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Selden Society

# LORD NOTTINGHAM'S CHANCERY CASES

VOLUME I

Edited, with an introduction by

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## PREFACE

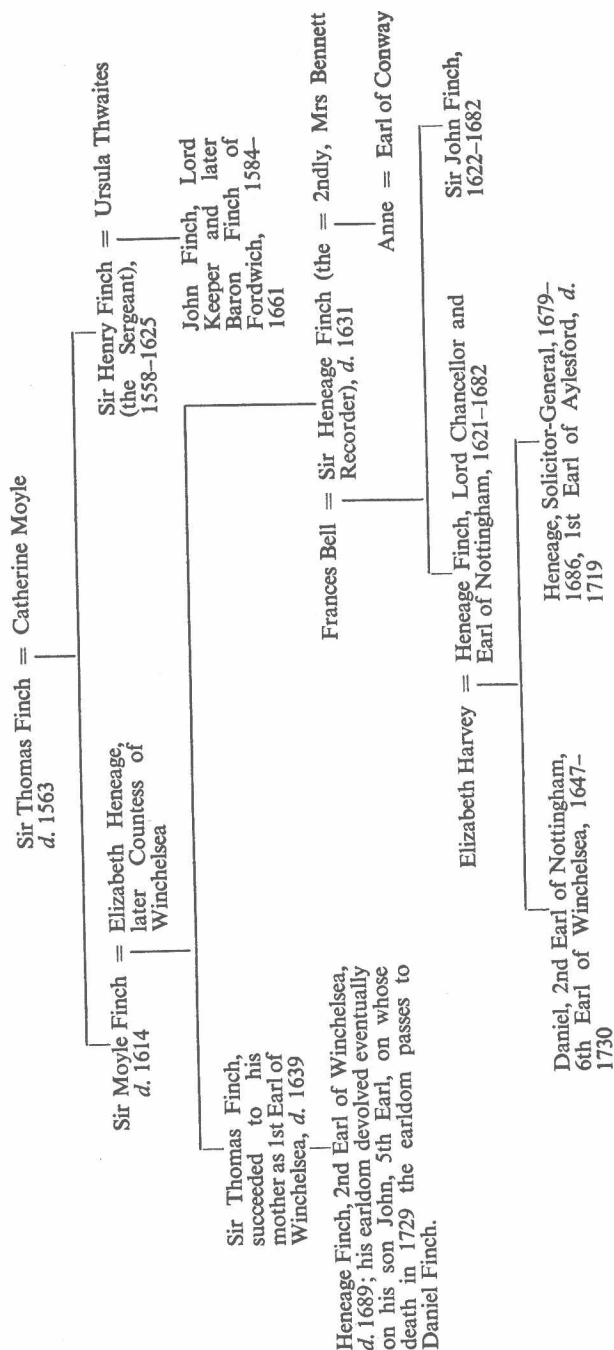
THIS volume and its successor contain Chancery reports written by Heneage Finch, first Earl of Nottingham, while he presided in the Court of Chancery as Lord Keeper of the Great Seal and later as Lord Chancellor. I first transcribed these reports when, at the suggestion of the late Professor Harold Potter, I started research into the beginnings of modern Equity with which Lord Nottingham's name is so firmly linked by professional tradition. Though starting much in the manner of Maitland's "antiquarian worthies who sometimes copied the more accurately because they hardly aspired to understand what they were copying," eventually my materials were cast into the form of an academic treatise which was mainly concerned to test Lord Nottingham's title to be considered the father of Modern Equity. This treatise has been largely drawn upon in writing the introductions to the two volumes which the Society has kindly allowed for the publication of these reports. The introduction to the first volume gives a sketch of Lord Nottingham's career, an account of his view of precedent in Equity and finishes with remarks on the text now edited and on other writings of Lord Nottingham. A detailed discussion of some leading principles and doctrines of Equity will be found in the second volume.

These reports are only a part of Lord Nottingham's legal writings which include two treatises, one on Chancery practice in his day and the other an exposition of many rules of Equity as they existed when he first held the Great Seal. These treatises (many references to which appear in the notes to these reports under the titles of *Practice* and *Prolegomena* respectively) it is hoped to publish in the Cambridge Legal History series. With the reports they form a trilogy of Lord Nottingham's contribution to legal literature and learning. While it is not intended at this moment to print or reprint other writings by Lord Nottingham, I have used other MS. materials in preparing this edition. Thus, with the kind permission of Lt.-Col. James Hanbury, I have inserted some speeches from among the Finch MSS. now with the Historical Manuscripts Commission. Again, in the notes, I have inserted unpublished notes written by Lord Nottingham in Coke upon Littleton. Generally, however, I have thought it wise not to burden the text overmuch by the copious notes of an academic treatise and also to confine the present publication of Lord Nottingham's writings to those directly relevant to the history of Equity.

