THE PRIVY COUNCIL AND PRIVATE LAW IN THE TUDOR AND STUART PERIOD: II

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In a previous instalment an attempt was made to describe the main subjects of private litigation dealt with by the English Privy Council under the Tudors and early Stuarts. It was suggested that the subjects were most heterogeneous and that the total volume of such litigation was large. In the present instalment will be discussed, first, the methods used to reduce the volume of private litigation by direct and indirect means; then the powers of coercion possessed by the Privy Council; and finally, its relations to the ordinary courts.

D. Attempts to Reduce the Volume of Private Litigation

There can be no doubt that the clamor of private litigants was an obstruction to public business and a burden to busy men. With the whole machinery of government to supervise and maintain; with constant threats of invasion by foreign enemies; with religious dissent a source of internal disaffection and the country riddled with spies; with all these and many other problems pressing for attention the Privy Council under Elizabeth still received and took action on an immense number of private complaints. In the later years of her reign a much higher percentage of cases was disposed of through arbitration, with resulting saving of time and energy for the Council. Yet many cases had at least a preliminary hearing. Some were heard at length. Even to settle the terms of reference to arbitrators, with the necessary assurances of impartiality, diverted time and attention from matters of high policy.

* The first instalment was published in the February issue, 48 Mich. L. Rev. 393 (1950).—Ed.
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The Privy Council Registers, to which numerous references must be made, will be cited in the same manner as in the first instalment. The Registers of the Tudor period will be cited by the names of their editors, Nicolas and Dasent, followed by the volume numbers in the series they edited. The Registers of the early Stuart period, up to 1626 when the published series ends, will be cited A.P.C., followed by the years covered by the volume in question.

115 Cf. the remarks of Dasent, Introduction to vol. XIV, Acts of the Privy Council, p. x: "Nothing is more remarkable than the constant devotion with which this comparatively trivial daily work was carried on by those whose whole energies might well have been absorbed in the anxious consideration of the dangers which were so closely besetting the country and the Queen. To Burghley and Walsingham, engaged in laboriously unravelling the tangled threads of a skein of conspiracy and murder, the details of the settlement of a quarrel between two Norfolk neighbors must have been supremely uninteresting."
One should not, of course, exaggerate the degree of collective action required in dealing with this very large but comparatively unimportant business. The Council had for long had the practice of acting through smaller committees taken from its own membership.\footnote{116} For private cases the regulations of the Council attempted at various times to provide specific days for hearings, with participation by limited numbers taken from its own membership; these regulations were allowed to lapse during the reign of Elizabeth but were revived under James I.\footnote{117} Furthermore, it seems extremely likely that many orders issued in the name of the Council were actually framed by individual members to whom suitors secured access through persistence or personal influence. It seems likely, too, that many such orders were never recorded in the Council Register and escaped review by other Council members or its secretarial staff.\footnote{118}

Even though the work was therefore not equally distributed throughout the Council as a whole, the volume of private litigation reached such proportions in the reign of Elizabeth that something more was needed than general warnings to the “obstinate and shameless haunters of the Court.”\footnote{119} In 1582 the Council set down an order that no private petitions would be entertained in matters that could be dealt

\footnote{116}{Baldwin, Select Cases Before the King's Council (Selden Society) xlv; Baldwin, The King's Council, 327-328.}

\footnote{117}{A regulation of Jan. 15, 1552 fixed Monday of every week as the day for hearing private suits. Literary Remains of Edward VI, vol. II, 552. Sir Julius Caesar preserved among his papers a lengthy order of the same year which specified no particular day for hearings but provided for meetings once a week and set up a committee of eight persons. Brit. Mus. Lansd. ms., fol. 100-103.}

\footnote{118}{Shortly after the accession of James I, on May 30, 1603, regulations were issued setting aside Tuesday afternoons for the hearing of private suitors with six Privy Councillors “at the least” to attend. Dasent XXXII 499 (1603). Under Charles I, Wednesday and Friday afternoons were set aside for suitors, though apparently without any attempt to allocate the work to a limited group of Councillors. Clarendon, State Papers, vol. I, 34. In fact the Council Register after the accession of James I regularly listed the names of the Councillors responsible for the issuance of Privy Council orders, and in most instances the number listed for orders issued in private cases was less than ten persons.}

\footnote{119}{The order of April 15, 1582 (Dasent XIII 394), which attempts to restrict the private litigation to be handled by the Council, recites that many letters issued in the name of the Council had been signed by Councillors without being reviewed for form by any of the clerks of the Council and without being recorded in the Council Register. The order then provides that no letter shall be signed or issued unless it has endorsed in the margin at the bottom the name of some clerk of the Council. Occasionally an order issued in the name of the Council bears internal evidence of having been drafted by an individual Privy Councillor. Dasent XIV 234 (1586); XXV 13, 189 (1595-6). In another case it appeared that certain persons had been ordered by a single Councillor to appear before the Council in a private dispute. XIV 50 (1586).}

\footnote{110}{The language used in the general order of 1552 preserved by Caesar in Brit. Mus. Lansd. ms. 161, fol. 102.}
with in the ordinary courts “onless they shall concerne the preservacion of her Majesties peace or shalbe of some publicke consequence to touche the government of the Realme.”

The only result of this order, in the years immediately following, was an actual increase in private business. A new order entered seven years later recited that the Council was “so troubled and pestred” with private suitors that it could scarcely attend to the business of the state and the judges of the ordinary courts “doe thereby finde cause of offence as derogating the laufull authority of the said Courtes and places of judgment.” The remedy again was a general order of dismissal of suits triable in ordinary courts of law or equity, but with two provisos: (1) that any litigant so dismissed would be heard if he could not get his case tried in the ordinary courts and (2) that no person should be denied the right to complain to the Council of “anie wrong, wilfull delay or deniall of justice” by any Court.

Similar orders were issued during the next decade, some general and some directed at particular classes of suitors. More important, the Council began to adopt the one really effective means of discouraging private suitors, by actually dismissing the cases most obviously suitable for decision in established courts.

E. Appeal to the Source of Justice

With the accession of James I in 1603, the problem was attacked in a different way—that is, through the resumption by the King of a personal authority as judge and mediator. As in other phases of the shift from Tudor to Stuart conceptions of government, this change marked no sharp break in institutional development. During the sixteenth century there had been instances of personal intervention by the

120 Dasent XIII 394 (1582).
121 Dasent XVIII 183 (1589).
122 Dasent XXI 240 (1591), Masters of Requests ordered to review all private petitions pending and remit to the ordinary courts those cases triable there; Dasent XXIII 82 (1592), general dismissal of Irish suitors whose cases were triable in ordinary courts; Dasent XXVIII 508 (1598), officers in the Channel Isles ordered to make strenuous efforts to prevent cases from coming up to the Council.
123 In the earlier period there had been isolated instances of dismissals to the common law courts: Dasent III 113 (1550); and to the Chancery: Nicolas VII 276 (1541); Dasent V 163 (1555); VIII 271 (1574); IX 344 (1577); XI 352 (1579); XIV 50, 117, 299 (1586-7); XV 300 (1587). After the order of 1589 there was a much larger number of cases similarly dismissed: to the common law courts: Dasent XX 251 (1591); XXVII 465 (1597); XXX 697 (1600); A.P.C. 1623-5, 166 (1623); to the Chancery: XVII 246 (1589); XVIII 195 (1589); XIX 187 (1590); XX 160, 250 (1590-1); XXII 126 (1591); XXIV 409 (1593); XXV 271, 301, 346 (1596); XXVIII 445 (1598); XXXII 174 (1601); A.P.C. 1616-17, 72 (1616); A.P.C. 1625-6, 389 (1626). It is possible of course that other dismissals may have occurred without formal entry in the Register.
King or Queen in private litigation. Private suitors constantly clam­ored for royal intervention. In some cases private complaints had been referred to the Council for action, with or without specific instructions for their disposition. But the conception of the sovereign as a per­sonal dispenser of justice was one not easily abandoned, especially by those clamorous litigants who rightly believed that oil was usually pro­vided for the squeakiest wheels. The channel for access to the sover­eign was organized and available—the Masters of Requests, who not only served as judges in their own court and as men of all work for the Council, but who had a separate function as personal agents of the King or Queen in dealings with private suitors.

The intention of James I to assume a more direct personal responsi­bility was soon disclosed. Less than two months after his accession, on May 12, 1603, a formal record was commenced of action taken on petitions addressed directly to the King. The manuscript register, so far unpublished, refers to many petitions quite unconnected with private litigation—for pardons to criminals and remission of criminal penalties, for grants of royal land and royal offices, for alms, for licenses to publish books, for confirmation of royal charters and the grant or cancellation of royal monopolies. The register was apparently kept by the Masters of Requests and gives abundant evidence both of their close personal contact with the King and the King's own active interest in the business it records.

124 Nicolas VII 240 (1541); Dasent III 382 (1551); XI 108, 149 (1579); XIV 169 (1586); XXI 109 (1591), the Queen in this case having directed the Council to arrest a principal whose default had caused his surety to be imprisoned: XXIII 184 (1592); XXV 42 (1592), the Queen in this case having indicated her desire that no “rigorous course” be permitted against sheriffs who had allowed a prisoner to escape. In Dasent XXX 492 (1600), the Council added its own warning to a litigant, to obey an order of the Queen that pending litigation be stayed.

