenges to the understanding of the principal royal justices on matters of law. Common to this traditionalist royal view and that of its critics was the competence of the law to address the issues that divided them, but there was disagreement over who had ultimate authority to interpret the law. That placed the judges at the centre of the crucial political debate over where the final sanction lay with regard to revenue matters to a degree that was not quite the same for religious policies. In relation to the latter the judges' role was perceived to be to maintain the supervisory jurisdictional competence of the common law in order to restrain the expansion of the power and competence of the established church and its courts. These were objectives that could be supported even by those amongst the laity who favoured government policies as well as political and religious opponents. When issuing prohibitions there were matters that related to prerogative power, particularly with regard to High Commission, but these tended to be shrouded in complex legal argument. More importantly the judges could argue that in asserting their powers over church courts they were asserting royal powers rather than diminishing them. In relation to revenue matters there was no such means of avoiding decisions that directly addressed the relationship between parliamentary rights and royal prerogative power, and which of them was paramount in any given set of circumstances. That exposed the judges to immediate political criticism without the possibility of using the technical subterfuges that they deployed in relation to the controversies surrounding Caroline religious policies and prohibitions. Nonetheless they still tried since they were acutely aware of potential conflict between their duties as officers of the Crown and their accountability to parliament.

[126] S.R. Gardiner, *Constitutional Documents of the Puritan Revolution 1625-1660* , 3rd edn. (Oxford, 1906), p.74.
[127] Rushworth, vol.1, Appendix, p.7.

With the dissolution of parliament in 1629 the judges ceased to be so exposed to the parliamentary assault on prerogative powers of imprisonment. The King's Bench judges had been able to explain their conduct in parliament in 1628 in relation to the *habeas corpus* proceedings relating to Darnell and his associates, and emerge unscathed. Although in 1629 no such opportunity for explanation arose in relation to the similar *habeas corpus* proceedings and questions relating to royal detention powers that arose in connection with Eliot and his associates, the suspension of parliament delayed any reckoning over this issue. Two points should be noted about this. Firstly it seems clear that the judges of King's Bench would have vigorously defended their conduct if questioned. In relation to the imprisonment of those MPs who had been summoned before the Privy Council and refused to answer any questions, the judges eventually accepted the arguments of counsel for the defendants that their offence was not a capital one and that bail should be granted against the provision of security.[128] This was despite considerable royal pressure and the sequestration of chief baron Walter at this time. In response to the refusal of the prisoners to accept bail on these terms a defence of the King's Bench judge, Sir George Croke, prepared for the Long Parliament, pointed out that in similar circumstances any of the King's subjects, if in the King's position, could have required the provision of such security as a condition of bail of a counterparty to proceedings.[129] In relation to the conviction of Eliot, Holles and Valentine for sedition, the King's Bench judges advised that, after full consultation with their colleagues in Common Pleas and the Exchequer, it was decided unanimously 'that an offence committed by a Parliament man in Parliament, and not there punished, is punishable out of Parliament'.[130] They saw this as fully supported by precedent and meant that the defendants' arguments that only parliament could judge them, thus ousting the jurisdiction of King's Bench, were wrong. These views were clear and robust and Croke, who came to be regarded by critics as the most

[128] Eliot, Selden, Holles, Valentine, Strode, Long, and Sir Miles Hobart. Strode and Long did not appear before the Privy Council but were arrested and interrogated subsequently. William Coryton and Sir Peter Hayman were summoned but submitted to the council and were released. See Reeve, 'The Arguments in King's Bench in 1629', pp.264-5.
[129] Brooks, *Law, Politics and Society*, pp.182-3.
[130] Bramston, *Autobiography*, p.59.

sympathetic of the judges, unambiguously declared the conduct of the defendants to be 'manuforti, illicit et seditiose'.[131]

The second point is that this defence was effectively accepted. The conduct of the judges in relation to the proceedings involving the Five Knights and Eliot and his associates did not form any part of the articles of accusation in 1641. Whilst it may be argued that this was because few of the judges from that time were still alive, two of them were, namely Sir Thomas Trevor, who had been a baron of the Exchequer since May 1625, and justice Croke. Another of the principal judges involved in King's Bench, Sir William Jones, was still active on the bench in the opening month of the Long Parliament, but had died on 6 December 1640.[132] Although he was not involved in the King's Bench decisions, Trevor was a party to the array of extra-judicial opinions taken by the Crown on powers of imprisonment in 1628 and the jurisdiction opinion cited in the proceedings against Eliot. But there was no reference to this in the accusations against him notwithstanding that certain allegations relating to failure to release prisoners in *habeas corpus* proceedings were included in the articles brought against two of the Kings Bench judges who had been appointed in the 1630s, namely chief justice Bramston and justice Berkeley.[133] The fact that even a judge who was comparatively well regarded in parliament such as Croke had felt the need to prepare a defence in relation to his conduct in the Five Knights Case, and Eliot and his colleagues, indicated that it was thought likely, that the conduct of the judges in relation to such matters might be examined in the Long Parliament.[134] But no such accusations emerged.

However the position was different with regard to revenue matters. As has been seen these dominated the articles of accusation seven of which concerned matters that were extant at the time of the dissolution of parliament in March 1629. Those all related to the imposition of duties or tonnage and poundage. Two concerned the refusal of the merchant Samuel Vassall, in 1628, to pay duties on currants, and related to the ongoing argument over the royal power to impose customs duties on

[131] BL MS Hargrave 24, f. 27v and Brooks, *Law, Politics and Society*, pp.184-5.
[132] Unlike the judge of Common Pleas,Sir George Vernon, who died in December 1639, there was no attempt to fine Jones posthumously: C.W. Brooks, 'Jones, Sir William (1566-1640), *ODNB*, (OUP, 2004), online edn. Jan.2008.
[133] See *Articles of accusation*, pp. 6, 11 and item 16 on p.11 earlier.
[134] See HALS MS Gorhambury xii. B. 25.

commodities that had formed an important part of the fiscal debates in the parliaments of James I and had been the subject of Bate's Case in 1606.[135] Vassall would have been well aware of the genesis of this issue and the parallels between his situation in 1628 and that of John Bate in 1606.[136] Chief baron Davenport's citation of Bate's Case as the reason why he would not hear the arguments mounted in Vassall's defence formed part of the accusation against him.[137] This exemplified the continuity of certain revenue issues in the political tensions between parliament and the government and a fundamental problem for the judges. If acceptance of a well known decided case might be deemed politically objectionable how were they supposed to make any legal ruling? These political tensions continued into the 1630s with the adoption and enforcement of further fiscal expedients, including the royal entitlement to knighthood fines, the exploitation of forest laws and the levy and collection of ship money. Judicial rulings on their validity formed the core of the articles of accusation in 1640. Opponents saw them as revenue raising devices that lacked parliamentary sanction and were thus unlawful. But all of them had an ostensible purpose other than providing revenue and they were supported by valid legal authority. This placed the judges, as royal servants and interpreters of the law, in an acutely difficult position.

The judges' response to the Forced Loan: a lesson in political mismanagement

In the autumn of 1626, in the aftermath of the dissolution of his second parliament on 15 June, the attempt of the young Charles I, and his government, to use the judges to support the legitimacy of the Forced Loan was, in turn, clumsy, splenetic and ineffective. Given the foreign policy crisis that faced the government, the scale of the failure, despite the threatening attitude adopted towards the judges that culminated in the peremptory dismissal of chief justice Crew and the King's angry threat to

[135] See J.C. Appleby, 'Vassall, Samuel (*bap.* 1586, *d.* 1667)', *ODNB*, (OUP, 2004), online edn. 2008 and *Articles of accusation*, pp.17, 27. Bate's Case had also related to a consignment of currants. One of the most articulate parliamentary critics of royal power to make fiscal impositions at the time, James Whitelocke, was, in 1628, a judge in the King's Bench. His colleague in King's Bench, Sir William Jones had supported Whitelocke's views. See Brooks, *Law, Politics and Society*, pp.137-9 and *State Trials*, 2:389-90, 479-486.
[136] Apart from the high profile of the case both men were members of the Levant Company. See 'Vassall', *ODNB*.
[137] *Articles of accusation*, p.18.

'sweep all their benches', was striking.[138] It undermined the ability of the government to deal effectively with those who refused to pay the loan and intensified the difficulties posed by the handling of the Five Knights' Case. This led to the use of controversial government tactics to keep the defendants in prison, without permitting any formal ruling by the court of King's Bench on either the legality of the loan or the scope of prerogative powers of detention.[139] The ramifications of this were of such importance, in relation to the emergence of the Petition of Right, that they would have made a lasting impression on the relatively inexperienced King and his new Lord Keeper, Sir Thomas Coventry.[140] If the judges had been willing, or able, to give a clear statement endorsing the legality of the Forced Loan there would have been no need for the government to dodge the issue of what to put into the *habeas corpus* returns for Darnell and his co-defendants. They would have been refusing to pay a lawful tax and the court could have moved to distrain their property in settlement of the unpaid taxes. The lesson was obvious.

This was an important moment in the development, within the government of Charles I, of a conscious and systematic strategy of using the judges and the law as a means of underwriting the legitimacy of political policies in order to counter political opposition. How that was implemented by building up a royalist government legal expertise and drawing on a reservoir of precedent that countered the legal interpretations of political opponents will be considered as this thesis progresses. What should be noted here is the timing. Shortly after the Five Knights were released in January 1628, as political pressure grew in relation to the Petition of Right, the King and Attorney-General Heath began to demand the extra-judicial opinions from the judges mentioned earlier. The first of the consultations and demands for them appears to have occurred on 2 March 1628, and then in May 1628 and March 1629. By the end of the summer of 1629 justice Whitelocke was complaining about

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[138] For a summary of the foreign political situation that provided such impetus for the Forced Loan and the King's reaction see Cust, *Forced Loan*, pp.30, 39-41, 54-5.
[139] For a persuasive account of the government's need to avoid the 'political nightmares' that might be raised by a formal court decision on either of these two issues see Kishlansky, 'Tyranny denied', pp.69-70.
[140] Coventry had held this office for less than a year at this point having been appointed on 1 November 1625. See R. Cust, 'Coventry, Thomas, first Baron Coventry (1578-1640)', *ODNB*, (OUP., 2004),online edn. Sept. 2013.

the constant requests being made to the judges to give their opinions before cases were heard.[141] To understand the subsequent course of the relationship between the Caroline government and the judges it is useful to consider how the handling of the involvement of the judiciary in relation to the Forced Loan went wrong and how this episode echoed later legal and political themes relating to revenue raising techniques under Charles I.

The main narratives of this episode do not focus much on the judges notwithstanding the detailed account provided by one of the longest serving of any of them, namely Sir Richard Hutton. He sat as a puisne judge in the court of Common Pleas from 1617 until his death in 1639.[142] Unlike his notably reticent commentary on the Ship Money Case, Hutton was forthright about the attitude of the judges to the Forced Loan. In addition there are some tantalising hints from other sources about the treatment of chief justice Crewe that embellish Hutton's narrative.[143] The judges' involvement in the fiscal expedients adopted by the government, after its failure to obtain parliamentary subsidies with the dissolution of parliament on 15 June 1626, did not get off to a good start. Alongside the use of Privy Seal letters requesting loans from prominent persons, the first such expedient was the request for a benevolence in July. That was a residual prerogative right of the Crown to require financial assistance from its subjects in order to meet some national threat or necessity.[144] This saw the emergence of two themes that would run through the question of judicial support and legal justification for revenue raising in this period. Firstly the denial of supply by parliament pushed the government to examine the basis of prerogative derived alternatives that had real, if often vague or ancient, legal authority to support them. Secondly this policy raised the increasingly contested question of what was the nature of the necessity or emergency that could validate recourse to such prerogative entitlement to aid, whether financial or otherwise.

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[141] Bramston, *Autobiography*, pp.48-54. Brooks, *Law,Politics and Society*, p.183, f.102. The practice of seeking such opinions was not confined to issues arising in parliament. At the same time as the Five Knights Case Attorney-General Heath required the judges to give an opinion whether a charge of treason could be validly brought against Hugh Pyne. See Brooks, *Law,Politics and Society*, p.179. In that case there were specific allegations of fact to which the judges were able to apply the law of treason. The response was precise and not what the government wanted.
[142] W. Prest, 'Hutton, Sir Richard (*bap.*1561, *d.*1639)', *ODNB*, (OUP., 2004), online edn. Sept. 2013.
[143] For an account of the involvement of the judges see Brooks, *Law,Politics and Society*, pp.167-8 whilst Cust, *Forced Loan*, pp. 51-62 analyses all of the political context and ramifications.
[144] G.L.Harriss, 'Aids, loans and benevolences', *Historical Journal*, 5 (1963), p.19 and Cust, *Forced Loan*, pp.32, 35-9.

Initially these issues did not arise with much force since a benevolence was probably the mildest form of levy. It was a form of gift by the subject in substitution for the performance of the obligation to render aid to the sovereign by military service in defence of the realm. The amount was not fixed and, with the dissolution of parliament, there was not much legal or practical incentive to pay, other than the frequent references by the Privy Council to the possibility of Spanish invasion.[145] In this unpromising environment on 17 July 1626 the judges were sent to Westminster Hall as part of an effort to try to persuade about five hundred taxpayers to pay the new levy instead of subsidies. They were loudly heckled with shouts of 'a parliament, a parliament or else no subsidies'.[146] Whilst it was fairly standard practice for judges to be required to speak up in favour of government policies on their assize circuits, this humiliating attempt to use their authority to make what were essentially political speeches outside their normal functions seems to have been particularly ill thought out. In addition each of the judges was asked to make a Privy Seal loan.[147] None of this can have put the judges in the best frame of mind for what happened next.

By mid September the King and the Privy Council had decided to abandon these ineffective procedures and to raise a loan more widely instead.[148] Again this rested on earlier precedent related to the King's right to assistance in time of need although the terms were expected to be slightly different. Ostensibly it required the subject's consent to a precise amount and was meant to be repaid.[149] The first that the judges knew of the change of policy was when they were summoned to a meeting with the King and the Privy Council at Whitehall on 13 October 1626 where they were first asked about the people's attitudes to the benevolence on their assize circuits and then were told about the new course of action. The King had decided to borrow from 'every of his subjects soe much as is sett in the subsidie booke' for five subsidies. This was announced in a formal speech delivered by Lord Privy Seal Manchester which referred to the need for this supply to support the King's allies, to maintain the true religion and defend the realm. The judges were asked to inform all the readers and benchers of

[145] Harriss, 'Aids', pp.12-13; Cust, *Forced Loan*, pp. 94-6.
[146] T. Birch, *The Court and Times of Charles the First*, 2 vols. (London, 1848), vol.1, pp.130-1. .
[147] *Diary of Sir Richard Hutton*, p.63.
[148] Cust, *Forced Loan*, pp. 46-50.
[149] Harriss, 'Aids', pp.12-13. If the notion of repayment seemed fanciful it should be noted that Elizabeth I raised forced loans from time to time and only one of them was not repaid. That remained on the government's books until 1620 as a loan: Cromartie, *Constitutionalist Revolution*, p.99.

the Inns of Court and urge them to pay sums equal to their subsidy assessments. The judges should make such payments themselves as all of the councillors present at the meeting had made such loans already.[150] The proposed loan was presented to the judges and councillors in precisely the same formulaic way that Harriss observed being used by royal commissioners in various fifteenth-century requests for loans. It followed a rubric that went back to the latter years of Edward I.[151]The King's advisers had done some research and were aware of an established form of procedure for this type of levy. This made the judges' subsequent reaction all the more striking.

In September 1626 the government had drawn up a detailed set of instructions to intended commissioners for the collection of the loan in the counties and boroughs. This contained the familiar litany of justification for the loan by reference to support for allies, the true religion and defence of the realm but it also added a further emphasis by stating that 'this course...is at this tyme enforced by necessitye' and was one 'to which noe ordinary rules of lawe can be prescribed'.[152] In addition it required the loan commissioners to ensure that those who paid the loan signed, or made their mark, on a list or roll, with their name along-side, and to publicise this list. The commissioners themselves were expected to lend and put their names at the top of the list. This was one of several tactics prescribed in the instructions to the commissioners for persuading people to make the loan. At the initial meeting on 13 October the judges were told that they would 'have a commission with such instructions as were agreed upon for the effectinge of this service'.[153] It was not clear why this was thought necessary as it seemed to imply that the judges would be loan commissioners. That did not seem to be what the judges had been asked to do at the initial meeting which was effectively to pay the loan themselves and then enjoin the readers and benchers of the Inns of Court to make such payment themselves. At this point the involvement of the judges started to unravel.

Shortly after the meeting the judges met and 'declared that the matter of the commission was mistaken', in the sense that they did not need one.[154] This did not fit in with the government tactic of

[150] *Diary of Sir Richard Hutton*, p.64.
[151] Harriss, 'Aids', pp.4-5.
[152] TNA SP16/36/43.
[153] *Diary of Sir Richard Hutton*, p.64.
[154] Ibid.

using the status of loan commissioners to persuade people to lend and so on 26 October the judges were specifically asked to write their names in a roll stating that they had all lent an amount equal to five subsidies, being the assessment benchmark for each lender's liability used in the commissioners instructions. The judges refused and Hutton explained that they were concerned that

> the end of this was that this might be shewed to drawe and move others to pay or to gayne therby by seacret implication, that we consented or allowed of this course of lone by proportion of subsidies, and we knowe not what wilbe the issue or end of this.[155]

They decided to request the King not to press them to subscribe since it might draw them into obloquy with the people and then they would be unable to perform their duties properly towards the King and the people. This indicated that, at this stage, the judges felt the pull of their duty both to Crown and to parliament. It was an extremely serious turn of events. The leading exponents of the law would not endorse an aspect of the government's method of collection for fear that it implied their endorsement of the legality of the loan and might irreparably damage their reputation. The situation then got worse as the ill-conceived use of royal pressure on the judges forced them to address the legality of the loan directly.

Chief justice Crewe and chief baron Walter explained their views to Lord Keeper Coventry and asked him to convey this to the King if required but, correctly anticipating a hostile reception, suggested that he 'putt it off if it were possible'. An equally apprehensive Coventry suggested that the judges delivered their response to the King themselves but was persuaded to do it himself provided that they set out their position in writing, presumably both to clarify it and show that it was not necessarily his own opinion. As expected the King was furious saying that it was a 'grand insolencye… to desire to knowe to what end our subscription was required, it was a matter of state'.[156] On 3 November 1626 the judges were summoned before Coventry, the Lord Treasurer James Ley, the first earl of Marlborough, and several other Privy Councillors. The judges were informed of the King's anger and his wish that Coventry should command them to subscribe. The judges responded by doing what the

[155] Ibid.
[156] Ibid. Hutton first described the King as 'mult discontent' and two sentences later as 'grandment discontent'. The reference to matters of state as a justification for taxation policy would be echoed in later royal defences of such policies.

more emollient royal councillors probably feared most and bluntly challenged the legality of the loan. Crewe, Walter and Sir John Dodderidge, justice of the King's Bench, replied that:

> cest case fuit tiel que ne fuit legall et que fuit encounter les statutes of 25 E.1 cap.6, 14 E.3 cap.1, 11 R.2 cap.11, R.3 cap. [*blank in ms.*], et que nous fumous jure, et que c'est n'ad ascun example, mes fuit un novell invention.[157]

The judges then made it clear that they would not subscribe as requested and held several subsequent meetings at Serjeant's Inn to decide how to proceed.

It is worth noting the statutory provisions cited since they included standard authorities for the restriction of prerogative taxation powers that were revisited in the Ship Money Case in 1637.[158] The first two are readily identifiable. The provisions of 25 E.1 c.6 were an important part of the 1297 *Confirmatio Cartarum*, in which Edward I had, amongst other things, confirmed *Magna Carta* as part of the common law. The relevant part of this section was the statement:

> that for no business from henceforth we shall take such manner of Aids, Tasks or Prises, but by the common assent of the Realm, and for the common profit thereof, saving the ancient Aids and Prises due and accustomed.[159]

Here, in concise form, was another problem that faced the judiciary when considering Caroline fiscal expedients. Whilst the medieval statute appeared to provide clear authority for requiring the Crown to obtain some form of popular assent to such taxes, there was a saving provision that gave the King sufficient grounds for asserting that exceptional circumstances permitted the taking of a levy without such assent. However it seems that the judges, given their comment about the lack of any earlier example of such a levy, did not regard the Forced Loan as falling within the category of 'ancient Aids and Prises due and accustomed'. The terms of 14 E.3, *Stat.*2. c.1 were similar, although there was now an express reference to parliament. They stated that no-one would:

[157] *Diary of Sir Richard Hutton*, p.65. It is not clear whether the word 'example' here was intended to mean simply another levy of this sort or to have the more technical meaning of 'precedent'.
[158] For one example see *State Trials*, cols.895-898 in the first day's argument of Oliver St.John, counsel for Hampden.
[159] *Statutes of the Realm*, vol.1, p.123. Just as Charles I, in a Proclamation issued on 7 October 1626, stated that the loan would not be used as a precedent, both Edward I and Edward III gave a similar assurances concerning earlier taxes within these statutes: see 25 E.1, c.5 and 14 E.3, *Stat.*2. c.1: see next footnote. On Charles's statement see Cust, *Forced Loan*, pp.48-9. This again pointed to the use of a known formula as part of the means of introducing such a tax.

> be from henceforth charged nor grieved to make Aid, or to sustain Charge, if it be not by the common assent of the Prelates, Earls, Barons, and other great Men, and Commons of our said Realm of England, and that in Parliament.[160]

Although there was no saving language the extent to which this was binding was put in doubt by the fact that Edward III had shortly afterwards annulled much of this statute on the basis that it infringed his prerogative.[161]

Unfortunately it has not been possible to locate the reference to 11 R.2, c.11 with certainty.[162] In relation to the missing reference to a statute of Richard III the most likely explanation is that this was intended to be a reference to 1 R.3, c.2 which was also cited and discussed at various points in the Ship Money Case.[163] This was entitled 'an Act to free the subjects from benevolences' and by its terms the King ordained 'that his subietts and the Comynalte of this his Roialme from hensfurth in nowise be charged by none suche Charge or imposicion called benevolence, nor by suche lyke charge'.[164] Again it stipulated that any such prior charge of this nature would not be regarded as a precedent. Given that the initial method adopted by the government to raise the revenue sought through the Forced Loan had been a benevolence, this reference seemed to bring the whole of this fiscal initiative into question. In addition the reference to this statutory provision had provoked the ire of James I sufficiently recently to be within the memory of both judges and royal ministers. During the course of 1615 the Jacobean government had pursued a policy of seeking revenue by asking wealthier subjects for 'voluntary' loans. The mayor of Marlborough had sought advice on this from a Wiltshire lawyer called Oliver St.John and had been told that the attempt to raise monies in this way, without parliamentary consent, contravened statute law. Proceedings were brought against him in the court of Star Chamber in 1616 for giving this advice. The court considered the provisions of 1 R.3, c.2

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[160] *Statutes of the Realm*, vol.1, p.290.

[161] W.M. Ormrod 'Edward III (1312-1377)', *ODNB*, (OUP., 2004), online edn.Jan. 2008.

[162] The relevant section in *Statutes of the Realm*, vol. 2, p.55 related to the suspension of a provision requiring the holding of assize sessions in the principal towns of each county and appears incorrect. An explanation is that the number eleven used in the citation was in fact the Roman numeral two making it a reference to 2 R.2. This was discussed several times in the Ship Money judgments of Croke and Finch: *State Trials*, 3:1150-1, 1233. They agreed this was not a statutory enactment but a reference to an entry on the Parliament Rolls setting out the speech of Lord Chancellor Richard Scrope to Richard II's third parliament convened at Westminster in April 1379. It concerned the government's need for money and included the candid statement that this could not be met other than by a levy on the commonalty which could not be made or granted without parliament. See C. Given-Wilson, *Parliament Rolls of Medieval England 1275-1504*, 16 vols. (London, 2005), vol. iii, p.56, col.a.

[163] See *State Trials*, 3:898-9, 1110-1.

[164] *Statutes of the Realm*, vol.2, p.478.

and concluded that it did not apply in this case. St.John was censured for his conduct.[165] That the judges were prepared to take the risk of stirring up the memory of that case indicated just how strongly they felt that the Forced Loan was unlawful. Subsequently this group of statutory authorities for the need for parliamentary assent for direct taxation would be subjected to rigorous royalist deconstruction but at this stage, whilst there was every expectation that parliament would be reconvened soon, the legal narrative of restraint on royal action within these statutory references still had traction.

Given the unfavourable response Coventry and Ley were advising the King not to press the judges on the question of legality, or state the reasons for their refusal, because these councillors sensed where this might lead.[166] Faced with the continuing demand to subscribe, the judges offered a form of wording which made it plain that they gave no view on the legality of the loan. It stated simply that the undersigned judges had lent the King such sums of money as they had been required, 'which we have done in our duties to his Majestie, and not for example to others'.[167] Hutton's account hinted that this form of words may have been chosen because it echoed the wording of the royal proclamation of 7 October 1626 relating to the Forced Loan.[168] If they thought that this might help, Coventry was sceptical and urged them to leave the last words out. Chief baron Walter and Hutton himself, who had delivered the form of words to Coventry, refused and indicated that getting this had been difficult enough. As Coventry had expected the suggested wording was met with great 'displeasure' and 'indignation' and it led to the dismissal of chief justice Crewe. Crewe was sent for by the King on 8 November 1626 and the King was 'discontent' with 'much that was unknown' passing between them. The chief justice returned in a 'sorowful' state of mind and was ordered to remain in his chambers. Two days later he was formally dismissed. Given the extent to which the King had invested his own authority and reputation, and those of his government, in the successful collection of the loan, having

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[165] See Brooks, *Law,Politics and Society*, p.145. This Oliver St.John was a distant older relative of the Oliver St.John who acted as counsel for Hampden in the Ship Money Case.
[166] Birch, *Court and Times of Charles the First*, vol.1, p.164 and Cust, *Forced Loan*, p.55.
[167] Ibid., p.66.
[168] Ibid., p.65. He stated that the wording 'fuit in nostre judgment plus safe et ad relation al un proclamation *dat. 7 Octobris*'. The proclamation contained the phrase that 'this course...shall not in any wise be drawne into example'. J.F. Larkin (ed.), *Stuart Royal Proclamations Volume II: Royal Proclamations of King Charles I, 1625-1646* (Oxford, 1983), pp.110-112.

closed off the possibility of receiving equivalent parliamentary subsidies, it had become increasingly likely that an example would be made of one or more of the judges for their opposition. Either immediately after this meeting with Crewe, or the next day, Charles made the remark that he would sweep the judicial bench, having learnt about the judges' resolution not to subscribe, and being 'very angry at it'.[169] To make matters worse the refusal to subscribe was now public knowledge which put the King under greater pressure. The judges' questioning of the purpose of the subscription, the implication in the new wording that this was a dubious attempt to gain their endorsement of the legality of the loan and their comments about the illegality of the loan before Coventry, Ley and other councillors, were more than sufficient to provoke the King's anger. However Joseph Mead's correspondent, Sir Martin Stuteville, in a letter dated 10 November 1626, raised the possibility that something even more explosive had passed between Crewe and the King, which the more discreet Hutton had not mentioned.

Stuteville remarked that when the judges were again required to subscribe Crewe, and chief baron Walter, 'sent the lord keeper to acquaint his majesty they were in a *praemunire*, as soon as they should have done it whereat his majesty was much displeased'.[170] To assert that such subscription could amount to *praemunire* was a repetition of the line of argument that had been used by Sir Edward Coke when he had argued that the terms of the statutory provisions of 27 E.3, *Stat.*2. c.1 and 16 R.2, c.5, sometimes referred to as the Statutes of Praemunire, applied to the Admiralty and Chancery courts, as well as the ecclesiastical courts and High Commission.[171] This controversial view achieved political prominence in the course of his dispute with the Lord Chancellor, Sir Thomas Egerton, over the grant of equitable relief, including injunctions, in cases which had been the subject of final judgement at common law. Coke, as chief justice of King's Bench, allowed an action to proceed on the Praemunire Statutes against Chancery officials for granting relief in such

[169] HMC *Buccleuch*, vol.iii, p.312.
[170] Birch, *Court and Times of Charles the First*, vol.1, p.168.
[171] *Statutes of the Realm*, vol.1, p. 329 and vol.ii, pp.84-6; Sir Edward Coke, *The Third Part of the Institutes of the Laws of England concerning High Treason and other Pleas of the Crown*,(1644), pp.119-27 and J.H.Baker, 'The Common Lawyers and the Chancery:1616', *The Irish Jurist*, 4 (1969), pp.368-92.

circumstances.[172] This dispute was the final step that resulted in the dismissal of Coke from the bench and the whole episode would have been well known, quite possibly to Charles himself, but if not, then certainly to Coventry and other members of the Privy Council. The continuing presence of Coke amongst the ranks of prominent parliamentary critics of government policy would have been a further reminder. The application of Coke's view of the ambit of Praemunire Statutes to the loan subscription dispute would have been on the basis that by requiring their subscription, the government was demanding a form of legal decision or judgement from the judges on a current legal matter outside the royal common law courts. To borrow from the wording of 27 E.3, *Stat.*2.c.1, the King and his councillors were asking an informal assembly of the judges 'to answer of Things, whereof the cognisance pertaineth to the King's Court'. If there was any substance to this then Stuteville's comment about royal displeasure was an understatement. There were few technical arguments more calculated to enrage the King than that he was unlawfully undermining his own courts, and the famous example of his father's dismissal of the eminent but troublesome Coke may have suggested an exemplary solution to this problem. This would also explain why, in common with James I, Charles refused to re-instate his recalcitrant chief justice if it was he who had raised the subject of *praemunire*.

Having vented his anger, the King soon came to his senses. In the immediate aftermath of Crewe's dismissal, chief baron Walter had the unenviable task of carrying on the discussion where Crewe had left off. Nothing had changed from a legal perspective, even if the stakes had been raised, and Walter stood his ground whilst 'il fuit tout que il poet d'aver satisfie le Roy'.[173] In this situation several commentators thought that more, or even all, of the judges would also be dismissed, and that Coventry might follow them.[174] However the King decided to hold back. In the case of Sir John Walter much has been be made of the difference between the terms of his patent, along with that of all of the other barons of the Exchequer, and that of the justices of King's Bench and Common Pleas. The latter, including Crewe, held their offices *durante bene placito* and so could be dismissed at the

[172] Brooks, *Law, Politics and Society*, pp.145-150.
[173] *Diary of Sir Richard Hutton*, p.66. See also Birch, *Court and Times of Charles the First*, vol.1, p.170 on Walter's refusal to budge.
[174] See HMC, *Buccleuch*,vol. iii, pp.312-3: letters dated 11 November and 14 November 1626, from different correspondents, to Edward Montagu.

King's pleasure, whereas the tenure of the Exchequer barons was *quamdiu bene se gesserit* thus making their dismissal subject to the establishment of some allegation of misconduct. This may have been a factor, but the more likely explanation was that, although the judges had already been mishandled, a purge of the bench threatened to turn this affair into a complete disaster. Whilst the refusal to subscribe was well known the details were not widely understood. Although damage had been done to the loan collection process by that refusal, and Crewe's dismissal, there was still some chance of containing this so long as the details of the judges' views remained obscure. That was the policy that Coventry pursued assiduously thereafter. The King had initially told Crewe to stay in his chamber but a period of a day and a half then elapsed between the tempestuous interview and the chief justice's receipt of his formal dismissal. It seems almost certain that Charles would have spoken at length with Coventry and other councillors within that time. The further dismissal of the chief baron of the Exchequer, the judge with the greatest expertise on legal matters relating to Crown revenues, would have rapidly focussed public attention on what the problem with the loan was that required such drastic action.[175] That would have pushed the question of its legality to the forefront of public scrutiny. Further judicial dismissals would have had the same effect. As things stood Crewe's dismissal could be presented as a personal dispute over his lack of appetite for promoting the loan rather than a substantive issue of legality.[176]

As tempers cooled, Coventry set about speaking to each of the judges separately in an effort to persuade them to agree to subscribe without the inclusion of the offending words at the end. Despite this none of the judges was persuaded to change his mind. Their behaviour did have some detrimental effects on the process of collecting the loan since it encouraged fifteen peers to refuse to pay or subscribe towards the end of November 1626.[177] However this never turned into a direct attack on its legality and the Crown was able to continue collection as best it could. All of this was consistent with

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[175] Whilst the Lord Treasurer was head of the Exchequer he was a political appointee whose technical expertise varied. On the law and practice of the Exchequer the chief baron had more expertise.

[176] If that was what Coventry hoped then it seems, from his perfunctory account of the judges' refusal to subscribe, that Rushworth, or his sources, accepted this at face value. His account stated simply that the purpose of the subscription by the judges, amongst others, 'was to be a pattern and leading Example to the whole Nation.' He went on to state that 'Sir Randolph Crew shewing no zeal for the advancing thereof, was then removed from his place of Lord Chief Justice' without further comment. Rushworth, vol.1, p.420.

[177] Cust, *Forced Loan*, p. 54.

the policy of Coventry, Ley and Manchester throughout the period from the inception of the Forced Loan in September 1626 up to and including the release of the remaining four defendants in the Five Knights' Case in January 1628. The issue of legality was carefully avoided.[178]

The significance of the behaviour of the judges in this episode was almost certainly not lost on the King and his advisers. The failure to establish the legality of the Forced Loan in advance led to disruption of the government's tactics for managing the process through the loan commissions and forced the government to pursue an awkward strategy of 'don't ask don't tell' in relation to the loan's legal status that affected all aspects of their response to resistance to collection of the loan. Faced with the potentially serious threat posed by the hearing of the Five Knights Case, Attorney-General Heath demonstrated a more astute understanding of how prior consultation with the judges could be managed in order to defend the collection process without having the underlying liability examined in court. According to two notes prepared by justice Whitelocke, for a speech to be delivered in the House of Lords on 14 April 1628, Heath had consulted in advance with the judges before the hearing. Based on this extra-judicial opinion Heath knew in advance how he could successfully resist the defence case because the judges had been unable to provide any authority that questioned the validity of a *habeas corpus* return that the prisoners had been imprisoned '*per speciale mandatum domini regis*'. He simply insisted that the defence had no authority for their contention that the prisoners were entitled to bail in such circumstances, because he knew that none existed. The judges had already confirmed this. In such circumstances there was no cause of commitment to be examined and the prisoners would be remitted on the assumption that it was a matter of state.[179] This indicated the beginning of more careful and systematic use of prior consultation, and extra-judicial opinions that would become a hall mark of the Crown law officers' relationship with the judges in the period from 1627 to 1640. This is not to say that earlier monarchs had never taken such extra-judicial opinions or that they were uncontroversial. Sir Edward Coke had opposed the giving of such an opinion in Peacham's Case in 1615 but he had effectively been alone on the bench in doing so. Even he had

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[178] Cust, *Forced Loan*, pp. 51-61.
[179] D.X.Powell, 'Sir James Whitelocke's extra-judicial advice to the crown in 1627', *Historical Journal*, 39 (1996), pp. 737-41.

difficulty in maintaining such opposition because of the judges' oath of office which obliged them to 'counsel the King in his business' and the existence of precedent for doing this.[180] Heath's consultation in 1627 avoided the pitfalls of the loan subscription fiasco because it was done confidentially, without requiring the judges to sign any public document, and thus fell more clearly within the terms of their oath.

Not all of the efforts of Heath and the King to co-opt the support of the judges were quite so successful, especially to begin with. The array of questions referred to earlier, that were posed to the judges throughout the period from late 1627 until April 1629, contained many that were too broad or imprecise. These elicited responses that were often unhelpful. Sometimes these made it clear that no sensible answer could be given without more precise facts, or that there was some impropriety that prevented them from giving an answer. The answers were often bland or evasive because the questions themselves too often turned into political statements rather than focussed queries that might elicit precise legal answers.[181] As an exercise in political management such questions were too often virtually useless. However the Crown would get better at taking such opinions as it improved its political use of the judges and their expertise and prestige.

Distraint of Knighthood: the Court of Exchequer and *R v. Stephens*

Although the impetus for the collection of fines levied for the failure to respond to the royal summons to knighthood did not come until the autumn of 1629, the origins of this policy went back earlier than the Forced Loan.[182] In December 1625, as one of a number of legal matters requiring attention at the commencement of a new monarch's reign, Lord Keeper Coventry had sent the King, for signature, a warrant 'to sende out writs for summoning Gentlemen of lyvelyhood to come and take the degree of

[180] Ibid., p.740.
[181] See *Autobiography of Sir John Bramston*, p.51 for a classic example of the former in questions 8 and 9 with their respective answers. Question 4 on p.52 received a distinctly evasive answer and the judges' answer to question 6 on p.53 identified how the questions had become circular and repetitive as well as raising a potential conflict of interest for the judges. Question 8 on pp.53-4 again prompted the judges to decline to answer because the issue may come before them in court.
[182] The best discussion of this policy remains H.H. Leonard, 'Distraint of Knighthood: the last phase, 1625-1641', *History*, 63 (1978), pp. 23-77.

knighthood'.[183] From the tone of his letter to Edward Conway, first Viscount Conway and secretary of state, enclosing the warrant this summons was initially seen as part of the procedure surrounding the imminent coronation of the new king. The deputies to the clerk of the crown, Sir Thomas Edmondes, had advised Coventry of this practice and there was no hint that this might function as a means of raising revenue. It was a matter of such political insignificance that the punctilious Charles initially refused to sign the warrant.[184] At the time of his father's coronation in 1603 these writs had been issued to the various sheriffs throughout the country. They had made the required proclamation and made returns to Chancery with the names of individuals who they believed fulfilled the necessary wealth criteria to qualify for knighthood. No further action was taken and, in particular, there was no attempt to impose fines for failure to respond.[185]

After his appointment as Chancellor of the Exchequer in 1606, mounting pressure on the royal purse led Sir Julius Caesar, assisted by Sir John Borough, to research a range of past precedents for Crown revenue sources that did not require parliamentary sanction. Distraint for fines incurred for failing to respond to a knighthood summons had emerged as just such a source from various precedents.[186] Borough, who Caesar had asked to research the revenue sources of the Crown under Edward I, was the keeper of ancient records at the Tower of London. He was strongly connected with Sir Francis Bacon both as a member of his household and working for him in the Lord Chancellor's office.[187] The research of Caesar and Borough provided an early example of a trend that would be developed to a greater level of legal sophistication under Charles I, namely the political use of historical and legal research in the development and justification of government policy. Their work still retained an antiquarian flavour in the sense that it uncovered from the past royal revenue raising expedients without building a legal case for the defence of such extra-parliamentary powers. However Caesar and Borough provided a continuity of resource and information for the later legal development of such expedients by eminent common lawyers when they became Crown law officers. Caesar remained a

[183] TNA SP16/12/89.
[184] TNA SP14/214/f.123v, item 30.
[185] Leonard, 'Distraint of Knighthood', p. 23.
[186] Ibid., p.24 and A. Wijffels, 'Caesar, Sir Julius (*bap.*1558, *d.*1636), *ODNB*, (OUP., 2004), online edn. Jan. 2008.
[187] S.A. Baron, 'Borough, Sir John (*d.*1643), *ODNB*, (OUP., 2004), online edn. May 2011.

privy councillor, from 1607, and was the Master of the Rolls, from 1614, until his death in April 1636.[188] Borough, who died in October 1643, was consulted regularly on matters involving historical precedents including coat and conduct money and ship money.[189]

Whilst Charles I was eventually persuaded to sign the warrant authorising the issuing of the writs to the sheriffs relating to the knighthood summons, no action for the imposition of fines, and distraint to enforce them, was taken until November 1627, at much the same time as the proceedings relating to the remaining four defendants in the Five Knights' Case. Then the various lists of names of those eligible for knighthood, which had been returned by the county sheriffs, were sent out of Chancery into the court of Exchequer with a request for action. The Exchequer responded by requiring the sheriffs to update the returns made around January 1626 because of the lapse of time. On 24 May 1628 new writs were issued to the sheriffs authorising them to compel the attendance of all of those named in the revised lists. The process had been refreshed to facilitate the imposition of fines. On 29 May 1628 the first commissioners for settling and collecting fines for failing to comply with an applicable summons to knighthood were appointed. Having done this no further steps were taken to enforce collection of fines until late in 1629.

The original military purpose of the summons to knighthood had been replaced with a fiscal one by at least the mid-fifteenth century.[190] Under Charles I the role of the commissions was vital to the use of the knighthood summons as a means of revenue extraction and the operation of the commissions was to be a major source of criticism of the conduct of the Exchequer barons. An enforcement warrant dated 8 February 1630, was directed to the Lord Keeper, the Lord Treasurer, the Lord President and the Chancellor of the Exchequer. It recited that the King had issued writs to the sheriffs of all the counties in the kingdom 'to summon all such as had 40£ land or rent by the yeare that at a certain day...they should prepare themselves to take upon them the order of Knighthood'. This powerful group of privy councillors then declared that:

[188] 'Caesar, Sir Julius', *ODNB*. Although Caesar was called to the bench of the Inner Temple and had held the post of Master of Chancery he remained a civil lawyer and did not practise outside the Church or Admiralty courts.
[189] 'Borough, Sir John', *ODNB*.
[190] Leonard, 'Distraint of Knighthood', p.23.

> his Majestie hath awarded his Comission under the Greate Seale of England to us and to others to treate and compound with all those who then made defaulte as well for their fines as such theire contempt as for respite to take upon them the said order.[191]

The warrant makes it clear that this commission was to be used from the beginning of the enforcement process as the focal point for calling defaulters to account, determining the amount of any fine and then negotiating any mitigation of the fine. The use of such commissions in relation to knighthood fines was supported by earlier practice under Queen Mary and before which had been unearthed by Caesar, and recommended in further research in 1629 by Richard Wright in Exchequer records in the Tower.[192] The important point was that the Exchequer court had been relegated to the role of government debt collector rather than arbiter of legal liability in this process. That had been done on the express authority of a royal warrant issued on the basis of precedent.

One of the main purposes of the commissions was to overcome what the government saw as the main legal obstacle to liability to pay any fine which was the identification of those who satisfied the property condition of knighthood. They did this by providing, at Wright's suggestion, the commissioners with the Exchequer records relating to the last subsidy as a reference point in a way that echoed the use of the same criterion for assessing the amount due in respect of the Forced Loan. The commissioners were expected to examine those who they suspected of satisfying the property condition on oath.[193] As a further refinement the government had established local commissions for each county by 16 June 1630 in order to address further concerns about the ability to establish satisfaction of the property condition arising from inaccuracies in the subsidy records.[194] In covering letters dated 4 August 1630 to Sir Henry Mildmay and Sir Thomas Fanshaw, relating to the commission for Essex, Charles portrayed this use of county commissions as a means of avoiding the inconvenience and risks of travel to London for those required to accept knighthood. But after noting that the county commissioners were to be provided with the Exchequer subsidy records to assist in

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[191] *APC* 1629-1630, p.272.

[192] Leonard, 'Distraint of Knighthood', pp.23 fn. 3, 24; TNA SP16/155/49. That was the conclusion reached by Leonard based on both his own doctoral research on knighthood under the Tudors and the authority of the documents reviewed and collected by Caesar. For the use of commissions in this manner under Queen Mary see BL MS Lansdowne 152.

[193] TNA SP16/155/49.

[194] Leonard, 'Distraint of Knighthood', pp.25-6 and Rushworth, vol.2, p.70.

determining local liabilities he commented that the original commissioners 'might easily mistake the true value of men, which you by your better knowledge of them may be more truely informed of'.[195] This made it clear that they were expected to use their local knowledge to make up deficiencies in the records. The commission regime had thus thoroughly supplanted the discretion of the local sheriff in identifying those who were liable as well as the Exchequer.

Attorney-General Heath, Lord Treasurer Weston, and Chancellor of the Exchequer, Sir Francis Cottington, had prepared the legal defence of knighthood fines rather better than their predecessors had done for the Forced Loan.[196] In his letter to Mildmay and Fanshaw the King also added, as encouragement to the Essex commissioners, that 'our right to these fines by law is now clear as appears by publick declaration of the Barons of the Exchequer and by Councell learned in the law'.[197] Since by this time Heath was prone to taking extra-judicial opinions it is possible that he had obtained one on this issue, although there is no direct evidence of this. But when the most serious legal attack on this policy was commenced by Edward Stephens, and a Mr Walter, the government appeared to be confident of the strength of its position. In a letter dated 3 February 1631 to Edward Montagu, his brother, the earl of Manchester dismissively remarked that:

> This term some have troubled themselves in putting in of dilatory plea, a non-summons, and some exceptions to the writ, which are idle, there being no plea to be allowed but that they had not lands of 40£ value at that time. Yet it is noted that as in the King's Bench heretofore, so now in the Exchequer, men of the same humour make much ado and long arguments, by some of the same counsel, to little purpose.[198]

That was a cogent summary, from a former chief justice of the King's Bench, of how Stephens' challenge would be resolved and was written before the final judgements were delivered.[199] This was in marked contrast to the legal balancing act that Coventry, Manchester and Heath had to perform in relation to the Forced Loan.

[195] TNA SP16/172/16, f.24r.
[196] Weston had been appointed Lord Treasurer on 15 July 1628 and Cottington had been appointed Chancellor of the Exchequer on 20 March 1629.
[197] TNA SP16/172/16, f.24r.
[198] HMC *Buccleuch*, vol.i, p.278. The reference to King's Bench was to the Five Knights Case.
[199] Manchester had succeeded Sir Edward Coke as chief justice of the court of King's Bench in November 1616. See B. Quintrell, 'Montagu, Henry, first earl of Manchester (*b.*1564, *d.* 1642)', *ODNB*, OUP., 2004), online edn. Jan. 2008.

The implications of the arguments mounted on behalf of Stephens had come to the notice of the Exchequer barons, and thus to the government, by November 1630 when baron Denham had stopped the Exchequer enforcement proceedings against Stephens so that his defence could be dealt with in a full court hearing.[200] That hearing commenced on 1 February 1631 and it continued for about a week.[201] Accordingly it was less than halfway through when Manchester had made his comments to his brother. Arrayed against the government was an impressive group of lawyers. Stephens himself was represented by Sir Edward Littleton and Robert Mason. William Prynne acted for Walter. The subsequent trajectories of the legal careers of Littleton and Prynne would represent the polar opposites of how politics affected such careers under Charles I. Mason's path was to be more modest, being cut short by his early death in 1636, but it more closely resembled that of Littleton. By 1631 Littleton was one of the leading practitioners at the English bar and it was not surprising that the case that he made for Stephens attracted the attention of both the government and the Exchequer barons.[202] The arguments of Mason and Prynne, although useful, were only embellishments of the central points made by Littleton.

Littleton argued that, in relation to Edward Stephens, the sheriff of Gloucestershire had failed to comply with the terms of the original Chancery writ, in January 1626, pursuant to the royal warrant that Coventry had so much difficulty getting Charles to sign. That writ instructed the sheriff to make a public proclamation of the coronation summons to knighthood of all men in his county who satisfied the property requirement of ownership of land, or land rent, of a value in excess of forty pounds per annum. It then required the sheriff to include the names of those who satisfied that requirement, in the short written account contained in his return to Chancery of his actions taken in accordance with the original writ, and finally to issue summonses to them individually.[203] The nature of the relationship

[200] E 178/7154, f.264.
[201] Leonard, 'Distraint of Knighthood', p. 29.
[202] He was a direct descendant of the fifteenth century judge and author of the seminal text of early modern English property law 'On Tenures', Sir Thomas Littleton. See 'Littleton, Edward, Baron Littleton', *ODNB*.
[203] For a Jacobean example of such a writ to the sheriffs and an example of a return see BL MS Harley 38, f.156 and BL MS Additional 38139, f.77. Since there appears to be no extant copy of the writ in the Stephens case this analysis is based on a reading of these Jacobean examples combined with the discussion of the wording of the writ relating to Stephens in the accounts found in LI MS Maynard 59, p.113; Bodleian MS Tanner 288, ff.90-129; BL MS Additional 12511, ff.2-31 and BL MS Additional 11764, ff.53-98. The Jacobean writ indicated how the various parts fitted together since it included all of the elements that were discussed in relation to

between these elements of the writ was the core of Littleton's argument which comprised two parts. The first, and most important, centred on the question of whether Stephens had received proper notice of his obligation to respond to the knighthood summons. If he had not, because the sheriff had not fully performed his duties under the writ, then Stephens was not guilty of any default or contempt for which he could be fined. The writ directed the sheriff to announce publicly the royal requirement that those who satisfied the stipulated property requirement must attend the King at his coronation to receive the order of knighthood. This proclamation was usually made at the county court, a form of county assembly that was the distant descendant of the old shire moot. This institution had been, since the Middle Ages, effectively shorn of its original functions as a court but it still retained significance as the forum for dissemination of certain important public legal announcements, such as those relating to parliamentary elections and the outlawry of individuals.[204]

Littleton made much of the precise Latin wording of the writ and, in particular, the form of the direction to the sheriff to make the proclamation. The wording was '*proclamari facias quod disponerent*' followed by the description of those to whom this was directed, being those who fulfilled the property criteria being persons '*qui 40 libros habent et per tres annos sic habuerunt*'. The writ next required the sheriff to certify the names of those who satisfied this condition in his return to the writ into Chancery. The writ wording was '*de nominibus illos qui etc...in cancellaria certificas*'. Then the sheriff was required to summons this category of persons using good summoners, the Latin wording being '*et summone per bonos summonitores*'.[205] The names of Stephens, and his co-defendant Walter, had not been returned by the sheriff into Chancery and they had not received individual summonses in accordance with the third limb of the writ. Littleton argued that all three parts of the writ must be fulfilled for his client to have received proper notice of his liability and to be able to comply with its requirements. He stressed the interdependence of the writ provisions by pointing out that the proclamation requirement used the verb *disponere*, which he portrayed as placing

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Stephens and Walter, and it was issued in connection with the impending coronation. It is likely that it was in a similar form to the writ issued under Charles I since Heath mentioned the equivalent writ under James I when responding to Littleton.

[204] Baker, *Introduction to English Legal History*, pp.23-4 and 27.

