This is to certify that the

thesis entitled

COLLABORATION AND CONFLICT:

COMMONS, LORDS AND APPEALS FROM CHANCERY

presented by

STEPHEN CHRISTOPHER CHARNEY

has been accepted towards fulfillment
of the requirements for

M.A. degree in History

Major professor

Date July 16, 1993

COLLABORATION AND CONFLICT: COMMONS, LORDS AND APPEALS FROM CHANCERY

By

Stephen Christopher Charney

A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER OF ARTS

Department of History

1993

ABSTRACT

COLLABORATION AND CONFLICT:
COMMONS, LORDS AND APPEALS FROM CHANCERY

By

Stephen Christopher Charney

Historians of seventeenth-century England have traditionally neglected the House of Lords as an aspect of constitutional history worthy of study. Instead, the Commons is the focus of their attention. This practice derives from the tendency to focus on aspects of the English constitution possessing the most relevance to modern times.

This investigation of one aspect of the Lords' functions, the appellate jurisdiction over Chancery, contrasts the arguments made in the secondary literature with contemporary documents. The use of the Journals of both Houses provides a means to understand the actual dynamics of the appellate function of the Lords.

This study demonstrates that historians of the Stuart period have left a valuable aspect of the English constitution uncovered. The Lords revealed itself to be resilient in a period in which many historians assume it to have been in decline.

TABLE OF CONTENTS

LIST OF TABLES

INTRODUCTION

In the two short parliamentary sessions of 1675[1] a battle raged between the Lords and the Commons over the right of the former to handle appeals from decrees given in courts of equity.[2] The Commons denied that the upper House could legally exercise such a jurisdiction, though for the previous fifty years the Lords had taken cognizance of, and made judgments on, appeals from courts exercising an equitable jurisdiction. This struggle between the Houses, hindering the conclusion of legislative and revenue matters and leading to two prorogations, effectively prevented a successful conclusion to the business that Charles II and the Earl of Danby had planned for those two sessions. In the next session, of February 1677, however, something unusual happened. After the lengthy prorogation of fifteen months, the Commons, with no explanation, failed to revive their challenge to this crucial element of the Lords' judicial functions.

As a result of this victory the House of Lords had comfortably established its position in the constitution as the supreme appellate court of the nation for both the common law and equity. The ostensible acquiescence of the Commons to the Lords' appellate jurisdiction over decrees

from equity courts coincided with the historic jurisdiction which the Lords possessed over appeals from common law courts in the form of writs of error. It was only the equity side of the appellate jurisdiction that was ever challenged by the Commons. Though the Lords did not consider in the session of 1677 the particular case that was at the center of the conflict over appeals from courts of equity in 1675, Sherley v. Fagg,[3] the peers continued in this new session to exercise their appellate jurisdiction over courts of equity as if it had never been challenged. This outcome was crucial to the viability of the Lords' role in the constitution. One contemporary member of the Lords, Bishop Burnet, recognized the supreme importance of the House's appellate jurisdiction to its function as an institution, pointing out that in the second half of the seventeenth century appeals from Chancery, "grew on by degrees to be the main business of the house of Lords."[4]

Though the immediate result of this struggle was significant, this silent victory entailed more than a simple justification of the Lords' appellate function, for it was the last of a series of attacks by the Commons in the seventeenth century on the constitutional role of the House of Lords. These momentous episodes of constitutional conflict have received curiously little attention from historians of the era. This problem stems largely from a much broader one: a lack of interest by scholars in the

House of Lords as an institution in general, in particular in the period after the Civil War. Historians of the Restoration period have chosen to ignore the fundamental changes in the constitutional role of the Lords' House.[5] They have devoted their attention to a seemingly more pertinent but teleologically selected topic, the House of Commons' progression to sovereignty. The historiography of the Restoration period is narrowly focused on the relations between the Stuart kings, Charles II and James II, and Parliaments, which are typically discussed by historians in terms of a single institution, the Commons.[6] They reflect on the Lords only as a peripheral consideration, an institution swiftly declining in importance after the upheavals of the Civil War. Stuart historians, still heavily influenced by a Whiggish set of priorities, have denied the House of Lords agency, treating it either as an appendage of the Commons in moments of opposition to the king or as a mere tool of the king used to keep the Commons in order. In effect, the House of Lords occupies a position in the historiography of the Restoration period as a topic worthy of research and study only when it provides insight into the growth in power of the House of Commons and its supposed attempts to wrest sovereignty from the monarch. Restricted to such a perspective historians have neglected the struggle between the two Houses in the period of the Restoration. It is understandably not as attractive to most historians, as the

study of conflict between the king and the Commons yields more material for explaining the present-day hegemony of the Commons.

The true implications of the conflicts in the Restoration period between the Lords and the Commons over the Lords' functions call into question the viability of the narrow focus of Stuart historians and mandate a reappraisal of the actual relations among the king, the Lords and the Commons. The narrow Whig approach to constitutional history has resulted in the neglect of a monumental chapter in the historical development of Parliament. The first fifteen years of the Restoration period witnessed several vicious struggles between the Lords and the Commons. These episodes threatened the position of the House of Lords in the constitution and their outcomes set the boundaries for its subsequent development. The resolutions to these conflicts also determined the limits to which the Commons would pursue any further encroachments on the power of the Lords. These defining outcomes were especially significant as they resolved the situation of fluidity that had existed due to significant developments in the constitutional position of the House of Lords in the earlier half of the seventeenth century.

Corinne Comstock Weston has demonstrated how most contemporary politicians and political thinkers of the period just prior to the outbreak of the Civil War had come

to accept the primary role of the House of Lords as a mediator, or barrier, between the king and the Commons, in effect constituting the balancing element in the constitution.[7] Weston makes this suggestion of a mediatory position of the Lords' House based primarily on its legislative capacity. Just as fundamental to the Lords' role in the constitution, however, was the acquisition of an inchoate judicial capacity in the early Stuart period and its subsequent development during the Civil War and in the Restoration period. This time of fundamental alteration constituted a turning point in the evolution of Parliament, amounting to a monumental change in the English constitution.

These changes marked the end of a long process of evolution during the sixteenth and the seventeenth centuries in the primary characteristics of the two Houses of Parliament. The business inscribed in the Journals of both Houses shows that the Lords and the Commons were becoming more specialized in their functions in this period: their particular roles in the constitution were becoming better defined. The Commons investigated the grievances of the realm, initiated legislation to remedy those grievances, and granted supplies of money to the king. These functions gradually became identified chiefly with the House of Commons. The Lords, while playing a significant role in these same activities, slowly modified their degree of

participation in comparison to the Commons, or adopted their own methods to deal with the same problems, an evolution that was especially noticeable after the Restoration. The conflicts between the Commons and the Lords in the 1660's and 1670's settled these changes. Through these conflicts the Commons managed to monopolize the granting of revenue and also to wrest the original jurisdiction over civil cases from the Lords, placing this function in the hands of the ordinary courts of common law and equity. These losses altered the position of the Lords in the constitution. This did not mean that the House of Commons had become a more important institution in the functions of the state relative to the Lords but that the distinction in the character of the primary activities of the two Houses was better defined.[8] The House of Lords after the episodes of conflict did not become simply a junior legislative partner of the Commons but firmly established itself as the supreme appellate court of the nation for both the common law and equity. The effect of what the Lords lost through their struggles with the Commons in the Restoration period was mitigated by this outcome, and they preserved for themselves a unique and practical role in the constitution. This result, however, would not have been so obvious to the peers in the upper House in the Restoration period who were plagued by a seemingly vindictive interference by the House of Commons in what they perceived to be their domain.

One function of the Lords that the Commons challenged in this period was the right to initiate and amend bills of revenue. This power, however, was more nominal than functional. Since the late fourteenth century it had been the accepted rule for the Commons to initiate grants of revenue, a custom that was acknowledged by Henry IV in 1407.[9]

That the Commons had the sole right to initiate such bills, however, is difficult to ascertain.[10] The Lords in the seventeenth century rarely attempted to alter money bills sent up from the Commons and when they did their efforts were typically motivated by concerns of privilege, a tenacious assertion of a claim to possess the right to assess their own taxes and guide the collection of their grants themselves. In the Restoration period the Commons denied the right of the upper House either to initiate or to amend money bills. Though the Lords initiated such bills three times in this period, in 1661, 1665, and 1677, the Commons stopped each attempt, reminding the Lords in each case of the impropriety of their action. Attempts by the Lords to amend money bills met the same fate after initial success. In the Convention Parliament of 1660 the Lords had amended several revenue bills without the protest of the Commons.[11] This minor success soon turned into defeat. The Lords' last successful attempt to amend one of the Commons' money bills occurred in 1663, after which the Commons forcefully applied their maxim that the Lords had no say in

the composition of revenue bills. The Lords unsuccessfully tested this constraint until 1679.[12]

The other area of significant conflict between the Commons and the Lords was over the judicial functions of the Lords. While the House of Commons had won its victory against the Lords over money bills relatively easily, the struggle over the Lords' judicial powers was not only a matter of more vicious conflict but also had a more significant effect upon the course of the political events of the realm. The conflicts over money bills did not disrupt parliamentary proceedings to the same degree as those relating to the Lords' judicial functions. The two most significant attacks made by the Commons, that against the original jurisdiction of the Lords over civil matters and that against the Lords' handling of appeals from Chancery, together led directly to four prorogations of Parliament and effectively forestalled the successful conclusion of vital government business. The Lords lost their original jurisdiction over civil cases as a result of their struggle with the Commons over Skinner v. East India Company from 1667 to 1669. Several years later, however, in the case of Sherley v. Fagg in 1675, the Lords preserved through a tremendous effort the other element of their judicature that was challenged by the Commons, that of the appellate jurisdiction over decrees given in courts of equity.

These judicial struggles were part of a process of change which can be discerned as commencing in the earlier half of the seventeenth century, one that left in the Lords' hands a large variety of judicial powers in addition to the primary judical roles they had historically maintained, the trial of peers and those who violated the privileges of the House, and a nominal jurisdiction over writs of error. The forms of judicature that they subsequently exercised in the early seventeenth century included judgment in impeachments originating in the Commons, an original jurisdiction over both civil and criminal cases, an appellate jurisdiction over cases from courts of equity, and a transformation of the nominal jurisdiction over writs of error into an actual jurisdiction. This broad acquisition of judicial authority, commencing in 1621, was supported by leading members of the Commons, including Coke and Noy, and by certain Lords, who, through citation of precedent, both correct and incorrect,[13] linked the House of Lords to the curia regis (and other institutions) of medieval England, which had possessed an amorphous jurisdiction over all sorts of matters, including petitions for justice.[14] In 1621, the Lords began to exercise a jurisdiction that was similarly broad. At least one historian has recently noticed the similarity of the Lords' jurisdiction as it had developed in the 1620's to that of the old curia regis.[15]

In the period from 1621 until the final settlement of

their judicial powers in 1675 the Lords redefined their primary role in the constitution. Though still a legislative body, the House of Lords had become a judicial body with a somewhat amorphous jurisdiction. Its judicial functions began to develop at the same time as the occurrence of an increasing recognition by lawyers and members of both Houses of serious problems in the English legal system. The two circumstances, however, as will be seen, were far from coincidental. The appropriation by the Lords of a significant judicial role was not the result of a sudden or dogmatic seizure of power but the logical outcome of the changing character of the two Houses in the seventeenth century and the contemporary conditions of the judicial system of the realm. The central purpose of the acquisition of a judicial role by the Lords was bent on solving the problems raised by corruption and the slow process of justice in the legal system and the inability to effect an adequate means of relieving grievances of a legal nature created by that system.

In spite of the increasing differentiation of the roles of the Commons and the Lords in the Stuart period, both Houses developed means in which they could address the grievances of subjects. Herein lies the key to the development of the judicial functions of the upper House and the relationship that it occupied with the Commons. The House of Lords, through its acquisition of a judicial role,

became a partner to the Commons in the redress of grievances of a legal nature. The Commons in the early half of the seventeenth century made several outright attempts to reform the legal system through public legislation, the primary goal of which was to give the individual subject the ability to seek efficient and fair justice in both common law and equity courts. Such grand manoeuvres, however, usually found vehement opposition from the king, particularly when the reforms involved Chancery. Early in the session of 1621, for example, ten bills were created by the Committee for the Reformation of Courts of Justice of the Commons for the expurgation of corruption from, and reform of, the court system, particularly Chancery.[16] This effort was preceded by less grandiose, but equally challenging attempts to reform Chancery in 1610 and 1614.[17] That these attempts largely failed testifies to the difficulty of reforming the legal system for the sake of securing justice for all subjects. Nor were the methods for achieving redress of grievances on an individual basis any more effective. The Commons investigated the complaints of subjects through several committees in the early Stuart period, the chief of which was the Committee for Grievances. This Committee investigated the allegations presented in petitions from subjects and would usually attempt to redress a grievance through the use of a private bill. The petitions would often ask the Commons for aid when an ostensibly unfair

decision was made in a court, even asking for help in securing the reversal of that decision. Sir Edward Coke, however, considered this process to be inefficient as an ordinary means to secure the redress of grievances for individuals.[18] Private bills frequently were set aside to take care of other business such as public bills and could often be expensive to litigants due to fees.[19] A petition to the king for redress, a means of avoiding the delays of private bill procedure but one which lacked the force of legislation accepted by both Houses, meant that the resolution of the grievance would be subject to the king's whims. The Commons thus ran into many problems in their attempts to secure the redress of grievances through their own means.

The Lords provided an alternative means for subjects to secure redress. As a court, the Lords could handle individual grievances in a fashion that the Commons could not. The revived judicial powers of the Lords in the seventeenth century gave them the ability to rectify the grievances of individuals much more expeditiously than the Commons.[20] The judicial role of the Lords allowed them to provide solutions to the problems of litigants without the concurrence of the Commons or of the King. The upper House had, in fact, become not only a court in its own right but the highest court in the nation. As a result of the process by which the Lords considered petitions asking for justice,

they came to share the role that had traditionally been ascribed to the Commons alone, that of "inquisitors of the realm."[21] The judicial role of the Lords provided a means to solve what was one of the most significant problems in the early seventeenth century, one recognized as such by Lord Chancellor Ellesmere and Coke, "slow justice."[22] Problems such as corruption, an overwhelming number of cases, and jurisdictional conflicts between different courts hampered the efficient process of justice. The Lords provided a means of mitigating the difficulties of this situation, giving subjects an alternate source of justice. The Commons, in spite of attempts to acquire a judicial power for themselves, as will be seen, were never able to duplicate the judicial role that the Lords developed in the seventeenth century.

This thesis will analyze the development of the use of judicial authority by the House of Lords to redress grievances from the perspective of the most perplexing element of its judicial powers, the appellate jurisdiction over decrees given in Chancery, and the subsequent struggle between the Lords and the Commons over it. The other instances of conflict between the two Houses were much more explicable in motivation. The Commons had historically perceived the grant of revenue as their peculiar function. The key to this conflict on the part of both Houses was privilege. For the Commons to consolidate their hold over

grants of revenue in the 1660's was nothing more than an affirmation of a de facto right, though it was important also to the Lords in terms of privilege. The other significant matter of contention, the Lords' original jurisdiction over civil cases, also has easily identifiable causes. The Lords' original jurisdiction eventually became threatening to the common law courts. Though the Commons had ostensibly acquiesced to the development of this jurisdiction in the early 1620's, they had done so when the Lords had considered only cases of an unusual nature that could not easily have been resolved in the ordinary courts of common law or equity. Such a jurisdiction was not likely to provoke outrage among the common law lawyers in the Commons. During and after the Civil War, however, the Lords came close to interfering in the ordinary process of the common law, deciding cases that might have been brought before the common law judges. The evolution of this jurisdiction created a threat to the legal system that the Commons, as will be seen, consistently displayed themselves as adamant to protect. In the case in which the Commons challenged the Lords' original jurisdiction, Skinner v. East India Company, several members of the Commons were brought before the Lords, creating a problem of a conflicting interpretation of the boundaries of parliamentary privilege. An analysis of the dynamics of this case, however, shows that the primary concern of the Commons was the character of

the jurisdiction itself, although they were still concerned about the privileges of their members. In addition, if this function were taken from the Lords there was a ready alternative, as the jurisdiction could immediately be left to the common law courts.

The struggle over the appellate jurisdiction over decrees from courts of equity, however, does not yield such a simple explanation; its development and the subsequent conflict over it are wrapped in mystery. As in Skinner, a member of the Commons was involved in the case on which the struggle over the appellate function focused, Sherley v. Fagg. Unlike Skinner, however, there is little indication that the Commons had any other basis for challenging the Lords' appellate function. This aspect of the Lords' jurisdiction in no way created a threat to the common law, as the original jurisdiction had. In addition, the development of this jurisdiction provides much evidence, both direct and indirect, that the Commons supported this jurisdiction of the Lords. Nothing substantive indicates that the Commons had any real desire to remove this function from the Lords' House. No available alternative for the Lords' appellate jurisdiction existed in contrast to the case of original jurisdiction, where jurisdiction could immediately be transferred to the ordinary common law and equity courts. In addition, after the episode of struggle in 1675 the Commons made no further attempt to challenge

this aspect of the Lords' functions, although one would expect them to have done so if they had been fundamentally opposed to this jurisdiction; whereas in several instances in which the Lords came close to exercising an original jurisdiction after 1669, the Commons were vehement in denying the right of the Lords to do so. The struggle over Sherley v. Fagg does not fit into an easily explicable scheme, as the other instances of conflict do. The House of Commons had, in effect, little substantial reason to attempt to abolish the Lords' jurisdiction outright, though the fact remains that it made such an effort in 1675.

The historiography of this period has provided only inadequate explanations for this conundrum. The tendency has been to rely on two untenable assumptions. The first of these is a simple acceptance, characterized by the teleological views expressed in the historiography of this period, of the constant progression of the Commons, of the belief that the House of Lords was listlessly allowing itself to be victimized by the increasing power of the Commons as a result of the peers' incapacity to handle their own business and take their duties seriously. Many historians consider the Lords to have been incapable of handling the immense powers at their disposal, chiefly their judicial functions, and have been accused of contributing to this image themselves through both "neglect and slackness."[23] The second assumption, parallel to the first, is that the

House of Commons, jealous of all sovereign power outside itself, desired to take powers away from the Lords without considering the implications of its own actions. This perception has particular bearing on the judicial struggles because of the assignment of similar motivations to the Commons' challenges to the Lords' original jurisdiction and its appellate jurisdiction.

The scholars who have commented on the judicial struggles have typically represented both episodes of judicial conflict as facets of a general challenge to the Lords' jurisdiction, in effect suggesting similar motives for the attempts to abolish both the original jurisdiction and the appellate jurisdiction of the Lords. Elizabeth Read Foster, though pointing out that the Commons had acquiesced in the development of the Lords' judicature in the pre-Civil War period, suggests that the Commons and the judges after the Restoration simply decided to "cut back the jungle of jurisdiction" that had resulted largely from the turmoil of the Civil War and thus attacked both the original and appellate jurisdictions of the Lords.[24] She does not suggest that the motives for the attacks on the two were different. Frances Helen Relf holds to the same basic contention as Foster, that the protests of the Commons against the Lords' judicature resulted from the general extension of the Lords' jurisdiction during the Civil War.[25] Flemion offers a more extensive explanation for the challenge of the Commons to

the Lords' original and appellate jurisdiction, though entertaining the same notion of a general opposition to the two very different forms of judicature of the Lords. He suggests that the Commons had originally supported the acquisition by the Lords of the appellate jurisdiction, though not of an original jurisdiction. However, according to Flemion, the Commons quickly became disillusioned with the incapacity of the Lords to handle both functions because it subsequently interfered in the jurisdiction of the common law courts. In effect, "the fear that the common law courts might be subordinated to this new tribunal came to outweigh the abuse of slow justice in their minds, and members of the house of commons attempted to remove from the upper house all judicial functions."[26] All three historians entertain the notion, which seems to me basically inaccurate, that the Commons saw both elements of the Lords' judicature as dangerous and threatening to the proper course of justice; they assume that the attacks made on the Lords' appellate and original jurisdictions had similar motives.

One of the keys to understanding the difference between the two, which the above interpretations do not take into consideration, is unrelated to the simple category of constitutional opposition. This is the unusual political context in which Sherley v. Fagg was broached and the appellate jurisdiction of the Lords was challenged. The struggle took place at that extraordinary moment in the

Restoration period in which an opposition in the upper House was forming under the Earl of Shaftesbury. There was an opposition in the House of Commons also, though circumstances suggest that its members were not controlled by or directly connected with Shaftesbury's group in the Lords; they possessed similar aims but different methods for pursuing them.[27] A. S. Turberville suggests, in reference to the struggles between the two Houses in this period, particularly that over Sherley v. Fagg, that "[t]he issues are exaggerated and distorted by a passion which is sometimes being industriously fomented for ulterior purposes."[28] Turberville claims that Shaftesbury, in his opposition role, exploited such opportunities of conflict between the Houses.[29]

Though this struggle took place before the infamous Exclusion Parliaments of 1679 to 1681, a potent opposition party under Shaftesbury was apparent as early as 1675, when it focused its hostility on the Earl of Danby, the Court, and the Anglican policies associated with them. The impatience of Lord Keeper Finch with the difficulties resulting from the struggle between the two Houses and his recognition of the efforts of an opposition to pursue its own agenda were apparent in his plea, "Away with those ill-meant distinctions between the Court and the Country...."[30] Shaftesbury's encouragement of the upper House to fight for its jurisdiction against the Commons is apparent in his

conduct in the conflict, for he often took the lead in defending the jurisdiction of the Lords. In 1675 he warned of the danger to the Lords in the struggle with the Commons by telling the Lords that "this Matter is no less then[31] Your whole Judicature, and Your Judicature is the life and soul of the Dignity of the Peerage of England, you will quickly grow burdensome, if you grow useless...."[32] Shaftesbury's vehemence in defending the Lords' appellate function may have been spurred on by the political struggles of this period. There is evidence that Shaftesbury used the conflict over the Lords' judicature to advance his own goals. Bishop Burnet, in fact, referring to the case of Sherley v. Fagg and the struggle that it caused between the two Houses, claimed that "Lord Shaftesbury said, it was laid by himself."[33]

The crisis may have transpired at a particular moment because of the work of Shaftesbury, but why was this particular matter used by the opposition to disrupt parliamentary proceedings? Why was this issue so successful in doing just that? The question is whether there was a genuine opposition in the Commons to the Lords' jurisdiction over appeals, and the controversy created by Shaftesbury simply provided a pretext to challenge it, or an opposition in the Commons to the Lords' jurisdiction merely resulted from a question of privilege blown out of proportion, leading to calls for the abolition of the Lords'

jurisdiction. I will argue that the conflict in 1675 over the Lords' appellate jurisdiction was due primarily to the dynamics of the Lords' consideration of the case of Sherley v. Fagg, and also of two other cases presented in the same session involving members of the House of Commons, Stoughton v. Onslow and Cripes v. Dalmahoy. This thesis argues against the suggestion that the struggle over the Lords' appellate function arose from factors directly related to the historical development of this power. Instead, I will demonstrate that the conflict had little to do with a general hostility between the Commons and the Lords over the judicial functions of the Lords, an interpretation that, although incorrect, could easily be derived from the occurrence of other instances of judicial conflict between the two Houses in this period, particularly that over the original jurisdiction of the Lords. Several circumstances suggest that the dispute over the appellate function of the Lords over decrees from equity arose simply from the particular aspects of the cases and the context in which they were considered. In effect, the struggle over the three cases involving members of the Commons was motivated primarily by questions of privilege, and only secondarily turned into a heated struggle that led to calls from the Commons to prohibit the Lords' jurisdiction over appeals from Chancery and other courts of equity. Before the consideration of these cases there is no indication of a

significant opposition to the Lords' appellate jurisdiction from members of the Commons in the entire period from 1621 to 1675. What will be demonstrated, however, is that in the Stuart period in general, and in the Restoration period in particular, both Houses were becoming more protective than they previously had been of what they considered to be their privileges, the scope and definition of which changed frequently. This is a key to understanding the struggles between the two Houses in the Restoration period.

