

THE ORIGIN AND DEVELOPMENT OF QUO MINUS

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I.

THE origin and development of the writ of *quo minus* is bound up with the history of the English Court of Exchequer. The latter originated as a tribunal specializing in matters of the royal revenue. Its intimate connection with the financing of government accounted for the rigidity and the promptness which characterized its procedure. Private creditors were naturally anxious to avail themselves, for their own purposes, of such expeditious judicial proceedings, which in origin and purpose were in the nature of a royal prerogative. They found the court responsive whenever interests of the royal treasury even were indirectly at stake. Sufficient interest of the treasury could be established when the plaintiff was a debtor to the king and, unless aided by the court against the defendant, would have been *the less able* to satisfy the king (" . . . *quo minus sufficiens existit* . . . "). This two-fold assertion of a plaintiff, first to be a debtor to the king, and second to be the less able to satisfy the king, was deemed justification enough for the Court of Exchequer to intervene by issuing a writ called the writ of *quo minus*.

Assumption of jurisdiction by the Court of Exchequer by means of the writ of *quo minus* inevitably led to conflict with the jurisdiction exercised by another court—that of the Court of Common Pleas. The determination of civil suits instituted by one subject against another was the particular domain of this court. An exercise of jurisdiction by the Court of Exchequer in what would in substance appear to be a common plea would necessarily involve a concurrence of jurisdiction, and whether or not this constituted an unlawful encroachment on vested monopoly rights of the Common Pleas became the subject of perennial dispute. Ultimately the Court of Exchequer won a complete victory and developed from a special forum of private character into a full-fledged superior court of general jurisdiction. The outcome was mainly due to the force of the writ of *quo minus*.

It is therefore surprising that the writ of *quo minus* has as yet not been favored with the degree of attention on the part of legal historians that it deserves, in view of its important part in the development both of the Court of Exchequer generally and of the characteristic features

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This Article owes much of its "origin and development," to Professor Julius Goebel, Jr., of Columbia University Law School. It also enjoyed the benefit of encouraging comment on the part of Mr. Hilary Jenkinson, of the Public Record Office, London. Its major and minor shortcomings are the author's personal contribution.

of Exchequer procedure.¹ Sometimes the writ is distinguished by epithets such as the "famous," the "well known" or the "peculiar" writ of *quo minus*, but altogether knowledge of the writ has increased but little since the time when Blackstone characterized it as based on an outright *fiction*, on a "bare suggestion" that was never controverted or scrutinized, an empty formula serving as a pretext for the Court of Exchequer to vindicate its jurisdiction over any kind of civil action.²

Blackstone's statement describes the law as it existed at the time he wrote. It has the force of expert testimony on the practices of his epoch and as such it is confirmed by his contemporaries and successors.³ The approach today, more than a century after the replacement of the writ by more modern forms of procedure,⁴ is naturally different. The historian is interested in a more complete picture of the writ as it unfolds through the course of the centuries. The jurist is interested in observing the operation and natural growth of any specimen of legal fiction. They are so interested not only because of curiosity and antiquarianism, not only because of the conspicuous role which legal fictions play in the modern technique of legislative drafting, but because they are aware that legal history, no less than political history, repeats itself. It is quite conceivable, for instance, that the rules on which present federal jurisdiction is grounded, may at some remote date of progressing nationalization and in defiance of constitutional structure, evolve in the direction of procedural fictions in a process bearing a close resemblance to the story of *quo minus*. Hence there is justification for an examination into the question whether current texts⁵ are entirely correct in depicting the writ

1. Cf., e.g., the *venire facias ad respondendum* and the extent in aid, which used the *quo minus* wording, although the term "quo minus" was commonly reserved to the *capias ad respondendum*. See 1 MANNING, THE PRACTICE OF THE OFFICE OF PLEAS OR COURT OF COMMON PLEAS IN THE EXCHEQUER AT WESTMINSTER (1819) 8; see note 89, *infra*.

2. 3 BL. COMM.* 45 *et seq.*, 286. For the form of the writ, see BL. COMM.* App. xix.

3. 1 BACON, ABRIDGMENT (6th ed. 1793) 598 *et seq.* Here the editor, Cunningham, (as against the author himself) speaks of a "common fiction." See also WEST, EXTENTS (1817) 253.

4. The Uniformity of Process Act, 2 Will. IV., c. 39, § 1 (1832) substituted the simpler writ of summons, reproduced in TIDD, THE PRACTICE OF THE SUPERIOR COURTS OF LAW (1833) 72, 262.

5. Cf. McKECHNIE, MAGNA CARTA (1st ed. 1905) 315 *et seq.*, 317, n. 1; (2d ed. 1914) 267 *et seq.*; PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (1936) 146, possibly based on the quotation in 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 240. In the same connection, see Y. B. 20 Edw. III, pt. 1, 16-20 (erroneously: 116), *i.e.*, the case of *Barton v. Pouche* (1345/1346). Plaintiff in this case actually owed the king (queen) a sizeable sum for a quantity of wool, and the defendant, a foreign merchant, owed plaintiff a share of this very amount. Defendant's attempt to wage his law was rejected because the king was "in a manner party." There was a genuine debt to the king (queen), and this gave the Exchequer justification to hear the case. There is no trace of a jurisdictional irregularity. Nor, incidentally, of the *quo minus* formula.

of *quo minus* as a fictitious and ingenious, if not crooked, device applied by an over-ambitious tribunal to "steal" jurisdictional power from other courts.⁶

There certainly was a time when that was true. Yet possibly this is only a part of the picture. Fictions, particularly of a rather complicated nature, usually do not originate by spontaneous generation. There is cause for suspicion when the writ of *quo minus* is placed, as it were, by the side of the *Latitat* and similar artifices in the chamber of procedural horrors. True, as early as the 13th and 14th centuries the records bristle with complaints, royal writs and statutory measures showing that the Court of Exchequer often took cognizance of "common pleas." But too little justice is done to the jurisdictional difficulties facing the court, in the sweeping statements which appear, for example, in McKechnie, Plucknett, and Baldwin,⁷ to the effect that the plain intention of the statutes "was always defeated by the ingenious use of legal fictions" (McKechnie), of which the "well known" fiction of "Crown debtors" was the most popular.

The main task and purpose of the Exchequer and its court was to collect royal revenues. If this could be done most effectively by assisting a king's debtor in collecting his own debts, the court would act only in keeping with its original charter in granting this assistance. Naturally, such action would involve the hearing of a plea between subject and subject. But it comes near to the problem of squaring the circle if a court on one hand is especially created to secure the promptest collection of the king's debts and on the other is deprived of any power to further the solvency of the king's debtors. It is just as understandable for the barons of the Exchequer to insist on their implied power to serve their royal master by all available means, however indirect, as it is for the debtors of a common person to insist that their creditor is not the king himself, but merely one who happens to be indebted to him and who, therefore, ought to be referred to the Court of Common Pleas. Where jurisdictional powers thus overlap already by their very definition, the proposition that the writ of *quo minus* was and always has been a fictitious contrivance calls for particularly strong and unequivocal evidence. It is not sufficient to show that a private creditor was allowed to invoke the Court of Exchequer against his debtor, if, when doing so, he was actually indebted to the king. To that extent the exercise of jurisdiction by the Exchequer

Hence this case offers no support for the proposition that there was a fictional *quo minus* in use by the middle of the 14th century. Cf. also BALDWIN, *KING'S COUNCIL* (1918) 218 *et seq.*; and LEADAM AND BALDWIN, *SELECT CASES BEFORE THE KING'S COUNCIL 1243-1482* (1918) liii, liv. The cases on pp. 13, 16, 17 are claimed unjustly to point to "pretexts," "fictions" or similar devices.

6. JENKS, *SHORT HISTORY OF ENGLISH LAW* (4th ed. 1928) 171, 354.

7. See note 5, *supra*.

Court is incidental to its very reason for existence. Nor is a showing conclusive that private persons sometimes attempted to qualify for a privileged status by becoming a "servant" to an Exchequer official.⁸ Even if this were merely a subterfuge, without proved connivance of the court, such a practice would, on the contrary, tend to indicate that the Exchequer of Pleas was entirely averse to legal fictions. Hence what we really want to see is whether a private creditor, actually not indebted to the king, could sue his debtor in the Court of Exchequer by merely alleging, suggesting or pretending to be a debtor to the king. We are satisfied that such a stage was reached by the middle of the 18th century (Blackstone). But we are not satisfied that even then the *quo minus* formula was a permitted untruth in every case and form of its ramified application. Much less are we satisfied that it had been so from the days of its origin.