[205] The exact terms of these phrases in the original writ were set out in the judgement of chief baron Davenport: see BL MS Additional 12511, f.28.

oneself in a state of mental readiness in the sense of receiving notice of the obligation, and the subsequent requirement of the individual summons using the verb *accedere*, which amounted to a demand for action by attending as directed. To be valid grounds for fining Stephens he must know of his summons to knighthood and then receive the specific summons to attend at a specified time and place. Littleton cited numerous examples from earlier writs, going back to the reign of Henry III, the collection of which must have required painstaking research. That was in keeping with Littleton's reputation for such expertise.[206] The point was to show that the form of these writs was remarkably variable, as were the levels of the property condition. Such variation indicated that these writs were not purely formulaic. Each provision was there for a purpose and should be acted upon.

As part of the procedural renewal in May 1628, the Exchequer issued writs of *distringas* to the various sheriffs. These were a form of writ comprised within that part of the judicial process which was concerned with bringing persons before the courts and was termed 'mesne process'.[207] They issued out of the court where the matter was actually pending rather than the source of the originating writ. The latter had come from Chancery but the matter was now dealt with by the Exchequer court because it concerned the collection of a fine. The *distringas* writs directed sheriffs to seize goods and chattels of the defendants to compel them to come before the Exchequer court and Stephens had finally been named in the return by the sheriff of Gloucester to a *distringas* of 24 May 1628. The second part of Littleton's argument dealt with issues raised by that *distringas*. He argued that, although the *distringas* referred to the originating writ of January 1626, and thus appeared to be a form of individual summons directed to his client, this did not cure the failure of the sheriff to comply with the requirements of the originating writ because the *distringas* did not include any new summons to knighthood. Mesne process was designed to secure the practical objective of getting parties before the court. It did not rectify the flaw in the original suit. In particular he pointed out that the *distringas* had used exactly the same form of words relating to the property condition of liability as had been used in the originating writ. Thus the continued use of *habent* in that formula, being the present tense

[206] In the account of Littleton's speech in BL MS Additional 12511 there were forty two prior knighthood writs cited and seven cases. A substantial amount of time and money had been expended to defend this case.
[207] Baker, *Introduction to English Legal History*, pp. 64-6.

of *habeo*, meant that the requirement for the period of three years prior entitlement to the requisite property ran back from the date of the *distringas* (i.e. May 1628) not from January 1626. The return to the *distringas* therefore had not established that Stephens had ever complied with the key property condition of the originating writ and thus was not liable for non-compliance with it.[208]

These procedural arguments were rigorous and detailed. If successful they would have completely disrupted and, at least temporarily, halted the government's efforts to levy and collect knighthood fines. Anyone who had not received an individual summons in addition to the proclamation would not be liable. If they had already compounded with commissioners they would be especially irritated and seek to get their money back. It was a fundamental weakness of the combination of original writ and mesne process that they gave any sheriff faced by resistance the ability and incentive to do nothing. Establishing compliance with the property criteria was problematic in relation to everyone other than the most overtly wealthy landowners. A sheriff's judgement on this issue was hard to monitor. It was easy for him to state that he could not find a defendant's property to distrain against, or even their person to detain. This was further exacerbated by the fact that the sheriff could be liable to pay damages for any mistakes that he made and that he might have to bear any expenses himself.[209] He also had to contend with the political power and influence of anyone who he proceeded against within the community in which he continued to live after his annual tenure of the shrievalty expired. This was why the commissions were used. The arguments of Littleton and his colleagues would disrupt those commissions as their proceedings faced disputes over the validity or receipt of individual summonses, in addition to arguments about satisfaction of the property condition. It was a practical disaster for this revenue policy. That, and the thoroughness and plausibility of Littleton's arguments, had great appeal to those who were politically alarmed by the potential viability of taxation policies based on prerogative powers and those who, more prosaically, were reluctant to pay another tax. However none of this demonstrated that this challenge was legally correct. The political problem for the Exchequer barons was that it was, almost certainly, not.

[208] BL MS Additional 12511, ff. 11v-12r and 13r.
[209] Baker, *Introduction to English Legal History*, p.65.

The arguments made by counsel for Stephens and Walter had serious weaknesses. First, and foremost, they had to admit that the King was entitled to issue knighthood summonses and levy fines for failure to respond to them. Littleton conceded that:

> I knowe... it is an ancient and undoubted right of the Crowne of England to comande the subiecte of this realme to take upon him the order of knighthood and by consequence for refusal thereof or their contempt in not appearing to the said writes to pay fynes.[210]

He was also aware that this power to require the assumption of knighthood was not solely connected to military requirements since it was also sometimes necessary for the trial of issues on a writ of right. The nature of the prerogative right meant, as Attorney-General Heath pointed out, that, if necessary, the King could rectify the supposed defect in all of the writs by issuing another knighthood summons or repeating the original one. It is clear from Wright's memorandum that Heath had checked this well in advance of the challenge mounted by Stephens.[211] Thus Stephens' case was entirely procedural and there was a technical weakness at the core of that challenge. Baron Denham and chief baron Davenport used it to demolish the arguments mounted on behalf of Stephens and Walter.[212]

For all of their linguistic scrutiny of the terms of the original writ of January 1626, none of Littleton, Mason or Prynne could clearly establish the inter-dependency of the clauses of that writ relating to the key instructions to the sheriff concerning the proclamation of the knighthood summons, the return to Chancery and the separate requirement for individual summonses. The surviving text of the equivalent Jacobean writ provides a likely explanation. In each of the equivalent clauses of that writ the category of persons towards whom the sheriff was required to direct the relevant action was separately spelt out in full as being those who satisfied the forty pound per annum property requirement. The language of that requirement was repeated, almost *verbatim*, each time. Accordingly the sheriff was directed to proclaim the knighthood summons to those who satisfied that requirement, to return the names of those who satisfied that requirement, repeated in full again, and then to issue summonses to those who satisfied it, set out in full yet again. The laborious repetition of this formula

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[210] LI MS Maynard 59, f.255.
[211] TNA SP16/155/49.
[212] Joseph Mead reported a split in public perception of Littleton's efforts. Whilst many thought they were valid some felt that his concession on the validity of the prerogative power would be used by Heath to overcome Littleton's arguments. See Birch, *Court and Times of Charles I*, vol.2, p.96.

might be due to conservative legal drafting within Chancery but it undermined the force of Littleton and Mason's close textual arguments about the language of the writ because each of these three clauses appeared to be self- contained and thus stand alone as independent obligations. If the writ had stated the terms of this category of persons in relation to the knighthood summons and then required the sheriff to simply return the names of that group and issue individual summonses to them, in each case by cross reference back to that initial direction to summons, then it would have been easier to argue effectively that the failure to comply with all three provisions absolved those not returned, or in receipt of an individual summons, from compliance with the initial proclamation. At best, from the defendants' perspective, it meant that the language of the writ could not provide unambiguous support for their arguments. Given important further points of construction and Exchequer practice raised in the barons' judgements, that ambiguity was fatal to Stephens' case.

The three barons that gave judgement in this case were Sir Thomas Trevor, Sir John Denham, and the chief baron, Sir Humphrey Davenport, in that order being the inverse of their seniority. The only other baron, Sir George Vernon was ill and did not participate.[213] Baron Trevor's opening judgment has attracted the most comment from historians, not least because of its clearly political tone and relative absence of legal analysis.[214] However his comments did reveal some of the political anxieties of the judges in 1631, and in particular their sensitivity to parliamentary criticism. Leonard was surely right to see this as a response to the attacks made on the conduct of the Exchequer court in recent parliaments. The involvement of Stephens' counsel in defending prominent parliamentary critics of government revenue policies underlined the apparent threat that the judges felt from that quarter.[215] Trevor sought to appease such critics in terms that were as much political as legal. He began by denying that the levying of knighthood fines was simply a form of tax stating that 'this is not to make

[213] Hutton's brief account of the case stated that it was Trevor who was absent through illness: see *Diary of Sir Richard Hutton*, p.84. The five extant detailed accounts of the case in LI MS Maynard 59, Bodleian MS Tanner 288, BL MS Yelverton 111, BL MS Additional 11764 and BL MS Additional 12511 all contain accounts of Trevor's judgement so this was incorrect.
[214] Leonard, 'Distraint of Knighthood', pp.30-1 and Brooks, *Law, Politics and Society*, p.195. His brief judgement in the Ship Money case showed a similar reluctance to move beyond legal generalities in a way that tended to confirm the view of the antiquarian William Dugdale that Trevor was not an impressive lawyer. See E.I. Carlyle, 'Trevor, Sir Thomas (1573-1656)', rev. W.H. Bryson, *ODNB*, (OUP, 2004).
[215] Littleton had represented John Selden and John Rolle. See further comment on the significance of this in Chapter 4. Prynne would have been known as a politically controversial figure for his early pamphlets.

antient revenewes to the Crown but it is an antient right to the Crowne to call men to be made knights and for not coming to cause them to pay fines'.[216] Since Littleton had conceded that the Crown had this power as a matter of law such a comment was of dubious legal relevance. Its only purpose can have been to address political concerns. In apparent the contradiction of his assertion that this was not a revenue device, Trevor then developed his argument into a defence of the use of prerogative rights to raise revenue. He asserted that:

> the strictest men of the parliament will confesse it that the king ought to be maintained...and I will ressemble this case to the lawe of the forrest in which the king hath a prerogative for his revenue, for a private man cannot maintaine his charge without his revenue much less can the king.[217]

He then connected this theme to complaints in parliament about the billeting of soldiers suggesting that the raising of monies through prerogative powers of this nature had helped to address that problem, by providing the means to pay soldiers, and finally connected this political point to the right to summons to knighthood. He concluded with the plea that 'noe gent should thinke themselves champions for the countrie for taking anie right from the king', a revealing phraseology that indicated the sort of rhetoric adopted by those MPs who had criticised Exchequer court conduct.[218] It is hard to imagine that the confusing mixture of political justification with the barest of legal argument in Trevor's judgement convinced anyone except those seeking evidence of political subservience amongst the judiciary. Although the tone of Trevor's argument was more an appeal for parliamentary critics to be reasonable than a serious defence of royal powers his simplistic comments were likely to have been perceived as an example of what Clarendon termed 'apophthegms of state urged as elements of the law' to the jaundiced eye of government critics.[219] Fortunately for the Crown there were much stronger legal arguments for the invalidity of Stephens's case and those would be set out in the judgements of Denham and Davenport.

Denham's judgement was a complete contrast to Trevor's. It was disdainful of Littleton's arguments and delivered in a tone of barely concealed annoyance. It offered a trenchant legal analysis of the

[216] Bodleian MS Tanner 288, f.120v.
[217] LI MS Maynard 59, f.279r.
[218] Ibid.
[219] Clarendon, *History of the Rebellion*, vol.I, p.87.

issues that attacked all of the points raised on behalf of the defendants. Whilst Leonard was correct in his observation that Denham was not known for subservience to government policy, it is hard to agree with his apparent attempt to bracket Denham's judgement with that of Trevor as an essentially defensive response to parliamentary attacks.[220] That Denham was fully aware of the same political pressures as Trevor is evident from his remark, clearly addressed to parliamentary critics, that 'you taxe us with injustice'.[221] However his response was not defensive. He asserted that the procedural objections raised on behalf of Stephens were based on a fundamental misconception of the nature of the originating writs to the sheriffs and the related Exchequer enforcement procedure. This was symptomatic of a basic, and possibly deliberate, misunderstanding of the role of the Exchequer court that underlay much political criticism of its behaviour in this period.

His argument was set out in his analysis of the distinction between the function of the *praecipe* writ, which was the form of writ that was central to any demand by a plaintiff for the assertion of a legal right, as opposed to the redressing of a wrong done to a plaintiff. The *praecipe* was one of the oldest and most formal medieval writs and its operation lay at the centre of the historical development of common law rights, particularly in relation to property.[222] Like the originating writ of summons to knighthood the *praecipe* writ was an instruction to a sheriff directing him to command a defendant to do, or permit, something required by a plaintiff or else appear before a court to explain why not. Referring to the knighthood writ, Denham observed that:

> this writt is not to bee compared to an original *precipe*, but every writt hath his reason, in an original *precipe* there ought to bee summons…because the partie ought to come and answer…here the Sheriff doth not knowe what estates men have nor cannot and therefore he makes proclamacon that all who have soe much p[er] ann[um] shall come in. Summons and proclamacon are *synonima* they are all one as a summons to parliament is by proclamacon.[223]

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[220]As examples of independent behaviour Leonard referred to Denham's dismissal from the northern circuit, at Wentworth's behest, for enforcing the law against recusants in full contrary to instructions issued to the Council in the North, and Denham's decision in favour of Hampden in the Ship Money Case. He might have added Denham's support of chief justice Richardson's ill-fated attempt to suppress church ales in Somerset. See Leonard, 'Distraint of Knighthood', pp.30-1 and W.Prest, 'Denham, Sir John (1559-1639)', *ODNB*, (OUP., 2004), online edn. Jan. 2008.
[221] BL MS Additional 11764, f.90v.
[222] Baker, *Introduction to English Legal History*, pp.57-9.
[223] LI MS Maynard 59, f.282v.

Littleton's argument about the variety in the form of the knighthood writ cut both ways. It was 'noe original writt' but was a royal summons that could take whatever form the King required. The knighthood writ bestowed an honour by general proclamation rather than requiring the enforcement of a legal right in relation to land or other property. As such the terms of the writ were matters of grace granted by the King and could not be construed against him. Summing this up Denham noted that the knighthood writ was 'not to demand anything of them but obedience and that to take an honour'.[224] Just like a summons to parliament the obligation to obey a knighthood summons granted privileges to those to whom it applied and imposed duties to act simply by reason of the original summons. Denham expressed his exasperation with Littleton and his colleagues in forceful terms exclaiming 'you are not in a grammar schoole but in a courte of justice open for everyone but not for matters of forme onely'.[225] This did not sound like a judge who felt any doubt about his understanding of the law but instead reflected frustration at the use of clever, but fundamentally wrong, arguments to thwart the valid operation of the Exchequer.

He also drew important distinctions between the practice of the Exchequer court and that of the other common law courts. Up until the second half of the sixteenth century Exchequer barons had been drawn from the remembrancers and other officers of the Exchequer versed in the accounting and debt collection practices referred to as 'the course of the Exchequer'. By 1579 all of the Exchequer barons, with the exception of holders of the inferior office of cursitor baron, were serjeants at law and were thus members of Serjeants Inn with the necessary experience to be able to try matters from Kings Bench and Common Pleas whilst on circuit. Despite this increase in practical interaction amongst the judges and the steady, if limited, increase in the use of the Exchequer writ of *quominus* and the Exchequer *subpoena* by a wider range of plaintiffs, the practices of the Exchequer remained a distinct and self-contained body of procedural rules that was legally binding yet distinct from the common law. They were practice rules rather than a separate system of law which existed in a semi-detached way, outside the common law within the syncretistic legal system. There was nothing closely analogous elsewhere but insofar as it governed the systematic operation of a special aspect of royal

[224] LI MS Maynard 59, ff. 281v-282v and Bodleian MS Tanner 288, f.125r.
[225] LI MS Maynard 59, f.283v.

prerogative power it bore some resemblance to the procedural rules of such prerogative courts as Star Chamber or the Council in the North Parts. Indeed there was medieval authority for the view that the Exchequer court was not a common law court at all.[226] Denham's irritation derived from the attempt by a lawyer such as Littleton, who fully understood Exchequer procedures because he had practised in its court, to override them by reference to rules relating to the operation of common law writs.[227] It was no more correct to apply such rules to Exchequer practice than it would have been to apply them to Chancery or Star Chamber. With the aftermath of the dissolution of the 1629 parliament still rumbling on, Denham and his colleagues may be excused for feeling that experienced lawyers, who should have known better, had been employed to mount specious legal arguments on behalf of opponents of government policies that were deliberately calculated to turn the Exchequer barons into political scapegoats.

Faced with this Denham robustly asserted the primacy of Exchequer practice in the context of collecting fines for failure to comply with a knighthood summons. Raising a point that would be developed by chief baron Davenport, he argued that the undisputed validity of the originating writ in Chancery gave the Exchequer all the jurisdiction that it needed to send for Stephens, and any other defendant, by writ of *mittimus* and fine him for failing to comply with a valid royal command. Then, warming to his theme, he complained that 'you rent the writt in peeces, the proclamacon from the summons according to the course of the common lawe but see the records of this court and you shall see more'.[228] In this vein he roundly stated 'this courte is a courte of the kings revenue and wee ought to send out proc[es] to distraine for the kings revenue. These writs are not in the nature of writs of the common lawe'.[229] Unfortunately for the Exchequer barons debates, in parliament, both in the late 1620s and in 1640, indicated little understanding of the admittedly complex and arcane practices of the Exchequer.[230] Accordingly such remarks were treated with little sympathy by the government's

[226] Baker, *Introduction to English Legal History*, pp.48-9.
[227] Littleton was an established practitioner in the Exchequer court: Brooks, *Law, Politics and Society*, p.194. This would not have been lost on Denham.
[228] Bodleian MS Tanner 288, f. 124v.
[229] LI Maynard MS 59, f.284r.
[230] For a brief overview of what was essentially a body of auditing and accounting methods comprised within Exchequer practice at this time see G.E.Aylmer, *The King's Servants: the Civil Service of Charles I 1625-1642* (London, revised edn. 1974), pp. 32-9.

critics and accusations were made based on inadequate understanding of such practices. In reality Denham's judgement was an accurate statement of their validity within the contemporary legal system.

Whilst Denham was assertive, chief baron Davenport was technically accomplished and explanatory without making any concession to Littleton's arguments. Indeed he opened his judgement with the uncompromising statement that the defendant's plea was 'not good but merely fryvolous and illegal both in forme and matter'.[231] However he too was aware of the potential political ramifications of the case and sought to deal with it by careful exposition. As he put it, when referring to the additional clause relating to a specific summons that was so crucial to Littleton's case,'the waight and noyse of this...inforces mee to be long to give everyone satisfaccon'.[232] He pointed out that this clause had not been introduced into any extant originating knighthood writ until the middle of the reign of Henry VII, despite the large number of earlier precedents that had been cited, and there had been a specific reason for its inclusion. In that case there had been a difference between the time and place for attendance by those summonsed by the proclamation and those who were to receive the specific summons. As further support for this he noted that not all subsequent knighthood summons had followed that writ. Having thus distinguished between that writ and the present one he went on to ask rhetorically why, if the form of writ had previously been perfectly valid without this additional provision, it should now have the effect of altering the law to deprive the King of a right which everyone acknowledged that he had.[233]

Having deconstructed the details of Stephens' defence in terms that supported Denham's judgement the chief baron added a significant jurisdictional point. The defendants before him, and their counsel, were not only wrong in their construction of the writ but were attempting to defend themselves on the wrong ground and in the wrong court. The only real defence was, as Manchester had observed to his brother, that a person did not fulfil the property criteria and the correct place to make that was in the place from which the originating writ emanated, namely Chancery. As Davenport put it, 'when the

[231] BL MS Additional 12511, f.28r.
[232] LI MS Maynard 59, f.286v.
[233] LI MS Maynard 59, fos. 285v-287r.

Kinge tells you when he wilbe crowned you goe into the Chancery and enter your appearance there…all ought to bee found in Chancery…who ought to bee knights either in respect of there land or age and the King shall judge of that'.[234] This complex jurisdictional situation, like the esoteric status of Exchequer procedure, illustrated the problems faced by the barons when defending themselves from political attack. There seems little reason to doubt that Davenport's analysis was correct. Given that the originating writ was a form of general royal command it was logical that the correct place in which to decide whether it applied to an individual was the forum from which that command came and to which the various county sheriffs were required to make their returns. The involvement of the Exchequer court was simply to act as the enforcer and collector of fines from those who should have responded to such command and failed to do so. The Exchequer did not even fix the amount of the fines since that was done on royal warrant by the loan commissions. The Exchequer court and its rules stood outside the whole question of legal liability for knighthood fines and the determination of their quantum. Given the complexity of interaction between the different courts and political entities that were involved, and the respective bodies of law and procedure that they administered, it was hardly surprising to find that the barons' critics either did not understand the legal validity of their decisions, or chose to ignore it safe in the knowledge that few would comprehend the true position. But that did not make accusations of misconduct or political bias amongst the Exchequer barons accurate. Whatever political view one took of the government's use of the summons to knighthood as a means of raising revenue, the statements of law in the judgements of Denham and Davenport in *R v.Stephens*, and in the arguments made by Attorney-General Heath, were almost certainly correct despite Littleton's ingenuity.

The Exchequer Barons and the Parliamentary Attack

Such inconvenient complexity did not deter parliamentary critics of the Exchequer barons in the Long Parliament such as Edward Hyde, or John Pym. Of the two it was Hyde, the practising lawyer, who

[234] BL MS Additional 12511, f.30v.

was most vociferous in his attack from a legal perspective, yet his critique appeared to show remarkably little understanding of the legal basis of the barons' decisions. Amongst the matters that attracted his attention were the Exchequer court proceedings for distraint of knighthood fines brought against James Maleverer, Thomas Moyser and others which formed one of the accusations against chief baron Davenport and baron Trevor.[235] Maleverer was resident in Yorkshire and had been the subject of distraint proceedings by the county sheriff, pursuant to several writs of *distringas* issued out of the Exchequer court in order to collect a fine for his contempt in not answering the coronation summons to attend the King on 31st January 1626 to receive the order of knighthood. Maleverer mounted two defences to this. He claimed that he did not own the requisite amount of property on the date for attendance on the King or at any time before. Additionally he asserted that the sheriff, in his part of Yorkshire, had not even made the knighthood summons proclamation by the date on which he was supposed to receive the knighthood some one hundred and eighty miles from where he lived. In order to plead these defences, the first of which was valid if true, Maleverer had, like many others who were the subject of knighthood fines, applied to the Exchequer court to have the proceedings against him discharged. Unfortunately for him, and others like Moyser and Francis Nichols of Hardwicke, he was trying to raise a potentially valid defence possibly too late and in the wrong court. According to the summary in the articles of accusation, which Rushworth followed almost *verbatim*, the Exchequer barons had responded that they did not have power to fine him and could not do so.[236] If Maleverer had an issue with the fine he needed to take that up with the local commissioners who had been appointed to deal with such matters. If Davenport was correct, the issue of the property qualification should have been taken up with the court of Chancery some time ago. The Exchequer court was only concerned with collecting a debt owed to the Crown, and they continued to do so by a series of directions to the sheriff to distrain Maleverer's property until the monies were recovered, much to the consternation of Maleverer and the others.

As stated in the articles the assertion by the barons that they had no power to fine Maleverer looked odd and it attracted Hyde's scorn. 'As if the sole business of sworn judges in a court of law were to

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[235] *Articles of accusation*, pp. 19-20, 28-30.
[236] Ibid.,p p.20, 29; Rushworth, vol.2, pp.135-6.

summon and call men thither, and then to send them on errands to other Commissioners for justice' he railed before asserting that such commissions under Edward I had no power to fine. He then alleged that this refusal to fine was 'a trick which they call the course of the court (to make his majesty a favour)'.[237] Denham had made it clear that the Exchequer court did have power to fine for failure to comply with a knighthood summons but only after the court had sent for someone liable to comply with such summons by writ of *mittimus*.[238] That was only done in relation to someone whose name was returned by a sheriff into Chancery or in response to a request from another court.[239] The barons were correctly asserting that the question of fines was being dealt with by express royal commissions and that they did not have power to interfere. As Trevor had put it 'there is a commission to compound with each for theire fynes…but this is the lawes of the Councell'.[240] There was precedent for the use of commissions that was more recent than that discussed by Hyde, namely that which Caesar had located in the reign of Queen Mary. None of Stephens' erudite, and far from timid, counsel had challenged the status of such commissions, or the way in which fines had been levied. Amongst the others mentioned in the articles, Thomas Moyser, was defended by William Noy, and in some extensive notes prepared by him for this purpose Noy also eschewed any attack on the commissions.[241] That such prominent lawyers failed to follow Hyde's line of attack suggests that his views were legally flawed, or driven by political expediency.

That impression is only increased by Hyde's attempt to associate all of this with the 'ancient course' of the Exchequer. This indicated either ignorance of Exchequer practice or was an attempt to pander to the political prejudices of his audience in parliament, and perhaps his own. Exchequer practice had nothing to do with the decision whether or not to levy knighthood fines on individuals. It was a series of accounting practices and procedures designed to ascertain the quantum of royal revenues that arose in a wide range of ways, including regular payments, such as rents under leases of Crown lands, and incidental payments, such as fines payable under penal statutes. In the case of knighthood fines the

[237] Rushworth, vol. 3, pp. 1353-4.
[238] Bodleian MS Tanner 288, f.124v.
[239] The process that was termed 'estreating' into the Exchequer of an 'estrait' or record from another court setting out details of any sum now forming part of the King's revenue for the purpose of initiating the collection process through the Exchequer.
[240] Bodleian MS Tanner 288, f.121r.
[241] BL MS Lansdowne 253, ff. 450-488.

government had used directly appointed commissions for practical reasons in addition to those already discussed. They avoided overburdening the Exchequer with an exceptional item of royal revenue. The involvement of Privy Councillors on them ensured that political pressure could be brought to bear upon powerful or recalcitrant individuals. These benefits were then enhanced by the use of the local commissions. They could exert local influence over defaulters and local commissioners had more chance of knowing exactly who satisfied the property requirement. The knighthood summons was a royal command, the legality of which was accepted even by some opponents of this policy, and the commissions were validly established by existing prerogative powers. The government's behaviour was clearly manipulative and, as the Maleverer case showed, often worked in ways that were blatantly unfair by making it difficult for any person that was targeted in this way to raise any proper defence. However it is hard to understand exactly how Hyde thought the Exchequer barons could oppose this, or indeed why, when even the lawyers acting for those who opposed this imposition could not devise any effective legal basis for doing so. The indications are rather that, once again, the government knew what it was doing and that the law was on its side.

That had profound implications for the validity of Hyde's mordant criticism of the judges in general and the Exchequer barons in particular. It illustrated how in the early 1630s the government was becoming more effective in locating and using legal precedents and archival authorities that supported, or even suggested, aspects of government policy especially in the vital but contentious area of revenue raising. Often all that the government, and its law officers, needed was clear knowledge that the law did not expressly favour potential opponents of its policies. The executive needs of the royal government and the pervasive, but vaguely defined, nature of prerogative powers could legitimately fill in the blanks. Just as Attorney-General Heath had been able to resist the *habeas corpus* applications in the Five Knights' Case because he knew that there was no basis for the judges to look behind the form of return to those writs, so the effective imposition of knighthood fines, and distraint proceedings to recover them, depended on the loose nature of the proclamation procedure. That the judges did not find any compelling grounds for challenging the lawfulness of government conduct in these matters was not so much a matter of judicial bias as a reflection of the true state of

the law. In particular it reflected the reluctance of the law to define royal powers, as opposed to individual property rights, and its inherent bias in favour of giving the Crown the benefit of the doubt. None of those characteristics were unique to the reign of Charles I.

Hyde's criticism of the Exchequer barons in the case of the merchant and MP, John Rolle, together with George Moore and certain other merchants, was no more realistic or cogent than his diatribe against them in relation to knighthood fines. The grievances of Rolle and his colleagues over the conduct of the Exchequer barons were essentially the same as those of another merchant, Richard Chambers, and they formed two of the other charges that were included in the articles of accusation against Sir Thomas Trevor.[242] In both cases customs farmers had seized their goods and detained them in order to obtain payments of the tonnage and poundage duties which parliament had declared unlawful in 1629. Chambers' situation had become more widely known because of remarks that he had made about the oppression of merchants in England when summoned to appear before the Privy Council. That had led to him being separately prosecuted in the court of Star Chamber.[243] Whilst this celebrated case excited comment in parliament in 1640, Rolle's situation was of more direct relevance since he had been a member of parliament at the time of the seizure of his goods. This raised the sensitive subject of parliamentary privilege and questions about the extent to which it could apply to a member's goods and whether it extended outside the times in which parliament was sitting. Both Rolle and Chambers had sought to recover their goods by actions of replevin and those actions had been stopped by injunctions issued by the Exchequer court preventing the sheriffs of London from taking such goods back from the customs farmers' warehouses. The court had also declared that in circumstances where the goods were in the custody of the King they were not properly recoverable by means of replevin. The Exchequer court offered Rolle, and his associates, the option of obtaining release of their property if they put up cash security for the sums alleged to be due from them in respect of tonnage and poundage, but they had refused. Chambers had no such option because the

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[242] *Articles of accusation*, pp.25-7.
[243] R.Ashton, 'Chambers, Richard (*c.*1588-1658)', *ODNB*, (OUP., 2004), online edn. Jan. 2008.

Privy Council gave express orders that despite the same offer from the Exchequer court his goods should not be released until his fine in the Star Chamber court proceedings was paid.[244]

Rolle's case prompted another onslaught on the barons from Hyde, this time for ostensibly conceding the legitimacy of the Crown's claim to tonnage and poundage. His rhetoric rose to new heights of invective, denouncing the judges who were the subject of the articles as men:

> who upon vulgar fears delivered up precious forts they were entrusted with, almost without assault, and in a tame easie trance of flattery and servitude lost and forfeited...that reputation awe and reverence which the wisdom courage and gravity of their venerable predecessors had contracted to the places they now hold.[245]

The occasion for this peroration was that the 'presumptuous decree against Mr Rolle and others…whatsoever gloss they put upon it… is no other than a plain grant of the subsidy of tonnage and poundage to his Majesty upon all merchandize'.[246] Just as in his discussion of knighthood fines this smacked of pure political rhetoric with a legal gloss. It was not clear why tonnage and poundage was a form of subsidy, the usual form of public taxation expressly granted from time to time by parliamentary vote. Tonnage and poundage was a form of customs duty and what had offended Charles I was that it had been granted to his father, and earlier monarchs, by parliament for life. He, and his ministers, understood perfectly well that any subsidy required express consent. In addition whilst Hyde was a lawyer himself, he failed to suggest any legal basis on which the Exchequer barons might have adjudicated the competing claims of the King and parliament regarding tonnage and poundage and thus challenged the enforcement measures of the customs officers. Although we lack details of the barons' judgments and the legal arguments presented in the dispute with Rolle, it seems that the Exchequer court were in no position to rule on the politically contested question of liability.

Even the unfavourable account in the articles gave no indication that the Exchequer barons made any pronouncement on the lawfulness of the King's claims. Instead they prevented an action of replevin

[244] *APC* 1629-30, pp.66-7; Rushworth, vol.1, pp. 670-9. He also sought to challenge the Star Chamber court proceedings against him by seeking a ruling in the Exchequer court that the basis of the Star Chamber court's jurisdiction was the statute of 3 H 7 which did not give it authority to punish for spoken words. The Exchequer court correctly, denied that 3 H 7 had set up the court of Star Chamber, remarking that it had been 'a court many years before' so that statute did not restrict its jurisdiction.
[245] Rushworth, vol.3, p. 1361.
[246] Ibid.

from being used to remove Rolle's goods from the customs farmers who were acting on royal command, as the secretary of state Sir John Coke had told parliament. The normal court for the commencement of an action of replevin was that of King's Bench and its purpose was to restore chattels that had been seized in settlement of a claim against their owner pending trial of the right to make such seizure. The Exchequer court had ruled that this was not an appropriate method of proceeding where the goods had in effect been seized on royal command. To take another view would have amounted to a direct challenge to royal authority and undermined the ability of the Exchequer to collect any revenue where there was an element of political dispute over liability. Without a clear legal basis for challenging the King's entitlement to this revenue the barons were in an impossible position. Charles's uncompromising response to parliament made it clear what sort of response anyone could expect from the government if they thwarted its collection attempts and it could rely, again, on the element of legal uncertainty over the fundamental issue of royal entitlement to the revenue. Accordingly the barons had done the best they could which was to put the whole matter into a state of suspension and offer Rolle a limited get out in the form of putting up security for the duty allegedly owed in return for getting his goods back. That was not unreasonable, given that their value was likely to be much more than the outstanding duty. That the problem was an entirely political one was underlined by the failure of Rolle and his associates to take that offer or to mount any legal challenge to the duty themselves before any of the royal courts.

The only emollient part of Hyde's speech on this subject was his attempt to exculpate the King. As he put it 'tis abundantly enough known that his sacred Majesty cannot be tainted with the Advices and Judgements of these men'.[247] This was part of the familiar trope of the monarch innocently led astray by evil councillors and officials. Just how unconvincing it was in this case had been demonstrated by the speed with which Charles had moved to discard this fiction in relation to his customs officials, a point that was further underlined by the fact that many of the men who had seized Rolle's goods indicated that they were salaried Crown officials.[248] In contrast Pym was less eager to blame the judges involved. The conduct of the bench was not mentioned at all in his summary of the issue of

[247] Rushworth, vol. 3, p.1362.
[248] W.A. Shaw, 'Rolle, John (1598-1648)', rev. R. Ashton, *ODNB*, (OUP, 2004).

tonnage and poundage. Instead he was unafraid to blame the King directly. This revenue had been 'taken by the King's own act without a parliament for doing which there is no precedent'. In relation to knighthood fines he blamed the commissions stating that 'fines were paid, which were imposed not by Courts but by Commissioners assigned for that purpose'.[249] Pym's clarity of vision arose because he saw how government revenue policies were always ultimately political. But Hyde was not entirely wrong to place the law at the centre of such issues. Although his attempts to avoid attributing responsibility to the King led him into a contorted attempt to blame the judiciary he was not wrong in his understanding of the importance of the law and its administration in the stresses that emerged in the Long Parliament. But it was not obsequious judges that were the real concern for those who did not support some or all of the policies of the Caroline government. What was worrying was the extent to which the law helped rather than restrained those policies.

<u>The Judges and the Forest Laws: a case of guilt by association?</u>

Although defensible under then current law the levying of fines for not receiving the order of knighthood used a prerogative right that had lost its original purpose, and a legal procedure that virtually ensured non-compliance in practice. In contrast the revival of the forest laws, and enquiries into the bounds of the royal forests, were both justifiable in law, and an attempt to improve the management of a valuable royal resource that was long overdue.[250] The forests, although long neglected, were a potentially significant resource for both raw materials and government revenues, and the forest laws were an established, if esoteric, branch of contemporary legal knowledge.[251] However historical narratives of the implementation of this policy, reflecting the perception of its parliamentary critics, have been dominated by the apparently aggressive and self-serving tactics of Sir

[249] Rushworth, vol.3, p. 1134.
[250] Brooks, *Law, Politics and Society*, pp. 194, 345 and G. Hammersley, 'The Revival of the Forest Laws under Charles I', *History*, 45 (1960), pp.87-8. Sir John Coke's account in 1626 of 'the Commission for retrenchment of his Majesties charges and increase of his revenues' emphasised the role of exploitation of the forests as part of a programme of cutting household costs and increasing the revenues of the Crown that was independent of Parliament: HMC Reports 23, *Cowper*, vol.i, pp.291-5.
[251] Brooks, *Law,Politics and Society*, p.195.

John Finch in extending the boundaries of the forests of Dean and Waltham.[252] The only specific charge brought by parliament against any of the judges relating to the forest laws was included in the articles of impeachment against Finch as Lord Keeper, which were presented on 14 January 1641. That charge related to his conduct in relation to the two sets of proceedings in Essex relating to Waltham forest.[253] The venues for Finch's notorious land grab were the justice seats held for Dean and Waltham forests which were presided over by the then chief justice in eyre south of the Trent, Henry Rich, the first earl of Holland.[254] Holland was assisted in each case by several judges, in accordance with normal procedure, and because of hostile perceptions of the behaviour of Finch, their involvement has come to be seen as judicial collusion in a dubious resort to royal prerogative power to raise revenue from the forests.

In order to interrogate this view of the conduct of the judges it is necessary to examine the strength of the case presented for the Crown in relation to the various forest eyres that were held in the 1630s. In relation to Finch, it is necessary to ask whether his conduct was so egregious that the decisions given in his favour by Holland's assistants amongst the judiciary were not ones that any reasonable judge could have given in the circumstances. Much of the emphasis on Finch's conduct derived from two sources which were biased in opposite ways. The first is an account which, as its title states was 'delivered to the King by Sir John Finch', of the proceedings of the justice seat for the forest of Dean held at Gloucester Castle on 10 July 1634.[255] There are seven surviving copies of this narrative, all of

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[252] S.R.Gardiner, *History of England*, vol. VII, pp.362-366; Jones, *Politics and the Bench*, pp.96-8, 140; Sharpe, *Personal Rule*, pp.117-19 and Hammersley, 'Revival of the Forest Laws', pp.94-102. The celebrated accounts of Gardiner and Hammersley are particularly vitriolic about Finch. After branding him as 'a man not likely to be troubled by scruples' Gardiner described the case presented by him for the Crown at the Dean eyre as 'monstrous' and Hammersley variously described it as 'scandalous' and 'dubious' and concluded that in relation to Finch's conduct before the proceedings for both forests 'the crudity of his forensic methods stretched the very wide limits of contemporary practice'. Despite this Gardiner conceded that the 'forest claims' were 'technically according to the law or could easily be argued to be so' and Hammersley acknowledged that at Dean ' the legal validity of Finch's argument...cannot be easily decided: it remained arguable to some of his learned opponents'. Finch's case was much stronger and better organised than that.

[253] Rushworth,vol.4, p.137 and also see p.140 for the denunciation of Finch's conduct by Falkland, including the gibe that Finch gave 'our lands to the deer'.

[254] Holland had been appointed to this office in 1631: see R.M. Smuts, 'Rich, Henry (*bap.*1590, *d.*1649)', *ODNB*, (OUP., 2004), online edn. May 2009.

[255] TNA SP16/271/67. This version is incomplete but it contains the notorious account of Finch's challenge to the scope of the boundaries of the forest.

which are virtually identical.[256] As Hammersley suggested the number of extant copies indicated widespread contemporary interest in this matter and that explained why it strongly influenced subsequent perceptions of what happened. In this version of events, at the Gloucester justice seat, Finch was cast as the central figure almost to the exclusion of all others. Whilst there was a brief summary of the arguments made by counsel for the towns that were to be re-afforested by the revival of the medieval boundaries requested by Finch, such counsel were not identified. This was an omission that was misleading and did Finch no favours.[257] Holland, and the three judges assisting him, the King's Bench justice Sir William Jones, the Exchequer baron Sir Thomas Trevor and Sir John Bridgeman, chief justice of Chester, seemed to perform a cameo role by delivering the confirmation of Finch's summary of the law that he required to satisfy a nervous jury. As reported the judges' ruling on the law was perfunctory and could not be described as anything like a reasoned judgement.[258] No supporting legal analysis at all was provided. In contrast Finch's arguments were given prominence and everyone apparently played a subsidiary role to him. This was precisely the intention that he wanted to create since the purpose of this document, and his conduct at Gloucester Castle, was the advancement of his own legal career. Attorney-General Noy was seriously ill and Finch was well aware of the situation, including the seriousness of Noy's condition.[259] That the position of Attorney-General was potentially up for grabs and just how much Finch wanted the post, amidst fierce competition, was indicated by a reported squabble over the post between Sir John Bankes and Finch that had to be settled by the King.[260] However it becomes apparent from a comparison with the more detailed notes made by Finch setting out his recollection of the Dean proceedings, and other sources, that the document prepared for the King omitted significant aspects of the case in order to overstate the importance of Finch's role. To do this it was carefully edited and

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[256] In addition to the copy already cited there were five others of which Hammersley was aware. These were BL MS Additional 25302, ff.56-66; Gloucestershire Archives D9125/1/3032 (formerly Gloucester Public Library MS LF6.2); Bodleian MS Gough Gloucester 1; HMC 3rd Report, Appendix, pp. 185, 211 and HMC 11th Report, Appendix pt.vii, p.250. In addition there is LI MS Maynard 59, ff.50-60.
[257] For opposing counsel's arguments see TNA SP16/271/67, f.141r and BL MS Additional 25302, f.56v.
[258] TNA SP16/271/67, f.143r and BL MS Additional 25302, f.58v.
[259] J.S. Hart Jr., 'Noy, William (1577-1634)', *ODNB*, (OUP,2004), online edn. May 2009; Gloucestershire Archives D9125/1/2937 (formerly Gloucester Public Library MS LF 1.1), f.33r. and *State Trials*, 3:8.
[260] TNA SP16/274/17. See also HMC 3rd Report, Appendix, pp.282-3 which indicated that the principal contenders for this office were regarded as Finch, Banks, Littleton and Bramston. The last two were favoured by the King for their technical ability whereas Finch was strongly championed by Queen Henrietta Maria.

cannot be taken at face value. Since Finch was elevated to the position of chief justice of the court of Common Pleas on 16 October 1634, whilst the position of Attorney-General went to Bankes, it seems to have had the desired effect. Ironically it was a form of self-incrimination when parliament, and subsequent historians, came to review Finch's conduct.

The second, and equally damning, account of Finch's involvement with the forest laws, was that provided by Robert Rich, the second earl of Warwick and Holland's elder brother. This related to Finch's performance at the justice seat for Waltham forest, held at Stratford Langthorne on 2 October 1634.[261] Holland presided with the assistance of justice Jones and baron Trevor. According to this account Finch's method of proceeding followed that employed by him in relation to the forest of Dean. He used the justice seat to enlarge the bounds of the forest by citing medieval precedent, including a record from the reign of Edward I that appeared to increase dramatically the extent of the forest to cover most of the county of Essex. When Warwick, as the owner of the largest landholding in Essex, sought to obtain time for himself and other landowners to respond Finch gave him until the next day. Warwick was clearly appalled not least by the implications of this vast re-application of the forest law regime to his own property, and that of his tenants and clients. Finch proceeded to present the evidence for his claim on behalf of the Crown the next day, and faced with prevarication by the jury, apparently browbeat them into reaching the verdict that he wanted, namely that the forest boundaries should be reinstated to the full extent requested. At this point Holland intervened and adjourned 'the court to a day wherein he would hear what the country could say in their defence'.[262]

Two things were remarkable about the events as described. The first is how closely Finch's conduct at Stratford followed his conduct in the hearing of the Dean eyre at Gloucester Castle, right down to the use of a particular document to settle the matter, his knowledge that counsel for the county had undertaken prior research in the Tower and his hectoring treatment of the jury. The second is just how histrionic Finch's behaviour was in Warwick's version of events. Having stated the huge widening of

[261] TNA SP16/275/21.
[262] Ibid.

the forest bounds that his three hundred year old precedent seemed to indicate he apparently asserted that he 'would know how his master had lost every inch of it'. He had followed the research efforts of counsel for the county 'hot foot' and finally stated that he 'would not stir from thence until he had a verdict for the King'. He described Warwick's attempt to gain time for the defence as fighting 'close like a man of war at his lock'.[263] Given Warwick's status, and the presence of so many of his friends and neighbours at the hearing, the behaviour described in Warwick's shocked narrative seemed provocative to the point of foolhardiness if it was based only on one 'roll of 17 Edward I'. It seems highly unlikely that either Finch's conduct, or Holland's emollient intervention, came as a surprise to either of them. Both men knew each other well and were important members of Queen Henrietta Maria's inner circle of advisers.[264] Furthermore they already had experience of how to co-ordinate carefully the outcome of a dramatic reassertion of forest rights by the Crown, in Gloucester.

It is also likely that they started the eyre proceedings with a clear understanding of where the attendant judges stood on the substantive issues. Evidence from other sources, relating to the justice seats for the forests of Windsor, Dean and Waltham, shows that several important features of the political management of the law and the judiciary by the government in the 1630s were present in the implementation of its policies towards the forests. The legal case advanced by successive royal law officers was much more extensively researched, and thus stronger, than fixation on Finch's theatrical performances suggests. Whilst interest in the forests started to develop under Attorney-General Heath, the core of the case for the extensive revival of royal rights in these assets was developed by his successor Noy, and this culminated in the work of Littleton after his appointment as Solicitor-General in 1634. The case for the re-assertion of royal rights in the forests in Windsor, Dean and Waltham was then used to provide support for the reassertion of royal rights over more forests when Bankes was Attorney-General in the later 1630s. The existence of good legal authority for this policy sheds a different light on the role of the judges in assisting this process. It indicated that they were correctly

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[263] Ibid.
[264] Both of them were trustees of the Queen's jointure settlement from the King: see TNA SP16/140/10. Holland was known to support Finch for the post of Attorney-General: see HMC 3rd Report, Appendix, p.283. Finch was the Queen's principal adviser on personal business. On Holland and the Queen see 'Rich, Henry ', *ODNB*.

applying the law, even if that was not how political opponents chose to see it. The establishment of this legal justification was, once again, accompanied by the use of techniques for managing the legal risks in this policy, including extensive research and prior judicial opinions. The grounds for legitimate legal objection to the revival of the forest laws were much less clear than those who were adversely affected thought.

The process of enforcement of royal rights over the forests under Charles I is generally regarded as commencing with the forest eyre held at Windsor on 24 September 1632. Holland presided as chief justice in eyre, with the assistance of the chief justice of King's Bench, Sir Thomas Richardson and baron Denham. The interests of the Crown were represented by the Attorney-General, William Noy. However the advent of the Windsor eyre did not represent the sudden revival of a long dormant institution to the same degree as summonses to knighthood. Whilst the regulatory regime of the forest laws had been undermined by private grants and lack of enforcement for very long periods of time, in forests such as Dean, Feckenham or Galtres, the same could not be said of the forests of Windsor or Waltham. Due to a combination of convenient proximity to the institutions of government in London and the King's passion for hunting, James I maintained interest in the protection of royal rights in both of those forests.[265] In Windsor the forest court system continued to function, with the Swanimote court for that forest holding annual sessions throughout James's reign and a significant number of disputes in this forest being dealt with in the court of Star Chamber.[266] Active royal interest, the involvement of significant local figures as officers of the forest, the presence of functioning forest courts and geographical convenience suggested Windsor forest as a good place to start the reassertion

[265] In his memorandum on the increase of private royal revenues, Sir John Coke named some 25 other forests, and 'divers forests in Wales' that were ripe for disposal or disafforestation. He made it clear that proximity of a forest to 'his Majesty's houses of ordinary resort', which meant those around London, was a basis for exclusion from that list and thus more protection. See HMC Report 23, *Cowper*, vol.i, p.294.

[266] D.C.Beaver, *Hunting and the Politics of Violence before the English Civil War* (Cambridge, 2008), pp.94-106. There were three tiers of courts within each forest. The lowest was the court of Attachment that brought presentments against offenders under the forest laws for formal examination by the next Swanimote court. Foresters' presentments were tried by jury at the Swanimote court. This established guilt only and enquired into the state of the forest. The justice seat was the highest forest court and had full power to punish offenders. It too enquired into the state of the forest and its boundaries by means of a jury. All fines imposed were collected with the assistance of the Exchequer court which was why a baron from that court was always an assistant judge at each eyre. See J.Manwood, *A Treatise of the Lawes of the Forest: Wherein is declared not onely those Lawes, as they are now in force, but also the originall and beginning of Forests...*(London, 1665), pp.440-525.

of royal rights over the forests. Holland's appointment as constable of Windsor Castle and keeper of the forest in 1629 also brought some local experience to the eyre proceedings.[267]

The difference between what had gone before, and what was undertaken by Noy at the Windsor eyre, was the commencement of a much more thorough investigation of royal rights than James I had found necessary to preserve the quality of his game and hunting. In the conventional narrative of the Caroline revival of the forest laws Noy's meticulous but carefully calibrated application of those laws is contrasted with Finch's unscrupulous and aggressive assertion of royal power.[268] This greatly overstates the discontinuity between what was undertaken by Noy and Finch on behalf of the Crown and, in doing so, misses the important way in which the legal validation of this initiative was connected and systematically built up by crown law officers into a powerful and coherent defence of this policy. That was then carefully tested before the judges that sat with Holland at each of the forest eyres. Whilst Noy may have 'tempered such enforcement with discretion' compared to Finch, the radical nature of his initiative should not be underestimated.[269] His 'discretion' was just better political judgement. He provided the foundations for all the key aspects of the government's policies for exploiting the forests that were carried out subsequently, and the basis for Finch's political showmanship. The important elements of this all emerged at the Windsor eyre. These were the overhaul of the forest administrative machinery, the establishment of legal rulings that challenged encroachments on royal rights in the forests and the assertion of the principle of reviving ancient forest boundaries, all done in contradiction of local assumptions based on custom.

The hearings were held at various locations and on different dates in 1632-3. The first was at Windsor on 24 September 1632 with another held at Bagshot on 27 September 1632. The process was repeated the next year with another hearing at Windsor on 23 September and at Bagshot on 26 September 1633, both of these being treated as adjournments of the proceedings held at those places the previous

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[267] Ibid.,p.107.
[268] See Hammersley, 'Revival of the Forest Laws', pp.88-9, 94-5 on 'the transition from the remarkable to the scandalous' between the eyres for Windsor and Dean.
[269] Hammersley, 'Revival of the Forest Laws', p.89.

year. Swanimote court hearings were also held to provide the subject matter of the eyre hearings. This reinvigorated the administration of the forest in several ways. The eyre opened with insistence on observing the ceremonial formalities in which various groups of forest officers were required to kneel before the court, surrender their insignia of office and pay a nominal fine for their return. This emphasised the dignity of the highest court in the forest before many people were made to feel the direct assertion of that court's authority in the prosecution of hundreds of violations of the forest law presented in the Swanimote court.[270] The annual meetings of that court would have had nothing like this impact because of its lack of power to punish offenders or make orders in relation to such sensitive issues as encroachments, timber consumption or boundaries. Whilst the fines levied did not contribute massive amounts to the royal revenues the combined effect of these activities provided an incentive for landowners, who found their property re-integrated back into the forest after centuries of lax enforcement, to seek formal grants of disafforestation of such property for more substantial sums of money. This process also provided the government with information about assets within the forests, such as wood and game, that could be made the subject of grants of individual licenses in return for large payments, as the forest of Dean eyre would show.