125 The services of the Masters of Requests as agents of the Council took a variety of forms. They conducted preliminary examinations, served as arbitrators either alone or in the company of others, were sent on diplomatic missions, and in fact were available for any administrative functions that the Council might assign. To catalogue them here would be un­profitable.

126 The Council itself in one instance at least used the Masters of Requests as an avenue for intercession with the Queen in a matter requiring her personal approval: Dasent XXVIII 452 (1598), involving authority to collect charitable contributions throughout the realm for the inhabitants of a town destroyed by fire. In other cases Masters of Requests were asked to notify the Queen of measures taken by the Council to dispose of the complaints, addressed to both the Council and the Queen, by exceptionally persistent suitors. Dasent XXV 301, 346 (1596).

In S.P. Dom., vol. 247, no. 66 there is a copy of a draft proclamation, dated Feb. 17, 1593, which attempted to deal with the great concourse of suitors at the Queen's court by assigning to the Masters of Requests a room outside the court gates at which they were to receive private suitors for one hour of every morning and afternoon.

127 The manuscript is BRIT. Mus. Lansd. ms. 266. It commences with entries of May 12, 1603 and the last date recorded is June, 1616. It comprises 289 folio pages, written in
The recourse thus opened to private suitors quickly proved extremely popular. In slightly more than a year, from May 12, 1603, through the end of May, 1604, a total of 466 private disputes were dealt with. As compared with the work of the Elizabethan Privy Council, there was much less emphasis on aid to merchants, but relief to debtors through protections and through mediation with creditors remained a principal activity.\textsuperscript{128} There were occasional, though com-

several different hands. Continuity was not strictly maintained but for the most part the entries were consecutive. Some care was shown to keep it accurate though the entries, especially in private cases referred to arbitration, were very brief and often quite uninformative.

Entries which help to identify the persons responsible for maintaining the register are the signatures by Roger Wilbraham on fol. 15b (July, 1603), 147b (1611), and 250a (1614). This would be the Roger Wilbraham who was confirmed in office as Master of Requests by James I and sworn in on May 4, 1603 [Dasent XXXII 497 (1603)], and who as Master of Requests signed two orders of the King in response to private petitions, directed to the Justices of the Common Pleas and the Chancellor the following year [MONRO, ACTA CANCELLARIAE, 36-41 (1847)]. An entry on fol. 265a (1614) recites that a previous order of reference had been made by Sir Christopher Parkins, a Master of Requests. It seems likely that many such orders of a routine character were made without personal consultation with the King.

That a distinction was maintained between the judicial functions of the Masters of Requests and their responsibilities in acting on petitions to the King is indicated by the case of William Holden and wife, complaining of a dismissal of their petition filed in the Court of Requests. The entry then proceeds: "Forasmuch as it hath ben often complaied of by the peticoners that I gave the order for the said dismission his Majestie is pleased that the cause shalbe reheard by the other Ms of Requests in my absence," with the further provision that if no cause was found to alter the decree the petitioners were directed to trouble the King no further. BRIT. Mus. LANsD. ms. 266, fol. 243a (1614).

\textsuperscript{128} Only one general commission aiming to clear debtors' jails is recorded, that appointed on July 2, 1603 for the prisoners in Norwich jail (BRIT. Mus. LANsD. ms. 266, fol. 9a). In all other cases action was taken on petitions of individual debtors (some of them being of course already imprisoned). The usual solution was the appointment of an arbitral commission to mediate for "tolleration," or, in the phrase which later became standard, "a charitable composicion." In the period May 12, 1603 through the end of May, 1604, out of 416 cases of all types referred to arbitrators 67 involved arbitration with creditors. There was a much higher percentage in the three calendar years 1612, 1613, and 1614. For the three years together the total of cases referred to arbitrators was 282, of which 129 (or 45%) involved arbitration with creditors.

In addition, petition direct to the King was an avenue for securing protections to distressed debtors. The protections, almost always for the period of a year, were sometimes granted on the unanimous requests of the creditors (BRIT. Mus. LANsD. ms. 266, fol. 109a, 162, 166b, 193a), though more commonly on the petition of the debtor [ibid., fol. 80b, 82b, 123b, 138b, 140b, 159a, 182a (2 cases), 183b, 194a]. In the case on fol. 170b (1611), 13 out of 17 creditors petitioned for a protection to their debtor, the other four being "obstinate."

In 1615 the King seemed to be moving in the direction of arranging discharge for a bankrupt debtor, who had delivered up all his goods to a commission of bankrupts and who petitioned for release from imprisonment "to seeke meanes to maintayne hiswelve wife & children." The entry states that "This sute seeminge to his Ma\textsuperscript{t}e in appearance to be reasonable," the King's pleasure is that the bankruptcy commissioners should call the creditors and persuade them to give plaintiff his liberty "to endevor some course of life to maintayne his wife and family in this his necessitie," in view of his voluntary payment of a large part of his debts and his surrender of all his assets for the purpose. BRIT. Mus. LANsD. ms. 266, fol. 284b (1615).
paratively rare, examples of attempts to facilitate litigation in ordinary
courts or otherwise to supervise the administration of justice.\textsuperscript{129} In
other respects the cases dealt with were even more heterogeneous than
the cases brought before the Elizabethan Council. A very large percent­
age dealt with title to land, or claims to recover possession of land,
including complaints on the ground of enclosures, obstruction to com­
mons, and eviction of farm tenants.\textsuperscript{130} There were complaints arising
from the forfeiture of bonds and mortgages, claims of fraud inducing
payments of money or conveyances of land, complaints for wrongful
detention of goods, and very many actions to collect simple money
debts. There was a complaint by a mother against two other women
for "bewitchinge her child,"\textsuperscript{131} an action brought by an aged deaf lady
against the churchwardens of her church to have a seat near the pulpit
where she could hear the preacher,\textsuperscript{132} and the complaint of four per­
sons, so characteristic of the time, "for drawinge them to be surties and
soe leave them in the lurtch."\textsuperscript{133} The petitions record every conceiv­
able kind of hardship, wrong, and oppression, and reflect a simple
faith in the remedies that the great power and authority of the King
could supply.

The normal remedy provided, again, was arbitration. During the
period from May 12, 1603, through May 31, 1604, out of 466 cases
involving private litigation 416 were referred to commissions "to hear
and end," "to persuade a charitable composition," or "to compound
the differences according to equitie and charitie." In later years the
total of petitions recorded was considerably reduced, but references to
arbitration remained in the vicinity of 80%. The chief reliance was
on the country gentry, who must have found their duties as arbitrators
extremely wearisome. However, all kinds of dignitaries were employed

\textsuperscript{129} Orders to speed decision in cases pending in common law courts and the Chancery
(Barr. Mus. LANSD. ms. 266, fol. 4a, 20a, 191b, 213b, 215b, 266a); orders for change of venue
in criminal cases because of suspected partiality (ibid., 211b, 233b); order for the impanelling
of an impartial jury (ibid., fol. 22b); petition aiming to prevent decision in the Chancery
after a hearing at which plaintiff’s counsel was not present (ibid., fol. 202b); order not
to proceed with case in which petitioner had been unable to sue out a writ of error for
reversal of the judgment rendered in the Common Pleas, because of the absence on circuit
of all the judges of the King’s Bench (ibid., fol. 182b-183a); authority to Coke, Chief
Justice of the King’s Bench, to arrest with a serjeant at arms a defendant in a King’s Bench
action who has failed to appear after a commission of rebellion (ibid., 258b, April, 1614).

\textsuperscript{130} See first instalment, note 83, 48 Mich. L. Rev. 393 at 419 (1950).

\textsuperscript{131} Ibid., fol. 266, (1603), the complaint being referred to the
Justices of Assize for decision according to “justice.”

\textsuperscript{132} Ibid., fol. 217a (1612), the churchwardens being directed to arrange for a different
pew if this could be done without undue prejudice to the other parishioners.

\textsuperscript{133} Ibid., fol. 13b (1603), the case being referred to a commission of arbitrators.
nobility, eminent clergy, and officers of the towns—and the common law judges and practicing lawyers were very prominent. Francis Bacon served as a referee, and Coke was frequently called upon, during his service both as Attorney General and as Chief Justice of Common Pleas and King's Bench. The motive usually expressed in the letters of appointment was "that his Majestie be no more troubled" or "to ease his Majestie." There is no reason to doubt the truthfulness of this explanation. The importunate suitors must have been as heavy a burden to the King as they had been to the Privy Council. The wonder is that their complaints were received and forwarded with so little attempt at selection or at major reduction in volume.

In a small percentage of cases more positive measures were taken, through personal order of the King directing the defendant to satisfy the petitioner or show cause to the King. This solution was apparently reserved for cases in which the fault of the defendant seemed clear; usually some inequality of status was also present between the parties. Like the references to arbitration, these affirmative orders

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134 Ibid., fol. 11b (1603).
135 Ibid., fol. 8a (1603), 25b (1603), 54b (1605), 80a (1607), 153a (1611) (2 cases), 211a (1612), 238a (1613), 252a (1614), 271b (1615).
136 There were of course some dismissals to the ordinary courts, though the surprising fact is their small number. In the period May 12, 1603 through May 31, 1604 there were out of 466 cases of private litigation only 20 dismissed to courts of common law or equity. Occasionally there appear such laudable statements as that "It was not his Mats intencon neither doth it appeere by his direction that any Course of Justice in any of his Mats Courts shalbe stayed by the former significacon of his Mats pleasure." [Brit. Mus. Lansd. ms. 266, fol. 14b (1603)].