D. E. C. Y.

# FAMILY TREE

SIMPLIFIED TO GIVE RELATIONSHIP OF PERSONS REFERRED TO IN THE INTRODUCTION



# INTRODUCTION

## I

### BIOGRAPHICAL SKETCH<sup>1</sup>

HENEAGE FINCH was born on 23 December 1621,<sup>2</sup> "of a family in which attachment to the praerogative, legal training, and eloquence might be called hereditary".<sup>3</sup> The family of "black, funereal Finchs" were certainly one of the most prominent in the legal history of the seventeenth century and they had played a part in the wider field of politics and public affairs. They came from Kent, a county whose reputation for firm but moderate royalism<sup>4</sup> they helped long to maintain. The family first appears in Kent before the Reformation<sup>5</sup> and on the dissolution of the monasteries had shared in the estates of the Kentish houses. The Finch of his day was knighted for his part in the French wars of Henry VIII, and his son, Sir Thomas Finch,

<sup>1</sup> There are helpful biographical sketches in *Dict. Nat. Biography* and Holdsworth, *History of English Law*, vi. 539-548. Lord Campbell's *Life* (ed. 1846, iii. 380-429) is largely taken from a sketch in the *Law Magazine* by Edmund Plunkett Burke (reprinted by W. N. Welsby in *Lives of Eminent English Judges*, 1846). Campbell has added little except his characteristically uncharitable judgments. The chapter in Pearl Finch's *History of Burley on the Hill* (London, 1901) is taken mainly from Campbell's account, though with some valuable additions from family manuscripts. There is a sketch by Lodge (*Portraits*, ed. 1850, vi. 83). In the *History of the Finch Family* (London, 1933) by Bryan J'Anson there is no new information but some good illustrations, including a 1681 engraving of the Chancellor. He was painted both by Lely and Kneller. The former portrait hangs in the Inner Temple Hall; the latter was hung at Burley on the Hill and is reproduced in Miss Finch's book. There is a fine marble effigy on his tomb.

<sup>2</sup> Where is uncertain. Anthony Wood guesses at Eastwell in Kent (*Athenae Oxonienses*, 3rd ed. 1820, iv. 66). Archibald Malloch in his biography of Sir John Finch and Sir Thomas Baines (Cambridge, 1917), says Heneage House. This venue is

supported "from the parchments of my Lady Heneage" (or rather a copy of them) where it is said: "He was born at Heneage House in London the 13th day of June a little before one o'clock in the afternoon being Friday, in the year of our Lord 1621", quoted by Pearl Finch, vol. I. 135. The particularity is striking but there is good contemporary evidence for December 23.

<sup>3</sup> Ranke, *History of England*, vi. 566, speaking of Heneage's son, Daniel.

<sup>4</sup> Keith Feiling, *History of the Tory Party* (1660-1714), 16.

<sup>5</sup> By the marriage of Henry Finch (Heneage Finch's great-great-great grandfather) to Alice, daughter of Philip Belknap of Canterbury. The family tradition gives a descent from Henry Fitzherbert, Chamberlain to Henry I, the modern surname being taken from the Kentish manor of Finches, acquired in the time of Edward I. In deference to this tradition Heneage Finch's first cousin, the third Earl of Winchelsea, on being created a baron at the Restoration takes the title of Baron Fitzherbert of Eastwell. Both Dugdale and Leland record this tradition. These claims may be seen from a 1620 pedigree by John Philipott, Rouge Dragon, printed in 1872.

consolidated the fortune of the family by marrying Catherine Moyle<sup>1</sup> with whom came the Eastwell estate. One of his sons, Henry Finch, first brought the family into the legal profession. He entered Gray's Inn, attained the rank of serjeant at law, and two years later, in 1616, became King's Serjeant.<sup>2</sup> He is chiefly remembered as having written what was at that time virtually unknown—a manual for the instruction of the law student.<sup>3</sup> His son, John,<sup>4</sup> was the first Finch to reach judicial rank. He followed his father at Gray's Inn, where he was reader in the autumn of 1619 and Treasurer in the second year of Charles I's reign. He was a high prerogative lawyer of extreme royalist views. It was in 1628 that he first appears as acceptable to the Court, being then elected Speaker of the House of Commons, and as such held in his chair on 2 March 1629 by Denzell Holles and others while the famous three Resolutions, the culmination of Sir John Eliot's opposition, were passed in a scene of wild excitement.<sup>5</sup> Finch was now *persona grata* with the government. He was Attorney-General to the Queen<sup>6</sup> and judicial promotion followed quite shortly. A place on the sidecushions of the Common Bench was quickly changed for the Chief Justiceship of the Court.<sup>7</sup> In 1635 he advised the issue of ship money writs to the inland counties, and in the resulting case of *R. v. Hampden*,<sup>8</sup> he delivered in the Exchequer Chamber a judgment containing views of almost pure absolutism.<sup>9</sup> Finally, on the death of Lord Keeper Coventry in 1639 he received the Great Seal and a peerage.<sup>10</sup> But his tenure was brief and his parting swift, for faced with an impeaching Parliament in 1640 and unable to move the Commons by a

<sup>1</sup> The names of Belknap, already mentioned, and Moyle are tolerably well known to readers of the Year Books. This lady was daughter of Sir Thomas Moyle, Chancellor of the Court of Augmentations under Henry VIII.