This thesis, in sum, will argue that the struggle over the Lords' right to handle cases of appeal from Chancery and other courts of equity was due primarily to the immediate context of the three cases, especially the manipulation of Shaftesbury, and not to an opposition of the Commons to the House of Lords' judicial powers in general or to their jurisdiction over appeals from Chancery and other courts of equity in particular. The House of Commons had, throughout the course of the evolution of the Lords' appellate jurisdiction, shown itself willing to accept the necessity of the Lords' handling of cases of appeal from courts of equity. Even in the Restoration period the Commons had not contested the right of the Lords to handle any particular appeal from Chancery, though in the case of Slyngsby v. Hale in 1670, wherein Hale was a member of the House of Commons, they reminded the Lords to be cautious about the privileges of the Commons.[34] What the members of the Commons would not

suffer was what they perceived as a violation of their own privileges; and it was only in 1675 when the opposition Lords under the leadership of Shaftesbury pressed their fellow peers to maintain their House's right to handle cases involving members of the Commons in times of Parliament, that the Commons challenged the right of the Lords to handle appeals from Chancery and other courts of equity in general. If, before then, particular members of the Commons were opposed to the consolidation and refinement of the Lords' jurisdiction over appeals from Chancery, such a feeling did not extend to the majority, or else the Commons would have contested this jurisdiction at a different, more opportune time, which they did not. This thesis will demonstrate that factors other than the character and the growth of the Lords' jurisdiction over cases of appeal from Chancery and other courts of equity supplied the reasons for the struggle in 1675.

To accomplish this goal I must consider the views and actions of both institutions of Parliament, not focusing solely on the Commons, the priority of Whiggish historians, nor dealing with the Lords as an anomalous institution that needs to be treated separately. A chief aim of this thesis is to understand the dynamics of the interaction between the two Houses in this period. In the process this analysis of an episode of conflict between the Commons and the Lords will suggest that investigation of the relations between the

two Houses in the Stuart period is crucial to an understanding of the significant constitutional changes of this period.

I. Necessity and Opportunity:
The Foundations for a Supreme Court -- the 1620's

In 1621 several developments occurred that had significant implications for the evolution of the judicial capacity of the Lords' House, including the future controversial appellate jurisdiction over decrees from equity. The Lords handled more in 1621 than just impeachments, the only aspect of the Lords' judicial capacity that has received significant attention from Stuart historians.[1] Parliamentary historians have largely neglected the other judicial developments of this year, though one, Flemion, has pointed out that the judicial developments of 1621, including that of the appellate jurisdiction, amounted to "the greatest expansion of constitutional authority for the upper Houses since its inception."[2] In 1621 the Lords began to hear civil cases initiated by petitions asking for justice that had not been decided in the other courts of the realm, a practice that amounted to the assumption of an original jurisdiction. This creation of a jurisdiction over civil cases of the first instance was accompanied by the acceptance of an original criminal jurisdiction over commoners in matters unrelated to the privileges of either House, which was unlike impeachment in that it was not initiated on the formal complaint of the Commons.

For the judicial role of the Lords as it stood in 1675, after Sherley v. Fagg, however, the most significant judicial developments of the 1620's were the revival of the upper House as the chief appellate court of the nation for the common law,[3] and the creation of a foundation for the development of the Lords' appellate jurisdiction over decrees from equity. The resumption of the appellate jurisdiction over writs of error was relatively automatic and unquestioned by either the king or the Commons. The practice and historical justification for handling these writs, however, though lacking controversy themselves, contributed to the development of the other, more controversial half of the Lords' appellate jurisdiction: that over courts of equity. The appellate function expressed in the handling of writs of error supplied a precedent that did not go unobserved by those who wished to create a means to appeal decrees given in courts of equity.

The appellate function of the House of Lords in regard to the common law courts was well established, dating back to the fourteenth century[4] and recognized as one of its particular characteristics.[5] The year 1621, however, reestablished its actual jurisdiction over appeals from such courts, which had become largely nominal over the course of the previous century. The Lords were nominally the court of last resort, after King's Bench and the Exchequer Chamber, for a litigant who believed that his or her trial in a common law court was unjust as a result of an error in the handling of the case. The common law courts did not allow

for the rehearing of a case if a litigant wished to appeal a decision.[6] A litigant could receive a writ of error only for "errors in law based on the record."[7] The Lords received, as far as the Journals indicate, only five writs of error between 1514 and 1589.[8] The exercise of this judicature had become almost non-existent after the court of Exchequer Chamber was created in 1585. No writs of error were recorded as being brought before the Lords from 1589 to 1621.[9] In 1621, however, the Lords began hearings on writs of error again. Though only four writs of error were brought before the Lords in the 1620's,[10] twenty-six were brought before them from 1640 to early 1646,[11] 328 from April 1646 to December 1648,[12] and forty-nine from June 1660 to November 1675.[13] Thus, the Lords had reclaimed a part of their appellate jurisdiction that had fallen into disuse.

The Lords' appellate jurisdiction over the common law courts, though latent in the early seventeenth century, was not forgotten, most particularly by Coke, who cited it in conference with the Lords to encourage them to participate in the impeachment of Giles de Mompesson. It supplied a convenient precedent for the Lords to exercise an appellate jurisdiction over cases from equity courts. If they exercised an appellate jurisdiction over the common law courts, it would not have been difficult for them reason, or to be convinced, that they had the right to exercise a similar jurisdiction over courts of equity. The inception of a rudimentary jurisdiction over appeals from Chancery and other courts of equity occurred at a time in which many,

especially members of the House of Commons, were frustrated by the type of justice that could be secured in Chancery, the chief court of equity. The Commons made an effort to relieve some of these problems but was forced to recognize the limits on its ability to offer relief, especially the inadequacy of the methods of appeal from decrees made in Chancery. I will suggest that certain leaders of the Commons, in cooperation with an opposition element in the Lords, encouraged the rudimentary system of review over appeals from Chancery that the Lords began to develop in 1621. The House of Commons, understanding the necessity of such a jurisdiction, welcomed its further development.

This suggestion, however, is problematic, for it is impossible to demonstrate with positive evidence that the Commons recognized the Lords' jurisdiction as legitimate or even as the best way to handle the problems that they observed in Chancery. There exists no outright declaration from the Commons or from the king approving of the development or growth of the appellate function of the Lords. Instead, my case will be based largely on evidence of either a suggestive or a negative nature. The first suggestive piece of evidence is that the Commons clearly recognized that the Chancery, because of several defects, especially the lack of an adequate means of securing an appeal from it, did not adequately give justice to litigants in cases tried before it. A second circumstance is that the Commons recognized that they could not effectively take care of the problems themselves, though they made attempts to do

so. The most significant piece of evidence is largely negative: the lack of dissent from the attempts of the Lords to handle appeals from Chancery in the 1620's. As the next chapter will show, this state of affairs lasted until 1675.

This absence of opposition to the Lords' appellate jurisdiction is seen in its true significance when one considers the general tendency of the constitutional manoeuvrings of this period. The king, Lords, and Commons in the seventeenth century showed themselves very quick in attacking innovations that they thought detrimental to their positions in the constitution or to their privileges. Both Houses of Parliament formulated stricter definitions of their privileges, many of which had been assumed to exist earlier, some extending back into the medieval period. For the Commons, the most important of those defined in the early seventeenth century were their jurisdiction over contested elections to their House, their freedom from incarceration while Parliament was sitting, the right to debate freely, and the right to organize the business of the House.[14] Over the course of the seventeenth century, these privileges were challenged quite often, particularly by the king, who saw them as infringements on his prerogative. In 1621, when the Commons claimed their privileges as rights that were inviolable, James retorted that their claim was unfounded and that what they considered to be their privileges by right came "from the grace and permission of himself and his ancestors;...for most of them grow from precedents, which shows a toleration rather than an

inheritance."[15] The Commons, very jealous of their privileges, did not accept the validity of this statement. Yet in the 1620's they were not as successful in defending their privileges as in the Restoration period, as will be seen. In 1629, for example, several members of the Commons, John Eliot, Denzil Holles, and Benjamin Valentine, were arrested for attacking the Speaker of the House in order to prevent him from adjourning the Commons. The Commons, though angered, could do nothing to defend their privilege of freedom from arrest during the sitting of Parliament until 1641, when it declared that the arrests of the three members amounted to a violation of privilege.[16]

The Lords also were very cautious about defending what they saw as their privileges and had some difficulty defending them against the prerogative of the king in the early Stuart period. They possessed the same privileges as the Commons and more, including the right to be tried by their peers. In 1621 they had John Selden and William Hakewill investigate and compile a record of their privileges.[17] One that was important to the Lords, and which they had difficulty in persuading the king to recognize, was the right of a peer to be summoned to Parliament. In the medieval period magnates who had been summoned to one Parliament might not be called to the next. In 1626, when the Earl of Bristol was not summoned to Parliament, the Lords' Committee for Privileges, established in 1621, declared that as a peer he had a right to sit in the Lords.[18] While in the early Stuart period concern over privileges was

caused chiefly by the fear that the king might violate them, in the Restoration period problems over privilege had an increased bearing on the relationship between the two Houses. Even in the 1620's, however, there were instances in which jealousy over privilege caused problems between the two Houses.

Jealousy over privilege was clearly displayed by king, Lords, and Commons in one significant judicial innovation in this period. In trying Floud the House of Commons was going beyond the traditional boundaries of its jurisdiction over those who violated the privileges of the House. Floud had not done anything that would have placed him within the Commons' jurisdiction. After the Commons' trial of *Floud*, the king contested the right of the Commons to exercise an original jurisdiction;[19] the Lords also protested, complaining that the Commons' action "doth trench deeply into the Privilege of this House, for that all Judgments do properly only belong unto this House."[20] The Commons responded by affirming their own right to act as a court, representing this as one of their own privileges, though they acquiesced in surrending this particular case to the Lords. The concern of the king, Lords and Commons to preserve their own prerogatives and privileges is a general indication that, if a constitutional innovation occurred and was allowed to take root, it was either supported by the other elements or at the very least recognized as a temporary necessity.

The Commons would have had good reason to support the

inception of the Lords' jurisdiction in 1621. As the chief repository for grievances, the House of Commons was more intimately aware than the Lords of problems with the justice given in the courts in the early seventeenth century. Coke claimed, "Members of the House were inquisitors of the realm, as coming from every part of it and being more sensible of grievances than the Lords in the Upper House were because they were once liable unto them."[21] Before the judicial innovations that made it worthwhile to petition the Lords, it was to the Commons that English subjects inevitably turned to with complaints of the legal system. In their debates and their actions in 1621, members of the Commons showed themselves very concerned about the quality and fairness of justice that could be given in the court of Chancery and other courts of equity and sought some way to address these problems. It is not possible, however, to uncover the reaction in 1621 of members of Commons to the first instance of the exercise of an appellate jurisdiction by the Lords. In 1621 the Lords took cognizance of only one appeal, and this case may not have reached the attention of members of the Commons at large. The lack of protest may have resulted from ignorance of the case rather than from approval of the Lords' actions. What can be established is that the Commons were looking for some means of dealing with the problems inherent in the justice given in Chancery and that the eventual development of the Lords' appellate jurisdiction addressed some of their primary concerns.

Historians have investigated and interpreted the

over equitable justice as practiced in the court of Chancery and the revival of the judicature of the Lords. She suggests that the revival of impeachment and, by extension, the Lords' handling of petitions asking for justice, both original and appellate, were due to a struggle between the common lawyers in the Commons and the system of equity.

> [M]ost writers on the subject have considered impeachment only as a political measure. They have not recognized it as an effort to restore to Parliament its place in the system of courts which it had occupied in the fourteenth century, or even more to put it above the courts of equity which had superseded it. Considered as such, the resumption of criminal jurisdiction by Parliament as a whole goes far to explain the assumption of civil (and even criminal jurisdiction by the Lords alone.[23]

Relf surmises that the common lawyers in the Commons, most notably Coke, wanted the whole Parliament to have this judicial role, though they came to realize the minimal role that the Commons itself could play, especially after its humilitating experience in *Floud's* case, in which both the king and the Lords denied it any judicature at all. Thus, according to Relf, the leaders of the Commons, including Coke and Noy, in conjunction with some of the opposition members of the Lords, such as Lord Saye, worked to have the Lords accept not only impeachments but also petitions asking for justice, particularly those asking for appeals from decisions made in courts of equity.[24]

Some elements of Relf's suggestions, as will later be

seen, did have significance in regard to the development of the Lords' jurisdiction over appeals from Chancery and other courts of equity. The problem with Relf's analysis is that she overemphasizes the degree of conflict between the two systems of law, a tendency that is just as evident in the writings of Holdsworth.[25] William Jones, however, has shown that, for the late sixteenth and the early seventeenth centuries, the real conflicts among the courts of the English legal system were internal: between the different courts of equity and between the different common law courts. The conflict between the courts of equity and common law was relatively minor and "the famous acrimony between Common Pleas and Chancery, Coke and Ellesmere, was no more than a surface conflict having little connection with day-to-day practice."[26]

That there was reason for the common lawyers to be suspicious of the court of Chancery cannot, however, be denied outright. Evidence suggests that many aspects of Chancery angered the common lawyers in the Commons, particularly in the sense that it may have constituted a rival to the common law. The equitable function of Chancery had begun to develop in the fourteenth century, and it emerged as a mature court in the fifteenth century[27] and provided a corrective to some aspects of the common law courts of the time. In effect, courts of equity, particularly Chancery, provided an alternative to an

increasingly ossified common law. By the fifteenth century the particular path of evolution which the common law courts had commenced to follow in the late thirteenth century had resulted in the loss of their flexibility and thus their ability to offer effectively justice to litigants. The common law courts "were disposed to pay attention to matters of formality, to the wording of what was expressed in a documentary transaction...."[28] Courts of equity took consideration of complaints that could not be adequately resolved by the common law, and unlike the ossified common law, paid heed to "matters of substance,... [to] the intention of the parties and to the methods used in arriving at the arrangement."[29] When the system of equity was firmly established a significant development altered the process of evolution through which the common law had been going, providing the potential for rivalry between the two systems of law. In the sixteenth century the judges of these courts began to practice a sort of equity by starting to "interpret statutes, and to extend 'to general cases the application of an enactment which, literally, was limited to a special case.'"[30] Thus the potential for rivalry between the courts of equity and those of the common law existed. Even if it did not reach a crucial point of hostility, the growing similarity in the types of cases of which the two legal systems could take cognizance must have made both systems wary of the jurisdictional encroachments of the other.

Several other circumstances suggest a possible animosity of the common lawyers and the Commons to the justice given in Chancery. Coke's actions as chief justice of King's Bench in 1616 show a degree of conflict between the common law courts and Chancery. One characteristic of Chancery that Coke confronted as chief justice was the power of the Chancellor to issue injunctions forbidding litigants to pursue cases in the common law courts or preventing the execution of judgments coming out of those courts. Coke, in 1616, declared that incarcerations by Chancery for violations of these injunctions were not legal.[31] James I, however, rebuffed Coke and supported the power of the Chancery to issue such injunctions, allowing the Chancellor to continue such a practice.

> We do will and command that our Chancellor or Keeper of the Great Seal for the time being, shall not hereafter desist to give unto our subjects, upon their several complaints now or hereafter to be made, such relief in equity...as shall stand with the merit and justice of their cause, and with the former ancient and continued practice and presidency of our Chancery. [32]

Perhaps the Commons distrusted the justice given in Chancery because the Chancellor, practicing an equitable jurisdiction, was not restricted, as the common law judges were in their decision-making, by the strict guidelines of precedent. The "procedural and jurisdictional" rules of Chancery were well set by the turn of the seventeenth

century, but precedent never dictated the decisions that the Chancellor could make; instead, he was to follow his own judgment, not arbitrary guidelines.[33] The Chancellor might easily, as a result, be associated by those favoring the common law and by disgruntled litigants with arbitrary justice, an impression which may have been reinforced by his intimate association with royal power. Those in the 1620's who were increasingly upset by the apparently arbitrary actions of the king may have been irked that James emphasized the role of the Chancellor, in his actions in court, as "the dispenser of the King's Conscience."[34]

Aside from the potential for conflict between the common law and equity in matters of jurisdictional and substantive issues, however, members of the Commons raised their voices about many more practical problems with the justice given in Chancery. These concerned the House of Commons because of the inadequate justice which Chancery provided for litigants, who would often complain to the lower House. The Commons envisioned their particular task as the investigation of the grievances of the kingdom and readily accepted petitions in 1621 and later through a variety of committees, most notably the Committee for Grievances and the Committee for Courts of Justice. In these ways, the Commons took consideration of litigants' complaints against the justice they received in all courts. Flemion argues effectively that one of the primary concerns

of members of the Commons in this period was the slowness of justice and that this concern was the chief reason they searched for ways to reform the judicial system of England, both the common law and equity.[35]

The process by which justice was given to litigants in the court of Chancery justifies Coke's concern with slow justice in that court; this was due largely to the amount of business with which litigants were burdening Chancery and to corruption. The work pouring into Chancery was more than the staff could handle. In 1623 a member of the Commons claimed that 35,000 subpoenas had been made out in a single year; the actual number was closer to 20,000,[36] but this was more than enough to overwhelm the clerks and other officials of Chancery, slowing down the process of justice. Many cases went on for up to twenty years in Chancery as a result.[37] The House of Commons was also aware of abuse and corruption among the staff of the Chancery. Extortion of extra fees and bribes ran rampant,[38] as perhaps could be seen most dramatically in circumstances leading up to the impeachment of Lord Chancellor Bacon in 1621: though that action was motivated by political reasons, it was brought officially for bribes he had received to render favorable judgments in Chancery.

In the early 1620's Chancery came under the eyes of the Commons as a source of grievances that needed to be rectified through the grace of the king or legislative

action. As a Parliament had not been called since 1614, the number of grievances could easily have built up, which may explain why there was such a large number of them in 1621. One petition "of manie grieved subiectes," raised some of the major problems with Chancery proceedings:

> the tedious and chargeable proceedings in the said Court, by leingth of Bills grounded upon untrue Suggestions displeasing to god the aucthor of truth, multiplicitie of needles suites breeding referrences, charges of reportes and many orders thereupon, chargeable mocions excessive fees and other intollerable dilatorie expences....[39]

In 1621 the Commons launched an attack on Chancery in an attempt to deal with such problems. In fact, ten bills were proposed in the Commons to reform the courts, with Chancery as one of the primary targets.[40] Edward Alford, one of the foremost in devising ways of reforming the Chancery, proposed "[t]hat some heades may be drawn and shewed to his Majestie of the Matters wherein we desire to be releived And that afterwards a bill may be framed."[41] His and other members' suggestions of what should be included in such a bill largely centered upon the theme of preventing abuses in Chancery and securing speedier justice for litigants. The proposals for reform included:

> Not to make iniunctions upon Motions without heareinge. To cut off the length of suites, which often tymes continue thirty yeares, whereas by the Civill Lawe they showld not be above three yeares, That all Decrees may be finall in respect of the Courte itself.... To reduce the Fees of all Officers to a

> certeynte.... No cause to be entertayned in the Chancerie after Judgment at Common Lawe.[42]

Perhaps the most ambitious suggestion in this proposal, however, called for some sort of court to handle appeals from Chancery. In this proposal for a bill Alford suggested that "[f]or Reliefe against Erronious Decrees there may be either a Commission of reveiwe, a Writt of Errour devised, or some Court of Appeale erected."[43] He introduced the bill itself into the House on April 19, 1621 -- a "Bill for Review and Reversal of Decrees of Equity"[44] though it was not committed. His call, however, reflected one of the chief problems with the court of Chancery, the lack of an adequate method for dissatisfied litigants to appeal from the court.

In the event of an unjust decree the litigant seeking to appeal from Chancery had few places to which to turn. Though the litigant in a common law court could obtain a writ of error to appeal to King's Bench, Exchequer Chamber and then the Lords in case of an error in law, there was no set hierarchy of appeal from the lesser courts of equity to Chancery or from Chancery to a higher court where a decision might be made final. The four established methods of appealing a decree from Chancery all had drawbacks. The litigant could petition the Chancellor or Lord Keeper asking him to rehear the case before the original decision was enrolled.[45] Because the same judge would be making the decision, it was not likely that the dissatisfied

litigant would receive a different decision, unless the Chancellor was willing to admit his mistake with the original handling of the case. If the decision had already been enrolled, the litigant could pursue his appeal through a "bill of review" asking the Chancellor to rehear his case.[46] In addition to the problem of the original judge rehearing the same case, this process had another drawback. The litigant was required to fulfill the dictates of the original decree before the Chancellor would reconsider the case, considerably slowing down the process of justice. In addition, the litigant had to demonstrate that some "technical irregularity" had occurred in the handling of the case.[47] The litigant's third option was to petition the king, asking him to set up a commission to review the case.[48] The fact that Chancellor was the keeper of his conscience, however, may have made the king less inclined to aid in the reversal of the decree. Also, the king's preoccupation with other, more significant business might delay the issuing of such a commission. The unpopularity of this method is indicated by the fact that only two appeals were handled this way, both before 1640.[49] The last course that a litigant could follow would be to petition Parliament for a formal Act that would overturn the decision of the court of Chancery;[50] this would likewise require the king's consent. This path would also be time-consuming, for the two Houses were often tied up in the creation of other legislation.

Several attempts to pursue this course in the 1620's and the one effort to do so in the 1640's were not successful.[51]

Clearly Alford's proposal of 1621 addressed an obvious need. For inexplicable reasons, however, it did not make any progress. Alford was not alone in his recognition of the need for a court superior to Chancery. Coke himself was determined to establish Chancery below King's Bench,[52] even suggesting, in one debate on the need to reform Chancery, the possibility that there should be "a writ of Error... in King's Bench. For the Chancery [is] the Younger Brother of the King's Bench."[53] Alford made another proposal for a new method of appeal from Chancery in 1623/1624: the Commons should "[c]onsider of two to be ioneyed in equall Commission with the Lord Chancellour, or of a commission of appeale, or of a writ of error in the Checker Chamber which wilbe a meanes to avoyd Corruption and how ther maintenance may arise."[54] On March 15, 1623 he introduced this proposal as "An Act for Reversing, Altering, or Correcting, of erroneous Judgments, Decrees, or Orders, in Courts of Equity, and for better Preventing of the like in Time to Come."[55] Though the act was committed and recommitted, nothing came of it or of a proposal of John Carvill in 1625 to create some means of reviewing and correcting decisions of courts of equity.[56]

The reasons why the Commons did not accept legislative proposals for the creation of a new court of appeal are mysterious though veneration of tradition may have done much

to dissuade them from creating such a court. Horstman claims that many Englishmen of this period did not welcome innovations because of an idealistic belief in the perfection of an ancient constitution.[57] He demonstrates that the ideal of the ancient constitution, the existence sometime in the past of a government which functioned perfectly, provided a standard to which many political thinkers, especially members of Parliament, wished to conform. The ideal led to the conclusion that any problems with the contemporary government or the legal system were due to straying from the original form of the ancient constitution. In effect "[h]istory set the standard to which government should conform...."[58] Such an attitude would have led many in Parliament to search for solutions in the past. There were, however, precedents for the creation of new courts by Statute. An Act of Parliament had created the intermediary court of appeal for the common law, Exchequer Chamber,[59] by statute in 1585, because of a recognized problem in the appellate structure of the common law system at the time. Parliament was not in session as often as was necessary in order to handle the number of writs of error sent to it from King's Bench. Thus, legislation provided a remedy to this problem.[60] Statute had likewise officially established the jurisdiction of the Council of Wales in 1536.[61] Despite these relatively recent innovations, demonstrating an ability and a willingness to alter the

legal system to secure more expedient justice, the Commons did not take this demonstration of power to heart in attempts to supply an appellate procedure from courts of equity. It is likely, though, that the unwillingness to innovate in regard to appeals from Chancery was due to the fact that there already existed an institution, the House of Lords, to which medieval precedents, whether accurate or inaccurate in their bearing on the Lords, assigned such a role, thus supporting the revival of an aspect of the ancient constitution. The practical application of this attitude to the development of the House of Lords' judicial powers will be discussed later.