In some cases there are difficulties in determining the nature of referrals to ordinary courts, illustrated by the case on folio 10a, where the plaintiff claimed that his name had been forged on a bond and the complaint was referred to the local justices of the peace to compound the cause "according to justice." The implication is that this is arbitration, but it might be possible for the referees under the authority given to direct the case to ordinary common law trial. In the calculations made, such cases are treated as references for ordinary trial.

The overriding difficulty of classification comes in selecting out the cases of private litigation appropriate for trial in courts of law and equity, from the multitude of petitions for royal grace, in some of which adverse claimants appeared to demand the bounty for themselves.

137 Petitions alleging non-payment of money debts in which the defendant ordered to "satisfy or answer": Brit. Mus. Lansd. ms. 266, fol. 12b, 32b, 35b, 36a, 105a, 112a, 113a, 226a, 239a, 249b, 258b, 260a, 272b, 277a, 289b, the last reference being an order directed to Sir Walter Raleigh; petitions for "land": ibid., fol. 16a, 43a, 153b, 205a; for goods detained: ibid., fol. 12b; for destruction of commons and eviction of farm tenants: ibid., 10a, 12a, 13a, 16a, 115a, 152a, 236b; other miscellaneous cases in which the same form of order was entered: ibid., 10b, 15b, 18b, 34b, 35a, 224a, 264a, 267a, 276b. In the case on fol. 45a appeared the unusual order to the defendant "to forbear extremitie and deale charitable or make answer."

In one instance, in 1614, the King appointed commissioners to take order that land given by Edward VI in trust for a charitable use but diverted to private purposes should be
seldom led to proceedings by way of enforcement or further contest. 138 We are left to surmise that such orders, invested with the personal authority of the King, were promptly complied with. If this surmise is not correct, it appears at least that enforcement measures were left to other agencies, such as the Privy Council, and that the settlement of disputed issues was referred to other courts. 139 For neither purpose was a new and distinct procedure organized. With so many other demands pressing for the attention of the King—including demands for favors, gifts and privileges of every conceivable kind—a truly judicial procedure for handling so large a volume of private disputes would have required the very rapid organization of another prerogative court.

restored to the original charitable use (BRIT. Mus. Lansd. ms. 266, fol. 258b). In 1611 a garnishment order was issued to a third person who owed money to the plaintiff's debtor (ibid., fol. 109a). Perhaps one should add to the cases of specific relief, the old lady and her pew, mentioned above in note 132.

138 Most of the cases referred to arbitration disappear thereafter, without even a report back from the arbitrators. However, in two cases orders were entered directing performance of arbitral awards (BRIT. Mus. Lansd. ms. 266, fol. 45a, 116b) and in 1609 letters were addressed to the creditors of John Cleighton "who wilfully refused to obey a former reference and to give the said Cleighton anie daies of paiement as divers other creditors had donne" (BRIT. Mus. Lansd. ms. 266, fol. 124b).

There was apparently only one case in which an order directing affirmative action, issued in the name of the King, led to any further steps. This was in the petition of one Parson against Sir William Paston, for non-payment of a £60 debt. On failure of the defendant to obey the order to pay, the order was merely repeated in letters addressed to the defendant, giving a month's time limit. BRIT. Mus. Lansd. ms. 266, 12b (1603).

139 In 1611, for example, Sir Henry Billingsley, who had a Chancery decree in his favor for land in Wales, sought to have the defendant "removed by the power of the contrye" from the possession which he withheld. The case was referred to the Privy Council, to take order for the suppression of this alleged "outrage" (BRIT. Mus. Lansd. ms. 266, fol. 174a).

Problems of enforcement also arose in connection with royal protections against civil litigation. In one case, where local deputy sheriffs were sued at common law for deferring to a protection and refraining from executing process against the protected debtor, the King merely wrote to the creditors directing them not to proceed with their actions against the officers unless cause were shown. BRIT. Mus. Lansd. ms. 266, fol. 213a. But where it appeared that the creditors were proceeding, in direct violation of the protection, to sue the original debtor, the King referred the matter to Coke, Chief Justice of the King's Bench, requesting him to call the parties and if he found that the protection had been "contemptuously disobeyed" to take order for the punishment of the offenders. BRIT. Mus. Lansd. ms. 266, fol. 262b (June, 1614).

In a substantial group of cases it is likely that referrals to the established courts was motivated by the disclosure of serious, controverted issues which the King thought it inconvenient to dispose of through the petition procedure. The point can be illustrated again with protections, where a claim that the original grant was based on false information was referred to two common law judges for decision (BRIT. Mus. Lansd. ms. 266, fol. 155a); a claim that the protected debtor had abused his immunity by using it to withhold two obligations transferred to him in trust was committed to the Lord Mayor and two aldermen of London for decision (ibid., fol. 84a); and the demands of creditors for the cancellation of a protection as unduly prejudicial to them were referred to the Lord Chancellor for adjudication (ibid., fol. 78b and 84b).
It might not have been too clear to contemporaries, though it seems clear in retrospect, that the principal contribution made by this summary royal justice was to provide an additional channel for private arbitration. At times it must have seemed that considerably more was involved. In other cases, not recorded in the manuscript register, James took the time to render judicial decisions in contested cases; apparently he fancied himself in the role. \(^{140}\) Quite apart from these instances of royal adjudication, however, the manuscript register of royal petitions reveals a constant and indiscriminate intervention by the King in all kinds of private litigation, with summary action under the King's own personal authority on a very large number of cases appropriate for ordinary trial. In the controversies with Coke, which had already begun, the power of judicature was elevated into a great constitutional issue, involving basic questions as to the nature and sources of law and the limits of political authority. In the King's own personal entourage it appeared that he considered himself the personal dispenser of justice in almost the same sense that he was the dispenser of alms and other royal favors. It was no wonder that some persons took alarm.

For the Privy Council this summary jurisdiction of the King must have meant some relief from the distractions of private suitors. Unfortunately, the register of the Privy Council for the first ten years of James I was destroyed in the great fire at Whitehall in 1618, and we therefore have no means to trace the effect on Privy Council business of this recourse to the King.\(^ {141}\) Shortly after the Privy Council Regis-

\(^{140}\) Hudson describes in his TREATISE ON THE COURT OF STAR CHAMBER 9, in 2 HARGRAVE, COLLECTANEA JURIDICA, the "accurately eloquent, judiciously grave, and honourably just" decree that James rendered as presiding judge in the Star Chamber, after hearing and argument in a single case that lasted five days. The most celebrated effort of James in this sphere, demonstrating very clearly the dangers inherent in his pretensions, was the case of the unhappy Earl of Ormond, discussed at length by Bake, "A Princely Judgment," 23 MINN. L. REV. 925 (1939).

\(^{141}\) The register of royal petitions for the years 1603-1616 reveals several references to the Privy Council of matters originally presented by way of petition to the King. It is easy to understand why examination by the Council was thought necessary in some cases, as in the dispute between the city of York and the royal Council at York over the limits of the latter's judicial powers (BRIT. MUS. LANS. ms. 266, fol. 232b), a dispute over title to the office of Marshal in Ireland (ibid., fol. 155b), controversies over the regulation of particular trades (ibid., 6b, 7a, 54b), and the demand of the watermen of London that the London players be required to return to their theater at the riverside so that the unemployment among the petitioners could be relieved (ibid., 245a). Issues of general state policy might also have been involved in two enclosure cases that were similarly referred (ibid., fol. 154a, 266b). In the other cases of ordinary private litigation that were referred to the Privy Council no reason can be suggested except the likelihood that the decision of disputed issues would take time and trouble (ibid., fol. 77b, 83a, 87a, 91a, 126a, 224a). The King may have thought himself disqualified from passing on the claim of a Scottish lady against Sir William
ter resumes, the register of royal petitions ceases, and it is impossible to say whether this type of personal intervention continued on the same scale in the second half of James' reign or in the reign of his son Charles. The Register of the Privy Council for this later period indicates that all the main types of civil litigation dealt with by the Elizabethan Council continued to appear, though in much reduced volume. Whether or not the reduction in private business was made easier to achieve by assistance from the King, the Council itself imposed a stricter self-limitation and concentrated the energies of its membership on its primary task, the government of England.

F. The Powers of the Council

There remain some crucial questions as to the powers of the Council. The discussion has already suggested that these powers were wide. Further analysis is needed of (1) the specific powers of coercion available and (2) the relations of the Council with established courts of law and equity.

1. Powers of Coercion

Of all the instruments of coercion available, by all odds the most useful were the recognizance and penal bond. The recognizance, like the bond, consisted of an acknowledgment of indebtedness for a specified sum of money, conditioned to be void if the obligor complied with the requirement laid upon him, and specified in the obligation. Such obligations were mentioned, often quoted in full, throughout the Council Register. By authority conferred in 1540 any individual member of the Council was permitted to take recognizances "in matiers touching the King"; it seems likely that this authority was continued and that matters "touching the King" were very broadly defined. Recognizances were used for a great variety of purposes unconnected with private litigation. The most common was the recognizance conditioned on keeping the peace. They were also used, for example, to impose on a large landholder the affirmative duty to maintain his tenants and followers in religious conformity; to compel a man "to refrayne the

Hilliard for "cutting & spoilinge her fetherbedds, silke curtaines, and other things in her house & abusinge her in wordes" (ibid., fol. 167b). This seems unlikely.

