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The Equity Side of the Exchequer

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THE EQUITY SIDE OF THE EXCHEQUER

ITS JURISDICTION, ADMINISTRATION, PROCEDURES AND RECORDS

Yorke Prize Essay for 1973

BY

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CONTENTS

Preface
Principal abbreviations
Table of statutes cited

1 Introduction

2 The equity jurisdiction of the exchequer
  Definition
  Origins
  Relations with other courts
  Summary

3 The administration of the court
  The officers
  The location of the court room
  The location of the king's remembrancer's office
  The location of the records of the court
  The language of the court

4 Procedures and records
  Pleadings
  Evidence
  The determination of the suit

5 The suppression of the jurisdiction

Appendix 1 Chart showing the quantity of bi...
The purpose of this book is to define and describe the equity jurisdiction of the court of exchequer. It is to put this jurisdiction into its historical perspective and to provide aids and explanations for the use of whomever may wish to explore deeper into the subject or may wish to use the exchequer archives for other purposes.

In the first place I wish to express my gratitude to Mr D. E. C. Yale who suggested to me this topic of research and assisted me in my work for a doctoral dissertation on this subject. It is also my pleasure to express my gratitude to Professor G. R. Elton, Professor P. G. Stein, Mr M. J. Prichard, Dr J. H. Baker, Mr J. C. Sainty, and Mr T. A. M. Bishop, who helped me in many ways. Further acknowledgement is due to Clare College, Cambridge, who very generously supported me as a William Senior scholar during the last two years of my work on this subject. Also my thanks are due to the managers of the Maitland Memorial Fund and Christ's College, Cambridge, for meeting the expenses of my research in the first two years.

The staffs of the University Library Cambridge, the Public Record Office, the British Museum, the Bodleian Library Oxford, Lincoln's Inn, the Middle Temple, and the Inner Temple libraries have been unfailingly helpful, courteous, and long-suffering in regard to the problems of my research; I am grateful to them all.

 CHAPTER I

INTRODUCTION

The equity side of the court of exchequer 'is by far the most obscure of all the English jurisdictions', declared the learned Plucknett.¹ The purpose of this essay is to shed some light upon this court and to explore its jurisdiction, to introduce its staff, to discover its procedures, to explain its equity records, and perhaps to render Plucknett's statement obsolete.

Substantive law is inextricably intermingled with the procedures of the court; the practicalities of the prosecution of a lawsuit can never be neglected. Of initial and fundamental importance is that for which the petitioner prays. In practical terms this was a remedy for a grievance or a complaint; in larger terms and in the context of this study, this was the prayer for equitable relief. This study demonstrates that equity was bigger than the chancery and that others besides the lord high chancellor had a hand in its development. It is true that the court of chancery was the most important court of equity, but the existence of an alternative high court of equity in the exchequer had a significant effect upon the development of equity and upon the chancery itself.

The historian must by his nature be involved with institutions since human beings exist within their institutions. He must know why these institutions were erected, how they affected their people, how they evolved, why they perished. Moreover, among the major sources of historical evidence for the writer on the sixteenth century and earlier are the records of the courts of law. To understand and to be able to use these records, the historian must understand the institutional procedures which produced them. This requires the study of the administration of the court, the procedures for the trial of a lawsuit, and the terms of art by which these things were expressed.²

The scope of this monograph is the equity jurisdiction of the court

of exchequer. It includes only that part of the exchequer which functioned as a court of equity. It includes only the problems of equity which were unique to the court of exchequer; the development of equity in all the courts together is not the history of the equitable jurisdiction of the exchequer but rather of equity in general. The history of equity in the chancery has been well covered. Therefore to go into the technicalities of equity where there is no particular reference to the exchequer would be to repeat unnecessarily already available information. However, in order to describe the equity side of the exchequer, it is necessary to sketch the outline of equity in general. The differences between the exchequer and the other courts of equity will be noticed, but as to that which was common to all equity courts, the discussion will be kept to a bare minimum.

The purpose of this monograph is to place the equity side of the exchequer into its historical, institutional, and legal perspective. It is to discover its administrative procedures and to determine how far its judicial procedures in the sixteenth and seventeenth centuries were the same as those of the other courts of equity. It is to produce an outline of the procedures and an introduction to the records of the jurisdiction for those who may wish to work in the same field but to dig deeper.

