Judges as Litigants in the 15th century

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In Easter term 1445, William Yelverton, one of the judges of the King's Bench, was summoned to respond in a plea of detinue. The plaintiff John Derham claimed that he had given Yelverton two bonds for safekeeping, one signed by him and the other by John Burgh, which had not been returned when requested. Yelverton appeared in court, willing to hand over the bonds if the court ordered him to do so. But since they had been entrusted to him under a certain condition which might not have been fulfilled, he asked that John Burgh should be summoned. This was granted and a new day was given in the following term.

A couple of years later we encounter Yelverton again, this time as a plaintiff in two actions of debt. His debtors were duly summoned, and, when they failed to appear, ordered to be arrested. When the sheriff could not find them, the outlawry procedure was started.

These law-suits were ordinary pleas and nothing unusual – except for the court which was chosen by the plaintiffs. The cases were all heard in the Court of Common Pleas, which is puzzling, because Yelverton, a party in all suits, was a judge of the King's Bench and thus entitled to the King's Bench's privilege.

This privilege meant on the one hand he was allowed to sue in his own court by attachment of privilege – even in personal actions such as debt normally not within that court's jurisdiction. Yet, although Yelverton could have

used a procedure against his debtors which would have brought them into court quicker than the usual mesne process, he prefered to sue in the Common Pleas by original writ.

On the other hand, the privilege meant that Yelverton could have asked for a writ of privilege in the detinue case which was brought against him. This writ, a form of *supersedeas,* would have prevented him from being sued in a rival court. Yet, Yelverton chose not to invoke his privilege but rather appeared in the Common Pleas to answer the plaintiff.

As we shall see, he was not an exception in this regard. Other judges, too, occasionally sued and got sued in a rival court. This raises some questions: Why did they sometimes prefer to sue by original writ rather than by attachment of privilege? And why did they occasionally answer their opponents in a rival court although they did not have to? And what does this tell us about bill procedure and privilege jurisdiction?

This paper will try to tackle these questions by analysing the litigation strategies used by the King's Bench and Common Pleas judges, taking into consideration all actions which were heard in the judge's own court as well as in the rival one between 1420 and 1500. It will start by addressing as a general background the relative frequency of litigation involving judges and the types of cases and look at some specimen litigation careers before returning to the choices made by justices and to privilege jurisdiction.

The analysis is based on 136 cases with judges as litigants in the two central common law courts. The cases were collected from about 100 plea rolls from each court and an additional 100 panella and recorda files. About 70% of the information comes from the plea rolls and 30% from the files. However, only the King's Bench files are available at the moment. This means that there is a good chance that my data are biased. Because if the King's Bench is seen in

isolation, we find that about 56% of the cases come from the files, and only 44% from the plea rolls. I assume we shall find a lot more references to actions begun in the Common Pleas in which judges are named once the writ files from that court become available. This should be kept in mind when I present my figures. I should also add that I took into consideration only those actions where the plea roll or writ explicitly mentions that the litigant in question was a judge. Hence, for instance, bills of custody prosecuted by John Markham, knight, in 1474 were not counted, although it is likely that this plaintiff was indeed the former Chief Justice of the King's Bench.

So, how often were judges litigants? Let us begin by looking at those who were suitors in their own court. For this we have 105 examples altogether. In 99 of these cases, a single judge acted as a plaintiff, and in five as a defendant in his own court. There is just one example in the sources consulted where two judges of the same court were plaintiffs in a law suit heard before their colleagues. Hence the scenario described by Sergeant Rolf in 1430 never materialized: during the discussion of a trespass action against the Chancellor of Oxford he had argued that if a writ were brought in the Bench against all its judges, they would judge their own case.

Since we only have 105 examples of judges as suitors in their own court it is fair to say that these actions were not a common phenomenon, either in the King's Bench or the Common Pleas. Rather, they are scattered around the plea rolls and writ files, and looking for them very much resembles the search for the famous needle in a haystack. Consequently, I have to disagree with Margaret Hastings, who claimed in her book on the Court of Common Pleas that the rolls show many entries in which judges were sole or joint plaintiffs. However, Hastings quoted one case only, and this from a year book report. Since she did not cite a single plea roll entry to back up her statement, I am a bit sceptical that she got it right.