For the period starting in 1613 for which the Privy Council Register is preserved there are some examples of cases referred from the King to the Privy Council for action: A.P.C. 1618-19, 211, 222, 232, 236 (1618); A.P.C. 1621-3, 13 (1621); A.P.C. 1623-5, 58, 130, 148, 151, 217, 415; A.P.C. 1626, 62.

142 Nicolas VII 27, 35 (1540).
148 Dasent XXXI 137 (1601).
company" of another man's wife; to protect a wife against physical violence from her own husband; and to carry out an elaborate scheme for rent control and construction of new rental housing as a solution for the problems caused by enclosures in a particular local community.

In the field of private litigation bonds or recognizances were used most frequently as a means of ensuring attendance before the Council by litigants. The sums expressed in such obligations varied with the status and financial ability of the litigants, but they were substantial sums ranging from £20 to £500 and occasionally more. Recognizances were also used to enforce specific duties imposed upon litigants, such as the duty to pay a debt owed to a foreign merchant, the duty to restore cattle wrongfully distrained, or a duty not to disturb the possession of land pending decision of litigation concerning it in the Chancery. Where the Queen or the Council undertook to decide a case, the normal procedure was to secure a recognizance from both parties to abide their award. The whole system of private arbitration organized by the Council depended very largely on the standard practice of exacting from each of the litigants bonds to carry out the arbitrators' decision, a practice strongly recommended to arbitrators by the Council on numerous occasions and sometimes enforced by the Council's own precautions.

It seems likely that both the recognizance and the bond performed their chief function through putting the signers in fear. There are nevertheless some few examples of bonds put in suit by order of the Council; a record of technical forfeiture was particularly helpful where no other means were readily available to ensure satisfaction to the

144 Dasent V 174 (1555).
145 Dasent XIX 313 (1590).
146 Dasent II 294 (1549), inhabitants of the town being required to enter recognizances to carry out the Council's detailed regulations. The case is further commented on by Tawney, The Agrarian Problem in the Sixteenth Century 369-70 (1912).
147 Dasent I 14 (1542).
148 Nicolas VII 253, 255 (1541).
149 Dasent VI 294 (1558).
150 Nicolas VII 52 (1540); Dasent I 49 (1542); VII 269 (1565).
151 Illustrations of bonds taken from the parties by the Council itself, conditioned that they abide the awards of arbitrators: Dasent I 19 (1542); XI 92 (1579); XV 347 (1588); XXIII 7 (1592). In Dasent X 281 (1578), the Council entered an affirmative order to the parties to execute such bonds. Strangely enough, there is almost no evidence of the treatment that litigants could expect if they had the temerity to refuse to assume such dangerous liabilities. In Dasent IX 215 (1576), one Roos, a gentleman of Nottingham, had refused to accept the two arbitrators named by Justice Dyer, to whom the case had been referred. The Council merely asked the Earl of Rutland to persuade Roos to enter a bond to perform the award of two other arbitrators.
Furthermore, the record of Council action may give an incomplete picture of the real impact of the bond. Where it ran by its terms to an adverse litigant, rather than to the Crown, no formal action by the Council would be required to put it into suit. Even on obligations acknowledged to the Crown forfeitures through suit in the Exchequer might have occurred, especially through the vigilance of informers who hoped for a share in the proceeds as their reward. The best evidence that this indirect sanction had real coercive effect is its widespread use for a very wide range of purposes. It is in fact of some interest that the penal bond, which provided more cause for resort to Tudor equity courts than any other feature of the common law system, was thus appropriated to the purposes of prerogative equity and remained at all times one of its most useful instruments.

Process against property provided a more direct sanction. Its most common form was the order for sequestration of land or goods, a type of order freely used in the sixteenth century Chancery. Sequestration was available not only as an interim measure to preserve property involved in litigation, but as a sanction against persons evading the process of the Council or disobeying its decree. By way of sanction the Council could also enter orders that can best be described as garnishment, directing third persons who owed money to disobedient defendants to hold it available for satisfaction of the plaintiffs. To overcome resistance to its orders for surrender of property, there could

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152 Orders by the Council to put bonds in suit because of failure to perform arbitral awards: Dasent VIII 21 (1574); A.P.C. 1621-3, 91 (1621); order to sue on a bond, in the Exchequer, if creditors continue their refusal to appear before the commission for Poor Prisoners: Dasent XXV 110 (1595); orders to sue on bonds guaranteeing appearance in the Admiralty as the only means of securing satisfaction of claims for wrongful seizure of goods: Dasent I 411 (1546); XXV 105 (1595).

153 Sequestration ordered pending decision by the Council: Dasent XII 261, 265, 351 (1580-1); pending decision by ordinary courts before which actions had been brought: Dasent XII 71 (1580); XX 216, 271, 291 (1591); pending decision by arbitrators appointed by the Council: XX 249, 331 (1591).

154 Sequestration ordered against persons evading process of the Council: Dasent XX 100 (1590); XXIV 361 (1593); to compel payment of a debt ordered paid to a foreign merchant: Dasent XXV 189 (1596); to compel a husband to comply with order for his wife's support: Dasent I 48, 81 (1542). Without prior decree of the Council, sequestration was ordered to enforce the duty of executors under the will of the decedent: Dasent XV 13 (1587); and to prevent a creditor from effecting a fraudulent transfer of his debtor's assets: Dasent XIX 214 (1590). In A.P.C. 1613-14, 50 (1614), an order equivalent to sequestration was entered by letters directing the master of a ship about to sail to unload goods from his vessel and deposit them in safekeeping, to prevent the owner, an Italian merchant, from shipping the goods abroad to defeat his English creditors.

155 Dasent X 363 (1578), and XI 299 (1579), both involving proceedings against a husband to compel support of his wife; XIV 16 (1586), involving a defendant who had evaded process of the Council for his arrest on a charge of fraud.
likewise be no doubt of the Council's power to invoke superior force and then to punish by arrest and criminal prosecution.\textsuperscript{156} The chief executive agency of the state, that stood so ready to overcome resistance to the process of ordinary courts,\textsuperscript{157} was scarcely prepared to tolerate resistance to such orders of its own.

- The direct sanction most often employed was personal arrest. The possession of a large and undefined power of arrest was assumed in the numerous cases in which the Council ordered the apprehension of suspected criminals, including those suspected of political crimes. In civil litigation, arrest was used as a means to compel attendance before the Council.\textsuperscript{158} It was also used as a sanction for the "contempt" involved in disobedience of the Council's orders, including orders for payment of money debts.\textsuperscript{159} Arrest under the council's authority was the normal means for supporting the process of ordinary courts.\textsuperscript{160} Enforcement of the awards of its own arbitral commissions was also undertaken by arrest or threat of arrest.\textsuperscript{161} In addition, the Council employed arrest in a number of situations involving no disobedience of any prior order, where the civil wrong was clear and strong measures seemed appropriate. One can lay aside those cases in which a contempt of the Council might be found for independent reasons, such as the arrest in a civil action of a party already in the custody of the Council's officers;\textsuperscript{162} or in which the conduct charged involved criminal as well as civil liabilities.\textsuperscript{163} A mere refusal of a debtor to satisfy his creditors,
when possessing adequate assets for the purpose, was considered sufficient ground.\textsuperscript{164} Arrest was also authorized for the failure of a lessor to comply with the covenants of his lease of a house to the French Ambassador,\textsuperscript{165} and as a means to bring an exacting creditor “to more conformitie” as to a forfeiture he was trying to exact.\textsuperscript{166}

The activities of the Council on behalf of distressed debtors, in the later years of Elizabeth, apparently provided the first strong challenge of the Council’s power to arrest. It was in answer to the attempt to enforce a royal protection to a debtor that the Court of Common Pleas in 1587 took the drastic step of releasing on habeas corpus a prisoner whose imprisonment had originally been authorized by the Queen.\textsuperscript{167} The Commission for Poor Prisoners, appointed in 1590, was clearly given, by delegation from the Council, the power to arrest for disobedience to its orders.\textsuperscript{168} The energetic activities of the Commission, under promptings from the Council, involved not only frequent interference with common law actions by creditors but large-scale resort to the sanction of arrest. These activities, added to the routine enforcement measures used in other types of cases, will probably explain the famous protest of the common law judges in June, 1591. The protest was addressed to the Chancellor and Treasurer, who had asked “divers” of the judges to state their opinions as to when

\textsuperscript{164} Dasent XI 199 (1579); XXI 403 (1591).
\textsuperscript{165} Dasent VII 365 (1570).
\textsuperscript{166} Dasent XIX 351 (1590), the creditor being already imprisoned on another ground and being ordered detained until he abandoned his effort to enforce a bond for £200 on which only £12 was due.
\textsuperscript{167} Searche’s Case, 1 Leo. 70, 74 Eng. Rep. 65 (1587), where the Queen had given a protection to one Mabbe with a provision that any person arresting him or his sureties was to be arrested by the Queen’s own officers and detained in prison until he had answered his contempt to the Privy Council. Searche, who had arrested one of Mabbe’s sureties, was accordingly arrested for violation of the protection, was released on habeas corpus by the Common Pleas, and was then rearrested under the terms of the protection. The Common Pleas at this point imprisoned the persons responsible for Searche’s second arrest.