At the beginning of the Windsor eyre hearings Noy dealt with various issues relating to laxity, non-attendance and inappropriate procedure by forest officers and in this context obtained an advisory ruling on the appointment of such officers from chief justice Richardson.[271] This demonstrated how the judges present were expected to be able to demonstrate authoritative knowledge of the forest law.[272] It also seems likely that their practical involvement would have been greater than this technical function. The sheer amount of information sought, and numbers of offenders punished make it unlikely that Holland, who lacked legal experience, could have dealt with these matters alone. The

[270] Within one part of the forest alone, Battell's Bailiwick, some 394 offences under forest law were prosecuted by the Windsor eyre in 1632 and 1633, for which the amount of £474 worth of fines were imposed. See Beaver, *Hunting and the Politics of Violence*, p.108.
[271] *Les Reports de Sir William Jones, chevalier, jades un des justices del'Banck le roy...*(London, 1675), pp.266-8. Also see pp. 273, 275, 279 and 297 for a variety of orders penalising the actions or defaults of forest officers.
[272] Manwood was clear that the judges were versed in the forest law since that law 'is allowed and bounded by the common laws of this realm': Manwood, *Lawes of the Forest*, p.410. Coke took a similar view of judicial expertise on this subject: Coke, *The Fourth Part of the Institutes*, p.290.

judges' experience on circuit dealing with the punishment of large numbers of criminals and local administrative issues raised at the assizes, made them well equipped to deal with such matters. However this placed the judges involved at the forefront of what was, at best, a reminder of royal power for the local communities that were affected.

An important issue for perceptions of the judiciary was the legal justification for this policy. Noy contributed much to this at the Windsor eyre by a combination of his own well researched expertise and rulings from the judges present, Richardson and Denham. Whilst Noy's role in establishing a strong legal case to recover royal rights in the forests was pivotal this initiative did not originate from him. The royal forests had featured prominently amongst the revenue raising options considered by Caesar, Borough and Sir John Coke. The forest law was the subject of well known readings at the Inns of Court and an exposition based on the surviving records of the honour of Pickering produced by William Fleetwood. All of this culminated in the detailed and thorough treatise of John Manwood.[273] The latter was published in a concise form in 1592 and in an enlarged form in 1598 and 1615 with a final version that was extended yet again in 1665, implying that the subject maintained professional relevance and interest in this period. There was also evidence of interest in this subject in the late 1620s, and possibly earlier, amongst government law officers. Various Exchequer inquiries were conducted into conditions in the forest of Dean in the 1620s and in 1629 a case was brought by Sir Robert Heath, as Attorney-General, in the court of Exchequer against a defendant called Harris for felling timber in the forest of Dean and using that timber to make charcoal for an ironworks, all contrary to the statutory provision 1 E.1,c.15.[274] A detailed defence, centred on analysis of the scope

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[273] Manwood's *Lawes of the Forest* combined all of these earlier sources with the statutory sources, which he published in full, and added further material based on his own experience as a justice of the New Forest and gamekeeper of Waltham Forest. He cited the reading given by George Hesketh in 1508, at Gray's Inn, on *carta de foresta* and the reading by George Treherne on the same subject in 1520 at Lincoln's Inn. See J.H. Baker, 'Manwood, John (*d.*1610), *ODNB*, (OUP., 2004). His treatise also referred to the records of 'the Assises or Iters of Pickering and Lancaster': Manwood, *Treatise of the Lawes of the Forest*, p.72. Sir Edward Coke set out an explanation of the forest laws in *The Fourth Part of the Institutes*, pp.289-320. Coke asserted that the forest laws were derived from statute and subject to regulation by Parliament: pp.304, 319. He disapproved of the work of 'new authors', which must have included Manwood's treatise. This pointed to the divergent views on these rights that emerged in Noy's exposition of them at the Windsor eyre. Whatever view one favoured there was an established and accessible, if specialist, body of law on this subject available in the 1630s.

[274] *Statutes of the Realm*, vol.4, p.377. For the Exchequer investigations see Hammersley, 'Revival of the Forest Laws', p.93 and TNA E178/3837 and E178/5304. On Harris's case see Brooks, *Law,Politics and Society*, p.196

and purpose of the relevant statutory provisions was made on behalf of Harris by none other than Noy. The preparation for that case no doubt provided him with much that would have been useful when preparing for the Windsor eyre.[275]

At the hearings Noy introduced, and emphasised repeatedly, two essential principles which had very ominous implications for what many landowners and inhabitants within this forest thought was the effect of the forest laws on their property rights. The first was the invalidity of prescription as a bar to the revival of royal rights in the forest and the second was the strict construction in favour of the King's interests of grants, letters patent and other forms of licence to individuals conferring special privileges or exemptions. Both of these principles were assiduously backed up with judicial rulings sought by Noy from Richardson and Denham. Although Richardson may be regarded as particularly susceptible to political pressure, the same has not been said of Baron Denham.[276] Yet there was no sign of disagreement between them on the points where Noy sought their ruling. This, taken together with the low-key political reaction both at the eyre and subsequently, suggested that their views were based on an accurate understanding of the law.

As a technical legal concept prescription was originally founded in Roman law and has developed in different ways under civil law systems and the common law systems of England and America. Although Noy would have understood and applied the concept in the precise sense that English law defined it at the time, what is meant here is the general concept of obtaining rights to use the property of another, or of diminishing the rights of such owner, derived from the inaction of that owner in enforcing his rights. Noy's denial of the validity of this means of encroaching upon or extinguishing

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and BL MS Hargrave 30, ff.266v-268r. Brooks incorrectly stated that Heath was assisted by Sir John Finch. It is clear from the manuscript report that the Crown's case was presented by Sir Heneage Finch.

[275] That the ironmaster Harris employed Noy implied that the latter already had a reputation for expertise in this area of law in the late 1620s.

[276] They were used to working together as they were colleagues on the western circuit at the time of the eyre and had been for several years before that. See 'Richardson, Sir Thomas', *ODNB*.

such rights ran like a thread through his response to a variety of matters examined before the eyre.[277] He carefully built up a series of cases that asserted the principle that failure by the King to enforce any of his rights in the forest over time did not alter or remove those rights. No customary rights could thus be established adverse to such royal rights. An example of this was provided by a case heard before the eyre at Windsor on 23 September 1633 relating to claims to several exemptions by the tenants of royal demesne lands at Bray, in Berkshire. In this case Noy underlined the strength of the Crown's legal position by rebutting a strong counter-argument, based on the construction of statutes, and supported by no lesser authority than Coke, that was raised by the tenants' counsel.

Royal demesne property was royal forest if the monarch said it was since it was Crown property. This put it outside the scheme of confirmation and disafforestation in the *Carta de Foresta.* The tenants at Bray claimed exemptions that entitled them to fell trees at their discretion, keep unlawed hunting dogs and hunt certain game. They also claimed rights of common pasture within the forest and to receive allocations of wood from the King's timber, and that they were outside the forest for the purpose of restrictions on the creation of disafforested areas, known as assarts, by removing game cover. They were entitled to these rights and exemptions because 'time out of mind, they had the franchises aforesaid'. Noy responded that it was not permissible to establish any assarts or wastes within forests, or cut forest wood without supervision by forest officers, by prescription because of the *Carta de Foresta*, c.4 and roundly declared that 'nothing was more plain than that a prescription to be out of the forest, without showing allowance in eyre, is not good'.[278] He then proceeded to review the five case authorities cited by counsel for the tenants and distinguished each of them as relating either to chases, which were not governed by forest law, or to lands within the Duchy of Lancaster that were not royal forests. He attacked the remaining privileges that had been claimed stating that 'no libertie within a forest, which either went in destruction of vert or game, was allowable by prescription, unless they

[277] See *Les Reports de Sir William Jones*, pp.270, 272 (Lord Lovelace's Case), 275-6 (Inhabitants d'Egham), 278 (Sir Richard Weston's Case), 280 (Sir Richard Harrison's Case), 283 (Tottersall's Case), 284 (Englefield's Case), 289-292 (Tenants de Mannor de Bray) and 293 (Ville de Cookeham and Wesden's Case).
[278] *Statutes of the Realm*, vol.1, p.120; *Les Reports de Sir William Jones*, p.289.

could show an allowance in a former eyre' and denied the customary claims for imprecision.[279] His refutation of the tenants' case was, as reported, thorough and clear. In support the judges, Richardson and Denham, ruled that 'a prescription *extra forestam* was not good without allowance and the whole claim of the men of Bray was disallowed *per curiam*' the final phrase making clear that there was no dissenting view from the bench.[280] Although Noy established this principle by tight legal argument, without Finch's later dramatic flourishes, that did not reduce the threatening implication that this raised for landowners with property in or near royal forests, and the judges had endorsed this entirely.

To ram this home Noy refuted the views of Sir Edward Coke and obtained the support of the judges for this. In response to Noy's assertion that the statutory provision of *Carta de Foresta*, c.4 contradicted certain of his clients' claims, counsel for the tenants of Bray had argued that prescription could validly override the provisions of a statute. This was based on Coke's assertion that this was correct if a negative statutory provision merely declared the existing common law instead of changing the law. It did not matter whether the existing common law was embodied in an earlier statute or not.[281] Noy had tackled this at the eyre hearing at Windsor the year before in Lovelace's Case. There he stated that a right to fell timber without supervision by a forester was also prohibited by *Carta de Foresta* c.4 and had cited a case as precedent for this notwithstanding Coke's view that prescription could override the statutory provision. He had not questioned the general validity of Coke's argument but had cited authority to the effect that it would not apply in this case. The less careful Richardson had then added that Coke's distinction was not valid at all, a ruling that was not strictly necessary but which Noy agreed with.[282] In relation to the Bray tenants a year later Noy again attacked Coke's view on this aspect of statutory interpretation. Again he cited a precedent, this time to the effect that no tithes should be paid from timber, but here it was used to refute Coke's principle of statutory

[279] Ibid., p.291.
[280] Ibid., p.292. Similar claims by the inhabitants of Cooksden and a George Wisden were also dismissed: p.293.
[281] Coke's views on this were summarised in the section on the courts of the forests in *The Fourth Part of the Institutes*, p.298 but Noy and Richardson knew of them through *The First Part of the Institutes of the Laws of England; or a commentarie upon Littleton*...(London, 1628).
[282] *Les Reports de Sir William Jones*, pp.270-1.

construction.[283] The significance of this was that Noy was systematically dismantling threats to his general principle that prescription provided no defence to the reassertion of royal forest rights and he did this with support from the judges notwithstanding the respect accorded to Coke within the legal profession. Remarkably none of this seemed to attract subsequent political comment.

The other thread that ran through Noy's arguments was the strict construction in favour of the royal interest of documentary evidence of any derogation from the forest laws.[284] The justification for this lay in the paramount importance accorded by those laws to the preservation of the forest and its assets. As Manwood put it this body of law was 'only proper unto a forest, belonging to the same for the continuance of it' and was 'not be tied to the order of the common law of this realm but unto the voluntary appointment of the prince'.[285] That was the reason why the chief justices in eyre were political appointees rather than drawn from the ranks of the professional judiciary. Noy used this central tenet of forest law to dissect the defence mounted by those who sought to justify alleged breaches of the forest law by reference to warrants, grants, licenses, or other written instruments purporting to relax the rigour of the application of those laws to their property or conduct.[286] In this he was strongly supported by Richardson and Denham.

In so doing they usually followed the rules of construction for written instruments granting property rights that would have been applied in the common law courts. Faced with the argument made by Sir Charles Howard that he was entitled to fell timber by reason of a warrant permitting him to fell such timber as was necessary to keep fences in Bagshot repaired, Richardson reasonably pointed out that this only permitted him to fell timber after the quantity of wood needed to effect the repair had been

[283] Ibid., pp.290-1.
[284] *Les Reports de Sir William Jones*, pp. 267 (Hundred of Wargrave), 268-9 (Whitlock's Case), 269, 293-5 (Sir Charles Howard's Case), 270-2 (Lord Lovelace's Case – construction of the monastic grant), 276-7 (Matthewes Case), 277 (Le Mannor de Wyndlesham), 278 (Sir Richard Weston's Case – construction of the King's patent), 279 (Sir Walter Tichbourne's Case), 280-2 (Reston's Case), 284-7 (Sir Edmund Sawyers Case).
[285] Manwood, *Lawes of the Forest*, Preface to the Matter, p.1 and pp.486-8.
[286] Never noted for tact Noy pointed out at a hearing over which Holland was presiding that warrants and licences granted by Holland as constable of Windsor castle were invalid and beyond the competence of that office: *Les Reports de Sir William Jones*, p.269.

agreed by forest officers.[287] Failure to follow such procedure invalidated the warrant as a defence. In Reston's Case Richardson supported Noy's contention that Reston's claim to the office of Woodward for the woods of Cookeham and Bray, and timber in lieu of fees for that office, by warrant from James I was defective by reason of the vague language of that document.[288] It seems clear that the warrant granted the office with such fees as were anciently attached to it but without offering any guidance as to what those might be. Again the objection seemed reasonable. In two cases Noy countered claims for derogation from the forest laws through exemptions contained in charters or grants to monastic foundations by pointing out defects in the transmission of such rights to lay proprietors by the Crown on the dissolution of the monasteries and thence to the current owners. In Sir Edward Sawyer's Case a claim to rights of common through a charter granted to the abbot of Waltham Holy Cross was destroyed by the lack of unity of possession that arose on the reversion of those rights to the Crown on the dissolution. This was then compounded by the subsequent failure to revive expressly those rights, as being appurtenant to the monastic lands held by Sawyer, in the conveyance to the lay purchaser through whom he had acquired them. Rights to hunt and enclose that Sawyer claimed were denied for the same reason.[289] In this case and Lord Lovelace's Case other exemptions that were claimed via the original monastic lands had been expressly recovered by 27 H.8, c.24, as being akin to rights of purveyance, and, again, had not been expressly revived in any subsequent transfer of the property to the current proprietor.[290] In these three cases the root cause of the problem for the defendants was inept drafting in the documents whereby former monastic property had been originally acquired from the Crown. When combined with lax enforcement of royal rights this lulled the relevant landowners into a false sense of security. The implications of this for the affected landowners were truly frightening, since it threatened the very nature of what they thought they owned. However the position adopted by Noy and supported by the judges appeared both reasonable and lawful.

[287] Ibid., p. 269.
[288] Ibid., pp. 280-2.
[289] Ibid., pp.284-6.
[290] *Statutes of the Realm*, vol.3, p.556; *Les Reports de Sir William Jones*, pp. 270, 286.

In pursuing these themes, of the invalidity of prescription and the strict construction of documents, and sharpening administrative oversight, Noy, with the assistance of the judges, had provided the government of Charles I with powerful means to exploit these royal assets. That legal authority was then used and further refined, by Finch and Littleton, in relation to other forests in a manner that would engender more open political controversy. However the groundwork had already been done at the Windsor eyres in 1632-3. Although the subject of little comment, the latter eyres also included the most threatening development of all, namely the reassertion of much wider forest boundaries, with the associated application of forest, rather than common, law to all land within the revived boundaries. Noy had indicated his view in 1631, based on systematic research that the bailiwick of Surrey was not purlieu of Windsor forest but an integral part of it.[291] That subjected Surrey to the full rigour of the forest laws and in 1632 the eyres treated it as such.[292] It was part of the reason for the two eyre hearings at Bagshot.

Armed with this Finch was well placed to advance the royal interest when in April 1634 Noy fell gravely ill and the King asked Finch, in his capacity as King's counsel, to accompany Holland and represent the Crown at an eyre to be held for the forest of Dean in Gloucestershire.[293] Given Noy's condition, the chance to work with Holland and the eclipse of the Solicitor-General, Finch was presented with an exceptional opportunity to advance his career and he seized it with relish. Hammersley concluded that the apparent elapse of two years between the Windsor and Dean eyres, and the fact that the forest of Dean, where no eyre had been held for three hundred years, was selected next, instead of Waltham where the forest courts had been active almost as recently as in Windsor, indicated that Noy's activities at Windsor were not 'the first step in a new policy towards the

[291] 'Purlieu' was a parcel of land usually on the edge of a forest that had been within the forest but was only partially subject to the forest laws. See Manwood, *Lawes of the Forest*, pp. 370-1.
[292] Beaver, *Hunting and the Politics of Violence*, pp.107-8.
[293] In line with the increasing political management of the law the politically well connected and ambitious Finch was asked to undertake this task rather than the obvious alternative namely the Solicitor-General, Sir Peter Shilton. Shilton was persuaded to give up this office in October 1634. It seems that he lacked political backing and did not have an especially distinguished professional reputation: see A.F. Pollard, 'Shelton, Sir Richard (1578-1647)', rev. P.E. Kopperman, *ODNB*, (OUP, 2004). Noy made it clear at Windsor that the Crown did not have to be represented by the Attorney-General in person at eyres: *Les Reports de Sir William Jones*, p.272.

forests'.[294] That inference missed the coherent continuity of this endeavour. In reality less than a year elapsed from the last Windsor eyre and the first Dean eyre. Furthermore Hammersley's own thorough account of the background to the Dean eyre revealed the reason for government interest in the forest of Dean. That arose from the ongoing local rivalry over very lucrative licenses to cut large amounts of timber to feed local ironworks and to mine coal.[295] Earlier Exchequer enquiries and Heath's prosecution of Harris in 1629 already indicated government interest. In the lobbying activity and local rivalry between the current incumbents of such licenses, Sir Basil Brooke and the hapless George Mynne, and the local contender, Sir Bainham Throckmorton, there had emerged an obvious opportunity for the government to extract significant sums of money by revoking the existing licenses and encouraging a bidding war between the competing commercial interests. The amounts involved would dwarf the sums extracted in fines from Windsor forest. Furthermore the point about Noy's, and Heath's, activity was not that it was a crude attempt to extract revenue. Instead it reasserted and legitimated royal power and control over major assets in a way that gave the government options as to how best to extract value from those assets. That could be adapted to whatever made most sense in a particular forest. This approach also emerged from Finch's view of his conduct at the Dean eyre. The law officers and judges cleared the way for government policy, by providing legal clarification, rather than acting as the agents of a pre-formulated revenue policy. Another sign of government interest in the forest of Dean at this time was the appointment of John Broughton to undertake a thorough survey of the timber in the forest of Dean, He was an acquaintance of Sir John Coke who had reviewed the forests in 1626. Broughton completed his twenty-two page report in August 1633 only four months after his appointment as deputy surveyor of the forest.[296] A final indication of the gathering pace of government interest in the forests was the fact that within three months of the Dean eyre, an even more contentious eyre hearing would be held in Essex, for Waltham forest.[297]

[294] Hammersley, 'Revival of the Forest Laws', p.89.
[295] Ibid., pp.89-93.
[296] Ibid., p.92, TNA SP16/236/82 and TNA SP16/245/19.
[297] Hammersley, 'Revival of the Forest Laws', p.93.

Two documents enable us to look behind Finch's self-congratulatory account to the King of his conduct at the Dean forest eyre in July 1634. The first is an account of both his thinking and conduct at the eyre that seems to have served as a draft for his memorandum to Charles I.[298] It was used by Hammersley to give a more detailed version of events but still one that was dominated by Finch's egregious behaviour and the supposed collusion of the judges with this. That failed to appreciate that Finch's opportunism was built on a firm legal basis and that the judges had little alternative other than to respond as they did. Finch was a sufficiently able lawyer to know what Noy had provided even if he did not have as much opportunity to discuss the circumstances in the forest of Dean with Noy as he would have liked. However the key insight into the connected development by Crown law officers of the case for royal rights in the forests was provided by the later documentary account of the full hearing in April 1635 that was held at Stratford Langthorne for Waltham forest.[299] This was convened at the behest of Holland to give those affected by the proposed re-establishment of the medieval boundaries of that forest a similar opportunity to present their case against Finch's argument made at the Waltham eyre hearing in October 1634, as had been accorded to such opponents in Gloucester. By 1635 Finch had been promoted to the bench and the case for the Crown was being handled by Sir Edward Littleton in his new capacity as Solicitor-General. In the course of his presentation on behalf of the Crown it emerged that the county interest in Gloucester had been represented by Littleton against Finch.[300] This sheds a very different light on several aspects of conventional accounts of the conduct of these forest eyres. The reason why this has not been remarked upon before is because of the domination of the surviving accounts of what happened at Gloucester by Finch's carefully edited note to the King. In that version the case made on behalf of the opponents of his claim for the continuation of the medieval boundaries covers barely half a side of one folio whilst Finch's summary of his rebuttal is six times that length, and at no point is there any mention of the name of any

[298] GA MS D9125/1/2937 (formerly Gloucester Public Library MS LF1.1).
[299] See Bodleian MS Rawlinson C 722.
[300] Bodleian MS Rawlinson C 722, ff. 30v, 31v, 35v-36r. In the last passage he stated that 'in Gloucester I was of counsel in the Country' and compared aspects of the two cases made against the King's interest at the two eyres.

opposing counsel.[301] Given the competition for the post of Attorney-General it was understandable that Finch would not want to give any credit at all to one of his main rivals.

The presence of Littleton at the Dean eyre hearing raised two important points. The first is that it undermines the tendency to take Finch's statements at face value and thereby characterise the proceedings as dominated by Finch bamboozling a country jury, with an undated document, and then bullying them into giving the verdict that he wanted, all aided and abetted by his political friend, Holland, and three judges who barely uttered a word except to give the legal response that Finch required.[302] Hammersley described the core of Finch's case as the use of 'an undated document of unknown provenance...without qualm as to its validity' to declare the perambulation of the forest of 28 E.1, on which the local opponents of Finch's claims based their defence, void. The jury were 'unexpectedly confronted' with this and then persuaded to remove any reservations that they had from their verdict by a quiescent ruling on the law from the three judges. It seems unlikely that Finch would have risked basing his case entirely on one unconvincing document, and bullying a jury, in the presence of one of the most eminent lawyers of his day. Finch's case was not as flimsy, nor was his conduct as aggressively opportunistic, as this view of it implied. Littleton did not object because, as he subsequently came to recognise, the perambulation of 28 E.1 was, at least arguably, void, and the support for it provided by the statute 1 E.3. *Stat.*2, c.1 was consequently ineffective.[303] That was a crucial part of the case against Finch's contention for the wider boundaries for the forest of Dean and it also formed an equally important part of the defence against the King's claims for Waltham forest too.[304] By April 1635 Littleton was arguing against the local landowners' defence against the forest laws in Essex as vehemently as Finch had done in Gloucester, and by this stage Littleton had assembled a more formidable body of legal authority for the Crown's view of the extent of the

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[301] See for example TNA SP16/271/67, ff.141r-143r and BL MS Additional 25302, ff.56r-58r.
[302] Gardiner referred to the judges as 'legal accessors': Gardiner, *History of England* , VII, p.363.
[303] *Statutes of the Realm*, vol.1i, p.255.
[304] See Serjeant Henden's summary of the case for the county of Essex: Bodleian MS Rawlinson C 722, f. 21r. For Littleton's attack on the validity of the perambulation of 28 E.1 and the relationship with the statute 1 E.3 see ibid., ff.35r-36r. Although two different forests were involved the perambulation was intended to encompass both of them amongst many others. That was why the point recurred.

forest.[305] This included the famous undated document, which Littleton expressly identified as '*inter* Bundell *foreste* 9 E.2 a French record... bearing no date' which he 'applied to the p[er]amb[ulacon] of 28 E.1for that's particularly recited'.[306] In Littleton's hands this document formed just one part of a much larger collection of evidence of the validity of royal claims.

The other point was that Littleton's presence ensured the intellectual continuity and coherence of the legal case for the reclamation of royal rights over the forests, and thus strengthened it. Littleton brought all of the strands used by Noy and Finch together in the case that he presented at Stratford Langthorne not only by his references back to the Dean eyre and the case that he had made there, but also by expressly referring to aspects of Noy's arguments at Windsor.[307] He also reviewed all of the extant evidence surrounding the perambulation of 28 E.1 and other authority cited by opponents of the royal claims in Waltham forest, again with the benefit of having been through this extensive exercise twice. This vindicated the government policy of choosing its law officers from the upper ranks of the legal profession irrespective of whether they had represented political opponents in the past and built up an impressive reservoir of legal knowledge in support of royal rights over the forests. The judges involved at such hearings were not given much opportunity for dissent since it was probable that the case for the royal claims was legally correct, even if they had not been enforced for long periods of time. That defect had been anticipated by Noy and his iteration of the inapplicability of prescription as a means of curtailing such rights.

How the judges were involved in this process was described in the more expansive account provided by Finch of his conduct in Gloucester. If his narrative is to be believed, and Littleton's more thorough restatement of the same approach suggests that it should, Finch did make an important contribution of his own that followed on from Noy's work. He also used the judges at the eyre hearing both to reassure himself and to achieve his objective. This was because he was nervous about the potential

[305] Kevin Sharpe, who was concerned with the revenue implications, rightly described this collection of legal authority as 'staggering': Sharpe, *Personal Rule*, p.119. Finch became impatient with it: see Bodleian MS Rawlinson C 722, f.26v.
[306] Ibid., f.30r.
[307] Ibid., ff. 35v and 36r

political reaction to the extent of what he decided to reclaim for the King. When Finch was asked to attend the Dean eyre he consulted Noy, who suggested that Finch look at the question of the boundaries and in particular at the perambulation of 28 E.1 and the apparent confirmation of that in 29 E.1. For forest offences Finch was directed to look at the proceedings of the relevant Swanimote court and to such other information as may be given to him, which may well have been a reference to the substantial background issues surrounding the current timber licenses and alleged abuses by their holders. Although Noy's 'indisposicon of health hindred farther conference with him' it is clear that Finch did discuss what needed to be done with Noy and had some three months to prepare his case.[308] Just as the boundaries had been first on Noy's list so Finch concentrated on this initially and searched in the Tower of London and the Exchequer tally office for copies of the two documents to which Noy had referred. This led him to discover that someone else was also going through the same records on behalf of the local interests involved. Although Finch mentioned no names it is now clear that this was Littleton, or someone on his behalf. Based on this sudden interest and, no doubt, the question as to why so senior, and expensive, a lawyer had been engaged by the relevant local parties, Finch surmised that there was serious concern about the extent of the boundaries. Such a detailed examination of past records and sources was typical of Littleton and so, prompted by Noy, Finch increased his efforts to the point where a case for a radical reassertion of much wider boundaries could be made.

The essence of the case that he then built was to go back to the *Carta de Foresta* of 9 H.3.[309] By that Charter whatever land had belonged to a subject of the monarch and been afforested in the reigns of kings Henry II, Richard I or John was fully disafforested. But if such land had either been afforested before the reign of Henry II or was royal demesne land, and thus owned by the monarch in his own right, it remained forest under the terms of the Charter. Finch's further research in the Tower led him to discover that there were grounds for questioning the validity of the perambulation of 28 E.1

[308] GA MS D9125/1/2937, f.33r.
[309] *Statutes of the Realm*, vol.1, p.120. This was the confirmation by Edward I but it contained the relevant provisions.

including, in particular, a document that expressly recited that perambulation but was undated. [310] In the later Stratford hearing Littleton specified a number of other serious defects in that perambulation.[311] To counter any political backlash that his boundary claims might provoke Finch adopted the same technique as Attorney-General Heath in the Five Knights' Case. He ran the details of his legal argument past Holland and his judicial assistants Jones, Trevor and Bridgeman before the hearing so that he knew what their response would be if he could ensure that the questions of law which they may be asked to determine were exactly as he expected. That he kept his intention to raise serious questions about the forest boundaries to himself and only approached the judges the night before the hearing possibly indicated an intention to ambush the judges and thereby put pressure on them to support his argument. However the fact that he only told Holland at the same time, and his apprehension about the wider reaction, suggested that the reason for this tactic was primarily to keep his intentions hidden from counsel for the local landowners rather than the judges. Leaving his discussion with them to the last moment was risky if he was not well prepared since it increased the possibility that he might be contradicted, told that no answer could be given in the time available or even criticised in front of Holland. Despite his protestation that he did not trust his 'own judgment in a matter of so great weight' it was likely that he had well prepared answers when he met the judges and 'opened to them the true state of the cause together with the difficulties'.[312] This was further supported by the quality and detail of his response to the arguments made by counsel for the local towns and other interests. That emerged much more clearly from his full account rather than the truncated version contained in the memorandum to the King which omitted some of his counter-arguments and abbreviated others.[313] Given the short notice given to opposing counsel, and Finch's rapid response at the hearing, it is almost certain that these had been prepared in advance, and whilst he may have had some help from the judges, it is more likely that he prepared most of this himself and mainly sought validation at his meeting with them.

[310] GA MS D9125/1/2937, f.33v.
[311] Bodleian MS Rawlinson C 722, ff. 30r-30v.
[312] GA MS D9125/1/2937, f.33v.
[313] For the full arguments see ibid., ff. 34v-35v.

An important aspect of the law that he was able to exploit was the way in which general legal rules and maxims favoured the Crown. This was in addition to the inherent royal bias in forest law. It is likely that the application of these presumptions to the case were suggested, or validated, by the judges at the meeting with Finch since axioms of legal interpretation of this nature were matters of special expertise amongst the judiciary who applied them regularly. The primary defence against the re-establishment of the boundaries for the forest of Dean asserted by Finch was the perambulation of 28 E.1and the weaknesses in that document have already been noted. The next two items raised by the defence were a confirmation of the perambulation from 29 E.1, and the general confirmation of the perambulations of the forests of England in 1 E.3 *Stat.*2, c.1. Because the key perambulation contained a variety of errors the confirmation was deemed ineffective ‘according to many cases of the Law because the Kinge was deceived’, irrespective of whether the deception directly related to the exact matter in question. That helped to dispose of the confirmation as a subsequent means of rectifying the situation. 1 E.3 *Stat.*2,c.1 was weak authority because of its very general wording and that was worsened by a presumption that in relation to statutes ‘in case of uncertainty that must be taken which is best for the King’.[314] Finally, what now seems one of the strongest arguments against the old boundaries, namely the long passage of time without proper enforcement was undermined by the principle enunciated by Bracton that *nullum tempus occurit regi*, which lay behind Noy’s argument that prescription could not remove royal rights. In his memorandum to the King, Finch chose to emphasise a different set of arguments relating to the difficulty of knowing what local usage really was, and doubts raised about this by later medieval records that indicated that the towns affected by the reasserted boundaries had behaved as if they were within the forest. This was possibly because such practical points would be more readily appreciated by a non-lawyer. However all of these principles of construction served to reinforce the strength of his case and Finch knew that the judges would apply them.[315] The combination of the forest and common laws readily supported the prerogative-based claims over forest assets and although judicial conduct at the forest justice seats was manipulated by the government law officers, the judges essentially applied the current laws

[314] Ibid., f.35r.
[315] These principles of interpretation may well have been what the judges reminded Finch about at their meeting, in the course of validating the arguments summarised in the memorandum to the King.

correctly. The bias was inherent in the law and the law officers were simply getting more efficient at managing that to obtain the right outcome for the government.

The subsequent proceedings at the Dean eyre against John Gibbons, Brooke, Mynn and Sir John Winter, all related to the cutting of excessive amounts of timber, in one way or another, outside the terms of such licenses or grants as they held. The role of the judges in these proceedings was very limited but the attack on the position of the licensees followed Noy's approach of strict examination of their conduct against the precise terms of their concessions. Gibbons was convicted of cutting timber in the forest on the basis that the grant that he relied upon did not specify that the land and its timber were within the forest. He was duly fined £8600.[316] Brooke and Mynne were similarly convicted of the theft of timber but on a much larger scale. They pleaded that they held letters patent permitting them to cut ten thousand cords per annum for a period of six years, that they had cut less than this and paid for any surplus taken. They were accused of taking three times the licensed amount and for doing so without supervision by forest officers. Finch made a detailed case against them based on calculation of the amount of wood needed to achieve the actual output of iron from their furnaces and produced witnesses as to their conduct. They produced testimony as to the actual consumption of wood but their case collapsed when they refused to produce their books of account and could not prove delivery of the wood through forest officers as required by the terms of the patent. At this point their defence closed and the judges' ruled that it had failed and called into question the validity of their letters patent, on the basis that they did not bear the Great Seal, but only that of the Lord Treasurer. They were duly fined the sum of £59,039.[317] Although a staggering sum, as Finch pointed out, it was calculated with reference to the value of the timber that was alleged to have been taken,

[316] *Les Reports de Sir William Jones*, p.347, BL MS Additional 25302, ff. 59v-61v and Hammersley, 'Revival of the Forest Laws', pp.96-7. Hammersley saw a suspicious discrepancy between justice Jones' five line summary and Finch's lengthier account but this seems illusory. Finch's assertion that the conviction was for theft of timber does not conflict with Jones's terse commentary. That stated that 'Gibbons...fuit convict de couper de arbois deins le forest'. Since his grant did not permit it, and the land was within the forest, such cutting of timber was theft of royal property.
[317] BL MS Additional 25302, ff. 62v-65r, Hammersley, 'Revival of the Forest Laws', pp.97-8 and *Les Reports de Sir William Jones*, p.348.

rather than twelve times that value in accordance with forest law.[318] Having seen this Winter withdrew his defence and was fined £20,230. The size of these fines demonstrated how such forest concessions could be exploited to generate significant revenue. Whilst several of the licensees subsequently sought, unsuccessfully, to challenge aspects of the proceedings in the court of King's Bench no specific accusations were levelled at the conduct of the judges in these matters.[319]

Waltham forest, like Windsor, had been the subject of royal interest under James I, through personal royal intervention in local disputes and Star Chamber court proceedings. At the King's prompting there had been occasional sessions of the court of attachments and the Swanimote court in the 1620s. However it was not until 1630 that there was a full revival of the latter court.[320] With that came the threat of the punishment of offences, the holding of forest officers to account and a full hearing of all such matters before a justice seat for the forest. At the beginning of September 1634 there were rumours that certain of the contenders for the post of Attorney-General after Noy's death on 9 August, namely Littleton, Bankes and Bramston, were searching the records of the Tower. By 19 September it had become clear that this was to 'find out the bounds of the forest of Waltham' and that 'the deeds are like to be produced at the justice seat'.[321] In Rossingham's correspondence with Scudamore, it is implicit that this activity by three leading lawyers was part of their respective attempts to be the replacement for Noy. It is likely that Finch was not involved in such research because he knew that he would represent the Crown, after his performance at Gloucester, and that he would be elevated to the bench after the Waltham eyre. He appeared before the first Essex hearing in exactly the same capacity as he had acted at Gloucester, and his confident performance suggested that he was equally well prepared.[322] One or other of the remaining three leading lawyers may have been examining the Tower's records on behalf of Essex landowners who feared that they might be the next group to be

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[318] BL MS Additional 25302, f.65r.
[319] Hammersley, 'Revival of the Forest Laws', p.98.
[320] Beaver, *Hunting and the Politics of Violence*, pp.58-65, 81-2.
[321] TNA C115/106/8432, 8434; Sharpe, *Personal Rule*, p.118.
[322] At the first hearing at Stratford Langthorne on 2 October 1634 Finch was not, as claimed by Sharpe, chief justice of the Common Pleas. Based on Warwick's account it seems likely that the hearing of the boundary issue was over by 5 October and Finch was not appointed chief justice until 15 October. For the details of Finch's elevation to the bench see *Diary of Sir Richard Hutton*, pp.99-103. This is relevant since there is a tendency to conflate Finch's role as advocate for royal rights and his role as judge making this all part of the same egregious behaviour. For example see Hammersley, 'Revival of the Forest Laws', pp.100-101.

affected by a reassertion of ancient forest boundaries. It is clear from Warwick's account of the first day of the hearing that, much the same as before the Dean eyre, Finch had become aware of research activity being undertaken by lawyers in the Tower that related to Waltham forest.[323] Whilst the hearing was attended by a substantial number of lawyers they seemed reticent about responding to Finch's demands.[324] When warned by him of the extent of the revived forest boundaries that he might claim, and challenged to prepare their defence, these lawyers indicated that they were ready to offer some defence against his claims if anyone would 'entertaine' (i.e. employ) them. It appeared that only a few of them had actually been hired to represent certain clients and then only for particular matters, such as the assertion of a specific licence or exemption. No-one had been employed to challenge the wider principle. When Finch pressed ahead the next day he again asked whether they were ready with any defence and they responded that they were not since they had not been instructed to act for the county in general and could not get any such instructions given that there had been no general summons issued to the county.[325]

The result was that Essex landowners affected by the reclaimed medieval boundaries were not represented at all and this prompted Warwick's intervention to buy some time. None of this deterred Finch who refused to grant any more time for a defence to be mounted other than a deferral overnight. The next day he insisted that the jury first listen to his case unchallenged and then deliver a verdict. When met by hesitancy on the part of the jury and a request from them to examine his main item of documentary evidence, Finch started to lose his temper, began to threaten them and refused to let them see the document, which had been read to them already. He then insisted that they go away, accompanied by the Lord Warden of the forest and the forest officers, and reach a verdict which they duly did. It accepted Finch's claims for the enlarged boundaries of what came to be termed the forest of Essex, in full just as he had required.[326] Both Holland and his two assistant judges, Jones and Trevor, permitted him to do this primarily because, in the absence of any legal argument against him,

[323] TNA SP16/275/21, f.44r.
[324] Warwick identified thirteen lawyers present in his account, either by name or by reference to their client's name, and indicated that there were several others that he did not know: see ibid., f.45v.
[325] Ibid., f.44.
[326] Ibid., fos.44r-45r.

they had no alternative given that, as would emerge later, the essence of Finch's argument was much the same as the one that he had made in Gloucester. In addition they were not given any ground for making any legal ruling. As for Finch's irascible behaviour towards the jury, the disgruntled Warwick undoubtedly regarded this as appalling, but as the leading landowner in the county he was particularly threatened by what Finch claimed in the King's name. Accordingly there are reasons for treating his version of these events with care.

The jury were in a very difficult position when faced with a case for a radical revival of medieval boundaries aggressively asserted on behalf of the King.[327] They faced a powerful assemblage of members of the nobility and gentry possessing major landholdings in the county many of whom were adversely affected by the revived boundaries. In attendance with Warwick there was a group of peers comprising Montague Bertie, second earl of Lindsey and Lord Warden of Waltham forest, Warwick's half-brother Mountjoy Blount, first earl of Newport and Lionel Cranfield, first earl of Middlesex. In addition Sir Henry Mildmay and Sir John North, attended in person and Sir Thomas Barrington sent lawyers to observe the proceedings.[328] Faced with Finch bearing down on them in the presence of this collection of leading political figures of the county it is not surprising that the hapless jurors appeared to stall. The lack of any counter legal argument left them without any solid basis for objection to Finch's case, as a jury, other than matters of fact. In Gloucester their counterparts on the jury had shifted much of the responsibility for a controversial decision by couching their verdict in terms that essentially said that if the judges confirmed that the legal objections raised against the Crown's case were invalid then Finch's reassertion of old boundaries was correct. That at least shared the burden with the judges and was procedurally correct by making them responsible for the decision on matters of law. The Essex jury was less astute and sought to assuage their fears by re-examining Finch's evidence. Whilst this may have appeared reasonable to Warwick it was open to the objection that it was not part of the function of a jury to interpret the meaning and effect of legal documents. That was the function of the judges. In addition their query concerning the documents appeared, possibly

[327] The revived boundaries brought about two thirds of the county back into royal forest, almost all of the area south of the current A12 road except for a small area around Tendring.
[328] Ibid., fos. 43r and 45v.

unintentionally, to question the honesty of Finch's account of what the documents said, in addition to their legal effect, without giving any reason for such a serious accusation.[329] Those two issues provided grounds for Finch's annoyance. The correct course for the Essex jury would have been to return a verdict that was conditional on confirmation that the legal effect of the documents was as stated to the jury, in much the same way as had been done in Gloucester. Distasteful as Finch's conduct may have been, the jury's response was legally incoherent and gave no proper grounds for any of the judges to intervene on their behalf.

Finch was no doubt aware, given the illustrious nature of much of his audience, of what was at stake. The jury's reluctance looked like what it probably was, namely the product of local influence. Finch knew that this opportunity for him to gain a significant victory for the King's rights in one of the two forests that had hitherto attracted the most royal interest, would probably not be repeated if the hearing was adjourned without a favourable verdict and Warwick, and his aristocratic associates, had a chance to lobby the King. That, and his ambition, reinforced Finch's intemperate conduct. Holland was faced with a division of loyalty, to the King's service and his own ambition on one side, and his personal relationships with other members of the peerage, his brother, Warwick, and several other family relatives on the other. Conscious that, as Finch had noted, the county was 'sullen', and having discharged what he conceived to be the duty of his office to the King by letting Finch secure a favourable verdict, Holland was quick to offer an olive branch to those who felt aggrieved by the decision. He adjourned the hearing so that the county opponents of the royal claims might have an opportunity to present material in their defence and promised that 'hee woulde doe them all the right he might'.[330] If Warwick and his friends thought they would get Littleton to represent them at that new hearing then they were soon to be disappointed as he was appointed Solicitor-General in replacement of Shelton on 17 October 1634, immediately after Finch's elevation to the bench.[331] He

[329] Finch did not entirely deny the jury access to the documents that he had cited. He commanded 'the Roule Keeper to goe with them but that they should see nothing else'. The roll keeper could assist the jury by reading the contents of the document to them, just as he had done in court, and still fully comply with this instruction. The first part of this statement seems redundant if that was not the intention: see ibid., f.45r.
[330] Ibid., ff. 44v and 45v.
[331] 'Littleton, Edward, Baron Littleton ', *ODNB*.

thus replaced Finch as the principal advocate for the reassertion of royal rights over the forests that had been developed since the late 1620s.

It was in this capacity that Littleton made what was to be the most thorough and complete case of all for those royal rights before the next Waltham forest eyre hearing at Stratford Langthorne in April 1635. This presentation was remarkable both for his mastery of the material and the fact that he appears to have conducted the entire case for the Crown, in a major set-piece hearing, alone. It said much for his own mastery of the subject and the quality of the case itself. In contrast the Essex landowners were represented by a team of six leading counsel. This comprised of four serjeants-at-law, Henden, Atkins, Whitfield and Thinne, plus Henry Calthorpe, who became recorder of the City of London later in 1635 at the King's request, and Robert Holborne, who would make a name for himself acting as one of the counsel for Hampden in the Ship Money Case in 1637.[332] Holland had been as good as his word and those who opposed Finch's efforts in Waltham forest were given the opportunity to defend their interests. In addition Holland attended this hearing with five judges from the central courts to assist him. These were chief justice Finch and justice Vernon from Common Pleas, justices Berkeley and Jones from King's Bench and baron Trevor. The government thus allowed this to become a full scale public test of the legality of reinvigorated royal rights in the forests on a scale that was almost comparable to the later test of the legality of ship money in *R.v Hampden*. As the most senior of these judges Finch took the leading role and delivered their unanimous judgement at the end. However all of them asked questions of counsel on both sides and commented directly on the arguments raised as they went along. The procedure was less formal than in their usual courts and individual judgements were neither sought nor offered. Their role was to examine the issues raised and advise Holland whether there were grounds in law for overturning the verdict reached by the jury at the previous hearing as he made clear when the hearing opened. That could

[332] C.W.Brooks, 'Calthorpe, Sir Henry (1586-1637)', *ODNB*, (OUP, 2004), online edn. Oct. 2008. See Bodleian MS Rawlinson C 722, ff. 2r, 9r, 12, 23v,42v-44v for references to counsel for the county interest.

have included considering whether another jury was required to make any further determination of fact.[333]

Whilst much was made of Finch acting as a judge of the validity of evidence that he had submitted at the earlier hearing, as has been noted, such ostensible conflicts of interest were not unusual given the lack of distinctions between the different functions amongst royal officials, including judges, discussed already. It was unlikely that the government saw anything wrong in asking a judge to rule on the validity of a case that he had presented as a government law officer and there is no indication that anyone thought it reasonable to ask a judge to recuse himself in such circumstances. Even the intense parliamentary criticism of Finch concentrated on his allegedly unjust treatment of the evidence presented in defence of the county interest without suggesting that there was anything wrong with him sitting in judgement of this matter. In addition Littleton brought even more authority and precedent to back up his case on top of the body of legal knowledge on the subject collected and used by Noy and Finch, so it was not accurate to depict Finch as simply ratifying his own evidence. That assessment has depended on the view that all Finch did at Gloucester, and the first Waltham eyre, was produce documents of dubious provenance, and then browbeat the jury. Overbearing, opportunistic and prone to sycophantic paeans to royal power as Finch was, such a view missed the fundamental strength of the royalist legal position. That was why the judges at the earlier eyres, and the four other judges at the 1635 Waltham eyre hearing, including two who had not been involved at the earlier hearing, accepted them. It also explained why none of those judges was impeached for their conduct in this regard despite their key role in what was seen in Parliament as a serious grievance.[334]

It was Finch, as Lord Keeper, who bore the brunt of the parliamentary attack. In his speech to the House of Commons on 22 December 1640 he acknowledged that 'there hath been some ill opinion

[333] Ibid., ff. 1v-2r.
[334] Of the judges accused by parliament Trevor had attended all three of the eyres where Finch had performed and Berkeley attended the last one. There was no mention of the forest laws in the charges brought against either of them: see *Articles of accusation*, pp.1-14, 39-48. Likewise there was no mention of the forest laws in William Pierrepont's lengthy denunciation of Berkeley in the House of Commons on 26 July 1641: see Jones, *Politics and the Bench*,pp. 209-13.

about me' in relation to the whole of 'the Forest business' and defended his conduct in both Gloucester and Essex.[335] However the impeachment articles brought against him concentrated entirely on Essex in terms that, in relation to the hearing of April 1635, are inconsistent with the full account of those proceedings in the Rawlinson manuscript C 722. That document contains fifty nine folios setting out the details of counsel's arguments on both sides and gives a purportedly *verbatim* account of Finch's judgement. It is of much greater length than most law reports of this period, either printed or in manuscript, and came closer to being a transcript of the proceedings, even if there are a few gaps in the accounts of counsel's arguments that suggest that the writer had some difficulty hearing or following all of what were often technically complex arguments. Despite this it is possible to follow most of those arguments. What emerged is hard to square with the charge made against Finch. The articles claim that Finch, as chief justice, 'continued by further unlawful and unjust practices to maintain and confirm the said Verdict' being the jury verdict at the Waltham eyre hearing of October 1634. At the hearing of April 1635 he 'did then and there, being assistant to the Justice in eyre, advise the refusal of traverse offered by the County, and all their Evidences, but only what they should verbally deliver, which was refused accordingly'.[336] What this appeared to assert was that lawyers for the county had proffered extensive evidence traversing (i.e. denying) the case made on behalf of the King and that Finch had advised Holland not to accept this and to insist that their case could only be put verbally at the intended eyre hearing. Given the lengthy arguments mades by multiple counsel for the relevant Essex landowners it is hard to see how this amounted to an 'unjust practice' still less an unlawful one. There is nothing to suggest that the forest laws, and eyres convened in accordance with their terms, made any provision for interlocutory proceedings that might allow there to be a formal sifting through of written evidence, or give opportunity for there to be written pleadings and defences exchanged between parties before trial in the manner of a bill court such as Chancery. The absence of any such procedure or court officers to receive such evidence meant that the eyre hearing was the only available way of proceeding. An explanation of the language of the charge was that the county's evidence included individual documentary exemptions for particular lands or persons, in addition to

[335] *State Trials*, 3:7-8.
[336] Rushworth,vol.4, p.137.

what was presented at the hearing which was primarily concerned with the forest boundaries. Finch's ruling thus seemed to deny their rights. But, even if that is correct, it still did not amount to any injustice. As Holland stated at the end of the April 1635 hearing, after the judges had upheld the original verdict of the jury concerning the boundaries, he was fully aware that 'though the bounds be taken in very large yet many may have p[ar]ticular charters to exempt them'. For that reason he did not close the hearing but adjourned it until the 28 September, five months later, so that they would have time to produce such evidence to another eyre hearing convened specifically to hear their claims.[337]

The real problem was that Finch, when delivering judgement, decided to turn this into a purely politicised narrative justifying the reassertion of the Crown's legal rights at Windsor, Gloucester and Stratford. Part of the significance of this was that he framed this process as cohesive and connected. However whilst the legal basis of this project was built up by painstaking legal research and presented in technically thorough terms by Noy and Littleton, Finch made the connections in politically provocative terms of the assertion of royal power and the requirement that those affected should submit to it. He claimed that at the Windsor eyre in Surrey 'all of that County to whose lands there was any pretence did voluntarily and readily yeild themselves within the bounds of the forest and do so continue without any... complaint'.[338] If that sounded optimistic then the situation was rosier still after the Dean eyre where, after the judges' ruling and the jury's verdict had been delivered 'they did most readily and willingly everie one of them, yea those that made the most opposicon...they did all *una voce* consent to it'.[339] In relation to the reclamation of his rights in Waltham forest the King 'presumed there would be that loyaltie and affeccon and obedience in them to him that they would not iudge him to recover and claime those that were his iust and due and undoubted rights'.[340] To turn a legal judgement into this sort of political oration was thoroughly toxic for his reputation and that of his fellow judges. It was exactly the sort of politicised comment from the bench that Finch would

[337] Bodleian MS Rawlinson C 722, f.59r.
[338] Ibid., f.56v.
[339] Ibid., f.57v.
[340] Ibid., ff.57v-58r.

make his trademark and was likely to provoke anyone affected by increasingly sophisticated and effective royal legal claims. Worse than that it lent just enough material to those, like Clarendon, who came to think that ‘there were many impertinencies, incongruities and insolencies, in the speeches and orations of judges’, for the politically disaffected to be able to build up a critique of judicial conduct that made the judges into political scapegoats without having to consider the real legal position in any detail.[341] Noy and Littleton assisted the government’s policies towards the forests by building up a strong legal case and leaving the political use of that to the King and his councillors. Finch was initially willing to do the same but he was too keen to identify with those wider political purposes. Although this assisted his promotion it attracted political antagonism towards him and the other judges.