<sup>2</sup> 11 June 1616. He was also autumn reader of the Inn in 1604. He twice represented Canterbury in Elizabethan Parliaments.

<sup>3</sup> "Νομολογία: un Description del Common Leys d'Angleterre solonque les rules del art." First published in 1613 in French, the work was re-edited in 1627 in English under the title of "Law, or Discourse thereof", and went through several editions till superseded by Blackstone.

<sup>4</sup> Whig historians castigate him. Campbell (ii. 552): "one of the worst characters in English history". Macaulay speaks of him as having "prostituted eminent parts and learning to evil purposes". *Hist. of England*, ch. vii.

<sup>5</sup> The Commons dispersed the same day and did not reassemble for eleven years. Trevelyan, *Stuarts*, 155.

<sup>6</sup> In 1633 Whitelocke relates in his Memorials that he with Selden, Noy, Hyde, Herbert and Finch was employed in presenting a court pageant to confute Prynne's *Histriomastix*, an attack upon the queen.

<sup>7</sup> A judge, 14 Oct. 1634. Chief Justice, 21 Jan. 1635. This judicial shuffle (Dugdale, *Chronica Series*, 106-7, *Cro. Car.* 375, *Cal. S.P. Dom.* 1634/5, 221) was wittily celebrated in a couplet:

"Noy's floods are gone, the Banks appear,  
The Heath is cropped, the Finch sings there."

<sup>8</sup> 3 State Trials 825.

<sup>9</sup> At p. 1235.

<sup>10</sup> As Baron Finch of Fordwich, a manor in Kent, then bought from his cousin, the second Earl of Winchelsea.



humble address, he "got up earlier", as Whitelocke puts it, "gave them the slip and escaped into Holland". He returned in 1660 and died within a few months, embittered by a long exile and leaving no heir to succeed him.<sup>1</sup>

The Restoration, however, saw the elder branch of the family on the full flood to further fortune. The Lord Keeper's uncle, Sir Moyle Finch of Eastwell, had been a regular member of the Commons for some years when he was made one of James I's baronets in 1611.<sup>2</sup> He had married in 1575 Elizabeth, daughter and heiress of Sir Thomas Heneage<sup>3</sup> of Copt Hall in Essex, who had been Chancellor of the Duchy of Lancaster, privy councillor and vice-chamberlain to the Queen. This lady by the time of her death in 1634 had become Countess of Winchelsea, and her second son, Thomas, succeeded to the honour and a considerable estate. Her fourth son, Heneage, had entered the legal profession and was elected Speaker in the second Parliament<sup>4</sup> of Charles I. He had earlier defended Francis Bacon and on this occasion clashed with Sir Edward Coke. He was already a lawyer of note, for in the same year that he spoke on behalf of Bacon he was autumn Reader of the Inner Temple and shortly afterwards reached the rank of serjeant at law. His professional career was crowned with the Recordship of London. He seems to have achieved a degree of wealth<sup>5</sup> as well as promotion in his profession, for he acquired Kensington House in which his son, as Chancellor, chiefly lived. He died on 5 December 1631, when his eldest son, Heneage Finch, was not quite ten years old.

The future Chancellor thus inherited a family background which was best calculated to help him in a legal career and also family wealth which might have turned the edge of a less able or ambitious nature. Few facts survive to tell of his early years and education. According to Anthony Wood,<sup>6</sup> he went up to Oxford in the Lent term of 1635, from Westminster School, and was admitted a fellow-commoner at Christ Church, where he continued for two or three years. He left, it seems, as many of his

<sup>1</sup> He sat on the trial of the regicides that autumn but took no active part. His widow died at the Moat, Canterbury, in September 1669. *Cal. S.P. Dom.* 1668/9, 496.

<sup>2</sup> 29 June 1611. He sat for Weymouth 1575-8, Kent in 1593, and Winchelsea in 1601. He is chiefly remembered by lawyers for the famous case of 1600 recited in 4 Co. Inst. 85.

<sup>3</sup> Thenceforward a favourite name in the family. Heneage Finch relates in a letter to his son how his wife is having difficulty as a godparent in a family converted to Roman Catholicism and that he

only avoided the embarrassment through "my irregular name." Hist. MSS. Comm., *Finch Papers*, i. 415.

<sup>4</sup> *D.N.B.* in introducing his son incorrectly describes him as Speaker in the first parliament, in which he had sat as member for London, as well as in the Commons of the previous reign.