The House of Commons was doubtless not particularly anxious to give the Lords the immense power entailed in such a judicial role to the exclusion of itself or of an independent body; nor was a large number of the Commons privy to an effort to get the Lords to receive such appeals. Those who were anxious to reform Chancery and find some method of appeal, however, would have seen that there was no other viable option. The Commons was acutely aware in 1621 of the difficulty of reforming a court that was so dear to the king, especially as James was irritated with the legislative attempts of the common lawyers in the Commons to reform and place constraints on the Chancery in that year.[62] In addition, in 1621, members of the Commons were forced to recognize that they had little chance to provide by

themselves a method of appeal. This realization would have derived not from any abstract consideration but from two instances -- the cases of Mompesson and Floud -- from which members probably would have concluded that, because of their limited role as a judical body, they would be ineffective in providing directly for appeals from litigants.[63] At the same time, in one petition, as will be seen, the Commons showed themselves willing to exercise some sort of judicial power over appeals to the exclusion of the Lords.

In several instances in 1621 the Commons considered expanding their own judicial role: the case of Mompesson, the petition of Pope for a reversal of his decree from Chancery, and the trial of Floud. In the first and the third instances the House of Commons was made to realize its lack of status as a court for anything but its own privileges, which was based on a lack of precedent; thus it was not capable to take direct care of the judicial problems of the nation. Subsequently members of the Commons probably came to be convinced that the Lords provided the best opportunity to achieve their goals of reform.

Mompesson's case in 1621 signalled the revival of the medieval process of impeachment, which had fallen into disuse two hundred years earlier. In this case, which involved the question of illegal patents, the members of the Commons were made aware of the weakness of their judicial capabilities; though they wished to try Mompesson themselves

to the exclusion of the Lords they could not discover the precedents to allow them to do so, for his crime was not a violation of the privileges of the House. As Mompesson was a member of the Commons, the lower House did have a certain jurisdiction over him; but the only crime that they would be able to try him for would be "an indignity to the House," and thus the only punishment that the Commons could have given him would be to have him sent to the Tower.[64] The members of the Commons, however, were determined to find some means by which they could inflict a harsher punishment on him and searched for precedents that would allow them to exercise a jurisdiction over his illegal use of patents. Regrettably, such precedents could not be found. Coke reported from the committee searching for them that "the opinion of the Committee is, that we must join with the Lords for the punishing of Sir Giles Mompesson, it being no offence against our particular House, or any member of it, but a general grievance."[65] Coke based his justification for applying to the Lords' House for trial of Mompesson on medieval precedent. He divided English judicature into four distinct spheres. One of these areas assigned to the Lords alone, "Coram Magnatibus Solis," a judicial role distinct from the others. Though his purpose in coming before the Lords was to convince them that they had the right to handle the impeachment of Mompesson, the justification made by Coke for this was exceedingly vague; in fact, he assigned to the

Lords an amorphous jurisdiction which could easily have been applied to other areas of judicature. He claimed,

> There is a necessity in this because else justice will fall to the ground and the Subject in some cases cannot be relieved. As, suppose a judgment be given for the King in the Kings Bench, there is no help for this but a Writt of Errour which must be brought before the Lords in the upper House of Parliament. Now the King cannot be judge in his own case, therefore it must be judged by the Lords alone or not at all.[66]

The Commons accordingly applied to the Lords for the trial of Mompesson, which constituted the revival of impeachment, with the Lords exercising the judicial functions of trying and sentencing Mompesson.[67] The king also indicated that he recognized that the Lords possessed an historical right to act as a court, whereas he suggested that the Commons had no such role:

> the lower howse have showed great modestye in there proceedings and in their places have proceeded as farr as they can in the informacion for they are noe Court of Record nether can give oath; it is you [Lords] that have the power of Judicature....[Y]ou neede not search presidents whether you may deale in this business without the lower Howse for there is no question yours is a house and a court of Record. You neede not stick uppon it, for the lower house, they are but a howse of customes and orders and their house hath come from yours, *for though heretofore a long tyme since you were all one house, yett uppon the division all the power of the judicature went with your howse.*[68]

In effect, through both their unsuccessful search for precedents to support their own desire to exercise a

judicial power and the king's reminder, the Commons must have been forced to realize that they lacked the historical justification for a judicial role such as the Lords possessed.

The recognition of their limited judicial powers, however, did not absolutely discourage the Commons from attempting to exercise direct methods to relieve disgruntled litigants from decrees given in Chancery. Before and after the trial of Mompesson the Commons considered petitions complaining of the justice given in Chancery, sparking legislation to reform that court. What is particularly interesting, however, is that, after the discussions over Mompesson, the Commons practiced, in one case, an appellate jurisidiction to a degree that the Lords would not dare to attempt until 1640. That the Commons considered the possibility of setting themselves up as a means to reverse decrees of Chancery is apparent in their acceptance of the petition of Sir William Pope presented on April 6, 1621.[69] Pope asked "to be relieved against a Decree in the Chancery...."[70] The Committee for Grievances considered the case on April 27. Though the members could not hear testmony on oath, they still heard counsel for both sides.[71] The Committee proceeded to consider the appeal on two grounds: "(1) Whether the Decree were a lawfull Decree. (2) If it were unlawfull, howe it mightbe Redrest."[72] The prevailing opinion was that the Decree was unjust, and the

decision that then had to be made was how to secure its reversal. John Pym, a member of the Committee for Grievances, set down three options considered by the Committee: "(1) That the Decree was tobe avoyded by a Bill....(2) That it might be done by Declaration of the House....(3) To repayre to the Lords. They reverse errours in the King's Bench, why not aswell Decrees in the Chancery; and by their sentence the Record may be razed and the Seale taken off."[73] The consideration of this final option demonstrates that the Lords' position as the final court of appeal for the common law made it a logical choice, in the minds of some members of the Commons, to handle appeals from Chancery. It was, in fact, this third option that the Committee for Grievances chose.[74] This initial choice reflects the positive attitude of the Commons on the propriety of the Lords' possessing an appellate jurisdiction over decrees from Chancery.

Apparently, however, a change of mind occurred, perhaps out of jealousy of the Lords; for on May 1 the Commons chose the second option, that of a Declaration

> That the Howse thought it fitt the Decree showld bee taken off the File And all Exemplifications and Writts of Execution upon this Decree to be browght in and Cancelled. It was not dowbted but that the Master of Rolls would Conforme himself to that Declaration....[75]

This episode suggests that the Commons may have considered

themselves suitable to handle such cases, but the presence among them of some who believed that they should proceed by legislation indicates a preference for refraining from fundamental innovations in the English judicial system. Christopher Brooke of the Committee for Grievances claimed, "We cannot reverse a decree but by an act."[76] As was earlier pointed out, this method of handling appeals proved to be inefficient; securing redress through a private bill, the first of the options listed by Pym, was a cumbersome process that Coke saw as contributing to the slow process of justice. That other options were considered, these others not being typical of the known methods of securing reversal of a decree from Chancery, demonstrates that many members of the Commons recognized if not this problem, then other significant problems with procedure by private bill. The ultimate decision of the House, that the matter be taken care of through a declaration of the House, shows that the Commons believed that they possessed the power to deal with the matter themselves. The original order of the Committee, that it be referred to the Lords, indicates, however, that there was a substantial number of the Commons in the Committee for Grievances who believed that the Lords were the most appropriate place to send such appeals. This may have been connected to their realization that they had to resort to the Lords to handle the case of Mompesson. The Commons did not use this procedure again in attempts to reverse decrees, perhaps because of the problems that arose over the case of Floud.[77]

Floud, a prisoner in the Fleet, was brought to the attention of the Commons as the result of seditious remarks he had made about the Elector Palatine and his family.[78] The Commons tried Floud, exercising what amounted to an original criminal jurisdiction. The House was subsequently subjected to the humiliation of being denied a jurisdiction outside of matters regarding its privileges by both the king and the Lords. The king called into question the right of the Commons to try and sentence Floud and pointed out to them a decision of Henry IV, "by which the then house of Commons themselves are stated to have represented the judgments of the parliament to belong only to the king and the lords."[79] The Lords cited the same dictate to the Commons and declared that the Commons had exceeded their own legitimate but minor judicial role, as the one being exercised in Floud's case "belongs unto the Lords."[80] Floud was then taken to the Lords for trial, convicted and punished.[81] The Commons had thus again been reminded of their limited judicial capacity. It is possible that this forced members of the Commons to realize that only the House of Lords could deal effectively with petitions asking for review of decrees given in Chancery and other courts of equity, for they were forced to acknowledge the weakness of their own judicature -- "limited to their own members and privileges" -- while recognizing that "the Lords... have a judicial power which ... [is] absolute...."[82]

It is difficult, however, to demonstrate that there was a direct connection between the Lords' development of an

appellate jurisdiction over decrees from Chancery and the Commons' concern over problems with Chancery, particularly in reference to appeals. In fact, the Commons in 1621, and throughout the 1620's, still accepted the petitions that they received asking for some sort of redress from decrees of Chancery[83] and sometimes proceeded to recommend to the Lord Keeper that he rehear cases, which suggests that they felt that they had a certain degree of jurisdiction over decisions made in Chancery. A litigant who felt that the judge of Chancery had treated him unjustly could petition the Commons, and the Commons would consider whether the charge was true. In the impeachment of Lord Bacon a complaint received in such a manner served as an excuse for the action taken against him. In one petition in 1624, received by the Committee for Courts of Justice, that of Mr. Grimesditch, a complaint was made against both the Lord Keeper and the Registers of the court. The committee decided that the Lord Keeper had done nothing wrong, but that one of the Registers, Mr. Churchill, had committed an injustice on a procedural matter. Grimesditch then offered another petition, asking "to have the Cause heard again, as before, <u>super totam materiam</u>."[84] The House then issued an order that Mr. Churchill should be brought before the House and that there should be "a Letter written by Mr. Speaker, to the Lord Keeper, to have this Cause heard again, <u>super totam materiam</u>, as he shall think fittest."[85] This procedure, however, did not amount to an appellate jurisdiction, for members of the Commons obviously did not consider

overturning the case themselves though they believed it unjust, nor did the instructions given to the Lord Keeper amount to an order -- it was a request. Aside from making such requests for justice, the nearest that the Commons in this period came to taking direct action to reverse decrees in equity was through legislation. This method was attempted several times in the 1620's, including one bill in 1628 that went through two readings and was committed,[86] but all failed to pass. With certain modifications, the most significant being in the late 1640's and 1650's, these examples typified the Commons' actions in regard to appeals before its challenge of the Lords' handling of Sherley v. Fagg. The House of Commons did not expand its role in dealing with petitions asking for appeals from Chancery because the Lords provided a more practical alternative.

There are some indications that the Commons did play an indirect role in encouraging the Lords as an appellate court for equity by tranferring petitions to the Lords. What has been established so far is that the Commons recognized that many problems existed in Chancery in this period and that one of the more significant problems was the lack of a sufficient method of appeal from that court. It has also been demonstrated that some members of the Commons wanted to rectify that problem by creating a new method of appeal. The Commons through its Committees for Grievances and for Courts of Justice typically handled petitions asking for some form of redress from decrees, though it did not possess the judicial power to reverse them. Flemion has suggested

that when the House of Commons recognized that it had no such judicial power and saw, after the humiliation of Floud's case, that it would not be able to develop this role, some members, most notably Coke, "began to transfer civil appeals to the upper house in an unofficial way."[87] That the Commons did so is difficult to prove, though a number of circumstances point to that possibility. One particular order in the Lords' Journals on April 26, 1621, shows that individual members of the Commons, even before the conflict over Floud, sent petitions to the Lords for action: "A Petition being offered to this House by one of the Lords, which Petition had been delivered to him by a Gentleman of the Committee of the House of Commons, for receiving of Petitions of Grievances, and preferred to the House of Commons."[88] The Lords responded by stating that they would accept no petitions presented in such a way; they must be presented by the litigant himself or "commended from the House of Commons."[89] On April 30, 1621, another petition was presented to the Lords by the petitioners themselves.[90] One of the Lords discovered that this petition had already been presented to the Commons. As Relf suggests, "The natural inference is that the men had addressed their petition to the lords at the suggestion of that [Grievances] committee."[91] It is thus possible that the Commons encouraged cases brought before it to be taken to the Lords, where more effective action could be taken. Though the above petitions did not deal with appeals from Chancery or other courts of equity, their passage from the Commons to the

Lords demonstrates that some members of the Commons were willing to send petitions asking for justice to the Lords and that they recognized that the Lords either possessed more of a right to handle such cases as a court or had more power than the Commons to help the petitioners.

Yet, aside from the wishes and needs of the Commons, the question remains of why the Lords would be willing to act as a court in which the judicial problems of petitioners might be solved. They had not readily accepted the Commons' request that they handle the trial of Mompesson until James had assured them that they had such a jurisdiction. In the first few instances in which it was presented with petitions asking for the reversal of decress from Chancery, the upper House was very reluctant even to handle the petitions, let alone to reverse the decrees. Even more important, it had not truly concerned itself previously, as the Commons had, in the redress of grievances. As stated earlier, the Commons had a much stronger tradition of investigating the grievances of subjects and seeking solutions to them. This was particularly true for the problems concerning the justice given in Chancery. There is some evidence, however, that the Lords were also concerned about the matter. At the same time as the series of bills for the reform of Chancery were being considered by the Commons, legislation was introduced into the Lords that was designed to speed up the course of justice in that court. The draft of one act found among the papers of the House of Lords, apparently never brought up officially, as it was not even mentioned in the

Journals of the Lords, sought to reform the access of litigants to the justice of Chancery. This was " An Act concerning days of hearing and orders in the Court of Chancery and other Courts of Equity at Westminster." [92] This draft act was designed to ensure that all cases brought forth in courts of equity were to be heard within five days after the last day of the term , and that "all persons interested [were] to have free access to the court during the hearing of a cause."[93]

The judicial role that the Lords soon acquired, however, brought them to the position of actively redressing the grievances of subjects. The question of why the Lords accepted the amorphous jurisdiction that was apparently being offered to them by both the king and the Commons during the crises over Floud's and Mompesson's cases has no concrete answer. The Lords may simply have been convinced through their acquisition of the role of judges in impeachment proceedings that they had a right and/or an obligation to handle the difficult judicial problems of the nation. Flemion suggests that Coke's statement to the Lords about their right to judge Mompesson, cited above, was designed the way it was, filled with ambiguity, in order to convince the Lords that they possessed a right to handle appeals from Chancery, and that he drafted it so loosely to solve the problems he saw in slow justice in that court.[94] Both Flemion and Relf have suggested also that there was a small group of opposition leaders in the Lords who believed that they could work the acquisition of the judicial powers

into the fulfillment of their own agenda. Flemion has demonstrated that there existed in the Lords of the 1620's an opposition that was bound together by common ideological interests, the lowest common denominator of which was "a deep and continuous desire to find a way to express their disapproval of the thrust of Stuart government."[95] Accordingly this opposition championed certain causes important to the prestige of the upper House. They hoped that this agenda would increase their popularity and, hence, their potential to expropriate for themselves the leadership of the House. One of the issues pursued for this purpose was the revival of the judicial powers of the Lords, which would enhance the position of the House. Flemion suggests that this was accomplished through the coordination between opposition leaders in the Lords, such as Lord Saye, and the opposition in the Commons.[96] Relf accepts the same basic interpretation of the two oppositions working together to bring petitions into the Upper House, though she ascribes it to a desire of members of both Houses to place Chancery under Parliament[97] whereas Flemion interprets it as a means to strengthen the popularity of an a number of the Lords opposed to the king's policies. What can be surmised from the character of the Lords' actions in regard to appeals in the 1620's is that there was a small group in the Lords that was adamant about getting the Lords to accept petitions

asking for appeals from Chancery and that the most vocal of these were among those who Flemion and Relf suggest belonged the opposition. This coincidence will be explored in greater detail in the next chapter, which investigates the actual growth of the Lords' jurisdiction over appeals.

Like the Commons, and members of the Lords, the king had a reason for supporting some means to secure another method of appeal from Chancery. Horstman has convincingly argued that James would have had good reason to welcome the revival of the judicial role of the House of Lords, particularly its appellate review of decrees from Chancery and other courts of equity. He suggests that the king allowed the development of the judicial role of the Lords largely because he was burdened by appeals made to him for justice: "In cases involving non-common-law courts the king was constantly besieged by litigants seeking help."[98] Both the Commons and the king recognized the medieval judicial role of the Lords.

When one puts together what has been demonstrated -- that there was a recognition of the problems in Chancery in the 1621, that the need to secure an appellate process from decrees of Chancery was one of these, that the historical judicial functions of the Lords were recognized, and that the Lords commenced hearing appeals from Chancery in the 1620's, its first being in 1621 -- a suggestion might

reasonably be made that the king and the Commons supported the development of the Lords' appellate jurisdiction in the early Stuart period. Moreover, as this chapter has shown that the Commons would have had good reason to approve of the inception of the Lords' jurisdiction, so the next will show that the Commons and the king did not oppose the further development of the Lords' jurisdiction. In the period from the Lords' consideration of the first appeal against a decree of Chancery until the consideration of Sherley v. Fagg in 1675, the Commons did not question the right of the Lords to handle such appeals and probably looked favorably upon that practice.

The Appellate Jurisdiction of the Lords: 1621-1675

As I have demonstrated in the previous chapter the House of Commons recognized the problems inherent in the justice received in Chancery and was anxious to find some alternate means by which litigants could appeal decisions of that court. The Commons, concerned with slow justice, made some unsuccessful attempts to supply this need, held back by, more than anything else, their lack of a judicial power with a historical foundation, something that the Lords possessed. The king, perhaps not unhappy with the justice given in Chancery, was nevertheless burdened by the many appeals made to him from all sorts of courts, including Chancery, and would not necessarily have resented some means to reduce the pressure on him. Both institutions openly admitted the rightfulness of the Lords acting as a court, the Commons most explicitly in the case of Mompesson and the king in that of Floud. In addition, as will be demonstrated in this chapter, a significant voice in the Lords was adamant about accepting petitions asking for appeals from decrees given in Chancery. The Lords, having a historic judicial function recognized by both the king and Commons, consequently possessed the potential to address the major

problems with Chancery and the appellate process for courts of equity in general, though the manifestation of an efficient appellate jurisdiction in the upper House was very slow in coming: The Lords took the chance to reverse a decree of Chancery for the first time only in 1640.

If the House of Commons had been opposed to the Lords' jurisdiction over appeals from Chancery, which I have argued it was not, it had a great deal of opportunity to make objections to it in the period from 1621 to 1675, the period in which this form of judicature evolved in both scope and efficiency. However, from the inception of the Lords' jurisdiction over appeals from Chancery in 1621 until Sherley v. Fagg in 1675, there was little comment from either the king or the Commons at all, still less in opposition. The pace of the growth of the Lords' jurisdiction, however, would certainly have raised objections from them if they had opposed it. From merely hearing pleas for justice from Chancery and offering suggestions to the Chancellor in a rehearing of the case, the Lords' appellate function evolved into a complete appellate jurisdiction, in which the Lords actually set aside decrees from Chancery and made orders on cases.

The growth of the Lords' jurisdiction over appeals from Chancery can be divided into three stages. In the initial phase, that from 1621 to 1629, the Lords' procedures in handling such appeals were ill-defined, and the peers

appeared to be very hesitant in dealing with petitions requesting them to reverse decrees of Chancery. Indeed, it is very difficult to consider the Lords as possessing a true appellate function in the 1620's, for they did not even consider overturning any of the cases brought before them. In this period, the Lords' jurisdiction over appeals was basically the same as that possessed by the Commons, with the exception that many members of both Houses in the 1620's believed that the Lords possessed a judicial right based upon historical precedent to review decrees of Chancery, though the Lords did not immediately translate this recognition into action. A complete change was evident in the period starting in 1640, with the first Parliament called since 1629, and ending with the abolition of the upper House in 1649; here the Lords exercised a complete appellate jurisdiction, overturning decrees, and acting much surer of the propriety of its jurisdiction. In the third phase, from 1660 to 1675, the Lords maintained the scope of the jurisdiction that it had come to exercise in the 1640's but also fell into conflict with the Commons over the appellate jurisdiction.

In each of these phases until 1675 the Commons made no serious objection to the Lords' jurisdiction over appeals from Chancery in particular, though there were minor conflicts over matters of privilege and, from 1646 to 1649, a gradually increasing opposition to the right of the Lords

to handle all judicial matters involving commoners. Aside from the latter situation, neither the Commons nor the king vociferously opposed the appellate jurisdiction of the Lords unless it interferred directly with the privileges of either. The Commons was unwilling to allow the Lords to take cognizance of matters involving members of the Commons without its acquiescence for cases of either an original or an appellate character. This is evident, for example, in the cases of Skinner v. East India Company (1669) Slyngsby v. Hale (1670), Sherley v. Fagg (1675), Stoughton v. Onslow (1675) and Crispes v. Dalmahoy (1675). The king protested only when he perceived the Lords to be excluding him from at least a nominal right to be treated as the supreme source of justice, particularly in the instances of appeals from Chancery.

The previous acquiesence of both the Commons and the king to the Lords' jurisdiction over appeals from Chancery had apparently disappeared by 1675, the year in which the Commons forcefully challenged the result of the half-century development of this form of judicature. The Commons in this year stated that the Lords had no right to handle appeals from Chancery or any other court of equity.[1] Even more telling is the fact that the king made no effort in this conflict to defend the jurisdiction of the Lords. It was, I contend, the immediate context and character of the cases of Sherley v. Fagg, Stoughton v. Onslow and Crispes v. Dalmahoy

in 1675 that led the Commons and the king to behave in such a way that it appeared that they opposed the jurisdiction itself, though they did not. The conflicts over these cases have led many historians, as pointed out in the introduction, to suggest that the Commons throughout the Stuart period did not support the appellate jurisdiction of the Lords over decrees from equity. Investigation of the three periods of the development of the Lords' appellate function and the Commons' behavior in regard to this evolution will show that the opposition expressed by the Commons in 1675 was an aberration that did not reflect its true attitude toward this form of judicature.

Between 1621 and 1629 the Lords began to accept petitions asking for appeals of decrees from courts of equity. In the 1620's, however, the Lords did not possess a complete appellate jurisdiction over decrees from equity. The Lords took cognizance of relatively few cases of appeal from Chancery and other courts of equity, as compared to the many petitions sent to them in the 1640's, 1660's and 1670's. In the few cases of appeal that did come before the House the Lords acted very cautiously. Two cases typify the character of the Lords' jurisdiction over appeals from equity in the 1620's and also display the reactions of the Commons and the king to the inception of the jurisdiction: Boucher's case in 1621 and Mathewe's case in 1624 and 1628.

The actions of the Lords in these instances make them

appear highly unsure about the propriety of considering these cases, which suggests that they may have been uncertain about their House's right to exercise an appellate jurisdiction over Chancery. Aside from the manner of handling these particular cases, however, the Lords' attempts to set up rules governing how appeals should be handled indicates that the Lords were well aware of the propriety of their handling of appeals from equity. Rules governing appeals were set up in the Parliament of 1621 in coordination with guidelines regarding the rest of their judicature, particularly for petitions asking the Lords to exercise an original jurisdiction. The Lords seem to have anticipated petitions asking for appeals before they actually came before them. Whereas the Lords had accepted for the first time a petition asking for the exercise of an original jurisdiction on April 30, the first petition that the Lords accepted that can be construed as an appeal from Chancery came on December 3. In the interval the Lords developed a means of dealing with private petitions asking for justice. In establishing a standing committee to handle petitions, the Lords demonstrated a growing recognition of their role as a judicial body.