The most careful and recent investigations into the origin of *quo minus* have been made by Gross⁹ and Jenkinson.¹⁰ The two cases in which Gross attempts "to find statements pointing to the existence of the well-known doctrine or fiction on which the modern writ *quo minus* was based" are, it appears, devoid of any inkling of *quo minus*. Further, these cases reflect a categorical refusal to take cognizance, precisely because the plaintiff was unable to prove his privilege. In one case¹¹ the defendant pleaded, in the other¹² the plaintiff admitted upon the court's explicit inquest, that there was no indebtedness to the king. The result in both cases was a dismissal of the suit.

Jenkinson admits that his endeavors to find the origin of *quo minus* were fruitless: "We have searched in vain both the Plea Rolls and the Files of Writs of our period for the famous writ *Quo minus*; to which . . . later authorities assign so much importance . . . We are reasonably convinced, therefore, that it is the product of a later age." Jenkinson sees what might be called the origin of *quo minus* in the suits a plaintiff could bring jointly with the king ("una cum"), or in part payment ("in partem solutionis") of his debt to the king, cases in which obviously the king had somehow to be actually interested in the matter. "Possibly the introduction of the vaguer *quo minus* wording, when the date of that can be established, will be found to mark the stage at which fictional use became common."

8. BALDWIN, *op. cit. supra* note 5; JENKINSON, *SELECT CASES IN THE EXCHEQUER OF PLEAS* (1931) xcix denies a general use of the device as a fiction. See also GROSS, *op. cit. infra* note 9, case no. 6: the suit of a would-be servant is dismissed because it was found that plaintiff "non est de gremio scaccarii."

9. GROSS, *The Jurisdiction of the Court of Exchequer under Edward I* (1909) 25 L. Q. REV. 138 *et seq.*

10. JENKINSON, *op. cit. supra* note 8, at c *et seq.*

11. No. 2, 11 Edw. I., GROSS, *op. cit. supra* note 9, at 139.

12. No. 5, 12 Edw. I., GROSS, *op. cit. supra* note 9, at 139.

The conclusion candidly drawn by Jenkinson and based on a systematic search of the records contrasts favorably with the vague and vain attempts to label the writ as the creature of an early period by methods of purely intuitive estimation. It seems, however, that the records of the 13th century so far as they have since been made available in printed form yield enough evidence to furnish a more tangible clue to the early years of *quo minus*. Once its sources have been brought to light, there remains only the task of tracing it down through the centuries, as briefly and summarily as space may permit, and in conclusion to reduce the fictional theory to the dimensions warranted by historical facts.

II.

In endeavoring to trace the writ of *quo minus* to its initial stage, we cannot be content to find some mode of procedure that, as an institution, will come as close as possible to the effect and the functions of *quo minus*. We, therefore, cannot stop short at proceedings such as "una cum" or "in partem solutionis." Our interest is concentrated on the most conspicuous features of the writ: the words of *quo minus* from which it derives its name, and the underlying idea of extending a royal privilege to a common person lest the royal revenues be adversely affected. It is noteworthy that neither the wording nor the purpose of the writ are in any way inherently restricted to judicial proceedings: any officer entrusted with the collection of debts to the king is a conceivable addressee of an order sounding in *quo minus*. Thus we must be prepared to extend the search beyond the boundaries of strictly judicial action into the general administrative machinery of the Exchequer.

Madox, the inexhaustible source of information on the early Exchequer, would not seem at first blush to encourage a digression from procedural into administrative law.¹³ He neither raises the question of the origin of *quo minus*, nor does his material permit of any conclusion as to the answer. However, his work contains a precious, though rather cryptic hint. Madox, while dealing with the prerogative of the king to collect debts owed to the king's debtors, quotes a great number of examples taken from the reigns of Richard I and Henry III. These writs are mainly addressed to the sheriff, directing him to distrain on the debtors of the king's debtors. Sometimes they are addressed to the barons of the Exchequer requesting their assistance. They do not often contain anything beyond the strict order. Occasionally, however, the writ becomes a trifle more eloquent:

"Summers. & Dors. Mandatum est eidem, quod dstringat debitores Herberti filii Mathaei, ad reddendum arreragia quae ei debentur, de tempore quo idem Herbertus filius Mathaei fuit Vicecomes in ipsis

13. 2 MADOX, HISTORY AND ANTIQUITIES OF THE EXCHEQUER (1711) 189 *et seq.*

Comitatibus, *ne pro defectu etc.* T. P. Grimb (aud) xxv die Novembris Ex Memor. 25.H.3. Rot.3.a."¹⁴ (Italics supplied).

This "ne pro defectu" appendix is interesting, because a sentence introduced by such phraseology promises just that kind of motivating reasoning which characterizes the *quo minus* formula. The mysterious "etc." which appears in this phrase, if of any significance at all, may probably be taken to conceal a thought that had already found stereotype expression, held no longer worth while reiterating. A glance at the Close Rolls covering the first third of the 13th century readily shows why the verbatim quotation of the "ne pro defectu" clause could be abandoned. It was quite customary for the royal writs of that time to use rather drastic language in order to impress the addressee with the importance of swift compliance: ". . . ne pro defectu sui ad eum rex se graviter capere debeat" is a favorite formula.¹⁵ Sometimes the tone is slightly milder: ". . . sciturus quod, si hoc facere distulerit, offensam regis gravem incurret, quam rex non poterit dissimulare",¹⁶ or ". . . ita quod pro defectu solutionis non oporteat nos ulterius inde scribendo laborare".¹⁷ Hence, facing in Madox a "ne pro defectu" clause in connection with a situation that we are accustomed to associate with the writ of *quo minus*, one is entitled to presume that the phrase behind Madox's enigmatic "etc.", once this word is deciphered, promises an interesting contribution to the history of the writ.

Indeed, a collection of records some ten years older than the one quoted by Madox seems to unveil the secret: the Memoranda Roll of the King's Remembrancer for Michaelmas 1230--Trinity 1231.¹⁸ It contains at least three writs ending with the "ne pro defectu" clause and shows it in its full and most instructive length, as applied in favor of debtors to the king:

1. "Notingham. Rex vicecomiti. Precipimus tibi quod sis in auxilium Petro de Goudington' ad distringendum milites suos in comitatu tuo ad reddendum ei scutagium suum de scutagio nostro de Kery de feodis que de ipso tene(n)t et ipse de nobis in capite in ballia tua. *ne pro defectu tui remaneat quin Petrus nobis inde sufficienter respondere.* Teste ut supra."¹⁹ (Italics supplied).

14. *Id.* at note (e). The writ is an order to distrain the debtors of Herbert, the son of Matthew, for certain arrearages, "lest through a fault, etc." Cf. also *id.* at notes (w) and (z).

15. Cf. C. R. 14 H. III, m. 4d (1229/30); C. R. 15 H. III, m. 7, 2d, 8d, 9d, 17d (1230/31); C. R. 17 H. III, m. 6d (1232/3); C. R. 18 H. III, m. 32 (1233/4).

16. C. R. 15 H. III, m. 8 (1230/1).

17. *Id.* at m. 7d.

18. 11 PUBLICATIONS OF THE PIPE ROLL SOCIETY (N.S., Robinson ed. 1933).

19. *Id.* at 57. The sheriff is ordered to assist a tenant *in capite* in distraining his subtenants, "lest through your fault Peter be unable to satisfy (lit.: sufficiently to answer) us."

2. The second writ of this kind is addressed to the sheriff of Middlesex, directing him to assist the king's debtor Hugo de Hodeng' in collecting the scutage owed him by his tenants: "*ne pro defectu tui remaneat quin idem Hugo nobis possit de debitis que nobis debet sufficienter respondere.*"²⁰ (Italics supplied). Lest through a fault of yours my debtor should be unable to give me entire satisfaction! It is nothing short of the *quo minus* idea in a slightly modified form. All that may remain to be desired is the use of the very term "quo minus" in the place of at least one of its equivalents: "quin" or "ne".

3. We need not search very far to discover this last link in the chain. It is supplied by the wording of the third writ of the category:

"Suhant'. Mandatum est vicecomiti quod distringat omnes debitores Gileberti de Stapelberg (Stapelford?) ad reddendum ei areragia que ei debentur sicut rationabiliter monstrare poterit quod ei debeantur de tempore quo fuit vicecomes in comitatu Suhamton' pro venerabili patre R. modo Dunelmensi episcopo. *ne pro defectu tui remaneat quo minus (!) sufficienter nobis respondere possit* de debitis nostris que exiguntur ab eo in eodem comitatu per summotionem scaccarii nostri de eodem tempore. Teste W. xxxv^o die Octobris anno xiiij^o."²¹ (Italics supplied).

Again a "ne pro defectu" clause. This time, however, we learn that the word "etc." in Madox's reproduction stood not only for the idea of *quo minus* expressed in some cognate wording, but for the *quo minus* formula itself, and that in a shape to which the Blackstonian sample would be the closest simile. Thus the five hundred years separating the reign of George II from that of Henry III apparently have not brought about more than an insignificant change in the context. No matter how much the substance of the institution and its practical use may have been affected by so considerable a lapse of time, as a matter of form the change, if any, is so slight as to warrant the conclusion that what Blackstone quoted as the writ of *quo minus* has a family tree pointing with a reasonable degree of certainty straight to the year 1230. The frequency with which the writ appears in its then obtaining form makes it even probable that it originated at some earlier date, and that by 1230 it had already reached a secured degree of currency.²²

20. *Id.* at 78.