The Council’s own power to arrest was more directly called in question by the Common Pleas the same term and year, in Howel’s Case, 1 Leo. 70, 74 Eng. Rep. (1587), where a return on habeas corpus, stating merely that the arrest had been ordered by a single Privy Councillor, was held insufficient at a first hearing. (A similar return had likewise been held insufficient the previous spring in Hellyard’s Case, 2 Leo. 176, 74 Eng. Rep. 455). The return was then amended to show that the arrest had been ordered by the whole Privy Council. This return was held sufficient, even though no cause for the arrest was specified. The conclusion drawn by the reporter is that cause for arrest must be stated where ordered by a single Privy Councillor, but not where arrest is ordered by the whole Privy Council; anticipating on the latter point the conclusion in the declaration of the judges in 1591, discussed in the text immediately following. Apparently the contest in this case did not arise out of aid to a debtor since the Council Register refers the next January, to a John Howell who had been involved in arranging the escape of a prisoner. Dasent XV 347 (1588).
\textsuperscript{168} Dasent XX 9 (1590).
a person imprisoned by the Queen or Privy Council could be detained in prison. The declaration was signed by all the judges of the Queen's Bench, Common Pleas and Exchequer. It recited that divers persons had been imprisoned for prosecuting ordinary actions at common law, even after judgment; that others had been imprisoned "against the law" and when writs had been issued to secure their release no sufficient cause for imprisonment was stated; that some persons after securing their release had been re-committed to prison in secret places; and that divers persons to secure their release from imprisonment had been forced to release their common law causes of action or the benefit of judgments; "for remedy in which behalf we are almost daily called upon to minister justice according to law, whereunto we are bound by our office and oath." Apart from their general appeal to the Chancellor and Treasurer to prevent such "charges and oppressions" to the subject, the judges had no real solution to offer. On the legal question raised, their opinion was quite clear that imprisonment by order of the Queen or Council was lawful. The report in Anderson indicates that the cause of the imprisonment "ought" to be stated on return of a writ of habeas corpus. But even this version does not suggest that failure to certify cause must lead to the prisoner's release. It carefully omits any claim that the sufficiency of the cause, when disclosed, could be reviewed by the judges, and it seems most likely that no such claim was intended.  

So the matter remained during the first quarter of the seventeenth century, a period during which the common law courts expanded and improved habeas corpus as a weapon in the battle of courts. At the height of the conflict, in 1615, habeas corpus was tried in two cases as a means of securing the release of persons imprisoned by order of the Council, but the decision of the King's Bench, announced by Coke, was very clear in refusing to release the prisoners. The challenge of James Whitelocke, denying that the King "neither by commission nor in his owne person" could "meddle with the bodies goodes or

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169 The declaration of the judges is reproduced in two versions, one from BRIT. Mus. LANSD. ms. 68 and one from Anderson's Reports, by 5 HOLDSWORTH, HISTORY OF ENGLISH LAW, App. I. The language quoted in the text is taken from the Lansdowne Manuscript version. The comments of 6 HOLDSWORTH 32-4 (1924), have been heavily relied on.

It seems especially clear that there was no intention to require a disclosure of the cause for arrests ordered by the whole Council, in view of the conclusions of the Court of Common Pleas only four years earlier in Howel's Case, 1 Leo. 70, 74 Eng. Rep. (1587) and in Hinde's Case, 4 Leo. 21 (1576).


171 The Brewers' Case, 1 Rolle 134, 81 Eng. Rep. 382; Salkingstowe's Case, 1 Rolle 219, 81 Eng. Rep. 444.
landes of his subjects,” was met by a strong assertion of “his Majestie’s prerogative and his absolute power incident to his Soveraignty”; with the net result that Whitelocke humbly submitted and apologized for these dangerous thoughts.\textsuperscript{172} It was in 1627, in Darnel’s Case, that these conclusions received their final confirmation. The power to arrest was asserted in this case on behalf of the King himself, since the return on habeas corpus recited that the arrest had been ordered “by special command of the King.” The argument in that great case, however, ranged over the whole subject of arrest by King and Council. The decision of a unanimous court very clearly asserted the sufficiency of the return and, thereby, the Crown’s possession of abundant power. Modern scholarship has confirmed that this decision did not falsify the precedents and was no mere surrender by a subservient judiciary.\textsuperscript{173}

The intervention of Parliament, leading to royal assent to the Petition of Right in 1628, brought severe restriction of the power of arrest by Crown agencies. Even so, wide powers remained, as the next twelve years were to show. By this time, however, the issues raised by the Council’s jurisdiction in private matters had become a minor phase of the great debate over the nature and location of governmental power. For the decision of these issues a war and two revolutions were ultimately required.

2. \textit{Relations with Ordinary Courts}

In general it was clear that the Privy Council, in its relations with lower courts, did not claim or exercise the power of appellate review. It was also clear that it did not have a general power to bring before it cases already pending in the ordinary courts, comparable to the power of \textit{évocation} successfully asserted by the French royal Councils from the end of the fifteenth century.\textsuperscript{174} These limited powers of the English Privy Council threw into higher relief the exceptional character of its intervention. Its constant interference with the procedures of ordinary courts raised constitutional issues, all the more serious because the authority under which it acted had no broad or firm foundation.

\textsuperscript{172} A.P.C. 1613-14, 211-219 (1613). Compare the similar very positive assertion in 1616, in confirming arrests ordered by the Commissioners for Sewers, that the power to arrest was necessary and had been validly delegated. A.P.C. 1616-17, 57. Some sensitivity on this issue is suggested, however, by the reference to the Chancellor of the question whether power to arrest had been conferred on the Commission for New Buildings, since the matter “reacheth far into the liberty of the subject.” A.P.C. 1618-19, 242 (1618).

\textsuperscript{173} 6 HOldsworth, History of English Law 34-37 (1924).

\textsuperscript{174} 2 Chenon, Histoire Generale du Droit Francais Public et Prive 551-2 (1929).
To the principle that the Privy Council possessed no powers of appellate review there was one important exception. By ancient privilege of the Channel Isles, appeal from decisions by the island courts was *au Roy et son Counsaill*. This privilege was confirmed by Council orders of 1565 and 1572, the *Counsaill* being defined as the Privy Council itself. Particularly during the reign of Elizabeth, the volume of Channel Isle appeals was large. A number of cases were heard at length and formal orders entered confirming or reversing decrees of the island courts. As a class they were extremely troublesome, since they frequently involved difficult questions under the French customary law by which the islands were governed. In spite of the protests of the Channel Islanders, the Council could not resist the temptation to use the summary methods to which it was accustomed, and especially to rely on arbitration for saving of time. Furthermore, the Council did not consider itself limited strictly to the function of appellate review, for it gave directions to the judicial officers in the islands in cases not formally appealed or not subject to appeal. It was difficult, and not at all necessary, to draw a clear line between appellate review and the wider supervision for the purpose of ensuring fair and honest administration of justice. The courts of the Channel Isles were no more exempted from this wider supervision of the Council than any other courts.

176 Dasent VII 223 (1565); VIII 75 (1572).
176 Illustrations: Dasent XII 120, 187 (1580); XIV 174 (1586); XVIII 39 (1589); XXIII 73 (1592); XXX 642 (1600); A.P.C. 1613-14, 46 (1613); A.P.C. 1625-6, 101 (1625).
177 An extreme instance was the problem as to the customary law of inheritance which had to be referred four times to commissioners to ascertain what the custom was, before the Council could set down a final order. Dasent XXVI 248, 347 (1596); XXVIII 296, 418 (1598); XXXI 241 (1601).
178 In 1586 the bailiff of Guernsey remonstrated, inconclusively, against a reference of an appeal case to commissioners to hear and end, claiming that this was "greatelie to the prejudice of the justice of that Isle." Dasent XIV 31 (1586). A similar protest in 1617, on the ground that reference to arbitrators violated the charter of the islands, forced the Council to retain the case formally. A.P.C. 1616-17, 325 (1617). In a large number of cases, nevertheless, appeals were referred to arbitral commissions, usually with the motive expressed that the Council "be no more trobled." Dasent XI 387 (1580); XIII 388 (1582); XV 48, 403, 427 (1587-8); XXV 151, 378 (1596); XXVIII 514, 596 (1598); XXIX 500 (1599); XXX 63, 161, 250 (1600); XXXII 363 (1601); A.P.C. 1613-14, 72, 91, 414; A.P.C. 1616-17, 213; A.P.C. 1621-3, 70; A.P.C. 1623-5, 4, 16.
179 Instructions to award relief in cases not formally appealed: Dasent VIII 146 (1573); XXV 378 (1596); XXVII 77 (1597); XXIX 728 (1599); case not subject to appeal referred back for relief on claim of judge’s partiality: A.P.C. 1616-17, 137 (1617); relief ordered to person claiming oppression by powerful adversary: A.P.C. 1613-14, 453 (1614).

In two cases the local judicial officers refused to carry out such summary orders, but in these instances the Council was able to direct that the complaints be transformed into formal appeals and thereby to confirm the earlier instructions: Dasent XIX 251 (1590); XXVIII 286, 412 (1598).
There were a few other instances in which the Council assumed a responsibility equivalent to appellate review. Decrees of the Irish Chancery were reviewed on the merits in two instances, and in others, rehearings by the Chancery in Ireland were ordered. Similarly, orders of the Council in Wales were set aside or their reconsideration directed. In one instance, a decree of the Court of Requests was in effect nullified, on the basis of a report from the Chief Justice of the Queen’s Bench that it was not justified on the merits. Review of decisions by the Chancery in England was clearly a more touchy matter. The procedure for appeal from Chancery decrees, by petition to the King or Queen, was already established. On the other hand, the working relations between Council and Chancery were extremely close, if only for the reason that the Chancellor himself was one of the prominent and active members of the Council; it was accordingly natural to entrust the execution of some Council decisions to injunctions which the Chancery was requested to issue. The Council Register discloses two instances in which the Chancery was requested to grant rehearings in matters already decided in the Chancery, one on the ground of defective notice to a litigant and the other through suspicion.