The first committee for dealing with all petitions asking for justice and not for specific cases was established on May 29, 1621.[2] The practice of establishing such committees at the beginning of each Parliament had

importance for the growth of the appellate function, as this was where cases of appeal were soon to be turned over for consideration. This committee made one particular order that would be significant to the future method of dealing with appeals from Chancery and other courts of equity, even though the first such petition was not to be received until several months later. The order creating this committee of eight gave them the duty "to consider of all petitions...exhibited to this House and unanswered; and to report to the House what answers are fit to be made unto them."[3] The committee, in its attempt to answer as many petitions as possible before the upcoming prorogation, established rules for the manner in which petitions were to be considered. It reported that

> they had considered of some Petitions, and answered them, but, the Time not permitting their Lordships to answer them all, they had agreed what Answer the Clerk shall make unto them, videlicet,
>
> 1. No suits to be stayed in Courts of Justice, upon Pretence of Petition exhibited in Parliament, and unanswered.
> 2. Decrees not to be reversed upon Petitions exhibited in Parliament, without the Hearing of Counsel in both Parts.
> 3. Reviews to be made, where the Judges of the Courts, upon Consideration of the Petitions, shall find Cause sufficient; if otherwise to certify the House what further Course to be taken with the Petitioners.[4]

What is interesting is the second rule, which referred to the reversal of decrees. There is no record in its Journals

that the House Lords had considered any appeals from Chancery or other courts outside of the common law before this order was made, though later in the 1620's they did handle petitions concerning cases already heard in Wards, Star Chamber, and church courts in addition to appeals from courts of equity and writs of error from the common law courts.[5] Hargrave took note of this reference in the committee's report and observed that, although the Lords had not yet heard such a case, they "almost acted as if they had appellate jurisdiction upon petitions."[6] Perhaps, in spite of the lack of a record of any such petitions in the Journals, the Lords had indeed received such cases for consideration, prompting them to devise this rule. At the least, their second rule suggests that the Lords were aware of the potential for handling such cases and also that they felt that they had some right to receive such petitions.

The first recorded appeal from Chancery or any other court of equity was introduced several months later. In considering it, however, the Lords appeared somewhat hesitant about accepting such a jurisdiction. This was Sir John Boucher's petition, presented on December 3, 1621.[7] It was a complicated case that led to significant debate over whether the Lords should accept the petition. Though the Lords did not explicitly consider the possibility of overturning the decree itself, the mere fact that they took cognizance of the petition and debated the merits of the

appeal was promising for the future development of the Lords' appellate jurisdiction. It is even more significant that neither the king nor the Commons reacted to their acceptance of this petition.

In his appeal Boucher complained about what he considered to be an unfair handling of his case in Chancery. He claimed that the Chancellor, Williams, who had replaced Bacon in 1621 after his impeachment, had not allowed proper time for all the evidence and witnesses in his case to be considered. The form in which Boucher framed his petition caused confusion, forcing the Lords to reflect on the propriety of accepting appeals from Chancery and other courts of equity.

> Now, for that it may tend to the utter undoing of any man, to be shut by Decrees before the Cause be fully opened or understood, or to be bound by such as are not duly granted;
> The petitioner doth therefore, in all Humility appeal unto your Lordships, humbly desiring, that, as well for Justice Sake and the future Good of others, as the Petitioner's Relief, your Lordships will be pleased to hear and judge the same.[8]

Was Boucher asking the Lords to punish Williams for his unjust handling of the case, or was he asking the Lords to review a case that he felt had been handled incorrectly? It appears from the petition and his later actions that he wanted the Lords to recognize the injustice he had received at the hands of the Chancellor and provide him with some

sort of relief from an unjust decree. Such an interpretation, however, was not forthcoming from most of the Lords. The Lords' initial reaction upon receiving this petition was to debate its character and decide whether or not they had a right to consider it. The debate indicates that the Lords were more concerned about the implications of Boucher's charge against the Lord Keeper than the case of Boucher itself, though some were eager to confirm the judicial supremacy of the Lords over Chancery. Those Lords who were hesitant about considering the petition of Boucher saw it not only as a serious charge against the Lord Keeper but also as a potential problem for the judicial system. The Archbishop of Canterbury echoed the concerns enunciated by some members by posing the problem,

> Whether to rejecte peticions for justice, or to admytt of peticions generally against all judges, which wyll much discourage them. Moved that yf they agree he shalbe hearde, he be admonished that he shall receive greate punnishment yff the aspersion in the peticion be not trewe.[9]

Another member raised very much the same dilemma, claiming, "[I]f theis peticions be admytted, noe judge, &c. shalbe free from aspersions."[10] The Earl Marshal likewise was against the acceptance of Boucher's petition for justice, "for then noe ende of suytes."[11] Thus, there was a significant element in the Lords' House that was very hesitant to accept the possibility of an appellate

jurisdiction which this petition raised. Apparently these Lords, by their statements, saw the exercise of an appellate jurisdiction by the upper House as something of an innovation. The acceptance of a jurisdiction of this sort might bring harm to the judicial system, and would therefore be inimical to the goal of bringing about a solution to the problem of slow justice instead of solving it.

Other Lords, however, thought that the House was the proper place to send such petitions asking for appeals. Those who were most adamant in encouraging their acceptance were the same Lords who, Relf and Flemion suggest, were among the opposition in the Lords. Lord Saye advanced the claim that it was appropriate to send such petitions to the Lords. Relf sees Saye as one of a number of the Lords who were working in conjunction with the leaders of the Commons, such as Coke, to revive the Lords as the chief tribunal of the nation, using petitions asking the Lords for as their vehicle.[12] Saye was determined that the Lords should take cognizance of Boucher's appeal. Though agreeing with the others that Boucher should receive punishment if his charges against the Lord Keeper were untrue, he claimed that there was "noe appeall from the Chauncery but hether...."[13] He also emphasized that Boucher's petition was "an appeale,"[14] not simply an accusation against the Lord Keeper. Lord Haughton also supported this view of the Lords as the chief court responsible for supervising the decisions of other courts,

calling the upper House the "Supreme Court."[15] Likewise, the Lord Keeper himself gave some recognition to the correctness of viewing the Lords as the place where such appeals for justice should be sent, though with a significant qualification. He suggested, in reference to the Lords' House, that "Appeales doe lye, but not directly; firste to the Kinge and then hither."[16]

The result of this debate was that the Lords decided not to refer Boucher's petition to the Committee for Petitions; instead, they sent it to the Committee for Privileges, requesting them to consider "whether it be a formal Appeal for Matter of Justice or no?"[17] The Lord Chamberlain pointed out before this decision was made that "the peticioner's cause cannot be hearde agayne, unlesse by an appeale." [18] The report of the Committee demonstrates that it was unsure what Boucher meant by his request for an appeal, construing 'appeal' in its medieval usage as an accusation. The Committee reported that

> divers Lords of their Sub-committee (appointed to search for Precedents) cannot find that the Word "Appeal" is usual in any Petition for any Matter to be brought in hither: but that they find that all Matters complained of here were by Petitions only; the ancient accustomed Form thereof being to the King and His Great Council: And that they cannot find but one Precedent of this Nature, which was a Complaint by Petition, against Michaell de la Pole, Lord Chancellor, for Matter of Corruption.[19]

The Committee recommended that "the Matter of Fact

complained of be heard with Expedition, that so great an officer may not long suffer in the Delay thereof."[20] Thus, the Lords did take cognizance of the petition, but they were not as concerned with reviewing the decree against Boucher itself as they were with the implications of the charge made aganst the Lord Keeper.

The House accordingly heard the matter as if the petitioner's intention was only to seek punishment of Williams for a miscarriage of justice. In the process of investigating these charges, however, Boucher pleaded to have "a favourable Hearing of the Merits of his Cause."[21] What the Lords would have done if they had found Boucher's charges against the Lord Keeper true cannot be known. After hearing witnesses to the process of the case in Chancery and the Keeper's behavior, the Lords decided that the charges were inaccurate. Instead of simply dismissing the petition, the Lords ordered that Boucher "should receive some Censure, or Punishment..."[22] The Lord Keeper, however, forgave Boucher and requested that he not receive any punishment.[23]

Though the Lords did not consider the decree itself, and Boucher did not receive the justice he had asked for, it is important that the Lords took cognizance of the petition and considered the propriety of considering such petitions in general. That they showed some willingness to view themselves as a court fit to handle such appeals is confirmed by the fact that, on the recommendation of the

Committee for Privileges, they considered the charges made in the petition, though whether or not they would have heard the merits of the case if the Lord Keeper had been found guilty of the charges Boucher had made is difficult to discern.

Neither the Commons or the king reacted to the willingness of the Lords to consider Boucher's petition despite good reasons for them to be troubled by this occurrence. The Commons, had defined their own participation in the judicial system of England based on what they saw as their primary role, as investigators of the grievances of the realm, a role they had established over the course of several centuries. In the two-step process of impeachment, for example, they investigated grievances and made accusations which they submitted to the Lords who, in turn, made the judgment. As Boucher did not submit his complaint to the Commons, many of its members might have felt that they were being neglected in their role as the investigator of grievances, supplanted in this function by the Lords. When the Commons had attempted to go beyond the scope of their judicature in the case of Floud they were humiliated by both the king and the Lords who denied their right to an original jurisdiction unrelated to their privileges. After such a revelation of the weakness of their own right to act as a court, they would have been adamant about defending the small degree of participation in

judicature that they did possess. Boucher's case, which could easily have been perceived by members of the Commons as a criminal accusation made against a high official of the king, the Lord Keeper, could have provoked jealousy if the Commons had not perceived the Lords' actions as serving a more important need. If Boucher's intention was to seek some form of punishment for the Lord Keeper because of his unjust measures, he was ostensibly violating the Commons' position as investigators of grievances. On the other hand, if the Commons did not perceive the petition in this way, as a criminal accusation, they may have viewed it as constituting an appeal from a decision made in Chancery. If the Commons denied the right of the Lords to handle appeals from equity in 1675 then why did they not raise the same objection in 1621 in Boucher's case ?

It is even more remarkable that the king did not complain of the Lords exercising such a jurisidiction, though whether this was due to his recognition of the propriety of the Lords' jurisdiction, to the special nature of the case, or to the cautiousness of the Lords in considering it, is hard to tell. As has been mentioned before, James was very protective of the jurisdiction of the Lord Keeper, as he possessed the king's conscience; and he had thwarted attempts by the Commons to place controls on the jurisdiction of the Lord Keeper in 1621. Why did he not react to the statements by many members of the Lords, and

their actions, and attack their willingness to review the process by which the Lord Keeper had made a decision? James could easily have been informed of the proceedings of the Lords through Lord Keeper Williams and thus would have had the opportunity to object to the actions taken on the appeal, if he had so desired. It is likely that neither the king nor the Commons objected to the proceedings of the Lords in regard to the case, although both might easily have perceived their privileges as being violated, because they recognized the need for some means to take care of the problems inherent in the procedure of the courts of equity.

After the experience of this case, the Lords continued to practice an appellate jurisdiction that was somewhat similar to that seen in the Commons' consideration of petitions throughout the 1620's. As the decade progressed, however, they became more forthright in the orders which they made on such cases, though they never reached the position in which they actually overturned a decree. That they went as far as they did owes much to their historical relationship with the king's small council, which was incorporated into the Lords' House. The practical judicial benefit that came out of this inheritance was the presence of the chief judges of the nation in the Lords' House, particularly the Lord Keeper/Lord Chancellor as the presiding officer of the Lords. The other judges of the chief courts were usually present in the Lords House not as

full members but as assistants called to the Lords at the beginning of Parliament by Writs of Assistance.[24] Thus a petition could easily be referred to the judges who would have cognizance of the case if the Lords saw problems with the original decision or if the case had not been decided.[25]

As a result of this judicial inheritance the Lords were in a good position to refer cases, either original or appellate, to the Lord Keeper or Chancellor. The Lords showed themselves inclined to refer petitions asking for justice that had yet to be considered by any court, and were fit for an equitable solution, to the Lord Keeper. Recommendations would be made in the Committee for Petitions and then approved by the whole House. In 1624, the Committee for Petitions reported on "the Petition of James Barley, Esquire, who complains, 'That Rowland Eare had defrauded him of the Manor of Barley, and of divers other Lands of great Value.'"[26] The recommendation was that it be "referred to the Lord Keeper."[27] This procedure was also used for those who desired a rehearing of a cause already heard in Chancery. One such petition was that of Richard Wright, "who desired that he may be heard upon the true State of his Cause (formerly determined by the Court of Chancery), before whom their Lordships shall appoint."[28] The Lords' response to this case was,

> Their Lordships think it fit, that the Consideration of this Petition be commended to the Lord Keeper of the Great Seal of London, to determine, and

> to give such Costs to the Party grieved by this Petition, as his Lordship, in his Wisdom shall think fit....[29]

In spite of these steps to provide a clearing-house for litigants upset with the justice they had received in courts of equity, the Lords themselves in the 1620's did not directly reverse a decree from Chancery or any other court of equity. Hargrave points out that "when directly addressed by petition to themselves to relieve against an erroneous decree of equity, the House still abstained from undertaking to exercise this species of appellant jurisdiction."[30] Hargrave was determined to prove that the Lords' attempts to establish a jurisdiction over appeals from Chancery amounted to an unconstitutional innovation. Although biased against the jurisdiction of the Lords, he was correct in suggesting that they did not directly reverse decrees in the 1620's. James Hart, however, has uncovered evidence which clearly demonstrates that the Lords were comfortable in the belief that they had the power to exercise an appellate jurisdiction over decrees given in courts of equity.[31] Hargrave bases much of his argument on the controversial case of William Mathewe, introduced by petition on May 8, 1624, [32] the details of which Hart shows that he misinterpreted.

William Mathewe sought an appeal from a decree given in Chancery.[33] The Lords' behavior on this petition led Hart and Hargrave to their very different interpretations of the

attitude of the Lords to the propriety of their jurisdiction. Hargrave points out that the suggestion of the Committee for Petitions to consider this appeal was turned down by the full House; they instead requested that the king appoint a committee to consider Mathewe's case.[34] He suggests that this was because the Lords did not believe that it was within their jurisdiction to handle appeals."[35] Hart, however, thinks that such an interpretation is misleading because of the special circumstances of the case. Mathewe, in fact, had earlier petitioned the king to consider his case, but James had confirmed the decree of the Lord Keeper. Hart argues that the Lords' consideration of the case at all indicates that they believed that they had the right to handle such appeals, but that the fact that the king had considered it previously had made them cautious; thus "[t]heir request for a commission should then be seen, not as a denial of their appellate authority, but as a bold, if very diplomatic affirmation of it."[36] Even though they had requested such a commission, they made clear to the Lord Keeper that this commission was to have eight Lords on it, and these were to be named by the Lords themselves.[37]

In 1625 the Lords took recognition of the fact that the commission had not been created and called Williams to account. The Lord Keeper explained why he had not done as the Lords had ordered. Williams claimed that the king had not recognized the order for a commission as it had not come

from him.[38] This is one of the few clear cases of opposition of the king to the Lords' appellate jurisdiction, but his purpose was more to preserve what he perceived to be his prerogative than to oppose the still inchoate jurisdiction of the Lords itself. Despite the Lord Keeper's explanation he was brought before the Lords in order to apologise and recognize the propriety of the Lords' issuing such commissions themselves.[39] The Lords, however, did not revive their call for a commission to review Mathewe's case; they were still considering it themselves in 1628.[40]

Hargrave, however, is somewhat accurate in portraying the Lords' appellate jurisdiction as being insecure, as the Lords did not reverse any cases in this period. The closest that they came to doing so was to order further hearings before the courts from which the case had come; they also went as far as to order that one appeal, Lane v. Baud, be heard before themselves in 1628, though other business and the dissolution of Parliament prevented this.[41] This occurrence demonstrates a problem in the Lords' attempts to act as a court -- the Parliaments of the 1620's were usually of short duration. Nevertheless, the Lords were asserting a degree of appellate jurisdiction over Chancery and other courts of equity by ordering further proceedings on cases that litigants brought before their House.[42] What is significant in this first decade of the Lords' appellate jurisdiction is that they provided a means by which

litigants could escape the muddle of the appellate process that had existed before. By ordering the rehearing of cases in courts of equity the Lords sped up the process by which litigants could seek a new decree. The benefits of this may have been obvious to the Commons and the king, for they did not complain about it, aside from the king's refusal to issue a commission in 1624.

The hesitancy of the Lords to grasp a more complete appellate jurisdiction ended in the 1640's. In the political upheavals of the 1640's many changes occurred, including a tremendous alteration in the character of the Lords' appellate jurisdiction. A desire to extend greater control over the courts that were identified with the king's prerogative in a period of extreme constitutional tension may have been the cause, though in its actions the Lords did not seem to be expanding its jurisdiction in an arbitrary fashion. Some of the first acts of the Long Parliament were related to abolishing courts such as the Star Chamber and the Court of High Commission and the jurisdiction of the Privy Council.[43] Though Chancery remained, it was subjected to intense scrutiny bent on reforming it. The Lords in the 1640's exercised a more intense appellate jurisdiction over it than earlier; and in the 1650's, after the abolition of the Lords, attempts were made to secure another method of appeal from it. The chief complaints about the Chancery in this period were very much what they had been before,

"corruption, delay, lack of consistency, excessive cost,...subservience to the crown" and, in the 1650's, in the place of the crown, to Cromwell.[44]

It is unquestionable that the Lords in the period from 1640 to 1649 increased the scope of their appellate jurisdiction over Chancery. Aside from simply hearing many more cases, the Lords also directly reversed a decree, for the first time, in 1640.[45] As Hargrave points out, in the 1640's, especially after the commencement of the Civil War, the Commons let the Lords have free rein with their jurisdiction in general,[46] not really questioning it until 1646. It might easily be suggested that the extension of the Lords' jurisdiction was part of a larger attack on the king's prerogative, aimed at his Chancellor. Matthew Hale, the Chief Justice of King's Bench in the reign of Charles II, believed that in the first years of the Long Parliament the Lords' acceptance of a more complete appellate jurisdiction was politically motivated -- an attack on the office of Chancellor.[47] Hart suggests that this was not the case and that the new extent of the Lords' jurisdiction was due primarily to the needs expressed for such an extension by litigants.[48]

Much evidence suggests that the Lords were not intent on utilizing the confusion created by the political manoeuvrings of this period as an excuse either to attack the Chancellor or arbitrarily to extend their jurisdiction.

The Lords had not been in session to handle any petitions asking for redress from decrees from Chancery for over a decade. Thus there must have been a backlog of complaints. In addition, many of the same problems existed with the type of justice that Chancery could give as before, especially in relation to appeals. Though the coincidence of the timing of the increase might suggest otherwise, the Lords, in fact, showed a great deal of reluctance to infringe on the jurisdiction that traditionally belonged to Chancery. The instructions for the Committee for Petitions in 1640 indicate this reluctance. The Committee was to "reject those [petitions] that are fit to be relieved at the Common Law or Courts of Equity, and retain those that are fit for their Lordships' consideration."[49] The same attitude is evident in the orders given to the Committee throughout the 1640's, the result of an effort to cut down on private business that was interfering with pressing public business. In addition to this reluctance to take on cases that the Lords felt were more appropriate for other courts, they also were very cautious with the petitions that they did accept. Of the 68 appeals from Chancery that the Lords received in the period from 1641 to 1643, most were sent to be reheard in Chancery; and, though they might send instructions along with the case to the Chancery, the Lords did not circumscribe the decisions that the Lord Keeper or the commissioners had at their disposal.[50] Hart also points out

that, in cases when they felt that the Chancellor or Lord Keeper's decision had been inadequate, the wording of their orders indicated caution. The upper House "set aside decrees, they did not reverse them."[51] Only twice in the 1640's did the Lords actually impose their own decision on a case that they had set aside.[52] Though numerically insignificant these instances provided a valuable precedent for the Lords' appellate jurisdiction as exercised in the Restoration period.

The Lords, after 1642 those remaining at Westminster, displayed themselves to be willing to hand over petitions asking them for justice to the Lord Keeper (after 1642 the commissioners) himself. The upper House was not inclined to steal the jurisdiction of Chancery.[53] For example, the petition of Francis Jennings in 1647 was simply referred to the Chancery for a decision.[54] Often the decision of the Lords on petitions presented to them for redress of a decree given in Chancery would be to have it referred back to the Chancery for retrial.[55]

Chancery itself meanwhile, during this period, because of the character of its justice, its corruption and its association with the infringements made by the king's prerogative justice on the common law, was subject to "scorn and attack."[56] These attacks were coupled with complaints about the judicial aspects of the House of Lords. The judicial functions of the House of Lords came under general

assault in the late 1640's, though not because of its appellate function in particular. In 1646 John Lilburne was arrested for slander against the Earl of Manchester. In his trial before the Lords he showed scant respect for their role as a court, denying their right to try commoners.[57] This was followed by an even more serious denial of the Lords' jurisdiction to try commoners in the impeachment of John Maynard in 1647.[58] The most specific and threatening attack on the judicial powers of the Lords, however, came in 1647 with the Heads of Proposals of the Army. Two clauses of the Heads relate to the judicial powers of the Lords. The first attacked the Lords' powers of judicature in general. It demanded "that the right and liberty of the Commons of England be cleared and vindicated, as to a due exemption from any judgment, trial or other proceeding against them by the House of Peers, without the concurring judgment of the House of Commons."[59] The other clause was more threatening to the Lords' appellate jurisdiction specifically. It stated that the appellate jurisdiction was to be invested in the House of Commons and the Lords together.[60] These proposals were not accepted, however, and the question of the Lords' jurisdiction lost relevance in 1649 when the upper House was abolished.

However, recognition of the need for a court in the same basic form of the pre-1649 House of Lords, exercising a somewhat similar jurisdiction, found expression in 1657 with

The Humble Petition and Advice. This proposal was designed to create a new monarchy for England under Oliver Cromwell, and also called for the establishment of a second House. As an attempt to restore a stable and somewhat conservative basis for English government this proposal was a relative failure. Due to political conflict the second House never became truly functional. These plans for another House, however, reveal that the jurisdiction that had been exercised by the Lords' House prior to its abolition must have possessed a significant degree of favor among those concerned with the problems in the legal system. It was to proceed "in writs of error, in cases adjourned from inferior courts into the Parliament for difficulty, in cases of petitions against proceedings in Courts of Equity, and in cases of privileges of their own House."[61] Thus, the new House would have possessed many of the judicial powers of the Lords' House including the appellate jurisdiction over decrees from courts of equity.

Chancery itself had changed after Lord Keeper Littleton fled to the king in 1641. Beginning in 1642 the single office was replaced by a series of commissions. This, however, did not solve the problems in the way that justice was carried out in the court. In 1649, there were three commissioners, assisted by Lenthall, Master of Rolls. One of the commissioners, Whitelock, however, complained that most of the work fell on him and recognized that litigants

were dissatisfied with the justice that was being secured in Chancery.[62] That the House of Commons was still concerned with Chancery can be seen in an attempt to secure its abolition in 1653.[63] One proposal suggested that "special commissioners" would handle the cases that were already in process, while many courts would be created in the localities to administer equity to litigants.[64] After he dissolved the Parliament in 1653, Cromwell tried to reform Chancery and provide some means of securing appeals from it. One of the articles of the proposed ordinance of 1654 called for a new court to allow appeals from the reformed Chancery. In the event of a litigant's desire to appeal a decision, the commissioners who had replaced the Chancellor as the judges in Chancery were "to notify the Courts of Upper Bench,... Common Pleas, and Exchequer, which were to select six of their members to join the commissioners and sit at the new hearing."[65] The reforms of Cromwell were nominally put into practice, but they were quickly done away with at the Restoration.[66] Both this attempt at reform and that expressed in The Humble Petition and Advice demonstrate that the House of Lords, prior to 1649, had fulfilled a need in the legal system that was only too obvious when it was absent.

As it was in the Restoration period that the appellate function of the Lords matured, it was also then that the Commons came to challenge the Lords' appellate jurisdiction.

In this period the Lords acted very much as they had in the 1640's. The upper House had become confident in exercising its appellate jurisdiction. In the meanwhile, until 1675, neither the king nor the Commons complained directly about the propriety of the Lords' jurisdiction over appeals from Chancery. There were, however, other signs of trouble between the Lords and the Commons over the judicial role of the Lords. Most of the disagreements between the two Houses over the Lords' powers of judicature, however, were singular matters that did not lead to prolonged conflict. In 1667, for example, the Lords and the Commons fought over the articles of impeachment offered by the Commons against Clarendon. Likewise, the Commons argued with the Lords in a procedural matter over the impeachment of Lord Mordaunt. Another matter almost brought conflict between the Commons and the Lords in 1667, when the Commons considered the petitions of two commoners, Fitton and Carr, who had been imprisoned by the Lords for libel against a member of the Lords, clearly a matter of privilege for the Lords, though extraordinary in the long terms of imprisonment set. The Commons took no further action than simply debating the petitioners' plight.[67] The struggles between the Commons and the Lords over the original and appellate jurisdiction of the Lords, as will be seen, were much more vicious.