The major obstacle to the study of this subject has been the scarcity of commentary. The first sketchy secondary works did not appear before the mid-seventeenth century, and the only systematic treatment of the jurisdiction was Fowler's *Practice of the Court of Exchequer* as late as 1795. Since its suppression in 1841, nothing at all has appeared. Therefore, we are forced to use an archival approach to the subject (for the sixteenth century at least). As an archaeologist creates a model of a dinosaur from a few old bones, which he has dug up, we must try to piece together an understanding of the procedures of the court from an examination of its relics, the original documents in its archives. In fact this approach is better than relying on commentary or other secondary sources. The records are free from ignorances, negligences, prejudices, opinions, and historians' purposes. They were made and kept for reasons other than to aid the uses to which they shall now be put; this assures their impartiality as sources of historical description. The court records have been preserved intact since the accession of Elizabeth I in 1558.

1 See the writings of W. J. Jones for the later part of the sixteenth century, D. E. C. Yale for the later part of the seventeenth century, and G. Spence for the eighteenth century.

Introduction

The method of research to be used for the study will be to examine closely everything in the archives of the exchequer up to the date of the death of the Marquess of Wincanton, treasurer. It is chosen because before 1580 pleadings were not preserved, and one can only place them within the terms of reference of the chancellor of the exchequer, and chief baron, to the Marquess. Since the exchequer equity records were kept or preserved before 1558, very little remains. These thirteen years of records provide an adequate basis on which to view the early equitable jurisdiction of the exchequer. It was not until at least a decade before the death of Elizabeth and the proper preservation of the court was established that it is necessary to examine closely the miscellaneous records which have survived by luck from before 1558.

The administration and procedures of the exchequer were not fully settled by 1572, and so it is necessary to use extensively the records to the end of the sixteenth century. The change will be done by the generous use of random samples. By the accession of James I in 1603 the jurisdiction was well established and flourishing. A fair amount of printed material is available from the second part of the seventeenth century in the form of reported cases, rules of court, and minutes of solicitors. Since the seventeenth century was a period of change in the procedure of the exchequer courts, this material is valid as general descriptions of the court in the later part of the century. Thus recourse to the records is less necessary and can be examined by intervals of ten to twenty years.

The eighteenth-century court is fully described in the materials, a fairly large number of cases were reported. In the jurisdictions of the exchequer and chancery both were written out of fashion, so much so that the chancery books are valuable as general descriptions of the court in the eighteenth century. Thus recourse to the records is less necessary. The materials plus several parliamentary reports dealing with the jurisdiction of the exchequer in the nineteenth century.

1 The pleadings were filed by counties; see pp. 126–9.

2 See bibliography.
includes only that part of the exchequer which functioned as equity. It includes only the problems of equity to the court of exchequer; the development of courts together is not the history of the equitable exchequer but rather of equity in general. The chancery has been well covered. Therefore nicipalities of equity where there is no particular chancery would be to repeat unnecessarily already n. However, in order to describe the equity side it is necessary to sketch the outline of equity in nces between the exchequer and the other courts noticed, but as to that which was common to all discussion will be kept to a bare minimum.

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The eighteenth-century court is fully described by Fowler, and a fairly large number of cases were reported. Moreover, the equity jurisdictions of the exchequer and chancery had become almost identical, so much so that the chancery books are valid sources of information on exchequer equity procedure. Since the two courts were so close, there is not much which needs to be discussed about this period in this monograph. The eighteenth-century records have been used only to find examples of writs in English. These same types of printed materials plus several parliamentary reports describe the equity side of the exchequer in the nineteenth century.

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J. Jones for the later part of the sixteenth century, D. E. C. Yale for the seventeenth century, and G. Spence for the eighteenth century.
The exchequer in the eighteenth century was only one part of the royal treasury, but in the sixteenth century and earlier the exchequer and the treasury were co-extensive. The exchequer was divided into two parts: the ‘upper exchequer’ or the ‘exchequer of account’ and the ‘lower exchequer’ or the ‘exchequer of receipt’. The lower exchequer was that part which handled the cash; the upper exchequer handled the accounting of the royal revenues, who was to pay in to and receive from the lower exchequer and how much. By the sixteenth century the upper exchequer had developed several distinct and independent offices each with its own personnel. The work of three of these, the king’s remembrancer’s office, the lord treasurer’s remembrancer’s office, and the office of pleas, had engendered the power to decide legal disputes arising out of the financial affairs of the crown. Imperceptibly over the centuries these three offices had become courts of law. The office of pleas, which was under the supervision of the clerk of the pleas, handled common law cases between private parties. The other two handled revenue disputes between the monarch and a private party. The judges in all of the exchequer courts were the barons of the exchequer. How and when the equity jurisdiction of the exchequer arose within the king’s remembrancer’s office will be discussed in chapter 2.