180 Dasent XXVI 28 (1596), the decree of the Irish Chancellor being found to be “agreeable to equity” in this instance and confirmed; A.P.C. 1626, 2, decree reviewed and modified by the Council.


181 Dasent XXII 119 (1591), and XXVII 225 (1597), both being directions to remit fines imposed by the Welsh Council; Dasent XIV 10, 187 (1586), and XIX 304 (1590), all three being directions to the Welsh Council to reconsider orders in criminal cases that were found to be too severe; Dasent XVIII 108 (1589), commission of three persons appointed to “revise and examine” a decree of the Welsh Council in which partiality was charged.

182 Dasent XXXII 372 (1601). The case reached the Council through a complaint of the party who had secured a decree in the Court of Requests in his favor, asserting that the opposite party had failed to perform it. After the Chief Justice of the Queen’s Bench had reported that the decree was erroneous, the complainant was forbidden to renew his complaint. After this decision by the Council it seems unlikely that the Court of Requests would have been willing on its own initiative to enforce the decree.

No explanation at all can be offered for the action of the Council in undertaking to hear and decide finally another case already pending, without action, in the Court of Requests. Dasent XIV 105 (1586).

183 I HOLDSWORTH, HISTORY OF ENGLISH LAW 372-373 (1922). An illustration of a rehearing ordered in the Chancery through appeal to the Queen appears in MONRO, ACTA CANCELLARIAE 626 (anno 1592) (1847).

184 Dasent III 366 (1551); A.P.C. 1616-17, 39 (1616); A.P.C. 1621-3, 417 (1623). The close connection between the Chancery and Council is further suggested by the entry in Dasent XVIII 147 (1589), where a commission was appointed under the Council’s authority to investigate whether a party to a Chancery case had performed an order which had been “sett downe before me, the Lord Chauncellour.”
of corruption among the under clerks. In another case a decree of the Lord Keeper imprisoning a litigant for contempt was reviewed on the merits by the Council, after a reservation by the Lord Keeper expressing his consent to the review in the particular case but asserting that he "was not to render an accompte of his sentences in that or like causes in her Majesty's said Courte, but onlie to her Majestie alone." These cases must be regarded as quite exceptional. A more normal result of a discovery that the matters in dispute had been examined and decided in the Chancery was a prompt and outright dismissal.

Review of decisions by common law courts was an even touchier matter. Yet there must have been many common lawyers who were prepared to admit that one element in common law procedure, the jury, was in need of greater control. So far the standard method of dealing with false verdicts was the cumbersome and inadequate attaint, though common law courts had long before asserted their own power to grant new trials. The setting aside of false verdicts must have seemed to the Council a natural consequence of its efforts to ensure the empaneling of impartial juries. One method of securing a reconsideration of verdicts was arbitration, or perhaps a new trial with the consent of the parties. But a clear enough case could induce the Council to direct not only a stay of judgment but the grant of a new trial, especially where the judges themselves were willing to confirm that the verdict was plainly wrong. The number of such orders is not large. But

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185 Dasent XXII 209, 377 (1592). In Dasent XV 12 (1587), the channel of appeal to the Queen had been used to attack an order entered by the Master of the Rolls in the Chancery, but the Council directed the Master of the Rolls after his re-examination of the case to report back to the Council so that it could determine whether the Council should take further action.

186 Dasent XXIV 33 (1593). After review, however, the Council confirmed the Lord Keeper's decision and entered its own order for the contemnor's arrest.

187 Dasent XVII 38 (1589); XXIII 237 (1592).

188 1 Holdsworth, History of English Law 225 (1922).

189 Dasent X 372 (1578), arbitration by the Chief Justice of the Queen's Bench of a case in which the losing party had announced his intention of bringing an attaint against the jury rendering the verdict; XII 248 (1580), arbitration by a commission of laymen; XII 11 (1580), new trial ordered by the Council with the consent of the parties.

190 Dasent XI 285 (1579), report to the Council by the Bishop of Bangor forwarded to the Justices of the Common Pleas so that they may "at their Lordships motion" stay judgment and order a new trial; XX 56 (1590), Justices of Assize asked to relieve against verdict after one of them had certified in writing to the Council that verdict rendered at
the Privy Council, through this occasional intervention, gave its support to a practice that was to establish, one hundred years later, a more rational mode of controlling the jury. Perhaps it helped to point the way.

Far more common than either appellate review or revision of common law verdicts were the requests to common law judges to stay proceedings in actions pending before them. It was this type of interference that raised the most serious questions as to the powers of the Council. It is true that common law proceedings were being interrupted on a far greater scale by injunctions from courts of equity; but the tradition was already established that the injunction applied to the litigant and left the common law court's function intact. It was common enough for the Council to threaten litigants, and its threats were at least as menacing as any the Chancellor could use. But it also spoke to the judges, with varying degrees of politeness that left its meaning clear.

Some of the requests for stay of proceedings were quite reasonable and would have been unnecessary if common law courts had not been tied by irrational technicality. Such, for example, were the requests for brief delays while proofs were being assembled or witnesses secured. Similarly, where grounds for authorizing a new trial might exist, as with a verdict based on perjured evidence, it was reasonable to request the common law judges to stay execution pending further examination.

the last Assizes was a "hard verdict"; A.P.C. 1613-14, 405 (1614), verdict obtained by personal influence ordered set aside and case to proceed either to new trial or arbitration; A.P.C. 1619-21, 72 (1619), new trial ordered after full hearing before the Council in the presence of the two common law judges before whom the case had been tried at nisi prius; A.P.C. 1619-21, 226 (1620), verdict ordered set aside and new trial directed after Justices of the Common Pleas certified that minor litigants were prevented from presenting all their witnesses through an error of their solicitor.

191 Dasent XV 207 (1587), Justices of Assize asked to postpone trial until the following term in order to permit a party to prepare his proofs; XV 195 (1587), Justices of Assize asked to grant a stay until the next Assizes if they find that an essential witness has been "conveighed awaie by night." Similarly, Dasent XI 64 (1579), Justices of Assize asked not to proceed with a case concerning which a suit was also pending in the Chancery, since the death of the Lord Keeper had delayed the entry of an injunction against prosecution of the common law action; Dasent XI 309 (1579), Chief Justice of the Queen's Bench asked to grant a stay for 5 or 6 days to permit a jury attainted for a verdict some three years before to read over the record of the earlier case. Other instances of temporary stays, with no reasons specified: Dasent III 403 (1551), Chief Justice of the King's Bench; VIII 14 (1571), Justices of Assize; IX 12 (1575), Justices of Assize; XIX 101 (1590), Chief Justice of the Queen's Bench as to an appeal for robbery.

192 Dasent XVII 208 (1589). On the other hand, it was possible to deal with such cases through coercion of the litigant, as in the injunction issued in Dasent XX 298 (1591), ordering the successful common law plaintiff not to take out execution on the basis of a verdict secured through false testimony.
With other types of stay orders more serious questions were raised. The stay of lower court proceedings concerning private disputes pending before the Council was perhaps a natural consequence of its authority as a prerogative court of justice, but the assertion of such authority was itself significant.\(^\text{193}\) Again it was natural, but significant, that the overriding authority of the Council's process should be asserted by directing the Chief Justice of the Queen's Bench or Common Pleas to stay common law actions against sequestrators who had acted under the authority of the Council.\(^\text{194}\) An even broader principle of immunity of Crown officers for their official acts was enforced by directing permanent stay of common law actions brought on account of such acts.\(^\text{195}\) Again, some general reasons of national policy might be advanced to justify the stay of common law proceedings brought for the purpose of enclosing tillable land, where the Council in the North had reported that the threatened dispossession of tenants "would be a weakening to the Borders."\(^\text{196}\) In other cases, however, no reasons for stay could be urged other than general considerations of equity and fairness between particular individuals.\(^\text{197}\) Whatever the grounds, these requests for stay of proceedings were a direct interference with the judicial function and an invasion of private rights, especially where in terms or by necessary implication the stay was meant as permanent.

It was the activity of the Council and its various commissions on behalf of distressed debtors that raised the most crucial issues. To facilitate its own efforts to negotiate a composition with a creditor, the Council in 1579 requested the Chief Justice of the Queen's Bench to stay the creditor's action at common law.\(^\text{198}\) The principal problem

\(^{193}\) Dasent VII 397 (1570); X 39 (1578); XIII 163 (1581); XXI 42 (1591); XXII 23 (1591); XXVIII 239 (1598); A.P.C. 1621-3, 231, 416. Similarly, stay of a common law prosecution was ordered in a case pending in the Star Chamber: Dasent X 274 (1578).

\(^{194}\) Dasent XII 261 (1580).

\(^{195}\) Dasent XV 332 (1588), Justices of Queen's Bench ordered to stay proceedings; XV 353 (1587); XVIII 367 (1589); XIX 149 (1590); XXV 34 (1595); A.P.C. 1621-3, 479, 508. In Dasent VII 212 (1565), the order to discontinue suits at common law against royal commissioners was directed to the common law litigant himself. It appeared in Dasent XV 308 (1587) that "two lewde and dysordered persons" had brought common law actions against royal officers for ordering their arrest; for this contempt the two persons were ordered arrested by the Council. They then sued out writs of habeas corpus, which the Chief Justice of the Queen's Bench refused to grant, knowing them to be imprisoned by order of the Council; and the offenders were directed to be kept in jail until their common law actions were discontinued. Dasent XVI 69 (1588).