The jurisdiction of the Lords over appeals from Chancery was immediately revived at the Restoration. From

1660 to 1675, the Lords considered seventy-three petitions for appeal from courts of equity, most of them from Chancery.[68] The numbers of appeals handled swelled as the Restoration period progressed. In 1660 the Lords accepted five appeals from courts of equity.[69] From May 1661 to January 1667, however, they accepted only seven appeals from Chancery and other courts of equity together.[70] From February 1667 to November 1675, the Lords handled sixty-one appeals. Though reversing some of the decrees, the Lords showed themselves unwilling to subsume the jurisdiction of Chancery, dismissing twenty-nine of the petitions brought to them for appeal in this sixteen-year period.[71] Even when they did reverse decrees of Chancery, they were careful in their phrasing; instead of overturning they often simply "set aside" decrees.[72] In addition, in the 1660's, the Lords remained adamant about keeping the number of appeals coming into their House at a low level, probably so that pressing public business could be taken care of. In this period, the Lords consistently refused to hear appeals from Chancery unless Bill of Review procedure had already been attempted.[73] The character of the Lords' jurisdiction, though much different from what it had been in the 1620's, and very much as it had been in the 1640's, does not appear to have been extraordinarily high-handed. The Journals of the House of Commons show that the lower House did not object to this jurisdiction until 1675. If they had objected to the Lords'

jurisdiction and saw it as constitutionally dangerous, it is highly unlikely that they would have been so reticent.

As will be seen, however, in relation to the conflicts in 1675, privilege had an influence in how the Commons perceived this jurisdiction. One case in the 1660's indicates that the House of Commons was not willing to raise a fuss if one of their members used the judicature of the Lords as a plaintiff. Robert Robertes, a member of the House of Commons, petitioned the Lords on a matter of justice, and the Lords ordered the Lord Chancellor to make a decision and issue a decree from Chancery.[74] The Lords then amended their order, ordering to the Lord Chancellor, very unusually "that he proceed to make a speedy Decree in the High Court of Chancery in this Case, according to Equity and Justice... notwithstanding there be not any Precedent in the case."[75] The Bishop of Lincoln dissented from this decision on two grounds. He suggested that it might give an "arbitrary power in the Chancery."[76] Furthermore he raised a concern that the order might cause problems between the Lords and the Commons because Robertes was a member of the Commons.[77] The Commons, however, did not protest against the Lords' handling of the case. The difference between this case and the other cases that will be considered is that the member of the House of Commons involved was the plaintiff, not a defendant.

In 1669 the struggle over Skinner v. East India

Company[78] brought about the demise of the Lords' original jurisdiction in civil cases. Prior to this case, the Commons had not challenged the right of the Lords to exercise an original jurisdiction over civil cases. However, as has been demonstrated, the Lords had been very cautious in not accepting cases that could be solved in the ordinary courts of common law or equity and habitually had referred petitioners to those courts if their complaints could be handled there. As the Committee for Petitions typically included several judges as assistants, they would ensure that this rule was followed, especially as they would not want their own jurisdictions infringed upon. In the case of Skinner v. East India Company, despite the recommendation of the judges that most of the matters of the case could be handled in Common Pleas, the Lords took cognizance of Skinner's petition. This neglect of the advice of the judges was not typical of the behavior of the Lords in this period. Another unusual, yet revealing characteristic of this case was that members of the Commons were defendents.

That Skinner v. East India Company did raise objections from the Commons might suggest that much of the animosity revolved around the question of privilege. In addition, however, and this point is very significant, the Lords were portrayed as interfering in the normal process of law, taking cognizance of a case that could have been decided in

a common law court. This, more than the question of privilege, is the key to understanding the primary issue of this case and sets it apart from the causes of the conflict over Sherley v. Fagg in 1675, a difference that historians have not adequately considered.

Skinner, a merchant, had petitioned the king in 1666 for redress against an action of the East India Company during the Interregnum. The Company, claiming its monopoly of trade in the East Indies, had seized his property and his goods.[79] When Skinner petitioned the king, he set up a commission of members of the Privy Council to deal with the case, but it proved unsuccessful in bringing the two parties to an agreement.[80] The king referred the case to the Lords, and Skinner sent his petition to them. However, the Company denied the jurisdiction of the Lords, suggesting that they did not have the power to handle a matter of original jurisdiction.[81] It claimed, "That the petition is in the nature of an original complaint, not brought by way of appeal, bill of review, or writ of error, nor intermixed with privilege of parliament, nor having reference to any judgement of that court."[82] When the Lords pressed them to cooperate it supplemented this statement by claiming that "the matters of complaint in the petition are such, for which remedy is ordinarily given in the courts of Westminster Hall, wherein these respondents have right to be tried...."[83] The Lords, concerned about these charges,

consulted the judges, who reached a decision that did not resolve the ambiguity of the matter:

> [T]he matters touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon his majesty's ordinary courts at Westminster; And as to the dispossessing him of his house and island, that he was not relievable in any ordinary court of law.[84]

This decision of the judges did not deter the Lords from considering all the matters of the petition, for they believed that, since part of the complaint was not relievable by either the common law or equity, they maintained jurisdiction of the whole.

As the case had a bearing on the privileges of the House, involving several members of the Commons, the manner in which the Commons protested the Lords' taking cognizance of the case is very revealing. The Company petitioned the House of Commons, reminding them that several of the Company were members of the Commons and suggesting the dangers to the liberty of commoners and to the sanctity of the common law of the Lords' exercising such a jurisdiction.[85] They believed that their status as members of the Commons might exempt them from the jurisdiction of the Lords on the basis of privilege. The Commons condemned Skinner for pursuing the case and thus breaching the privilege of the Commons. Subsequently it ordered a committee headed by Solicitor General Finch "and all the gentlemen of the long robe"[86] to

determine the jurisdiction of the Lords in the matter of Skinner; and this committee, after a search of precedents, devised three resolutions against the propriety of the Lords' consideration of the case. The first claimed that the trial, involving members of the Commons, was a violation of the Commons' privilege.[87] The second stated the dangers of the Lords assuming an original jurisdiction and denied their possession of it, noting that the case was one that could be solved in the ordinary courts of law.[88] The third discussed the violation of the individual rights of the defendants to a fair trial.[89] What bears examination, however, is that the Commons as a whole did not abide by the recommendations of the committee. The Commons voted to send two resolutions to the Lords, ignoring the specific contents of the first and third resolutions that the committee recommended. The two resolutions that they sent focused on the larger issues of the law, denying the Lords an original jurisdiction and condemning their decisions in a case over which they had no jurisdiction.[90] The question is, then, why the Commons did not assert the issue of privilege in their resolutions. That the Commons felt that the Lords' taking cognizance of a case involving some members of the Commons was a violation of privilege is evident in the condemnation of Skinner for pursuing his case and in the decision of the committee to include the matter of privilege as one of their resolutions to be presented to the Lords.

This was a period in which the notion of parliamentary privilege might easily be extended over many actions for which it did not necessarily have a historical justification. Both Houses in this period experimented with privilege, often in a very arbitrary fashion.[91] Holdsworth suggests that in the seventeenth century "it was clear that the law might in effect be changed by the resolution of a single House, and that the subject had no protection against any sort of arbitrary act which the House might choose to say was privileged."[92]

The Commons in Skinner, in Slyngsby v. Hale in 1670, and in the three cases of 1675, which will be discussed shortly, behaved in such a way as to indicate that it was fundamentally opposed to the right of the Lords to try cases involving members of the Commons, at least not without its permission. This protective attitude to privilege for members, however, conflicts with the decision of the Commons in Skinner's case not to send the resolution of the committee regarding privilege to the House of Lords. The first reaction by the Commons to the appellate cases that will be discussed was to remind the Lords of the matter of privilege that was involved when members of the Commons were defendants. It is thus curious that the Commons chose not to resist the actions of the Lords on this basis in Skinner's case. Another difference between Skinner and Sherley is that in Skinner the Commons denied the propriety

of the Lords' jurisdiction from the very beginning, whereas in Sherley, as will be seen, the Commons attacked the appellate jurisdiction of the Lords only after the Lords had ignored the Commons' warnings about the privileges of its members. In Skinner's case the Commons was concerned primarily with the propriety of the jurisdiction that the Lords were trying to exercise. In taking cognizance of a case that, for the most part, belonged in Common Pleas, the Lords were violating the security of the common law courts that the Commons and the common lawyers had worked so diligently to preserve. From the beginning of Skinner's case the Commons showed their determination to halt this dangerous encroachment of the Lords, which was more alarming because the Lords blatantly ignored the opinion of the judges that most of the case could be resolved in the ordinary courts of the common law.

This might have been why the Commons, in a period of extreme jealousy over privilege, chose not to focus on that issue even though the defendants were members of the Commons. To have taken up the suggestion of the committee to send the Lords the resolution concerning privilege would have distracted attention from the main issue of a violation of the common law. If the Commons won the struggle on the basis of privilege, they would not have put a dent in the power of the Lords to interfere in the common law. They would have scored only a minor victory for privilege. This

struggle between the two Houses did not find explicit resolution. Instead, the king, desiring to end the deadlock that the case was causing, prorogued Parliament twice. The Lords did not take up the case of Skinner again,[93] and though after this they made a few futile attempts to exercise such a jurisdiction, they had effectively lost their ability to handle civil cases of original jurisdiction involving commoners.

When the dynamics of the cases of Skinner and Sherley are compared it does not appear that they were part of a more general attack upon the entirety of the Lords' jurisdiction, as Flemion, Relf and Foster have suggested. There is little evidence that indicates that the challenge to the Lords' original jurisdiction in 1669 and the appellate jurisdiction in 1675 were connected in any way except for the fact that both involved the potential for questions of privilege by coincidence of member(s) of the Commons being defendant(s) in both cases. In fact, the statements of the East India Company itself and the actions of the Commons indicate that in Skinner there was no general opposition to the Lords' appellate jurisdiction over Chancery and other courts of equity. When the Company responded to the Lords' handling of the case they implicitly recognized the Lords' ability to handle appeals from equity. In complaining about the Lords' consideration of this case, they objected, "That the petition is in the Nature of an

Original complaint, not brought by way of Appeal, Bill of Review, or Writ of Error...."[94] The House of Commons confined its objections to the Lords' cognizance of the case to their lack of an original jurisdiction.[95] Moreover, in a comprehensive bill created by the Commons during the crisis over original jurisdiction, they did not challenge the right of the Lords to handle appeals from Chancery. The aim of the attack on the Lords' jurisdiction in Skinner's case seems to have been limited to their original jurisdiction, which posed a threat to the common law.

The struggle over the Lords' appellate jurisdiction in 1675 needs to be considered in this context. The only potential challenge to the Lords' appellate jurisdiction before the case of Sherley v. Fagg and the two accompanying cases of Stoughton v. Onslow and Crispes v. Dalmahoy in 1675 is found in the case of Slyngsby v. Hale in 1670. The petition presented by Slyngsby asked for an appeal from a decree given in Chancery. As in the case of Skinner, the defending party was a member of the House of Commons. The Commons accordingly sent the message that they "desire[d] the Lords to have Regard to the Privileges of the House therein."[96] The Lords responded by sending a message by the Lord Keeper stating, "That the House of Commons need not doubt, but that the Lords would have as due Regard for their Privileges, as they had their own."[97] The Lords, though determined to try the case, were cheated out of the

opportunity because Slyngsby withdrew his request when he found that he could get a rehearing of his case in Chancery.[98] The Lords, however, issued a declaration confirming their right to take on such cases even if a member of either House was involved:

> the Lords do declare, that their Proceedings have been according to the Course of Parliament and former Precedents; and that the Lords do assert it to be their undoubted Right in Judicature, to receive and determine in Time of Parliament Appeals from Inferior Courts, though a Member of either House be concerned, that there may be no Failure of Justice in the Land.[99]

This is the precedent on which the Lords based their stance in the crises of 1675, which will be the subject of the next chapter.

In the Restoration period the Commons and the Lords were in conflict over several aspects of the Lords' judicial functions. It is important to recognize that these matters do not necessarily suggest that the Commons was opposed to the Lords' judicial functions in general or to the appellate jurisdiction over Chancery and other courts of equity. The difficulties over impeachment did not lead the Commons to challenge this aspect of the Lords' judicature. In the process of the other judicial difficulties, no voices were raised by the Commons about the Lords' appellate jurisdiction from Chancery. As the next chapter will show, however, the attitude of the Commons to the appellate function of the Lords, up to now benign if not favorable,

changed, if only temporarily. This was due to the particular characteristics of the three cases of 1675 themselves, each involving a member of the Commons, and the particular context in which they were considered.

III. Court, Country and the Appellate Controversy of 1675

I will argue in this chapter that the contestation by the Commons of the appellate jurisdiction of the Lords over Chancery and other courts of equity was due primarily to factors other than a general opposition by the Commons to that function of the Lords. As shown in the previous chapters, the Commons had good reason to support the growth of the Lords' appellate jurisdiction in the 1620's and after, as the Commons themselves had searched for a means to provide for appeals from Chancery for litigants. Nor had the Commons contested the right of the Lords to exercise an appellate jurisdiction, aside from the particular objection to a member of the Commons being a defendant in 1670 in Slyngsby v. Hale. Although other historians have viewed the challenge to this aspect of the Lords' jurisdiction as being part of a larger movement to limit the Lords' powers of judicature in general, the circumstances of the challenge in 1675, however, suggest something quite different. The apparent opposition of the Commons in 1675 was largely the result of the characteristics of three unusual cases brought

before the Lords, and the peculiar and politically-charged environment in which they were considered.

The characteristic of the case of Sherley v. Fagg in 1675 and two other cases which occurred at the same time, Stoughton v. Onslow and Crispes v. Dalmahoy, which determined that the Commons would contest the right of the Lords to handle these three cases specifically was that each involved a member of the House of Commons as the defendant in the appeal. This factor supplied sufficient reason for the Commons to contest the right of the Lords to handle appeals from courts of equity involving members of the Commons in time of Parliament, for the Commons at this time, during a period of enhanced jealousy over privilege, ostensibly considered it to be one of their privileges to be immune from civil suits in time of Parliament, especially if a suit was prosecuted in the Lords. The Commons had historically displayed a concern that members of their House should not be called before the Lords without their consent.[1]

The fact that the Commons, in the midst of the struggle over Sherley, resolved that the Lords did not possess an appellate jurisdiction over decrees from equity should not be construed as representing a genuine opposition to the appellate jurisdiction of the Lords. Instead, in the early stages of these cases the Commons did not even suggest that the Lords' appellate jurisdiction was unconstitutional. The position of the Commons changed when the Lords, under the

encouragment of Shaftesbury, would not yield to the Commons' assertion of their privileges. Only then did the Commons deny the right of the Lords to handle appeals from equity in general, rather than just those involving members of the Commons in time of Parliament.

This chapter will suggest that the reason for such a change of attitude was the political agenda of the Earl of Shaftesbury and his encouragment of the Lords to handle these cases and belligerently assert their right to exercise a complete appellate jurisdiction even if a member of the Commons was involved, in spite of the Commons' protests. Shaftesbury's actions indicate no willingness to compromise with the Commons on a matter that was obviously very important to their privileges. The Commons showed no inclination to challenge the Lords' appellate jurisdiction until they were forced by Shaftesbury's scheme to believe that doing so was the only method of securing their privileges. Their subsequent statement that the Lords did not possess an appellate jurisdiction was in opposition to their behavior from 1621 to 1675.

Shaftesbury's motivation for his actions in regard to the three cases in 1675 might have been a genuine support for the Lords' jurisdiction. The circumstances of the two sessions, however, suggest that he had other priorities and that the Lords' appellate jurisdiction became his tool to upset parliamentary proceedings. It is unlikely that the

debate over these cases would have reached such extremities, forcing the king to prorogue Parliament twice had it not been for Shaftesbury's desire to force the dissolution of Parliament. His priority in this period was opposition to the Anglican policies of the Earl of Danby and the Court and to Danby's hold through patronage on the House of Commons. Shaftesbury is well known for his opposition to the Court and the presence of Catholics in government during the period of the Exclusion Parliaments from 1679 to 1681. His opposition to the Court, however, was apparent immediately after 1673, when the Cabal had been dissolved and he was no longer Lord Treasurer. Shaftesbury exploited the fears of the Lords that the Commons and Danby desired to limit their constitutional position and the jealousy of the Commons over the privileges of their members, by highlighting the issues that were at stake in these cases. In doing so, he hoped to frustrate the policies of Danby and the Court by forcing a dissolution.

The proof of this reconstruction of events lies in the progress of the two sessions of Parliament in 1675, from April to June and from October to November, and the actions of the Earl of Shaftesbury in reference to the three relevant cases in these sessions. A demonstration of Shaftesbury's aims, however, is not the major goal of this chapter, whose purpose is to demonstrate that the Commons through their actions did not show themselves eager to

deprive the Lords of their appellate jurisdiction over Chancery and other courts of equity but that they were forced into this course of action by the aims and the behavior of Shaftesbury.

The divisions over religious questions in this period, especially in the 1670's, provide the historian with numerous problems in explaining the character of opposition in the Parliaments of Charles II. That an opposition, however amorphous, existed is apparent in the struggles over the religious issues of the day and the comments of those who were associated with the policies of the Court. It was to such an opposition that Lord Chancellor Finch referred to in his speech at the opening of Parliament in 1677, commenting on the failure of the previous two sessions:

> Away then with all the vain Imaginations of those who Labour to infuse a Misbelief of the Government! Away with those ill-meant Distinctions between the Court and the Country, between the Natural and the Politic Capacity! And let all who go about to persuade others that there are Two several Interests, have a Care of that Precipice to which such Principles may lead them.[2]

Charles II was just as adamant in pointing out the existence of such a group that was responsible for frustrating his policies. At the beginning of several sessions of his Parliament in 1675 and 1677 he called to the attention of the Lords and Commons his awareness of the "enemies" and the "pernicious Designs of ill Men" who were determined to upset

his policies.[3]

The opposition in the House of Lords under the leadership of the Earl of Shaftesbury centered upon the intense religious controversies of the Restoration period.[4] Much evidence exists which shows that an opposition group to religious restrictions existed in the Lords in this period; though shifting in its consistency it was largely inimical to the zealous Anglicanism that typified the Commons' actions throughout the Restoration period. Opposition in the upper House to religious restrictions, particularly in regard to Protestant dissent, had been present since the restoration of the Lords' House in 1660. The most potent manifestation of this was the "Presbyterian opposition."[5] The Lords, in general, in this period proved themselves to be much more tolerant in religious matters than the Commons, particularly in the late 1660's and 1670's. Richard Davis suggests that the issue of religion was "the single most important cause of organized opposition, and later of party, in the House of Lords."[6] A significant element in the Lords identified with toleration for dissenters and displayed themselves as fierce opponents of the overzealous Anglican behavior of the House of Commons even as early as the creation of the acts of religious intolerance that came to be termed the Clarendon Code. This was evident, for example, in the passage of the Conventicle Act, in which the Lords moderated the punishments which it originally

outlined.[7] The House also showed its willingness to be more tolerant than the Commons in 1668 and 1669, when it prevented the passage of two new conventicle acts sent up by the Commons.[8] The Catholics and those friendly to dissent had often acted in conjunction before 1673 to oppose the religious restrictions that affected their interests, though the discovery of James' Catholicism in 1673 divided them.[9]

In 1675 the Catholic and Presbyterian members of the Lords came together again temporarily to oppose Danby's Anglican policy.[10] His attempt in that year to pass the Test Act, part of his Anglican policy, made the opposition of a group of the Lords to religious restrictions more obvious, and this occurred at the same time as the three appeal cases that led to the struggle over the Lords' appellate jurisdiction. The Earl of Shaftesbury took the lead role in this opposition, along with other members, such as Buckingham, Wharton, and Holles.

There also existed at this time in the Commons a connection of interest that could be considered a "Country Party."[11] Among this interest were those members who had participated in the struggle against the king in the 1640's and those angered by the mismanagement that they saw in the running of the government.[12] There had in fact been an observable shift in the character of the government and the path down which it was heading with several events of the 1670's: the Declaration of Indulgence, the alliance of the

English and the French in a war against the Dutch, and the revelation that James was a Catholic.[13] The opposition in the Commons pursued a course of action that was indicative of both a distrust of government and of hostility to Catholics. Both Houses were in fact infected by anti-Catholic feeling in 1673, the Commons introducing a new test bill that was intended to keep Catholics out of the House of Lords and the Lords proposing a bill for ensuring the safety of the Anglican religion from the threats of Catholicism.[14] In 1675 the opposition in the Commons had a set of bills that they wanted passed. This included a test act for all of Parliament similar to the one of 1673 restricting Catholics from the Lords, a Habeas Corpus bill, and a bill to prevent the king from extracting money from the country without lawful consent of Parliament. There were also plans for other bills against Catholics and unsuccessful attempts to rid the government of both Lauderdale (through an address) and Danby (through impeachment).[15] As will be seen, the agendas of the oppositions in the Lords and the Commons, though similar in spirit, conflicted in the progress of the session as a result of the dispute over the three appellate cases. This was largely the result of the means Shaftesbury chose to defeat Danby's program for Parliament.

In the session which opened in April of 1675, Danby was determined to forward an Anglican policy, largely centered on removing non-Anglicans from all offices of state,

including Parliament. This was coupled with a call for revenue to strengthen the fleet.[16] This matter of state security, however, was neglected as a result of the reaction of the opposition to the religious proposal. The Test Bill was introduced into the Lords in the first week of the new session and was termed "An Act to prevent the Dangers which may arise from Persons disaffected to the Government."[17] The intention of the Bill was to require from all officials and members of Parliament an oath that they would not attempt to disturb the "existing establishments" of the Anglican Church and the government.[18] It was in opposition to this bill that Shaftesbury directed his efforts.

As the Journals of the House of Lords did not record the debates between members or the divisions in voting, it becomes problematic to establish the connections among the three basic factors which I have suggested were part of one effort to ruin the sessions: the opposition to Danby's Test, the effort to secure the dissolution of Parliament, and the manipulation of the cases of Sherley v. Fagg, Stoughton v. Onslow and Crispes v. Dalmahoy. To establish the connections among the three factors one must rely upon the records of the protestations in the House of Lords, which contain the names of those who objected to particular resolutions or acts. The consistency of the names on these protests indicates that some Lords made a consistent effort to disrupt the proceedings of Parliament. Other scraps of

unofficial information help confirm the suggestions made by the trends in these protests.

The Lords made four protestations in reference to the Test Bill of 1675, which, though varying in the numbers of Lords who protested, contained a core of members who protested each time.[19] Moreover, before the introduction of the Test Bill, ten members, including Shaftesbury protested against thanking Charles for his speech opening Parliament.[20] The matters of the protests against the Test Bill itself indicate that it received significant opposition, though the bill in the end was passed by the Lords. After the second reading of the Test Bill on April 21 the question was asked of the Lords, "Whether this Bill does so far entrench upon the Privileges of this House, as it ought therefore to be cast out?"[21] This question did not pass, and twenty-three members[22] protested the decision of the House. These members conceived the terms of the bill to be a violation of their privilege and offered the explanation that

> we do humbly conceive, That any Bill which imposeth an oath upon the Peers with a Penalty, as this doth, that, upon the Refusal of that Oath, they shall be made incapable of sitting and voting in this House; as it is a Thing unprecedented in former Times, so is it, in our humble Opinion, the highest Invasion of the Liberties and Privileges of the Peerage that possiblly may be....[23]

The second protest of the Lords occurred five days later, and was against the motion that the Bill be committed, which

it nonetheless was. This protest complained again that the oath was as a violation of the privileges of the Peers but added that the bill,

> as we humbly conceive, does strike at the very Root of Government, it being necessary to all Governments to have Freedom of Votes and Debates in those who have Power to alter and make Laws; and besides, the express words of this Bill obliging every Man to abjure all Endeavours to alter the Government in the Church, without regard to any Thing that rules of Prudence in Government, or Christian Compassion to Protestant Dissenters, or the Necessity of Affairs at any Time shall or may require.[24]

Though this protestation was made by only twelve members, each of them had been part of the first protestation against the Test Bill: Buckingham, Howard Earl of Berkshire, Bristol, Clarendon, Delamere, Basil Denbigh, Mohun, Salisbury, Shaftesbury, Stamford, P. Wharton and Winchester.[25] All but Buckingham, Berkshire, Bristol, and Denbigh had also taken part in the protest against thanking the king for his speech. Those remaining, and to a degree, the other four, provided the core of the opposition, as will be seen. These Lords were, for the most part, consistently involved in the protests relating to the dissolution of Parliament, the other protests against the Test Bill, and the protests encouraging the Lords to be more forceful in asserting their rights to their appellate judicature.