<sup>5</sup> Miss Nicolson in her edition of the *Conway Letters* (New Haven, 1930), p. 2, says that besides making one fortune he married another. The circumstances of his second marriage were somewhat ludicrous.

<sup>6</sup> *Athenae Oxon.* iv. 66.

contemporaries did, without taking a degree,<sup>1</sup> though he seems to have devoted himself steadily to the studies of the place.<sup>2</sup> Leaving Oxford he was admitted to his father's Inn, the Inner Temple, on 26 November 1638, and was called to the Bar on 30 January 1645.<sup>3</sup> Whether he was primarily attracted to the profession by the success of his cousin,<sup>4</sup> the Lord Keeper, is perhaps doubtful: a more natural explanation is the instinctive leaning to the law that most members of his family with any talent displayed.

He applied himself assiduously to the exacting task of mastering the common law, and, as Clarendon said of another great lawyer of his day, "he had taken great pains in the hardest and most knotty part of the law as well as that which was more customary". It was indeed a task which few of his contemporaries accomplished, for most of them in the event were rather mastered by their subject, to become, as Erasmus called them, "the most unlearned kind of learned men".<sup>5</sup> At this time, however, legal education, though showing some signs of the lethargy which in the next century killed all organized legal instruction in the Inns, was yet vigorous enough to encourage and sustain the student. Heneage Finch seems to have taken the advice of his great-uncle, Henry, the author, that a "law student ought to read all the morning and to talk all the afternoon".<sup>6</sup> He compiled commonplace books and noted cases in Westminster Hall.<sup>7</sup> He cultivated his natural eloquence in the evening debates

<sup>1</sup> Campbell suggests this was because of his father's sudden death. This, however, had taken place at least half a dozen years earlier.

<sup>2</sup> *Finch Papers*, i. 217. Letter of 4 Oct. 1662, sympathizing with his son, then at Christ Church, on "the unkindness of those who desire not to see any better example than they themselves are willing to follow. It was my fortune then, as it is yours now, to meet with the same inconvenience and for the same reasons".

<sup>3</sup> This itself testifies to his ability, the regular course being then seven years. Coke completed the course of eight years, as it was in his day, in six. It also shows he cannot have been concerned with the troubles of those times.

<sup>4</sup> *D.N.B.* calls John Finch an uncle of Heneage—an obvious blunder corrected in *Bull. Inst. Hist. Res.*, ii. 57, to "first cousin once removed".

<sup>5</sup> "Omnium doctorum indoctissimum genus", quoted by John Evelyn in a letter to the Dean of Carlisle, 10 Nov. 1699, in which he makes some penetrating remarks

on the legal education of the "swarms & legions of obstreperous lawyers as yearly emerge out of our London seminaries".

<sup>6</sup> A dictum attributed by Roger North (*Lives of the Norths*, 1826 ed., i. 26) to Heneage Finch himself. He may have heard him repeating it.

<sup>7</sup> Hist. MSS. Comm., 7th report, app. 514b, 515a, 517b, gives reports compiled by him in early days. He also made a commonplace book, and it was probably at this time that he annotated a copy of Plowden's *Quaeres* which was in the library of Francis Hargrave (now B.M. 1130, c. 4). The title of this rare edition is *Les Quaeres del Monsieur Plowden*, and Hargrave writes on the title page: "Note this edition is without date and I have not seen any other edition printed separately, but the book called Plowden's *Quaeres* englished methodized and enlarged was published in 1662. Therefore this book must have been before that year, probably it was published in the reign of James I. I apprehend that Heneage Finch, the former owner of this book and the writer

which were held in the Cloister Walks in the Temple.<sup>1</sup> Eventually he was called, and eighteen months later married Elizabeth Harvey, with whom he seems to have led the happiest of married lives.<sup>2</sup> She died seven years before her husband. He did not marry again. We know little of her character, but several of her letters survive in the Finch papers and they make delightful reading.

During the years following his marriage little is known of him. Being quite out of sympathy with the Puritan regime, there is no inducement to undertake any public work or appear in public affairs. His name appears in Siderfin's reports and he seems to have been retained in some important cases, particularly before the Common Bench.<sup>3</sup> There is little doubt that like many others of his way of thinking he preferred to withdraw himself to the Temple and the courts and to cultivate his legal practice. Nevertheless, he was ready to appear in cases with a political colour. Thus he

of the manuscript notes in it, was the famous Lord Chancellor Nottingham. The notes are in general profound and worthy of that great man. With respect to John Finch, whose name is also written on this leaf, probably he was John Lord Finch, son of Sir Henry Finch, who wrote the "*Discourse*", on the law, Lord Keeper in the reign of Charles I, was Lord Chancellor Nottingham's first cousin once removed." The volume is interleaved but the notes are all in the margin. Cases resolving the doubts are inserted, otherwise the annotator has inserted his own incisive views.