21. *Id.* at 76, another order of the same kind, but with the important variation: ". . . lest through your fault he be *the less able* sufficiently to answer us for our debts . . ." For a writ of similar content and of the same time, see PRICE, TREATISE ON THE LAW OF THE EXCHEQUER (1830) 527, n. 1.

22. In fact, its most characteristic elements are quite common in the administrative language of the early 13th century. For "ne pro defectu," see note 15, *supra*. "Ne remaneat" appears already in Rot. Lit. Cl. 6 Joh. m. 1; "sicut rationabiliter monstrare poterit" in Rot. Lit. Cl. 6 Joh. m. 19 and m. 26; 15 Henry III. m. 17.

But even if the year 1230 does not mark precisely the début of the writ, it seems reasonably safe to say that this type of command to the sheriff to assist a royal vassal in distraining his sub-vassals is the real origin of the writ of *quo minus* as it is later used to initiate judicial proceedings. The most reliable authorities on the law of Exchequer procedure agree in characterizing and defining the writ of *quo minus* as a *distringas* "in aid of persons chargeable with duties or services to the king" (Price).²³ This is exactly what our samples represent: *distringas* in aid of the king's debtors.

It would be a tempting task at this juncture to enter into an examination of the formal problems connected with the records. The entries appear on the Roll of the King's Remembrancer. Are we to infer that this official actually issued the writ, or did he merely record a writ issued by another official, be he a member of the Exchequer or possibly the chancellor? Available material is too scant to admit of more than mere speculation. Antedating the Cowick ordinance of 1323 (defining the powers and authorities of the remembrancers) by nearly a century,²⁴ these records are the product of an epoch in which the Exchequer had become neither completely emancipated from control by the Chancery,²⁵ nor had yet achieved a clear division of functions within its own organization. We know that by 1230 there were writs issuing from and sealed with the seal of the Exchequer,²⁶ that even the *Dialogus* already speaks of certain "brevia regis de exitu thesauri".²⁷ Yet we also know that often the same category of writs (*e.g.*, "liberate") would issue from Chancery or from Exchequer,²⁸ and in vain do we look to the *teste* of the documents for a helpful indication in any one direction. The issue—original, judicial or administrative writs—is further confused by the circumstance, to which Maitland²⁹ calls attention, that "a group of what we may call *fiscal or administrative writs* have obtained admission among the writs by which litigation is begun."³⁰ (Italics supplied).

23. GILBERT, AN HISTORICAL VIEW OF THE COURT OF EXCHEQUER (1738) 18, 41; PRICE, *op. cit. supra* note 21, 526 *et seq.*

24. Cf. TOUT, THE PLACE OF THE REIGN OF EDWARD II IN ENGLISH HISTORY (1936) 176. For the text of the ordinance, see 3 THE RED BOOK OF THE EXCHEQUER (Hall's ed. 1896) 848 *et seq.*

25. POOLE, THE EXCHEQUER IN THE TWELFTH CENTURY (1912) 189.

26. Pat. R. 14 Henry III, m. 3 (1229/30) calls them "brevia . . . nostra de Scaccario que prius consueverunt sigillari prefato sigillo nostro de Scaccario."

27. 1 DIALOGUS DE SCACCARIO vi.

28. MADOX, HISTORY AND ANTIQUITIES OF THE EXCHEQUER OF THE KINGS OF ENGLAND (1769) c. X, § 13; DIALOGUS (Hughes, Crump and Johnson ed. 1902) 82 l. 18, n.

29. Maitland, *History of the Register of Original Writs*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 549 *et seq.*, 559, 560, 563, 572.

30. According to Maitland, *op. cit. supra* note 29, at 559, the Chancery in the early 13th century was accustomed to perform much of its purely administrative and fiscal work in quasi-judicial forms. These variegated writs found a place in the *Registrum Brevium*

Hence the formal and more technical aspect must remain an open question. It suffices for present purposes to have satisfactory evidence that already the year 1230 witnessed an "extra-judicial," "fiscal or administrative" writ which in its wording and its function may be considered as the direct precursor of what was later termed the judicial writ of *quo minus*. In two respects the features of the early *quo minus* are remarkable: first, "quo minus," expressing as it does nothing but a motive for an order, not the order itself, carries with it the potentiality of a transplantation into any other domain where its peculiar reasoning may appear to be equally valid. It is adaptable to judicial as well as original writs, to actions no less than to orders of execution, to extents no less than to common pleas. Second, there is as yet nothing fictitious about it: in all of the three cases of 1230-1231 there was a debt actually due to the king, justifying this summary and prerogative procedure. There is a strong and clear showing that the proceeding enured to the actual benefit of the king, and there is no warrant to question that the king's debtors were in acute difficulties to pay off their debts unless they were helped by a powerful arm to collect their own claims. The writ of *quo minus* in its initial phase thus expresses the *quo minus* idea in all its true and natural meaning.³¹

III.

The proceeding by which the king collected his debts³² was always a highly privileged one, and the 12th century, marked by the development of an increasingly powerful machinery of financial administration, left in this respect a heritage of lasting value. Even Magna Carta, while attempting to restrict the royal power to impose feudal exactions, did

Originalium, although only a small part of them really deserved this name. In the Irish Register of November 10, 1227, Maitland found under no. 44 "a writ forbidding the sheriff to distrain R.... to render ten marks to N., for which he is neither principal debtor, nor pledge; but 'this writ does not run in privileged cities, or where the debtor is the King's debtor.'" From a register of a somewhat later time (the middle part of the reign of Henry III) Maitland mentions (under no. 78) a writ to the "Sheriff to aid in distraining villains to do their services." Hence the *Distringas* in aid of our period does not seem at least to issue exclusively from the Exchequer. On the function of the sheriff to assist tenants in distraining their rear-vassals, see MORRIS, *THE MEDIEVAL ENGLISH SHERIFF* (1927) 260.

31. 3 *THE RED BOOK OF THE EXCHEQUER* (Hall's ed. 1896) 830, contains a writ of 3 Edw. I. (1275) granted to the executors of a king's debtor to stay proceedings against them by other creditors, in view of the royal prerogative to be satisfied first: the deceased's goods "nullatenus distrahi debeant *quominus* integre debita nostra possumus habere." The writ is interesting because here the king's debtor appears not as a creditor, but as a debtor to others, and this again is considered as a suitable occasion for the display of royal prerogative under the heading "*quominus*."

32. Cf. Goebel, *Constitutional History and Constitutional Law* (1938) 38 COL. L. REV. 555 *et seq.*, 575, n. 55.

but little (*cf.* cc. 9 and 26) to hedge the act of distraint with a minimum of legal safeguards. In substance it remained after 1215 the same prerogative to practically unfettered self-help that it was prior to 1215.

It was but natural that debtors to the king, when either passing on their own burdens to their vassals or imposing on them new and independent charges, were anxious to secure for their own benefit the aid of this royal prerogative by applying to the king for the sheriff's assistance in distraining their debtors. The king had a two-fold interest to accede to such requests: the fee paid for the grant of the license and the desire to protect his own resources in preserving the solvency of his debtors.

The writ issued on such occasion is, as we saw, the origin of the *quo minus* formula. From there it is only a small and entirely logical step to the point where the king's debtors seek to obtain a similar enjoyment of quasi-delegated royal privilege during the stage of judicial proceedings instituted to secure a judgment against their own debtors. The Court of Exchequer did not hesitate to follow the administrative tradition of assisting the king's debtors in collecting their debts. In doing so it adopted the underlying principle and reasoning of this tradition. Moreover, the continuance of a time-honored practice was emphasized by a perpetuation of that very form, the use in court of the *quo minus* wording itself.

The exact period when the *quo minus* language of extra-judicial acts begins to gain a foothold in court proceedings is as yet unascertained.³³ But judging by later text writers, the 14th century would seem to be responsible for the definite introduction of *quo minus* into the judicial proceedings of the Exchequer. Aside from a recurrent quotation of a case decided in 10 Edward III (1336)³⁴ to the effect that a defendant in a *quo minus* suit would not be allowed to wage his law, we are referred to at least three cases as being early samples of *quo minus* proceedings.³⁵ Yet one should not overlook the fact that these references under the

33. The formula "in partem solutionis" to which Jenkinson calls attention as a possible predecessor to *quo minus* proceedings appears likewise in extra-judicial writs, probably considerably earlier than it does in court. See C. R. 17 H. III, m. 17 (1232/3): "mandatum est P. de Rivall' quod c. et l. li . . . liberet Petro Joiberti . . . in parte solutionis annui feodi sui"; and THE GREAT ROLL OF THE PIPE FOR THE 26TH YEAR OF HENRY III 1241-1242 (Cannon's ed. 1918) 13: "Idem vicecomes . . . de catallis que fuerunt Herui de Stafford' que debent allocari in parte solutionis debitorum ipsius Herui sicut continetur . . ."