Those who had agreed to commit the Bill, however, complained about the protest issued [the second against the

Test Bill] and decided that "the reasons given in the said Protestation do reflect upon the Honour of the House, and are of dangerous Consequence."[26] This complaint, however, resulted in another protest by twenty-one members, including not only ten of the twelve, minus Bristol and Stamford, who had issued the last protestation, but also most of those who had participated in the first protestation against the Test Bill.[27]

The final protestation against the Test Bill involved an attempt to have a proviso added to the Bill that would have secured the right of members of Parliament not to have the oath imposed on them and guaranteed their right to pass new laws, which rights they believed would be violated by the bill. When this provision was not accepted, fifteen members protested,[28] including all but two, Paget and Halifax, of those who had signed the protestation against the king's speech. All fifteen of these final protesters against the Test Bill had also participated in the first protest against it. All of the members, save one, Bristol, of the second protestation against the Test Bill had also participated in this fourth and final protest against it. In addition, all of those participating in this fourth protest, save one, Stamford, had also participated in the third protestation.

The list of protestations provides an effective means by which to make connections between those who opposed the

Table 1

Protests Against Danby's Test

Peer	Protest of April 21	Protest of April 26	Protest of April 29	Protest of May 4
Ailesbury	x		x	
Audley			x	
Bedford	x		x	x
Berkshire	x	x	x	x
Bridgwater	x		x	x
Bristol	x	x		
Buckingham	x	x	x	x
Clarendon	x	x	x	x
Delamere	x	x	x	x
Denbigh	x	x	x	x
Dorset	x		x	x
Eure	x		x	x
Fitzwalter			x	
Grey	x		x	
Halifax	x		x	
Holles	x		x	
Mohun	x	x	x	x
Paget	x			
Petre	x			

Table 1 (cont'd)

Salisbury	x	x	x	x
Saye	x		x	
Shaftesbury	x	x	x	x
Stamford	x	x		x
Wharton	x	x	x	x
Winchester	x	x	x	x
Totals	23	12	21	15

basic tenets of the Test Bill and those who desired a dissolution of Parliament and also encouraged the Lords to maintain the judicature of their House in spite of the opposition of the Commons. There were two attempts by the opposition Lords to get the king to dissolve the parliament, the first of which was on November 20, 1675, during the time in which the battle over Sherley v. Fagg was raging. A motion was made to address the king to dissolve Parliament.[29] The vote on whether to present the address to the king in fact was very close: the House decided against sending the address to the king by a vote of fifty to forty-eight.[30] Twenty-two members[31] issued a protestation against the decision of the Lords not to make the address to the king, which said that the length of the Parliament meant that the members of the Commons were no longer truly representative of their constituencies and blamed the trouble between the Commons and the Lords on this fact, suggesting that only through a dissolution could the two Houses be brought into an effective relationship again.[32] It is noticeable that a substantial number of those who participated in this protestation had been relatively consistent in protesting against the Test Bill also. This is particularly the case for Berkshire, Bridgewater, Buckingham, Clarendon, Delamere, Dorset, Mohun, Grey, Salisbury, Shaftesbury, Stamford, Wharton, and Winchester. In effect, there was consistency between those who were opposed to the Test Bill and those

who desired the king to dissolve Parliament. In 1677, after the two sessions in question had been prorogued for fifteen months, four of the key protesters, Buckingham, Salisbury, Shaftesbury, and Wharton, all asserted that Parliament was thus dissolved and were arrested for this proclamation.[33]

The protestations indicate that there was a close connection between those who were opposed to significant elements of the Test Bill and those who desired that the Parliament be dissolved. What is more significant for the purpose of this chapter, however, is that it was largely the same core of members who supported a forceful attitude of the Lords to the Commons, proclaiming the absolute nature of the Lords' appellate jurisdiction. The members signing the protestation about Sherley v. Fagg indicate the connection. The Commons on May 5, 1675, noting that the Lords had taken cognizance of the case, had sent the Lords a message requesting that they have regard for the Commons' privileges in the case as it was one in which a member of the House of Commons was involved.[34] The Lords, in considering an appropriate reply to the Commons, decided against sending one that belligerently affirmed their right to exercise their appellate jurisdiction regardless of the office of the party and simply told the Commons "[t]hat the House of Commons need not doubt but that their Lordships will have a regard to the privileges of the House of Commons as they have of their own."[35] Several Lords believed that this answer

would not suffice and suggested that

> the Answer voted to be sent to the House of Commons, being the same that was sent down formerly in the Case of Hale and Slyngsby, hath, as we with all Humility do apprehend, been already mistaken by them, as a Condescension of this House to forbear proceeding in Judicature, in Affairs of this Nature; and appears to us very liable to so great a Misconstruction, that it may seem in some Measure to acknowledge that the House of Commons have a Claim to some Privilege in Judicature; which is a thing that we conceive belongs solely to this House....[36]

Though only nine Lords protested the decision of the House to send such a relatively non-belligerent message to the Commons, the majority of these had been key members in several of the protests against the Test Bill and for the dissolution of Parliament -- most particularly Bridgwater, Berkshire, Dorset and Shaftesbury, and, to a lesser extent, Bedford and Denbigh.[37] Shaftesbury, the most consistent member of the opposition, demonstrated his absolute support for an unrestricted right of the Lords to handle appeals from courts of equity in a speech in which he argued for the Lords to set a date to hear the case of *Sherley vs. Fagg.*[38]

Thus it is apparent that a significant core of the Lords is associated with opposition to the Test Bill, support of the dissolution of Parliament and the support for the Lords' judicature. What needs to be shown next is that the cases of Sherley v. Fagg, Stoughton v. Onslow and Crispes v. Dalmahoy were tools to achieve the dissolution of

Parliament which was needed in order to subvert the Anglican plans of the Earl of Danby. The proof that will be offered is the unusual nature of the progression of events that led up to the challenge by the Commons to the Lords' judicature.

The coincidence of three appeals against decrees made in favor of members of the Commons in such a short period is suspect: why would three appeals involving members of the House of Commons be introduced in the first several weeks of a very short session? The first case introduced upon petition to the Lords was an appeal made by Sir Nicholas Crispe and several members of his family on April 19, 1675, against a decree in Chancery in favor of Thomas Dalhomey, a member of the House of Commons, and several others.[39] The second, introduced on April 23, was that of Sir Nicholas Stoughton seeking "an Appeal from the Dismission of his Bill out of the Court of Exchequer."[40] The defendant in this appeal was Arthur Onslow. The third petition was that of Dr. Thomas Sherley seeking an appeal, "complaining of a Dismission of his Bill of Discovery in Chancery...."[41] Sherley had presented the same petition to the Lords in 1669;[42] but, when Parliament was prorogued after the crisis over Skinner , Sherley took no further action on it. As in the other two cases the defendant, John Fagg, was a member of the House of Commons. There is no way to prove that the three petitions were instigated by the Earl of Shaftesbury or any other member of the opposition, but this coincidence

and the manner in which these cases were handled indicate that the opposition used these cases to the advantage of their plans.

The initial behavior of the House of Commons did not suggest that a significant struggle would emerge over these cases. In fact, the Commons' first reaction was simply to make note to the Lords that they should be aware of Fagg's privilege as a member of the Commons, ostensibly because his status as a member protected him from being brought to plead in the Lords, although they did not deny the jurisdiction of the Lords over appeals from Chancery or other courts of equity in general. The interest of the country Lords in emphasizing the issues of privilege inherent in these cases in order to achieve a disruption of business was probably not shared by the opposition in the Commons. The oppositions in the two Houses were, in fact, pursuing different agendas. There was little coordination in their strategies. Though Shaftesbury had contacts with the opposition interest in the Commons he had no direct leadership over them.[43] While Shaftesbury manipulated the case of Sherley v. Fagg in order to achieve a dissolution, a strategy to which he had resigned himself by the second session,[44] it was not in the interest of the opposition in the Commons to have Parliament dissolved. They had a legislative program that they were trying to get through and it would have been ruined by a dissolution.[45]

The Commons' reaction to these three cases duplicated their response to Slyngsby v. Hale in 1670. In that case the Commons had requested that the Lords "have Regard to the Privileges of this House therein."[46] The Commons initially did not take notice of the first two cases, Stoughton's and Crispes', perhaps because the members involved had not brought objections to the notice of the Commons. On May 4, however, Fagg complained to the Commons. The Commons immediately began a search for precedents, looking particularly at the case of Slyngsby v. Hale "to see if the Lords can try a member of the Commons." They then sent a message to the Lords very much like the one sent in the case of Slyngsby saying that they "desire the Lords to have regard to the Privileges of this House...."[47]

The majority of the peers tried to be careful not to offend the House of Commons in their reply. Indeed, the Lords did not immediately respond to the Commons, deciding first to search for precedents.[48] The Committee for Privileges decided that the Lords had a right to handle such cases in spite of the fact that a member of the Commons was involved, citing the precedent of Slyngsby v. Hale and the declaration they had made about their judicature after Slyngsby had withdrawn his case, though this declaration had not been sent to the Commons in 1670. The Lords resurrected the declaration, and it was moved that it be sent to the Commons as part of their answer to the Commons' request for

the Lords to have regard for their privileges. However, perhaps in an attempt not to offend the Commons, the House voted instead that the message be merely the same one that had been sent to the Commons in the case of Slyngsby. The House thus decided on the less belligerent answer, "That the House of Commons need not doubt but that their Lordships will have a Regard to the Privileges of the House of Commons as they have of their own."[49] It was at this point that Shaftesbury and eight other members of the opposition suggested that the message, when it was sent to the Commons in 1670, had already given them the impression that the Lords were unsure of their own Judicature and that it recognized a claim of the Commons that they had "some Privilege in Judicature."[50] Although Shaftesbury and others were more than willing to upset the Commons over this matter, the moderate nature of the Lords' answer indicates that the majority of the Lords were interested in preserving a good relationship with the Commons. The Lords, nevertheless pressed for the hearing of the cases at hand. On May 12, they set the date for the hearing of Crispes' case for May 19.[51]

The Commons were not satisfied with the response of the majority of the Lords, though Fagg himself decided to answer the petition of Sherley on May 12.[52] The Commons were convinced that the Lords' handling of Sherley's case amounted to a violation of their privileges. They responded

in two ways. They first resolved, "That the Appeal brought by Dr. Sherley in the House of Lords, against Sir John Fagg, a member of this House, and the Proceedings thereupon, are a Breach of the undoubted Rights and Privileges of this House."[53] The Commons then sent the sergeant-at-arms to arrest Sherley, though his attempt to do so, just outside the Lords' House, was thwarted by Lord Mohun, who seized his warrant and read it before the Lords.[54] The Commons responded by complaining to the Lords, asking them to punish Mohun.[55] The Lords supported the actions of Mohun and extended their privilege to Sherley to prevent his arrest.[56]

The Commons, though disgruntled by the matter, did not yet deny the propriety of the Lords' jurisdiction in general, though they became more determined to protect the members' privilege of not having to be tried before the Lords. On May 15, they reissued their statement that the case against Fagg was a breach of privilege (even though Fagg had put in an answer to the Lords) and added another statement to it, that "there be no further Proceedings in that Cause, before their Lordships."[57] The Commons also took cognizance of the case of Stoughton v. Onslow, in which a member of the House of Commons was also involved, and ordered that Stoughton be arrested for pursuing his case, though the Lords on discovering the order placed their protection over him on May 17.[58] The Comons subsequently requested a conference with the Lords on the case of

Sherley. At the conference members of the lower House reiterated their position that the Lords' consideration of the case amounted to a breach of the privileges of the Commons.[59]

The Lords were at this point becoming concerned with the attitude of the Commons to their jurisdiction. Though they had made an attempt to maintain their privilege of judicature, while still not offending the Commons, the Commons had, in effect, challenged the right of the Lords to handle particular appeals, even to the extent of attempting to arrest the litgants who had brought their cases before the Lords. It is interesting to note that of the six reporters (plus the Lord Keeper and the Lord Privy Seal) chosen by the Lords for the conference with the Commons, three were associated with the opposition interest and were later among the most vehement in defending the absolute judicature of the Lords: Bridgwater, Shaftesbury, and Holles.[60] After this conference, when they realized the determination of the Commons to maintain their privileges, the Lords reconsidered the importance of the declaration that they had earlier made and that Shaftesbury and his allies had wanted sent directly to the Commons, affirming their right to handle all cases of appeal, even if a member of the Commons was involved, and adding the proviso, "and from this Right, and the Exercise thereof, the Lords will not depart."[61] Just after the Lords reaffirmed this

declaration they received another message from the Commons, this time in reference to Stoughton's case, stating that they "desire[d] their Lordships to have Regard to the Privileges of the House of Commons."[62]

At this stage what had earlier been merely a question of privilege began to raise questions about the respective jurisdictions of the Commons and the Lords. Although the Lords showed themselves unwilling to discuss their judicature with the Commons, reflections upon their jurisdiction were inevitable. In the course of these reflections, the Commons, spurned by the Lords in their efforts to get them to recognize their privileges, took the ultimate step of denying the appellate jurisdiction of the Lords over decrees from Chancery and other courts of equity in totom, not simply the right of the Lords to handle cases involving members of the Commons.

The Lords, after receiving the latest message of the Commons, sent their absolute declaration to the Commons, no longer concerned with being careful about offending them. This signaled a significant change in the Lords' attitude from their response to the Commons' original complaint in the case of Sherley. The actions of the Commons, in attempting to arrest those who had presented a petition to the Lords, could easily have been construed as a denial of the Lords' jurisdiction in general, though it is apparent at this stage that the Commons were primarily concerned with

protecting the privileges of their own members. The Lords responded by ensuring the right of the litigants to pursue justice in the Lords in security. Already having Sherley and Stoughton under their protection, the Lords, aware of the danger that the Commons would arrest the Crispes for prosecuting their case against Dalmahoy, extended to them, and to their counsel, the same protection.[63] In preparing heads for a conference with the Commons, they suggested that the attempt made to arrest Sherley for his appeal violated the privileges of the Lords and had serious consequences for the justice of the nation, claiming that removing the jurisdiction of the Lords from consideration of cases involving members of Parliament would amount to a failure of justice.[64] The Lords further showed themselves to be unwilling to discuss any matter of their judicature with the Commons, responding on May 27 to a request by the House of Commons for a conference "concerning the Privileges of their House in the Case of Mr. Onslowe," by agreeing, but with the proviso that "nothing be offered at the Conference that may any Ways concern their Lordships' Judicature."[65] At the same time, however, the majority of the Lords did not show themselves particularly willing to use the cases before them simply to make a point about their privileges to the exclusion of considering them in a judicious fashion. This is demonstrated by the petition of Crispes v. Dalmahoy, which had been partly responsible for the rift between the

Houses, and its subsequent dismissal by the Lords,[66] who saw no grounds for reversing or setting aside the decree of Chancery and did not use the case for the purpose of confirming their right to handle all cases of appeal even if members of the Commons were involved.

The Commons had in the meantime become even more determined to defend their privileges against the Lords' jurisdiction. In addition to attempting to arrest both counsel and litigants involved in the controversial cases before the Lords and to claiming the Lords should not try these cases of appeal involving their members, they resolved on May 18, "That it is the undoubted Right of this House, that none of their Members be summoned to attend the House of Lords during the Sitting or Privilege of Parliament."[67] After the Lords said they would not allow the discussion of their judicature in the conference desired by the Commons on the case of Onslow, the Commons not only did not show up for it but they voted two resolutions that reflected their frustration over the Lords' refusals to have regard for their privileges. The Commons resolved on May 28, "That no member of this House do prosecute any Appeal from any Court of Equity, before the House of Lords."[68] The second resolution of the Commons was much more drastic; and, because in the second session they decided not to reaffirm it, it probably reflected the temporary frustration of the Commons over the events of the session, as in the second

session they decided not to reaffirm it. They resolved, "That there lies no Appeal to the Judicature of the Lords in Parliament, from Courts of Equity."[69]

What made the situation even more intractable was the arrest by the Commons of the counsel of the Crispes -- Peck, Churchill, Pemberton, and Porter -- who had earlier had their petition dismissed by the Lords, for violating the Commons' privileges and orders.[70] This action of the Commons led the Lords to deny the jurisdiction of the Commons to make these arrests on matters of privilege. The counsel who were arrested were soon recovered by the Black Rod from the Sergeant-at-Arms of the Commons.[71] For the conference that was to be had on the matter, the Lords chose four members, three of whom were among the opposition and had identified themselves not only as defenders of the Lords' jurisdiction but also as opponents of the Test Bill and proponents of the dissolution of Parliament: Bridgwater, Shaftesbury, and Holles.[72] The heads proposed for the conference with the Commons highlighted the propriety of the Lords' appellate function and denied any right of the Commons to challenge it. They called the Commons' orders to have the counsel arrested

> a great Indignity to the King's Majesty in this His highest Court of Judicature in the Kingdom, the Lords in Parliament; where His Majesty is Highest in His Royal Estate, and where the last Resort of judging upon Writs of Error and Appeals in Equity, in all Causes, and over all Persons, is undoubtedly fixed and permanently lodged.[73]

In addition to this high praise for their own judicature, this committee, dominated by members of the opposition, drew up a statement on the Commons' jurisdiction that would have obviously angered the Commons even more. They claimed that the Commons, by making an order for the arrest of the Crispes' counsel and thus holding up proceedings, had violated their privileges, especially as the House of Commons "are no Court, nor have Authority to administer an Oath, or give any Judgement...[and] have no Authority nor Power of Judicature over Inferior Subjects, much less over the King and Lords...."[74] The committee likewise decided to cite to them the record in which the Commons had claimed not to wish to participate in the judicature of the Lords in the Roll of Parliament of 1 Henry IV.[75] This record was made after Richard II had been deposed by Parliament and replaced by Henry IV in 1399. It stated,

> That as Judgements in Parliament belong only to the King and the Lords, and not to the Commons, except in case it please the King out of his Special Grace to acquaint them with those Judgements in favour to them; so that no Entry ought to be made Prejudicial to them, to make them Parties now or hereafter, to any Judgements given or hereafter to be given in Parlament.[76]

After this conference, which occurred on June 3, the Commons again had their Sergeant-at-Arms arrest the four members of Crispe's counsel.[77] The Lords responded by sending Black Rod to have them released and also to arrest the Sergeant-at-Arms for attaching the counsel and then

decided to ask the king to appoint a new Sergeant for the Commons.[78] They also decided that they would proceed with no further matters (except those that Charles specifically recommended) until their privileges had been "vindicated."[79]

The Commons, in the meantime, had created their own heads for a conference on June 4 upon the matter of the last conference, in which the Lords had emphasized their jurisdiction and denigrated that of the Commons. It is more than likely that the way in which the Lords' committee, dominated by the opposition members, had denied any role in judicature for the Commons, had convinced the Commons to take the action of arresting the counsel, if only to protect their right to maintain their privileges. The response they devised to the Lords' messages at the conference of June 3 was to suggest limits on the Lords' jurisdiction and to vindicate their own. The Commons attacked each in turn of the statements that the Lords made on judicature. They contested the accuracy of the Lords' claim that the king was in his highest dignity when present in the Lords' House by suggesting that instead he was "highest in his Royal Estate, in full Parliament."[80] The Commons also attacked the Lords' denial of the Commons' possession of any judicature at all. The Commons claimed,

> Your Lordships do highly entrench upon the Rights and Privileges of the House of Commons; denying them to be a Court, or to have any Authority or Power of judicature, which if admitted, will leave them without any Authority or Power to preserve themselves.[81]

The Commons furthermore denied that the controversial statute of 1 Henry IV, applied in the way that the Lords believed it did, for it had been made in circumstances which were of an unusual political nature.[82] The Commons offered a conference to the Lords, at which they desired to present these considerations. The Lords, however, did not immediately respond to the request because they were busy responding to the second arrest of the four counsel for Crispe. Black Rod reported that he could not find the Sergeant of the Commons and thus could not attach him and also that the Lieutenant of the Tower, acting on the orders of the Commons, would not release the counsel.[83] The king agreed on the same day to replace the Sergeant of the Commons, and, perhaps inspired by this, the Lords asked the king to remove the Lieutenant of the Tower because of his refusal to release the four counsel.[84]

At this point the king, who had been silent until now, decided to address the two Houses. Charles had not interfered before because he was anxious to secure his legislation and did not want to offend either House. His decision not to defend the Lords' jurisdiction was probably due to the more prominent role that the Commons played in money bills, for he was in desperate need of revenue at this time. Certainly he was acutely aware of the predicament in which the Lords found themselves. Of the forty-nine meetings ofthe House of Lords in this session he was present

at forty-three of them.[85] Therefore, if he had disapproved of their handling of the three petitions in question he had every opportunity to address the situation. It is probable that Charles was determined simply to ensure that Parliament consider his own business. Seeing that the struggle between the two Houses could not be resolved by themselves, however, he took a personal role on June 5 in trying to bring about a reconciliation. Charles addressed what he saw as the chief cause of the problems, referring to the practices of Shaftesbury and the rest of the opposition Lords. He said "I hope you are all convinced that the Intent of all this, in the Contrivers, is to procure a Dissolution. I confess, I look upon it as a most malicious Design of those who are Enemies to Me and to the Church of England...."[86] Charles warned them to compose their differences and suggested "that whilst you are in Debate about your Privileges, I will not suffer My own to be Invaded."[87] Unhappily for the Lords, however, he decided against removing the Lieutenant.

Though the king had recognized the presence of an opposition in his Parliament, determined to halt his agenda by contributing to the strife over the Lords' appellate jurisdiction, each House denied that its own members were responsible. As the majorities of both Houses were determined to defend the privileges of their own Houses, they were concerned to ensure that they did not create divisions within themselves. The Commons declared, "That it

doth not appear to the House, that any Member thereof hath either contrived or promoted the difference between the Two Houses of Parliament."[88] The Lords were more vehement in suggesting that no such offending party existed: "This House doth unanimously declare, That they are of Opinion, That no Member of this House hath done any Thing contrary to his Duty, or any Way contributed to the contriving or widening the Difference between the Two Houses."[89] The two Houses then proceeded with their struggle, neither willing to give way on the question of appeals or the imprisonment of the counsel. Even when the Lords had the Lord Chancellor issue writs of habeas corpus,[90] the Lieutenant of the tower refused to release the prisoners.

The king, dissatisfied that his warnings had not been heeded decided to prorogue Parliament on June 9. T he business he and the Danby had outlined for the session had not been carried out, nor had that of the opposition in the Commons. Only five minor bills had been completed by the end of the session.[91] The king declared that the struggle between the two Houses was the immediate cause of the prorogation, though he ascribed this struggle to "the ill Designs of our Enemies."[92] The new session was set to meet on October 13.

In this new sesion the struggle between the two Houses reached its climax. The king and Lord Chancellor Finch were determined in the opening speeches of the session to stress

the need for cooperation and to insist that the Houses should give priority to state business. The king asked the Houses to eschew the debates on privilege that had ruined the last session and called to their attention the need to proceed on bills for the protection of the Church (though the Test Bill of Danby was not revived) and grants of money "to take off the Anticipations which are upon My Revenue, and for the building of Ships."[93] Finch likewise reminded them of the need to be attentive to the king's business instead of matters concerning only the privilege of their respective Houses.[94]

The two Houses reacted somewhat differently to these requests. The Commons did set themselves to the king's business and for a short while abstained from renewing their struggle with the Lords. They did not, however, grant the revenue that the king had requested, except for a very limited amount for the strengthening of the fleet.[95] The opposition in the Commons addressed itself to the legislation that had been stopped by the prorogation and to legislation requesting the king to call back English subjects serving in the French army, which indicated a growing hostility to France.[96] The Lords, however, made the case of Sherley v. Fagg their first priority for the session. Though this was probably due to the machinations of Shaftesbury and the rest of the opposition Lords, the generally favorable response among the Lords may have been

due to another consideration. Most of the Lords probably remembered how they had lost their power to handle cases of original jurisdiction. After Parliament had been prorogued in 1669 due to the struggle over Skinner v. East India Company, the Lords did not successfully lay claim to this jurisdiction again. The Lords may have felt that, if once they gave up on this particular petition asking for appeal that the same thing might happen. However, it cannot be denied that a large part of the defense of the Lords' appellate jurisdiction, as will be seen, was due to the action of the opposition group in the Lords. These Lords, though recognizing that the House of Commons was willing to lay the issue aside temporarily, revived the issue in order to force the king to dissolve Parliament.