The more socially secure and politically sensitive Holland carefully avoided any such mistake. He understood the implications of what had been achieved and, addressing the eyre audience, offered to do ‘whatsoever lies within my power to serve you’. He understood ‘the sharpnes and severitie of the forest laws’ and ‘that your bounds are extended to a great and extraordinarie largenesse’.[342] But this did not prevent him from implementing what had now become an established process for reviving royal rights over the forests. In August and October 1635 he presided over a justice seat for the New Forest at Winchester where the reasserted forest boundaries drew a large portion of the estate of Thomas Wriothesley, the fourth earl of Southampton back into the forest and thus threatened Wriothesley with severe diminution of the value of his estate. By July 1636 a pardon and release of the royal claims had been granted, but this had been an object lesson in why anyone caught within the net of the forest laws would be wise to consider paying to have their lands formally disafforested.[343] In 1637 Holland presided over forest eyres in Northamptonshire and Oxfordshire. The eyre in Northants for Rockingham forest demonstrated another facet of this policy that Wriothesley had discovered, namely that it was no respecter of persons. William Cecil, the second earl of Exeter, was

[341] Clarendon, *History of the Rebellion*, vol. I, p.89.
[342] Bodleian MS Rawlinson C 722, f.59r.
[343] Gardiner, *History of England*, VIII, p.86 and W.Knowler, *The Earl of Strafforde’s letters...*, 2 vols.(Dublin, 1740),vol.i, p.467.

fined £20,000, Mildmay Fane, the second earl of Westmorland, and his mother Mary, the first Countess of Westmorland, were together fined £19,000, Sir Christopher Hatton was fined £12,000 and the first earl of Newport, already adversely affected in Essex, was fined £3,000. These were only the most prominent examples with more than £7,000 more fines levied. It was notable that most of these individuals were not noted opponents of the government and, like Wriothesley, found ways of reducing or avoiding payment. Charles, and his ministers, could thus fairly claim that they were only doing their duty in marshalling royal resources and were not motivated by political animosity even if this indicated naivety about the scope of their political authority. In addition to the spectacular fines the boundaries of Rockingham forest were extended tenfold from six miles to sixty. Holland was assisted at the Rockingham eyre by chief justice Finch, justice Crawley of the court of Common Pleas and all of the judges that had accompanied him to Gloucester in 1634, namely justice Jones, baron Trevor and Sir John Bridgeman.[344] It seems likely that this substantial panel of judges was deployed precisely because of the scope of what was intended in relation to the boundaries and the consequential fines. Yet their involvement, and that of Holland, seemed to attract little comment either then or subsequently. It was only Finch's behaviour that seemed to attract lasting opprobrium.

The eyres were continued in Yorkshire, Nottingham and Derbyshire and the systematic nature of the policy was indicated in the papers of Sir John Bankes who was the Attorney-General from 1634 to 1640. Although Bankes never had the professional reputation of Littleton or Bramston he may well have gained expertise in relation to the forest laws by assisting Noy in his research, and he could always draw upon his colleague Littleton's knowledge in this period.[345] He indicated how the forest eyres were being fitted into government policy by drawing up a memorandum in 1637 that advised how to deal with objections raised against their proceedings.[346] It described them as 'legal and just' in a manner that was consistent with the cases brought by his predecessors and suggested that they would be approved by parliament. Equally eloquent was the succession of grants of disafforestation

[344] Knowler, *The Earl of Strafforde's letters*, vol. ii, p.117.
[345] C.W. Brooks, 'Bankes, Sir John (1589-1644)', *ODNB*, (OUP, 2004), online edn. Jan. 2008.
[346] Bankes Papers, 16/7.

and licences that contained the re-grant of the concession for the forest of Dean in 1639.[347] This indicated how the reassertion of royal rights in these assets encouraged the purchase of grants of disafforestation, or, separately, of concessionary rights in the forests. That the government should have chosen to exploit the royal rights that its law officers had laboured to establish by a combination of threats and venality did not discredit the legal basis of those rights, or the judges who upheld them.

When Parliament came to address this issue by statute, on 7 August 1641, it sought to do so by restricting the boundaries of the forests to those which 'were commonly known reputed used or taken to be the Meets Meeres Limits and Bounds of the...Forrests respectively in the twentieth yeare' of the reign of James I (i.e. 1622-3). In doing so the statute referred to 'divers presentments...and some judgements' whereby forest boundaries had been 'variously extended or pretended to extend' beyond the boundaries 'commonly known and formerly observed to the greate greivance and vexation of many persons having land Adjoyning'.[348] That was a weak response compared with the parliamentary assault on High Commission, Star Chamber and even the judges themselves. It did not abolish the forest laws, or even deny the legal validity of the judgements and presentments that it reversed. Instead it criticised those decisions for failing to accept prescription as a defence against royal claims, without indicating any reason other than inconvenience, and sought to substitute prescription by reference to an arbitrary date for the precedents cited by Littleton.[349] This was because Parliament wanted to restrict royal rights in the forests but realised that these forests were important state assets. Abolishing the forest laws was very risky without a thorough investigation of the scope of those laws and the circumstances of each forest. That would have taken time and money and neither was readily available. Accordingly valuable resources, such as timber, might be lost inadvertently.[350] The result was a statute that tried to address immediate political concerns by limiting royal claims without

[347] Bankes Papers, 43/11-43/18a. The re-grant to Sir John Winter is in document 14/14.
[348] 16 Car.I, c.16, *Statutes of the Realm*, vol.5, pp.119-120.
[349] The basis for the royal claims in respect of the forests was statutory and this pointed to the defective nature of the attempts to clarify or amend those claims. The simplest and most legally cogent way of dealing with this would have been to repeal the relevant statutes and substitute the new test by reference to a contemporary survey of the state of the forests but that was not attempted. Such was the continuing hold of the *Carta de Foresta* and the political exigencies of the time.
[350] Under the Protectorate there was an attempt to revive the Dean eyre to manage the forest: Hammersley, 'Revival of the Forest Laws', p.102.

providing any real response to the validity of those claims. That amounted to implicit acceptance of the legitimacy of the case made by the law officers of Charles I and his judges, even if the latter were associated in the minds of their political critics with the politically obnoxious behaviour of Sir John Finch.

Chapter 3: THE JUDGES AND THE ECCLESIASTICAL POLICIES OF CHARLES I

The condition of the church, ecclesiastical reform and common law rights:

Whilst such attempts had been made before with tacit royal support, Charles I and William Laud [351], as Bishop of London from 1627, and, after 1635, as Archbishop of Canterbury[352], were involved in possibly the most vigorous attempt since the Henrician Reformation to strengthen the finances of the established church and to restore episcopal authority and clerical discipline within it. This was especially controversial because it was combined with the implementation of certain doctrinal and ceremonial policies, termed 'Arminian' by its opponents, on the basis that they were the proper descendants of the true church, the religious policy of Henry VIII and the Elizabethan religious settlement. Certain proponents of Calvinist doctrine, and in particular those who felt that the Protestant reformation had not gone far enough, often termed by their opponents 'Puritan', were thus portrayed as a disruptive and disorderly influence subverting the theology of the church and its religious and civic authority. The question as to which of these views most accurately reflected the nature of the English Reformation has been the subject of much recent historical debate the vehemence of which has been increased by its integration into discussion of the causation of the English civil war.[353] The point, for the purpose of this discussion, is that there was, at least, a systematic attempt to implement policies under Charles I which had distinct doctrinal implications, whatever their true relationship to the reformation, in addition to administrative and economic reforms intended to increase the orderliness, authority and wealth of the church. The spectre of popery and the

[351] For detailed accounts of the various initiatives that tend, controversially, to diminish Laud's role as the source of these policies, whilst emphasising the role of Charles I or other clerics, such as Matthew Wren, the Bishop of Norwich, see J. Davies, *The Caroline Captivity of the Church: Charles I and the Remoulding of Anglicanism* (Oxford, 1992), pp.1-125 and Sharpe, *Personal Rule*, pp.275-402.
[352] A. Milton, 'Laud, William (1573-1645)', *ODNB*, (OUP, 2004), online edn. May 2009.
[353] For the genesis of this debate see N.Tyacke, 'Puritanism, Arminianism and counter-revolution' in *The Origins of the English Civil War*, ed. C.Russell (London, 1973), pp.119-44, 270-1. Then see P.White, 'The rise of Arminianism reconsidered', *Past and Present*, 101 (1983), pp.34-54; N. Tyacke, 'The rise of Arminianism reconsidered' with a rejoinder by P.White, *Past and Present*, 115 (1987), pp.201-29; K. Fincham and P.Lake, 'The ecclesiastical policies of James I and Charles I' in K.Fincham (ed.), *The Early Stuart Church 1603-1642* (London, 1993), pp.23-49,251-6; A.Milton, 'The Church of England, Rome and the True Church', ibid., pp.187-210, 282-5; P.White, 'The *via media* in the early Stuart church', ibid., pp.211-30, 285-9; N. Tyacke, 'Anglican attitudes: some recent writings on English religious history, from the reformation to the civil war', *Journal of British Studies*, 35 (1996), pp. 139-67 and G.W. Bernard, 'The Church of England, *c.*1529-*c.*1642', *History*, 75 (1990), pp.183-206.

theological erosion of the gains of the reformation were thus added to the political connotations of unregulated prerogative power, and implicit threats to lay property rights. That this meshed with the broader political and social views of Charles I and his government, and was implemented by a comparatively unified Privy Council in the absence of any parliament, only added to the concerns of religious and lay opponents alike.

Two aspects of Caroline ecclesiastical reform that particularly concerned the common law courts were the enhancement of the economic condition of the church and the reassertion of the authority and jurisdiction of the ecclesiastical courts. The latter derived from a renewed emphasis on the powers and dignity of the church, and the role of the church hierarchy in providing discipline within its own ranks and within society at large. This led to a more assertive approach by the church courts to jurisdictional issues. However it was the perceived need to improve the financial circumstances of the church and its clergy that most often brought the judges and the common law courts into conflict with government policy in relation to the interconnected issues of tithes, impropriations and prohibitions. Tithes had been one of the principal sources of income for the clergy since the medieval period or earlier. Indeed the concept of a portion of communal produce being applied for the maintenance of a priest pre-dated Christianity, as John Selden had pointed out.[354] But the system had run into considerable difficulties since the reformation. In general tithes amounted to an annual levy of ten per cent of gross produce derived from the periodic produce of land, such as crops fruits or livestock, of mixed sources, such as wool butter or milk, and of certain manufactures. However by the early seventeenth century this description concealed much complexity and legal dispute. Whilst medieval strip farming may have made the taking of a levy by way of severance of easily identifiable produce in kind reasonably effective this system had subsequently been thoroughly undermined by a combination of factors. The first was the proliferation and scale of new products and manufactures as methods of commercial exploitation of the land, and forms of trade, had increased throughout the

[354] C.Hill, *Economic Problems of the Church from Archbishop Whitgift to the Long Parliament* (Oxford, 1956), p.77.

sixteenth century.[355] The second problem was that such complexity encouraged the use of a form of commutation of liability, referred to as a *modus decimandi*,[356] to simplify the process of taking the tithe levy. Instead of payment in kind a fixed cash sum or other form of payment was substituted for the relevant liability and this arrangement, which was not documented, came to be regarded as a form of local custom. Unfortunately for the church this was a period of significant inflation which meant that any commutation of a payment in kind for a cash sum, the terms of which became an unchangeable custom, meant that the value of the arrangement was progressively diminished. By how much may be gauged from the fact that price series indexed against prices in the period 1451-1475 indicate that the price index for foodstuffs, which would have formed the bulk of most tithes, for the decade starting in 1561 was 298. By 1601 it was 527 and it was 687 by 1651.[357] Although the inflation rate for livestock and industrial products was lower, with the index in 1651 being 327, it is reasonable to assume that the value of a cash *modus* agreed in lieu of a staple food crop tithe in 1560 was likely to have reduced by about two thirds by the 1630s and had been on a steep downward trend almost ever since its inception.[358] Consequently the value of many parish livings was being steadily depressed.

These problems were further exacerbated by the effect of lay impropriations. Within a parish the legal structure of the ecclesiastical benefice involved the holding of lands and proprietary rights, including the receipt of tithes, by the rector or parson of the parish as a corporation sole. This property provided the income of the benefice. Supported by such income the rector would, in theory, minister to the souls of his parishioners and perform other parochial duties. However it had become accepted that benefices were like other forms of property and that clerical functions could be discharged by a

[355] For examples of the uncertainties that such economic developments engendered see Hill, *Economic Problems*, pp.78-84.
[356] A *modus* was, in law, any means of expressing the terms of an existing agreement so this did not necessarily imply commutation of a payment in kind into cash. Substitution of corn for wheat would be a modus, but the concept of an agreement to vary the existing obligation was vital for the common law assumption that this fell within its jurisdiction. As Coke put it 'if a horse or other thing be given in satisfaction of a duty, the duty is extinct and gone'(*The Case de Modo Decimandi, and of Prohibitions debated before the King's Majesty* 12 Co.Rep., 43). The right to tithe had been waived by the Church in lieu of an alternative agreement. That was then a matter for the common law.
[357] R.B. Outhwaite, *Inflation in Tudor and Stuart England* (London, 1969), p.10.
[358] Ibid.; C.G.A. Clay, *Economic and Social Change in England 1500-1700*, 2 vols. (Cambridge,1984), vol.I, ch.2 and M.J. Braddick, *State Formation in Early Modern England c.1550-1700* (Cambridge, 2000), pp. 48-50.

deputy or vicar. The original purpose of having benefices structured with church property held by a corporation sole was to ensure that such property remained within the ownership and control of the church on the death or removal of the rector, but this had not prevented leakage of what should have been ecclesiastical property into lay hands. Much of this had occurred as a result of the transfer of monastic lands into lay ownership in the course of the Henrician reformation. The scale of this transfer was substantial. In 1603 the bishops indicated that they believed that there were a total number of 3,849 impropriated livings, a number that corresponded closely with Spelman's subsequent estimate, published in 1646 after his death, of 3,845 out of a total number of 9,284.[359] On this basis more than forty per cent of livings were owned by lay patrons. Whilst this gives no indication of the distribution of value between impropriated benefices and those that were not, there were allegations that impropriations included some of the most valuable. That was credible since they often derived from the property of substantial monastic institutions. In addition in some areas such as Kent and Yorkshire the proportion of impropriated benefices comfortably exceeded half.[360] This was detrimental to the church in several ways. Before the reformation many of the monasteries had delegated the process of tithe collection to lay 'farmers' of such revenues. Although some parishioners thus became familiar with the notion of performing their tithe duties for someone other than a member of the clergy, the benefits of the levy were, at least notionally, going to a spiritual entity. After the reformation that spiritual connection was stripped away removing much of the distinction between tithes and rents. In addition to the large financial loss to the Church caused by lay encroachment on former Church property, this undermined ecclesiastical claims for the sacred nature of tithes with one critic, William Stoughton, suggesting that this justified the common law courts assuming jurisdiction over all tithe suits.[361] Many lay impropriators saw their interest as a form of

[359] Hill, *Economic Problems*, p.144.
[360] Ibid., p.145.
[361] Ibid., p.134 and W. Stoughton, *An Assertion for true and Christian Church Policie* (Middelburg,1604), pp.90-103.

property to be exploited like any other, making the clerical incumbent no more than a charge on the property.[362]

Another feature that augmented lay influence in the church and weakened its economic condition was the right of presentation to a clerical living or benefice, termed an 'advowson'. This often belonged to members of the laity either as an adjunct to impropriated property, or as part of an original foundation made by a patron within his own property for the benefit of his tenants. The rights of the owner of an advowson, termed the 'avowee', were subject to some restraint in that any appointee had to have been ordained and usually had to be approved by the relevant diocesan bishop. But in practice avowees exercised considerable influence over clerical appointments. The perceived value of the advowson may be gauged by the incidence of sales of the right of next presentation which was rather more popular than outright sales of the full rights of an avowee.[363] While such procedures were permissible at common law they were disliked by the ecclesiastical courts and remained an issue in arguments about the jurisdiction of High Commission.

All of these factors, amongst others, ensured that the Church never received anything approaching the true economic value of its assets on a regular basis.[364] They diminished the incomes of the clergy and the ability of the Church to pay for the upkeep of its property, such as the lands that remained in direct clerical possession and the fabric of churches, colleges and other ecclesiastical buildings. This economic decline also made it more difficult to provide a reasonable stipend to new recruits to the Church and in some parishes made it practically impossible to provide any ministry at all. As Laud put it, 'I find one great complaint and very fit to be redressed. It is the great grievance of the poor vicars, that their stipends are scarce able to feed and clothe them'.[365] This discouraged the recruitment of able new entrants to the ranks of the clergy, and undermined clerical status in an environment

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[362] For evidence that rectors, who had direct access to tithes, were better off than vicars, whose tithes were impropriated see Hill, *Economic Problems*, pp.77-131; F. Heal, 'The economic problems of the clergy', in *Church and Society in England: Henry VIII to James I* , eds. F. Heal and R. O'Day (London, 1977) pp. 1-14, 188; M.L. Zell, 'Economic problems of the parochial clergy in the sixteenth century', in *Princes and Paupers in the English Church, 1500-1800,* eds. F.Heal and R.O'Day (Leicester, 1981), pp.19-43 and Braddick, *State Formation*, pp.295-7.
[363] Hill, *Economic Problems*, pp.64-5.
[364] Another such issue was the way in which leases of Church property were structured: Hill, *Economic Problems*, pp.30-1, 36.
[365] LPL MS 943, p.347.

where recusant Catholics and Protestant dissenters were only too willing to challenge the role and relevance of the established Church. Accordingly Laud viewed the revival of the Church's economic fortunes as central to the improvement of ecclesiastical dignity and authority.[366] However members of the laity were equally determined to ensure that their exploitation of Church property remained unchallenged. Such economic concerns created opportunities for an uneasy, but powerful, alliance of convenience between Puritan critics alarmed at the doctrinal and disciplinary implications of government religious policy, and lay impropriators and tenants of Church property.

It also defined the areas of friction between the government's religious policies and the common law courts. In addition to toughening the leasing practices of the Church, the desire to improve the income of parish clergy underlay attempts to force impropriators to augment stipends and to contribute to the repair of Church property. It underlay moves to allow more livings to be held in plurality. It drove efforts to bring tithes and related *modi* under closer scrutiny in terms of what was subject to tithe, and to reduce impropriators' rights to tithes and the restrictions on the jurisdiction of ecclesiastical courts over tithe disputes. It lay behind clerical attempts to revise *modi* and by-pass common law courts to settle disputes over church property. It led to the examination of rent-charge tithes in London and attempts to augment them and to introduce this system in towns elsewhere, such as Norwich.[367] The lack of available income had weakened the ability of the Church to provide a more effective preaching ministry, which had led to the rise of various lay schemes to fill this gap. That in turn threatened episcopal authority and control and was to result in particular in the action, in 1632, brought by Attorney-General Noy against the feoffees for impropriations in the court of Exchequer for establishing an unlawful corporation.[368] Above all it placed the central common law courts, especially those of King's Bench and Common Pleas, and the judges who presided in them, at the centre of a political move to revise the economic results of the Henrician reformation. That exposed the judiciary to a potent and threatening critique of their conduct.

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[366] Davies, *Caroline Captivity*, pp. 84-6; F.M. Heal, 'Archbishop Laud Revisited' in Heal and O'Day (eds.), *Princes and Paupers*, pp. 129-142 and LPL MS 943, p.347.
[367] This lay behind the accusation against Berkeley and Bramston regarding prohibitions: see item 13, p. 3 above.
[368] Hill, *Economic Problems*, pp.245-274 for full discussion of the context of this case in relation to economic issues.

The role of prohibitions and initial moves to restrict them:

Of the various forms of legal protection sought by those opposed to the government's ecclesiastical policies the most prominent was the writ of prohibition. This was both a prerogative and a judicial writ. In the former category it formed part of that group of writs that included *quo warranto*, *non procedendo*, *habeas corpus*, *mandamus* and *certiorari* , all of which were concerned, in different ways, with the regulation by the central royal courts of the behaviour of lesser authorities. They were used to ensure that such authorities followed their own procedures correctly and stayed within their proper jurisdictional boundaries. They also provided claimants with means of redress against actions by such bodies that exceeded their legal authority or were otherwise contrary to law. Of these writs prohibition was probably the oldest, with roots going back to the thirteenth century when it emerged as the principal means for a litigant to stop an action against him in the ecclesiastical courts. At that stage it was already central to conflicts over jurisdiction between ecclesiastical and royal courts.[369] By the second half of the sixteenth century it had become the main method by which the courts of King's Bench and Common Pleas regulated the jurisdiction of most other courts. Although not originally a judicial writ by this period it had become so.[370] This meant that a litigant had to show cause to issue such a writ by application to either of the courts of King's Bench or Common Pleas in contrast to the normal form of writ commencing a legal action at common law. That issued from Chancery on request, and the payment of a fee, as part of its administrative function. Technically the ambit of the powers of the court of Common Pleas to entertain applications was more restricted than that of the King's Bench but in practice they virtually operated in parallel.

The writ of prohibition gave the senior common law courts the ability to decide what matters could be heard before most other courts and to prevent proceedings from being continued in those courts if any aspect of them conflicted with the common law. This was despite the fact that those courts administered different and separate systems of law and all courts fell under the ultimate authority of the Crown. Prohibitions thus undermined syncretistic views of the court system and promoted the

[369] Baker, *Introduction to English Legal History*, pp.128-9, 143-5.
[370] Charles M. Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law*, 4 vols., (2nd edn.online, Chicago University, 2004), vol.1, pp. vii and xviii.

common law above other bodies of law within that system including the civilian and canon law of the ecclesiastical courts. Thus prohibitions could be used to disrupt or thwart efforts to enhance ecclesiastical finances and authority. In relation to economic matters tithe disputes provided a rich variety of grounds for use of the prohibition to stop clerical claims in their tracks. The plea of the existence of a *modus decimandi* in a tithe suit before an ecclesiastical court need only be raised within the initial surmise lodged with the King's Bench or Common Pleas, at the commencement of an application for a prohibition, for there to be sufficient grounds, subject to satisfaction of some disputed statutory rules, for a prohibition to be issued. In the view of the common law the existence of a *modus* was a matter of fact that could only be determined by a jury, most of whose members would be tithe payers themselves and thus not especially sympathetic to church interests.[371] Their finding would then be applied in accordance with common law rules for determining what constituted customary payment and a valid *modus*. This was a consistent cause of complaint for those who wished to improve church finances.[372]

There were many other grounds for prohibition of a tithe suit in an ecclesiastical court. These included any dispute as to whether particular assets were subject to tithes; whether the ecclesiastical court had imposed evidential rules that differed from those of the common law; whether land, such as former monastic property or reclaimed waste land, was exempt from tithes or whether the tithes had been duly severed from the parishioner's property. This was in addition to more obvious ones, in the view of the common law, like the existence of a written agreement evidencing a modus, any issue that involved the interpretation of a statute, the interpretation of a deed or covenant, or any aspect of land law. The existence of any of these within a suit before an ecclesiastical court almost guaranteed that a prohibition would be issued. Moreover there were grounds for prohibition that related to the scope of how the ecclesiastical courts operated and what suits they could take. These hampered the ability of those courts to protect their authority and their role in people's lives. One example of such grounds

[371] In 1605 Bancroft referred to 'poor ministers still left to country trials, there to justify their tithes before unconscionable jurors' when testifying to the Privy Council: Hill, *Economic Problems*, p.127. Also see TNA SP16/406/54, f.118r in which the King referred disapprovingly to clergy in presentation disputes, and the High Commission court, being 'exposed to the weak judgments or to the wilfulness of a country jury'.

[372] See the complaint of Sir John Lambe in 1640 in SP16/474/68.

was the willingness of the common law courts to prohibit on the basis of conflict between common and civil law evidential requirements. Others included prohibitions to prevent people from being sued in ecclesiastical courts outside their home diocese; to limit the scope of remediable wrongs dealt with in the ecclesiastical courts; to regulate the conduct of intestacy and probate matters; to limit the operation of grants of alimony to wives separated from their husbands and even to regulate the operation of access ways to churches. All of these reasons for prohibition, provided significant obstacles to any programme that sought to enhance the power of the church and its courts.

Consequently systematic efforts were made by the King and the Privy Council to discourage the judges from issuing prohibitions in three different ways. The first, and simplest, was direct intervention by the King. The second was the brokering of express written agreements between the different parts of the court system that defined their respective jurisdictions. The third was by requiring the judges to justify privately their decisions. These efforts produced mixed results. Despite the deployment of what was possibly the most diverse array of tactics by the government to regulate a specific aspect of judicial behaviour, prohibitions proved to be possibly its least successful attempt at political management of the law for reasons that will be considered.

In theory any court could be prohibited. However the court of King's Bench, although notionally of the highest standing amongst the central common law courts, did not in practice prohibit the court of Common Pleas, and neither of them ever sought to prohibit the court of Star Chamber. This was because of its special position as an emanation of the Privy Council. The senior court of equity, Chancery, was not prohibited in practice although, unlike Star Chamber, there were indications that it could be prohibited in theory.[373] However suits in the junior courts of equity, the Court of Requests, the two regional prerogative courts, the Council in the North Parts and the Council in the Principality and Marches of Wales and the court of tin mining interests and miners, the Stannary Court, were all the subject of writs of prohibition.[374] The King intervened directly to restrain prohibitions concerning the Council in the North. On 22 June 1629 Charles wrote to the Council because he had been advised

[373] See Gray, *Writ of Prohibition*, vol.I, General Introduction, pp. xxviii-xxix, liii-lvi and C.M. Gray, 'The Boundaries of the Equitable Function', *American Journal of Legal History*, 20 (1976), pp.192-226.
[374] For regulation of prohibitions for Stannary Court see PC2/42/8, f.457 and TNA SP16/392/41 and 41i.

that its proceedings had been 'much more perplexed and our subiectes oftener disappointed of the iust finish of their suites there' as a result of 'the too frequent granting of prohibitions' by the common law courts of Westminster. To address this problem the King stated that 'in all these questions of jurisdiction' he would assume 'the iudgment thereof to ourselves'. [375] He asked the Council to draw the attention of the common law judges to these comments. A similar intervention appears to have been made in the relation to the Council in the Marches with the King's letter again formally recorded with the Council.[376] In December 1638 Sir John Coke, as Secretary of State, wrote to the Master of the Court of Requests advising him that the King had noted that various petitions to the court had been passed 'which concerned church causes; wherein for want of due informacon given to his Majestie from those reverend prelates whome the causes might concerne sundrie things have passed to the prejudice of the church'.[377] The Master and his court were then directed to draw any petition that concerned 'business reflecting upon the church' to the attention of the King and to refer the matter in question to the relevant metropolitan or diocesan bishop who should have cognisance of it.

This policy of royal involvement was restated in a draft declaration in 1633 by the King that, as part of his duty to uphold the authority of all courts, he would maintain each of them within the limits of their respective jurisdictions and that he intended to 'settle a certaine order as well concerninge prohibitions' so 'that no one of our courts may be prejudiced by another'. However the language demonstrated a fundamental misconception that would undermine all government efforts to restrict prohibitions. The 'order' concerning prohibitions that the King wished to impose was to avoid 'all late inventions and noveltyes on all sides' so that 'prohibitions may freely proceede from such courts in such causes and in such forme as by the antient laws of the realme have bene accustomed'.[378] This assumed that the ambit of the writ of prohibition was restricted by a static and clearly understood set of ancient customs rather than the reality of what was a fluid, changeable and often contested, set of principles applied by judges to changing economic circumstances. Those principles were highly

[375] TNA SP16/145/23, ff.31v-32r.
[376] TNA SP16/415/5.
[377] TNA SP16/404/127, f.256r.
[378] TNA SP16/255/42, f.112r.

technical, complex and subtle to the point where it was not entirely clear that the judges themselves fully understood them.

This problem emerged again with the attempt to address this issue by express agreement between the courts. In practice the most effective direct intervention was taken in relation to prohibitions affecting the court of Admiralty and it was used as a model for tackling the ostensibly similar issue for other courts. It provided a revealing contrast with the ecclesiastical courts. The Admiralty court had jurisdiction over matters arising on the high seas, and by the early seventeenth century dealt almost exclusively with civil disputes, having lost its criminal jurisdiction in the early sixteenth century to commissions operating under its supervision. It applied Roman law supplemented by customs of the sea.[379] There were important reasons why the Caroline government were able to address concerns about the use of prohibitions in respect of the Admiralty jurisdiction with comparative ease. The court regulated matters of vital economic and military importance both to the government and the mercantile interests that used it to settle disputes. There were no clear vested interests that benefitted from common law encroachment on the court's jurisdiction, other than the professional ambitions of common lawyers. Apart from that, and any litigants who preferred to take their chances with a jury trial, no-one gained by obstructing its conduct of business. Its decisions were the subject of little domestic political controversy. The court had developed technical expertise in marine and commercial matters that was very useful to parties engaged in international trade and finance and the government benefitted from the flows of goods and money that this engendered. Finally its interests could be effectively represented by its principal judge who was, at this time, Sir Henry Marten.

This contrasted with the ecclesiastical courts which appeared to have a vested interest in the outcome of many of the disputes that came before them, including economic issues, matters of discipline and the enforcement of doctrinal conformity. All of these areas of activity might stimulate a variety of opposition and controversy and a party brought before a church court could effectively bring the proceedings there to an end by successfully applying for a prohibition. The only alternative for the

[379] For a summary of the jurisdiction, functions and common grounds for prohibition of the court of Admiralty see Gray, *Writ of Prohibition*, vol.I, General introduction, pp.xlvii-liii.

complainant at that stage would be to try to bring some equivalent action at common law, which may either not exist or subject his case to the scrutiny of a jury. In contrast, in the Admiralty court, the defendant in prohibition would often have a basis for proceeding at common law on the same set of facts, thus making prohibition less effective as a blocking tactic.[380] Finally, proceedings in the ecclesiastical courts arose in relation to a much wider set of issues than came before one specialist commercial court.

Nonetheless the procedure adopted by the government for dealing with prohibition of Admiralty court suits provided a superficially attractive example of how prohibitions could be regulated by political action. In the period from 1629 to 1632 a series of increasingly shrill complaints were made to the King or Privy Council, by various groups including officers of the Admiralty court, merchants and shipwrights. [381] In response the King and the council moved decisively. On 21 January 1633, in a council meeting attended by Charles, the 'differences... touching prohibicions' between the judges of King's Bench, Common Pleas and Admiralty were the subject of 'mature deliberacion' and it was then ordered that all of those judges 'conferre one with another at the councell Chamber in Whitehall' with the Attorney-General Noy in attendance. They were required to reach agreement amongst themselves on this subject or adjourn until such time as the matter may be presented for adjudication by the King himself.[382] That meeting of the various judges was duly held on 26 January 1633 and after a further meeting an agreement was submitted to the King for his approval.[383] On 18 February, again at a meeting of the council at Whitehall attended by the King, the product of that drafting meeting, being a set of formal articles and declarations settling the differences between the common law judges and those of the Admiralty court, was read, discussed, and then subscribed by all of those judges in the King's presence. The text was then included in full as part of the minutes of the meeting in the council register.[384] It was a succinct statement of the scope of the Admiralty jurisdiction and the points where friction had arisen with the common law. The simplicity aided its enforcement and

[380] Ibid., pp. lii-liii for further consideration of these points.
[381] For examples of this see TNA SP16/150/82, TNA SP16/158/38, TNA SP16/185/8, TNA SP16/208/xxii, TNA SP16/210/30, and TNA SP16/231/37. As an example of their strident tone see TNA SP16/178/54.
[382] TNA SP16/231/35, f.67r.
[383] TNA SP16/231/48 and 48a.
[384] TNA SP16/232/59, PC2/42/ff.456-7 and in John Godolphin, *A View of the Admiralty Jurisdiction...* (London, 1661), pp.157-160.

enforced it was.[385] Despite examples where the judges in King's Bench seem to have followed the letter rather than the spirit of this agreement, it appears to have worked as the tide of complaint from the Admiralty court abated in the extant records.[386]

At the same council meeting on 18 February, in addition to the courts of the Admiralty and the Stannaries, there had been an attempt to address the larger issue of prohibition of the ecclesiastical courts. Sir Henry Martin, this time in his capacity as judge of the prerogative court of Canterbury and dean of the arches, had been instructed to consult with civil lawyers and draw up a list of objections and propositions which the civil lawyers had to the prohibitions issued by the common law courts in relation to ecclesiastical courts. Presumably it was hoped that the issues involved could be conveniently summarised in a short and binding agreement in a similar form to that successfully used in relation to the Admiralty jurisdiction. This was then to be submitted to the two chief justices who were to prepare their answers with the assistance of the other judges. The latter were commanded to be back in London by the beginning of May to complete the exercise. Apparently this process was never completed as no form of a written agreement was set out in the council records and there is no further reference to one elsewhere. This meeting was, however, described by Sir Robert Berkeley, justice of the King's Bench, in his testimony on 12 January 1644 to the committees of the House of Lords appointed to examine witnesses in relation to the case against Laud.[387] Berkeley recollected that about ten years before all of the judges and the barons of the Exchequer from the Westminster courts were required to prepare answers to articles setting out complaints made to the King about prohibitions to the ecclesiastical courts. Again Attorney-General Noy was present at their meetings. The judges were then required to attend a meeting of the Privy Council with at least twenty councillors in attendance plus the King, all of the King's counsel extraordinary and various civil lawyers. Although he was not sure who prepared the articles Berkeley noted that Sir Henry Marten was 'very forward therein'. Despite these efforts the result was inconclusive. The King stated that 'all courts should enjoy their proper jurisdiccon' and then Lord Keeper Coventry continued, on the King's

[385] See TNA SP16/365/30, TNA SP63/256/606 and TNA SP16/436/21.
[386] For an example of a later prohibition dispute involving the Admiralty court see TNA SP16/381/4-6. However the volume of such complaints does seem to have dropped.
[387] TNA SP16/500/11.

instruction ‘to the same purpose’.[388] Although Berkeley had every reason to be vague about exactly how far the judges had been willing to agree to limit their powers to grant prohibitions because of the treason charge levelled against him, it seems clear that no precise agreement was ever reached. Given the much greater complexity of the issue of prohibition of ecclesiastical courts, it must have become apparent that it would not be easy to draw up and agree the terms of any agreement between the civil and the common lawyers on this subject and the King relinquished the handling of this large technical issue to his Lord Keeper. This attempt, just like the occasional personal interventions of the King, had foundered on the same failure to appreciate that prohibitions of ecclesiastical courts were a flexible and evolving response to underlying trends affecting the Church rather than a fixed set of rules that the judges had departed from.

In fact the Caroline government came remarkably close to imposing a potentially effective, if politically explosive, solution to this whole problem early in the 1630s. The King’s awareness of his power to act as the arbiter of jurisdictional issues raised the possibility of setting up a tribunal for doing this on a regular basis. On 6 May 1631, by royal commission, the King appointed Lord-Keeper Coventry and thirty three non-judicial members of the Privy Council, including the then Archbishop of Canterbury, George Abbot and Samuel Harsnett, the Archbishop of York, ‘for the hearing and examining of all differences which shall happen between any courts of justice in any matter concerning jurisdiction of courts’. This group comprised of nearly all of the non-judicial members of the Privy Council, and any six or more of them were authorised to adjudicate such jurisdictional matters and advise the King of any decrees or orders that they regarded as necessary ‘for the quiet and peaceable establishing of the said courts in their rights’.[389] The establishment of such a commission was the next logical step after the King declared his intention to assume control of jurisdictional regulation since it was impractical for him to attempt to discharge this function on a day to day basis. To create a political tribunal comprising of a small number of Privy Councillors, drawn from a larger pool of political figures at the centre of government, was the practical solution. In a letter dated 12

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[388] Ibid, f.48r.

[389] TNA SP16/190/28, ff.55r; Petyt MS. 538, vol.56, f.210 and Thomas Rymer, *Foedera, conventiones, literae et cuiuscunque generis, acta publica inter reges Angliae, et alios quosuis imperatores, reges,... ab anno 1101, ad nostra usque tempora habita aut tractate;...*, 20 vols.(London, 1704-35), vol.19, pp.279-281.

May 1631 to Sir Thomas Puckering, the reputed intelligencer John Pory described this new commission as being ‘to balance the jurisdictions of all the courts of justice’. He went on to remark that it was ‘a means whereby in time to draw appeals from all of them to the council board’.[390] In so saying he may have been more astute than he realised and his comment showed that at least some of the potential that this commission created, for superseding the role of the common law courts in regulating jurisdictional issues, was appreciated outside government and legal circles. What was less apparent was that the implications behind the establishment of such a commission were even more radical than Pory suggested. It bore a remarkable similarity to the genesis of High Commission and the methods of the government to enhance the power of that body. As such the implications were little short of revolutionary. The development and use of such a commission would have amounted to the *de jure* demotion of the common law to being just another one of the different jurisdictions operated under the supervision of the Crown, in exactly the way that many civil lawyers and clerics thought should happen. However there seems to be no evidence that the commission was developed any further. This, combined with the absence of further comment on such a potentially momentous step, suggested that the government was not yet prepared to make such a bold assault on the exalted status of the common law and its courts, in principle. Lord Keeper Coventry would have understood the ramifications of this and it is possible that he, and others including the King himself, were unwilling to incur the wrath of the entire establishment of the common law, and any future parliament, quite so blatantly. It is also possible that their practical experience to date made them aware of just how technically difficult and time consuming it could be to police these boundaries.

Despite these various actions there was not much further effort to impose an express and complete set of limitations on the common law courts in relation to prohibitions after 1634. Some commentators have sought to portray the declaration, contained in a set of notes concerned with listing dispensations and appointments of clergy procured by Laud between 1634 and 1637, as the introduction of a sweeping bar by the King, at Laud’s instigation, on the ability of any judge to ‘meddle’ with the

[390] Birch, *Court and Times of Charles the First*, vol.2, p.114.

ecclesiastical courts.[391] In reality this declaration dealt with a much more technical and limited issue, which may explain why the ostensible creation of a total power of veto over the common law courts in favour of the Archbishop of Canterbury was buried in a list of minor ecclesiastical appointments. The text read as follows:

> Declaration ecclesiasticall prohibiting all his Majestes judges & other officers nott to suffer any p[ar]dons, licences, etc to passe seale or any wise to intermeddle with ecclesiasticall ffines fforfeitures and recognisances taken in any ecclesiasticall court without the speciall approbation of the B[isho]pp of Cantur[bury][392]

In the left hand margin next to this entry the date is stated to be October 1635. The entity that was most likely to be imposing such fines forfeitures or other sanctions would have been High Commission, although there were circumstances where this could apply to other ecclesiastical courts.[393] The issue that this declaration was aimed at was the judges' habit of issuing prohibitions to enforce their right to interpret the scope of pardons issued through their courts, and thus require the ecclesiastical courts to respect both their interpretative pre-eminence and such pardons.[394] The first time an ecclesiastical court might hear of a relevant pardon was when it had dealt with a matter, proceeded to sentence and received a prohibition. This requirement was intended to limit the effect of pardons, which were usually issued by the King, by drawing them to Laud's attention before the question of prohibition arose. It would have reduced the number of such prohibitions without challenging the judges' right to issue them.

The parliamentary reaction to the curbing of prohibitions was summarised by Falkland, in his speech to the House of Commons on 9 February 1641, when he opined that prohibitions had been hindered

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[391] TNA SP16/383/49. The declaration is on the first page in the sixth paragraph. The Calendar entry for this inaccurately described it as a 'declaration prohibiting all judges to meddle with all ecclesiastical affairs without the approbation of the Archbishop of Canterbury'. See R. G. Usher, *The rise and fall of the High Commission* (Oxford, 1913), p.319; Hill, *Economic Problems*, p.331 and Davies, *Caroline Captivity*, p.75. Usher interpreted the Calendar entry without checking the original, construed it as applying to all judges, both civil and common law and conjectured that this was aimed at supporting High Commission. He then misattributed the date of the Calendar entry, February 1638, which related to the date when the list was compiled, to the declaration. The others appear to have followed him without question.

[392] Ibid., f.117r.

[393] To this extent Usher's conjecture was valid.

[394] See Gray, *Writ of Prohibition*, vol. I, pp. 107-8, 172-3, 234-7; vol.II, pp. 193-6, 352, 382, 391-5, 397-8; vol. III, pp.184-8, 215, 242 for a selection of examples of this.

'first by apparent power against the Judges, and after by secret agreements with them'.[395] Falkland's analysis missed other tactics used by the government and implied that the application of 'apparent power' ceased and was entirely replaced by private coercion. In reality direct political power was used increasingly to find practical ways around the obstacle posed by the judges and prohibitions.[396] In a letter to Thomas Wentworth, dated 9 September 1635, Laud commented that 'as for the Church, it is so bound up in the forms of the common law that it is not possible for me, or any man, to do that good which he would, or is bound to do.'[397] This often quoted remark reflected several concerns. At one level it summarised how profoundly lay economic interests were embedded within the post-Reformation church and defended by the common law. At another the word 'forms', suggested awareness of the centrality to the common law of the forms of action embodied in writ types. That hinted at the pervasive complexity of the supervisory functions of the common law courts, manifested by their power to issue prohibitions. Faced with such difficulties direct political action to restrain the common law judges had been, and would still be, used as other tactics were abandoned. Justice Berkeley alluded to one tactic and Falkland had named it: secret agreement.

<u>Prohibitions and private judicial restraint in causes not involving High Commission:</u>

The testimony of Berkeley indicated how pressure was exerted on the two chief justices, and through them on the puisne judges in the courts of King's Bench and Common Pleas, by the steady demand for reasons and justification for the day to day decisions of the judges made in relation to the prohibition of ecclesiastical courts. This was a crucial covert means of political influence and management. He explained that on many occasions he, and the other judges, had been told by the two chief justices that he had served with in the court of King's Bench, Richardson and Sir John Bramston, how they:

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[395] J. Nalson, *An impartial collection of the great affairs of state from the beginning of the Scotch rebellion in the year MDCXXXIX to the murther of King Charles I*, 2 vols. (London, 1682), vol.1, p.739.
[396] For example the royal instruction in relation to the operation of the *ex officio* oath in February 1638 in TNA SP16/381/29 and to the court of Requests in December 1638 in TNA SP16/404/127.
[397] Laud, *Works*, vol. vi, p.310.

> have bene question[e]d both at their being at the star chamber and at the Co[u]rt touching rules for p[ro]hibicions in the Kings Bench to the high Commissioners and to other ecclesiastical judges and desired informacons from the s[ai]d judges touching the reasons of the s[ai]d rules made in the absence of the s[ai]d ch[ief] Justices...And to the end the Ch[ief] Justice[s] might themselves be ready to answer such complaints the puisne judges used in the absenc[e] of their chief, to wish the Counsil at bar upon their moc[i]ons for prohibit[ion] in cases w[hi]ch appeared not to be ordinary to move when the co[u]rt was full[398]

Although Berkeley became conveniently vague after this being unable to say who exactly had exerted this pressure, or which cases were affected, this description fits with evidence from contemporary case reports and the government's management of judicial promotions to the chief justices' posts.

The political climate described made the judges fully aware of the government's policies and preferences regarding prohibitions and their desire to enhance ecclesiastical interests. In some instances the government would address specific judges dealing with particular courts or cases. As royal servants they would have been particularly concerned to accommodate the royal will when it was stated so clearly, and intervention in legal matters by the Privy Council were, as already indicated, fairly routine. However the judges were also custodians of the common law and were aware of possible parliamentary hostility to encroachments upon it. Faced with such pressures the judges used their technical understanding of the law and its procedures, to steer a way through such hazards. The presence of political influence might thus be mitigated and decisions made that avoided looking too clearly anomalous. The multi- layered aspects of prohibition applications lent themselves to such behaviour.

In order to show cause why the writ should be granted the party seeking the prohibition, referred to as the 'plaintiff-in-prohibition', filed a written statement setting out the grounds for the writ in a 'surmise' or 'suggestion'. This was in English and was not bound by the conventions of normal writ forms. The plaintiff-in-prohibition was often the defendant in ecclesiastical court proceedings. However that did not have to be the case since the function of the writ, as a form of regulation of jurisdictional boundaries, meant that any person with legal capacity to sue could commence such proceedings. In addition there were circumstances where an ecclesiastical court plaintiff might decide

[398] TNA SP16/500/11, f.48v.

to self-prohibit. An example would be if he wanted a particular issue of fact decided by a jury, or a matter of law decided by a common law judge. The surmise would be considered by one or more judges, either *ex parte* (i.e. with only the plaintiff-in-prohibition represented) or attended by counsel for each of the interested parties. Depending on the quality of the case and arguments a prohibition may then be granted or denied. If it was granted without the defendant-in-prohibition being represented then that party could seek a reversal by motion for consultation, a writ of consultation being a direction back to the ecclesiastical court to resume the case. It was the formal means of reversing a prohibition.

If a prohibition had been granted, without consultation at this stage, then the prohibition would stand. But it was open to the defendant-in-prohibition to state his intention not to comply with the prohibition and force the plaintiff to a full formal hearing of the matter before the common law court. Such a refusal to comply did not yet constitute contempt of court. The full hearing would be initiated by a formal complaint of non-compliance which would set out the terms of the original case, this time in Latin following the strict rules of pleading. To this the defendant would have to file an equally formal answer. By following the pleading rules the matter would either come down to a question of fact, which would be put to a jury, or law, which would be decided by the judges, or a mixture of both. These matters would be determined at a hearing and prohibition or consultation granted accordingly. This second stage of the process was termed 'attachment on prohibition' and failure to comply with a prohibition granted after it was completed was contempt of court and punishable as such. The ecclesiastical courts would customarily stay their own proceedings until the various stages of this prohibition procedure were finished.[399]

The process offered both of the parties, and the judges, a variety of tactical opportunities. It is noticeable how easily a plaintiff-in-prohibition could get an initial prohibition and either end the matter there or force the other party into a full hearing either at that stage or later. This was a major cause of the complaint of ecclesiastical litigants that the common law courts too readily granted prohibitions. As a separate point this two tier system gave the judges tactical options in a difficult

[399] For a full account of this procedure see Gray, *Writ of Prohibition*, vol. I, General Introduction, pp.xviii-xxiv.

political environment. They could put off taking an awkward decision by giving a weak initial ruling at the hearing of the surmise, possibly whilst airing some doubts, in the hope that the losing party would either give up or force the matter to the attachment level. Divisions on the bench could also be addressed by using such tactics to play for time. Further layers of procrastination could be added by delaying the final decision or encouraging the losing party to seek a writ of error. In different circumstances the judges could rapidly grant a prohibition in strong terms with little opportunity for objection thus effectively challenging the defendant-in-prohibition to escalate to a full hearing if they dared. It is with such tactical ploys in mind that evidence of political influence in prohibition cases should be considered.

One situation that caused obvious exasperation to ecclesiastical litigants was the granting of multiple prohibitions for the same ecclesiastical suit. Certain cases, in the period from 1625 to 1631, saw the early development of a pro-Church response to this issue by William Noy, grounded in the common law, and some discomfiture amongst the judges. The main point turned upon the interpretation of several statutory provisions and so fell within the ambit of the common law courts. The key statutory provision, 50 E.3, c.4, stated that:

> when Consultation is once duly granted upon a Prohibition made to a Judge of Holy Church, that the same Judge may proceed in the Cause, by virtue of the same Consultation, notwithstanding any other Prohibition thereon delivered to him: Provided always that the Matter in the Libel of the said Cause is not...changed[400]

The reference to a 'libel' here carried its contemporary meaning of a written statement. It referred to the ecclesiastical plaintiff's statement of claim and contained no implication of defamation. This provision was intended to prevent repeated prohibition applications on slightly different points in the same ecclesiastical suit being used as a means of hindering a plaintiff.

In *Cockeram v. Davies*,[401] a late Jacobean case in King's Bench in Hilary term of 1625, a classic problem had arisen concerning the construction of this statutory provision. In an application for a prohibition in an action for tithes brought by the parson, Davies, against, Cockeram, his parishioner,

[400] *Statutes of the Realm*, vol.1, p. 398.
[401] BL MS Lansdowne 1036, f.86 and Gray, *Writ of Prohibition*, vol. I, pp. 85-7.

Cockeram had surmised the existence of a *modus* but he had failed to provide adequate proof of its terms within the six month statutory time limit prescribed in section xiv of the separate statutory provision of 2/3 E. 6, c.13.[402] The prohibition was denied and consultation granted. The ecclesiastical court then found for Davies and Cockeram lodged an appeal against this decision to a superior ecclesiastical court. He also sought to use his own appeal as an opportunity to seek another prohibition in the King's Bench court. His counsel argued that 50 E.3, c.4 referred to 'the same judge' and that the judge dealing with this matter on appeal would clearly be a different person. Justice Dodderidge took the view that the appeal procedure effectively suspended the original suit until it was determined and that it was thus effectively part of the same suit but justice Jones disagreed. He found for the plaintiff on the basis that because the original *modus* argument had only been defeated by the expiry of the time limit under 2/3 E. 6, c.13 the original consultation had not been 'duly granted'. It had been issued because of the expiry of an evidentiary time limit rather than on the merits of the case. In such circumstances 50 E.3, c.4 was not intended to prevent the issue from being revisited. Jones carried the day and the court awarded the prohibition at the surmise stage. There was evidence from passing comment in the case of *Bowrie v. Wallington* that it may have been further upheld on attachment.[403] The case illustrated how, in prohibition proceedings, statutory provisions intended to assist the church's ability to collect tithes, and the ecclesiastical appeal process, could be circumvented to the detriment of the economic interests of the church by ingenious legal argument. However there was a counter-attack.

In the next term of 1625, William Noy, as counsel for the defendant-in-prohibition parson Wallington, sought to make it entirely clear that ecclesiastical appeal normally did not provide a means for avoiding the ambit of 50 E.3, c.4 with an extraordinary thoroughness that suggested a deliberate move to set a precedent that defended Church interests. This was the case of *Bowrie v. Wallington*.[404] The facts of this case were similar to *Cockeram v. Davies*. It was another tithe case with parson

[402] That section stipulated that in certain circumstances the party seeking a prohibition must prove the contents of his surmise within a period of six months. It only applied to tithe suits. See *Statutes of the Realm*, vol. 4, p.57.
[403] Gray, *Writ of Prohibition*, vol.I, p. 87, fn. 45.
[404] See 79 ER 1257; 82 ER 246; 82 ER 282; 73 ER 1016; 73 ER 1018; BL MS Hargrave 38, f.17b; BL MS Lansdowne 1063, f.116b and Gray, *Writ of Prohibition*, vol.I, pp.99-102.