<sup>1</sup> These walks were destroyed by the fire of 1666. When the Benchers of the Middle Temple afterwards wished to build chambers, Heneage Finch, then a Bencher of the Inner House, and Attorney-General, dissuaded them wittily and eloquently, says Roger North (*Lives*, i. 27) because of the case-putting, "which was done in his time", he said, "as mean and low as the buildings were then, however it comes that such a benefit to students is now made so little account of". The cloisters were rebuilt by Sir Christopher Wren with chambers over them. Heneage Finch attached as much importance as Serjeant Maynard to "ars bablativa". Writing to his son, Daniel, at Oxford in 1663, he advises him: "Be sure to be present at all disputations in the Hall, whither the fellow commoners seldom came in my time, and study the

question before hand, for one argument of your own choosing, out of those books which write upon the question, will be better managed by you than any argument your tutor can put into your head." In another letter he warns against the dangers of diffuse reading and inculcates a practical view of learning: "the languages of Greek and Latin are no part of learning themselves but only a help to it . . . learning consists in the knowledge of things, not of words . . ." *Finch Papers*, i. 236 and 244.

<sup>2</sup> Pearl Finch, *op. cit.* 152. "On Thursday, the 30th of July, 1646, my cosen, Mr Heneage Finch, son and heir of Sir Heneage Finch, Recorder of London, was married to Mrs Elizabeth Harvey, eldest daughter to Mr Daniel Harvey of London, by Dr. Holdsworth at a little church in London Wall between Bishopsgate and Moor Gate, but the wedding was kept at Carlisle House, being her father Mr Harvey's house. . . ." There were fourteen children of this marriage, and his son Daniel had an even larger family. It has been conjectured that his wife's family included Dr William Harvey, who first discovered the circulation of blood. It is known that William Harvey in his will calls Heneage Finch "his loving cousin".

<sup>3</sup> In 2 Siderfin 152 he appears to be called a Serjeant, but the title belongs to Twisden, who is mentioned just previously. A similar error of a misplaced comma occurs in 1 Siderfin 74. Roger North

appears in Parliament in February 1659 to argue for Mr Streete, who had been elected for Worcester, but who was said, in a hostile petition, to have been in arms for the King. He seems to have conducted the case skilfully and boldly, since he was complimented by opposing counsel in that he had "not only done the part of an advocate but of the exquisite orator and, under his pardon, a judge too, to direct you what to do".<sup>1</sup>

At this time he was certainly in possession of a large and growing practice, and his success was founded not only on the reputation he enjoyed with litigants but also with lawyers. Roger North, speaking of his brother's career about the year 1657, says that Francis North "contrived to stay in London to be present at famous pleadings, as particularly that of Sir Heneage Finch, and some others".<sup>2</sup> Some indication of the rise of his practice is that in the years immediately before the Restoration he was earning well over a thousand pounds yearly, apart from his inherited income. He certainly never had to trouble about financial exigencies and when he received the Great Seal he was able to forgo the four thousand pound annuity usually attached to the office. The best evidence is available in the form of his own fee book, now among the Finch papers deposited with the Historical Manuscripts Commission.<sup>3</sup> On the very first day for which there is an entry, 21 April 1656, he appeared in all three courts of law in Westminster Hall. That Easter term he received £142 10s. 0d. and in the following vacation £31 10s. 0d. Business is naturally slacker in the summer, but in Michaelmas term he takes £269 15s. 0d., and he works through the Christmas vacation, taking £121 and in the spirit of the times attending a parliamentary committee on Christmas Day. His receipts from Easter 1656 to Easter 1657 are £1,189 11s. 0d. The next year's total is £1,269 6s. 0d., and the year after £1,726 7s. 0d. The total fees from Easter 1656 to June 1660, when he became a law officer, amount

(*Lives*, i. 31) quotes Heneage Finch as saying that in the Common Bench "the law is there at home", for, says Roger North, "there all suits are drawn forth upon the ancient and genuine process of the common law". In the King's Bench, he says, more news than law was stirring.

<sup>1</sup> Burton's *Diary* (1828 ed.), iii. 433. Burton also notes other instances of his parliamentary practice. *E.g.*, in 1657 he represents the Lady Katherine Scott in a matrimonial case (Burton, i. 334). Practice before the House might be lively, for the diarist records in this case there was a great committee. "There were about one hundred people present, besides pick-

pockets, which, by report, were there also. They said one was under the table, and Colonel Fiennes drew his sword and vapoured hugely how he could spit him; but the fellow escaped, if there were any such."

<sup>2</sup> *Lives*, i. 33. Though he gives Heneage Finch his title he acquired on the Restoration, I take this reference to be to North's student days. He was called to the Bar by the Middle Temple on 28 June 1661.