Shaftesbury's actions in this session indicate that he and the other opposition Lords wanted to cause problems between the two Houses, primarily through the revival of the controversies of the previous session. The issue was revived when Sherley presented his petition again on October 19.[97] There is some indication that he did so for ulterior motives. In one of the debates on whether to consider the petition, Danby claimed that, several days before, the king had requested that Sherley wait to put in his petition and that Sherley had replied that "he could not, for ... he was obliged by some persons of honour to bring it in."[98] It is possible that this was part of Shaftesbury's scheme to

revive the struggle between the two Houses and stop the progress of business though no direct relationship can be found between Shaftesbury and Sherley.[99]

The House, in its debates on whether to reconsider the petition of Sherley, was probably significantly influenced by a major speech of Shaftesbury on October 20. Shaftesbury raised the concerns of the other Lords about what this particular petition meant to their future role in the constitution and also what it meant for the state of the government over all. He told the Lords that the issue at stake was a "Matter...no less then Your whole Judicature"[100] and warned them that "you will quickly grow burdensome, if you grow useless."[101] He also raised another issue that he believed could be tied into this matter of appeals, that of religion. He first raised a concern about the bishops in particular and their loyalties to the privileges and powers of the House. This was especially pertinent as it was the bishops who seemed to be the most vocal in opposing the acceptance of Sherley's petition. Shaftesbury raised the concerns of the Peers about the royal control of the bishops by stating,

> I have often seen in this House, that the Arguments, with strongest reason, and most convincing to the Lay Lords in General, have not had the same effect upon the Bishops' Bench, but that they have unanimously gone against us in matters that many of us have thought Essential and undoubted Rights....[102]

In doing so he cast aspersions on the position of the Bishop of Salisbury, who had suggested that the Lords should wait to set a date to hear the case and also had raised doubts about the right of the Lords to handle this case.[103] In addition, Shaftesbury made an effort to convince the Lords that the principle of divine right monarchy threatened the present state of the government. He claimed that this doctrine was behind, among other things, the Test Bill that Danby had attempted to push through in the previous session.[104] Shaftesbury gave the impression that this doctrine had infected elements of the Court, part of whose plan was to decrease the power of the Lords. He suggested that "tis' not really the interest of the House of Commons, but may be the inclination of the Court that you lose the Power of Appeals; but I beg...that your Lordships would take in this affair, the onely course to preserve your selves."[105]

The House decided on November 4 to set the date for the hearing of Sherley's case for November 20.[106] In the interval the Lords followed an ordinary course of business, such as had been apparent before the initiation of this struggle, namely, considering matters brought before it by the Commons. They also began to work on proposals that addressed one of the concerns of the king expressed in his opening speech.[107] Perhaps more important for the matter that the Lords were soon to address in the case of Sherley v. Fagg, they accepted several petitions asking for appeals

from Chancery on which they made orders.[108]

What is very unusual, considering the vehemence of the struggle between the Lords and the Commons, about this exercise of the Lords' appellate jurisdiction, however, is that the Commons raised no objections. The Commons had earlier ostensibly made it a point of principle that the Lords possessed no such jurisdiction, even if the defendant was not a member of the Commons. Here is a clear conflict between their statements and their actions. As I have already argued, the dispute over the appellate jurisdiction of the Lords began as a matter of privilege; the Commons were simply concerned to ensure that their members were not called before the Lords without their permission, which was not given or requested in Sherley's case. It was only when the Lords had proven obstinate in pursuing the case in spite of the Commons' objections that the Commons tried to remove the Lords' appellate jurisdiction over equity wholesale.

At this point in the second session, when the Lords considered these other petitions, however, the Commons were again ostensibly willing to compromise with the Lords. If the Lords had not forced the continuance of Sherley's case, the Commons might have been willing to drop the issue. The Commons' failure to complain of the Lords' exercise of the appellate jurisdiction in the several instances in 1675 when it did not concern members of the Commons, makes this a plausible explanation. Again, it seems that the Commons

were not opposed to the Lords' appellate jurisdiction itself, but merely wished to exclude members of the Commons from it, a stance which, as will be seen, the Lords, pushed by their opposition members, were not willing to concede. That the Commons were not opposed to the Lords' appellate jurisdiction itself receives further confirmation in the actions they took when they became aware that the Lords were considering the petition of Sherley again.

The Commons had on November 13 taken cognizance of the fact that the Lords had taken up Sherley's petition again and that they had set a date for it to be heard.[109] In spite of their previous behavior the Commons did not take immediate action against this decision. It is probable in this case that the House of Commons was concerned about preventing another dissolution in order to get the king's and their own business through. On November 17 the Commons debated what to do about the Lords' action. They had in the previous session (May 28) resolved that the Lords could not handle appeals from equity. Again they raised this issue: "The Question being propounded, That there lies no Appeal to the Judicature of the Lords in Parliament from Courts of Equity." This question did not pass, by a vote of 158 (noes) to 102 (yeas).[110] Another proposal put to a vote, on a matter passed in the previous session, indicates the same moderate attitude of the Commons:

> The question being propounded, That this House will declare the Vote of the last Session, that

> whosoever shall appear at the Bar of the Lords' House, to prosecute any Suit against any Member of this House, shall be deemed a Breaker and Infringer of the Rights and Privileges of this House to now be in Force....[111]

This question, like the last, did not pass.[112] It is likely that these belligerent proposals did not pass because the Commons were convinced that, if they pressed the Lords on the issue, there would be no way to prevent a dissolution. The moderate attitude of the Commons, however, soon changed. This resulted from the relative failure of the Commons to bring the Lords to see their point of view in a conference that they requested on November 18.[113]

The majority of the Lords were not inclined to be cooperative with the Commons. That they were concerned about their privileges cannot be denied. Shaftesbury's speech had probably convinced many of them of the necessity of asserting their rights. Thus they were not cautious about upsetting the Commons. Not only had they revived Sherley v. Fagg, but on November 18 they again accepted the petition of Stoughton, which had been considered in the previous session, and set November 30 as a date to hear the case.[114] This same attitude can be found in their reaction to the "Conference for the Preservation of a good Understanding between the Two Houses" requested by the Commons.[115] It was not auspicious for the success of this meeting that three key members of the opposition element in the Lords were part of the committee to confer with the Commons: Bridgwater,

Dorset, and Shaftesbury.[116] The Commons' representatives noted the need to proceed on other business and not allow the matter of privilege to interfere with it, as Charles had reminded them at the opening of the session. Sir William Coventry stated,

> The Commons esteem it a great Misfortune, that, contrary to that most excellent Advice, the Proceedings in the Appeal brought the last Session, by Mr. *Sherley*, against Sir *John Fagg*, have been renewed, and a Day set for hearing the Cause; and therefore the Commons have judged it the best Way, before they enter into the Argument for Defence of their Rights in this Matter, to propose to your Lordships, the putting off of the Proceedings in that Matter for some short Time, that so they may, according to His Majesty's Advice, give Dispatch to some Bills now before them, of great Importance to the King and Kingdom; which being finished, the Commons will be ready to give your Lordships such Reasons against those Proceedings, and in Defence of their Rights, as they hope may satisfy your Lordship that no such Proceedings ought to have been.[117]

The next item recorded in the Lords' Journal is that they had agreed to hear Sherley's case.[118] The response of the Lords at the conference must have been just as final. They were determined to protect their jurisdiction.

The response of the Commons to this repudiation of their suggestion was a complete change of the position they had expressed in the past two days in voting down the two belligerent resolutions. On the same day after the conference the Commons declared that

> it is this Day Resolved and Declared,

> that Whosoever shall solicit, plead, or prosecute any Appeal against any Commoner of England, from any Court of Equity, before the House of Lords, shall be deemed and taken a Betrayer of the Rights and Liberties of the Commons of England; and shall be proceeded against accordingly.[119]

The Commons had this resolution posted in public.[120] The Lords, after deciding to postpone the case of Sherley for two days so that he could find counsel, took cognizance of this action of the Commons.[121] During the commotion over this matter, one Lord moved to address the king to dissolve the Parliament. Though this motion failed, twenty-two Lords entered their protests against not asking for the address, including most of those who had been part of the protests against the Test Bill.[122] These Lords were determined to secure a dissolution of Parliament, as opposed to the upcoming prorogation about which most of the Lords must have known, and which would not have forced new elections to the Commons. A new election might have brought members to the Commons who were more favorable to the religious toleration espoused by the opposition Lords. Those Lords, however, who were sincerely interested in exercising the jurisdiction for which they had fought so hard in the two sessions of 1675 did not have the chance to give either the petition of Stoughton or Sherley a hearing, as the king chose to prorogue parliament, a prorogation that lasted for fifteen months.[123] Charles, with the aid of funds from Louis XIV, did

not require the grants of Parliament to survive in the meantime. Perhaps he felt that this lengthy period would give sufficient time for the Lords to reconsider their position and for him and Danby to build a greater court following in the Commons through patronage.

The Lords, in spite of the long prorogation, awakened by Shaftesbury's statements of the importance of the appellate judicature to their existence, did not surrender their jurisdiction. Though they did not consider the petitions of Sherley and Stoughton in the new session of 1677, they recommenced accepting petitions asking for appeals, as they continue to do, though in the altered form of select Law Lords, in the twentieth century. Thus, unlike what happened to the Lords' original jurisdiction, prorogation after the contestation of the Commons did not mean that the Lords lost their appellate power. They accomplished this victory in the face of a king who was more concerned with the supply of revenue to support his domestic and foreign policies than with the balance of the constitution and the efficiency of the legal system. Whereas James had done much to encourage the Lords to accept a limited degree of judicial power, perhaps in order to stifle attempts by the Commons to claim it, Charles was willing to sacrifice the judicial power of the Lords that had evolved over the course of fifty years in order to secure revenue. It is likely that he had been governed by

the same opportunistic attitude toward the Lords' judicial powers in 1669, when he did not defend their right to exercise an original jurisdiction and chose to prorogue Parliament twice instead, afraid to side with the Lords for fear of offending the Commons.

The Commons did not raise a protest against the Lords' appellate function after this period. Their behavior concerning the three cases indicates that their real target was not the Lords' appellate jurisdiction itself but the Lords' attempt to decide cases that involved members of the House of Commons. When the Lords considered other cases of appeal from Chancery in this period the Commons did not complain. The Lords had been convinced of the need to maintain their judicial right by Shaftesbury and the opposition associated with him. Shaftesbury and his followers were guided by the desire to stifle the Anglican policies of Danby and force the dissolution of Parliament. The end result is that the Lords' appellate jurisdiction was preserved. England now had an established chief appellate court, for both equity and the common law, confirmed by the victory of the Lords in 1675.

IV. CONCLUSION

The argument that I have pursued throughout this exploration of the growth of the Lords' appellate jurisdiction is that members of the Commons were not opposed to its inception or its growth. If anything, the Commons had reason to favor this development. As has been demonstrated, the lower House itself had attempted to devise a solution to the problem that this element of the Lords' judicature eventually solved: the lack of an adequate hierarchy for appeals from Chancery and other courts of equity. Because of their lack of an adequate precedent for fulfilling a judicial role, as demonstrated by their dealings with Mompesson and Floud, the Commons could not fulfill this need. The Lords however, possessed a historical justification that would provide fertile ground for the exercise of an appellate jurisdiction.

The development of the Lords' appellate jurisdiction, however, was very slow in the 1620's. The Lords in general were unsure about the propriety of their jurisdiction and were hesitant in making orders on petitions asking for redress of a decree given in Chancery. That they did accept

such petitions, however, does suggest, along with other things, that the Lords were becoming more confident of their right to review such cases as the 1620's progressed. That the Commons directly encouraged this development is difficult to prove, though there is circumstantial evidence that members of the Commons sent petitions asking for justice from their own committees to the Lords. The two most convincing pieces of evidence that suggest that the Commons approved of this development is that the Commons saw the need for such an appellate jurisdiction and that they did not complain when the Lords initiated this function. The same is true for the king.

As the Lords' appellate jurisdiction developed there was the same lack of dissent from their proceedings. The Lords began to exercise a fuller appellate jurisdiction in 1640, and, with the exception of the period of the Interregnum, never lost this function, laying aside decrees of the Chancellor, overturning them, and ordering further proceedings before him. In the process the Lords were not challenged, either by the Commons or by the king. If the argument is made, as for example by Hargrave, that this was true in the 1640's only because of the political circumstances of the time and would not be allowed in normal times, what is one to make of the similar activity of the Lords without protest in the Restoration period, until 1675?

The only significant attacks by the Commons on the

appellate jurisdiction of the Lords came when the Lords were perceived to be infringing on the privileges of the Commons. Though the Commons in 1675 declared that the House of Lords did not have any appellate jurisdiction from Chancery and other courts of equity, their primary reason for doing so was to end the assault on their privilege, which they perceived in the struggles over Sherley v. Fagg, Stoughton v. Onslow and Crispes v. Dalmahoy. That the matter of privilege was the primary cause of the Commons' opposition can be demonstrated by the fact that the Commons did not protest the consideration by the Lords of appellate cases that did not involve members of the Commons in the period that I have discussed. Indeed, even after they denied the appellate jurisdiction of the Lords over all commoners in 1675, they did not complain when the Lords handled appeals that did not involve members of the Commons. Only cases involving members of the Commons seemed to spur the Commons into action.

Another factor that was responsible for the assaults by the Commons on the Lords' jurisdiction was the context in which these three cases were considered. The opposition politics of Shaftesbury and other peers exacerbated the struggle. Shaftesbury used the three cases as a tool to force the dissolution of Parliament and thus prevent the success of the Anglican agenda of Danby and the Court. In doing so Shaftesbury perhaps helped to save this element of

the Lords' jurisdiction. His encouragment of the Lords to defend their jurisdiction over appeals must be considered one reason for the success of the Lords in defending their appellate jurisdiction.

However, it is also unlikely that the Commons would have attacked the Lords' jurisdiction to the extent that they did if the Lords had given way on these three cases. As has been suggested, they showed no sincere indication of being opposed to this element of the Lords' judicature except as it related to their own privileges and jurisdiction. In fact, they had an interest in maintaining a means by which litigants who were unhappy with their decrees in Chancery or other courts of equity could secure an appeal. The Commons throughout this period continued to consider means by which to reform the court of Chancery. However, they did not, after the early 1620's, except during the Interregnum, suggest that another means of appeals should be created, which demonstrates that they recognized the validity of the Lords' jurisdiction as well as the necessity of it.

In short, the attack on the appellate jurisdiction by the Commons in 1675 was an aberration, and the Commons throughout the period from 1621 to 1675 were not inimical to the Lords' handling of appeals from Chancery and other courts of equity. The Commons did not oppose this development because they recognized the need for such a

function and because they were aware that they could not fulfill the need themselves.

In a more general sense, however, this thesis has demonstrated something more significant: that a fruitful and accurate study of Parliament in the Stuart period can only be accomplished through an equal consideration of both Houses. This period did not see an insignificant and powerless House of Lords. Historians searching for the moment when the Commons began its progress to ultimate sovereignty in the nation have overlooked the viability of the Lords in the seventeenth century, especially in the Restoration period. This attitude created a tremendous hole in the historiography of Parliament, filled only by the scattered and dated works of Turberville and Firth, and by a few recent, bold efforts to fill in the gap by scholars such as Flemion, Foster and Hart. Much more needs to be done. As the House of Lords in modern Britain, relatively constitutionally powerless, has recently received recognition for its value as a forum for intelligent and necessary debate, so the House of Lords of the seventeenth century, possessing legislative power equal to the Commons in all but revenue matters and exercising the role of chief appellate court of the nation, needs to be given more recognition for the important political and constitutional roles it played. This thesis has made an effort to demonstrate those roles and has revealed the Lords as a

potent institution that occupied a position in the seventeenth-century constitution equal in importance to the House of Commons.

ENDNOTES

ENDNOTES

Introduction

[1] These two sessions were from April 13 to June 9 and from October 13 to November 22.

[2] The main courts of equity included Chancery, the equitable side of the Exchequer and the Court of Requests, though the latter fell into disuse during the Civil War. Many minor courts also possessed an equitable jurisdiction, which were, like the major courts of equity, liable to appeal to the House of Lords, though usually not in practice. The courts of the Cinque Ports, for example, possessed such a jurisdiction. Some of the Palatinates also possessed an equitable jurisdiction, such as the Duchy of Lancaster and the Palatinate of Durham, which developed chanceries of their own. William Holdsworth, A History of English Law, Vol. I, 7th ed. (London: Metheun & Co., 1956), 111.

[3] Much of the secondary literature refers to Sherley as Shirley.

[4] Earls of Dartmouth and Hardwicke, Speaker Onslow, and Dean Swift, eds., Bishop Burnet's History of His Own Time: With Notes, Vol. II (Oxford: University Press, 1833), 76.

[5] J. P. Kenyon, viewing the dearth of secondary literature on the House of Lords, has gone as far to state that "the study of the House of Lords in the reigns of Charles II and James II is not so much in its infancy as in the womb." The Stuart Constitution, 2d ed. (Cambridge: Cambridge University Press, 1988), 412.

[6] One blatant and frustrating example of this in the recent historiography of the period is found in John Miller's Article: "Charles II and His Parliaments, " Transactions of the Royal Historical Society 32 (1982). Despite the title, the discussion is solely on the House of Commons.

[7]Corinne Comstock Weston, English Constitutional History and the House of Lords, 1556-1832 (New York: Columbia University Press, 1965). This theory of mixed government/monarchy was popularized by Charles I in his answer to the Nineteen Propositions. Weston argues that this was the dominant theory of government until the Great Reform Bill of 1832 and the firmer establishment of cabinet government.

[8]Charles Harding Firth, The House of Lords during the Civil War (London, New York, Bombay and Calcutta: Longmans, Green and Co., 1910), 296.

[9] William Holdsworth, A History of English Law, Vol. VI (London: Metheun and Co. Ltd., 1922), 250.

[10] Holdsworth, Vol. VI, 250-251. Holdsworth suggests that there are instances which call into question such a monopoly of the Commons over money bills. He points out that in 1472, for example, the Commons initiated a grant for the commons of England, while the Lords initiated one for the peers. Maxwell p. Schoenfeld suggests that the Lords and the Commons "had traditionally voted their own taxes, though in the same bill." The Restored House of Lords (The Hague and Paris: Mouton & Co., 1967), 170.

[11]Holdsworth, Vol. VI, 250n - 251n.

[12] Kenyon, 417.

[13] Allen Henry Horstman points out the difficulty of deciphering which institution is referred to in medieval records, as different names were often given to the same institution, and the same term was often used to describe different institutions. He suggests that this would have given great trouble to those like Coke who were searching medieval precedents. For example, the " small council and the Great Council were often referred to as 'curia regis, 'king's council', ' consilium regis', 'consilium privatum et assiduum', consilium ordinarium', ' magnum consilium', 'commune consilium' and even 'witengamot.'" "Justice and Peers: The Judicial Activities of the Seventeenth-Century House of Lords" (Ph. D. diss., University of California, Berkeley, 1977), 23. This would have had particular bearing on those, such as Coke, who were looking for judicial precedents especially, relating to this thesis, in regard to the judicial powers of the Lords.

[14] Sir Matthew Hale and Francis Hargrave, in the preface to Hale's work, though arguing against the applicability of a strict parallel between the House of Lords and this body, provide an analysis of the similarities of the two. Jurisdiction of the House of Lords or Parliament (London: T. Cadell, Jun. and W. Davis, 1796).

[15] Allen Horstman, "A New Curia Regis: The Judicature of the House of Lords in the 1620's," Historical Journal. 25 (1982): 419. Horstman suggests that "[i]n many ways the House of Lords with its judicature in the 1620's resembled a *curia regis* of the Middle Ages, both in function and intent--a body assisting the king to govern the realm."

[16] Robert Zaller, The Parliament of 1621, A Study in Constitutional Conflict (Berkeley: University of California Press, 1971), 90.

[17] Ibid., 90-91.

[18] J. Stoddart Flemion, "Slow Process, Due Process, and the High Court of Parliament: A Reinterpretation of the Revival of Judicature in the House of Lords in 1621," The Historical Journal 17 (1974): 9.

[19] Ibid., 9n.

[20]Horstman, "A New Curia Regis," 413. Horstman points out, "After 1621 few petitions sought private bills...One reason for the popularity of petitions to the lords arose because the House, using its judicature could give direct relief to a petitioner, whereas the House of Commons could only prepare a list of grievances to submit to the king."

[21] Elizabeth Read Foster, The House of Lords, 1603-1649 (Chapel Hill and London: University of North Carolina Press, 1983), 110. James Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice, 1621-1675 (London: Harper Collins Academic, 1991). Hart provides a thorough analysis of the process by which the Lords acquired a jurisdiction over petitions asking for justice, though he chooses not to discuss how this evolution interacted with the expressed concerns of the Commons; nor does he speculate on how initial cooperation between the two Houses over the Lords' jurisdiction over petitions led to conflict.

[22] Flemion, "Slow Process, Due Process, and the High Court of Parliament," 3.

[23] Firth, 295.

[24] Foster, 188.

[25] Relf, xxxi.

[26] Flemion, "Slow Process, Due Process, and the High Court of Parliament," 16.

[27] Haley, K. H. D., The First Earl of Shaftesbury (Oxford: Clarendon Press, 1968), 350-351, 398-399.

[28] A. S. Turberville, "The House of Lords under Charles II, Part I," The English Historical Review 44 (January, 1929): 406.

[29] Ibid.

[30] Journals of the House of Lords, Vol. XIII, 39.

[31] I have chosen to utilize the original spelling of quoted passages throughout this thesis. No corrections have been made.

[32] "The Earl of *Shaftsbury's* Speech in the House of Lords the 20th. of *October*, 1675," in Two Speeches (Amsterdam, 1675), 4. This speech can be found in the Main papers of the House of Lords, Reel 95, n. 338g.

[33] Dartmouth, 77.

[34] LJ XI, 299.

[1] Exceptions to this rule are Flemion, Hart and Horstman.

[2] Jess Stoddart Flemion, "The Nature of Opposition in the House of Lords in the Early Seventeenth Century: A Revaluation," in Peers, Politics and Power: The House of Lords, 1603-1911, eds. Clyve Jones and David Lewis Jones (London and Ronceverte: The Hambledon Press, 1986), 8.

[3] The cognizance of the Lords over writs of error had fallen out of practice in the sixteenth century.

[4] Holdsworth, Vol. I, 370.

[5] Luke Owen Pike, A Constitutional History of the House of Lords (London: MacMillan and Co. , 1894), 292.

[6] Holdsworth, Vol. I, 214.

[7] Foster, 180.

[8] Ibid., 179.

[9] Ibid.

[10] Horstman, "Justice and Peers", 298.

[11] Foster, 182.

[12] Horstman, "Justice and Peers", 298. This may have resulted from the fact that the king's signature was no longer required to secure such a writ [299].

[13] Calendar of the Journals of the House of Lords. From the beginning of the Reign of King Henry VIII to 30th August 1642; and from the Restoration in 1660, to 21st January 1808 (London: G. Eyre and A. Strahan, 1810), 733-735.

[14] Holdsworth, Vol. VI, 95.

[15] Ibid., 93.

[16] Kenyon, 28-29.

[17] Foster, 137.

[18]LJ III, 537.

[19] Francis Hargrave, Preface to his edition of Matthew Hale's Jurisdiction of the Lords' House or Parliament (London: T. Cadell, Jun. and W. Davies, 1796), xvi-xvii.

[20] LJ III, 110.

[21] Quoted in , Elizabeth Read Foster, "The Procedure of the House of Commons against Patents and Monopolies, 1621-1624, in Conflict in Stuart England, ed. William Appleton Aiken and Basil D. Henning (London, 1960), 80 (n. 24).

[22] See, for example "Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth I," American Journal of Legal History 5 (January, 1961).

[23] Relf, xiii.