Wallington having sued Bowrie for failing to deliver the relevant tithes in kind and Bowrie alleging a *modus*. He argued that this *modus* governed the payment of tithes by the whole of the village even though it was established that some parishioners did individually render their tithes in kind. This failure to establish the correct terms of the *modus* amounted to a substantive decision against Bowrie's defence, not merely failure to comply with an evidentiary time limit. He had appealed to the court of Arches, and like Cockeram, then sought another prohibition. This time the court found against him and the consultation, originally granted for failure to establish the terms of the *modus*, stood. However Noy raised four further points to emphasise why this was the correct decision. His first was to stress the public purpose of the writ of prohibition. It was, like *praemunire*, a remedy for restraining the defendant-in-prohibition from acting in contempt of the secular royal courts. It was wrong to try the defendant for doing this more than once and the statutory restriction implemented this principle. His second point was to bolster justice Dodderidge's argument that the appellate judge was not to be construed as being a different judge for the purposes of the statute. Noy noted that the appellate judge would return the case back to the original ecclesiastical court judge for execution of sentence if the appeal was not reversed. If the two were treated as separate in law this would produce the absurd situation where the appellate judge was prohibited whilst the original one was not. To support this he further remarked that when construing statutes reference to a category of persons included persons with the same legal interest, such as the executor of any person described in a statute. Finally he referred the court to the parliament roll containing the original petition underlying the statute 50 E.3 and the royal response. Using this research he asserted that the intention of the statute was that there should be only one prohibition per case. The judges were not obliged to accept that roll, instead of the wording of the statute, but it added force to the other arguments. This exposition, beyond what the case required, indicated Noy's early expertise on this subject and that he was trying to establish a set of principles that could be used to limit prohibitions. He would re-visit these arguments again.

At this stage William Noy was a successful legal practitioner and a member of parliament, for St. Ives. In his career to date he had maintained political connections both at Court and in parliament. There was little indication of his religious sympathies although it may have been that to a lawyer who

declared to the House of Commons in 1621 that ‘when we goe in the new ways wee are likely to goe astray. Let us keepe the ould waye’ the established Church was rather more sympathetic than any form of religious dissent.[405] Whatever his motivation it is clear that his exceptional experience of assisting ecclesiastical litigants in the common law courts pre-dated his appointment as Attorney-General in October 1631 by at least six years.[406] Such expertise was important for several reasons. It showed that the common law could be deployed to limit prohibitions. This provided Laud and the government with insight into their own scope for manoeuvre. It was also a reason why Noy was an obvious replacement for Sir Robert Heath as the government’s chief law officer, and why Laud held Noy in such high regard. He famously lamented on Noy’s death in August 1634 that ‘I have lost a dear friend of him, and the Church the greatest she had of his condition’.[407] That Noy’s expertise on this subject was more widely known is illustrated by the way in which the projector Richard Day sought to involve him in his scheme for the purchase of impropriations by the Crown having already taken his legal advice on ‘this secure and honourable in[n]ovation’.[408] Although Noy subsequently indicated his dislike of impropriations it seems that his knowledge of the subject was gained in the 1620s, or possibly even earlier. It was that knowledge which underlay his informal advice to Laud that the statutory provision of 32 H.8, c.7 did not alter the nature of tithes or oust Episcopal jurisdiction from impropriations.[409] The contrary view would have placed impropriations completely outside ecclesiastical court jurisdiction for all purposes other than recovery of tithes.[410] It also lay behind his successful action against the feoffees for impropriations in the Exchequer court mentioned earlier. In this context it is noticeable that in the relatively modest law reports published under his name there were fourteen cases, plus a practice note on hearsay evidence, included on prohibitions. All of these came from the period from 1600 to the mid 1620s and related to the prohibition of

[405]‘Noy, William’, *ODNB*. His career after 1625 is considered later.
[406] Other examples not examined here were his appearance as counsel for the ecclesiastical defendant-in-prohibition, in Mayow’s Case in 1625: 82 ER 278, and in *Arundell and Wife v. Willis and Wife* in 1628: BL MS Hargrave 38, f.198. It was hinted that he accepted the appointment for religious reasons: see W.J. Jones, ‘“The Great Gamaliel of the law”: Mr Attorney Noye’, *Huntingtin Library Quarterly*, 40 (1976-7), pp.221-2.
[407] Laud, *Works*, vol. iii, p.221.
[408] TNA SP16/159/23, f.28r. See also TNA SP16/119/11 and Hill, *Economic Problems*, p.319.
[409] *Statutes of the Realm*, vol. 3, pp.751-2.
[410] Hill, *Economic* Problems, p.264. On the advice to Laud see exchange between John Williams, Bishop of Lincoln, and Laud on this subject in July 1635 in Laud, *Works*, vol. vi, pp. 426, 429.

ecclesiastical courts.[411] It all suggested an exceptional knowledge of the interaction between the common law and the rights of the church.

That expertise was next displayed in the case of *Stroud v.Hoskins*.[412] The case was brought in the court of King's Bench over a prolonged period from Hilary term of 1630 until the Easter term of 1631. The central issue was similar to that in *Cockeram v. Davies* with some minor differences. The plaintiff-in-prohibition, Stroud, had been sued in the ecclesiastical court for tithes of former heath land that had been reclaimed within the last seven years. He had sought a prohibition because section v of the statute 2/3 E.6, c.13 provided an exemption from tithes for seven years from the date of reclamation in respect of barren land that had been brought into agricultural use.[413] However although this was stated in his surmise he had failed to prove it by two witnesses within six months in accordance with section xiv of that statute. Consultation had been granted at the preliminary stage of the prohibition procedure and Stroud had sought another prohibition. His counsel argued that it was not necessary for him to prove the facts of the surmised waste exemption but the court found that he did.[414] By this stage the case was essentially the same as *Cockeram v. Davies* without the distraction of the ecclesiastical court appeal. Accordingly did 50 E.3, c.4 mean that the initial consultation barred the new application for prohibition when it had been granted on a procedural rather than a substantive ground? In the end the court followed the earlier decision and said no but this time there was a notable struggle to achieve resolution of a point that justice Jones, in the earlier case, thought was settled thirty years before.

The ecclesiastical defendant-in-prohibition, Hoskins, was remarkably well represented. Noy acted for him and his co-counsel was Henry Calthorpe who at this stage had been solicitor general to Queen Henrietta Maria since 1625.[415] Against this Stroud deployed two counsel who, although less easy to

[411] A comparison may be made with the law reports of Sir George Croke, justice of the Common Pleas and then King's Bench. In the volume of Croke's Reports for the reign of James I, being the period of Noy's reports, only seven such cases appeared. It is testimony to Noy's technical reputation that despite being reviled in parliament his reports were published in 1657, complete with a certificate of approval from the Cromwellian bench, a year before the first volume of Croke's Reports were published by his son-in-law Harbottle Grimston.
[412] 79 ER 782; 82 ER 122 and BL MS Hargrave 39, ff. 97,119b, 130,137.
[413] *Statutes of the Realm*, vol. 4, p.56.
[414] 79 ER 782-3. See also Gray, *Writ of Prohibition*, vol.I, pp. 68-9.
[415] 'Calthorpe, Sir Henry (1586-1637)', *ODNB*.

identify, may well have been no less professionally eminent.[416] The matter was taken to a full hearing of attachment on prohibition by a determined and well resourced clerical claimant. The prominence of Noy's extensive arguments in the manuscript report of the case and other factors suggested political interest in it. The most obvious of these was Noy's reference to the political context of the issue raised in the case. He remarked that in 1606-7:

> when there was the great debate about Prohibitions, this very matter was complained of, and the answer given hereto was that the complainants should have shown in particular where the fault was and then it would be redressed.[417]

The 'very matter' to which Noy referred was the application of 50 E.3, c.4, to restrict ecclesiastical defendants to one prohibition application for each underlying suit.[418] By reminding the judges of the political controversies over prohibitions under James I he was reminding them of current government attitudes to prohibitions. It was very rare for a reference to political concerns to appear in contemporary case reports and this one was sufficiently elliptical to avoid any reaction from the judges to what could have been construed as a veiled threat. Noy had also suggested that their former judicial brethren had indicated that lax application of this statutory restriction on prohibitions would be 'redressed'. Noy then proceeded to try to do just that by arguments that were a comprehensive response to the various ways in which those seeking prohibitions tried to get round the terms of 50 E.3, c.4.

In response to the argument, that seems to have swayed the court, that the procedural requirements of 2/3 E.6, c.13 could not have been contemplated by 50 E.3, c.4, because it post dated the earlier provision by a considerable period,[419] Noy dug into the background of the latter statutory provision in the same way as he had in *Bowrie v.Wallington* and Mayow's Case. He cited a Commons petition of 51 E.3 that complained that, despite the enactment of 50 E.3, c.4, prohibitions were still being issued in respect of suits after a consultation had been granted and requested that this be stopped unless the

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416 The manuscript report referred to Brown and Jermin. Possible candidates included George Brown, recorder and MP for Taunton in the 1620s and the pro-parliamentarian Phillip Jermyn: Prest, *Rise of the Barristers*, pp. 215, 277.

417 BL MS Hargrave 39, f.119r.

418 Gray, *Writ of Prohibition*,vol. I, p. 88, fn.47.

419 See 79 ER 783, which ends with the brief comment that, in relation to the need to prove the surmise suggestion in accordance with 2/3 E.6, c.13, 'it is a collateral cause out of the suggestion, and no cause of consultation at the time of the statute made.'

underlying ecclesiastical suit had genuinely changed. He argued that this was evidence that the intention of the statute was to make such real change the only exception to the statutory rule of one consultation for each ecclesiastical suit. To bolster this he sought to produce case evidence from before 50 E.3, c.4 indicating that the practice of granting prohibitions after consultations obtained for the same underlying case represented the then current position at common law. The statutory provision that sought to reverse this was thus intended to embody a new principle limiting the number of prohibitions, rather than following medieval conventions that statutes, in the absence of contrary intention, just restated the common law.[420] These were potentially radical arguments based on seeking evidence of the historical intent of parliament from archival records. Such an approach has been more commonly associated with lawyers opposing the conduct of the Caroline government. However here Noy employed these techniques to provide a common law defence of the ecclesiastical courts, and restrict the ambit of prohibitions, in much the same way as counsel defending Hampden in the Ship Money Case.

Faced with this rebuttal of conventional interpretation of the statute on these issues, which chimed with current royal and ecclesiastical views, there was evidence of judicial discomfort in finding for the plaintiff-in-prohibition. Firstly the two formal accounts in the law reports of justices Croke and Jones, both of whom were present, and the manuscript report, show that this matter was revisited in several hearings over a period of about fifteen months and may have been the subject of a complete about turn by the court.[421] The manuscript report indicated that there had been one hearing in Hilary term of 1630 followed by two more in Trinity term of that year. Croke's law report then placed the final decision in Hilary term of 1631 but Jones's report placed it in Easter term of that year. As a further twist the manuscript indicated a decision for the defendant-in-prohibition followed by the grant of a consultation whilst the two judges' reports indicated a decision in favour of the plaintiff and the grant of a prohibition. Such a mass of contradiction amongst the reports of the case either showed an extraordinary degree of confusion amongst the reporters or, as seems more likely, that this case

[420] Gray, *Writ of Prohibition*, vol.I, pp. 91-2; Cromartie, *The Constitutionalist Revolution*, pp. 102-4.
[421] Gray, *Writ of Prohibition*, vol I, p.87, fn.46. Gray chose to regard the manuscript report of the verdict as a misreport which, as he acknowledged, was immaterial for the legal effect of the decision, but it is not for the historical implications.

involved a protracted struggle between the parties with various attempts to reverse the court's decisions. With regard to the discrepancy relating to the timing of the final decision between the reports of Croke and Jones there is a clue in the latter report. Having stated that four judges were of the opinion that the provisions of 50 E. 3, c.4 did not apply, Jones's account reported that chief justice Richardson, ruled that the prohibition 'stet'.[422] This use of the jussive subjunctive of the latin verb *stare*, meaning 'let it stand', indicated that a prohibition had already been granted, probably at the time indicated in Croke's report. Accordingly the second ruling on this matter reported by Jones related to a further, unsuccessful attempt, in the next court term, to reverse that decision. That such a second attempt should be made would be remarkable in itself but when added to the contradictory ruling described in the manuscript there is considerable evidence that this case had turned into a serious attempt to reverse the court's position on a politically sensitive issue. An account of events that fits all of the records, without assuming substantial inaccuracy in any of the extant accounts, would be that the manuscript account, which contained all of counsel's arguments, covered a series of hearings on the initial application for a prohibition, possibly before some of the King's Bench judges including Richardson, but not all of them. At that stage the court indicated that it was minded to grant a writ of consultation. However the parties pressed the matter to a full hearing and faced with this all of the judges attended. At that hearing, as reported by Croke, the issue was decided in favour of the plaintiff and prohibition was granted on the basis of established precedent despite the court being aware that this would not be welcomed by the government. The edited account of Croke's report in the English Reports shows that there may have been even more precedents supporting this outcome than just *Cockeram v. Davis*.[423] If correct this would not have been the first or last occasion on which Richardson was overruled by his colleagues. The political pressure was such that the court reconsidered the matter again, possibly at royal or Privy Council request, but came to the same conclusion.

Such a tortuous course was also indicated by chief justice Richardson's closing comment and the *per curiam* form of the judgment. Richardson remarked, after confirming the grant of the prohibition, that

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[422] 82 ER 122. The words are 'sur ceo rule done que le prohibition stet'. Gray did not comment on this.
[423] See head note to 79 ER 782.

if the defendant-in-prohibition had been able to demonstrate the falsity of the substantive issue regarding the nature of the land in the initial surmise he would have been able to have 'several consultations'.[424] This emollient remark pointed to discomfort with the decision and a desire, on the part of the man who would have to explain it, to soften any hostile political reaction. The judgment *per curiam*, given by Richardson, further underlined the defensiveness of the court in a matter where their ruling seemed well supported by precedent. If asked by the government to justify this decision, in the manner described by Berkeley, the chief justice could respond that, whilst sympathetic to the ecclesiastical defendant, he was persuaded by his colleagues that precedent clearly supported the plaintiff-in-prohibition and so, reluctantly, the court ruled in his favour. The judgment stated a simple rule in succinct terms that avoided wider political conjecture.

A different issue which irritated ecclesiastical plaintiffs was the grant of prohibitions after ecclesiastical sentence. If it was bad enough that it was so easy to obtain a prohibition, the ability to do so after the ecclesiastical court had given its verdict made the situation even worse. The response to this was that if jurisdiction had been exceeded, or an unlawful ruling had been made, or procedure used, it did not matter what stage had been reached in the process. Consequently the judges never formally conceded that their power to prohibit was limited in such circumstances, except to the extent that there was excessive delay by the plaintiff-in-prohibition in seeking his remedy, or there was an attempt by such a plaintiff to raise facts not already in the court record.[425] There is evidence that in the 1630s a private agreement was made between the government and the judiciary on this issue of the type described by Falkland. Once again Richardson was the pivotal figure bridging the period of change. In Hilary term of 1626, as chief justice of Common Pleas, he ebulliently asserted the discretion of that court on this issue in relation to the application for a prohibition in an intestacy matter, Fotherlyes Case.[426] Acting for the defendant-in-prohibition, Mary Fotherlye, and asserting the right of the local bishop to rule on the matter, Sir John Finch asserted that 'the custom of this court is,

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[424] 82 ER 122. The words are 'le defendant nient obstant son plea avantdit en barre de prohibition poet pleder en chief al matter del'dit suggestion, & sil voet ceo dispute, donque il avera several consultations sur le dit libell'.
[425] For the position before 1625 see Gray, *Writ of Prohibition*, vol. I, pp. 124-6 and after 1641 see *Dudley v. Crompton*, 82 ER 453 where the court had no problem with prohibition after sentence but refused prohibition for excessive delay.
[426] 124 ER 123; 79 ER 657 and BL MS Harley 5148, f.114.

never to grant prohibition after decree or sentence given'. In reply Richardson made it clear that this was not a novel case, citing a relevant Jacobean precedent for granting a prohibition. His decision was then supported by justices Hutton and Yelverton, on slightly different grounds.[427]

However by Easter term 1633 things had changed. Richardson was now chief justice of King's Bench and that court was presented with an application for a prohibition in connection with an ecclesiastical suit for tithes of wool and lambs brought by the incumbent of a deanery.[428] The deanery was that of Lichfield. It was in the gift of the King and had been granted to the incumbent by royal patent. The tithe payer disputed whether the patent had effectively passed the right to claim tithes. The proper construction of such a patent was a common law matter so a prohibition was sought. Present on the bench, hearing this matter with Richardson, were justices Jones, Croke and Berkeley. It is not clear exactly which dean of Lichfield brought the original tithe suit but it was either Augustine Lindsell, who held this deanery from 15 October 1628 until shortly before his consecration as bishop of Peterborough in February 1633 or his successor John Warner who held this deanery from 1633 until his nomination to the bishopric of Rochester in 1637.[429] The deanery of Lichfield was a stepping stone to higher preferment within the Church of this period and both Lindsell and Warner were notable supporters of royal and Laudian church policies. Lindsell had been part of the group of theologians of the so-called 'Arminian' grouping of the church, that met, and in Lindsell's case resided, at the London residence of the Bishop of Durham, Richard Neile in the period from 1617 to 1628. This group included such objects of Puritan antipathy as John Cosin, Richard Mountague and William Laud himself. Lindsell was a leading intellectual figure behind the very policies being promoted by both the King and Laud at the time of this case. Given the time involved in getting a hearing before the Westminster courts it seems most likely that the initiator of the tithe suit was Lindsell. But if it was John Warner the political sensitivity to the court's ruling would not have been much less. Although lacking Lindsell's connections and intellectual influence, Warner was the royal chaplain that accompanied Charles I to Scotland for his coronation there and was regarded as actively Laudian

[427] Ibid.
[428] BL MS Harley 1631, f.378b and Gray, *Writ of Prohibition*, vol.I, pp.157-160.
[429] A.Foster, 'Lindsell, Augustine (*d.* 1634)', *ODNB*, (OUP, 2004) and I. Green, 'Warner, John (*bap.*1581, *d.*1666)', *ODNB*, (OUP, 2004), online edn. May 2008.

in his sympathies. For the court of King's Bench to prohibit such men, in relation to rights surrounding a royal benefice, for anything less than an obvious example of an ecclesiastical court exceeding its powers was to invite trouble. This pressure was reflected in the court's behaviour.

Each of the four judges reacted in characteristically different ways. Justice Croke took the strongest line in support of the court's powers and in disregard of political ramifications. He favoured granting a prohibition with immediate effect on the principle that this was the correct course as soon as it was clear that an ecclesiastical court was required to resolve a common law issue. Justice Jones was equally firmly of the view that the appropriate course of action was to wait and see what the ecclesiastical court actually did. If the patent was easy to construe then there might be no problem and if it was not then guidance might be sought from the common law courts anyway. If the ecclesiastical court construed it inaccurately then that was the time to consider a prohibition. This was pragmatic, made the court's position easier to defend and might avoid the issue altogether. Berkeley suggested that the surmised facts in the application raised an alternative ground for prohibition that was possibly less awkward than pointing out a significant defect in a royal patent. This was that, although not expressly raised in the surmise, the need to construe the patent implicitly questioned the scope of the boundaries of the deanery. Any question concerning the location of boundaries was a matter of fact and so a matter for a jury. A prohibition could thus be granted on this well established ground. The views of these judges suggested three different ways of tackling the problem that they faced in this case that reflected their individual styles. Croke asserted the pre-eminence of the common law without concern for political consequences but was not necessarily more legally accurate, in so doing. Jones was shrewd and understood how to put off the contentious decision without necessarily bowing to political pressure. Berkeley was legally aggressive and ingenious and, although royalist by instinct, professional *amour propre* predominated. None of them gave any hint of an agreement with the government on any issue in this case. However Richardson blurted out that 'if you let them go to sentence in the spiritual court and then award prohibition they will complain that it is against our promise not to grant prohibition after sentence'. In case that embarrassing admission had somehow gone unnoticed he also refused to countenance Berkeley's way of avoiding the problem, apparently

being uncertain whether a rule applicable to parish boundaries would have applied to a deanery. The concern for Richardson may have been that this argument, along with Croke's, clearly envisaged that a prohibition would be granted. They had merely differed over which was the best ground. That left the chief justice with the unwelcome task of having to explain himself again. The case was adjourned with no indication of any further resolution.

Despite that, there are hints that it, or the agreement to which Richardson referred, did have subsequent influence. In Easter term of 1637 in *Pew et uxor v. Jeffreyes* the deliberate falsification of the ecclesiastical court record by the plaintiff in prohibition provided a sound reason for refusing prohibition, yet the King's Bench court was eager to stress, with doubtful relevance, that 'being after two sentences in the Spirituall Court...the common law ought not to intermeddle therewith'.[430] In Michaelmas term 1639, despite counter-argument by counsel for the plaintiff-in-prohibition, a prohibition was denied by the King's Bench court on a surmise of a *modus* in an application for prohibition after ecclesiastical sentence. The ground given was that it was too late.[431] That the court still refused a prohibition when the *modus* might have been raised before sentence indicated an intention to avoid prohibiting after sentence.[432] A practice note reportedly relating to the court of Common Pleas in Hilary term of 1641 put the position in similarly restrictive terms when it stated that 'a prohibition after sentence shall not be granted but in some especial case.'[433]

There were many other examples of judicial tenderness to ecclesiastical sensibilities. The case of *Watton v.Ball* , which came before the court of King's Bench in Easter term of 1633, illustrated this in a subtle form.[434] The matter involved a suit for a pew in Stoughton church that was being conducted before the court of the Archdeacon of Huntingdon. It was initiated by Ball against Valentine Watton, who claimed the pew by way of prescriptive right appurtenant to a manor which he held. Watton sought a prohibition on the basis that a prescriptive right was analogous to a *modus* in that it was a

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[430] 79 ER 996.
[431] 82 ER 417 and Gray, *Writ of Prohibition*, vol.I, p.127 and vol. II, pp. 161-3
[432] See comment of justice Berkeley in *Watton v. Ball*, that the pleading of a *modus* before an ecclesiastical court automatically makes it lay property outside the ecclesiastical jurisdiction: 'when you prescribe it is made lay chattel, but not before'. BL MS Harley 1631, f.386b.
[433] 82 ER 426.
[434] BL MS Harley MS 1631, ff. 386b, 404b; Grey, *Writ of Prohibition*, vol.II, pp.131-3.

temporal right that should not be dealt with by an ecclesiastical court. The issue was whether it mattered that the surmise for the prohibition did not state that the prescriptive right had been pleaded and disallowed before the ecclesiastical court. The Archdeaconry of Huntingdon had been held by William Laud, from 1615 to 1621, and from 1622 until June 1633, it was held by Owen Gwyn, the Master of St John's College, Cambridge. Although Gwyn had been passed over for appointment to the bishopric of St David's in favour of Laud, Gwyn was favoured by both Charles and James I. Whilst not a prominent Laudian, he was no opponent. He held an important university post and had good royal connections.[435] Justice Berkeley, with the concurrence of Justice Croke, provided a thorough analysis of how the matter should have been presented to the court in the initial surmise, distinguishing between the nature of a *modus* and a prescriptive right. Any plea of a *modus* in defence of a tithe claim rendered the ecclesiastical court action void from the beginning, although Berkeley clarified that the surmise must state that the *modus* had been pleaded.[436] In contrast a plea of a prescriptive right did not automatically void the ecclesiastical suit. It must either be accepted as valid by the ecclesiastical court, thus bringing the matter to an end in that court, or be disallowed or disputed. If the ecclesiastical court took either of those courses, and the relevant surmise stated this, then a prohibition should be granted. Croke agreed and Watton was required to go back to the ecclesiastical court. If the plea was rejected or issue was taken on it then he should return to the King's Bench with a surmise in the correct form. That is what he did within the same court term and a prohibition was duly granted without further discussion.

The distinction made in this case was very fine but it served a useful purpose for judges under political scrutiny. The tactic was much the same as that suggested by justice Jones in the matter involving the deanery of Lichfield. It allowed the judges to proclaim their respect for the dignity of the ecclesiastical court by requiring that the matter be referred back to that court, and demonstrated how scrupulously they imposed surmise requirements. It also gave the ecclesiastical court an opportunity to end the matter, by accepting the plea, and thus let the common law court off the hook. Alternatively the ecclesiastical court might create further grounds for prohibition by, for example,

[435] E. Allen,'Gwyn, Owen (*d.*1633)', *ODNB*, (OUP, 2004).
[436] See footnote 430 above.

accepting the plea but imposing an evidentiary requirement that was not recognised at common law in relation to a temporal right, such as the requirement for proof by two witnesses. That would strengthen the case for prohibition and the judges' ability to defend their conduct if necessary. It showed how artfully the Caroline judges could deflect government criticism without actually conceding very much. This did not point to the bench being unduly cowed in its defence of the common law and it united judges with political views as diverse as Croke and Berkeley. Although such tactics weakened political attempts to restrict use of prohibitions in practice, unfortunately for the judges, their parliamentary critics did not appreciate such niceties.

In Easter term 1633 direct comment appeared in a King's Bench prohibition case which indicated the political pressure on the bench and it was met by similar tactics.[437] The ecclesiastical case was a suit for tithes of grain and other products. In relation to the grain the parishioner pleaded the existence of a lease to him of the tithes from the claimant and the existence of a *modus* for the remaining items. Justices Berkeley and Jones were sitting for this case and they granted the prohibition in relation to the elements of the claim covered by the *modus* but declined to do so for the grain despite the peculiar result that the ecclesiastical plaintiff would be seeking tithes in contravention of his own disposal of the right to them by way of lease. Counsel for the parishioner was Sir John Bankes, who became Attorney-General in 1634 and was no political opponent of the government. However even he expressed incredulity at the decision asking 'will the plaintiff there be allowed to proceed against his own lease?' Berkeley sought to defuse this by remarking that 'you say that the lease is by indenture and so what prejudice to you but that you may well have appeal'. Once again the court was declining to make an immediate decision to prohibit and preferred to push the matter back to the ecclesiastical court notwithstanding that it would have made sense to deal with the matter in the prohibition proceedings. The approach was similar to that in *Watton v. Ball* and the basis for doing this was revealed by justice Jones with his closing remark. Referring to the ecclesiastical court, he commented that 'we ought to allow all that belongs to them, for they would have more'.[438] In a case in King's Bench in Easter term of 1635, shortly after Sir John Bramston was made chief justice of that court,

[437] BL MS Harley 1631, f.377b.
[438] BL MS Harley 1631, f.378.

Jones and Berkeley repeated these tactics.[439] The ecclesiastical case was an action for recovery of tithes of lambs, hay and bees. In relation to the lambs both judges suggested that the custom surmised by the plaintiff-in-prohibition was recognised by canon law and thus a prohibition should not be granted. However Bramston and justice Croke took the view that it was already evident that the ecclesiastical court would not recognise this custom. Faced with this Berkeley and Jones resiled from their initial position and the court unanimously granted prohibition on all counts. There was no attempt to split the court or adjourn for further discussion. This suggested that the division was tactical rather than real. Whilst Berkeley emerged as a defender of prerogative powers in other cases, and Jones was also inclined to conservatism, neither of them appeared to be enthusiastic about this type of decision. They were as willing as their colleagues to deflect political pressure without actually conceding any common law jurisdictional oversight.

The cases discussed so far illustrated how government pressure on specific grounds for prohibition developed in the period from 1625 until the early 1630s and how the judges responded. The chief justices were almost certainly pressed to justify their conduct and the judges were asked to collectively give private assurances on particular issues. Thus far Falkland's analysis was correct but it overestimated the degree to which the common law judges were a uniformly malleable group and their willingness to relinquish control of one of their most prestigious functions. It also ignored the judges subtle but effective tactical manoeuvres and the extent to which there were legitimate ways in which ecclesiastical litigants could counter attempts to prohibit their suits in the common law courts. Noy exemplified how that might be done by developing principles that imposed a more restrictive interpretation of the law surrounding prohibitions but his death in 1634 effectively cut that approach short as his successor Bankes lacked the experience and the time to pursue it further . The combination of judicial ingenuity, and the diversion of government legal resources to other matters, such as the collection of ship money, meant that by the mid-1630s the various attempts to loosen the grip of the common law on the courts and economic affairs of the church had proven less effective

[439] Anonymous, 79 ER 951; Gray, *Writ of Prohibition*, vol.II, pp.72-3.

than the supporters of royal and Laudian church policies desired. But as justice Jones suggested they still wanted 'more'.

Prohibitions and High Commission:

Looking back on the period before 1640, Edward Bagshaw was in no doubt that:

> had Judges done their duties... by granting Prohibitions to the High Commission... and writs of Habeas Corpus to such persons whom they had fined and imprisoned without cause, Bishops and Presbyters might... have long since happily agreed.[440]

It was a serious charge that placed the judges at the centre of political and religious controversy. But how accurate was it? Bagshaw did not offer much in the way of specific examples and this was not surprising. The jurisdiction of High Commission was both imprecise and highly contested. It held no jurisdiction by prescription or custom and it did not even refer to itself as a court until 1586.[441] That development came about through the increasingly settled establishment and conduct of the Ecclesiastical Commissioners of the Province of Canterbury who were part of the Commissioners for the Establishment of the Royal Supremacy in Causes Ecclesiastical. Although the authority of the latter ultimately originated within the legislation of the Henrician Reformation, the hiatus caused by the return to papal authority under Queen Mary had led to a statutory re-affirmation of the royal supremacy over the church, and all ecclesiastical legal jurisdiction, at the commencement of the reign of Elizabeth, in the Act of Supremacy, 1 E. 1, c.1.[442] That statute provided for the delegation of this extensive authority in language that was broad and elastic. It is likely that this was to avoid any suggestion of creating express limits to the scope of a vital aspect of the royal prerogative, and the religious settlement of which this statute was a central part. However such political language presented severe problems of statutory construction for the courts.

[440] Bagshaw, *A Just Vindication* , pp. 4-5.
[441] Usher, *rise and fall of High Commission*, p.72. It was not recognised clearly as a court in its Letters Patent until 1611.
[442] *Statutes of the Realm*, vol.4, pp.350-5.

The root of this technical problem was the fact that attitudes to the interpretation of this provision reflected a division of opinion over the religious, political and legal implications of the royal supremacy that went back to the earliest stages of the English Reformation. In the 1530s Bishop Stephen Gardiner and some other members of the clergy had interpreted the effect of the assumption of supremacy by the Crown in ecclesiastical matters as meaning that the church and its courts were accountable only to God and the King. This opinion had been contradicted by the then Lord Chancellor, Thomas Audley, who had pointed out to Gardiner that the church would be monitored by the common law and if necessary *praemunire* would be used against errant clerics.[443] This early encounter captured a fundamental difference of view over what was meant and implied by the royal supremacy at the commencement of the Reformation. That carried over into views of the effect of the restatement of that supremacy in the statutory provision 1 E.1, c. 1 and the related delegation of powers to ecclesiastical commissioners within section 8 of that statute. The intellectual heirs of Gardiner amongst the clergy in the early seventeenth century, such as the civil lawyer Richard Cosin, Coke's adversary Archbishop Bancroft, and William Laud, saw the function of 1 E. 1, c.1 as affirming the restoration to the Crown of such aspects of its prerogative in ecclesiastical matters as had been usurped by the papacy prior to the Henrician legislation.[444] Aside from that the Elizabethan statute had no effect other than to re-assert the breadth of the royal prerogative in all such matters. This included the right to delegate such powers as the monarch thought fit, pursuant to section 8, to commissioners to discharge such functions as may be designated in letters patent issued by the monarch from time to time, in order to assist in the regulation of the church and the religious welfare of the kingdom. The statute had no restrictive effect on prerogative powers relating to religious matters so the commissioners were only restricted by the terms of patents which could be altered by the monarch at will. The commission would supplement the existing ecclesiastical court structure which dwelt side by side with the secular courts as one of several, but equal, systems with a common head, the King.[445]

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[443] Brooks, *Law Politics and Society*, pp. 97-8.
[444] Cosin's book *An Apologie for Sundrie Proceedings by Jurisdiction Ecclesisastical* (London, 1591) provided a thorough defence of this point of view.
[445] For examples of Laud's thoughts in this vein see Laud, *Works*, vol.i, p.116; vol.ii, pp.228-9 and vol.iv, p.137.

As Audley's comments had indicated, many common lawyers thought otherwise and their view provided a different narrative and analysis of the relationship between the two systems and with that, the delineation of the jurisdiction of High Commission. The most cogent form of this view was stated by Sir Edward Coke. Bagshaw adopted, simplified and promulgated this with vigour. Central to this analysis was the assertion that the royal supremacy over all religious matters was defined by statutes passed by the ultimate sovereign authority in the realm, namely the King in parliament. On this basis the Elizabethan Act of Supremacy did not, in itself, restore supremacy. By repealing the Marian statutory provision, 1&2, P&M., c.8, which had repealed the core Henrician Reformation statutes, the provisions of 1 E.1, c.1 revived the original Reformation legislation and the reassertion of supremacy contained within it. [446] That did not create any additional royal power beyond that granted by the earlier laws of England. The terms of those laws, and in particular the interpretation of the relevant statutes, were to be determined exclusively by the judges of the common law courts. In addition to the vital repeal restoring royal supremacy, 1 E.1, c.8 sanctioned the creation of a commission to address a particular problem that was faced on the accession of Elizabeth to the throne. She had effectively inherited a Roman Catholic clergy and needed an instrument outside the normal ecclesiastical court structure, which was dominated by the courts of individual bishops, in order to impose a restored Protestant discipline within the church. This same commission was given a general power to:

> visite, refourme... and amende all such Erroures, Heresies, Scismes, Abuses, Offences, Contemptes and Enormitees whatsoever, which by any manner Spirituall or Ecclesiasticall Power, Auchtoritee, or Jurisdiccion can or maye lawfullye bee refourmed... corrected or amended.[447]

Coke's analysis had important consequences for High Commission. Its jurisdiction and powers, in common with all ecclesiastical courts, were, subject to royal secular laws and their extent was to be exclusively decided by the common law judges. In addition the commission was subject to such common law prerogative writs as prohibition and *habeas corpus*. Because the source of authority for High Commission was a statute, the royal letters patent issued from time to time by the Crown did not define its powers since nothing could be validly granted to the commission by patent that was not

[446] *Statutes of the Realm*, vol.4, pp.246-254. See Coke, *The Fourth Part of the Institutes*, p.325.
[447] *Statutes of the Realm*, vol.4, p.352 and Coke, *The Fourth Part of the Institutes*, pp.326-7.

within the terms of 1 E.1, c.8. The context of that provision indicated that the function of the commission was visitational and disciplinary in relation to the clergy and otherwise restricted to dealing with serious ecclesiastical offences expressly reserved to it by other statutes.[448] Examples of the latter were heresy or incest. Since the effect of 1 E.1, c.1 was only restorative, the clergy could not gain any powers that they did not have before the Reformation. Accordingly the ecclesiastical authorities, including High Commission, had not acquired the power to fine or imprison through the statute since such powers had never been possessed by any pre-Reformation church court.[449] High Commission was also bound by the provision of another statute, namely 23 H.8, c.9.[450] That prohibited the citation of a person before an ecclesiastical court in a diocese, or peculiar jurisdiction, outside the one in which they lived. The application of this to High Commission presented severe practical problems unless, or until, it could expand its physical presence into most dioceses.

The historical and political narrative expressed by Coke in the Fourth Institute and *Caudrey's Case* may have been embellished with hindsight, and may have later appeared more radical than he intended because of its use in political polemics, such as those of Bagshaw. But it was supported broadly by judicial decisions reached before his first judicial appointment in 1606.[451] With his dismissal in 1616 the judges' views on these issues started to disintegrate and became more tentative and confused. This process began before the accession of Charles I and it is likely that it was the product of a climate of judicial reticence after Coke's removal and a softening of the clerical position

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[448] Usher dismissed much of the force of Coke's argument because of his apparently excessive emphasis on the word 'enormitie' in the list contained in 1 E.1,c.8: Usher, *rise and fall of High Commission*, p.231. This ignored the likelihood that Coke was applying the established rule of statutory construction that in a list of like words and concepts they are to be regarded as being intended to be of equal weight in the absence of evidence to the contrary. Thus the inclusion of reference to enormities in a list with such serious matters as 'heresies' or 'contemptes' tended to show that the concepts that the statute was intended to cover were major rather than minor ones. Since the church courts provided a widespread system for dealing with lesser offences if Coke's historical argument had some validity (which Usher denied) then the legal argument was more defensible than Usher realised.

[449] For Coke's views on the jurisdiction of High Commission see *The Fourth Part of the Institutes*, pp.324-335. In addition see his historical analysis of the relationship between the ecclesiastical and secular courts in *Caudry's Case*; 77 ER 1 and the commentary on this in Brooks, *Law Politics and Society*, pp.119-120.

[450] *Statutes of the Realm*, vol.3, p.377.

[451] See 74 ER 701; the extra-judicial opinion in 123 ER 1025 and 1043; BL MS Lansdowne 1074, f.303v; 79 ER 974; 74 ER 963; *Poole v. Gray* in BL MS Lansdowne 1074, f.405 and 1058, f.54v; Chamber's Case in BL MS Hargrave 19, f.169v; Needham's Case in BL MS Lansdowne 1111, f.141v; Fuller's Case in 74 ER 1091, 77 ER 1322, BL MS Additional 25, f.81 and BL MS Hargrave 33, f.119; 78 ER 90; Birry's Case in 78 ER 90 and BL MS Additional 25,205, f.22 *sub nom.*Bery; Williams Case in BL MS Lansdowne 1111, f.210; the extra-judicial opinion in 77 ER 1301.

after the letters patent of 1611 were issued. That revision of the commission's patent moved away from the wider and broader language of its predecessors and went into much greater detail about the commission's powers and procedures. Whilst this seemed to address some of the common lawyers' concerns by being more specific, it did not concede much and it assisted the development of the commission as a court with defined procedures.[452] This was probably what James I and his advisers intended.[453] The 1611 letters patent were thus the first example of a government tactic that was to be used more frequently under Charles I, namely alteration of the commission's patent as a means to alter its powers. In theory this was irrelevant from both points of view. For the civilians the royal prerogative powers in religious matters were unfettered by statute, and although the letters patent might provide some protection for the commissioners, their authority could be altered at will. From the common law perspective a patent could not sanction anything not authorised by the statute. From 1625 onwards there was persistent tinkering with the letters patent that could only have been intended to enhance the power of High Commission. In 1625 the definitions and details of the 1611 patent were removed and it reverted to the wider and less precise terms of the 1601 patent by reinserting the broad language of 1 E.1, c.8 back into the statement of the powers of the commission.[454] This enabled the commission to resume its original function as a powerful instrument of ecclesiastical visitation and discipline as it 'became once more absolute, unlimited and without appeal'.[455] This was precisely how it was used by Laud in the period from 1634 onwards. By re-emphasising this function, in addition to its role as a supplement to the existing ecclesiastical courts, it would thus attract doctrinal as well as economic hostility. This led to greater expectations of the jurisdictional restraints on its power by the common law courts and re-ignited earlier arguments about the nature and derivation of the commission's powers.

Because he regarded the civil lawyers' view of the authority of High Commission as being correct Usher took a sanguine view of this. He regarded the notes compiled by the combative civil lawyer, Sir

[452] Usher, *rise and fall of High Commission*, p.236.
[453] 12 *CoRep*. 84; 77 ER 1361; Gray, *Writ of Prohibition*, pp.317-325. Usher took a similar view although he did not regard these steps as restricting prerogative power because he disagreed with Coke's views on the effect of 1 E.1, c.1 and 8: Usher, *rise and fall of High Commission*, pp.237-241.
[454] See Usher, *rise and fall of High Commission*, Appendices C and D, pp. 343-4.
[455] Usher, *rise and fall of High Commission*, pp.242-3.

John Lambe, in 1640 on 'points to be enquired into by the High Commission' as being simply a repetition of certain of the detailed provisions of the 1611 patent and saw this as evidence that those provisions were embedded in the operational procedures of High Commission when operating as a court, notwithstanding the subsequent changes made in the patents of 1625, 1629 and 1633.[456] However he did not provide further evidence for this view and his assessment of the changes in the Caroline patents is difficult to accept. This is because of the amount of attention given to them by the Caroline government and its critics, and because of the important practical changes to the operation of the commission in this period that were identified by Usher himself. Under Charles I the patents were revised three times in the first eight years of his reign, apparently without much consultation, whereas under James I they were revised twice, in 1611 and 1613, in ways that at least appeared to respond to lengthy discussion. Under James they appear to have been publicly enrolled for the first time. This gave notice to the public at large of their contents, including the ostensible authority of the commission, and was done thereafter.[457] It can be seen from annotated copies of the 1633 patent that it attracted sufficient interest for some people to carefully mark every change made between this patent and its predecessor.[458] This implied that the alterations were perceived as having a real purpose and effect. That view was shared by Attorney-General Noy and Charles I. In a docquet addressed to the King, in 1633, Noy carefully enumerated the new powers that were added to the commission by the patent of that year. They included power to punish a substantial list of additional crimes 'as were not comprehended in any other Commission', to award 'competent alimony to wronged wives' and for individual commissioners to administer an oath to a defendant or witnesses to expedite the proceedings of High Commission.[459] He failed to mention the greater emphasis placed on the role of the commission in punishing such behaviour, and the addition of language supporting the contentious question of the commission's power to fine or imprison.

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[456] TNA SP16/474/71, 72. Usher, *rise and fall of High Commission*, p.237.
[457] In Needham's Case in 1605, justice Fenner had remarked that 'no one can see what their commission is for it is not enrolled which seems to me a great abuse.'
[458] See the various separate annotations of this patent in TNA SP16/252/59, 60.
[459]TNA SP16/252/62, 199r.

Apart from the theoretical expansion of its power in its patent the reach of the commission was greatly expanded by increasing the number of its members and the proportion of its members who could form a quorum for the valid transaction of business. The period from 1625 also saw the development, in parallel to the revival of its visitation function, of the operation of the commission as a court through the adoption of formal procedures. Whilst the commission of 1611 had been the largest yet with ninety two members, this number dropped in the remainder of the reign of James I. However in 1625 the number was raised to one hundred and eight where it remained under Charles I. The proportion of members whose presence was required to render its proceedings quorate had dropped from forty five per cent in 1608 to thirty two per cent in the atmosphere of conciliation after 1611. However, after 1620, the percentage began to rise steadily. First it went up to fifty two percent and then, in 1626, to fifty eight percent and finally it reached sixty six per cent in 1633. The separate diocesan commissions had been discontinued in 1611 and the numerical growth was concentrated in the Commission for the Province of Canterbury so that by 1625 all of the archbishops and bishops were members of that specific commission and the archbishopric of York had been subsumed within its jurisdiction. By 1629 Scotland was included as well.[460] As a result of the expansion of the numbers by 1633, in addition to all of the episcopacy, the High Commission included all of the officeholders of the Privy Council, most of its senior aristocratic members, all of the common law judges, and the heads of all the prerogative and ecclesiastical courts.[461] This list was supplemented by archdeacons, deans and most of the civil lawyers. The political connection and prestige of the court was thus elevated to something approaching that of the court of Star Chamber, even if the operation of High Commission was dominated in practice by the most senior clerics rather than the secular members of the government. Although the common lawyers were represented by the presence of the judges, as a body it was heavily dominated by clerics and civil lawyers and the quorum membership was dominated by them since most privy councillors and judges, other than the chief justices, were excluded from it. The substantial extension of the quorum, with such a preponderant civilian membership, enabled the

[460] Usher, *rise and fall of High Commission*, pp.250-251 and 255.
[461] Assertions that Sir George Croke was excluded seem incorrect despite the apparent deletion of his name in the copy of the 1633 letters patent: see TNA SP16/252/59, f.142r. His name appears later in that document and in the version of this document in TNA SP16/252/60. Apart from the chief justices, the common law judges rarely sat on the commission.

commission to convene much more easily in the local dioceses, whenever required, notwithstanding the centralising effect of the growth of the Canterbury commission.

That allowed the more efficient imposition and regulation of more systematic procedures for the operation of the commission as a court without hampering its role in ecclesiastical visitation. Whilst the majority of the commission's day to day proceedings were concerned with disputes between individual suitors, just like the ecclesiastical courts, two procedural developments in this period further sharpened the ability of High Commission to proceed effectively against religious dissent.[462] The first was the emergence under Laud of the role of the King's Advocate as a state prosecutor before the High Commission, in much the same way as the Attorney-General operated in the secular courts.[463] Proceedings initiated in this way were to be at the heart of subsequent political and religious controversy over the operation of the commission, as was the second such development. That was the definitive settlement of the rule that refusal to take the *ex officio* oath before High Commission should be taken *pro confesso*, and thus be deemed an admission of all of the offences with which the defendant who refused the oath was charged in the articles brought against them. The King gave a clear directive to the High Commission to this effect on 4 February 1638 to put the matter beyond doubt, although there was evidence that this was settled practice in the commission going back to 1631.[464] That this was aimed at religious non-conformity was evidenced by prefatory language stating that this was necessary because 'divers disorderly persons have withdrawn themselves from obedience to our ecclesiastical laws into several ways of separation, sects schisms and heresies' and when brought before the commission had refused to swear their oaths or answer the articles against them. This reference also echoed the summary of offences added to the 1633 letters patent that Noy had provided to the King and the new language inserted into those letters patent which referred to 'blasphemers', 'schismatics' and those who attacked the church's ministry.[465] This brought High Commission in line with the practice of the Star Chamber court. Given the considerable enhancement

[462] For a survey of normal commission business see Usher, *rise and fall of High Commission*, pp.256-261.
[463] Usher dated his first definite appearance to 1631, based on his reading of BL MS Harleian 4130. See Usher, *rise and fall of High Commission*, p.264.
[464] TNA SP16/381/29; Usher, *rise and fall of High Commission*, p.248.
[465] TNA SP16/252/60; TNA SP16/252/62.

in its status, and clear political backing, it was not surprising that the Caroline judiciary showed signs of hesitation when it came to issuing writs of prohibition or *habeas corpus* in relation to High Commission.

Whilst the court of Common Pleas in the period from 1625 to 1631 became more fragmented in its approach to the prohibition of High Commission, largely due to the efforts of chief justice Richardson, it did not abrogate them entirely. The same period in the King's Bench saw a more subtle shift. After 1631 there seems to be a curious gap in the records as case reports concerning High Commission, in both of these courts, ceased entirely until 1640 when two rather insubstantial *habeas corpus* cases in King's Bench appeared in Croke's reports.[466] Before considering this anomaly it is worth examining the earlier period where case report evidence exists for signs of change. The primary jurisdictional question that came before the common law courts in those case reports was whether High Commission was able to try matters that were not the most serious ecclesiastical offences, or 'enormities' as Coke put it, or the special statutory offences of heresy or incest. A particular question that recurred was the extent to which the commission had jurisdiction over the award of alimony at the suit of wives formally separated from their husbands. These matters usually arose in prohibition proceedings. The other area of contention was the scope of the power of High Commission to impose the secular penalties of fine or imprisonment. Those might be raised in applications for prohibitions or *habeas corpus*.

In the period from 1626 to 1628, both the King's Bench and the Common Pleas reached decisions that were broadly consistent with the 'enormities' test. Examples of this included Stanways Case [467] and Johnson's Case [468] in King's Bench in 1626, and *Smith v. Clay*,[469] *Giles v. Balam*,[470] and Howson's Case [471] in Common Pleas between 1626 to 1628. In these cases such offences as failure to repair the chancel of a church, reading the Bible in a facetious manner, failing to preach on a Sunday, retaining an adulterous and drunken curate, taking communion vessels home for private use, non-residency in a

[466] Torle's Case: 79 ER 1100 and Anonymous: 79 ER 1113.
[467] BL MS Hargrave, f.45v; BL MS Lansdowne 1063, f.154v.
[468] 82 ER 249.
[469] 124 ER 294; BL MS Harley 5148, f.120.
[470] 124 ER 307; BL MS Harley 5148, f.143v.
[471] 124 ER 182; 124 ER 377.

parish and spitting on someone else's pew seat were regarded as being insufficient to amount to 'enormities' and thus outside the jurisdiction of High Commission. Accordingly prohibitions were granted in respect of the underlying suit in the commission on the basis that the latter had exceeded its jurisdiction. Aldam's Case in Common Pleas supported these decisions by illustrating what would constitute an enormity.[472] It involved accusations before the commission of adultery, drunkenness, blasphemy and derogatory remarks about the King, who the defendant had described as an 'Egyptian'. Presumably that comment was taken by the court to be a suggestion that the King was like the Pharaohs, who had enslaved and persecuted the Israelites, and was thus a persecutor of the 'godly'. Prohibition was denied and justice Harvey indicated that it was solely because of the remarks about the King, so the first three charges were insufficiently serious to fall within the remit of High Commission. In relation to the question of the commission's power to grant alimony to a wife legally separated from her husband, the letters patent of 1629 and 1633 had ostensibly conferred such power but in Hurbie's Case, in 1629 and in Drake's Case, in 1631 King's Bench prohibited such suits before the commission and in an anonymous case in 1629 the Common Pleas court did the same.[473] On the subject of the powers of High Commission to punish with fine or imprisonment, rather than using these as sanctions to enforce spiritual penalties, the cases in this period do not provide clear evidence of the position of the two courts but such indications as exist, particularly in *habeas corpus* cases in King's Bench, showed no willingness to concede such powers to the commission.[474] None of this indicated excessive judicial deference to High Commission.