\(^{196}\) Dasent XI 139 (1579).

\(^{197}\) Dasent XXV 377 (1596), stay requested of action in the Common Pleas against a partner prevented from performing his obligation to account by imprisonment abroad; A.P.C. 1623-5, 29 (1623), stay requested of action in the King's Bench against a sheriff who allowed a prisoner to escape but who had since recaptured him.

\(^{198}\) Dasent XI 27 (1579).
soon became that of maintaining the authority of the Council’s commissions, to which the campaign was mainly delegated. The Council intervened not only to threaten a creditor with imprisonment for disobedience of a commission’s decision,199 but to enjoin the litigant from suing at common law against the commissioners themselves for their efforts to carry out the Council’s instructions.200 In two cases the Chief Justice of the Queen’s Bench was asked to grant a stay of actions against the commissioners.201 In 1587 commissioners were prosecuted in the Common Pleas for praemunire, with results that are not disclosed.202 Faced with risks like these, the commissioners were unable to show the desired enthusiasm for their task, though the Council repeatedly bolstered their courage by promises to protect them against any actions by frustrated creditors and to commit any persons molesting them. The Council had taken the precaution to include the two Chief Justices as members of the large Commissions for Poor Prisoners appointed in 1589 and 1590. The other members of the Commissions were urged to consult the Chief Justices in any difficulties and to secure aid and support from this source.203 The divided loyalties that these appointments created must have put the Chief Justices in a most difficult position. It was perhaps for this reason that a collective protest from all the common law judges was decided upon in June, 1591.204 As has already been indicated, the protest used strong language in condemning the invasion of private rights and the interference with judicial functions that had occurred in the recent past, though it suggested no real solution other than the Council’s own self-restraint.205

199 Dasent XVII 6 (1588).
200 Dasent XIV 310 (1587).
201 Dasent X 255 (1578); XIX 441 (1590); the latter entry including a request to the Chief Justice to arbitrate the case himself, even though judgment against one of the commissioners for false imprisonment had already been recovered. In Dasent XX 41 (1590), the common law action against a commissioner had been merely commenced, and had not gone to judgment; the solution adopted by the Council was merely to refer the matter to two laymen for arbitration.
202 Dasent XV 99 (1587), the order of the Council being issued by the Chancellor and Treasurer only and providing that the Master of the Rolls and Solicitor General were to meet with the parties and the indicted commissioners and settle the matter if they could; otherwise to report back to the Chancellor.
203 Dasent XVIII 109 (1589); XIX 182, 396 (1590); XX 9 (1590).
204 In both the versions of the judges’ declaration reproduced in 5 HOLSCHWORTH, HISTORY OF ENGLISH LAW, App. I, pp. 495-7 (1924), it appears from the recitals that the Chancellor and Treasurer had asked “divers” of the judges for their opinions as to the legality of imprisonment by Queen or Council. There is no indication of the date of the inquiries, or to whom they were addressed.
205 Supra, Section F 1.
The years 1587-1591 mark a crisis in the relations of the Crown with common law courts that can be compared only with the crisis generated by Coke some twenty years later. The attack of the common lawyers in this earlier period was concentrated on narrower, but equally crucial issues. The chief weapon was the writ of habeas corpus. It was a remarkable eruption in the Common Pleas in 1587, when habeas corpus was used to release a person imprisoned by the Queen's direct order. It was still more remarkable that the rearrest, under the same order, of the person released by the court should have led the Common Pleas to retaliate by imprisoning those responsible for the second arrest. The Council's concern over the whole situation was expressed in its letter of April 28, 1588, addressed to the judges of the Queen's Bench and reciting that "certain persons" imprisoned by members of the Privy Council had been released on habeas corpus "without their Lordships' knowledge or privytie." The judges were "required and admonished" that they were, out of respect for the Council, to notify the individual Councillor who had signed the commitment order before releasing any such prisoner thereafter. But the Council itself was prepared to take strong measures, for in the same year it directed the Keeper of the Marshalsea not to release a prisoner committed by the Council, under a habeas corpus issued from the Queen's Bench. The same measures were used in two cases in 1592, after the declaration of protest of June, 1591, had been received from the judges. It appears then that by 1590 the lines were drawn for a major battle that was not allowed to occur. No great divisions had yet emerged between the Crown and the people of England over theories of government or larger issues of national policy. Bound by loyalty to the Queen and united by the recent great national effort in defeating the Armada, the

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206 Searche's Case, 1 Leo. 70, 74 Eng. Rep. 65 (1587). The year 1587 is also significant for hostilities between the Queen's Bench and Chancery, involving the use of habeas corpus to release a Chancery prisoner and a resort to prosecution for praemunire, with settlement made possible only by the personal intervention of Queen Elizabeth. Dawson, "Coke and Ellesmere Disinterred," 36 IRL. L. Rev. 127, 134 (1941). It was also in 1587 that the Court of Common Pleas boldly invoked Magna Carta to justify its disobedience to the orders of the Queen, twice reiterated, to admit an appointee of the Queen to an office in the Court. Cavendish's Case, 1 Aud. 152, 123 Eng. Rep. 403 (1582); discussed by Radin, "The Myth of Magna Carta," 60 Harv. L. Rev. 1060 at 1077 (1947).

207 Dasent XVI 48.

208 Dasent XV 349 (1588).

209 Dasent XXIII 95, 330 (1592). In the second of these the order to the Keeper of the Marshalsea included a direction that he was to certify on his return that the prisoner had been imprisoned by special command of the Council, thus presumably complying with the legal requirements of the judges' declaration.
judges like other Englishmen sought compromise, not conflict. In spite of the language of protest in their declaration of 1591, the judges were no doubt quite honest in conceding to the Crown and the Council an overriding power, which was part of the Constitution and which courts could not properly restrain.

On the program of relief to debtors the protest of 1591 had a quite discernible effect. The instructions issued to the Commission for Poor Prisoners in April, 1592, laid principal emphasis on mediation and persuasion and conferred no power of arrest. The Commission was continued until the death of Elizabeth, and received some support from the Council through pressure directed to litigants. In the reigns of the first two Stuarts permanent commissions were abandoned and the program of relief to debtors followed two quite divergent lines. Pure arbitration, through ad hoc committees empowered only to mediate, remained extremely popular; this was the method chiefly used in the system of personal justice organized around James I. Where the Council itself undertook to mediate, as it occasionally did, it still felt free to request the judges to stay common law actions by creditors while its mediation continued. The other main alternative was the royal protection, operating as a rule quite independently of any organized system of mediation. General protections, effective normally for a year, were issued in the name of the King himself, and forbade all actions against the protected debtor during the time limit specified.

In any account of the relations between the Crown and established courts, protections deserve a prominent place. They represent in the clearest form an interference by the prerogative with the enforcement of private rights. Unlike the specific requests for stay that have been mainly considered, they were general in their effect. Their time limit was short, seldom more than one year, but they were renewable and were very often renewed. The infringement of a protection, by con-

210 The Commission is directed to have regular monthly meetings attended by the principal "persons of qualitie" among its membership, who will be able to give "more countenance and authority"; if persuasion fails creditors are to be warned that if they later violate any penal statutes or if any other advantage can be taken against them by strictness of law, they can expect no leniency; and the common law judges are to be appealed to for aid in mediation and for confirmation of the warning that no leniency will be shown where leniency is possible under the law. Dasent XXII 384 (1592).

211 The Council ordered a litigant to appear before the Commission: Dasent XXXI 461 (1601); and when the Commission's efforts had failed summoned creditors to appear before the Council for further hearing: Dasent XXII 354 (1592); XXV 414 (1596); XXVI 56 (1596).

212 Supra, Section E.

213 A.P.C. 1619-21, 75 (1619).
continued prosecution of suit against the protected person, exposed the infringer to arrest and punishment by the Council. Protections were common under Elizabeth; they were, if anything, more common under the first two Stuarts. They were used not only for Crown officers but for private persons in great variety. Granted by act of royal grace, on recommendation of the Council or through the influence of courtiers, they offered the possibility of a privileged class which was immune from suit in the ordinary courts—a possibility that had already been realized in contemporary France. No great extension of this device was needed for the royal administration to exempt its acts from review for legality by established courts. It should be said for the Council under the early Stuarts that it was alive to some of the dangers inherent in protections, that it was careful in protections to debtors to recite specific grounds for the immunities it gave, and that it sometimes preferred a less drastic course. The question, which history leaves unanswered, is whether this self-restraint could have continued if the views of the King's men had prevailed and unlimited ruler-sovereignty had been finally established, in England as in France.

On the whole the Council's interference with judicial proceedings was acquiesced in by the Tudor judges. It is true that in 1550 Justices Lyster, Bromley and Portman gave a bold answer when summoned before the Council to explain why they had proceeded in a prosecution for praemunire contrary to the Council's letters of "restraincte" addressed to them: "Thei aunswered that thei were sworen to suffer the lawes to have their due courses, so that without violatinge their othes thei coulde

214 Dasent XXII 441 (1592); A.P.C. 1621-3, 328 (1622). In the earlier case in Nicolas VII 305 (1542), the Council not only directed the release of the person imprisoned in violation of a protection, but ordered the creditor to pay his expenses. Specific warnings to creditors, without actual arrest, were used in Dasent XX 329 (1591); XXX 365 (1600); and XXXI 426 (1601).