34. BROOKE, LA GRAUNDE ABRIDGEMENT (1586) "Quo minus," no. 5, referring to FITZHERBERT, LA GRAUNDE ABRIDGEMENT (1565) "Ley," no. 66.

35. FITZHERBERT, *op. cit. supra* note 34, "Ley," no. 52; 38 Lib. Ass. 20 (1364/5) and BROOKE, *op. cit. supra* note 34, "Quo minus," no. 6; Y. B. Mich. 44 Edw. III, p. 43, pl. 54 (1369), considered as a case of *quo minus* by BROOKE, at "Quo minus," no. 1; BROWN, COMPENDIUM OF THE SEVERAL BRANCHES OF PRACTICE IN THE COURT OF EXCHEQUER (1688) 12; 18 VINER, ABRIDGMENT 152 (2d ed. 1791-5).

heading "quo minus" belong to writers of a period when *quo minus* already was current. Their purpose is practical usefulness rather than historical exactness. For this reason a careful distinction must be drawn between the language of the reports and that of the textbooks. The fact situations in all three cases are certainly suggestive of a classification *sub titulo* "quo minus," but they are no less compatible with the older form of "una cum" or "in partem solutionis," actions lacking the *quo minus* element. In fact, the case referred to by FitzHerbert as decided in 20 Edward III (1346) is the same as the one quoted by Holdsworth in a similar connection — *Barton v. Pouche*.³⁶ As explained above, it is an outright action *in partem solutionis* for a debt ultimately due to the king (queen) and with no vestige of a *quo minus* wording. The case of Y.B. 44 Edward III (1370) reported at length, cannot be vindicated for the *quo minus* class either. The plaintiff "pria briefe pur le Roy, et lui mesme" (asked for a writ for the king and himself), which seems to indicate an "una cum" action.³⁷ No turn of words in the report evokes the characteristic consideration: that without a remedy in Exchequer plaintiff would be the less able to satisfy the king. Hence both the case of 20 Edward III and of 44 Edward III apparently owe their later classification as *quo minus* actions to a misleading anachronism rather than to historical interpretation.

The transition from the frequent type of "una cum" and "in partem solutionis" actions to the regular *quo minus* species is probably best and most reliably represented by a case decided in 38 Edward III (1364).³⁸ In following Brooke's explanation, confirmed as it is by the report (though the latter is somewhat distorted by clerical errors), we would not hesitate to classify it under the heading "quo minus": "Prior farmor le roy fuit appele in leschequer de rñd al roy de s̄ det, il dit q J.S. fuit indetted a luy sine q il ne poct satisfyer al roy, & pria pces vs luy, et habuit, & il fuit agard' de rñd, qd. nota."³⁹ (Italics supplied). Here a debtor to the king seeks to draw his own debtor into court clearly and solely on the ground that otherwise he would not be able to satisfy the

36. See note 5, *supra*.

37. Y. B. Mich. 44 Edw. III, p. 43, pl. 54 (1370).

38. 38 Lib. Ass. 20 (1364/5). 2 MANON, *op. cit. supra* note 28, at 79, n. y, quotes an interesting trespass case argued in the Exchequer. It dates from 45 H. III (1254/5) and is thus exactly one hundred years older than 38 Lib. Ass. 20. The defendants were alleged to have prevented a sheriff and his aids from distraining: ". . . *quo minus* potuerunt facere districtionem pro debitis Domini Regis." Unfortunately the quotation is not very clear as to the person of the plaintiff: the King himself or one of his debtors. At any rate the case constitutes an important connecting link between the extra-judicial and the judicial *quo minus* and one of the earliest available.

39. A prior, farmer to the king, was called to the Exchequer to answer the king for his debt; he said that J. S. was indebted to him *without which he was unable to satisfy the king*, and he asked for process against him, which was granted and it was held that he answer, which note.

king. The case is remarkable for its genuine expression of the *quo minus* reasoning and for its hybrid character combining *quo minus* with *una cum* in making the defendant answerable to both the king and the plaintiff. But there is a third reason why it might justly be called a leading case in this field. It is one of the early authoritative judicial utterances on the recurrent question of Exchequer jurisdiction as a matter of principle. Under the so-called Statute of Rutland, "no Plea shall be holden or pleaded in the Exchequer aforesaid, unless it do specially concern us and our Ministers aforesaid."⁴⁰ Yet when does a plea cease to "concern us?" The question was not answered by this or subsequent statutes, and so the court could lay down an extremely broad rule of jurisdiction: "Car de tout ceo q touche Le Roy, et puit torner en avātage de luy, de haster sa besoign, no' prendrom' conisance."⁴¹

In asserting so extensive a jurisdiction, the court is in full accord with what Britton defined as the task of the Exchequer: ". . . to hear and determine all causes relating to our (the king's) debts and seignories and things incident thereto, without which such matters could not be tried; and that they have cognizance of debts owing to our debtors by means whereof we may the more speedily recover our own."⁴² The high authority which Britton enjoyed throughout the middle ages contributed to counterbalance the legislative attempts to tie the court down to strictly fiscal matters and enjoin it from holding "common pleas." Such also was the effect of the king's own practice to allow private individuals, as a matter of personal favor, to sue their debtors in the Exchequer.⁴³ These factors may have facilitated the occasional misuse of Exchequer jurisdiction, and by questioning altogether the authority of the "Statute of Rutland" it could retrospectively indeed appear to Chief Baron Saunders⁴⁴ that the Court of Exchequer had always been, as of right, a court for all common pleas.⁴⁵ The records, however, yield no indication beyond

40. Statute of Rutland, 10 Edw. I, § 11 (1281/2).

41. "Because we will take cognizance of anything affecting the king and of what may be to his advantage and further his purposes." Translation.

42. Britton I 5, (Nichols and Baldwin ed. 1901) 265, to which passage PRICE, *op. cit. supra* note 21, at 8, n. 3 refers as the obvious "foundation of the civil jurisdiction of the Exchequer of Pleas."

43. 2 MADOX, *op. cit. supra* note 28, at 76.

44. Dissenting in *Stradling v. Morgan*, 1 Plow. 208 (1560).

45. Naturally, abuses originated mostly from the creditor's side. As a matter of curiosity, however, it may be noted that debtors seemed to develop a similar predilection for the Exchequer and thereby tended to contribute to the growth of abusive practice: a statute of 1 Rich. II, c. 12 (1377/8) had to ordain "that if any at the Suit of the Party judged to another Prison for Debt, Trespass or other Quarrel, will confess himself voluntarily and by a feigned Cause (1), Debtor to the King, and by that Means to be judged to the said Prison of the Fleet, there to have greater Sweet of Prison (1) than elsewhere, and so to delay the Party of his Recovery, the same Recognisance shall be there received, and if he be not Debtor to the King of Record, his Body shall incontinently be remanded to the Prison where he was before. . . ."

the fact that Exchequer jurisdiction was asserted if and only if the king's interest seemed to be somehow involved in the case.

The report in 38 Lib. Ass. 20 does not disclose the text of the writ granted in order to bring the defendant into court. It may or may not have used *quo minus* language. The records of the 15th century fill this gap. They show that *quo minus* has as yet no stereotype wording. It flexibly adapts itself to the particular situation and appears then in at least three different contexts:

1. *Quo minus debitum regis solvere poterit*, in the case of a monk suing, without his abbot, as debtor to the king;⁴⁶

2. *Quo minus rex feodi firmam habere non poterit*, to enable the grantee of a royal franchise to redress an infringement;⁴⁷

3. *Quo minus debita recusat solvere*, to enable a plaintiff, contrary to the rules of common law, to sue the executor of his deceased debtor on a simple contract, provided the plaintiff is indebted to the king.⁴⁸

Looking to the procedural peculiarities of the *quo minus* writ, the rule established in the 14th century, that the defendant was not admitted to wage his law, seems to have been questioned in a case of 4 Edward IV.⁴⁹ However, the weight of authority continues to be against waver of law

46. Y. B. Hil. 8 H. V, p. 6, pl. 23 (1421). Some twenty actions of the same kind are reported by the clerk of the pipe to have been pending at the time. The same year stands on record for another interesting *quo minus* decision: an executor suing in *quo minus* and alleging that *he* is the less able to satisfy the king must make the allegation explicitly qua executor, since he could not use (as is presumed) the money recovered as executor in order to satisfy the king for a debt he owes in his individual capacity. Y. B. Mich. 8 H. V, p. 10, pl. 19 (1420) and FRZHERBERT, *op. cit. supra* note 34, "Briefe," no. 891, reappearing literally in Savile, no. 88, at 39 (1581/2). This formalistic rule continued to be observed in the 17th century. See *Swan v. Porter*, Hardres 60 (1656) and the advice given by BROWN, *THE ENTRING CLERK'S VADE MECUM* (1678) 216. An administratrix has to declare: the intestate . . . "qui obiit intestatus Debitor Domini Regis . . . Quominus etc. pro debito dicti intestati . . ." The holding of Y. B. Mich. 8 H. V, p. 10, pl. 19 (1420) may evince an acute sense for technical pleading, but it certainly likewise illustrates a tendency on the part of the court closely to scrutinize private litigations submitted to its jurisdiction.