However as the 1620s drew to a conclusion, the familiar figure of chief justice Richardson started to introduce doubts into the Common Pleas about prohibition of High Commission. These looked suspiciously like the product of political influence.[475] This was because they were so inconsistent with earlier views taken by the court and placed him, once again, in a minority of one in his own court. His

[472] 124 ER 184.
[473] BL MS Hargrave 39, f.17v and Gray, *Writ of Prohibitions*, vol.IV, p.379; 79 ER 792; 124 ER 263.
[474] George Huntley's Case in King's Bench and Isabel Peel's Case in Common Pleas in 1629 both of which are discussed later. Also see Torle's Case in King's Bench in 1640: 79 ER 1100.
[475] That Richardson may have had reason to be nervous is suggested by the existence of a list of the prohibitions granted in relation to High Commission by the Common Pleas whilst he was chief justice apparently compiled for the Privy Council: TNA SP46/164/f.110. Another such list was compiled for prohibitions relating to intestacy matters: TNA SP16/248/95. That was another important area of contention over prohibitions.

views evoked some crushing responses from the other judges present, and even counsel. This emphasised how his behaviour only made sense as politically defensive gestures, especially in high profile cases. Two examples of this were provided in Lady Shirley's Case and Larkin's Case where he tried to raise doubts as to whether alimony suits were really outside the commission's jurisdiction. [476] The first of them started in 1627 and continued in various forms over the next four years. It related to suits brought by Lady Dorothy Shirley (*née* Devereux) against her husband Sir Henry Shirley in High Commission, first for his adultery and the payment of alimony, and then for the non-payment of such alimony. Whilst Sir Henry had been a friend of the Duke of Buckingham, he had lost much political influence as a result of his insulting behaviour towards Henry Hastings, the fifth earl of Huntingdon. For this Sir Henry had been rebuked by the Privy Council and forced to apologise by the committee of privileges of the House of Lords.[477] It is likely that the government was content for his wife's suits to be dealt with by High Commission. Counsel for Sir Henry, being the plaintiff-in-prohibition, asserted that alimony was outside the jurisdiction of High Commission because the commission could only try serious matters that were not triable at common law. Richardson corrected this vague analysis by pointing out, with equal imprecision, that the commission's remit covered 'heresies and... such other things ecclesiastical'. He then remarked that the letters patent for High Commission contained words that expressly covered the issue of alimony but the original statute did not and the statute 'had no prerogative in that', meaning that it provided no authority for such power. From this he then concluded that 'the question is if the King, may by the common law' confer such power by letters patent. Where this suggestion, which had not been made by even the most ardent supporters of the pre-eminence of royal supremacy, came from is hard to tell but the responses of the two other judges in the court were scathing. Justice Hutton pointed out that on this basis the letters patent may grant powers 'for all other things' thus stripping the statute of all effect. On reviewing the alimony wording in the letters patent, justice Yelverton observed that under James I, 'this matter alimony was commanded to be put out of their commission'.[478] With these barely polite responses from

[476] 124 ER 370; BL MS Additional 46189, f.30; 124 ER 203.
[477] R.P. Jenkins,'Shirley, Sir Henry, second baronet (1589-1633)', *ODNB*, (OUP, 2004) and V.E. Burke'Stafford, Lady Dorothy (1600-1636)', *ODNB*, (OUP, 2004), online edn., Sept.2010.
[478] Ibid.

Richardson's colleagues the matter was adjourned until the other judges of the Common Pleas, Sir George Croke and Sir Francis Harvey, were available. There is little reason to believe that they supported Richardson's strange musing either.

In Webb's Case in 1629 Richardson and justice Hutton refused to grant a prohibition sought by parishioners who were before the commission for failing to maintain the upkeep of a church.[479] The parishioners argued that they had never maintained this church but contributed towards the repair of a church in a neighbouring parish and paid tithes and other ecclesiastical duties there. Accordingly they were not bound to maintain their local church by what amounted to a form of prescriptive right analogous to a *modus.* The court took the view that parishioners could always be legally compelled to repair a church and on this basis no such prescriptive custom could exist in law. Prohibition was therefore refused on a basis that would have been valid in relation to such a suit before any ecclesiastical court. However in a court comprising Richardson and only one puisne judge it was decided, surprisingly, to add that the parishioners' conduct was an enormity. That the court's judgment in this case chimed with government policy at all levels was reflected in the attempted restraint of prohibitions in the royal proclamation concerning repair of churches made on 11 October 1629. In the debates in the House of Lords in February preceding that proclamation Laud had specifically complained about how attempts to enforce repair obligations had been thwarted by applications for prohibitions, particularly in relation to suits for such repairs brought before High Commission.[480] It is likely that Richardson was aware of this concern when considering this case, a few months later, in Easter term of 1629.

In Miller's Case in Trinity term of the same year Miller and others had been cited before High Commission for a variety of offences relating to nonconformity.[481] These included hindering a conforming minister, unilaterally appointing days for public fasts, collecting for the cause of the Palatinate and insisting on receiving communion sitting rather than kneeling. Miller had failed to appear before the commission when summoned and had been fined forty pounds. That fine had been

[479] 124 ER 238
[480] Davies, *Caroline Captivity*, p.74.
[481] 124 ER 243.

estreated into the Exchequer. Individually such charges were fairly minor and their counsel moved for prohibition on the basis that they were more appropriate for the local diocesan court. That hinted at a possible further ground for prohibition namely the contentious question of the application of the statute 23 H.8, c.9 to the removal of cases from diocesan courts into High Commission.[482] Richardson denied the prohibition with a denunciation of the defendants as 'nonconformists with the government of the Church of England' and persons who had purported to usurp the exclusive power of the King to designate fast days or the beneficiaries of collections. He offered no authority for this assertion of royal pre-eminence in such matters, to the exclusion of parliament, the Privy Council or the Church itself. He stated that no prohibition would be available for the fine as it was a matter for the Exchequer to settle. Then he blithely asserted that the offences were far too serious for the local Ordinary and, apparently making a pun stated that 23 H.8, c.9 only applied to local diocesan matters that were 'ordinary'.[483] This ignored the problem of construing the relationship between the two statutes by using a circular argument that begged the question as to what constituted a serious offence. In Coventry and Stamford's Case, eight months before, in Michaelmas term of 1628, Richardson had ended up again in a minority of one in a lengthy series of arguments over the complexities arising from the effect of 23 H.8, c.9 on the operation of High Commission with justices Yelverton, Hutton and Harvey, so he would have been well aware that his exposition of this issue in Miller's Case was not settled law.[484] Richardson was at least consistent, in that in both cases he sought to reduce the scope for prohibition of High Commission, in Miller's Case by widening the range of enormous crimes within its jurisdiction and in Coventry and Stamford's Case in relation to its powers to fine or imprison. The trend was clear: the chief justice of Common Pleas sought relaxation of the common law restrictions on the authority of High Commission that accorded with government policy.

[482] *Statutes of the Realm*, vol.3, pp.377-8. This provided that someone may not be cited into an ecclesiastical court outside the diocesan or peculiar jurisdiction in which they lived. It stipulated a penalty for any ecclesiastical judge who breached this provision. The classic exposition of this was given by Coke in Porter and Rochester's Case: 77 ER 1416; BL MS Lansdowne 601, f.207; BL MS Harley 4817, f.192.

[483] When faced with nonconformist defendants he was fond of this. Another example was his inaccurate attempt to use a pun on the offence of *crimen stellionatus* in the Star Chamber case against Henry Sherfield.

[484] 124 ER 204; 124 ER 393.

Finally the related matters of the Countess of Purbeck's Case [485] and Isabel Peel's Case,[486] both heard in the Common Pleas in the period from Easter term 1628 to Hilary term 1629, displayed Richardson's tendency to try to protect High Commission powers in a case that attracted exceptional public and political interest. In such an arena his behaviour was noted and attracted adverse comment beyond that of his colleagues. These two cases arose out of the adulterous relationship between Frances Villiers, Viscountess of Purbeck, and Sir Robert Howard. Lady Purbeck was the daughter of Sir Edward Coke and his second wife, Lady Elizabeth Cecil, who was the widow of Sir William Hatton and was still known as Lady Hatton. Against his wife's wishes Coke had his daughter married to John Villiers, the elder brother of the Duke of Buckingham, in 1617 as part of an attempt by Coke to regain royal favour. John Villiers was created Viscount Purbeck in 1619. By the early 1620s he had started to show signs of mental illness and Lady Purbeck was living separately from him. In such circumstances there was a scandal when she gave birth to a son in October 1624. The father was rumoured to be Sir Robert Howard, the younger son of the earl of Suffolk. The case had political ramifications because the child stood to inherit part of Lady Hatton's fortune and the title and wealth of Buckingham himself, since he had no male heir, through his brother's estate.[487] This was calculated to incense both Charles I and Buckingham. It was an offence against public morals, a slight on Buckingham's family honour and a threat to his inheritance. Howard and Viscountess Purbeck were duly cited to appear before High Commission to explain their behaviour and at a subsequent hearing Viscountess Purbeck was found guilty of adultery. Isabel Peel lived in a house that had access to Somerset House, where the Viscountess had been living under Buckingham's protection, and where the adultery was alleged to have taken place. Peel was accused in High Commission of pandering and procuring in relation to the affair by facilitating its continuation, and was found guilty. Both Peel and the Viscountess were fined and required to perform penances, and were imprisoned pending the provision of sureties for performance of the sentences.

[485] 124 ER 228; 124 ER 400.
[486] 79 ER 700;124 ER 181; 124 ER 380.
[487] S.Handley,'Villiers, John, Viscount Purbeck (1591?-1658)', *ODNB*, (OUP, 2004), online edn. Jan., 2008 and H.M. Chichester, 'Howard, Sir Robert (1584/5-1653)', rev. Sean Kelsey, *ODNB*, (OUP, 2004).

In addition to the political interest in these cases, Richardson had a family connection because of his marriage to Buckingham's cousin Elizabeth Ashburnham (*née* Beaumont) after appointment to the position of chief justice of Common Pleas.[488] His wife was well connected at Court being close to Buckingham's wife, Lady Katherine Manners, and Queen Henrietta Maria amongst others.[489] Isabel Peel sought a prohibition of the commission's proceedings, and *habeas corpus* to procure her release from prison, in Easter term of 1628, before the court of Common Pleas. The core of her case was that it was covered by a general pardon granted by James I in September 1624 but the case also raised issues of the scope of the commission's jurisdiction to hear a case such as this and its powers to fine or imprison. Once again Richardson was noticeably isolated from the other judges in the court. Isabel Peel was granted a prohibition because the court accepted that the pardon did apply even though some of the offences had occurred after it was granted and it excluded adultery. The offence was seen as a composite one, in the sense that High Commission had not differentiated between offences before and after the pardon, and had thus ignored it. In addition, although adultery was outside the pardon, Peel's offence was one of procuring that offence rather than it committing it herself, and so she was covered. In reaching this conclusion justices Croke and Hutton, with some support from justice Yelverton, also raised questions about the authority of the commission to hear the case in the first place and its power to imprison. According to Hetley's law report it was Croke who raised the question of whether the offence fell within the jurisdiction of High Commission, in part to show why prohibition should be granted even for actions taken after the date of the pardon. There then followed a series of arguments raised by Croke that were apparently countered by Richardson, with Hutton and Yelverton intervening in support of Croke. In the account given in Croke's law report, it was Hutton who attacked the wrongful use of the commission's power to imprison and its assumption of jurisdiction for adultery or procuring the same.

A remarkable feature of Hetley's report was how Richardson was disparaged by the reporter. After initial discussion of the applicability of the pardon Croke cited a case involving a husband who had

[488] *The Court and Times of Charles the First*, 2 vols., (London, 1848), 1: 169.
[489] V.E. Burke, 'Richardson, Elizabeth, suo jure baroness of Crammond (1576/7-1651)', *ODNB*, (OUP, 2004), online edn. 2008.

obtained a prohibition after having been cited before High Commission for acting as procurer for his wife's adultery with Sir Michael Blunt.[490] In analogous circumstances to the Peel case Croke asserted that the prohibition had been granted both because it was covered by a pardon and because 'adultery was not inquirable there'.[491] To this the reporter sneered that 'Richardson objected divers things with much earnestness, but so apparently contrary to law, that I have omitted it'. Yelverton and Croke pronounced that the imprisonment of Isabel Peel, as a means to coerce payment of the fine and performance of the penance, was 'void', to which Richardson responded that the commission had no other means to ensure performance of its sentences and if she just complied she would be released. Hutton asserted that the commission 'cannot impose a fine but for heresies, schisms and errours'. To this Richardson responded with the dubious assertion that the effect of 1 E.1, c.8 was that the commissioners 'may proceed according to the tenour and effects of the letters patent of the King'. Yelverton continued to object to the imprisonment but Richardson was not to be deflected from his defence of High Commission. He changed course and vaguely argued that even under 1 E.1, c.8 the commission 'may proceed upon other things than heresies and schisms'. When Hutton pointed out that the Exchequer court had in the past been willing to void fines estreated to them by High Commission in excess of their authority, Richardson apparently continued by attempting to stand Coke's 'enormity' argument on its head by asserting that 'the word enormity contains a thing of lesser nature'.[492] The prohibition was granted and Richardson commented that the commission should have proceeded by excommunication rather than fine and imprisonment, almost as if he was talking to himself.

Hetley's reports bear the name of the serjeant-at- law Sir Thomas Hetley, who died in 1636 but it has been doubted whether he produced them. Instead it has been suggested that they should be ascribed to Humphrey Mackworth.[493] If that is correct it puts a particular slant on this report as Mackworth was a much more radical figure than Hetley. He was a lawyer and a known opponent of the religious

[490] Probably a poorly reported reference to Doctor Conway's Case: 123 ER 801.
[491] 124 ER 181.
[492] Ibid.
[493] C.W. Brooks, 'Hetley, Sir Thomas (1570-1637)', *ODNB*, (OUP, 2004), online edn. Jan. 2008 and P. Gaunt, 'Mackworth, Humphrey (1603-1654)', *ODNB*, (OUP, 2004), online edn. Jan., 2008.

policies of Charles I. He went on to become a colonel in the parliamentarian army and a circuit judge under the Commonwealth. He served on the council of state under the Protectorate. This might explain the overtly contemptuous attitude displayed towards Richardson in this report and why he was portrayed as a judicial cheer leader for broad High Commission powers. It means that this evidence must be treated with care. However it also suggests that Richardson, by 1629, had been identified publicly as a judge who favoured the government's policy of enhancing the power of the commission. Even if allowance is made for religious antipathy, Richardson's conduct, as reported, was consistent with what is known of his behaviour from other sources.[494]

The hearing of the Countess of Purbeck's Case took place in Hilary term of 1629. Like Peel, the Viscountess was sentenced to imprisonment pending the provision of sureties as security for performance of such penance as the commission imposed and she was fined. It was specifically stipulated that she should not be bailed until the sureties were produced, a point that justice Yelverton found particularly objectionable. Her offence was adultery and despite Croke's apparent assertion in Isabel Peel's Case that this was outside the jurisdiction of High Commission, Serjeant Henden, who was counsel for Lady Purbeck, did not attack this directly. Instead he sought prohibition on the basis that it was the punishment that was outside beyond the jurisdiction of High Commission and that 23 H.8, c.9 meant that the matter should have been dealt with by her local bishop. Given her social status, the notoriety of the offence and the political embarrassment caused by her behaviour a direct attack on the commission's ability to try the offence may have seemed risky.[495] In addition Croke's own assertion on the point in Isabel Peel's Case had only produced a precedent for prohibiting the procuring of adultery and not adultery itself. That was still contested and the sentence was a ground that was more likely to elicit sympathy, as Yelverton's comments showed. However Richardson would have none of this. Following on from his final thoughts in Isabel Peel's Case about proceeding by excommunication, he asserted that the first part of the sentence only amounted to a version of the procedure for dealing with recalcitrant defendants who had been excommunicated pursuant to the

[494] See his speeches of dubious relevance in cases in the Star Chamber court against Leighton, Sherfield and the first action against Prynne.
[495] Gray, *Writ of Prohibition*, vol.IV, p.346.

procedure referred to as *de excommunicato capiendo*. That laid down a procedure for ecclesiastical courts to obtain a writ through the common law courts to detain and imprison excommunicated persons until they performed the conditions imposed for lifting the excommunication.[496] His argument omitted reference to the various stages of the *de excommunicato* procedure that allowed the defendant to contest and avoid imprisonment and evaded the question as to whether the commission had power to do this. He then asserted that High Commission had the power to fine as a punishment, a position that was not even consistent with his own views on this point in earlier cases. At this stage the matter was adjourned, possibly because of disagreement on the bench, but at a later date Richardson ruled that because the fine had been estreated into the Exchequer no prohibition could be granted. It is possible that he spoke for the court as a whole since the issue had thus been successfully passed to another court so there was no intrusion on the authority of High Commission in a high profile case. But Richardson's arguments remained bizarre and anomalous.

The situation in the period from 1625 to 1631 in King's Bench showed less evidence of judicial attempts to indulge the power of High Commission. Common Pleas seemed to be favoured more by those who sought prohibitions, especially in the earlier part of this period, possibly because it was seen to have more experience in this area of the law. In two cases the King's Bench had remained hostile to High Commission's power to grant alimony despite Richardson's attempts to suggest otherwise in the Common Pleas. In the remaining seven cases there was little to suggest that the chief justice of the King's Bench since February 1627, Sir Nicholas Hyde, had taken the same approach to High Commission as Richardson. In the one reported case with a distinct flavour of religious and political controversy, George Huntley's Case in Hilary term of 1629,[497] the court acted cautiously, but without overt bias, towards a non-conformist defendant who had snubbed the Archbishop of Canterbury, by refusing to preach a visitation sermon before him in the diocese of Canterbury. Huntley had been fined the substantial sum of £500 and imprisoned, in April 1627. He remained there for two years before bringing an action for *habeas corpus* early in 1629.[498] He was seen as an

[496] Gray, *Writ of Prohibition*, vol.IV, pp.347-8.
[497] BL Hargrave MS 39, f.14v.
[498] TNA SP16/499/74.

opponent of the established Church, and the Church authorities wished to make an example of him.[499] If his local Archdeacon's request to deliver the visitation sermon was a deliberate move to force him to submit to clerical discipline he readily took up the challenge and the two prominent counsel acting for Huntley, Sir Robert Heath and Sir Henry Calthorpe, demolished the notion that Huntley had a duty of canonical obedience in the circumstances of the case.[500] The King's Bench ordered the release of Huntley on bail and deferred any comment on the issues of law that were raised. It was a reluctant response to a well argued case but was as much as could be expected given the rank of the recipient of the discourtesy, the involvement of High Commission and the fact that this was an application for *habeas corpus* rather than a prohibition.

Huntley appears to have remained out of jail and made various attempts to bring actions for false imprisonment, in King's Bench, against members of High Commission involved in his case. This striking, if foolhardy, campaign illustrated several aspects of the interaction between the common law courts in this period. The first was the change of climate in the King's Bench that came with the appointment of Richardson as chief justice in October 1631 after the death of Hyde in August. The second was the determination of the King and Privy Council to protect the commission and the judiciary. The third was that there still were people willing to defy the commission in the name of the common law. According to the testimony of the part time journalist John Dillingham at Laud's trial, Huntley attempted to get the court to hear his suit despite the fact that he could not get any counsel to plead on his behalf.[501] Richardson suggested that he use another court and, when further pressed to hear the matter, indiscreetly and plaintively replied 'I pray thee, Mr Huntley, sue in some other court, for upon my faith I dare not do thee justice'.[502] According to Huntley's account of his travails in the information that he produced for the proceedings against Laud this attitude of the court continued since on subsequent occasions the court threw his case out because of defects in the form of the

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[499] Laud grouped him with such other 'Sectaries and Separatists' as William Prynne, Henry Burton and George Walker. See Laud, *Works*, vol.iv, p.373.

[500] Heath pointed out that as a licensed preacher Huntley could not preach outside his own cure and the archdeacon had no power to waive this restriction. Gray, *Writ of Prohibition*, vol.iv, p.380.

[501] J. Raymond, 'Dillingham, John (*fl.*1639-1649)', *ODNB*, (OUP, 2004).

[502] TNA SP16/499/74. Laud did not directly challenge the accuracy of this report, although he prefaced his response with the comment 'if he spake those words, the more shame for him'. Given Richardson's habit of making remarkably indiscreet comments, Laud may have suspected that the report contained some truth and confined his response to pointing out that it made no reference to him. Laud, *Works*, vol.iv, p. 136.

documentation filed in the court. When a different attorney, George Merefield, re-drew and filed the documents he was summoned before the Privy Council and imprisoned for failing to provide the Sheriff with the right documentation to bring the defendants before the court.[503] Thus in Huntley's view the judges showed a craven fear of the government and the latter was willing to use an arbitrary and pedantic pre-occupation with legal form to quash Huntley's legitimate legal proceedings.

However Huntley was being disingenuous. The Privy Council action against Huntley's lawyer, George Merefield, was the final riposte to a series of legal attacks made by Huntley on individual commissioners from 1629 to 1635. These were self-consciously made in the name of defending the jurisdiction of the common law against clerical encroachment as Huntley made clear in his petition in 1631 to Attorney-General Noy, for leave to proceed in King's Bench.[504] With this in mind he had tried to persuade Sir John Bankes, to act for him and had forced two commissioners, Doctors Balcanqual and Barker to seek legal advice in 1631 from Noy as to how they should plead to Huntley's false imprisonment action against them.[505] Noy advised them to plead their position as commissioners as a complete defence. It was also decided to approach Laud and get him to speak to the King, because soliciting such royal intervention had been used successfully in the reign of James I, by Archbishop Bancroft, to persuade Sir Edward Coke to accept such a plea as a full defence in a similar case.[506] This was not the only way in which the King became aware of Mr Huntley and his activities. In fact Merefield had attempted to get a writ of *capias*, that was allegedly incorrectly drawn, enforced against Sir Henry Marten, in his capacity as a member of High Commission. Sir Henry had complained to the King. Trying to arrest a judge for doing his job was unacceptable and the King had responded by ordering Lord Keeper Coventry to direct the cursitor clerks in Chancery not to issue any writ against a judge of the King's courts for actions undertaken by them as judges without first informing the Lord Keeper. Coventry also told the judges of King's Bench and Common

[503] TNA SP16/499/75.
[504] TNA SP16/205/103.
[505] TNA SP16/205/104 and TNA SP16/275/35.
[506] There is evidence that in the end the King's Bench court was forced to accept some degree of progress in these proceedings even if they did not go far. See TNA SP16/211/41 for court ruling that required the attendance of the plaintiff and defendants in 1632.

Pleas to issue similar directions to the filazers in those courts.[507] At this point the government had had enough. Huntley's attempts to bring these claims were ended by this order and the direct intervention of the Privy Council which had Merefield imprisoned under threat of action in Star Chamber.[508] Whilst Richardson's behaviour was craven the government's response was understandable and relatively restrained.

This episode is also relevant to the problem of understanding the absence of cases relating to the common law judges and High Commission in the period from 1631 to 1640 and the reduction in reported prohibition cases in the 1630s.[509] Whilst individual judges might have been persuaded by political pressure to refrain from issuing prohibitions, it is hard to see how this could prevent determined litigants from bringing such suits in the courts. That such potential litigants existed was shown by George Huntley and he was not alone. Apart from the defiance of well known figures such as Prynne or Burton, there were others such as Ralph Grafton, Thomas Foxley and George Walker, all of whom had disputes with High Commission over its powers or jurisdiction.[510] If all of the judiciary had adopted a policy of rejecting any prohibition or *habeas corpus* application brought before them that related to High Commission there would still have been some evidence of this in the extant law reports as applications were brought and consistently failed. This would have gone on for so long as it took for it to become obvious that such applications were expensive and futile. In fact the evidence reviewed indicates that the judiciary did not respond to government pressure with any such policy and continued to display a respectable degree of independence and a variety of views and tactics when faced with such pressure. Only Richardson displayed overt bias and as a chief justice was particularly susceptible to political influence. The judges did not seem to stop issuing prohibitions relating to High Commission even if such applications did not become the subject of detailed law reports. To consider

[507] Cursitors were the Chancery court officers responsible for the issue of all original writs. Filazers were officials of the common law courts responsible for the filing of judicial writs issued for the counties copies of which were then sent to the Chief Clerks of those courts for central filing.
[508] TNA SP16/499/75; TNA SP16/282/39.
[509] A similar hiatus occurred for the strong line of reported decisions, particularly in the court of Common Pleas, on prohibitions in intestacy, probate and sexual morality cases in the period between 1635 and1640. See the time gap in the reported cases examined in Gray, *Writ of Prohibition*, vol. iv, pp.87-90. There also seem to be much fewer reported prohibitions cases on tithes although these did not stop altogether: see 79 ER 1081-2 for example.
[510] See Laud, *Works*, vol.iv, p.373.

why this odd gap in the records existed, and what it may mean, it is necessary to look at such evidence as does remain.

Because of the political backing and composition of High Commission in the late 1620s it is tempting to conclude that this gap was the result of direct political restraint of the judges, particularly at the instigation of Laud. In 1629 he hinted at how this might be brought about in item 9 of his memorandum to Charles I entitled 'Considerations for the better settling of the Church Government'.[511] In that he recommended 'that his Majesty's high commission be countenanced by the presence of some of his Majesty's Privy Council, so oft at least as any matter of moment is to be sentenced'. The continued increase in the number of commissioners and the size of the quorum suggested that his recommendation was implemented. In the period after 1631 when the flow of law reports ceased, Laud had been bishop of London for three years and was both a privy councillor and on the commission for exercising the powers of the Archbishop of Canterbury during the sequestration of the nominal incumbent, George Abbott.[512] Laud's power was very much in the ascendant. The behaviour of Richardson towards Huntley, and that of various people involved in the proceedings relating to Grafton may be seen as further evidence of his direct influence over judges. Ralph Grafton, an upholsterer, had been fined £50 in High Commission on 21 June 1632 for 'depraving the Common Prayer-book...and for not coming to church'.[513] The fine was estreated into the Exchequer and enforcement proceedings commenced under which Grafton was committed to the Fleet prison pending payment. Despite legal applications to obtain his release he remained in prison until November 1638. Grafton alleged that the keeper of the Fleet made it clear that he would not release Grafton, whatever the Exchequer court required, unless he heard directly from Laud. In addition it was alleged that when the matter came back before the Exchequer court Baron Trevor refused to release Grafton and declaimed 'O the Bishop, O the Bishop', which was seen as a reference to Laud and his malign influence.[514]

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[511] Rushworth, vol.2, p.7.
[512] A. Milton, 'Laud, William (1573-1645)', *ODNB*, (OUP,2004), online edn.2009.
[513] Laud, *Works*, vol.iv, p.127; TNA SP16/401/49.
[514] Laud, *Works*, vol.iv, p.126.

This role as the *eminence grise* exercising influence over the judiciary and preventing the use of prohibitions as a check on the operation of High Commission was one of the main allegations made against Laud in his trial for treason.[515] Laud countered this by claiming that the number of prohibitions admitted in the Courts of Arches and Audience within the province of Canterbury, being appellate courts within that province, in the seven years that he had been archbishop were more than in any seven years under his predecessor George Abbott.[516] He supported this with written evidence and claimed that he would have done the same for High Commission if his evidence had not been seized by his accusers. It seems hard to believe that he would offer such a defence, which could easily be checked and disproved by examination of the papers proffered and the records available to the prosecution, if there was not some truth to it. Most of the testimony against him took the form of hearsay reports of his alleged derogatory comments about prohibitions, or threats to those who sought or delivered them. This indicated that prohibitions were still being granted, even in respect of High Commission, notwithstanding Laud's power and hostility. That such a writ was granted in one of these cases can be verified. Laud took particular exception to the disrespectful manner of delivery of certain prohibitions into High Commission. He alleged that a lawyer threw a prohibition writ at the judges with such force that it bounced off the table and hit Laud. In relation to the latter incident the petition of 1634 from William Baispool, solicitor, survives in which he apologised to Laud and sought release from the Compter prison in Southwark, after his committal for 'unmannerly behaviour in the delivery of his Majesties writ of prohibition' into High Commission.[517] This indicated that at least one common law court had issued such a writ, thus providing some support for Laud's account up to the mid 1630s and his appointment as archbishop.

A letter dated 3 February 1638, from then chief justice of Common Pleas, Sir John Finch to Laud offered further insight. An initial application for a prohibition had been made by counsel for Lady Wotton in the Common Pleas, apparently on behalf of the incumbent of a parish in Northamptonshire,

[515] In addition to a general charge that 'he hath...endeavoured to interrupt and pervert the course of justice in his Majesty's courts at Westminster and other courts' Laud was also charged with having 'by his letters and undue means and solicitations used to judges, opposed and stopped the granting of his Majesty's writs of prohibition where the same ought to have been granted'. Laud, *Works*, vol. iv, pp.89 and 137-41 for some examples.
[516] Laud, *Works*, vol.iv, p.141. As Usher pointed out this may not have been a very large number. See Usher, *rise and fall of High Commission*, p.317.
[517] TNA SP16/280/4, f.5r.

in relation to a suit in High Commission. The previous incumbent had been convicted of simony which automatically rendered his title to clerical office void. An ecclesiastical suit was brought by him to challenge the new incumbent's rights and those of Lady Wotton to make the new appointment. That explained her interest in the matter. The grounds for prohibition alleged in the surmise were the ecclesiastical plaintiff's failure to provide the articles setting out the basis of the underlying suit, and trying to validate the previous incumbent's claim when statute made it invalid. The Common Pleas had refused, entirely properly, to deliver a final verdict on the application because the defendant-in-prohibition had not been represented at the hearing of the motion for prohibition. But they ruled that because there was a sworn statement that the articles had been denied to the plaintiff-in-prohibition, the proceedings before High Commission must be stayed until those articles were available to both sides. Finch was clearly nervous about how this would be received and wrote to Laud proclaiming that:

> no man that ever sate on a bench was more tender how he invaded the Jurisdiction of other courts...and for the high commission court...that it is a court of an high and eminent nature and it behoved us to be very wary of granting prohibicions to stop that court.[518]

Despite this he was persuaded by his colleagues that a stay in such circumstances 'was never denied'. He added at the end of this account that 'I was a little troubled at the mocion, being the first that was ever made since I sate in that court, concerning any proceedings in that high Court'.[519] The obsequious tone of this letter emphasised how the political climate made a chief justice anxious about prohibiting church courts generally and the commission in particular. Yet the High Commission proceedings were stayed over a procedural issue that had been a source of contention with the common law courts for as long as the arguments about the *ex officio* oath, and which could have been overruled by express royal order. In addition the judges had left the question of prohibition on the application of statute wide open and made it clear, from Finch's account, that the stay had been granted to force disclosure of the articles so that a prohibition could still be sought when the details of the case were better understood. Finch may have been relieved that the question of prohibition could thus be put in abeyance but there seemed to be no attempt to put the plaintiff-in- prohibition off

[518] TNA SP16/381/24, f.57r.
[519] Ibid., f,57v.

altogether. That makes Finch's assertion about the absence of such motions seem even more curious. He had been appointed chief justice on 16 October 1634 so by the time of this hearing he had held that post for nearly three and a half years, yet he claimed that in all that period the court had not heard one application for a prohibition of High Commission.

It is hard to see how this strange silence could be attributed to a nervous, but far from cowed, judiciary that had shown itself adept at finding tactics for avoiding head on confrontation over prohibitions. On 4 November 1639 a prohibition was brought from the King's Bench to the commission in relation to a suit in the matter of *Baker v. Hunt, Crowder et al*. This concerned the enforcement of a contract for the repair of the pulpit, pews and communion table and provision of other joinery services for the church of St Mary Outwich in the City of London. The interpretation of a contract was clearly outside the commission's jurisdiction and in such circumstances the King's Bench did not hesitate to act and prohibition was granted. The question is why there were not more such examples. Several general explanations have been offered for what has been seen as a retreat of the common law in relation to High Commission in the 1630s. Sharpe, following Usher and J.P. Kenyon, pointed out that eighty per cent of the cases heard in High Commission between 1611 and 1640 were private suits brought by parishioners or clerics against each other. Official prosecutions, excluding those brought on behalf of the poor, were only about 10 per cent of such cases.[520] His argument was that the commission was more a popular venue for dealing with parochial and clerical issues, even a vehicle for anti-clericalism, than an instrument of Laudian religious oppression. Usher concluded that the retreat occurred because of changes on the bench, the popularity of the commission with suitors and because less people sought prohibitions because they left suitors without remedy.[521] Changes of personnel on the bench brought about some changes, mainly due to the efforts of chief justice Richardson, but these were often legally contentious and not supported by many of the judges in the reported cases. This did not establish effective precedents that moved the common law substantially away from the Cokean view of the jurisdiction of the commission. Whilst such changes indicated caution and apprehension in the judicial response to this issue they do not explain the

[520] Sharpe, *Personal Rule*, p.377 and the table of cases in Usher, *rise and fall of High Commission*, p.279.
[521] Usher, *rise and fall of High Commission*, pp. 320-321.

sudden silence. Like the Star Chamber court the popularity of a court as a vehicle for litigants did not prevent it from attracting a dangerous degree of opprobrium from political opponents and the question as to whether the effect of leaving a suitor without remedy made a prohibition desirable or not depended on which side of the case you were on. This had always been the effect of an application for prohibition, so it was hardly a new discovery in the 1630s.

A different factor, suggested by Gray, may have reduced the prohibition of High Commission. It arose from Usher's observations about the re-emphasis under Laud of the commission's visitational function.[522] This redirected the official focus of the commission onto errant clergy, Puritans, ceremonial matters and issues of nonconformity and away from civil matters involving laymen such as disputes over church property, defamation, sexual misconduct of lay persons and arguments over marital property. This doctrinal approach aggravated and alarmed religious dissenters but reduced the sort of litigation that was an easy target for prohibition and thus avoided the interference of the common law courts.[523] Whilst this might have reduced the exposure of High Commission to prohibitions it did not deal with the wider issue of the effect of prohibitions on projects for strengthening the economic position of the church and the status of its courts. In order to do that an attempt was made to by-pass the judges in a different way altogether.

Direct action: the Privy Council as final arbiter of jurisdiction

The initiatives of the King and Privy Council in the early 1630s to define the jurisdiction of different parts of the court system had faltered in the face of the complexity and imprecision surrounding ecclesiastical jurisdiction. Private agreements with the judges on specific issues had brought very limited results for much the same reason. But there is evidence that after 1635, when Laud reached the zenith of his power, the government began to reinvigorate its use of direct political intervention to deal with this problem. It seems that what it had been unwilling to do *de jure* by means of a formal commission for determining jurisdictional issues in 1631 it did *de facto* by use of the arbitral

[522] Usher, *rise and fall of High Commission*, p. 243.
[523] Gray, *Writ of Prohibition*, vol.iv, p.336.

functions of the Privy Council as a means of circumventing the common law courts. The method used was to encourage clergy involved in disputes where prohibition had been sought, or was likely to be sought, to petition the Privy Council or the King directly for help and thus use royal power to defend church interests directly. A group of senior councillors were particularly active in dealing with such references and their actions were assisted by the direct involvement of the King. The concept of a petition direct to the King or Privy Council was an established method of seeking redress and one that, in theory, did not overtly challenge the status of the common law courts. In practice the creation of a political climate that facilitated clerical resort to the council was an effective way of avoiding the restrictions on ecclesiastical claims imposed by prohibitions. This may also have had the unintentional effect of causing some clerics to openly show disrespect towards the common law judges to such an extent that government intervention was required to reassert the dignity of royal justice.

As an early example of how this worked, in 1634 Roger Maynwaring, having been installed as Dean of Worcester in September of that year despite his brush with parliament in 1628, petitioned the King concerning a tithe dispute with William, Lord Craven. Given that Craven was one of the nine wealthiest peers in England his money would, as Maynwaring pointed out, make him a formidable opponent and seeking royal support made good sense.[524] It was indicative of where official sympathies lay at this time that the church was represented by Attorney-General Bankes, acting in person as its counsel, and it is likely that he suggested this course of action. Maynwaring expressly asked that the King 'signifye y[ou]r royall pleasure unto the judges of the sayd severall benches requiring theyre more speciall care of y[our] Churches rightes' to prevent them being 'indangered to those hands where happlye they will not be soe readily at y[ou]r Ma[jes]tyes Comand in tymes both of peace and warr and ever will be while they continue in your churches possession'.[525] The notion that property in the possession of the Church was more readily 'available' to the Crown than that of a peer of the realm played nicely on the political association between enhancement of royal and ecclesiastical authority. In addition Maynwaring emphasised how this case was similar to 'divers

[524] R.M. Smuts, 'Craven, William, earl of Craven (*bap.*1608, *d.*1697)', *OD NB*, (OUP, 2004), online edn. May 2007.
[525] TNA SP16/281/79, f.211r.

others in the like kinde' and would set a general precedent of 'infinite preiudice' to the church if it went in favour of Craven, suggesting that Maynwaring understood exactly how to attract royal attention. It worked since the King gave instructions, written in the margin of the petition, to issue letters to the courts of King's Bench and Exchequer. Whilst those letters have not survived it was unlikely that they helped Craven. A well connected and advised clergyman had invoked royal power to restrain the bench in favour of church interests in the simplest way.

Another such precursor was the clerical request for political action to restrain prohibitions made in the petition of the London clergy, in November 1634. This related to the erosion of the value of tithe rates fixed in the early sixteenth century by inflation and the reduction in the variety of payments due to the clergy since the Reformation. A major complaint in the petition was that this had been exacerbated by the erosion of clerical income by unsympathetic treatment of claims for tithes, mortuary fees and other payments before the Lord Mayor's court in the City of London, where the mayor was both a party to such suits and the judge. It was alleged that the London clergy were forced to pursue their claims in this hostile arena because prohibitions had been used to stop their actions before ecclesiastical courts. As a result avoidance and reduction of tithe payments had increased. The King was asked to stop this and the ongoing arguments surrounding the quantum of London tithes saw a number of different uses of royal power to remedy the problem. Initially the matter was referred to a committee of senior Privy Councillors, which included chief justice Richardson, to investigate. The matter was then referred to the King to act as arbiter of the dispute.[526] It appears that, at least during the time it took for the royal determination on this issue to be made, a restraint on prohibitions was put in place if the governing figures of the City of London are to be believed.[527]

In the meantime according to Peter Heylyn, an important move was made within the government to render one of the key courts more obviously amenable to church interests. This was the appointment of the Bishop of London, William Juxon, to the position of Lord Treasurer in March 1636. The impetus to do this came almost entirely from Charles I rather than Laud, who appears to have

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[526] TNA SP 16/535/4; Rushworth, vol.2, pp.269-72.
[527] TNA SP16/291/101.

overlooked this possibility.[528] Consequently a senior bishop now sat on the bench alongside secular judges in the principal court for revenue matters, namely the Exchequer. As Heylyn remarked, in relation to the London tithe disputes:

> London...did much depend in their trade and payments on the love and justice of the Lord Treasurer of England. This therefore was the more likely way to conform the citizens of London to the directions of their bishop, and the whole kingdom unto them...for with what confidence could any of the old cheats adventure on a public examination in the court of Exchequer...when a Lord Bishop of London sate therein as the principal judge?[529]

In reality the effect of this was wider than that since all fines imposed by any ecclesiastical court or High Commission were estreated into the Exchequer court for collection. The presence of a cleric as Lord Treasurer in itself would reduce the threat of the High Commission power to fine being thwarted by the Exchequer court and would increase the willingness of that court to pursue such matters. It sent a powerful message to the judiciary as a whole, as well as the Exchequer barons, for the latter to find themselves adjudicating with a senior cleric amongst their number.

Alongside this bold step there were signs, in the period from 1635 to 1639, of growing clerical confidence in using recourse to the Privy Council as a means of avoiding prohibitions. In the council there was closer monitoring of this issue and its members were deployed to arbitrate underlying suits involving ecclesiastical property. The confidence had an impact on the common law judges and litigants before them. In February 1637 Giles Bury, the rector of Bradwell-on-Sea, petitioned the Privy Council, in hectoring terms, regarding a claim for tithe hay that he had brought against two parishioners in the court of his local ordinary. The parishioners had countered his claim by asserting the existence of a *modus* in the form of the provision of winter cheese instead of the hay. Although such a defence might have been accepted by the ecclesiastical court, the parishioners decided not to take any chances. They sought a prohibition in the Common Pleas. On the basis of a surmise only, as was normal where a *modus* was raised, the prohibition had been granted, even though Bury had made

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[528] B. Quintrell, 'Juxon, William (*bap.*1582, *d.*1663)', *ODNB*, (OUP, 2004), online edn. Jan. 2008.

[529] P.Heylyn, *Cyprianus Anglicus or, the history of the life and death of the Most Reverend and renowned prelate William, by divine providence Lord Archbishop of Canterbury: containing also the ecclesiastical history of the three kingdoms of England, Ireland and Scotland from his first rising until his death* (London, 1668), p.304 and Hill, *Economic Problems*, pp.281-2.

representations against this at the initial hearing in the Common Pleas.[530] He denounced this in aggressive terms asserting that the prohibition was prejudicial to him and his successors and did 'intrench upon the iurisdicion eccl[esiastic]all in generall'.[531] To allow it to stand would endanger the peace of neighbouring parishes. On this basis he exhorted the council to protect the prosperity of the church and require the judges of Common Pleas to issue a writ of consultation to allow his suit in the Church court to proceed. The response was swift and decisive. All of the judges involved, chief justice Finch and justices Hutton, Vernon and Crawley were required to give their account of the matter at the beginning of the next law term and a date in May was fixed for the matter to be formally heard by the Privy Council.

The judges' response revealed a very different picture. When certain of the inhabitants of Bradwell had made an initial application for prohibition it had been denied because the judges thought that the assertion of a *modus* was feigned. Then a second application had been made that was supported by five sworn affidavits in support of their case plus two prohibitions that had been granted by the court of King's Bench in relation to the same issue. The first prohibition dated from Trinity term of 1607 and had been obtained by a parishioner called Malden in relation to a suit brought by Bury's predecessor, a Dr Tabor. The second one dated from Trinity term of 1627 and had been obtained by the same parishioner on the same grounds against Bury himself. Both of these applications had been proved before the King's Bench. Faced with such evidence of the validity of the parishioners' argument, and Bury's bad faith, the Common Pleas had nonetheless only granted a temporary prohibition and required that the parishioners should take the issue to a full trial in order to obtain the grant of a prohibition in final form. Despite the caution of the Common Pleas, Bury looked like losing again if the parishioners persisted. Accordingly he had commenced proceedings in Chancery and issued subpoenas against each of the parishioners seeking the prohibition in order to stay the suit in the Common Pleas. He had then sent them letters offering to drop the Chancery proceedings if they dropped the prohibition suit. Having failed to receive a satisfactory response Bury had then taken the

[530] Another oblique indication that prohibitions were being granted in this period.
[531] TNA SP16/347/5, f.5r

matter up with the Privy Council.[532] What is striking about this was just how careful the Common Pleas had been. Faced with what appeared to be a fairly standard initial surmise of a *modus* their response had been to assume that it was false in the absence of further evidence. No reason was given for this but it looked like a reversal of the sort of response that would have been given, for example ten years before in the Jacobean court. Coke's view was that the pleading of a *modus* took the matter out of the ecclesiastical jurisdiction automatically. Whilst inclined to exercise some discretion, the subsequent approach of the Jacobean and Caroline bench changed that principle into a rebuttable presumption. In addition, when faced with two Kings Bench decisions on exactly the same matter, one involving the same defendant-in-prohibition, the judges had still insisted on putting the plaintiffs-in-prohibition to the expense and trouble of taking the matter to a full hearing. There could hardly have been any stronger precedents for supporting the immediate grant of prohibition without further proceedings. It was another sign, like his letter to Laud about the Lady Wotton case, of just how politically careful the Common Pleas under chief justice Finch had become. But they would still issue prohibitions.

Other notable features of this process were the willingness of the Privy Council to give it their full attention, and the tone of Bury's address to them. Based entirely on Bury's allegations, which proved to be thoroughly misleading, the council had required a written explanation of their conduct from a chief justice and three puisne judges, and set aside time for a full hearing of this matter: all in relation to a rector's claim for a tithe of hay. It was indicative of the council's priorities at this time that a relatively minor dispute affecting the interest of the Church could command such attention at the highest level of government. From his combative remarks about defence of ecclesiastical jurisdiction, and the wider implications for tithe suits and the interests of the Church, it appears that Bury expected this rhetoric to attract favourable attention. In his statement to the council for the hearing on 3 May 1637 he returned to these themes referring to an opinion of the civil lawyer and vicar-general, Sir Thomas Ridley, that customs of the type alleged were 'meerely eccl[esiastic]al not secular' so that, referring to the common law courts, Bury was 'not liable to their attachm[en]t as if he were a

[532] TNA SP16/347/5i

transgressor of the Kinges honour and dignitie'.[533] That was a clear assertion of the claim for equal and autonomous status for ecclesiastical law with the common law, and the lack of any justification for common law interference through prohibitions or *praemunire*, that was made by civil lawyers, like Ridley and many senior clerics.[534] Bury went on to assert that if accepted these claims of custom would lead to the 'unsettling of many tithes' and that his parishioners behaviour was symptomatic of their 'notorious disaffeccion to the profite of the church'.

It was a confident performance but the confidence was misplaced. In reality it was all bluster. He had failed to deal with the affidavit evidence or the crucial assertion that all of this had been examined in King's Bench twice before. The Privy Council believed the judges, and they were not pleased to find that Bury was not the vulnerable cleric defending the Church against lay interests that he seemed. He was an obstreperous and experienced litigant who had used them as just another tactic in his attempts to avoid unfavourable court decisions. After consulting chief justice Finch, and the other judges, again the council decided that 'the judges have done in that businesse nothing but what was just and verie proper for that court to doe'. Bury was committed to prison for 'his boldnesse in professing to asperse a court of justice'.[535] Apparently this had the desired effect as Bury was released on his submission to the judges by a warrant from the council two days later on 5 May 1637.[536] What was remarkable was not that the council acted in this way but that Bury thought that his attacks on common law involvement would be enough to cause the council to ignore all of the other aspects of the case. Dr Bury was not the only clergyman to invoke the power of the Privy Council in this way, nor was he the only one to show excessive zeal in attacking members of the judiciary and be rebuked for his conduct. In addition to Bury's behaviour the Privy Council had in April 1637 imprisoned Edward Hastler, the Rector of Bagnor, for presenting a petition alleging that in another prohibition case chief justice Finch had 'contrary to the trust and duty of a judge....sought to direct justice, and to draw the said Hastler into some disadvantage'. This was in addition to the public denunciation, in April 1638, of justice

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[533] TNA SP16/355/48, f.73r.
[534] B.P. Levack,'Ridley, Sir Thomas (*b.*before 1548, *d.* 1629)', *ODNB*, (OUP, 2004), online edn. Jan. 2008.
[535] PC 2/47/13 f.181; TNA SP16/355/49, 50.
[536] PC 2/47/13 f.185; TNA SP16.355/51.

Hutton in the Common Pleas court for treason by Thomas Harrison, because of Hutton's dissenting judgement in the Ship Money Case.[537] Harrison was a cleric with a living in Northamptonshire.

There were more restrained and effective examples of such clerical recourse to the council. In May 1637 the council received petitions from Richard Wood, the vicar of Shawbury in Shropshire, and Frances Carleton who were on either side of a tithe dispute relating to the hall and town of Great Withiford. Wood claimed that he had been the subject of several prohibitions obtained by Carleton and his under-tenants but had obtained a 'verdict at law' for the tithes of that hall and town which was expressed to be 'finall for the settling of that difference'. He did not indicate whether that verdict was obtained in a Church court, but it seems likely that it was. Carleton had responded by claiming the existence of a *modus* which Wood had refused to recognise. After an initial setback, Carleton obtained a prohibition. Faced with this the Privy Council requested that justice Jones, who had heard the dispute before, at the next Assizes should 'call the parties before him and then treat and mediate a friendly accommodacion and finall end of all matters between them'.[538] Whilst this may seem a reasonable solution it should be remembered that Carleton, and indeed justice Jones, probably thought that it was an end of the matter when the prohibition had been granted. However the same judge was being directed to re-open his decision and mediate between the parties. Although less ambitious or aggressive than Bury's efforts, this still subverted the grant of a prohibition to the advantage of the clerical litigant and sent a clear message to justice Jones to be careful about Church interests.

An otherwise routine petition to the King, shortly after this, provided an example of another significant aspect of the Privy Council role as a route around the common law judges. This was the operation of what seems to have functioned as an *ad hoc*, sub-committee of the council. The group comprised Archbishop Laud and Lord Keeper Coventry, primarily. They were usually joined by Lord Treasurer Juxon, with Lord Privy Seal Manchester occasionally acting as a substitute for Coventry. To this powerful gathering the local diocesan bishop might be added, when his involvement was

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[537] PC 2/47/13 f.165; *State Trials*, 3:1374; Sharpe, *Personal Rule*, p.717. It is not clear whether any of the persons who made a similar accusation of treason, and various other defamatory remarks against justice Croke were clerics: see TNA SP16/457/36.
[538] TNA SP16/357/118, f.225r.

relevant to the adjudication. Often it was, because they investigated and decided disputes involving clerical claimants, church economic interests or matters within the ecclesiastical jurisdiction. There were forty eight such adjudications of this type within the period from 1635 to 1639. The number may have been greater since, within the records of the Privy Council, there were various procedural decisions taken, particularly by Laud and Coventry, on adjudications for which no final decision was recorded and it is not possible to discern their subject matter. What is striking is the consistency of the involvement of such senior members of the government in what seem to be relatively trivial matters and the particular concentration of these proceedings in the council within the years 1637-8.[539] There is no evidence that this was a formal grouping of the type envisaged in the commission for settling jurisdictional questions of May 1631, but it is possible that they were intended to fulfil that role in practice, for ecclesiastical matters, without provoking the political controversy that formal adoption of that solution would have entailed. The constant inclusion of Coventry or Manchester in what was otherwise a group with strong clerical bias, indicated that there was some concern about ignoring the role of the common law in such matters entirely.