Chapter 3 will discuss the administration of the equity court in general and its officers from 1547 to 1714 in particular. This will be supplemented by lists in appendix 2.

The fourth chapter will describe the procedures and records of the court and will trace a suit from its initiation to the execution of the decree. This seems a more sensible approach for a work of institutional history than attempting to discuss the subject chronologically. It involves the risk of chronological dislocations, but misunderstanding may be avoided by careful notice of the dating of the material cited in the footnotes. Institutions have a certain bureaucratic inertia, and the king’s remembrancer’s office was no exception. Therefore a separate section in chapter 3 is not necessary. The paragraphs here may be of interest.

Barristers and solicitors had the same duties as they had in the other high courts. Therefore a separate section in chapter 3 is not necessary. They had functions to perform. How the postman, and the second in seniority the...
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more, they can be of great value to researchers in
other fields. By explaining what can or cannot be found in the archives
and by showing how to get at the information by the use of indices
and calendars, future inquiries will be facilitated and possibly time
saved which would otherwise be wasted.
This monograph will not discuss the substantive law of equity in
the exchequer. When the exchequer assumed its equity jurisdiction
in the sixteenth century, it took over the doctrines as well as the
procedures of the chancery and the other courts of equity. After the
exchequer equity court was firmly and fully established, the subs­
stantive doctrines developed in pari passu with chancery. When a point
of importance was decided by the court in which it happened to have
been brought, that decision was usually followed by the other courts
of equity according to the current understanding of the principle of
stare decisis. Since many more equity cases were heard in chancery
than in the exchequer, there are more leading cases from the court of
chancery. However, there are a proportionate number from the ex­
chequer, such as the following. Venables' Case (1607)1 established the
doctrine of prerogative cy pres; in Pawlett v. A. G. (1667)2 it was ruled
that relief in equity could be had against the crown and a basic prin­
ciple of equities of redemption was established. Important rulings
about contribution among sureties were made in Dering v. Earl of
Winchelsea (1787)3; Dyer v. Dyer (1788)4 proved to be a leading case
on the doctrine of resulting trusts.
In the context of this institutional study, the lawyers hired by
private parties do not appear to be important as officers of the court.
Therefore a separate section in chapter 3 is not needed. Their parti­
cipation will be noted in chapter 4 at those stages of the procedure
in which they had functions to perform. However, a few general
paragraphs here may be of interest.
Barristers and solicitors had the same duties and privileges in the
exchequer as they had in the other high courts at Westminster. One
can assume some specialization of practice, but the true extent of it
cannot be known without more research into the history of the legal
profession. The senior barrister practising in the exchequer was called
the postman, and the second in seniority the tubman. They were so

2 Hardr. 465, 145 Eng. Rep. 550 (Ex. 1667) per Hale; see W. S. Holdsworth, 'History of
per Eyre.
4 2 Cox 92, 30 Eng. Rep. 42 (Ex. 1788) per Eyre.
denominated from the particular seats in court assigned to them. The postman had pre-audience of the attorney general and the solicitor general; that is, he made the first motion at the opening of court. When the chancellor of the exchequer took his seat, the tubman had pre-audience of the postman.

In 1729 an act was passed for the purpose of controlling the solicitors in an attempt to improve the quality of the profession. This Act provided, among other things, that every solicitor be sworn in every court in which he practised and that the oath be enrolled. It led to the beginning of the rolls of the solicitors and the solicitors oath roll. A revenue measure was passed in 1785 putting an annual tax on solicitors; it required them to take out yearly a certificate of admission to practise, and registers of these certificates were to be kept.

There is not much point in discussing the fees and salaries of the officers of the court except in very great detail, such that it would be inappropriate in this monograph. The amounts of the salaries alone is not very important since they were only small percentages of the economic values of the offices. Fees were much more important, and so were the advantages of being in positions from which lucrative opportunities could be seized. The actual income from fees to the various exchequer officials can only be guessed at; no records were ever kept. There were schedules of fees to be paid by the parties at the various stages of the litigation, so one can get a vague idea of the cost of pursuing a lawsuit. However, there were so many variables that a close estimate is not possible. Also any comparison with the costs in the other law courts would be unrewarding because what might be gained on the swing might be lost on the turn. Only a very detailed and thorough study could reach any significant results; such a treatise cannot be included here.