47. Y. B. Hil. 32 H. VI, p. 24, pl. 7 (1454). The report expressly adds: "et cest brief issist hors del exchequer" and thereby removes any doubt that the writ of *quo minus* then was issued as a judicial writ by the Court of Exchequer, not as an original writ issuing from Chancery and returnable in the Exchequer, the reason being, as pointed out by PRICE, *op. cit. supra* note 18, at 14, that the "Exchequer of Pleas was never recognized as an open King's Court for the holding of common pleas."

48. Y. B. Trin. 11 H. VII, f. 26, pl. 9 (1496). This privilege was later controverted in Y. B. Trin. 27 H. VIII, p. 23, pl. 20 (1535), but reaffirmed in *Information against Bates*, Lanes 22 (1606). It depended upon the plaintiff suing as king's debtor (supposant q jeo *sue* in det al roy") or, according to the probably correct version in Fleetwood's edition of the reports (London 1679), upon his *being* a debtor to the king ("supposant q jeo *suis* in det au Roy").

49. Quoted in Y. B. Hil. 32 H. VI, p. 24, pl. 7 (1454).

in *quo minus* proceedings.⁵⁰ In view of the reason originally alleged for this rule, the predominant interest of the king, it may not be amiss to interpret this as a further circumstance tending to show that the use of *quo minus* was then reserved to cases of genuine indebtedness to the king.

This impression is corroborated by what information the records yield on the fate of *quo minus* in the course of the 16th century, or more precisely, in the era of Queen Elizabeth, since the reign of her father was rather unenlightening on this point. The Elizabethan period shows the writ in a state of widespread use and reflects with more clarity than any preceding century the attitude of the courts as to the scope of this remedy. The Exchequer case of *Stradling v. Morgan*, decided in 1559, is the first and (with one later exception) probably the most elaborate judicial review and clarification of the law of *quo minus*:

"The Exchequer is not a Court for Common Pleas, but it is a Court for the King's business only, that is, touching the revenues, debts, and duties of the King. But no plea between common persons shall be held there, unless for a person privileged there, as officers that attend upon the Court, the absence of whom (as they would be absent if they were impleaded elsewhere) would be prejudicial to the business of the King in the said Court, and therefore for the King's benefit and to dispatch his business in the same Court the officers and ministers of the Court shall sue there . . . And so shall one that is indebted to the King *by surmise of quo minus, etc.* . . . and the reason is, because the King shall have execution of the thing and damages recovered in the *quo minus*, towards satisfaction of the debt which the plaintiff owes the King: so that the plaintiff in the *quo minus* partakes of the King's prerogative, and the King shall have benefit by the suit . . . And in all these . . . cases the plaintiff, in order to give jurisdiction to the Court, ought to make his surmise, and (!) shew the cause, viz. that he is privileged, or indebted to the King . . . But in the principal case the plaintiff has brought his action, and has not made any surmise to entitle the Court to jurisdiction. And without surmise the jurisdiction shall not be taken away from other Courts and given to this Court . . . for the penalty here and the action for it is only given by the Act to the party, and nothing is given to the Queen, for which reason the Court without surmise or (!) cause shewn has no more cause to hold plea upon it than it has upon an action of debt brought upon an obligation . . ." ⁵¹ (Italics supplied).

50. See FITZHERBERT, *op. cit. supra* note 34, "Ley," no. 66. For a later period, see Slade's Case, 4 Co. 95b (1602), and Le Grand Case in Le Court Gards, 2 Roll. 294 (1622); BROWN, *op. cit. supra* note 35, at 11-12.

51. 1 PLOW. 208 (1560), dealing also with the disputed authority of the so-called Statute of Rutland.

The opinion certainly does not clear up the entire complex of jurisdictional problems incident to the writ of *quo minus*. It is ambiguous inasmuch as it requires, at one time, both a surmise *and* a showing of cause with regard to privilege, and at another time allows either one. It further fails to separate the two issues evoked by the *quo minus* formula: the "surmise" to be a debtor to the king from the surmise of "quo minus", *i.e.*, the suggestion by a plaintiff who actually is a debtor to the king to be the less able to satisfy him. At any rate, it adds to the sporadic utterances scattered in the reports of two precedent centuries the all-important and eloquently emphasized rejection, on principle, of a general common pleas jurisdiction of the Exchequer.

Whatever suspicion remains as to the willingness of the court to ask for nothing more than a purely formal surmise of *quo minus* or a surmise to be the king's debtor is removed by the inferences to be drawn from *Savile's Reports* on Exchequer cases of 22, 24 and 25 Elizabeth (1579-1582). In these three years no less than six cases appear in the books, in which the privilege of suing as a Crown debtor has been flatly denied. True, it does not appear in how many cases of the same years the obviously increasingly popular writ was allowed. But the reasons for denial of the privilege of suing as a Crown debtor indicate a sense of critique that is scarcely compatible with a desire on the part of the court to meddle with the jurisdiction of other courts. In *Ragland v. Wildgoose* plaintiff sued as debtor to the king.⁵² He substantiated his claim of being a Crown debtor by adding that he owed the king the sum of £300. The defendant, anxious to escape the jurisdiction of the court, paid the £300 into court and asked to be dismissed. The problem was a delicate one. The court might have felt inclined to keep a jurisdiction that was unchallenged and unquestionable when the action was instituted. It did this, in fact, in a later case.⁵³ In the *Ragland* case, however, it followed the defendant's argument: the privilege being grounded on a debt to the king vanishes with the debt; "quia cessante causa cessat effectus." In the case of *Lowe*,⁵⁴ a clerk to the King's Remembrancer, plaintiff brought an action jointly with his wife, an executrix under the will of one Jenings, for a debt due by the defendant to the testator. Privilege was denied—the privilege of a clerk was likewise asserted by *quo minus*—because the debt accrued to the plaintiff's wife as executrix only. In *Brinklow v. Perne* the plaintiff alleged to be a debtor to one Gray, erstwhile searcher of London.⁵⁵ It was held that Gray indeed had the assistance of the court since he was indebted to the Queen; but as he had died, his privilege ceased, whereby the plaintiff likewise lost

52. Savile, No. 27, at 11 (1579).

53. Savile, No. 77, at 33 (1581/2).

54. Savile, No. 49, at 20 (1581).

55. Savile, No. 107, at 51 (1582).

his privilege as a Crown debtor. Sometimes a party attempted to found a privilege on the ground of a suit pending in the Exchequer Chamber. Chief Baron Manwood, who did not mince words⁵⁶ to assert the jurisdictional powers of his court, was just as vigorous in his refusal to take cognizance of framed privilege actions: "Ne fuit unqs view que un suit la comenced per English Bill donera cause de priviledge in cest Court. Per cest means chescun party que est sue in London poet exhibit un English Bill sur un feyned cause, avera priviledge."⁵⁷ His words are a valuable contribution to the validity of the fiction theory as applied to the 16th century.

We may conclude this series of cases with a case that is just as typical of the then prevailing tendency among creditors to sue in the Court of Exchequer, as it is of the still impeccable correctness in the court's attitude. An information was brought against a usurer. He pleaded "not guilty," but in an attempt to make the most of his predicament he sued one of his debtors in the Exchequer claiming the privilege of being a Crown debtor, since the Crown proceeded against him for a fine. Again it was Chief Baron Manwood who made it clear to the plaintiff that the court would not allow the privilege to be diluted by technical niceties.⁵⁸ He found one clear way for plaintiff to obtain privilege: to plead "guilty" in the information proceeding. Otherwise, he added, the court would feel that the plaintiff would rather lose his privilege than lose his money!⁵⁹

A new variation of *quo minus* prevails throughout the reign of Queen Elizabeth: *quo minus nobis* (or: *dominae Reginae*) *satisfacere valeat* (whereby he is less able to satisfy us). This is the form both of the writ⁶⁰ and the bill⁶¹ of *quo minus*.