But what about judges litigating in a different court? As it turns out, suing in a rival court was definitely the exception: only 28 cases, that is to say about 20%, were brought in courts to which the judges did not belong. In only four of these actions, the judges were defendants. In the remaining 24, they were plaintiffs.

Finally, we have even fewer examples, namely four, in which two or more judges of different courts were joint litigants, once as defendants and three times as plaintiffs.

II

Let us now look at the whole set of cases more closely. What types of actions were the judges involved in?

As plaintiffs, they most often sued for debt. We have 86 of those actions. Next comes trespass, of which we have 22 examples. Detinue (5), cases relating to real property (4), violation of a statute (5), covenant (2), account (1) and dower (1) only appear in single figures.

When we look at judges as defendants, the picture is noticeably different: There are just nine cases of them being sued. In four of these, the delivery of conditional bonds which they had been given to safeguard was demanded, and in one the judge in question had detained four documents altogether. Three times judges were made to answer in an action concerning real property, while a judge was sued just once, namely for debt.

Thus the impression one gets from the plea rolls is that the king's judges in the 15 century were quite law-abiding - or, maybe, that their opponents were simply too scared to sue (although this is not too likely).

As plaintiffs, our judges had to deal with pretty mundane problems, first and foremost with debt. Unfortunately, we can seldom say how the debt came into being because most suits did not go beyond pre-trial stage. Our information therefore comes mainly from attachment writs, which contain only very basic information. They never mention the reason for the debt and often even omit the amount owed. When we actually learn about the sum, the debts range from a little over £3 up to £40. Only two cases stand out: In the first, John Cottesmore and William Paston sued a London grocer for £1000 on a bond. The grocer claimed that the bond was conditional, the condition being that if he would abide by an arbitration negotiated by the two judges, the bond would be void. But before it came to a jury verdict in this case, the grocer retracted, was sentenced to pay the debt and 20s in damages and was committed to the Fleet prison. He stayed there until Cottesmore and Paston waived their claim about eight months later.

In the second of these exceptional debt cases, John Fortescue demanded 1000 marks by bill of custody. The Chief Justice won this case by judgement by default, which is why we do not have any background information.

III

Let us now look at the litigation career of a particular judge. I have chosen John Markham as an example because he is the most active litigant of all the 33 judges I found references for. Markham was justice of the King's Bench from 1444 to 1461 and thereafter Chief Justice until 1469. He was caught up in 19 law suits altogether, which are spread out over almost 30 years. We therefore can follow Markham's activities while he was judge and Chief Justice of the King's Bench as well as after he retired from office. Moreover, Markham is a pretty typical example. He appears only as a plaintiff, never as a defendant. This fits reasonably well into the overall picture. In addition, most of his actions, namely 15, were for debt. Again this fits nicely.

Markham was most active during his time as justice of the King's Bench, commencing at least 11 suits in the period from May 1451 until 1460. However, while he was Chief Justice (1461-1469), he all but disappears from the files and rolls as a litigant. There is just one action in which he was involved during this time, and he was involved as a plaintiff. But after his retirement, Markham makes a strong reappearance, starting at least 7 law suits.

Now, is this pattern – active as judge and as a pensioner and mostly absent from court as a litigant while being Chief Justice – also typical? The example of Thomas Billing, who was a justice of the King's Bench for 5 years and later its Chief Justice for 12 years, shows that Markham was exceptional in this regard. Billing litigated at least once as a judge, but eight times as Chief Justice (spread over 10 years) and his colleague John Fortescue even acted 15 times as a plaintiff while presiding over the King's Bench. One legal claim was made against him during this time (spread over 17 years), while he was involved in only three cases after he had retired. Thus, in contrast to Markham, Billing and Fortescue litigated mainly as Chief Justice.

And, if we look at the Court of Common Pleas we see a similar picture. Its presiding officers also sued while holding that office, although apparently less often than their King's Bench counterparts. I have come across 6 cases involving Thomas Bryan (3), Richard Neuton (2) and Thomas Grene (1).

Thus the overall picture shows highs and lows in the litigation careers of individual judges, but no clear pattern. The only thing that does emerge clearly is the fact that even chief justices had to go to court to protect their rights.