215 For example, the order forbidding any action to be brought by quo warranto to attack a monopoly of glass manufacture granted by the King: A.P.C. 1626, 410. Cf. the order to the Chief Justice of the Common Pleas directing stay of informations against London merchants for ingrossing butter and cheese, in spite of the language of the statute of Edward VI authorizing such informations: A.P.C. 1615-16, 524 (1616); and the direction to the Chief Baron of the Exchequer to dismiss an information brought by a private informer for the importation of wine in a French vessel, in view of the objections raised by the French Ambassador: A.P.C. 1615-16, 238 (1615).

216 Instead of granting a protection, the Council wrote to the Creditors in A.P.C. 1623-5, 43, 52 (1623), requesting them to delay suits against the debtor. Similarly, in A.P.C. 1623-5, 309; A.P.C. 1625-6, 46; and A.P.C. 1626, 101 the Council wrote to arbitrators that the members of the Council "do expect and thinke fitt" that the creditors refrain from prosecuting any actions pending attempts at arbitration.

In several of the entries there are expressions of reluctance to recommend grants of royal protections: as in A.P.C. 1621-3, 114 ("although their Lordships are very tender in cases of this nature"); A.P.C. 1621-3, 288, 407.
staye no proces." The sudden and surprising revolt by the Common Pleas in 1587, against the enforcement of a royal protection, was surely a reflection of the same general state of mind. In 1591 came the protest of all the judges against interferences by the Council, a protest that required some courage though in net result it confirmed the powers that it said had been abused. But apart from these examples there is no record under the Tudors of refusal to grant the stays that were requested or, more commonly, "required."

With the appointment of Coke to judicial office, the conflict that had been suppressed under Elizabeth could no longer be postponed. During the ten lively years of his tenure of judicial office, it was the power of judicature that became, for the time being, the main battleground of constitutionalism. Coke attempted in a variety of ways to assert the supremacy of common law modes of adjudication. But the Council's power to arrest he was not prepared to challenge. As to protections, it was to Coke himself, as Chief Justice, that the King and the Council both turned for enforcement measures against creditors infringing their terms. It may be significant, however, that the specific issue which led to his dismissal from office was the power of the King to stay common law proceedings in which the Crown had or claimed an interest. It was the Case of Commendams that made final and irremediable the breach between the Chief Justice and the King.

After the downfall of Coke there was no one whose conviction and tenacity of purpose could organize the common law judiciary into an

217 Dasent III 159 (1550).
218 Supra, note 171.
219 The referral to Coke by the King, with a request for punishment of the offenders, was in June, 1614 (supra, note 139). In Sept., 1614, the Council requested Coke to arrange the release of a protected debtor who had been imprisoned in violation of the protection in a common law action of debt, "forasmuch as the giving way unto such contempts toucheth to neere the royall authority and prerogative of his Majesty, and the example may prove of dangerous consequence." A.P.C. 1613-14, 548.
effective opposition. By then, in any case, the powers of Crown and Council in private litigation had become a minor phase in a much larger contest, which could scarcely be settled by courts.

G. Conclusion

The question remains why the Privy Council under the Tudors and early Stuarts maintained an activity in the general field of private litigation, over so wide a range and at so great a cost in energy and time. All the evidence confirms the conclusion that the private business of the Council was felt to be a burden, that it interfered with the performance of far more important tasks, and that the reduction of its volume became an objective of royal policy.** The question becomes more pointed when it is recalled that all its varied activity revealed no purpose of major reform in private law doctrine or procedure, except in a single area—the development of more workable and humane methods of administering debtors’ estates.

During earlier stages of English history the expansion of royal authority in adjudication of private disputes had contributed to an important degree to the strengthening of the central government. This was due not only to the new liabilities created through the action of the central courts but to the control thereby established over local government and over feudal and manorial courts. By the sixteenth and seventeenth centuries great changes had occurred. The supremacy of the central courts was firmly established. The confirmation or extension of their authority operated to only a minor degree as a motive for the Council’s activity in the field of private litigation. On the contrary, in much of this activity it competed directly with the royal courts and encroached upon their functions.

It is true that the work of the Star Chamber in the sixteenth and seventeenth centuries served to enhance the authority of the Crown and to create new liabilities in the field of criminal law. It is also clear that the Star Chamber was the Council in its judicial aspect—a judicial branch that was increasingly differentiated in function and procedure though it maintained to the end its intimate connection with the Council, the essential source of its power. In institutional develop-

**221 Even those who, like Bacon, were friendly toward the claims of the prerogative, viewed with strong disfavor the “entertaining of private causes of meum and tuum,” as is indicated in Bacon’s Advice to Villiers [6 Speeding, Letters and The Life of Francis Bacon 41 (1868)]. The efforts to reduce the Council’s private business, dating from the later years of Elizabeth, are referred to above, Section D.
The growth of the Star Chamber parallels the formation of a judicial branch of the French Privy Council, occurring likewise by gradual stages in the course of the sixteenth century. Unlike its counterpart in France, however, the English Court of Star Chamber was specialized from its inception and became increasingly so. It was a high court with very wide power, an essential instrument of Tudor and Stuart government; but it was and remained essentially a court of criminal law.

In its handling of civil litigation the Council showed no similar tendency toward development of a distinct judicial procedure, administered by a specialized personnel. Petitions of private suitors were intermingled with all kinds of administrative business. For the most part they were dealt with summarily. Where formal adjudication was necessary, the shift to a judicial role was accomplished without formality. Particularly under Elizabeth, the Privy Councillors most active in dealing with private cases were men like Burghley and Walsingham, who were also carrying the heaviest burden in general administration. When committees for private cases were restored under the Stuarts, the reasons were apparently the same reasons of convenience that produced committees for other kinds of business. At least until 1626, when the published register ends, there appeared none of those subtle changes in procedure, attitude, and membership that mark the formation of a separate "court." The absence of these symptoms is itself significant. There was as yet no impelling motive for extension of the Council's judicial functions in civil litigation. Even those most friendly toward the growth of royal power did not find here a really useful instrument.

The intervention of the Council in private litigation was connected, in some aspects, with larger purposes of the central administration. The supervision it undertook over the administration of justice was one phase of a broad responsibility over all phases of English government, and helped no doubt to confirm the authority of the Crown. Aid to royal officers was part of a system of rewards for Crown service and gave some guarantees of immunity from liability for official acts; both objects were important in developing new functions of govern-

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222 A qualification of this statement might be suggested, to include the Court of Requests. The derivation of the Court of the Requests from the Privy Council is historically clear; it acquired a distinct judicial procedure and a specialized personnel. But before the middle of the sixteenth century its separation from the Council was quite complete and it had become concentrated on its specialized functions as a minor court of equity.
ment and enlisting much needed personnel. Aid to merchants could be explained through the interest of the Crown in the promotion of trade, and especially through the large influence that economic factors had already acquired in foreign policy. Aid to debtors served in some degree the interests of merchants and the orderly conduct of trade, though it chiefly aimed to alleviate the hardships caused by an over-developed system of creditors' remedies. Among the main grounds for intervention by the Council, aid to debtors was the only one that sought correction of private law doctrine and procedure; but this was because their harmful results were on such a scale as to create a national problem.

Outside these principal areas of activity, a power to intervene in particular cases could naturally be quite useful. It was impossible to define in advance the types of cases in which some interest of the administration might appear. The political prominence of the litigants, the sudden intrusion of some question as to governmental powers, the social consequences of the conduct involved (as with enclosures)—such considerations in great variety might provide motives for intervention, to an extent not fully predictable. The power to act by summary order or by more formal adjudication was a useful supplement to the wider powers of government that were concentrated in its hands.

On the whole, however, the activity of the Council in private cases went far beyond the areas, or the individual situations, in which specific interests of the national administration could be detected. The explanation must be found in the persistence of medieval ideas as to the responsibilities of the Crown in dispensing justice. It is easy to understand why private suitors should have wished, so urgently, to enlist on their behalf the great power of the King and his Council. But response to their appeals required action in an immense variety of minor human conflicts, unconnected with the broader purposes of a national government or with any program of major law reform. The willingness to assume this burdensome task can be explained only through the continued vitality of a very old idea—that political authority implied a duty to ensure the realization of justice in the ordinary affairs of men, a duty that could never be finally renounced.

One is bound to feel admiration for able men, with great power and the courage to apply it, with a broad conception of their duties and a strong sense of social responsibility. Especially is this so when the work they did was useful, when it contributed in so many ways
to the organization of English society and the resolution of social conflicts. Though its activities left no permanent mark on English private law or procedure, the firm controls of the Council were an essential part of the system of Tudor and Stuart judicial administration. Its strong support helped greatly to confirm those ideas of policy and morality that were later to be worked, by other agencies, into the structure of English law. Against this positive achievement, however, must be balanced the dangers of authority in a group without specialized training, impatient with formality and accustomed to the exercise of overriding power. The realization of justice in individual cases required patience, care, and attention to detail. The judgment of the Long Parliament in 1641, in abolishing the private jurisdiction of the Council, was a judgment of condemnation on the institutions of prerogative government and the ambitions they expressed. History has confirmed that the judgment was right—that so great a concentration of power was dangerous, however wisely the power was used.