56. Manwood is reported [Savile, No. 101, at 47 (1582)] to have said: "Et il dit, il ne veia aucun reason pur que le Court d'Exchequer ne serf de cy grand authority come autres Courts sont, car il prist ceo destre plus auintient quant les autres Courts, que le Roy doet aver revenue devant il avera divers Courts, que sans revenue il ne poet aver officers; et pur ceo le Court que fuit pur le revenue est plus auintient, & quant le revenue increase les Courts increase."

57. Savile, No. 108, at 51 (1582). "It is unheard of that a suit instituted there by English Bill should give privilege in this Court. By such method any party sued in London may exhibit an English Bill on a feigned cause and would have privilege." Translation.

58. Savile, No. 112, at 53 (1582).

59. The increasing frequency of *quo minus* suits accounts for an increasing number of cases in which Chancery is requested to stay *quo minus* proceedings. See Jones v. Whitney (1578) in BROWN, CLERK'S TUTOR IN CHANCERY (3d ed. 1705) lxix, and WEST, SYMBOLEOGRAPHY (1611) pt. II, 276-285, for the excerpt of a similar case pending between 1592 and 1596.

60. Hunt's Case, 3 Dyer 328 (1573). Compare the situation discussed in note 31, *supra*. Hunt's Case is noteworthy because it rejects a King's debtor's claim to a privilege to be sued only in the Court of Exchequer. He was sued in Common Pleas. The Court of Exchequer later joined in denying this privilege.

61. Pelham's Case, 1 Co. 3b (1588). The report is the first to show the complete text of a bill of *quo minus*.

To sum up the observations from the records of the 16th century: the writ of *quo minus* has become a widely used instrument to sue in the Exchequer. The court, however, visibly withstands the temptation to compromise with creditors and expand its jurisdiction. Faithful to the doctrine laid down in *Stradling v. Morgan*, it will look for the benefit of the Crown.⁶² If it is discernible, it will not be allowed to suffer by too strict an interpretation of technical rules.⁶³ If it is absent, the party will be referred to another court.⁶⁴

With the 16th century furnishing strong evidence of a well controlled, genuine and undistorted use of *quo minus*, and with a "fictitious" *quo minus* in full swing during the 18th century, the 17th century remains to furnish some clue to the turning-point. In search of it we would, however, do well to recall the peculiarities of the *quo minus* writ as compared to the misused bill of Middlesex, the *Latitat* and other devices. The writ of *quo minus* as a writ *ad respondendum* had for a long time offered creditors a remedy more advantageous and more expeditious than those of other courts: there was no wager of law, no fine, or no discriminately high level of costs and its use was nationwide. In other words, it had many qualities to make it an instrument attractive to creditors, which explains why creditors tended to encourage the court to expand its jurisdiction. On the other hand, in certain respects debtors were treated better by the Exchequer than by other courts, in others, no worse. There was no outlawry in the Exchequer; wager of law was gradually obsolescing in general, and the *Latitat* had become an efficient means to remove territorial obstacles of jurisdiction. Hence, taking *quo minus* as a mere instrument to bring a defendant into court (as against a summary means of execution), a wider use of the writ would be likely to pass without public opposition, and even meet the wishes of a large part of the public.

Earnest opposition to an expansion of Exchequer jurisdiction was to be expected only from the Courts of Common Pleas and King's Bench. However, it so happened that these courts were then engaged in a vigorous struggle against each other, concentrating their efforts on marshalling legislative help to settle their own internal disputes. The atmosphere was thus most propitious, around the middle of the 17th century, for a smooth and untroubled intrusion into the jurisdictional area of the other superior courts. It was probably not so much a greed for power that induced the Exchequer to follow the signs of the time, but rather a very marked sense of its own dignity⁶⁵ as the "most ancient" court

62. Where the king's benefit is visible, the concurrent jurisdiction of the Exchequer is also recognized by other courts. Cf., e.g., *Caudrey's Case*, 5 Co. [Ecl. L.] 16a (1595).

63. 2 Dyer 174a (1559/60).

64. *Sparrie's Case* (1590), 2 NELSON, ABRIDGMENT, "Privilege," (1726) 1297, no. 2.

65. See note 56, *supra*. But see also Robinson, *Anticipations under the Commonwealth of Changes in the Law*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 467, 477, speaking of "covetousness rather than desire to amplify jurisdiction."

that would not allow its members to stand aloof while King's Bench, the same court whose supremacy the Court of Exchequer had refused to recognize as early as the middle of the 14th century,⁶⁶ was successfully striving to increase its prestige.

These conditions account for the absence of any "éclat" centering around the transformation of the Exchequer Court into a general court of common pleas. Further, the development was accelerated and facilitated by several other factors.

First, increasing refinement in the art of pleading tended towards production, at the earliest possible stage, of the crucial issue. This implied the elimination of any secondary or "collateral" matter. Coke's report of *Bellamy's Case* shows in a significant dictum that the basic *quo minus* allegations were considered as "collateral." "If the Kings Fermor bring a *Quo minus* in the Exchequer, he ought to alledge that he is the Kings Fermor to enable him to sue there; but he needeth not to shew it to the Court, for that it is *meer collateral to the Action*."⁶⁷ (Italics supplied). No authority is quoted for this view, but since it serves the purpose of an analogy drawn from the practice of courts other than Common Pleas, it cannot be a *novum*, it must be assumed to reflect a known rule of Exchequer pleading.⁶⁸ The treatment of an issue as "collateral" will of necessity gradually turn the collateral allegation into a mere "suggestion," "surmise," "supposition," current in so many other proceedings of the time.

Another procedural peculiarity must also have been instrumental in bringing about the change. It cannot be overemphasized that a plaintiff's allegation of being a debtor to the king was the assertion of a personal privilege. Now it seems to have been the general practice for courts to reserve the question of privilege to their own and uncontrolled determination. "The Privilege is not traversable and triable per Pais, but a matter of Law of which we take Notice."⁶⁹ This tendency of the courts to remain each their own master in matters of privilege⁷⁰ is obviously the

66. When jurisdiction of review from the Court of Exchequer was withheld from King's Bench and given to the council. See 31 Edw. III, c. 12 (1357) and WILKINSON, *STUDIES IN THE CONSTITUTIONAL HISTORY OF THE THIRTEENTH AND FOURTEENTH CENTURIES* (1937) 124 *et seq.*

67. *Bellamy's Case*, 6 Co. 38b (1605). Coke in no way hints at a fictitious use of *quo minus*: "He that is a Farmer, or indebted to the King, for the King's more speedy satisfaction of his debt or duty, shall sue his debtor by a *quo minus* in the Exchequer." 2 COKE, *INSTITUTES* (1642) 551.

68. As further illustrations, see *Sharpeigh v. Waller and Bromley, Co. Ent.* 42 (1609), and *Jones v. Hughes, id.* at 49 (1607).

69. *Kirkham v. Wheely*, 3 Salk. 281 (1695). *Cf.*, however, *The King and the Earl of Banbury, Skin.* 517 (1694), restricting nontraversability to privileges provable by record.

70. As said by Chief Baron Eyre in *Cawthorne v. Campbell*, 1 Anst. 205 (1790): "In theory, every Court is properly the judge of its own privilege, and no other Court

theory on which the Exchequer proceeded to extend its common pleas jurisdiction. The general acceptance of the principle made it difficult if not impossible for other courts to interfere.

Lastly, it was a fortunate circumstance for the Court of Exchequer, once it was bent on increasing its power, that its jurisdiction was lawfully grounded on a personal privilege whose vagueness and elasticity permitted the inclusion of anybody owing the Crown any amount, however small, in taxes, duties or excises. And if the privilege could not be denied to an intentionally or inadvertently tardy taxpayer, was it not repugnant to withhold it from the individual who had been conscientious enough to pay his dues punctually? It is not difficult to see the immense potentialities inherent in the very concept of "Crown debtor," particularly at a time when commerce was developing and former feudal aids, reliefs, scutages and tallages were being replaced by a general system of taxation. True, the Court of Exchequer probably welcomed so indefinite and comprehensive a privilege and was none too anxious to curtail it. It was more promising an implement of expansion and at the same time was clothed with a more attractive appearance of legality than the many furtive devices, such as "ac etiam" and the like, resorted to by the other courts. And yet, before accusing the court of outright "usurpation,"⁷¹ it is appropriate to remember that the Exchequer of Pleas, since Britton's time, was lawfully entitled to favor the "king's debtors." If this concept itself in the course of the centuries underwent an unforeseen process of amplification, fairness would require a due discounting of the magnitude of political and economic changes and an abstention from ascribing their consequences solely to human malignity. Such an attitude would seem to be better in tune with the acts and reactions of the contemporaries: there is nothing in the legislative records of the 17th century to support the view that in the public opinion of the time the Court of Exchequer was transcending the authority sanctioned by century-old tradition.⁷²

ought to interfere with it . . . There is no Court that suffers its process either to be insulted or to be materially interrupted."