[24] Ibid, xiv-xxv.

[25] See "The conflict between the court of Chancery and the courts of common law," in A History of English Law. Vol. I (London: Metheun and Co. Ltd., 1956), 459-465.

[26] Jones, 12.

[27]G. W. Thomas, "James I, Equity and Lord Keeper Williams," English Historical Review 91 (1976): 512.

[28] Thomas, 512 (quoting G. W. Keeton and L. A. Sheridan, Equity [London, 1969], 17.).

[29] Ibid. (quoting D. M. Kerley, An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery [Cambridge, 1890], 724-726.).

[30] Ibid. , 515 (quoting P. St. J. Langan, Maxwell on the Interpretation of Statutes [12th. edn. , London, 1969], 236.).

[31] Holdsworth, Vol. I, 461.

[32] Ibid., 463.

[33]Thomas , 513.

[34] Ibid., 514.

[35] Flemion, "Slow Process, Due Process, and the High Court of Parliament" , 7.

[36] Holdsworth, Vol. I , 423-424.

[37] Ibid., 426.

[38] Ibid., 424.

[39] Wallace Notestein, Frances Helen Relf and Hartley Simpson, Commons Debates, 1621, Vol. VII (New Haven: Yale University Press, 1935), 205.

[40] Zaller, 90.

[41] Notestein, Vol. IV , 193. This volume of Commons Debates, 1621 is the diary of John Pym entitled, "All the Remarkable Passages of the Things Done in the Lower House of Parliament."

[42] Notestein, Vol. IV, 193-194.

[43] Ibid., 193.

[44] CJ I, 582.

[45] James S. Hart, "The House of Lords and the Appellate Jurisdiction in Equity, 1640-1643," Parliamentary History 2 (1983): 59.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Thomas, 522.

[53] CJ I, 584.

[54] Notestein, Vol. VII, 587.

[55] CJ I, 737.

[56] Maija Jansson and William B. Bidwell, eds., Proceedings in Parliament, 1625 (New Haven and London: Yale University Press, 1987), 215.

[57]"Justice and Peers"

[58] Ibid., 34.

[59] There were, in fact, three distinct courts of Exchequer Chamber. Of the other two, one handled appeals from the Exchequer itself. The other was "an informal assembly of the common law judges to discuss difficult issues." A difficult case might be sent here, and after debate the decision of these judges was to be followed by the original court that had raised the difficult point. Ibid., 45-46.

[60] Holdsworth, Vol. I, 244.

[61] Ibid., 123-124.

[62] Thomas, 525.

[63] Relf suggests that this recognition, caused by these cases, forced the Commons to turn to the Lords in order to establish the Parliament as a court superior to equity. (xiii-xviii). These cases will be explained shortly.

[64] Relf, xiii.

[65] Ibid., xiii-xiv.

[66] Ibid., xiv-xv.

[67] LJ III, 33-72.

[68] Lady De Villiers, ed. , "The Hastings Journal of the Parliament in 1621," in Camden Miscellany Vol. XX, ed. R. L. Rickard (London: Offices of the Royal Historical Society, 1953), 27-28 (my italics).

[69] Notestein, Vol. IV, 211; Flemion, "Slow Process, Due Process, and the High Court of Parliament," 13.

[70] Notestein, Vol. IV, 211.

[71] Ibid., 268.

[72] Ibid.

[73] Ibid., 269-270.

[74] Ibid.

[75] Ibid., 285.

[76] Ibid., Vol. II, 329.

[77] Flemion, "Slow Process, Due Process, and the High Court of Parliament," 13.

[78] Relf, xv.

[79] Hargrave, xvii.

[80] LJ III, 111.

[81] LJ III, 111-134.

[82] Flemion, 14.

[83] An example of this consideration of petitions involving cases from Chancery is Mrs. Thomas's case in 1624, which was a "complaint about corruption of the Lord Keeper" and a claim that the decree he gave was "unjust." The Committee for Courts of Justice considered the petition and declared that "the Decree is good and just." CJ I, 767.

[84] CJ I, 766.

[85] Ibid.

[86] Robert C. Johnson and Maija Jansson Cole, eds. , Commons Debates, 1628 Vol. II (New Haven and London: Yale University, 1977), 540. Mary Frear Keeler, Maija Jansson Cole and William B. Bidwell, eds. , Proceedings in Parliament, 1628 Vol. VI (New Haven and London: Yale University Press, 1983), 5.

[87] Flemion, "Slow Process, Due Process, and the High Court of Parliament", 14.

[88] LJ III, 88.

[89] Ibid.

[90] LJ III, 101-102, "The Petition of the Fisherman Dreggers..."

[91] Relf, xx.

[92] Third Report of the Royal Commission on Historical Manuscripts, Appendix, 23.

[93] Ibid.

[94] Flemion, "Slow Process, Due Process, and the High Court of Parliament," 3, 8.

[95] Flemion, "The Nature of Opposition", 13.

[96] Ibid., 8-9.

[97] Relf, xiii.

[98] Horstman, 417-418.

[1] CJ IX, 347.

[2] LJ III, 141.

[3] Ibid.

[4] LJ III, 157.

[5] Horstman, "A New *Curia Regis*", 413. The handling of appeals from Wards, Star Chamber and High Commission, was relatively infrequent and ended when these courts had been abolished or had fallen into disuse in the 1640's (The Court of Wards was abolished only after the Restoration).

[6] Hargrave, xxix.

[7] LJ III, 179.

[8] Ibid.

[9] Samuel Rawson Gardiner, ed., Notes of the Debates in the House of Lords, Officially Taken by Henry Elsing Clerk of the Parliaments, 1621 (Westminster: J. B. Nichols and Sons), 107.

[10] Ibid.

[11] Ibid., 108.

[12] Relf, xx.

[13] Gardiner, 107.

[14] Ibid., 108.

[15] Ibid., 107.

[16] Ibid., 108.

[17] LJ III, 180.

[18] Gardiner, 109.

[19] LJ III, 189.

[20] Ibid.

[21] Ibid., 191.

[22] Ibid.

[23] Gardiner, 120.

[24] Foster, 15.

[25] Horstman, 416.

[26] LJ III, 415.

[27] Ibid.

[28] Ibid, 416.

[29] Ibid.

[30] Hargrave, xxxviii.

[31] Hart, 46-69.

[32] LJ III, 363.

[33] Hart, 54.

[34] Hargrave, xl-xli.

[35] Ibid.

[36] Hart, 54.

[37] Ibid.

[38] ibid.

[39] Ibid.

[40] Ibid., 54-55.

[41] Relf, xxix.

[42] See, for example, Starkey v. Starkey, LJ III, 831.

[43] Stuart E. Prall, "Chancery Reform and the Puritan Revolution," American Journal of Legal History. 6 (January 1962): 58.

[44] Ibid.

[45] Hargrave, lx (n).

[46] Ibid., lvii.

[47] Hart, 56.

[48] Ibid., 56-57.

[49] LJ IV, 255. Quoted in Hart, 58.

[50] Hart, 66.

[51] Ibid.

[52] Ibid.

[53] See, for example Mayn v. Bannister (28 July 1641), Calendar, 26, and the petition of Lady Hastings (21 February 1641), ibid. Also Langham v. Lymbry (14 May 1644), LJ VI, 553.

[54] LJ X, 584.

[55] See, for example, the cases of Lord Fauconbridge (11 January 1641), and Sir William Russell (16 May 1642). Calendar, 26.

[56] Prall, 28.

[57] Hargrave, lxi.

[58] Ibid., lxi-lxii.

[59] Firth, 173.

[60] Hargrave, lviii.

[61] Hart, Justice, 219-221.

[62] Holdsworth , Vol. I, 433.

[63] Prall, 30.

[64] Ibid., 37.

[65] Ibid., 42.

[66] Ibid., 44.

[67] Cobbett's Complete Collection of State Trials, Vol. VI (London: T.C. Hansard, 1810), 726-727 (n).

[68] Calendar, 635-638.

[69] Hargrave, xci.

[70] Ibid., xciv (n).

[71] Calendar, 635-638.

[72] See, for example, LJ XI, 199, Cary v. Cromwell (December 5, 1660).

[73] Horstman, "Justice and Peers", 433.

[74] LJ XI, 630 (Robert v. Wynn).

[75] Ibid., 631.

[76] Ibid.

[77] Ibid.

[78] Charles II, in order to end the strife between the two Houses over this case, ordered them to erase every entry dealing with it from their journals. The most complete accounts of it the can be found in Cobbett's Complete Collection of State Trials, Vol. VI , and in Denzil Holles' work, The Grand Question Concerning the Judicature of the House of Peers Stated and Argued. And the Case of Thomas Skinner... (London: Richard Chiswel, 1669).

[79] Holles "The Grand Question," 5.

[80] Ibid., 1-18.

[81] Ibid., 19.

[82] Cobbett, 716.

[83] Ibid., 719.

[84] Ibid.

[85] Hollis, Grand..., 35-38.

[86] Cobbett, 726.

[87] Ibid., 728 (n)."That the proceedings of the House of Lords, upon the petition of Thomas Skinner, Merchant , against the governor and company of Merchants of London trading to the East Indies, Sir William Thompson, and several other members of the House of Commons, being members of the said company, -- are a breach upon the Privilege of the House of Commons."

[88] Ibid. , "That the House of Lords assuming and exercising a jurisdiction, and taking cognizances of the matters set forth and complained of in the petition of Thomas Skinner...-- the said cause coming before the Lords originally only upon the complaint of the said Thomas Skinner, and the matters in the said petition complained of, concerning the taking away the said petitioner's ship and goods, and assaulting his person, being relievable in the ordinary courts of law; --is contrary to the law of the land, and tends to the depriving of the subject of the benefit of the known law, and the introducing of an arbitrary way of proceeding."

[89] Ibid. ,"That the House of Lords, in the cause depending before them,...allowing of affidavits taken before masters of the Chancery, and a judge of the Admiralty, as proof in the said cause, wherein also the Governor and Company had no liberty to cross-examine the said persons making such affidavits; and the House of Lords not granting a commission to the said Governor and Company for the examination of their witnesses, the same being desired by the said Governor and Company , is illegal, and a grievance to the subjects"

[90] Ibid. , 726-728. "That the House of Lords taking cognizance of, and their proceedings upon the matter set forth in the petition of Thomas Skinner merchant against the governor and company of merchants of London trading to the East Indies, concerning the taking away of the petitioner's ship and goods, and assaulting his person, and their lordships over-ruling the plea of the said Governor and Company, the said cause coming before that House originally, only upon the complaint of the said Skinner, and being a common plea, is not agreeable to the laws of this land, and tends to deprive the subject of his right, ease and benefit due to him by the said laws." 2. "That the Lords taking cognizance of the right and title of the land in the petition mentioned, and giving damages thereupon agains the said governor and company is not warranted by the said laws of this land."

[91] Holdsworth, Vol. VI, 268-269.

[92] Ibid., 268.

[93] Apparently Skinner was still attempting to secure relief in the 1690's . Horstman, "Justice and Peers", 373.

[94] Holles, 19.

[95] Ibid., 49-50.

[96] CJ IX, 132.

[97] Ibid., 133.

[98] LJ XII, 301.

[99] Ibid. , 348.

[1] See for example, the entry on May 22, 1624, "Sir James Parrot sent for [by] Lords: Will not do it, without Leave of the House. Left to him to do as he will in it." CJ I, 793.

[2] LJ XIV, 39.

[3] See, LJ XII, 653, 729; XIII, 4, 37.

'Richard Davis, "The 'Presbyterian' opposition and the emergence of party in the House of Lords in the reign of Charles II," in Party and Management in Parliament, ed. (New York: St. Martin's Press, 1984), 13-17. K. H. D. Haley, The First Earl of Shaftesbury (Oxford: Clarendon Press, 1968), 349-402.

[5] Davis, 1

[6] Ibid., 4.

[7] Ibid., 8.

[8] Ibid., 12.

[9] Ibid.

[10] Ibid.

[11] K. H. D. Haley, The First Earl of Shaftesbury (Oxford: Clarendon Press, 1968), 350.

[12] Ibid., 351.

[13] Miller, 7.

[14] Haley, 358-360.

[15] Ibid., 373.

[16] LJ XII, 653-654.

[17] Ibid, 659.

[18] Davis, 13.

[19] Davis has analyzed these same protests to the Test Bill and has concluded that they do indicate the existence of an opposition group under Shaftesbury, though he neglects to elaborate in any depth on his findings in discussing the 1675 sessions. His concern is to establish the existence of an opposition group to religious intolerance, not to discuss the bearings that this presence had on the the judicial struggles in 1675.

[20] LJ XII, 656. These were Clarendon, Delamere, Halifax, Mohun, Paget, Salisbury, Shaftesbury, Stamford , P. Wharton, and Winchester.

[21] Ibid., 665.

[22] These were Ailesbury, Bedford, Howard Earl of Berckshire, J. Bridgwater, Bristol, Buckingham, Clarendon, Delamere, Basil Denbigh, Dorset, Ro. Eure, Halifax, Holles, Mohun, Will Paget, Will. Petre , Grey De Rolleston, Salisbury, Saye and Seall Shaftesbury, Stamford, P. Wharton, and Winchester. Ibid.

[23] Ibid.

[24] LJ XII, 669.

[25] Ibid.

[26] Ibid., 671.

[27] These were Ailesbury, Audley, Bedford, Howard Earl of Berkshire, J. Bridgwater, Buckingham, Clarendon, Delamer, Basil Denbigh, Dorset, R. Eure, Fitzwalter, Halifax, Holles, Mohun, Grey De Rolleston, Salisbury, Saye, Shaftesbury, P. Wharton, and Winchester. Ibid.

[28] These were Bedford, Howard Earl of Berkshire, J. Bridgewater, Buckingham, Clarendon, Delamer, Basill Denbigh, Dorsett, R. Eure, Mohun, Salisbury, Shaftesbury, Stamford, P. Wharton and Winchester. Ibid. , 677.

[29] LJ XIII, 33.

[30] "Two Speeches" in the Main Papers of the House of Lords , Part 5 (6 Jan 1673-3 May 1675) Reel 95 (Amsterdam, 1675), 15-16 (This reel contains material that commenced within the above dates and continues until that matter was completed. Hence it contains this pamphlet, which was printed long after May 1675)

[31] These were: Howard Earl of Berkshire, J. Bridgewater, Buckingham, Chesterfield, Clarendon, Delamer, Dorsett, Halifax, Mohun, Newport, Will. Petre, Grey De. Rolleston, Salisbury, H. Sandys, Shaftesbury, Stamford, Townsend, Westmoreland, P. Wharton , Winchester, and Yarmouth. LJ XIII, 33.

[32] Ibid.

[33] LJ, XIII, 39.

[34] CJ IX, 330.

[35] LJ XII, 680-681.

[36] Ibid., 681.

[37] Ibid.

[38] "Two Speehes", 1-12.

[39] LJ, XII, 663.

[40] LJ, XII, 666.

[41] LJ, XII, 673.

[42] Eighth Report of the Royal Commission on Historical Manuscripts Part 1, (Darlington: North of England Newspaper Co. Ltd., 1907), Appendix, 137a.

[43] Haley, 398.

[44] Ibid., 393, 398.

[45] Ibid., 398.

[46] CJ IX, 132.

[47] Ibid. , 330.

[48] LJ, XII, 679.

[49] Ibid., 680-1.

[50] Ibid., 681.

[51] Ibid., 689.

[52] Ibid.

[53] CJ IX, 337.

[54] LJ XIII, 691.

[55] Ibid.

[56] Ibid., 692.

[57] CJ IX, 338.

[58] LJ XII, 694.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid, 694-695.

[63] Ibid., 698.

[64] Ibid., 700.

[65] Ibid., 706.

[66] Ibid., 709.

[67] CJ, IX, 340.

[68] Ibid., 347

[69] Ibid.

[70] LJ XII, 713.

[71] Ibid., 715.

[72] Ibid. , 718. Holles' own role in defending the Lords' judicature was more than simply a part of his official action in the House of Lords. He also penned a lengthy treatise on the subject: The Case Stated Concerning the Judicature of the House of Peers In the Point of Appeals (Amsterdam, 1675).

[73] Ibid., 718.

[74] Ibid.

[75] Ibid., 719.

[76] Hollis, The Case Stated Concerning the Judicature of the House of Peers in the Point of Appeals, 29-30.

[77] LJ XII, 720.

[78] Ibid., 722.

[79] Ibid., 723.

[80] CJ IX, 354.

[81] Ibid.

[82] Ibid.

[83] LJ XII, 723.

[84] Ibid.

[85] Davis, 13.

[86] LJ XII, 725.

[87] Ibid.

[88] CJ III, 355.

[89] LJ XII, 726.

[90] Ibid., 727.

[91] Ibid., 729.

[92] Ibid.

[93] LJ XIII, 4.

[94] Ibid., 4-5.

[95] Haley, 396-397.

[96] Ibid., 398.

[97] LJ XIII, 8.

[98] Haley, 394.

[99] Ibid., 393-394.

[100] Two Speeches, 4.

[101] Ibid.

[102] Ibid., 9.

[103] Ibid., 1.

[104] Ibid., 11-12.

[105] Ibid., 12.

[106] LJ XIII, 12.

[107] Ibid. , 22. "Heads for Securing the Protestant Religion."

[108] LJ XIII, 15. Denyes v. Sir A. Frazer and Bulkley v. Bulkley.

[109] CJ III, 375.

[110] Ibid., 379.

[111] Ibid.

[112] Ibid. The division is not reported in the Journal for this vote.

[113] Ibid., 380.

[114] LJ XIII, 28.

[115] Ibid., 29.

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] CJ III, 381.

[120] Ibid.

[121] LJ XIII, 32.

[122] Ibid., 33.

[123] Ibid., 35.

BIBLIOGRAPHY

BIBLIOGRAPHY

Beckett, J. V., and Clyve Jones. "Introduction: The Peerage and the House of Lords in the Seventeenth and Eighteenth Centuries." In A Pillar of the Constitution, The House of Lords in British Politics, 1640-1784. London and Ronceverte: The Hambledon Press, 1989.

Calendar of the Journals of the House of Lords. From the Beginning of the Reign of King Henry VIII to 30th August; and from the Restoration in 1660, to 21st January 1808. London: G. Eyre and A. Strahan, 1810.

Cobbett's Complete Collection of State Trials. Vol VI. London: T. C. Hansard, 1810.

Darmouth, Earl of, Earl of Hardwicke, Speaker Onslow, and Dean Swift, eds. Bishop Burnet's History of His Own Time: With Notes. Vol.II, 2d ed. Oxford: The University Press, 1833.

Davis, Richard. "The 'Presbyterian' Opposition and the Emergence of Party in House of Lords in the Reign of Charles II." In Party and Management in Parliament, 1660-1784, ed. Clyve Jones, 1-25. New York: St. Martin's Press, 1984.

Eighth Report of the Royal Commission on Historical Manuscripts. Darlington: North of England Newspaper Co., Ltd., 1907.

Firth, Charles Harding. The House of Lords During the Civil War. London, New York, Bombay and Calcutta: Longmans, Green and Co., 1910.

Flemion, Jess Stoddart. "The Nature of Opposition in the House of Lords in the Early Seventeenth Century: A Revaluation." In Peers, Politics and Power: The House of Lords, 1603-1911, ed. Clyve Jones and David Lewis Jones, 5-22. London and Ronceverte: The Hambledon Press, 1986.

Flemion, Jess Stoddart. "Slow Process, Due Process, and the High Court of Parliament: A Reinterpretation of the Revival of Judicature in the House of Lords in 1621." Historical Journal 17 (1974): 3-16.

Foster, Elizabeth Read. The House of Lords 1603-1649, Structure, Procedure, and the Nature of its Business. Chapel Hill and London, 1983.

Gardiner, Samuel Rawson, ed. Notes on the Debates in the House of Lords Officially Taken by Henry Elsing, Clerk of the Parliaments, A. D. 1621. Westminster: J. B. Nichols and Sons, 1870.

Haley, K. H. D. The First Earl of Shaftesbury. Oxford: Clarendon Press, 1968.

Hargrave, Francis. Preface to his edition of Matthew Hale's Jurisdiction of the House of Lords or Parliament. London: T. Cadell, Jun. and W. Davis, Hart, 1796.

Hart, James. "The House of Lords and the Appellate Jurisdiction in Equity 1640-1643." Parliamentary History 2 (1983): 49-69.

Hart, James. Justice upon Petition: The House of Lords and the Reformation of Justice, 1621-1675. London: Harper Collins Academic, 1991.

Holdsworth, William. A History of English Law. Vol. I, 7th ed. London: Metheun & Co., 1956.

Holdsworth, William. A History of English Law. Vol. VI. London: Metheun & Co. Ltd. 1924.

Holles, Denzil. The Case Stated of the Judicature of the House of Peers in the Point of Appeals, 1675.

Holles, Denzil. The Grand Question Concerning the Judicature of the House of Peers, Stated and Argued. And the Case of Thomas Skinner.... London: Richard Chiswell, 1669.

Horstman, Allen. "A New *Curia Regis*: The Judicature of the House of Lords in the 1620's." Historical Journal 25 (1982): 411-422.

Horstman, Allen. "Justice and Peers: The Judicial Activities of the the Seventeenth-Century House of Lords." Ph.D. diss., University of California, 1977.

Jansson, Maija, and William Bidwell. eds. Proceedings in Parliament, 1625. New Haven and London: Yale University

Press, 1983.

Jones, William B. "Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth I." American Journal of Legal History 5 (January, 1961): 12-55.

Journals of the House of Commons, 17 Vols., n.d.

Journals of the House of Lords, 79 Vols., n.d.

Keeler, Mary Freer, Maija Jansson Cole and William B. Bidwell, eds. Proceedings in Parliament, 1628 Vols. 1-6. New Haven and London: Yale University Press, 1983.

Kenyon, J. P., ed. The Stuart Constitution, 1603-1688. 2d ed. Cambridge: Cambridge University Press, 1986.

"Letter From a Person of Quality to His Friend in the Country (1675)," in The Main Papers of the House of Lords, Part 5: Nov. 1648-1678, Reel 95 (6 Jan 1673/4 - 3 May 1675). Brighton: Harvester Microform Publications Ltd., 1984.

Miller, John. "Charles II and His Parliaments." Transactions of the Royal Historical Society 32 (1982): 1-23.

Notestein, Wallace, Frances Helen Relf, and Hartley Simpson. Commons Debates, 1621 Vols. 1-7. New Haven: Yale University Press, 1935.

Pike, Luke Owen. A Constitutional History of the House of Lords. London and New York: MacMillan and Co., 1894.

Prall, Stuart E. "Chancery Reform and the Puritan Revolution." American Journal of Legal History 6 (January 1962):28-44.

Relf, Francis Helen, ed. Notes of the Debates in the House of Lords, Officially Taken by Robert Bowyer and Henry Elsing, Clerks of the Parliaments, A. D. 1621, 1625, 1628. London: Offices of the Royal Historical Society, 1929.

Russell, Conrad. Parliaments and English Politics. Oxford: Clarendon Press, 1979.

Schoenfeld, Maxwell P. The Restored House of Lords. The Hague and Paris: Mouton & Co., 1967.

Third Report of the Royal Commission on Historical

Manuscripts. London: Eyre and Spottiswoode, 1872

Thomas, G. W. "James I, and Lord Keeper John Williams." English HistoricalReview 91 (July 1976): 506-528.

Turberville, A. S. "The House of Lords Under Charles II, Part I." English Historical Review 44 (July 1929): 400-417.

Turberville, A. S. "The House of Lords Under Charles II, Part II." English Historical Review 45 (January 1930): 58-77.

"Two Speeches." in The Main Papers of the House of Lords Part 5: Nov.1648-1678, Reel 95 (6 Jan 1673/4 - 3 May 1675). Brighton: Harvester Press Microform Publications Ltd., 1984.

Villiers, Lady De, ed. "The Hastings Journal of the Parliament of 1621." In Camden Miscellany. Vol. XX. London: Offices of the Royal Historical Society, 1953.

Weston, Corrine Comstock. English Constitutional History and the House of Lords, 1556-1832. New York: Columbia University Press, 1965.

Zaller, Robert. The Parliament of 1621, A Study in Constitutional Conflict. Berkeley, Los Angeles, and London: University of California Press, 1971.