An example of the operation of this group arose when a petition was presented by Dr George Griffith to the King, in October 1637, in relation to a tithe dispute. Griffith was a fairly well connected clergyman who was archdeacon of the diocese of St Asaph. The bishop of that diocese, John Owen, was his brother-in-law and Griffith held two rectories, one of which was that of Llandrinio.[540] It was in relation to that rectory that he had various tithe claims for two farms, which were awarded to him by 'three severall definitive sentences in the ecclesiasticall courts'. However the two occupants of the farms had procured that these judgments 'be controuled by three severall prohibicions'.[541] Griffith alleged that this had been done with the financial support of one of the richest men in Shropshire, and

[539] The distribution was: 2 in 1635, 3 in 1636, 15 in 1637, 24 in 1638 and 3 in 1639. This was not the only example of the use of a small group of senior councillors to directly adjudicate matters in this period. Indeed the emergence of this approach to dealing with policy issues was a feature of it and Coventry was one of the most active figures in such proceedings. See TNA SP16/357/28 and TNA SP16/412/33 as examples relating to financial transactions with the government. The collection of ship money provided others. However these tended to relate to important matters involving government revenues or foreign affairs rather than relatively small matters that seemed to get this treatment because of the issues that they raised for the government's religious policies.

[540] J. G. Jones,'Griffith, George (1601-1666/7)', *ODNB*, (OUP, 2004), online edn. Jan. 2008.

[541] TNA SP16/369/90, f.92r.

member of the Council in the Marches of Wales, Sir Richard Newport. Accordingly Griffith sought reference of this matter to the Privy Council.[542] Whilst Newport, if he was involved, was a potentially formidable adversary the annual value attributed to the farms by Griffith himself, was £100. Although the amount of the tithe claims was therefore unlikely to exceed £20 the matter was immediately referred to Laud and Coventry. They were asked to summon all of the parties, examine all of their 'differences' and settle them. The more normal course in the past, where the council felt external arbitration of a matter required its intervention, was to appoint some local dignitaries, of sufficient status to be able to stand up to Newport, to investigate and report back to the council with a proposed solution to the dispute. If Newport tried to resist he would be summoned before the council, or even the Star Chamber court, where the settlement would be enforced. The council was only directly involved as a last resort and few people were prepared to push an issue that far. This was a fairly routine function of the council.[543] However to expect the head of the English church and the head of the secular legal system to address such a matter personally, and in full, was unusual. It spoke volumes about the priorities of both the King and the council at this time, and their attitude to the discretion of the judiciary.

The increase in the appetite of the council for dealing with such references was noted by the original editor of the twelve volumes of the calendars of state papers covering this period, the antiquary John Bruce and an example that he cited provided an earlier example of such activities.[544] In a petition to the King dated 3rd December 1635, James Bucke, the vicar of Stradbrooke in Suffolk, raised an issue relating to the proceeds of an impropriated lease of church property worth £40 per annum. The lease had been acquired by certain of his parishioners to augment his living, with the assistance of the Bishop of Ely, Francis White. Bucke had fallen out with certain of the trustees holding the benefit of

[542] S. Wright, 'Newport, Richard, first Baron Newport (1587-1651)', *ODNB*, (OUP, 2004), online edn. Oct. 2008.

[543] It was what many petitioners expected. See the initial petition of James Rawson in TNA SP16/389/14 for example.

[544] CSPD. In his preface to the volume for 1635, Bruce, observed that 'a peculiarity of this time which becomes very apparent in the present volume is the number of cases of what were presumed to be grievances affecting ecclesiastical persons which were brought before the Council, and were dealt with by them in a summary manner.'

this property over what he termed ‘his earnest endeavours to bring the parishioners to conformity’.[545] He alleged that the trustees had subsequently sold certain of the tithes and stated that they would rather apply monies derived from the leased property at their discretion than to assist him. For Laud and the council this raised similar objections to those which had led to the proceedings against the feoffees for impropriations in 1632. Those were that the behaviour of the trustees ‘tended to the drawing to themselves in time the...dependency of the...clergie’.[546] In addition Bishop White was a close associate of Richard Neile the Archbishop of York and a supporter of the religious policies of Laud and the King. It was likely that he disposed of the lease at half value as part of the attempts by Laud to augment the value of church livings. Just as in the Griffith case the matter was referred for adjudication to a group comprising Laud and Manchester, this time acting with the assistance of Secretary Windebank. They moved swiftly and the matter was heard by them on 16 December 1635. They found for the vicar and that the trustees had acted ‘unconscionably and dishonestly and in breach of the...trust’. The trustees were directed to hold the property for the benefit of the vicar and two of them were ordered to pay the profits of the lease for the past year to the vicar. All of this was done notwithstanding that none of the adjudicators was a practising lawyer with knowledge of trust law. It was perhaps with this in mind that the report to the King suggested that this decision should, if Bucke so required, ‘be decreed in some court of equity’.[547] This case, like the later one concerning Dr Griffith, had involved an important point of principle from the government’s perspective namely clerical independence from lay economic influence and it was dealt with at the highest political level without judicial involvement.

Further examples show the intensity of activity of this executive group and the consistency of its focus. In November 1635 a petition from the vicar of Somercotes St Mary in Lincolnshire was referred to Coventry and Laud by the King. It related to the construction of an embankment to drain a salt marsh which formed the principal part of the demesne land of a rectory, and its conversion into

[545] TNA SP16/303/32, f.88r.
[546] Rushworth, vol.2, p. 152.
[547] TNA SP16/304/31, f.61r.Also see TNA SP16/304/30a.

arable land.[548] This had been done by the lay impropriator of the rectory and as a result the marsh was no longer grazed by sheep so the tithes that it provided were reduced along with the vicar's income. This was apparently dealt by the council because it involved a lay impropriator profitting at the expense of the Church. April 1637 saw two separate hearings and rulings by Laud and Coventry on matters, respectively in Over Elden and Battersea, involving refusal to hand over tithes.[549] On 24 January 1638 Laud, Coventry and Juxon, joined by the Bishop of Norwich, Matthew Wren, handed down detailed instructions for the cessation and resolution of various proceedings in the courts of Chancery, Arches and Wards in relation to a dispute over tithing customs.[550] At the same meeting Laud, Coventry and Juxon settled another tithe dispute, relating to Bardwell in Suffolk, concerning the alleged diminution of tithes caused by the encroachment of a deer park.[551] Two days later Laud and Coventry ruled on the resolution of a dispute over title to a vicarage and then title to a rectory.[552] The 4 May 1638 saw another such flurry of activity for this group. An order was made for the settlement of a tithe dispute between the owner of Hertford mill and the parson of St Andrews, Hertford. Laud, Juxon, Manchester and Coventry required a further report on a dispute between the church and city of Exeter. Laud, Juxon and Coventry appointed a day for hearing a tithe dispute between the rector of Souldern, Oxfordshire and certain freeholders there. Laud, Coventry and Manchester gave their ruling on a matrimonial property dispute and Laud and Matthew Wren, now Bishop of Ely, gave their ruling as referees of a tithe dispute between the vicar of Wymondham and the lessees of the rectory.[553]

Tithes were the most common subject for prohibition of ecclesiastical courts, and the most common issue dealt with by this council group. Of forty eight matters dealt with by the group twenty one of them expressly related to tithes.[554] A further seven related to diminution in the value of income

[548] TNA SP16/302/139.
[549] PC2/47/13 f. 167.
[550] TNA SP16/379/64.
[551] TNA SP16/379/65
[552] PC2/48/14 f.272v-273r.
[553] TNA SP16/389/47, 54, 55, 57 and 58. N.W.S. Cranfield, 'Wren, Matthew (1585-1667)', *ODNB* (OUP, 2004), online edn. Oct. 2008.
[554] For these matters see: TNA SP16/302/139; PC2/47/13 f.167 (two disputes); PC2/48/14 f.280 (two disputes); PC2/48/14 f.201v; PC2/48/14 ff.267-269r, TNA SP16/379/64 and TNA SP16/379/65 (all relating to same two disputes); TNA SP16/387/7 and TNA SP16/389/55; PC2/49/15 f.84 and TNA SP16/389/47; TNA SP16/389/58;

available to the incumbent of a vicarage or rectory caused by a local landowner of which the reduction or cessation of tithes may have formed a part.[555] Five more references were requests for augmentation of clerical income for particular vicarages where falling tithe values may have been a factor.[556] Aside from these items the group dealt with four disputes over title to clerical incumbencies and three disputes between clergy and town corporations.[557] Of the remaining eight examples six were a miscellany of matters that would otherwise have fallen within the jurisdiction of the ecclesiastical courts comprising two matrimonial matters,[558]two intestacy matters,[559] one matter concerning church seating [560] and one case of a cleric forced to make recompense to his patron for harassing him by petitions to the King.[561] The latter was another indication that it had become so readily apparent to members of the clergy that recourse to the government was an effective means of countering lay interests that they sometimes overstepped the bounds of acceptable behaviour.

Two further aspects of the proceedings before this high level group were notable. Firstly it is apparent that the hearings were formal with both parties to the dispute under consideration usually being required to attend with legal counsel. Directions were given on evidential matters and rulings were made on any parallel proceedings before the courts, usually to the effect that these should be stayed or withdrawn. The second emerged from two other matters that were the subject of rulings by Laud and Coventry. On 24 January 1638 they considered a petition concerning the dilapidations of a house and timber in the estate of Sir John Tyrrell that was brought to the attention of the King by Tyrrell's nephew.[562] This was a family dispute about the care of an elderly and infirm relative and the accusation that Sir Henry Browne, who was looking after the elder Tyell, was not looking after his

PC2/48/14 f.16v; PC2/48/14 f.29; PC2/48/14 f.207r; PC2/49/15 f.83v; PC2/49/15 ff.126v to127r and TNA SP16/391/33; PC2/49/15 ff.114r and 217v; PC2/49/15 f.139v; PC2/49/15 f.162; PC2/49/15 f.242 (two disputes); PC2/49/15 f.287 and TNA SP16/412/147.

[555] For these matters see: TNA SP16/303/32; TNA SP16/304/31; TNA SP16/366/43; PC2/48/14 ff. 280-1; TNA SP16/382/1; PC2/49/15 ff.55; PC2/49/15 f.255r; TNA SP16/410/15.

[556] For these matters see: TNA SP16/355/187, 188; TNA SP16/362/43; PC2/48/14 f.280; PC2/49/15 f.258v; PC2/49/15 ff. 287.

[557] For the former see: PC2/48/14 f.272v-273r (two matters); TNA SP16/361/24; TNA SP16/364/51. For the latter see: TNA SP16/355/168, 169 and 170; PC2/48/14 f.201d and TNA SP16/389/54.

[558] TNA SP16/389/57 ; PC2/48/14 ff.246-8 and 309.

[559] TNA SP16/395/11; PC2/49/15 f.245v.

[560] PC2/48/14 f.207v.

[561] TNA SP16/395/ 69 and 84; TNA SP16/410/97.

[562] TNA SP16/379/58.

property to the detriment of the nephew. Such a matter could be of concern to the Church courts and the decline of this property might have had some effect on Church interests, by causing a fall in the value of tithes. However considerations of leasehold obligations and waste of landed property were clearly matters within the competency of the common law. The matter was duly referred to the chief justice of King's Bench, Sir John Bramston, and justice Croke for adjudication in accordance with the conventional approach of the council to the arbitration of disputes. The same occurred in relation to the petition by a cleric concerning a tenement in Birchen Lane in London on 4 May 1638. The matter had already been considered in earlier court proceedings and it was simply referred back to the court.[563] Whilst this reference of issues relating to land to judicial scrutiny might look like a return to normality it should be remembered that most of the remarkable number of contentious matters involving ecclesiastical interests that the elite group in the council decided in person were also properly within the ambit of common law jurisdiction.

It therefore appears that there was a significant trend for the Privy Council to intervene in the adjudication of disputes affecting church interests in this period.[564] Direct recourse to the King or the council was an effective way of avoiding the reach of the common law and its judges. A small, but potent, arbitral group was used as an executive committee to deal with the increased volume of matters referred to the council which involved issues of importance for the religious policies of the government. In effect the notion, favoured by civil lawyers and clerical opponents of prohibitions, that ecclesiastical jurisdiction was a parallel, separate but entirely equal system to the common law and its courts was being implemented by political intervention. It was done to strengthen the church *de facto*

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[563] TNA SP16/389/52.

[564] For examples of disputes involving ecclesiastical interests dealt with by the council rather than the courts, but not involving references to the senior group of councillors, in the period from 1635 to 1639 see: TNA SP16/303/6 and TNA SP16/304/26 (dispute between church wardens and local land owner over occupation of land adjoining church); TNA SP16/303/7 (dispute between churchwarden and parishioners over church repair); TNA SP16/310/2 (dispute over presentation to rectory); TNA SP16/310/4 (issue arising from adjudication of barratry accusation against a vicar); TNA SP16/316/64 (petition and counter petition between vicar of Weston and Sir Edward Powell); TNA SP16/355/182 (petition relating to appropriation of tithes held by tenant of Bishop of Chester); TNA SP16/379/97 (dispute between vicar and lay impropriator regarding right of presentation); TNA SP16/379/100 (dispute over title to a rectory); TNA SP16/391/68 and TNA SP16/421/46 (dispute over lease of lands within estate of a rectory); TNA SP16/391/73 (resolution of multiple disputes over repair of parish church by reference to local bishop); TNA SP16/421/42 (dispute over payment of part of a curate's stipend); TNA SP16/420/8 (tithe dispute and conduct of a jury relating to it); TNA SP16/420/19 (dispute over right of presentation to a vicarage); TNA SP16/420/87 (dispute over entitlement to tithes) and TNA SP16/421/47 (dispute over quiet possession of vicarage between competing appointees).

without any agreement that it was politically acceptable or legally correct and despite the need for senior councillors to focus on other pressing issues such as the collection of ship money. Such a policy was calculated to undermine all confidence in the common law judiciary, amongst the clergy, the civil lawyers, members of their own profession and, most importantly of all, the wider public. Faced with this it is difficult to know what the common law judges could have done to recover their central role as regulators of ecclesiastical jurisdiction. That role had been circumvented and the scope for judicial protest was reduced because it is not clear on what basis it could be made. The council's activities in this regard were arguably within the normal ambit of its arbitral activities, even if their scale and the level of senior ministerial involvement were exceptional. Unfortunately for them this would not protect the judges from the sort of generalised accusations levelled against them by Bagshaw and those who sought to prosecute Laud.

Chapter 4: Incentivisation and the Management of the Judges

Overview

In his examination of the early modern Bar, from 1590 to 1640, Wilfred Prest noted that 'those few common lawyers who managed to gain some influence on the Privy Council or at court...were more highly regarded as legal functionaries than as courtiers or statesmen'.[565] Whilst accurate as a description of the professional origins of those who held the highest political offices unconnected to the law this misses a different development in the relationship between central government and the law that started to emerge under James I but appeared in its most systematic form under his son in the period after 1629. That was the management of the law as a political end in itself in order to underpin government policy. Under the early Tudor monarchs individuals such as Empson and Dudley and Thomas Cromwell had risen to high political office partly because their legal skills and knowledge made them effective administrators and agents of government policy in the ways considered by E.W. Ives.[566] Under the early Stuart monarchs lawyers, such as Sir Thomas Egerton and Sir Thomas Coventry, were deployed to ensure that the law itself remained an effective instrument and source of government policy. This was a policy in itself and, under Charles I rather than his father, it made the office of Lord Keeper one of the most important offices of state in his government. An important aspect of this was the use, by both James I and Charles I, of a mixture of incentives and disincentives relating to the judges. The former involved the increasing importance of the royal law officers as a source of recruitment into the judiciary and the extension of the career path for judges into both the peerage and the highest levels of political office. The latter involved a more calculated use of the dismissal, suspension or admonishment of judges.

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[565] Prest, *Rise of the Barristers*, p.252. The one exception was Sir James Ley because of his tenure of the office of Lord Treasurer from December 1624 to July 1628: see W.Prest, 'Ley, James, the first earl of Marlborough (1550-1629)', *ODNB*, (OUP, 2004), online edn., May 2009. Ley did however fit the pattern discussed here.

[566] Ives, *The Common Lawyers*, chaps.1, 10 and 11.

The rise of King's counsel extraordinary:

Under Elizabeth I the offices of Attorney-General and Solicitor-General had become increasingly valuable and both John Popham and Henry Hobart had sought discharges from the degree of serjeant-at-law in order to take up those offices.[567] This indicated a trend that received further impetus under James I. Prior to the mid-sixteenth century appointment to the order of the coif, with its exclusive rights of audience before the court of Common Pleas, had been the height of achievement at the Bar, and thus within the legal profession as a whole, below a judicial appointment. It was also an essential pre-requisite for such an appointment. The early seventeenth century saw the steady erosion of the status of the order of serjeants in relation to that of the royal law officers. This occurred in relation to rights of audience and precedence and the route to judicial appointment. In 1604 Francis Bacon was the first King's counsel extraordinary formally appointed by patent, after having held this position on an informal basis since July 1594.[568] Although there was no mention of the ranking of this position at that time it steadily became apparent that the status of this position, and that of the royal law officers, was starting to exceed, that of the serjeants. In 1604 John Dodderidge sought formal discharge from the degree of serjeant in order to become Solicitor-General and in November 1605 Henry Hobart was similarly discharged before his appointment as attorney of the court of wards and liveries. Each of Popham, Dodderidge and Hobart all resumed their status as serjeants automatically on their subsequent judicial appointments.[569] In 1608 James Ley did not apparently bother to seek any discharge from his position as serjeant on his appointment as attorney of the court of wards, despite the incompatibility of this with pleading in the court of Common Pleas. He assumed his position as serjeant with equal alacrity when appointed chief justice of King's Bench in 1621.[570] In addition to this the sale of appointments to the degree of serjeant under James I became notorious, with Sir Edward Coke raising the issue in parliament in 1623. It did not have much effect and both Sir George Croke and William Noy were amongst the most well known lawyers who had their careers

[567] J.H. Baker, *The Order of Serjeants at Law* (Selden Society, Supplementary Series, vol.5, 1984), p.65.
[568] Ibid., p.112 and M. Peltonen, 'Bacon, Francis, Viscount St Alban (1561-1626)', *ODNB*, (OUP, 2004), online edn., Oct. 2007.
[569] D.Ibbotson, 'Dodderidge, Sir John (1555-1628)', *ODNB*, (OUP, 2004), online edn., May 2005; S. Handley, 'Hobart, Sir Henry, first baronet (*c.*1554-1625)', *ODNB* (OUP, 2004), online edn. Jan. 2008 and Baker, *Serjeants*, pp.65-6.
[570] Ibid., p.65.

temporarily affected by their refusal to pay for admission as serjeants. Croke was eventually admitted at no cost but Noy never took the coif.[571] This process of sale also led to increasing numbers of appointments further debasing the value of the order.

All of these factors contributed to the degree of serjeant being treated increasingly, by the most ambitious lawyers at the top of the profession, as a convenient stepping stone rather than the ultimate recognition of their status that it had once been. That impression was reinforced by the rate at which *per saltum* judicial appointments increased in the first half of the seventeenth century. The phrase, which literally meant 'by a leap', referred to the practice of making a candidate for judicial appointment a serjeant immediately before the sealing of the patent for such appointment to enable them to qualify for it. It therefore showed that the appointee was not already a serjeant. Whilst there were seven examples of this in the sixteenth century in the subsequent fifty years that number rose to twenty one and occurred in almost a third of judicial appointments in that period.[572] This indicated the extent to which the number of judicial appointments under the early Stuarts came from counsel to the King and other members of the royal family, the two main law officers or, temporarily, the nominees of a royal favourite. Although this acceleration began under James I it was particularly noticeable amongst the Caroline judiciary. Each of Sir Henry Yelverton, [573] Sir Thomas Trevor ,[574] Sir John Walter ,[575]Sir Nicholas Hyde,[576] Sir George Vernon,[577] Sir Robert Heath,[578] Sir John Finch,[579] Sir Edward Littleton[580]and Sir John Bankes,[581]was made a serjeant within a few days, or at most a few months, before being appointed to judicial office. In addition seven of them were either government law officers or royal counsel. Two were, in effect, the arguably unqualified nominees of the Duke of

[571] Baker, *Serjeants*, pp.110-11.
[572] Ibid., pp.113-14.
[573] Baker, *Serjeants* , pp.358-9. S.R. Gardiner, 'Yelverton, Sir Henry (1566-1630)', rev. Louis Knafla, *ODNB*, (OUP, 2004), online edn. Jan. 2008.
[574] 'Trevor, Sir Thomas ', *ODNB*.
[575] Baker, *Serjeants* , pp.358-60. W.R. Prest, 'Walter, Sir John (*bap.*1565-1630)', *ODNB*, (OUP, 2004), online edn. Sept.2013.
[576] Baker, *Serjeants*, pp.360-2. 'Hyde, Sir Nicholas', *ODNB*.
[577] Baker, *Serjeants* , p.364. 'Vernon, Sir George', *ODNB*.
[578] Baker, *Serjeants* , pp.365-8. 'Heath, Sir Robert', *ODNB*.
[579] Baker, *Serjeants* , pp.371-3. 'Finch, John, Baron Finch of Fordwich', *ODNB*.
[580] Baker, *Serjeants* , pp. 187, 386-7. 'Littleton, Edward, Baron Littleton', *ODNB*.
[581] Baker, *Serjeants* , p.188.'Bankes, Sir John', *ODNB*.

Buckingham.[582] This was out of a total of eighteen judicial appointments made in the period from the accession of Charles I in 1625 until 1641. These features combined to by-pass the traditional professional progression for judicial appointees through a period served as a serjeant and had almost become the usual procedure for such promotion, in contrast with the situation in the second half of the sixteenth century.

The cumulative effect of the use of the *per saltum* procedure, other irregularities in certain of the judicial appointments and the increased numbers of serjeants being appointed did not pass unnoticed within the ranks of the judges. Ironically it was Sir Thomas Richardson, who made the most direct public reference to misgivings on the bench over the effect of these developments when presiding, as chief justice of Common Pleas, at the call of Sir Nicholas Hyde to the status of serjeant. Referring to the degree of serjeant and the number of lawyers recently called to it he exhorted Hyde to 'labour... to redeeme this calling from that disreputation which of latter time it hath fallen into by the multitude' and 'to labour and strive with all possible meanes... to perfourme so great an office in such sourt as...may bringe yow to be esteemed worthy of it'.[583] What Hyde made of being thus addressed by a man whose appointment as chief justice was suspected of having been acquired by the payment of £17, 000 and his marriage to Buckingham's cousin is not recorded.[584] Whether or not this reflected real concern on Richardson's part, it is likely that these comments at least reflected sentiments that he felt would be supported by his fellow judges. These misgivings and others were also present in the comments of justice Hutton on Richardson's own appointment speech in 1626, on the appointment of Sir George Vernon as an Exchequer baron in 1627 and on the deliberations of the judges on the

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[582] The *per saltum* appointments of Sir James Weston, in 1631, and his replacement Sir Richard Weston in 1634, as barons of the Exchequer, have not been categorised in this way because since the end of Elizabeth I's reign barons of the Exchequer were required to be former serjeants in order to qualify as assize judges: see Baker, *Serjeants* , p.113. Appointment in this way was for that technical reason alone rather than as a sign of political preferment.

[583] Baker, *Serjeants* , p.362.

[584] 'Richardson, Sir Thomas', *ODNB*. Richardson is not included in the list of *per saltum* judicial appointments above because he was made a serjeant in the last month of the reign of James I and then nearly two years elapsed before his elevation to the bench. It is not clear that there was any connection.

amount of time that should elapse between being made a serjeant and elevation to the bench in a *per saltum* judicial appointment.[585]

There was a move away from a more reactive government policy regarding judicial appointments and towards a more proactive one. This is not to say that Elizabeth I and her ministers, or any earlier Tudor government, were not concerned about the identity and conduct of judges. However provided that judicial candidates were reasonably competent and not known opponents of government policies, both religious or otherwise, and appointments took account of royal favour or concern from time to time without demur, the legal profession's selection methods were allowed some autonomy. Such procedures did not require constant political management not least because the preoccupations of the law, particularly in relation to private landed property and contractual relationships, were not perceived as intrinsically political. In this sense the legal profession and the judges were like the Church and the ecclesiastical hierarchy without the dangerously disruptive issues of religious controversy.

In contrast James I and his son started to exhibit signs that they regarded the law as a threat and a tool. Their approach involved developing a pool of candidates suitable for elevation to the Bench in parallel with such candidates as emerged from the internal practices of the profession and the courts. In the period from 1603 to 1640 it became increasingly obvious that the route to rapid promotion to the Bench was by the direct personal provision of legal services to the King, his consort and children or the government. The law officers, and counsel to the royal family, were familiar with the political preoccupations of the monarch and aware of the potential benefits of reflecting them in order to advance their own careers. If the outlines of this development remained hazy under James I and the influence of Buckingham, it became more sharply defined after the latter's death in 1628. But even under Buckingham, although it operated in a rather haphazard way because it was based on a combination of personal loyalty with venality and the performance of personal favours, the resulting legal appointments were consistent with the early Stuart attitude towards the law. The proximate

[585] Baker, *Serjeants*, pp.360-4. In the margin next to his report of Richardson's protestation that he had asked the King to be spared the appointment that he was suspected of purchasing Hutton wrote '*vix credenda canis*': see *Diary of Sir Richard Hutton*, pp.68, 70-1.

cause of elevation to the Bench under Buckingham, such as the alleged payment of money by Vernon or Richardson's marriage to a relative or Hyde's provision of crucial personal legal services, often varied. But Buckingham would not entertain a request for advancement from any lawyer who was suspected to be inveterately hostile to what either James or Charles perceived to be the legitimate claims of the royal prerogative. This was made clear, for example, in the ups and downs of Yelverton's career as Attorney-General, which was both advanced in 1617 and then terminated in 1620 as Buckingham's attitudes to Yelverton's soundness waxed and waned.[586]

The judges and more glittering prizes:

Alongside changes to the source of appointees to judicial office there were major improvements in the career prospects of the judges themselves. This took two forms. The first was the tendency that began under James I for holders of high legal office to be given peerages. It showed that appointment to the upper echelons of legal office was a route into the highest levels of social status. The second, and closely related, trend was the promotion of judges to high political office as the corollary of their career on the Bench. As with most of these developments the latter became more pronounced under Charles I. Returning to the ecclesiastical analogy, it seems valid to regard the status of the judiciary within the legal profession in the sixteenth century as akin to that of the episcopacy within the ecclesiastical hierarchy. The most prestigious position to which a cleric could aspire was appointment to one of the major episcopal sees or, ultimately, an archbishopric. Within the law it was appointment as a judge in one of the three Westminster courts or ultimately one of the two posts as chief justice or that of chief baron of the Exchequer. Appointment to the post of Lord Chancellor or Lord Keeper was essentially political and although many appointees were able lawyers they were not chosen from the ranks of the common law judiciary.[587] The central court judges were thus a self contained group at the top of the legal profession from which there was no further advancement.

[586] See 'Yelverton, Sir Henry', *ODNB*.
[587] Of the fifteen Lord Keepers or Lord Chancellors appointed in the sixteenth century six were clerics. Whilst all of the remaining nine had some connection with the law none had ever held the post of Exchequer baron or

The elevation of James's first Lord Chancellor, Sir Thomas Egerton, to the peerage, as Viscount Brackley, on 17 November 1616, shortly before his death, pointed the way forward for holders of the highest legal office. It was rumoured that the acceptance by James of Egerton's request to retire from the post of Lord Chancellor was accompanied by the promise of an earldom.[588] This continued. Sir Francis Bacon did not have to wait so long. Four days after Egerton's resignation on 3 March 1617 Bacon was appointed Lord Keeper. On 7 January 1618 he was made Lord Chancellor and on 12 July 1618 was created Baron Verulam of Verulam.[589] The process of rewarding a legal career that provided support for royal rights had accelerated. Another Buckingham *protégée*, Sir Thomas Coventry, was created Baron Coventry of Aylesborough on 10 April 1628, just over two years after his appointment as Lord Keeper.[590] However none of Egerton, Bacon or Coventry had ever held a senior post in any of the common law courts, and so their careers had similarities with their sixteenth century predecessors. The same could not be said of Sir Henry Montagu, Sir James Ley, Sir John Finch or Sir Edward Littleton.

The careers of Montagu and Ley marked the point at which the highest judicial appointments began to be stepping stones to both the peerage and the highest political offices, even if neither Montagu nor Ley seems to have been able to exploit this fully. Montagu had pursued a conventional and successful professional career at the Bar, becoming recorder of London in May 1603, receiving a knighthood two months later and by 1614 having become king's serjeant.[591] As such he was a conventional candidate for promotion to the bench. This duly occurred when Coke was dismissed from the position of chief justice of the King's Bench in November 1616 and Montagu was appointed in his place. Although it was suggested that Montagu paid £10,000 for the post there seems little to indicate that he was not qualified for it even if his career to date appeared stolidly professional alongside that of the mercurial

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judge in the Common Pleas or King's Bench. The only ones who held any judicial posts were Sir Thomas Bromley, who was recorder of London, and Sir Gilbert Gerard who was Commissioner to hear causes whilst the post of Lord Keeper was in commission in 1592. He was also Master of the Rolls. See N.G. Jones, 'Bromley, Sir Thomas (*c.*1530-1587)', *ODNB*, (OUP, 2004), online edn. Jan. 2008 and C.W. Brooks, 'Gilbert, Sir Gerard (*d.*1593)', *ODNB*, (OUP, 2004), online edn. Jan. 2008. Richard Rich, first Baron Rich, and Bromley held the post of Solicitor-General before becoming Lord Keeper and Gerard was Attorney-General.

[588] 'Egerton, Thomas, first Viscount Brackley', *ODNB*.

[589] 'Bacon, Francis, Lord Verulam,' *ODNB*.

[590] 'Coventry, Thomas, first Baron Coventry', *ODNB*.

[591] 'Montagu, Henry, first earl of Manchester', *ODNB*. Baker, *Serjeants*, p.179.

Coke. That this was exactly what the government wanted was made clear in Egerton's speech at Montagu's installation as chief justice which attacked Coke as an obvious warning to Montagu as to how to conduct himself as a judge.[592] The very lack of political colour in his professional career, as well as his professional relationship with Attorney-General Bacon, recommended him as the right replacement for Coke as much as any payment. The good relationship between his brother, James, bishop of Winchester and dean of the chapels royal, and the King also helped.

If that was the intention then it worked since Montagu's preoccupations as a judge focussed on implementation of aspects of Jacobean social policy rather than the sensitive points of friction between the law and prerogative power that had unseated Coke. What happened next was unusual for a judge, but formed part of a variety of promotions and demotions by the Jacobean government that showed little regard for the conventional approach to a variety of high offices.[593] In December 1621 Montagu resigned as chief justice and was appointed Lord Treasurer for the sum of £20,000, a transaction that was sufficiently well known to form an article of Buckingham's impeachment in 1626. It did not prove to be a sound investment and Montagu was replaced as Lord Treasurer by Lionel Cranfield, who was then Baron Cranfield, in September 1621. Montagu was compensated for this by appointment as Lord President of the Privy Council, an office that had not existed since 1553 and had little financial value. Financial recompense came with the marriage of Montagu's son Edward to Buckingham's niece Susannah Hill, a £10,000 surety, and on 7 February 1626, Montagu was created earl of Manchester. On 16 July 1628 he exchanged the office of president of the council for that of Lord Privy Seal and continued serving prominently on the Caroline Privy Council in that capacity until his death in 1642.[594] A prominent barrister had become a judge, and then moved on to sample a range of high offices of state, and become a peer of the realm and a privy councillor at the centre of government.

[592] *Diary of Sir Richard Hutton*, p.14.
[593] The summer of 1621 saw the appointment of John Williams, dean of Westminster and soon to become bishop of Lincoln, as the first ecclesiastical Lord Keeper since 1558: see B.Quintrell, 'Williams, John (1582-1650)', *ODNB*, (OUP, 2004), online edn.Jan. 2008.
[594] 'Montagu, Henry, first earl of Manchester', *ODNB*.

Montagu's successor as chief justice of King's Bench was Sir James Ley, a former judge on the Welsh circuit of Carmarthan and subsequently chief justice of the court of King's Bench in Ireland. Ley had a long and conventional legal career, having been called to the degree of serjeant in November 1603.[595] After returning to England in October 1608 he was appointed to the post of attorney-general of wards. All of this, together with his considerable age and experience, made him another conventional candidate for appointment as a judge. He eventually obtained the post of counsel to Charles, then Prince of Wales, in 1619. His break-through finally came in January 1621 when he was made chief justice, at the age of seventy one. Six months later he married Buckingham's seventeen year old niece, Jane Boteler. Thereafter his career followed a course that was remarkably similar to that of Montagu. With Cranfield's exclusion from public office and fine in 1624, Ley was mooted as his successor as Lord Treasurer. Ley was appointed to that office and made a privy councillor in December of that year. In February 1626, at the same time as Montagu, he was created earl of Marlborough and in July 1628 he resigned from the office of Lord Treasurer, in favour of Sir Richard Weston, in return for some financial inducements. As part of that transaction he took up the post of President of the Privy Council that was vacated by Montagu. He resigned that post shortly before his death in March 1629.[596]

The careers of Montagu and Ley may be regarded simply as examples of the ups and downs of court patronage under James I, and the pervasive influence of Buckingham and his desire to improve the fortunes of an apparently endless supply of indigent relatives. But this overlooks the significant effects of all of this on the conduct of judicial appointments. Those might previously have been regarded as matters of a technical nature but now they were thrust firmly into the centre of the political arena. This was partly a result of the comparatively public nature of the various rows with Coke and the political reverberations of his dismissal. It was necessary for James I both to calm things down, as he had recognised in his subsequent speech in Star Chamber, and yet control certain aspects of the legal arguments made by Coke that seemed to threaten what the King perceived to be the extent of his powers and rights. The appointment of much more intellectually cautious lawyers such as

[595] Baker, *Serjeants*, pp.176, 321-2.
[596] 'Ley, James, first earl of Marlborough ', *ODNB*.

Montagu and Ley, instead of Coke, together with those who had legal viewpoints closer to those of the King, such as Egerton and Bacon, seemed to achieve this by returning to a more traditional policy towards judicial selection. However by actively undermining the traditional professional pathway into the judiciary and encouraging senior judges to exchange their positions for high offices of state unrelated to the law, and then reward this with elevation to the peerage, the Jacobean regime was dissolving conventional expectations and limitations surrounding judicial offices.

Whilst this was mainly controlled by the political ambitions of Buckingham the most obvious risk was that it brought judicial appointments into disrepute. But because it derived from a pragmatic and changeable political agenda, and Buckingham's personal ambitions, its real effects were random. Some of the judges appointed were seen as venal, some incompetent, some sycophantic, some surprisingly effective and several as a mixture of these traits. Although it is tempting to focus on the more egregious examples of Buckingham's judicial patronage, such as the venality and marriage alliance that initiated the wavering and pliable judicial career of Sir Thomas Richardson, or the more straightforward purchase of a post that did not previously exist by Sir George Vernon, closer examination of the years of Buckingham's influence, from 1616 to 1628, reveals a much more subtle and varied picture. Shortly after Montagu succeeded Coke at the end of 1616, Sir Richard Hutton was, in 1617 at York, made a justice of Common Pleas. Hutton was conventionally well qualified for this position and there was no suggestion of payment or any other arrangement with the King or Buckingham. 1621 saw the appointment of Sir William Jones as a justice of the Common Pleas after a period of four years service as the chief justice of King's Bench in Ireland where he impressed the government.[597] Several new appointments were then made in October 1624. Justice Jones was transferred to the King's Bench. Sir James Whitelocke was removed from his post as chief justice of Chester and appointed as a justice of King's Bench. Sir Francis Harvey was appointed as a justice of Common Pleas.[598] 1625 saw a further flurry of appointments occasioned by the resignation of Ley and the deaths of Sir Robert Houghton, Sir Humphrey Winch and subsequently Sir Lawrence Tanfield. In

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[597] 'Jones, Sir William', *ODNB*.
[598] D.X. Powell, 'Whitelocke, Sir James (1570-1632)', *ODNB*, (OUP, 2004), online edn. Oct. 2008 and W. Prest, 'Harvey, Sir Francis (*c.*1568-1632)', *ODNB*, (OUP, 2004), online edn. Sept. 2013.

January Sir Randolph Crewe was appointed to replace Ley as chief justice of King's Bench and Sir George Croke was appointed justice of Common Pleas.[599] In May came the appointments of Trevor to the Exchequer, Yelverton to the Common Pleas and Sir John Walter as chief baron of the Exchequer, in the place of Tanfield.[600] On the death of Sir Henry Hobart in December 1625 the office of chief justice of Common Pleas became vacant and eventually went to Sir Thomas Richardson in November of 1626.[601] The dismissal of Crewe in November 1626 vacated the office of chief justice of King's Bench which went to Sir Nicholas Hyde in April 1627.[602] The procession of judicial appointment then calmed down with no further change prior to Buckingham's death on 23 August 1628.

A cursory examination of this list suggests that apart from the lesser amounts of money that were received for promotion to the position of serjeant, Buckingham mainly focussed on extracting maximum value from the appointments to the positions of chief justice in King's Bench and Common Pleas. The one exception to this appears to have been the appointment of Walter as chief baron, where there seems to have been no suggestion that Buckingham played a role. That omission may have been the result of fortuitous timing for Walter. Although he had been Attorney-General to the Prince of Wales for twelve years he had always lost out to others under James I. However, when Tanfield died in April 1625, Charles had just become King and apparently moved quickly to promote his main personal legal adviser.[603] It is likely that Buckingham decided not to interfere. Another feature that emerged from these appointments was that they were remarkably eclectic. Nobody seems to have regarded Whitelocke and Yelverton as particularly servile or incompetent in their conduct under Charles I. Still less would such accusations stand against Crewe, Walter, Croke or Hutton the first two being famously dismissed and the second two delivering the most critical dissenting judgements in the Ship Money case in 1637. Jones and Hyde had a more complex track record but neither was consistently pliable or predictable. Of the remaining appointees Trevor and Vernon were severely criticised and Richardson's conduct showed distinct signs of political influence. However a record of

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[599] *Diary of Sir Richard Hutton*, p. 55.
[600] Ibid., pp.57-8.
[601] Ibid., pp.60-1
[602] Ibid., pp.66,70.
[603] 'Walter, Sir John', *ODNB*.

three out of ten hardly points to these appointments being systematically exploited to ensure consistent judicial support for the political policies of the Caroline government in the 1620s. At most Buckingham's role helped to filter out any obvious dissenting voices. It did not amount to a consistent policy.

The real significance of the changes to judicial appointments in the period from 1603 until Buckingham's death in 1628 was their solvent effect on the limited extent to which the process of motivating judges maintained any independence from the political concerns of the government. When the favourite was gone this process showed how the King, who was always the source of Buckingham's power, might exploit the same patronage more coherently to use the law to support his government's political agenda. The distinctions between law and politics, and between the political and judicial functions of the judges, which were vague at best, were further dissolved. The limited conventions that made the common law judges a repository of esoteric rules surrounding private property, that were perceived by some as a source of political protection, and the legal structure of the Elizabethan religious settlement, had been weakened. That had important political implications.

Judicial appointments in the period of personal rule

Under Charles I, after the dissolution of parliament in March 1629, a more coherent sense of the importance of the law as a source of political justification developed from the struggles that led up to that dissolution , and with it a more systematic approach to the use and function of the judiciary. Part of that was the policy of the Caroline government toward judicial appointments. It was marked by three trends. The first was an emphasis on bringing the best senior lawyers into government service, either as law officers or judges, irrespective of past political connections, and without the sale of such offices or other extraneous conditions. The second was use of the clear incentive of promotion and demotion for loyal and effective support for the government's policies. The third was the continued extension of the career progression of judges to higher political office and the grant of peerages in a way that exclusively focussed on the administration of the law. Some royal counsel and law officers

became judges and some of those judges would become Lord Keeper, with a peerage, but not the holder of any office unrelated to the law.

The career of Sir Robert Heath was an example of a competent product of Buckingham's patronage and the more precise political management of the judges after 1629. He was a Buckingham *protégée* but had proven to be an effective Attorney- General since his appointment in October 1625, even if his methods had sometimes been controversial.[604] In October 1631 he was made chief justice of Common Pleas in the place of Sir Thomas Richardson when the latter was appointed chief justice of King's Bench on the death of Sir Nicholas Hyde. But in October 1634 Heath was dismissed, primarily because of his habit of publicly voicing legal concerns in relation to very politically sensitive cases in the court of Star Chamber. The terms of his dismissal were both unusually lenient and specific. He was able to return fully to legal practice provided that he did not act against royal interests or practice at all in the Star Chamber.[605] As a sign of his steady return to favour, on 12 October 1637, he was appointed a king's serjeant and assisted the government on a number of commissions.[606] Finally on 23 January 1641 he was appointed a justice of King's Bench and was subsequently appointed chief justice of that court on 18 October 1642. Heath's initial rise pointed to the importance of direct service to the King as a rapid route to the highest level of the judiciary, just as the terms of his dismissal and subsequent reinstatement provided a characteristic example of carefully calibrated political management. That Charles was prepared to dismiss judges with more alacrity than his father had already been demonstrated by the removal of Crewe in November 1626 and the steady disenchantment of the King with Sir John Walter over the Forced Loan, the Five Knights Case and the bailing of Sir John Eliot and his associates in 1629, that led to the permanent suspension of Walter from the position of chief baron in October 1629.[607] However whilst the removal of each of Crewe

[604] 'Heath, Sir Robert', *ODNB*.
[605] *Diary of Sir Richard Hutton*, pp. 89-90, 98-9; T.G. Barnes, 'Cropping the Heath: the fall of a Chief Justice, 1634', *Historical* Research, 64 (1991), pp.331-43; TNA SP16/274/69. Barnes view of what triggered Heath's removal and its unusual terms is persuasive but he overlooked the extent to which Heath's questioning of charges in Star Chamber proceedings had become a habit. See Heath's comments in the Conisby, Sherfield and Mynne cases: BL MS Harley 4022, ff. 11-18, 54-60; *The proceedings in the Star Chamber against Henry Sherfield Esq;...* (London, 1717), pp.45-8.
[606] 'Heath, Sir Robert', *ODNB*; TNA SP16/323/43e; TNA SP16/453/78.
[607] On Walter see 'Walter, Sir John', *ODNB*; Brooks, *Law, Politics and Society*, pp.182-3; C.Russell, 'Eliot, Sir John (1592-1632)', *ODNB*, (OUP, 2004), online edn. Jan. 2008. Both Brooks and Russell regarded the

and Walter bore the hallmarks of royal anger and frustration, the removal of Heath, with its precisely defined terms allowing him a route back to judicial office, indicated the use of a precise combination of threat and reward to ensure the smooth operation of the Star Chamber court as a political instrument.

The deal whereby Sir John Shelton was persuaded to give up his patent as Solicitor-General when Heath was first dismissed, in order to make way for Sir Edward Littleton, and the recommendation of Robert Mason to the city of London as Littleton's replacement as recorder of London, all pointed to the same calculated political management of legal offices in order to strengthen legal support for royal policies. The early 1630s saw a steady process of recruitment of the most prominent and able members of the legal profession into government service and the judiciary, and the former provided a ready source of candidates for the latter. This was apparently done without treating the representation of opponents of government policy, or principles that undermined such policy, as disqualification from government appointments. Indeed it almost seemed as if the opposite was true. Competence and ingenuity were the paramount qualities that were sought as the government grasped the fact that lawyers services in an adversarial legal system were for hire and the best lawyers saw it as their duty to do the best job that they could for whichever side they represented. What was remarkable was the extent to which obviously political opposition to government policies prior to 1630 was overlooked in the interest of recruiting such talent.

Each of the Attorneys-General, William Noy and Sir John Bankes, Solicitor-General Littleton and Robert Mason had a significant degree of involvement in political and professional activity that supported political initiatives that opposed to the policies of the Caroline government in the late 1620s. Prior to 1625 Noy had good connections with the Crown and the church. He had been nominated for various projects by Sir Francis Bacon, provided legal counsel to Prince Charles, who nominated him as M.P. for Fowey, and maintained a close relationship with the Earl of Bridgewater

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proximate cause of Walter's suspension as being his resistance to the King's desire to obtain judgement against Eliot and his associates, but as Brooks pointed out Walter had a history of such resistance that went back to the Five Knights case. In fact it went back even further to the Forced Loan when Walter had borne the brunt of the pressure exerted by Charles on the judges in the immediate aftermath of the dismissal of Crewe.

who was a defender of Buckingham. As already discussed Noy developed a considerable degree of expertise in defending the interests of the Church. However this appeared to change after 1625. In parliament Noy advised on the charges to be brought against Buckingham and opposed the Forced Loan. In 1628 he advocated the passage of legislation intended to facilitate access to writs of *habeas corpus* and supported the Petition of Right. In 1629 he opposed royal claims to tonnage and poundage. As a lawyer he represented Sir Walter Earle, one of the Five Knights, and Richard Chambers when he was prosecuted for not paying tonnage and poundage. In November 1630 he defended Samuel Vassell in relation to his refusal to pay the imposition on currents and the attempts to jail him for contempt of court.[608] Littleton's record in the late 1620s was arguably even more disturbing for the government. Like Noy he had a fairly conservative background before the parliaments of Charles I, being a northern circuit court judge, a member of the council in the marches and by 1625 the son-in-law of the judge, Sir William Jones. However in 1626 he was prominent in the parliamentary attack on Buckingham and drafted the remonstrance that constituted the parliamentary response to the arrest of Digges and Eliot. In 1628 his profile as a government opponent was even higher. He condemned the Forced Loan and pushed forward the Petition of Right in response to the treatment of the Five Knights. He presented the House of Commons case against arbitrary arrest to the House of Lords. In 1629 it was he that moved for the Commons to summon those responsible for the arrest of John Rolle and he had pointedly stated that no canon made by convocation had any authority without the consent of parliament. Subsequently he acted for John Selden, after Selden's arrest, in March 1629, for his part in the tumultuous events that ended Charles' fourth parliament. Even more seriously, in December 1629 both Littleton and Mason were cited, in a bill presented in the Exchequer court by Attorney-General Heath, for assisting Sir Walter Long to conceal assets, by means of fraudulent conveyances, in order to avoid payment of a fine levied in the Star Chamber court against Long for acting as a member of parliament whilst he was sheriff of Wiltshire.[609] In 1631 Littleton had

[608] 'Noy, William', *ODNB*. Birch, *Court and Times of Charles the First*, vol.2, p. 82.
[609] Birch, *Court and Times of Charles the First*, vol.2, p.83. H. Lancaster, 'Long, Sir Walter, first baronet (*c.*1591-1672)', *ODNB*, (OUP, 2004), online edn. Sept. 2010.

brought the case on behalf of Edward Stephens that threatened to derail the government's attempt to levy knighthood fines.[610]

The parliamentary activities of Bankes in the late 1620s were similar. In 1626 he contributed to the same debates as Noy and Littleton and in much the same vein. In 1628 he chaired the committees in the Commons that dealt with tonnage and poundage and the grievances of parliament thus placing him at the centre of some of the most serious parliamentary attacks on the government. He was a prominent critic of the King's attempt to arrest individuals without showing cause, as well as the government's use of martial law and billeting.[611] This pattern also applied to the less high profile career of Robert Mason. He supported the proceedings against Buckingham in 1626 to the extent that he assisted in the delivery of the charges against the Duke to the House of Lords and introduced the Commons motion demanding the Duke's committal. In 1628 he assisted in the drafting of the Petition of Right and attacked the use of martial law. Most provocatively of all he acted as counsel defending Eliot in 1629.[612] Despite the fact that all of this would have been fresh in everyone's memory none of it seems to have affected the speed with which each of these lawyers was enticed into government service at the beginning of the 1630s. In 1631 Noy was made Attorney-General after Heath's elevation to the bench in late October of that year.[613] On 7 December 1631, nine months after *R v. Stephens*, Littleton was made the recorder of the City of London on the recommendation of the King, having been appointed counsel to the University of Oxford earlier in the year. Despite this Littleton represented the local landed interests and towns opposed to the reassertion of the boundaries of the forest of Dean in April 1634. Yet on Heath's removal from the bench he was made Solicitor-General.[614] At that time Bankes was made Attorney-General.[615] Like Littleton and Noy he had also received early signs of royal favour despite his recent parliamentary record. In June 1631 he had

[610] 'Littleton, Edward, Baron Littleton', *ODNB*.
[611] 'Bankes, Sir John',*ODNB*.
[612] M.Jansson, 'Mason, Robert (1579-1635)', *ODNB*, (OUP, 2004), online edn. May 2014.
[613] 'Noy, William', *ODNB*.
[614] 'Littleton, Edward, Baron Littleton', *ODNB*.
[615] It was intimated that Bankes secured this post rather than Finch because he was supported by Lord Treasurer Weston: see B.Quintrell, 'Weston, Richard, first earl of Portland (*bap.*1577, *d.*1635)', *ODNB*, (OUP, 2004), online edn. Jan. 2008. If so this would not be the only example of his influence over legal appointments. Bankes also seems to have assisted Noy in relation to revenue raising by reassertion of royal rights in the forests, which may provide a clue as to why the Lord Treasurer might favour him: see 'Bankes, Sir John', *ODNB*.

received a knighthood and the next month he was made attorney-general to the infant Prince of Wales.[616] In 1634, on the King's recommendation, Mason was appointed recorder of the City of London in the place of Littleton.[617]

Some commentators have sought to explain this by claiming that the extent of the political opposition exhibited by them both in parliament and their legal practices was more illusory than real.[618] They have pointed out that most of the individuals concerned always had professional connections that linked them with more conservative elements both personally and professionally and that lawyers were, by the nature of their profession, skilled at representing both sides of a case. Whilst true this does not explain the surprising alacrity with which the active participation of these lawyers in some of the most powerful attacks made on the King and his government in the 1620s was ignored. In other contexts Charles was not notably forgiving or relaxed in his attitude towards those he regarded as opponents of his policies, yet he seems to have been willing to make an exception in the case of able lawyers.[619] This was surprising for several reasons. The King was not a known admirer of common lawyers. Additionally, whilst the relatively conservative connections and activities in the careers of Noy and Littleton, for example, were undoubtedly there before 1625, their subsequent conduct in parliament was specifically directed against Charles and his government, in very recent memory, and as much political, in intent and effect, as legal. That the King was intensely annoyed by his parliamentary critics in the 1620s was indicated by his fierce response, including pressure on the judges and the suspension of Walter, to the behaviour of Eliot and his parliamentary associates. When other steps taken by the government to manage aspects of the law and its administration, discussed elsewhere in this thesis, are taken into account it is contended that the most likely explanation of this surprising development is that the King and certain of his advisers had decided that the law was an important and useful tool for the support of government policy that needed precise management. Although he probably agreed with Wentworth's general advice that he should 'have no lawyer of your

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[616] 'Bankes, Sir John', *ODNB*.
[617] 'Mason, Robert', *ODNB*.
[618] See 'Noy, William', *ODNB* entry by J.S. Hart Jr.which follows the discussion of this point in Jones, 'Great Gamaliel', pp.197-226.
[619] Examples of his attitude towards those who offended or opposed him included his refusal to reinstate chief justice Crewe, his refusal to release Eliot and his attitude to a range of religious opponents such as Prynne.

privy council, for they did but distract state affairs' the King had come to understand that the political significance of the law was much too important to let its administration be left to the sort of reactive patronage practised by his father.[620] To do this he had sufficient legal expertise in the Privy Council in the form of Coventry, and to a lesser extent, Manchester.