IV

However, a pattern does emerge in their choice of courts. Let us look at John Markham again. All of the 11 actions begun while he was justice were sued in his own court. And all were by attachment of privilege: eight for debt,

one for maintenance and one for trespass. In one instance the reason for the action was omitted.

But the law suit in which Markham was involved during his time as Chief Justice was commenced in the Court of Common Pleas. It was an action of covenant brought jointly with others.

After he left office, Markham appeared as litigant in both common law courts. He brought five actions for debt in the King's Bench and two, also for debt, in the Common Pleas.

Thus, Markham remained in his own court most of the time, even after he had retired. And, as other examples show, Markham, again, was typical in this regard. Suing in a rival court was definitely the exception.

V

Nevertheless, these cases are of special interest because of the right of the King's Bench and Common Pleas to hear cases which were brought by or against any of its officers and by or against retired Chief Justices of the King's Bench. Let us therefore have a closer look at those actions and the litigation strategy they reveal.

Let us start with the suits where a single judge left his home turf as plaintiff. They can be divided into three categories:

The first category are actions brought against a member of a different court. We have two examples of those. In the first, Nicholas Ayssheton, Justice of the Common Pleas, sued an action of trespass for taking and carrying away of goods against Thomas Lacy, clerk of the King's Bench, in the King's Bench. This case is interesting in so far as Ayssheton was sitting on the Bench while Robert Danby was its Chief Justice. And it was Chief Justice Danby's opinion that whenever an officer of the Common Pleas sued an officer of the King's Bench, the privilege of the Common Pleas should take priority. For this reason,

Aysshetoⁿ should have sued Lacy in the Common Pleas, if Danby had had his say. But apparently, Aysshetoⁿ saw this a bit differently.

However, one should not make too much out of this case. It does not prove that the King's Bench privilege took priority, for John Fortescue, Chief Justice of the King's Bench, sued the chirographer of the Common Pleas in the Bench for breaching the statute 2 Henry IV (c. 8) by taking an excessive fine. Hence, the score is one each.

The second category of cases where a judge-plaintiff left his home turf is based on the type of action. It should be remembered that each court's privilege to hear suits brought by or against its officers or ministers was not unlimited. The privilege of the court *coram rege*, for instance, did not include actions concerning freeholds, which means that those suits ended up in the Common Pleas, while the privilege of the Bench excepted actions touching the king's person, felonies and appeals. If, therefore, one of our Common Pleas judges had been accused of a felony, he would have had to answer in the King's Bench, despite his privilege.

The third and most interesting category might be called 'personal preference'. For this we have five examples. The first is John Hals, who sued an abbot in the Common Pleas for debt by writ. Hals may have chosen the Bench because he had been a judge there before he was transferred to the court *coram rege*. Thus, he may have simply preferred his old court for this action.

But even judges who did not have a similar career sometimes chose to sue in a rival court. As I said in the beginning, Judge Yelverton tried to recover two private debts in the Common Pleas, and Justice Catesby sued an action of trespass in the King's Bench.

Personal preference (though of a different sort) may also have played a role in the action brought in the King's Bench by Thomas Littleton, Justice of

the Common Pleas. He sued against John and Thomas Somerville who had publicly defamed him as a procurer of John Somerville's wife. In theory, Littleton could have sued on his home turf, since his court's privilege did not exclude actions like this. However, it is understandable, I think, that the Common Pleas judge preferred to discuss this rather embarrassing matter in the absence of his immediate colleagues.

Hitherto I have dealt with judges as sole plaintiffs in a rival court. We now come to actions in which they were joint litigants. Of those we have 16 examples.

In one, a judge sued together with colleagues from different courts. John Markham, Chief Justice of the King's Bench, commenced the action of covenant mentioned earlier together with Robert Danby, Chief Justice of the Common Pleas, Richard Illingworth, Chief Baron of the Exchequer, and other justices and sergeants at law.

The remaining 15 joint actions were brought together with 'ordinary' co-plaintiffs. The King's Bench Chief Justices Billing and Fortescue as well as the Judges Laken and Yelverton pleaded their writs for debt in the Common Pleas, and when Chief Justice Billing sued three pleas of land with others, they had to purchase writs of right returnable to the Common Pleas.