71. As was done even by the Exchequer Chamber in *Attorney Gen'l v. Halling*, 15 M. & W. 687 (1846).

72. Towards the end of the reign of James I, a bill was under consideration "for Restraint of Assignments of Debts to the King; and for Reformation of Abuses in levying of Debts for Common Persons, in the Name and under the Prerogative of the King." 3 JOUR. HOUSE OF L. 398 (May 21, 1624). Yet as shown by notes of contemporary reporters [cf. *Common Debates 1621* (1935) 2 YALE HIST. PUB. 154], the abuse of royal prerogative by alleged debtors to the king referred to devices used in order to become debtor, not to *quo minus* as being at the disposal of everybody. Also the bill, which, incidentally must have fallen in oblivion, seems mainly to have been directed against ill-practice in the field of Extents. An attempt to include *quo minus* in the procedural reform of 1692 (4 & 5 W. and M., c. xviii) failed on account of opposition by the Commons (Hist. Mss. Comm. 14th Rep. App. Pt. 6 no. 693 and no. 701). Again the alleged abuses had no connection with the use of the term "Crown debtor" as a fiction but referred to

In reviewing the law of *quo minus* procedure, *Le Grand Case in the Court Gards* is rather picturesque in its emphasis on the fiscal origin. It continues to call it a "remedy de recover les debts le Roy, car ceo est le increase de son Treasury, et que est le Treasury est le strength de le Roy, et que est le strength del' Roy est vinculum pacis et nervus belli le overflowing fountain de son beneficence et benevolence . . ." ⁷³

But all that the reports have to offer by way of confirming this idea are empty technicalities of pleading. In *Barnehurst v. Cabbot* the defendant objected, though in vain, that "the plaintiff alleged himself to be a debtor to the protector without more, and does not say of England." ⁷⁴ One cannot help feeling that a defendant who has to resort to that kind of exception would be glad to challenge the plaintiff's capacity as a Crown debtor, if there were room for such a defence. Yet, as is said in *Wilkins v. Shalcroft*, ⁷⁵ it suffices for a plaintiff "to call himself debtor and accountant without more."

Where a plaintiff sued not as debtor and accountant but merely as the king's debtor ("quo minus per debitorem domini Regis"), the defendant's attorney, Holt, successfully asserted his client's Oxford University privilege, and he did so on the ground of an argument that makes us pause: "A quo minus is not a writ or bill of privilege, nor is it so called; as when privileged persons sue in the courts where they are privileged . . . if the plaintiff were an accountant and entered upon his account, that would alter the case . . . But a *quo minus* is now (!) but a common action here . . ." ⁷⁶ (Italics supplied). As a matter of legal theory the attorney's version may not have been quite correct, as Chief Baron Hale was quick to point out. But if an outstanding lawyer in 1670 could call the *quo minus* action brought as the king's debtor a common action (as against the action of a privileged person), adding that this involved a change as compared to some preceding period ("now"), and if an authority of Hale's rank adopts the argument in much of its substance, then it seems safe to say this: whatever evolution the writ of *quo minus* must have gone through, it had by 1670 ceased in practical effect to be a writ of privilege, so far as Crown debtors were concerned.

The latter restriction is noteworthy. Limits had to be set to the process of profaning what used to be a genuine privilege. The concept of privilege still remained vital to the jurisdiction of the Exchequer Court. It was much more so than at Common Pleas or King's Bench, where privilege jurisdiction was but an appendix to the normal scope of power. Hence

the exaction of unduly high bail. VERNON, CONSIDERATIONS FOR REGULATING THE EXCHEQUER (1642) is a careful enumeration of all the grievances caused by Exchequer procedure. *Quo minus* is not among them.

73. 2 Roll. 294 (1622).

74. Hardres 5 (1655).

75. Hardres 188 (1661).

76. *Castle v. Lichfield*, Hardres 505 (1669).

the obvious care with which the court deals with the problem of privilege at precisely the same time as the writ of *quo minus* through a cooperation of heterogeneous causes undergoes a far-reaching process of transformation. The Exchequer feels that unless it keeps the revenue jurisdiction well under control, it has to face the danger of losing it to other courts. It also feels that in order to gain and maintain power in the normal case of a common plea, it may be necessary or at least wise to yield some of it in the exceptional one, as was done by Hale in view of the Oxford University privilege. These considerations are more or less discernibly reflected in the court's attitude to the problem of extent, and so are they in its rulings on questions of privilege. It is not necessary to dwell upon all the details of the privilege complex. They are elaborated in *Alderman Langham v. Baker*,⁷⁷ *Baker v. Lenthall*,⁷⁸ *Carterett v. Massam*,⁷⁹ and *Clapham v. Lenthall*.⁸⁰ These cases have retained their authority for more than a century, as shown by *Cawthorne v. Campbell*.⁸¹ In substance they represent a careful "weighing" of privileges in other courts, as compared with Exchequer privileges, and an attempt to set up a kind of hierarchy among the latter, the lowest in rank being the so-called "general" privilege of the Crown debtor. It is a privilege to sue, not to be sued, and is defeasible by any special privilege of the defendant in another court. This sacrifice of the Crown debtor privilege whenever it is challenged by an adverse genuine privilege is the rather modest consideration the Exchequer imposes on itself in the tacit and advantageous compromise ending its struggle for the power of Common Pleas jurisdiction.

In the course of the 17th century the practice of Exchequer procedure has attracted the interest of textwriters more frequently than during the precedent centuries. But surprisingly enough, they are even less responsive to our query than the reports. Sheppard makes a distinction worth remembering: in order to institute a suit of *quo minus*, plaintiff must *be* a debtor to the king (Sheppard evades, however, the critical question of proof); if he is a debtor to the king he "may *surmise* that for the wrong which the defendant doth to him, he is less able to pay the King his Debt or Farm, and this shall give that Court Jurisdiction to hear and determine that Cause."⁸² (Italics supplied). Here the two basic allegations of the plaintiff are clearly separated.

The most detailed available work on the practical routine of Exchequer procedure is an unpublished, undated, anonymous manuscript on the

77. Hardres 116 (1658).

78. Hardres 117 (1658).

79. Hardres 316 (1662).

80. Hardres 365 (1664).

81. 1 Anst. 205 (1790).

82. SHEPPARD, GRAND ABRIDGMENT (1675) 126. Cf. also SHEPPARD, EPITOME (1656) 807.

"Rules and Orders made by the Barons for regulating of Proceedings in the Office of Pleas of the Court of Exchequer" and observations on "The Practice of the Office of Pleas". Its date may be approximately established between 1635 and 1640.⁸³ Yet in spite of all the eloquence it displays, all the valuable clerical data, the minute description of the practical side, including the costs, and all the historical explanations, the fundamental question on the fictional nature of the *quo minus* allegations is not answered or even mentioned. Occasionally the author uses the suspicious locution that a clerk may "make himself" a debtor. He also reproduces the wording of the writ showing that it has not considerably changed since the reign of Queen Elizabeth: *quo minus nobis satisfacere valeat* still being the nucleus. But the problem of proving the plaintiff's capacity as Crown debtor obviously does not occur to him.

This silence is likewise a characteristic feature of Brown's instructive book on Exchequer practice, published in 1688.⁸⁴ A defense questioning the plaintiff's quality as debtor to the king is discussed neither under demurrer, nor under pleas to the jurisdiction, nor under pleas in abatement, nor finally under pleas to the person of the plaintiff.⁸⁵ With the exception of a single and rather unenlightening sentence summarizing the old case of 11 H.7.26,⁸⁶ there is only one significant contribution to the problem, and this is in the preface to the book:

"That this Court was at first instituted onely for the Conveying the King's Treasure and Revenues into his Coffers, is not much to be doubted. However in process of time the Wisdom and Care of our Ancestors hath likewise been to add two other Branches to its Jurisdiction for the Benefit of the Subject, viz. that of Equity, in the nature of the Court of Chancery, and the Office of Pleas, for Actions at Common Law between Party and Party. In which Office moreover there is provided this conveniency . . . that the *Quo minus* goes every where throughout the Kingdom of England, and Dominion of Wales . . . , As being supposed (!) to be always brought by one who is *Debitor Domini Regis*." (Italics supplied).

83. The author mentions neither the Commonwealth, nor Charles II, nor James II, but only James and Charles. One of the forms he recommends for practical use is dated: "28^o die Novem̄ An^o regni Dñi Caroli nunc (!) Regis Angl. etc. 10.^o" On the other hand there is no reference to the important rules of 15 Charles I.

84. BROWN, COMPENDIUM OF THE SEVERAL BRANCHES OF PRACTICE IN THE COURT OF EXCHEQUER (1688).

85. Salkeld, at 2 Salk. 462, mentions a case [*Wilson v. Rookes*] where defendant delivered to the Barons a writ termed "dummodo non tangit nos," wherein it is stated that the Crown is not interested in the suit. The Court ignored it: "There is such a Writ in the Register, but there are several Writs there which no Usage or Precedent does warrant, of which this is one." The court suggested, however, that the defendant might have pleaded the matter to the jurisdiction.