The law officers, and royal counsel, provided a reliable source of appointees for the highest and most politicised judicial posts. If Noy had lived he would probably have been elevated to one of the chief justices' positions, such as that of the Common Pleas that Heath relinquished. Instead Finch was appointed after his performances before the Dean and Waltham eyres. That was not a return to the type of judicial appointment favoured by James I. Although Finch had risen via the route of king's counsel, and was made a serjeant *per saltum*, he still had thirty two years experience in the law and was a leading practitioner both in the Star Chamber and Chancery courts. Whilst Bankes got the post of Attorney-General, Littleton had to wait until early 1640 for appointment as chief justice of Common Pleas in the place of Finch. Consonant with what had become early Stuart practice, Finch attained even higher office when he was appointed Lord Keeper three days after the death of Coventry on 14 January 1640. He had become a privy councillor in March 1639 and on 7 April 1640 he was created Baron Finch of Fordwich in Kent. Again a judge had attained high political office, and been ennobled, and the pattern was repeated when Finch fled to Holland under threat of impeachment in December 1640.[621] Littleton was appointed Lord Keeper in Finch's place on 18 January 1641. He too had been made a privy councillor and in February 1641 he was created Baron Littleton of Mounslow. His political appointments did not end there as he was made head of a commission to perform the office of Lord Treasurer in May 1641and this was renewed two years later.[622] Bankes was appointed chief justice of Common Pleas when that post was vacated by Littleton, in January 1641, and was made a privy councillor. But he never achieved any higher political office despite the King's increasing doubts about the reliability of Littleton as Lord Keeper when tensions with parliament developed in the early1640s.

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[620] Prest, *Rise of the Barristers*, p.252.
[621] 'Finch, John, Baron Finch of Fordwich', *ODNB*.
[622] 'Littleton, Edward, Baron Littleton', *ODNB*.

In addition to the appointments made from this special group the majority of judicial appointments after 1629 were made conventionally from within the upper ranks of the legal profession. What stood out was the relative absence of suggestions of preferment given in return for favours or money, and the quality of those selected. The appointment of Sir Humphrey Davenport as chief baron of the Exchequer on 10 January 1631 was uncontroversial. Davenport had been a serjeant since 1623 and a king's serjeant since 1625, in which capacity he had acted, amongst others, for the Crown in proceedings against Eliot.[623] On 2 February 1630, after forty one years' practice at the bar, he had been appointed a justice of the Common Pleas with little or no comment, possibly in recognition of his recent service to the government. His translation to the senior judicial position in the Exchequer court would have required the support of Lord Treasurer Weston, as political head of the Exchequer, and there was no hint of impropriety other than a vague comment that he was a 'kinsman' of Weston.[624] In his response to the Lord Keeper's address on admission as chief baron, Davenport pointed out that he had gained experience of the course of the Exchequer in the reign of James I.[625] This experience was borne out in the detail and quality of his extant judgements which showed a technical understanding of this subject, and the interaction between the jurisdiction and procedure of the Exchequer and other courts, which exceeded that of the other barons.[626]

Another major judicial appointment that was not drawn from the ranks of the law officers, or royal counsel, was that of Sir John Bramston as chief justice of the King's Bench on 14 April 1635, shortly after the death of Richardson. Bramston's professional career was successful and, although he was as prominent in representing well known opponents of the government in the late 1620s as Noy and Littleton, his behaviour was less overtly political because he was never a member of parliament. He was one of several counsel for the Earl of Bristol in relation to the latter's impeachment in 1626. He had acted for two of the so-called Five Knights, Sir Thomas Darnel and Sir Arthur Heveningham in 1627, and in 1629 he represented certain of the members of parliament imprisoned with Eliot.

[623] 'Davenport, Sir Humphrey', *ODNB*.
[624] Birch, *Court and Times of Charles the First*, vol.2, p. 84. The nature of the relationship is unclear.
[625] *Diary of Sir Richard Hutton*, pp.83-4.
[626] His judgements in *R v. Stephens*, in the Londonderry Plantation Case in Star Chamber and in *R v. Hampden* all exemplified this.

However all of his prior career exhibited signs of professional acumen as much as any suggestion of real political sympathy with opponents of government policy. He had been made a serjeant in the 'great call' of serjeants in 1623 along with Davenport and Croke despite being younger by, respectively eleven and seventeen years. He initially chose Buckingham as his patron but had to change to the earl of Warwick because Buckingham had agreed to sponsor another lawyer. To be counsel for Bristol hardly suggested any partisan political stance and his representation of Darnel the next year was undertaken on the order of chief justice Hyde when Darnel complained of being unable to obtain legal representation. Only his representation of Eliot's parliamentary supporters smacked of anything more risky. Since most eminent members of the profession were involved in that matter failure to act in some capacity would be more surprising. His alignment with the government proceeded rapidly in the early 1630s. By 1634 he had, in rapid succession, been made a queen's serjeant, a king's serjeant and knighted. He had also, in a sign of his political connections, been involved in commissions that related to issues of central concern to the government. One was a commission, with Bankes, to find ways to bolster the soap-makers' monopoly. Another, which he shared with Bankes and Littleton, was an investigation into ways to supplement the incomes of impoverished clergy and a third related to the purchase, or hoarding, of commodities for the purpose of price manipulation.[627] These activities placed him at the centre of the government's blend of political and legal concerns and the core group of government lawyers from whom the most prestigious judicial appointments were made.

The other two judicial appointments in the 1630s, outside the Exchequer court, were those of Sir Robert Berkeley and Sir Francis Crawley. Berkeley was sworn as a justice of the King's Bench on 18 October 1632, to fill the gap left by the death of Sir James Whitelocke in June, after a comparatively rapid rise through the ranks of the legal profession. Called to the bar in 1608 at the remarkably young age of twenty four, by 1623 he was recorder of Worcester and a member of the council in the marches of Wales. By 1627 his growing reputation had been noticed as he was admitted to the order of serjeants in April and immediately made a king's serjeant only eighteen months after having become a

[627] 'Bramston, Sir John the elder', *ODNB*.

bencher at his inn, the Middle Temple. Like Bramston he was never a member of parliament and did not participate in any of the political conflicts of the 1620s. Instead he was chosen as one of the counsel leading the prosecution of Eliot and his associates and the government's opposition to their bail applications, alongside Attorney-General Heath in 1629.[628] Like Bramston he had strong professional credentials combined with an even more pronounced lack of obvious sympathy with government opponents. There was no suggestion that he was appointed for any reason other than professional ability, a fact that was to be borne out when he emerged as the most technically able and trenchant supporter of the lawfulness of government initiatives amongst the Caroline judiciary. In August of the same year Sir Francis Harvey, justice of the Common Pleas, had also died and at the same time as Berkeley was sworn in Sir Francis Crawley was appointed in Harvey's place. Crawley's reputation has suffered from Edmund Waller's disparaging remark that his 'progess through the law has been like that of a diligent spy through a country into which he meant to conduct an enemy', and his performance in the Ship Money Case where he went one step beyond Berkeley and Finch by conceding to the King an unfettered prerogative power of taxation.[629] Whilst his career prior to his appointment was less spectacular than that of Bramston or Berkeley he was not the complete nonentity that Waller suggested. Crawley was called to be a serjeant in 1623 at the same time as Davenport and Bramston, being nine years younger than the former and two older than the latter. He also acted for the earl of Bristol in 1626 and was selected by the Earl of Cork to defend him in the Commons in 1628. All of this made his progress within the profession rather more meritorious than that of Sir George Vernon, whom Crawley joined in the Common Pleas after the latter's transfer there from the Exchequer court in May 1631.

The remaining appointments were those of Sir James Weston, Sir Richard Weston and Sir Edward Henden as barons of the Exchequer. Henden was a professionally well respected serjeant of long standing, having assumed the coif in 1616. He had acted in a number of prominent cases representing

[628] *Diary of Sir Richard Hutton*, p. 92. Baker, *Serjeants*, pp.183, 363-4. S. Doyle, 'Berkeley, Sir Robert (1584-1656)', *ODNB*, (OUP, 2004), online edn. Jan. 2008. Brooks, *Politics, Law and Society*, p.182.
[629] *State Trials*, 3: 1305, 3:1083-5.

opponents of certain government policies.[630] Sir James Weston was appointed an Exchequer baron in May 1631, as the replacement for Vernon, having been called to the bar in 1600. He was a cousin of the Lord Treasurer, Richard Weston, who as the head of the Exchequer exercised considerable influence over appointments in that court. Sir George Croke nevertheless described the new baron as 'a wise and learned man and of courage'.[631] The Lord Treasurer's influence was again evident when, in early 1634, Sir James Weston died and was replaced by another distant relative of the Lord Treasurer, and his namesake, Richard Weston. The latter was appointed to this post on 6 May 1634 having been a Welsh circuit court judge since 1632.[632] Lord Treasurer Weston's influence ended with his death in March 1635 and the appointment of the venerable Henden, in January 1639, on the order of the King, restored the trend towards technical competence combined with political conservatism in this period. Henden's appointment was occasioned by the death of Sir John Denham who had been a Baron of the Exchequer since May 1617.[633] Denham and Sir Thomas Trevor had sat in the court throughout the greater part of the reign of Charles I prior to the calling of parliament in 1640 and, together with Sir Humphrey Davenport, had run the court throughout the personal rule. The continuity was scarcely touched by new appointments.

That highlighted another feature of judicial appointments in the period from 1629 to 1640. A stable cadre of judges, including the Exchequer barons, existed below the senior judicial positions in each of the three main Westminster courts. In this group experience and technical competence were sufficient for a judge to retain his position despite occasional tensions over support for government policies, and personal eccentricities. Whilst it might be tempting to conclude that judges who demonstrated some dissent over the legality of ship money and other government policies, in particular Croke, Hutton and Denham, were passed over for promotion, this view is not supported by the example of the career of any other puisne judge or baron. Although Hutton and Denham were particularly long serving, both having been appointed just after Henry Montagu had succeeded Coke in 1616, Sir John Dodderidge

[630] Baker, *Serjeants*, pp. 328-330, 365, 368-370. *Diary of Sir Richard Hutton*, pp. 86. 96, 113. Henden led the presentation of the case for the landowners affected by the extension of the boundaries of Waltham forest in 1635.
[631] E. Foss, *Biographica juridica: a biographical dictionary of the judges of England from the conquest until the present time 1066-1870* (Boston, 1870), pp.718-19.
[632] D.A.Orr, 'Weston, Sir Richard (1578/9-1658?)', *ODNB*, (OUP, 2004), online edn. Jan. 2008.
[633] 'Denham, Sir John ', *ODNB*.

had served even longer having been appointed justice of King's Bench in 1612. Of the puisne judges who served under Charles I, Baron Trevor was just as long serving as Croke, and Sir George Vernon commenced his tenure only a couple of years later. All of them, together with their contemporary puisne judges, Williams, Dodderidge, Whitelocke and Yelverton, saw Richardson and Hyde plucked from outside the existing judiciary and appointed to chief justices' positions over their heads in the 1620s. The same trend continued throughout the 1630s and into the early 1640s. Even Berkeley and Crawley, whose legal arguments supported government policies, were passed over in exactly the same way by Finch, Bramston, Littleton, Bankes and even the previously dismissed Heath. In the period from 1603 to 1642 only two incumbent puisne judges were elevated to one of the top three judicial offices and those appointments both occurred at the beginning of the reign of James I.[634] No such appointment was made under Charles I. In the same period, of the nineteen remaining appointments to the positions of chief justice or chief baron, eleven were elevated directly from positions as government law officers or royal counsel with eight chosen directly from the Bar.

This supports the view that under Charles I it was the offices of the chief justices and chief baron that were central to the political management of the law and the judiciary. This fitted in with the way in which the Privy Council customarily took legal advice by summoning either of both of the chief justices to provide it, since none of the judges were privy councillors *ex officio*. Puisne judges were rarely summoned for this purpose, usually in relation to some area of specialist expertise.[635] Under Charles several features of this relationship were refined. The law officers and royal counsel understood the political concerns of the King, and his ministers, and that enabled them to develop political skills alongside their legal expertise. It made sense to have a group of lawyers who understood the views of the monarch and the needs of his government, and to recruit the best lawyers within the profession for this role. It only appeared improper or sinister to opponents of government policy. What was more concerning was the parallel development of political incentives to motivate

[634] Sir Francis Gawdy succeeded his brother as justice of King's Bench in 1588 and was then promoted to chief justice of the Common Pleas in August 1605 only to die within four months. Sir Lawrence Tanfield was appointed justice of King's Bench in January 1606 and then promoted to chief baron of the Exchequer in June 1607. Sir Edward Coke moved from Attorney-General to chief justice of Common Pleas and then to chief justice of King's Bench. He was never a puisne judge.

[635] Such as Sir William Jones'expertise on Irish matters. See 'Jones, Sir William', *ODNB.*

the holders of the top judicial appointments in the form of political promotion and elevation to the peerage. For a very small group of lawyers these incentives made judicial office a route to high political office and social status in a way that hinted at the attitude of Charles towards the law and its inherently political function. Like his father he saw it as a source of support for his government and those who implemented it as his servants. But he wanted this relationship to operate more efficiently. Providing those who managed the interface between the needs of government and the law, namely his law officers, the chief justices, the chief baron and ultimately the Lord Keeper, with rewards of political power and social prestige was a vital part of that process. In keeping with Charles' tendencies to pay attention to detail in government and to compartmentalise its operation by encouraging ministers to look to him for support in order to control factional disputes, the chain of preferment for lawyers ended with the position of Lord Keeper.[636] There would be no fluid movement into other political roles in the way that had occurred under James I because management of the law was as important as the management of his finances or the Church.

Whilst this trend had started under James I, it became entwined in the separate patronage and political concerns of Buckingham. That began to change on the accession of Charles as he took steps on his own initiative, such as the dismissal of Crewe and the promotion of Walter, but it was not until Buckingham's death that it became more politically coherent. Able lawyers were used to provide examples of legitimate expedients to raise revenue, implement social policies and strengthen the economic condition of the Church. They were not expected to politicise the law, or act as politicians, but rather to diligently investigate the nascent legal rights and powers of the monarch in order for effective policies to be implemented. Government lawyers, including the judges, were specialists recruited to serve the purpose of underpinning political authority. That was why under Charles law officers like Heath, Noy, Littleton and Bankes appeared to be diminished figures, in political terms, compared with those of the previous reign like Egerton and Bacon, although they may well have been better lawyers.

[636] See comments on Charles' style of government in Cust, *Charles I*, pp.177-182.

This was also relevant to the treatment and function of the puisne judges. They were kept as a specialist group whose function was to administer the law as it affected most of the King's subjects and, from time to time, to provide the legal legitimacy for particular government actions or policies. For the latter to be effective, and probably because Charles regarded the law as inherently on his side, the judges needed to be seen to function with some degree of autonomy. This helped to explain the apparent tolerance shown towards certain judges. Apart from the fact that direct challenges to individuals, such as those made against Finch, Hutton and Croke, were affronts to the dignity of royal justice, too much blatant political interference was counter-productive when judicial endorsement was required for government policies. Occasionally Charles' temper had got the better of him when he was less confident or experienced, as Crewe and Walter had found out, but after 1629 he learned to modulate his reactions without lessening the political pressures on the judges.[637] It was an effective balancing act, and whilst it is conjecture, it seems likely that the chief instigator of these policies towards the judges and legal profession was the Lord Keeper throughout this period, Sir Thomas Coventry.

[637] Ibid., pp.183-196 on Charles' growing sense of purpose in the 1630s.

Chapter 5: Conclusion

The Ship Money Case as example:

The case of *R v. Hampden* dominated the articles of accusation brought against the judges and the same is true of subsequent historical discussion of the judiciary under Charles I. It might therefore seem perverse to omit some discussion of it from this thesis. However it did not contribute to the process of political management discussed here but was instead the best known expression of that process and illustrated its strengths and weaknesses. Accordingly it is briefly examined here as part of the conclusion.

The prominence of this case arose because, of all the extra-parliamentary revenue raising expedients adopted by the Caroline government, ship money was the most ambitious and innovative. In practical terms it was collected with more success than its opponents would have liked and yet it was still insufficient to fund adequately the naval objectives for which it was ostensibly required.[638] The case attracted political interest because it turned the court of Exchequer Chamber, and the lengthy judgements delivered at the hearing, into a debate over constitutional issues relating to the scope of royal prerogative power and the need for parliamentary assent to taxation.[639] This was despite the fact that neither the government nor the judges themselves, for different reasons, wanted this to happen.[640] Justice Jones saw the dangers for the judges clearly when, after noting the strong opinions held on both sides over the larger issues, he ruefully remarked that ‘it is impossible to escape their tongues, and between those two decks of censure I am like to fall.’[641] However the overall effect of this case, like that of judicial decisions on other revenue raising expedients and the restriction of prohibitions, was to demonstrate the potential strength of the Crown’s legal case. This is not to deny the immense political damage done by the powerful counter-arguments raised by justices Croke and Hutton. Yet the government got the decision that it needed to continue the levy, albeit at a cost. Furthermore the

[638] Sharpe, *Personal Rule*, pp. 593-5.
[639] As justice Croke put it ‘on the one side it concerns the king in his prerogative and power royal and on the other side the subject in his lands, goods and liberty’: *State Trials*, 3:1128. Chief justice Finch agreed: ibid., 3:1217.
[640] The judgements were littered with self-conscious references to the importance of the case. See *State Trials*, 3:1078, 1089, 1125, 1126, 1127-8, 1182, 1205, 1217-18.
[641] Ibid., 3:1182.

core arguments supporting the prerogative power to require performance of the specified duty in time of necessity, and the King's right to be the judge of such necessity, were supported by two of the judges who decided in favour of Hampden, namely chief baron Davenport and chief justice Bramston, in addition to the seven judges who decided against him.

Of the three remaining judgements the reasoning behind that of baron Denham, who did not attend the hearing due to illness, remains opaque. His short judgement was based on the absence of any formal court judgement against Hampden to found any action against him. For all of the courage of Croke in delivering his defiant judgement, and the political popularity of such views, his argument was weakened by the problem of Hampden's demurrer to the terms of the various writs in the case. Thus Hampden had accepted that the facts stated in them were entirely correct, rendering any attempt to look behind such statements irrelevant.[642] Neither Croke nor Hutton effectively refuted justice Berkeley's detailed critique of the statutory references and precedents cited by counsel for Hampden, or Berkeley's characterisation of the obligation in the ship money writ as 'a duty to be performed' rather than a debt or tax.[643] Instead, as Russell suggested, they set up a counter-narrative of precedents against taxation without parliamentary consent without demonstrating why Berkeley was wrong.[644] In the end all of the remaining judges followed Berkeley which was not so surprising if one considered what any English monarch prior to Charles I was likely to have regarded as their valid powers in times of danger for defence of the realm.

That the government's case for ship money should be so rigorously defended from the Bench was the result of various aspects of the management of the law that have been considered already. The case also provided a crucial example of the limitations of this approach insofar as it amounted to an attempt to use the law and the judiciary as a way of ending political controversy over government policy. Extra-judicial opinions might provide useful means for assisting Crown lawyers to anticipate problematic aspects of a particular case, as Heath had done in *habeas corpus* proceedings, or Finch

[642] See Croke's comments on the illegality of the writs and the motives behind them in *State Trials*, 3:1129, 1138. Davenport summarised the point precisely: 'upon this record...and the demurrer thereupon joined we are to see what is the law and custom of England upon the matter extant in the record': ibid., 3:1205.
[643] Ibid., 3: 1095, 1105-13, 1122-3.
[644] Russell, 'Ship Money Judgments', pp. 313-14.

had done at Dean forest eyre, but they did not provide political legitimacy. Furthermore faced with the prospect of unwelcome public scrutiny of judgements on the legality of a revenue policy that pushed at the limits of what could be justified, certain judges showed how they could deploy their expertise to evade government pressure whilst satisfying their own consciences, just as they had done in relation to prohibitions. This applied to the idiosyncratic judgements of those who ruled against Hampden, such as baron Weston and justice Jones, as much as the mixture of arguments found amongst the dissenting minority rulings.

Neither the concept nor the main features of ship money were particularly novel when the first writs were issued in October 1634, or even when the second writs that extended the levy from the ports and maritime counties, and were the subject of the proceedings against Hampden, were issued in August 1635. Many of its characteristics followed similar demands from the government of Elizabeth I in 1588 and 1597 and even the controversial extension to inland counties had been intended for a further such initiative in 1603 that had ended with the queen's death in that year.[645] After proposals to assemble a Mediterranean fleet by a levy on merchants and ports in 1618, the policy that emerged in 1634 was presaged by a serious attempt in February 1628 to demand the provision of ships and men on almost identical terms to those demanded later.[646] For the purpose of the arguments advanced in this thesis it is suggestive that this proposal should have emerged with such force amidst the foreign policy turmoil that had prompted the demand for the Forced Loan, along with various other revenue raising proposals, and was then abandoned whilst the government struggled with the consequences of its poor management of the legal basis of the Forced Loan. It underlined how serious that failure was for the conduct of something that was of paramount importance for the King, namely an effective foreign policy. What was different about ship money in the 1630s was not so much the details of the policy as the determination with which it was enforced and, most important of all, the fact that it began to be imposed on an annual basis. This stretched the credibility of legal arguments centred on otherwise entirely defensible royal powers that might be exercised in defence of the realm to meet sudden exigencies. That the government was aware of such concerns was indicated by the way in

[645] R.J.W. Swales, 'The Ship Money Levy of 1628', *Historical Research*, 50 (1977), pp.165-6.
[646] Ibid., pp.166-69.

which it sought to avoid letting the legality of the levy be raised in court almost as assiduously as it had done in relation to the Forced Loan. Attempts by the merchant Richard Chambers, and another inveterate opponent of such policies, William Fiennes, first Viscount Saye and Sele in 1636 and early in 1637 to bring this issue to court were successfully parried and this seems to have been part of a wider policy to avoid such confrontations.[647] One of the charges made against justice Berkeley concerned his remarks when Chambers' attempt to sue the mayor of London for jailing him for non-payment of ship money was rejected in the King's Bench.

Such caution was behind the thoroughness and care with which the government sought to manage the legal justification of the levy prior to the hearing of the case against Hampden. This illustrated their approach to the law in relation to politically sensitive issues in the 1630s in several ways. It involved the marshalling and use of supportive legal precedents, the use of the chief justices as both principal judicial advisers to the government and political managers of the puisne judges, and the extensive use of extra-judicial opinions. Yet these tactics ultimately failed to stop the central issues from coming to trial and ran into difficulties that foreshadowed what happened when the formal judgements were delivered. The judgement of chief justice Finch provided a very clear, if disingenuously selective, narrative of these proceedings. He indicated that the first consultation with him, chief justice Richardson and chief baron Davenport, on this subject occurred very shortly after his appointment as chief justice in October 1634. It was clearly a government priority and the three senior judges consulted 'a multitude of antient records, writs and other precedents of Ed.1, Ed.2, Ed.3, their times, and other records of other king's reigns'.[648] This body of precedent had been 'first prepared, collected and digested, and afterwards imparted to some of his majesty's learned counsel...and some other eminent persons of the commonwealth', by Noy.[649] As in so much else of his work, Noy had not invented the concept or form of ship money, but had excavated a formidable body of authority to justify its legality as a long standing royal right. This was bolstered by procedural consultation with

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[647] Sharpe, *Personal* Rule, p.719; N.P.Bard, 'The Ship Money Case and William Fiennes, Viscount Saye and Sele', *Historical Research*, 50 (1977), pp.179-81.
[648] *State Trials*, 3: 1219.
[649] Ibid., 3: 1218. As King's counsel extraordinary and legal adviser to the Queen, Finch would have been one of the 'learned counsel' at this early stage.

chief baron Davenport and the other Exchequer barons and the first of four written judicial opinions. The first two of these were requested by the King from the two chief justices and the chief baron and they tend to be overlooked because the parliamentary accusations focussed only on the last two opinions that were taken from all of the judges. It is likely that this was because the last two were the opinions that most fully summarised the Crown's case and were expressly disclaimed by Croke and Hutton in their judgements.[650] The importance, for the purpose of this discussion, was the way in which the first two opinions showed the government building up its legal case with judicial support in steady increments and the way in which this exploited the traditional role of the three senior judges as the main legal advisers to the government and Privy Council.

The first opinion from the senior judges confirmed the royal power to compel the Cinque ports to provide ships and men in such numbers and at such times and places as the King might require in order to defend the kingdom and his dominion of the sea. The second such opinion in June 1635 extended the obligation to pay for this from the Cinque ports to the whole of the country.[651] Although in some ways more general than the opinions from the whole of the bench, the first two really addressed an obligation arising from time to time to assist the King to prevent maritime incursions whenever, and to such extent as, the occasion might require. Even if this could be extended to the whole kingdom it seems that it was not regarded as sufficiently immediate and extensive to support the nationwide levy that was intended, and so the concept of the royal power to require the levy when 'the good and safety of the kingdom in general is concerned and the whole kingdom in danger' was introduced. This opening language in the last two opinions was identical.[652] There was a steady progression in the government's legal case that was meticulously supported by judicial endorsement at each stage. Lessons had been learnt from the past as short precise texts were sought from the judges in contrast to the rather vague generalities that Attorney-General Heath had often raised with them in the crises of the late 1620s with such mixed results.

[650] Ibid., 3: 1125, 1144-6, 1198. Finch's narrative, although stressing that they still signed the opinions, essentially corroborated their accounts: ibid., 3:1220-1.
[651] Ibid., 3:1219.
[652] Ibid., 3: 844. 1220.

Unfortunately for the government this obscured important weaknesses in their attempts to manage the judiciary. The first was that the comfort provided by these opinions concealed rather than removed judicial dissent over the legality of ship money that went wider than focus on Croke and Hutton would suggest. The problem was that the opinions contained awkward, but subtle, ambiguities that were not apparent to the more rigid and practical mind-set of the King or his political councillors. The final opinion in February 1637 was given in response to a formal royal letter which it repeated almost *verbatim*. The symmetry of letter and response probably appealed to Charles and some of his advisers. However whilst this looked like a combination of assertive royal precision met with judicial servility, this opinion by repetition hid as much as it delivered. The opening language concerning the kingdom in danger, noted above, could be read as an objective condition precedent on which the whole of the rest of the wording depended. To avoid the threat that opponents might challenge the legality of the power to command the services specified by requiring proof that the facts of the situation met this condition, whoever drafted this language sought to make satisfaction of the condition a matter for the subjective judgement of the King. Thus the last sentence stated that 'your Majesty is the sole judge both of the danger, and of when and how the same is to be prevented and avoided'.[653] Unfortunately the desire for brevity seems to have overcome the need for clarity as this did not work as neatly as intended. It was at least arguable that if the objective pre-condition did not exist the last sentence never became operable. The point was emphasised by the ambiguity of the King's judgement 'of the danger'. Was he the judge of whether there was a sufficient danger or merely of the scope of the danger once it had arisen? Other such problems were also probed in the subsequent judgements. The opinion only spoke of performance of a service, there was no mention of the payment of money. Stating that the King might 'by law' compel performance begged the question as to what happened if the method of compulsion was procedurally unlawful even if the substantive right was lawful. That was the argument that fundamentally threatened the distraint of knighthood proceedings in *R v. Stephens*.

[653] Ibid., 3:844.

The existence of such ambiguities in an opinion on a hypothetical situation greatly helped chief justice Finch overcome substantial judicial disquiet over these opinions. It is likely that he needed to apply much less coercion to obtain the opinions in the form demanded than his parliamentary critics suggested. It went to the heart of the political problems faced by the judges that their critics did not understand that some judges might sign such statements precisely because they knew that the wording was not as clear as the government thought. In addition to the trenchant opposition of Croke and Hutton three other judges had problems with the wording of the last two opinions. These were chief justice Bramston, chief baron Davenport and, most surprising of all, the arch royalist, justice Berkeley.[654] This was an impressive group of possibly the most professionally able members of the Bench, including two of the three most senior judges. Whilst Croke and Hutton were more concerned with the lack of parliamentary consent it seems that Bramston insisted that the opinion was dependant on the objective existence of public danger and necessity. He 'pounded and desired that these words might be inserted an apparent immanent and publique danger wch (said he) is only in tyme of necessity when all other usual meanes doe faile to this LCB and Berkeley J agreed'.[655] However Finch 'did mainly oppose it and said that the kinge would utterly dislike to have any such addicon'. [656] According to Hutton's note the matter was debated at length with seven judges agreeing that Bramston's clarification should not be made 'but the other 5 continued their opinions'.[657] In all of this it was justice Jones who noticed the ambiguity in the existing language stating that it 'could have no other intencon' and thus already accommodated Bramston's concern. It is not clear how this was resolved but that ambiguity was a useful way of bridging the gap between the majority and at least three of the dissentients. Then Croke and Hutton would have been much more isolated and open to persuasion to accept the majority view. But Croke was entirely correct when he pointed out that this way of resolving these issues meant that 'the king might be misinformed...conceiving us all to agree

[654] LPL MS 3391, f.62, Croke's letter to Bramston dated 3 November 1641 enclosing f.64, Hutton's note on this discussion. In *State Trials*, 3:1145, Croke stated that 'four others' dissented in some way 'from that which was subscribed'.
[655] LPL MS 3391, f.62. This account of his father's view, without reference to the other dissenting judges, was repeated by Bramston's son: *Autobiography of Sir John Bramston*, p.68.
[656] LPL MS 3391, f.62.
[657] LPL MS 3391, f.64v.

together'.[658] In fact, as Jones's observation suggested, the situation was worse than that because in addition to Croke's principled concern about parliamentary consent, which might be wrong, this process concealed the fact that the whole opinion was flawed in other ways. As a result the King would get a nasty surprise when all of the judges gave full judgements setting out their views. It showed how adroit the government really needed to be if it sought to bend judicial pronouncements to its will and how adept the judges were at finding ways to avoid this.

The tussle over these opinions pre-figured the splits that appeared publicly in the judgements at the hearing at the end of 1637. Although Bramston and Davenport grounded their judgements on different arguments, the possibility that four or five judges might openly dissent, with the unpredictable Jones hovering somewhere in the middle, should not have come as a big surprise to anyone present at the debate over the opinions, least of all Finch. In fact the only surprise was the extent of Berkeley's conversion to the government's case and the dissent of baron Denham.[659] The thoroughness and conviction of Berkeley's judgement suggested that he had become genuinely convinced of the strength of the case for the royal power to levy ship money and possibly, like baron Weston, that a real necessity did exist.[660] The elderly and sick Denham may have had more personal reasons for a change of view. Berkeley's and justice Crawley's judgements were aimed as much at what was expected from Croke and Hutton, which they knew from the discussion of the last two opinions, as the arguments of Hampden's counsel. Finch would also have been prepared for those judges' dissent but he had also to respond rapidly to the potentially devastating procedural critique of Davenport.[661] Apart from the seriousness of the implication that it raised, that this was a tax masquerading as demand for the provision of a service, this critique had not apparently been raised before. In addition it came from the most senior judicial expert on taxes and their collection. In discharging their normal functions the Exchequer barons were the judges who were by far the most familiar with the details of such procedures. That Davenport was adept at such procedural analysis has been seen already but the point

[658] *State Trials*, 3:1145.
[659] Denham had subscribed to the opinions apparently without comment. Finch remarked that 'none more cheerfully did subscribe to his majesty's letter': ibid., 1242.
[660] *State Trials*, 3:1057-8.
[661] He floundered. His attempt to accuse Davenport of inconsistency in relation to his judgement on distraint of knighthood was particularly unconvincing because it took no account of the loan commissions: ibid., 3:1238-9, 1241-3.

here was that his dissent took a form that avoided the larger political confrontation between royal and parliamentary rights. This was a classic example of what made the Caroline judiciary so difficult to control. Given his prominent position this looks like a shrewd way of avoiding political opprobrium whilst refusing to give ship money, in its then current form, his endorsement. Whilst the chief baron found fault with virtually every stage of the legal procedures used to enforce ship money, suggesting real concern over the government's methods, the political motivation was even more obvious in Bramston's judgement. As chief justice of the court of King's Bench his dissent was every bit as dangerous. However Bramston's judgement read throughout like a complete endorsement of Finch's judgement and only turned in favour of Hampden in the very last paragraph.[662] He criticised Croke and disavowed all of Davenport's procedural objections except for the final one relating to the failure to identify the recipient of the monies payable in lieu of a ship. It might be aptly described as a masterpiece of political trimming. Both he and Davenport could say if, as seemed likely, they were asked to justify their decisions that they in no way contested the King's power to demand ship money, or resiled from the written opinions, but that the procedure for enforcement had been botched. That this raised an even more serious question about the nature of what was demanded, would only emerge fully in the unlikely event that the government tried to unwind what had been done to date and start again.

The end result gave just enough legal justification to continue with the enforcement of ship money, but it came closer than any other public legal test of government policy in this period to an embarrassing failure. This indicated the limitations on the government's ability to harness the law and the judges to its purposes. It was ultimately unable to prevent Hampden and his supporters from bringing the legality of ship money to trial or to conceal the existence of judicial criticism of it. Given that the law could never remove all political opposition to this policy and that it was not possible to postpone indefinitely some sort of reckoning before one of the courts why did a comparatively well prepared government not do better? It is possible that the process of getting the judges' opinions lulled the King and his ministers into a false sense of security. If either Finch, or Lord Keeper

[662] See *State Trials*, 3:1244-5, 1249 where he expressly approved Finch's arguments.

Coventry, failed to make the extent of judicial resistance at that stage known to the King he did him a disservice, just as Croke had suggested. At the least it is hard to believe that the potential popularity of Croke and Hutton's consistent opposition would have escaped the notice of more politically astute members of the government. To know that the success of this important policy might depend on the decision of a single judge would have been positively alarming. One explanation is that the King's own sense of the righteousness of his cause, combined with confidence in a successful outcome arising from the effective defence of earlier revenue initiatives, made Charles underestimate the risks, or his advisers reluctant to draw them to his attention. Once the hearing of Hampden's case became inevitable it seems that a further procedural snag prevented the deployment of the *per curiam* judgement as a tactic to conceal judicial dissent. That this possibility was not altogether fanciful was suggested by Croke's discussion of the judicial conventions behind that procedure as one of the reasons why he signed an opinion with which he disagreed.[663] The reference of this matter to a full session of the court of Exchequer Chamber probably prevented the use of this device. That was because the court was not actually deciding the case of *R v. Hampden* in the normal sense of ruling in favour of a plaintiff or a defendant in a suit before the court. Instead it was providing an advisory ruling on the validity of Hampden's response to the s*cire facias* writ issued by the entirely separate court of the Exchequer, which was discharging its usual function of enforcing payment of monies due to the Crown, in this case under the ship money writs. Hampden's response to the Exchequer court's order in the s*cire facias* that he appear before them to explain why he should not pay the sum of twenty shillings in discharge of his obligations under the second ship money writ was that he accepted the facts specified in the writ but denied the legality of the obligation. To assist the Exchequer court to respond to such a fundamental issue the entire bench was assembled as the Exchequer Chamber court, being the final court of adjudication on a writ of right, to provide a definitive answer on this point of law. As Davenport put it, 'judgement is not here to be given, but a judicial advice; and according to the number of voices here judgement must be given in the Exchequer without respect to any of our particular opinions who sit in this court'.[664] The Exchequer Chamber court was thus the

[663] Ibid., 3:1145.
[664] Ibid., 3:1203.

venue for the public rendering of a legal opinion by each judge on the issue in question and it would have been a contradiction of its function in such circumstances for any single judge to deliver a verdict on behalf of the whole court. Irrespective of whether any of the dissenting judges would have consented to being silenced in that way the conventions of the *per curiam* decision and judicial comity were not available in these circumstances. The jurisdictional complexity of the contemporary legal system had once again thwarted the government's ability to manage the judges in a way that was reminiscent of the endless technicalities that impeded the control of prohibitions.

Conclusion:

When asking the judges for the last of their opinions on ship money in February 1637, Charles I made a clear statement of his faith in the ability of the law to provide political legitimacy for one of his most controversial policies. He explained that he had adopted this course to deal with the queries of a 'fewe' who had questioned the levy or their assessments. He 'thought fit in a Case of this nature to advise with you our judges who…are well studied and informed in the Rights of our Soveraigntie' and remarked that this would be quicker than a formal trial 'but also of more authoritie to overrule any preiudicate opinions of others in the poynt'.[665] Rather than seek resort to parliament the judges and the law would validate royal power instead. Far from being regarded by the government as politically radical or innovative, this reflected a deeply conservative view that the law was, in justice Berkeley's words, 'of itself an old and trusty servant of the King's; it is his instrument or means to govern his people by'.[666] As royal servants and advisers the judges were both agents and supporters of such use of the law. In the absence of clear constitutional distinctions between the political and legal functions of the judges, or any legal definition of the relationship between prerogative power and individual property rights, the royal request was within the bounds of political propriety. Even the government's most vehement parliamentary critics had not consistently articulated such distinctions or definition.

[665] PC2/47/13/f.85v.
[666] *State Trials*, 3:1098.

Faced with serious threats to its policies abroad and the severe need for money at home to pay for the consequences of earlier military and administrative failures, the government of a relatively inexperienced and young monarch sought financial support from parliament in the period from 1625 to 1628. The parliamentary response was an understandable pre-occupation with the competence of royal administration and the conduct of royal counsellors, most particularly Buckingham, combined with an unrealistic reluctance to address the financial needs of government without imposing conditions that the King saw as an affront to his dignity. In such circumstances the government sought alternative means of raising revenue based on what it understood to be existing prerogative rights without much consideration of the legal details surrounding them. If monarchs, especially medieval ones, had successfully made such demands in the past then that was sufficient. These political decisions on revenue raising expedients were based on administrative and antiquarian research in the records in the Tower of London and the Exchequer by government officials rather than lawyers. At this stage consultation with the judges was an afterthought. The result was the decision to raise the Forced Loan and the subsequent discovery that the entire professional judiciary regarded this as unlawful at a moment of political crisis. Efforts to enforce payment without allowing its legality to be challenged helped to raise another serious cause of contention with parliament, namely the scope of prerogative powers of imprisonment. Amidst this political tumult it was parliament, urged on by the formidable legal authority of Sir Edward Coke, that advertised the potential of the law as a means of resolving political conflicts in the form of the Petition of Right.

What emerged from this was a process of improved political management of the law and its principal representatives, the judges, by the Caroline government that indicated just how the legal restraints of the Petition of Right could be mitigated. In the absence of more research it has not been possible to identify with certainty where this strategy came from but the most likely source was the relationship between Charles I and the man who was his closest adviser on matters of law and politics up until his death in 1640, Lord Keeper Coventry. Whilst the equally long serving Manchester may have supported Coventry from time to time, it was the Lord Keeper who combined the crucial role as manager of the relationship between the judges and the government with pre-eminent professional

expertise as head of the courts of Chancery and Star Chamber. As such he had the extensive knowledge of, and influence over, the legal profession, the judges and the law itself that was necessary to implement such a strategy. It is noticeable that despite several differences of opinion and dismissals the King always reinstated him. Whilst it has been commented, almost as if it were a criticism, that Coventry seemed to concentrate on the supervision of the law and the justice system this would be consistent with the view advanced here that this was because of the political importance that the government accorded to the role of the law and the judges in the support of its policies. However in that context it is noticeable that by the late 1630s he was at the core of the government, alongside Archbishop Laud, in dealing with the increased volume of ecclesiastical business referred to the Privy Council that has been noted.

What is easier to identify is the outline of that strategy. With the recruitment of able lawyers from the upper echelons of the profession the government encouraged the development of legal research that supported royal rights and powers and the economic and jurisdictional rights of the church. In a reversal of the earlier approach the law became the starting point for viable policies rather than a response to political decisions after the event. As the prospect of another parliament receded such legal groundwork became more important as a substitute for parliamentary consent. As a crucial part of this process of political co-option of the law the judges were manipulated and cajoled with mixed success. At one level the judges were helped. The strengthening of the legal cases for knighthood fines, the use of commissions, the reassertion of royal forest rights, ship money and the lack of effective challenges to tonnage and poundage and impositions, greater definition of the power of High Commission and the scope of prohibitions avoided mutually damaging confrontation between the judges and the government. Although the government's increasingly punctilious legalism might subject certain of the judges, particularly the Exchequer barons, to a degree of discomfort this was alleviated where the royal legal position was valid, even if exploitative. Whilst the use and practice of the judicial opinion was, as the judges well understood, more problematic their decisions in court, as discussed, were more easily justified. In addition the King, eager to bolster the status of the judiciary and add lustre to any assistance that they might be required to give to his government's initiatives,

was careful to punish any challenge to their honour, even if it came from a cleric. This was exemplified by the decisive action taken against those who slighted Finch, Croke and, most famously, Hutton.

From the judges' perspective such benefits were important but the pressure on them was all but incessant. It took several forms. Firstly there was the direct influence within the individual courts through the day to day involvement of the two chief justices and the chief baron who were in regular contact with privy councillors and the King as a normal part of their functions. Secondly there were the various types of more formal consultation of those senior judges, and the wider body of the bench, either as advisors to the Privy Council or by means of more or less specific written opinions. Thirdly there were formal attempts to regulate judicial behaviour in relation to jurisdictional matters through express or private agreements or direct royal intervention. Finally there was the involvement of a Privy Council that discharged its normal functions relating to dispute resolution and politically sensitive aspects of the administration of justice with exceptional focus and vigour in this period in order to promote certain policies in ways that by-passed perceived obstruction by the judges. Most of the time government methods fitted into the conventions of the relationship between the King and his judges. However despite all of this the results were less reliable than the government wanted or its critics assumed. The judges proved to be adept at countering such influence when it suited them. What alarmed opponents was not the product of excessive royal coercion or judicial subservience so much as the comparative success of the government in showing how the law actually supported, or at least did not contradict, its policies.

Whilst the three senior judges were selected from a group of lawyers who were well acquainted with the needs and preferences of the King, his family and the members of the council, their use as day to day political managers was not always successful. In the period from 1625 until his death in 1635 Sir Thomas Richardson, first as chief justice of the Common Pleas, and after 1631, as chief justice of the King's Bench was noticeably ineffective despite his best efforts. To a remarkable degree he was routinely ignored by the puisne judges in whichever court he presided over. In addition to *Stroud v. Hoskins*, Lady Shirley's Case, Miller's Case, the countess of Purbeck's Case and Isabel Peel's Case,

further examples of this included his failure to prevent his three colleagues in the Common Pleas from granting a prohibition to William Prynne against a High Commission prosecution in November 1628 and the decision on the *habeas corpus* application of John Prigeon in January 1634 when Richardson was forced by the other judges in the King's Bench court to strike down an arrest warrant that he had issued.[667] His bailing of Sir Richard Heron earned him a rebuke from the entire remainder of the bench. As seen earlier, in the Lichfield Deanery Case and George Huntley's Case he made politically embarrassing public utterances that referred to government influence affecting his conduct. His performances in the prosecutions of George Mynne and Henry Sherfield before the court of Star Chamber attracted adverse public comment and embarrassed both chief justice Heath and Lord Keeper Coventry. As if all of this was not enough his performance at the Somerset assizes over the issue of church ales angered Coventry, Archbishop Laud and even the King. That all but ended his career. The government showed its displeasure in a manner that showed legal sophistication. He was professionally humiliated by being forced to ride the home assize circuit around London.[668] Richardson was possibly the most egregious example of the haphazard effect of Buckingham's grip on judicial patronage and was undoubtedly pliable. However his incompetence and inconsistency made him more of a political liability to the government than an effective political manager. But his behaviour added much to the misleading perception of a judiciary in thrall to the government.

The outcome was scarcely more successful with the more legally competent but surprisingly politically maladroit chief justice Heath. However his dismissal in 1634 and reappointment as a puisne judge in 1641exemplified just how precisely calculated the government's political management of these key judicial posts had become by this stage. Heath had been a loyal political servant and was clearly a good lawyer. He was thus good material for the position of puisne judge but not politically sensitive enough for the role of chief justice. There were no royal temper tantrums on

[667] 'Richardson, Sir Thomas', *ODNB*; C.Holmes, 'Law and Politics in the reign of Charles I: the case of John Prigeon', *Journal of Legal History*, 28(2007), pp.174-6.

[668] 'Richardson, Sir Thomas', *ODNB*. The home circuit involved large amounts of gaol delivery proceedings which were both demanding and unhealthy, and was the lowest status circuit, especially for a chief justice. There were hints that Richardson might have had mental health problems in addition to John Nicholas' comments about his demeanour on circuit in Salisbury: see TNA SP16/196/93. His nervous outbursts in court and rambling judgements, combined with bizarre conduct in relation to Heron and church ales, point in that direction.

display. It was only with the appointment of the unashamedly royalist Finch in the place of Heath that the government had found someone with the right combination of full support for the King's requirements with professional ability that an effective political manager had been found. Unfortunately his introduction of obviously political rhetoric into his most prominent judgements, like Richardson's ineptitude, drew much political anger onto all of the judges and the government's use of the law. As Charles himself said of Finch, 'the world took notice that he was a passionate man which was noe good qualitie in a judge'.[669] In Clarendon's view Finch's judgement in relation to ship money made it 'much more abhorred and formidable' than all of the government's efforts to enforce it.[670] Allowing for Clarendon's usual hyperbole where judges were concerned Finch's blatantly political comments in that case, and in relation to the forest laws, were in noticeable contrast to the careful concentration on legal issues by other judges, including Berkeley. Whilst Finch's enthusiasm and ambition provided the King with an assiduous overseer of his judges, and ultimately raised Finch to high political office and a peerage, it demonstrated a dangerous lack of political acumen on the part of both of them.[671] Although it has been argued here that the period from 1629 to 1640 saw a much more politically efficient use of the law and the judges it is not suggested that this was ultimately successful or politically wise. Indeed it did not shut-down political dissent but made the situation very much worse.

There were several reasons for this. One was that, contrary to the views of their parliamentary critics the judges did not become consistent or reliable instruments of government policy. In the struggles between the King and parliament in the late 1620s when they were asked for their opinions on ill-defined points they gave vague responses or declined to give any answer. The barons of the Exchequer found themselves in a particularly awkward situation because of their central function as the adjudicators of all issues surrounding the collection of the King's revenue. In relation to tonnage and poundage this arose because of the tactics of the King and parliament in their dispute over the King's entitlement to such revenue. Rolle's case before the court depended as much on the question of

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669 Barnes, 'Cropping the Heath', p.332.
670 Clarendon, *History of the Rebellion*, pp.89-90.
671 It was no coincidence that Finch initially gave up the law and studied for nine years to make himself 'fytt for imployment of state' before resuming his legal career: see *Diary of Sir Richard Hutton*, p.101.

parliamentary privilege as the right to collect the duty and the extent to which the Exchequer court could rule on that was far from clear. The treatment of Chambers showed how far the government would go to thwart any legal challenge to collection of that duty as proceedings were commenced in the Star Chamber court to enable the continued retention of his goods. At this stage both sides were engaged in knockabout tactics as neither the King nor parliament saw any reason to refer the central issue for determination by the courts. This continued in relation to Samuel Vassall's dispute over impositions. Bate's Case was a valid precedent, but Vassall refused to accept this. It may have been good politics but it was not good law and the Exchequer barons were not to blame for that. On the subject of prohibitions, despite a battery of different tactics the sheer complexity of the subject and the subtle judicial tactics deployed to blunt those efforts eventually left the supervisory jurisdiction of the common law hampered but not controlled. The use of the Privy Council as a substitute method for enhancing Church finances was, in reality, an admission of defeat. Unfortunately for the judges the technical mastery that lay behind their most effective tactics for avoiding government pressure, whether it be in relation to prohibitions, opinions or ship money, was too esoteric and low-key to calm the political fears that lay behind the most disturbing implication of the government's use of the judges and the law.

In truth the law, when fully researched and presented, was predominantly on the side of royal rights and powers, and not the occasional institution of parliament or the property rights of the subject. Whilst the successful use of this insight by government law officers to deploy the court of Star Chamber against seditious speech, writing or acts was threatening, it was less surprising given the political composition of the court. However the ability of the government to justify the legality of its position on a range of matters when they came before the main Westminster courts was much more troubling. The effective legal validation of knighthood fines, royal rights over the forests and ship money, the extension of the powers of High Commission and the economic rights of the Church and the inability to mount any successful legal challenge to impositions, tonnage and poundage, monopolies or the use of royal commissions all suggested that the competency of the law to support government policy was substantial. The common law itself was not the bulwark against royal power

that some political opponents of government policies so fondly imagined. If royal councillors could not be blamed entirely, the law was all that was left other than acquiescence, pleading for royal indulgence or insurrection. That was what made blaming the judges so attractive. It got the King and the common law off the hook in one stroke. The judges could be conveniently designated as a special form of evil councillor that both led the monarch astray and corrupted the law. If that was incorrect then the law could not mediate between the political views of the King and his councillors and their parliamentary critics. For those who were less convinced that the judges were really responsible for the political situation that had arisen, as they listened to the criticisms raised by their parliamentary colleagues in the early stages of the Long Parliament in November 1640, the position was stark. It was possible that the tyranny of Charles I was validly supported by the law.

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