<sup>3</sup> The book is a small but tall volume with parchment covers. Inside the covers are notes of some moot cases debated at the summer reading of 1629 presided over by the Reader, Heath, who was reading on 32 Henry 8, c. 7.

to £5,608 9s. 0d. In the next ten years he made nearly forty thousand pounds. Most of this total is represented by comparatively small fees, the vast bulk being sums between one and five pounds. Such a fee as £140 from Lord Ranelagh on 29 July 1671 is wholly exceptional. As Solicitor his private practice, therefore, is producing about four thousand pounds a year. It fluctuates slightly and one year only produces £2,664 10s. 0d. This year, 1665-1666, has the explanatory note "Plague" in the margin. As Attorney his fee book again shows an increased income. From 10 May 1670 to 3 May 1671 the figure is £6,176 6s. 8d., and from 3 May 1671 to 7 June 1672 the total is £7,541 10s. 0d. From a loose sheet in the fee book it appears that from 9 July 1672 to 2 July 1673 (inclusive) his fees were £6,285 10s. 0d., and they continue until 9 November, when he notes: "Sunday night I received the Seal and was made C.S." From June 1672 to November 1673 the fees amount to about £7,623.

It is certain, therefore, that Heneage Finch was well established in practice when the turn of the political wheel gave him the opportunity of entering public life. Richard Cromwell was allowed to retire from the last troubled councils of the Puritan regime and the commonwealth was swept away by Monk and the returning flood of royalist opinion and popularity. Heneage Finch took this tide at its height and with many others was swept in with it. In April 1660 he was returned to the Convention Parliament both for the city of Canterbury and the Cornish borough of St Michael's, and he elected to sit for Canterbury.<sup>1</sup> The temper of the times is shown by the very loyalist sentiments in a declaration promulgated by the new member on behalf of his constituents on 11 May 1660, in which they declare their past and present adherence to "the good old way of due allegiance".

The next step was the extirpation of "the good old cause". It was necessary that the prosecution of the regicides should be in competent hands. Sir Geoffrey Palmer had been appointed Attorney-General the same month of the King's return<sup>2</sup> and on 6 June Heneage Finch received the office of Solicitor-General, being knighted at the same time.<sup>3</sup> Next day he was created a baronet, of Ravenstone in Buckinghamshire, part of his patrimony and where he lies buried. Why he was selected from the many royalist lawyers, many of whom if not more learned had suffered more

<sup>1</sup> The city accounts record the banquet given to him and his fellow burgess, Sir Anthony Aucher, Hist. MSS. Comm., 9th rep., pt. 1, 165b. The family influence was strong in Kent. The Earl of Winchelsea was Lord Lieutenant at that time. The Canterbury election was one of the first to attract public notice.

Hist. MSS. Comm., Leyborne Popham MSS. 229.

<sup>2</sup> Sworn on 31 May; patent dated day before. Crown Office Minute Book, 15.

<sup>3</sup> Collins, *Peerage* (4th ed. 1768) iii. 236; Dugdale, *Chronica Series*, 115; Crown Office Minute Book, 17.

loss for loyalty, is a matter of conjecture<sup>1</sup>; but once in office there was no doubt that the right man had been chosen. Sir Geoffrey Palmer was not a member of Parliament<sup>2</sup> and consequently the parliamentary duties of the law officers of the Crown fell to the Solicitor. During its tenure of this office he was regularly on parliamentary committees and must have felt the truth of Bacon's opinion that the Solicitor's was "the painfullest place in the kingdom".<sup>3</sup> The Attorney-General was even then advanced in years, and when he died in 1670, after many years of ill health, Heneage Finch had in fact for some time been discharging his duties for him.

The prosecution of the regicides was conducted by Heneage Finch. There was some little difficulty in restraining the new Cavalier Parliament to the wise resolve of the King to be as lenient as safety allowed. The punishment of the regicides, however, was never doubted, and indeed their exclusion from the general pardon was almost the condition on which the rest of the roundhead regime were forgiven.<sup>4</sup> How far Heneage Finch favoured severity is not clear. He supported the Lords' amendment to the bill of indemnity extending the range of liability beyond those who had sat in judgment on the King in 1649 and excluding from the amnesty Vane, Haselrig, Lambert and Axtell. The only reason, he thought, why they should be spared was that of David's: "Slay them not, lest my people forget it."<sup>5</sup> He also supported the motion to impeach one Drake who had written an embarrassingly logical pamphlet to prove the Long Parliament had never been legally dissolved or the Convention Parliament legally summoned.<sup>6</sup> Further, all those authors who had written in justification of the King's execution were in danger, amongst them the late Latin secretary, John Milton. His imprisonment was ordered on 16 June 1660,<sup>7</sup> and the Attorney-General ordered to prosecute him for the "Pro Populo Angli-

<sup>1</sup> Hyde had been first introduced to Laud by a member of the Harvey family when the Archbishop was acting as Lord Commissioner of the Treasury. But this is a very tenuous connection.