None of our judges sued by attachment of privilege together with co-plaintiffs, who were not entitled to the same court's privilege – apparently this could not be done.

Let us finally look at judges as defendants in a rival court. Those actions are rare indeed. I have come across just four cases: two against joint defendants and two against a single judge.

Actions against joint defendants one of whom was entitled to a privilege of court were tricky, as one learns from the year books. They contain vivid discussions of whether a plaintiff's choice of court could or should take away a defendant's privilege.

But the two actions in which our judges were joint defendants in a rival court do not present a problem, for they were pleas of land. That is why there was no question that the Common Pleas was seized of the jurisdiction.

And in the first of the actions against a single judge, it was also the type of action, again a plea of land, which determined the choice of court.

However, the second action is different. It was the detinue case mentioned in the beginning which was brought against Yelverton, Justice of the King's Bench, in the Common Pleas. Yelverton did not insist on being sued in his own court although he undoubtedly could have done so in this case, but rather submitted to trial by writ in a rival court.

Now, what does this tell us about privilege jurisdiction? It tells us that using a privilege of the court was permissive and not mandatory: While a defendant entitled to the privilege could not be compelled to answer in a rival court, he could choose to do so. And this is what Yelverton did. But why he refrained from using his privilege is a question I cannot answer at the moment, simply because I do not have enough cases to generalize from and no obvious reason does emerge from the one I found. More research needs to be done.

But, anyway, one should not forget that it was not only Yelverton who did not use his privilege. The plaintiffs who sued him in a rival court by writ could have sued him by bill of privilege in his own court. For some odd reason they did not use this procedure, which seems astonishing, given that bill procedure is supposed to be more convenient. In addition, some of our judges did not sue by

attachment of privilege. Again, the right to sue in this way was an option, not a duty. But still: Why would anyone refrain from using a more efficient and cheaper procedure?

What could have made these people sue by original writ rather than by bill? A possible explanation might be found in a bill of privilege for a debt on loan, which was brought against an attorney of the Common Pleas in 1461. The damages awarded to the plaintiff by the jury were reduced by the judges because the plaintiff had sued by bill as was explicitly said.

Now, I don't know whether money was indeed the one and only reason for the litigation strategy employed by all our plaintiffs. But the fact that people refrained from suing by bill at all should make us wonder. Maybe the advantages of bill procedure were not as evident as we imagine them to be. Moreover, one could argue that it made sense to sue by writ in true actions set in Middlesex, in particular if damages were indeed reduced in suits begun by bill. After all, the sheriffs in those actions based on an original writ could hardly pretend that they were unable to find the judge in Middlesex.

In closing, I would like to highlight three issues raised by my paper.

First, the litigation strategy pursued by and against the judges should, I think, encourage us to reassess the supposed advantages of bill procedure over process by original writ.

Second, it should encourage us to reassess the rationale lying behind privilege jurisdiction. Undoubtedly, the very existence of the privilege bears witness to the fact that it was assumed that the courts would be impartial and not side with their members and officers. Nevertheless, the maxim that no one would be his own judge (except the king) was upheld, for a judge would rise from the bench and sit among the prothonotaries while his case was being argued. And there were more safeguards in place, for a Chief Justice was not

supposed to 'sign' judicial writs in his own case, and a law-suit to which a judge was party had to be recorded by his colleagues.

However, cases involving judges cast some doubt on the rationale for the privilege jurisdiction given in the literature. It is said there that the court's officers should not be forced to leave their work in one court in order to sue or be sued in a different court, which implies that the work of the court generally would suffer if its members were elsewhere. But if this was indeed the rationale, one would have to explain why the privilege was permissive and not mandatory, leaving it to the privileged person himself to decide if he wanted to use it or not. One would also have to explain why privilege jurisdiction would not stay all actions without exception or why most *supersedeas* writs issued to stay jurisdiction in a rival court do not mention impairment of the court's business at all.

And last but not least, some of the cases commenced by judges as plaintiffs in a rival court should encourage us to reassess the alleged rivalry of the two common law courts in the 15th century.