86. "One who is indebted to the King by Surmise of a *Quo minus* may have the privilege of this Court" (p. 11).

Everything here hinges on the right interpretation of the term "supposed." It may be meant as a prerequisite, but it may with at least equal right be taken as a legal term: to accept without further proof.

Thus the documentary evidence of a metamorphosis of *quo minus* during the 17th century is rather tenuous and circumstantial. Judging by the judicial records it may satisfy the requirements of a *prima facie* case that by the middle of the century, possibly somewhat earlier, the plaintiff's two allegations (of being a debtor to the king and less able to pay the debt) had become a matter of mere form: the allegations were indispensable, but as such they were sufficient and unchallengeable.⁸⁷

IV.

What is called the "writ of *quo minus*" was a means to bring a defendant into the Court of Exchequer. Among the other writs in use during the 18th and 19th century for the purpose of commencing an action in the Court of Exchequer was one likewise applying the *quo minus* wording: the *venire facias ad respondendum*. It similarly issued at the suit not only of a real but also of a supposed debtor or accountant of the king.⁸⁸ The historical connection with the interest of the king had evaporated to a mere verbal reminiscence. A private suit in the Court of Exchequer was no longer a matter of personal privilege.

But that was not true for every kind of proceeding in which the *quo minus* clause was traditionally adopted. The "distringas in aid" of old was not perpetuated in the diluted and perverted writ of *quo minus*, but rather in the so-called "extent in aid." This was a summary proceeding for collecting the debt owed to a person who in his turn had formally recognized to be indebted to the Crown.⁸⁹ It anticipated the final judgment by immediate execution, though it provided for an opportunity for the suffering party to come into court and raise all the defenses he may have had against his creditor and many of those his creditor would have had against the Crown. In view of its nature as a serious and dangerous weapon, the interested parties (either the debtor to a crown debtor or the assignees of a bankrupt debtor) would use every means in their power to obtain redress. They would request the Court of Exchequer to set the extent in aid aside or they would apply to Chancery for relief on the ground that the extent in aid ought not to

87. On *quo minus* practice in the 18th and early 19th century, see 3 Bl. Comm.* 270 *et seq.*; 1 TIDD, PRACTICE (9th ed. 1856) 38 *et seq.*; *id.* at 92, 155 *et seq.* TIDD, FORMS (6th ed. 1824) 72, 79.

88. 1 MANNING, PRACTICE OF THE OFFICE OF PLEAS OR COURT OF COMMON PLEAS IN THE EXCHEQUER AT WESTMINSTER (1819) 8.

89. On its technique and history, see WEST, A TREATISE OF THE LAW AND PRACTICE OF EXTENTS (1817) 11 *et seq.*, 252 *et seq.*; CHITTY, PREROGATIVES OF THE CROWN (1820) 261 *et seq.*, 317 *et seq.*; GILBERT, A TREATISE ON THE COURT OF EXCHEQUER (1758) 167 *et seq.*

have been issued. The tenor of these motions was precisely what we were searching for in vain during the later stage of *quo minus* proceedings. An extent in aid was only granted to a confessed Crown debtor. A second prerequisite was an affidavit signed by the latter, to the effect that without the extent against his own debtor he would be *less able* to pay off the Crown debt. Hence our interest may be focused on the attitude of the courts — Exchequer and Chancery — to defenses challenging either the capacity as a Crown debtor or the “less able” affidavit or both.

In only one case did Chancery go so far as to disregard the unquestioned quality of a person as Crown debtor and to compel him to refund what he had lawfully obtained from his debtor by means of an extent in aid, on the ground that he had sufficient estate of his own to satisfy the king's debt.⁹⁰ The decision was consciously made as a policy decision against the abuse of extents in aid by wealthy creditors, which had become “a great oppression in the city.” Later trend of authority discloses a marked attenuation. In *Dickinson v. Molineux*⁹¹ (1692), *Brown and Sandys v. Trant et al.*⁹² (1701), *Brown v. Bradshaw*⁹³ (1701) and lastly in *Phillips v. Shaw*⁹⁴ (1803) Chancery expressed its unwillingness to undo what the Court of Exchequer deemed proper and just. Its attitude may be briefly characterized in two propositions: the assurance to be a debtor to the Crown will be closely examined; only a genuine Crown debtor may claim the privilege of an extent in aid. The assurance, however, to be less able to satisfy the Crown unless an extent in aid be granted, is a matter of the Crown debtor's conscientious but, in effect, uncontrolled personal judgment, *i.e.*, for all practical purposes a mere flourish.

This represents in substance the Exchequer Court's own view. In *The King v. Blatchford* (1792) the Attorney General explains why the “less able” assurance should be taken for granted: “It would be absurd to expect the immediate debtor of the Crown to swear that the debt of the Crown is in danger, or that he himself is in insolvent circumstances. It is sufficient if he swear that this part of his funds is in danger.”⁹⁵ This is certainly an overstatement. A prerogative process might perfectly well be restricted to cases of acute repercussion from the ultimate debtor's default on his creditor's ability to satisfy the Crown. In fact, by a rule of the Court of Exchequer of 1822, it was ordered that no fiat for an extent in aid should be granted unless the prosecutor made

90. *Capell v. Brewer*, 1 Vern. 469 (1687).

91. Pre. Ch. 47 (1692).

92. 2 Vern. 426 (1701).

93. Pre. Ch. 153 (1701).

94. 8 Ves. Jr. 241 (1803).

95. 1 Anst. 162 (1792).

affidavit that without extent in aid the Crown debt would be in danger of being lost to the Crown.⁹⁶ Chief Baron Eyre, therefore, relied merely on old Exchequer usage in rejecting the motion to set aside the extent for insufficient proof of the "less able" allegation.⁹⁷ On the other hand, the contention to be a debtor to the king was not allowed to become a matter of mere form. The court would interpret the concept in a wide and generous sense,⁹⁸ but it would be inclined to deny the privilege wherever the Crown debt had been satisfied by either the immediate⁹⁹ or the ultimate¹⁰⁰ debtor, or where the Crown debtor ekes out sundry small arrearages of income tax and excises to support his application.¹⁰¹ It is always aware of the "most mischievous consequences"¹⁰² that any relaxation in this respect would engender: "All that we have to look to is, to prevent our process being abused."¹⁰³ This *leitmotiv* is at the root of various secondary rules: *e.g.*, not to have the sheriff pay the proceeds over to the creditor (instead of the court) unless by special leave of the court,¹⁰⁴ and not to allow an extent in aid for a larger sum than is owed to the Crown, unless the creditor's claim is indivisible.¹⁰⁵ As was said by Chief Baron Hale:

" . . . to make the King's prerogative instrumental, and become a stale to satisfy other men's debts, would be unreasonable, inconvenient and mischievous to the subject."¹⁰⁶

V.

In summary, a survey of the authorities on the "well-known fiction" of *quo minus* seems to justify a double conclusion:

1. The writ of *quo minus* originated in an extra-judicial practice of distraint in aid, traceable to the beginning of the 13th century and based not on a fiction, but on a genuine debt to the king. Nothing then warrants the suspicion that this debt was but a pretext to secure the assistance of the sheriff. When adopted by the Court of Exchequer the writ continues for several centuries to presuppose a genuine debt to the king.

96. See 23 Eng. Rep. 595, ed. note.

97. See also *Rex v. Taylor and Newman*, Bunn. 127 (1723).

98. *The King v. Rippon*, 2 Pr. 398 (1816); *Rex v. Williams*, 3 Pr. 75 (1816). Compare also the statutory change brought about by 57 Geo. III., c. 117, § 4 (1816).

99. *Rex v. Clarke*, Bunn. 221 (1726).

100. *The King v. Hopper*, 3 Pr. 40 (1816).

101. *The King v. Wilton*, 2 Pr. 368 (1816).

102. *Ibid.*

103. *Barlow v. Hall*, 2 Anst. 461 (1793).

104. WEST, *op. cit. supra*, note 89, at 264; CHITTY, PREROGATIVES OF THE CROWN (1820) 317.

105. WEST, *op. cit. supra*, note 89, at 273.

106. *Att'ney Gen'l v. Poultney*, Hardres 403 (1665).

But the plaintiff's allegation of being less able to satisfy the royal treasury does not appear to have ever been subjected to judicial examination. By the middle of the 17th century, possibly somewhat earlier, the plaintiff's capacity as a Crown debtor likewise ceased to be scrutinized.

2. The extent in aid preserved the historical *quo minus* features and carried them over to the 19th century. No extent in aid was available without proved debt to the Crown. The "less able" allegation was mostly taken for granted by the courts. But at the beginning of the 19th century even that practice was abandoned and *quo minus* was restored to its true and literal meaning.