<sup>2</sup> At this time the Attorney did not sit in the Commons. Palmer occasionally sat as an assessor in the House of Lords, to which he was summoned as law officer by a writ of summons. Francis North was the first Attorney-General to establish his right to retain his seat in the Commons, which he did as member for Lynn in 1674. Heneage Finch appears to have done so without question. See generally Hatsell's *Precedents* (3rd ed.) ii. 26.

<sup>3</sup> His Solicitor-Generalship was with regard to his senior partner very much of the same character as later Sir William Murray's was *vis-à-vis* Sir Dudley Rider.

<sup>4</sup> Ranke, ii. 323. See also Feiling, *op. cit.*, 100, for the part Heneage Finch and Dudley North played in the Commons over the compromise. The Solicitor presented the Commons' case at a joint committee of conference between the two houses on 16 August.

<sup>5</sup> 4 Parl. Hist. 100, 102, 108.

<sup>6</sup> 5 State Trials, 1365; 4 Hatsell's *Precedents* 135. The matter was never prosecuted, though articles were drawn up. The pamphlet is reproduced in 4 Parl. Hist. App. 1. The submission reported in 1 Ventris at p. 15 on the consequent invalidity of an Act of Parliament seems unique.

<sup>7</sup> 2 Hatsell, 262. The books were burned by the common hangman, but Milton remained for a time uncommitted, possibly because, as Samuel Johnson suggests,

cano Defensio", and for a work in answer to the Ikon Basilike. He obtained his discharge on 15 December. Two days later Andrew Marvell moved on his behalf for a refund of the excessive fees the serjeant at arms had exacted.<sup>1</sup> The plaint was referred to the committee of privileges. The Solicitor is recorded as opposing the application on the ground that Milton had been Latin secretary and rather deserving hanging.<sup>2</sup>

It is more instructive to judge by his conduct at the trial of the regicides than a chance remark in debate. These proceedings opened on October 9<sup>3</sup> at Hicks' Hall when Sir Orlando Bridgman offered to the grand jury a definition of treason in legally unexceptionable terms but wide enough to include the past activities of several of those who sat on the bench with him.<sup>4</sup> Indeed the task of the prosecution was more delicate than difficult. Both Harrison and Axtell attempted to make observations which the presence on the bench of Monk, Anthony Ashley Cooper and others made it impossible to allow. The only legal difficulty arose upon the able argument addressed to the court by John Cook, the lawyer, and upon which the prosecution were constrained to compliment him. The argument was based on that Act of Henry VII<sup>5</sup> which protected adherents of a *de facto* king from the penalties of treason and which Cook argued to be equally applicable in equity of any supreme political authority. But a strictly royalist interpretation of the word "king" met this plea and Cook did not escape. All accounts show that Heneage Finch was firm and forceful in presenting the prosecution's case. His language seems to have been moderate and courteous to a degree which in the later years of the reign became quite unknown in political trials.

In the House of Commons the Solicitor was already prominent in the business of the session and this standing he retained while he remained a member. The religious settlement was naturally one of primary importance.<sup>6</sup>

he was "not perhaps very diligently pursued". At this time he was known for his polemics, some of which were certainly treasonable, rather than his poetry. Burnet, *History of own Times*, i. 276, thought that, considering the feeling against him, he was lightly dealt with.

<sup>1</sup> £150, which had been borrowed with difficulty.

<sup>2</sup> 4 Parl. Hist. 162. Milton's friends appear to have been successful in obtaining a reduction in the fees. See generally Masson's *Life of Milton*, vi. chap. 2.

<sup>3</sup> Ranke, iii. 328; 5 State Trials 985. The Commissioners of Oyer and Terminer adjourned to the Old Bailey for the arraignments next day.

<sup>4</sup> Ogg, *England in the Reign of Charles II*, i. 178.

<sup>5</sup> 11 Henry 7, c. 1. According to Fuller, Henry and his contemporaries felt the need of some such paper protection, "for they lived in a troublesome world, wherein the cards were so shuffled, that two kings were turned up trumps at once, which amazed men how to play their games". *Holy State*, bk. IV, ch. VIII. This Act may have been one of the reasons which influenced some of Cromwell's supporters to urge the Crown upon him. For a contemporary appreciation, see Hist. MSS. Comm., 5th rep., 181b.

<sup>6</sup> As early as 8 May 1660, a proclamation stated that the Commons were considering legislation for securing the Protestant religion, granting an amnesty and paying arrears of army and navy pay. Ranke, iii. 323.



The Convention, however, was unable to reach a solution of this question, for it had been summoned under Presbyterian auspices and there was reaction to extreme Anglican claims. Heneage Finch was "the outstanding Churchman of the Convention" and led the Anglican party during the great debates of July 9th and 16th in the Committee of the House.<sup>1</sup> His speech was, von Ranke considers, the best delivered in those difficult exchanges. He took his stand squarely on the legal position that episcopacy had always been the settled form of ecclesiastical government and there was "no law for altering government by bishops". In matters of doctrine he was ready to let the word of Scripture stand alone, though many of his party pressed for the thirty-nine articles in their entirety. Certainly he was a strong friend to episcopacy and his speech of 30 July was a vigorous argument that all ministers inducted into livings without the consent of the patrons should be expelled. The religious settlement was at length postponed till after the General Election probably at the instance of the Chancellor. On the motion of Ashley Cooper the debate was adjourned for three months. There was in the meanwhile a conference of the Anglican and Presbyterian parties<sup>2</sup> and a declaration promulgated which contained considerable compromise and which met most of the requirements of the House. Yet when Sir Matthew Hale moved on 28 November the enactment of this compromise his bill was rejected on a second reading by 183 to 157, Heneage Finch taking part in the opposition.

Work of a more specifically legal nature was now at hand. On 21 November he proposed the abolition of the royal rights of Purveyance<sup>3</sup> and of the Court of Wards, the loss of revenue being made good by fresh excise duties. The abolition of the Court of Wards<sup>4</sup> was only in keeping with the disappearance of other courts which derived in origin from the old and now obsolete Tudor method of administration. The additional excise on beer, cider and tea deftly transferred the financial burden from the landowning part of the community on to rich and poor alike. The same legislation effected a radical change in one branch of real property law by converting all military tenures into free and common socage. These changes were not altogether unexpected. They had in part been anticipated during the Commonwealth. The feudal "system" had long since degenerated into a series of capricious exactions which were uniformly unpopular except with the Crown. Their operation has been feelingly

<sup>1</sup> Feiling, 103, 128. Ranke, iii. 350. Osmund Airy in *D.N.B.*, on the other hand, decries his contributions to these debates.

<sup>2</sup> At the Savoy on 23 Oct., 6 State Trials 1.

<sup>3</sup> As a result royal housekeeping ex-

penses went from £70,000 to £120,000. *Cal. S.P. Dom.* 1663/4, 420.

<sup>4</sup> 12 Car. 2, c. 24. The court had already been abolished by a Commonwealth ordinance. But Masters of the court continued to be appointed.



described in a well-known passage in Blackstone.<sup>1</sup> The financial settlement is indicative of much subsequent history. The King is ceasing to be a territorial power and the legislative power is beginning to pass into the hands which hold it till 1832.

By the winter<sup>2</sup> it was clear that the time of the Convention Parliament was running out. Venner's revolt aroused a sense of old resentment and royalism which made it an auspicious moment to summon a new Parliament in the spring of 1661. In April Heneage Finch was elected both for the borough of Beaumaris in Anglesey and for the University of Oxford and naturally elected to sit for the latter.<sup>3</sup> This seat was secured for him chiefly by the influence of the Bishop of Oxford, the Heads of Houses and Clarendon, whose son Lawrence Hyde stood successfully with him. There was a strong opposition at least in part inspired by the differences the University had had with its former representative, Selden, whose "abuse of the University's favour", says one critical observer, "is fresh in many minds and they will not be over-zealous for lawyers".<sup>4</sup>

Though his relations with his constituents seem uneventful he did not in every respect meet their exacting demands. "He was chosen parliament man for the university," says the antiquarian Anthony Wood, "but did us no good when we wanted his assistance for taking off the tribute belonging to hearths. In 1665, after the Parliament then sitting at Oxon<sup>5</sup> had been prorogued, he was created in full convocation, doctor of the civil law, being then one of the four members of Parliament<sup>6</sup> that had communicated the thanks of the honourable house of commons, lately sitting in the said convocation house, to members of the University for the 'Reasons concerning the solemn league and covenant, negative Oath &c made in 1647'. Which oration being concluded, in the presence of several parliament men (besides the said four) the vice-chancellor stood up and spoke to the public orator to do his office. Whereupon he making a most admirable harangue said among other things to this effect that 'the University wished they had more colleges to entertain the parliament men, and more chambers, but by no means more chimneys, &c', at which Sir Heneage changed his countenance and drew a little back."<sup>7</sup>

The parliamentary background to this incident was the passing of the Five Mile Act of 1665. The strong Anglican views of the Solicitor-General

<sup>1</sup> Comm. ii. 76.

<sup>2</sup> Hist. MSS. Comm., 5th rep., 196. Letter of 11 Dec. 1660 gives gossip about approaching dissolution and describes Heneage Finch as "a knowing person".

<sup>3</sup> *Commons' Journals*, 13 May 1661. Foss erroneously says Cambridge.

<sup>4</sup> *Cal. S.P. Dom.* 1660/1, 275, 517, 526, 527, 530.

<sup>5</sup> Because of the plague.

<sup>6</sup> With Hyde, Col. Strangeways and Sir John Birkenhead.

<sup>7</sup> *Athen. Oxon.* iv. 66. This event took place on 7 Nov. See *Commons' Journals*, 31 Oct. 1665; *Cal. S.P. Dom.* 1665/6, 35.