Since this monograph is the first attempt ever to discuss the history of the equity jurisdiction of the exchequer, it must. Of course, the history of the jurisdiction from beginning to end must begin with a broad, general view of the wide perspective, then one cannot understand the reasons for whatever might be discovered with time. Is a phenomenon archaic, normal, or incipient, or not? Is it part of a large scheme or merely a mere fragment. To begin the investigation of a subject with a history covering only ten to twenty years I should think superficial conclusions would be drawn from which would be a blinkered study (by my standards as an investigator). It is better to have a cinema than a photograph of the courts of equity so that the place therein the exchequer can be understood.

In the first part of the fifteenth century the new jurisdiction, the chancery and the council, were given procedures and remedies to administer (in its wide perspective) the common law of England. This system was originated in the court of chancery; the courts which later adopted it are courts of equity. The purpose of the courts of equity was to carry on the ancient courts of common law by providing a demonstration of the old traditional law in those cases where procedures were inadequate.

The success of equity procedures resulted in every new court which was set up or which evolved in the latter part of the fifteenth century the courts of star chamber and the duchy chamber of Lancaster evolved and in the first half of the sixteenth century the regions marches of Wales, the council of the north, and the marches of the west were modeled on the king's council; like it they all used equity procedures for their suits. The counties palatine of Durham, Lancaster, and the marches of the king's council were modeled on the king's council; like it they all used equity procedures for their suits. The counties palatine of Durham, Lancaster, and the marches of the west were modeled on the king's council; like it they all used equity procedures for their suits. The counties palatine of Durham, Lancaster, and the marches of the west were modeled on the king's council; like it they all used equity procedures for their suits. The counties palatine of Durham, Lancaster, and the marches of the west were modeled on the king's council; like it they all used equity procedures for their suits.

1 Fowler, Practice (1795) vol. 1, pp. 8, 9; Foss, Judges, vol. 9, p. 110.
2 Stat. 2 Geo. 2 [1729] c. 23, ss. 3, 4, 8, 14, 18; Stat. 14 Geo. 2 [1739] c. 13, s. 3; Stat. 25 Geo. 2 [1749] c. 46, s. 2; Stat. 30 Geo. 2 [1757] c. 19, s. 75.
3 Ind. 4609 and 4610 (1729-30, 1794-1841), formerly E. 109/f and 2.
4 E.108/t (1772-1841); see also Lists of Attorney's and Solicitors (1729) pp. 3, 4; Additional Lists of Attorney's and Solicitors (1731) pp. 225-54.
5 Stat. 25 Geo. 3 [1785] c. 86, ss. 1, 4; E.108/t is the register for the equity side of the exchequer for 1788, 1795-1841.
of the equity jurisdiction of the exchequer, it must consider the entire history of the jurisdiction from beginning to end. The study of an institution must begin with a broad, general view. If one cannot see the wide perspective, then one cannot understand the meaning or reasons for whatever might be discovered within a narrow span of time. Is a phenomenon archaic, normal, or incipient? Is it important or not? Is it part of a large scheme or merely a momentary aberration? To begin the investigation of a subject with a narrow focus which covered only ten to twenty years I should think pointless because superficial conclusions would be drawn from what could not help but be a blinkered study (by my standards as an institutional historian). It is better to have a cinema than a photograph.

It remains now only for this chapter to generalize about the history of the courts of equity so that the place therein of the equity side of the exchequer can be understood.

In the first part of the fifteenth century the courts of equitable jurisdiction, the chancery and the council, were using a new system of procedures and remedies to administer (in its widest sense) the common law of England. This system was originated and developed in the court of chancery; the courts which later adopted it were called courts of equity. The purpose of the courts of equity was to complement the ancient courts of common law by providing a more efficient administration of the old traditional law in those cases where the old procedures were inadequate.

The success of equity procedures resulted in their being used by every new court which was set up or which evolved after 1400. In the latter part of the fifteenth century the courts of star chamber, requests, and the duchy chamber of Lancaster evolved as courts of equity. In the first half of the sixteenth century the regional council of the marches of Wales, the council of the north, and the short-lived council of the west were modeled on the king's council at Westminster, and like it they all used equity procedures for the determining of civil suits. The counties palatine of Durham, Lancaster, and Chester developed courts of equity in this period. In the latter half of the reign of Henry VIII when the government was under the influence of Thomas Cromwell, a number of revenue courts were erected to administer the finances of the kingdom. These courts, the courts of wards and liveries, augmentations, first fruits and tenths, and

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The only exception was the common law court of great sessions of Wales. This court was established in 1543 as a part of the integration of Wales into the English system of government and judicial administration. Equitable remedies were already available in Wales. Later the courts of great sessions developed equity sides, but there is no evidence of these equity jurisdictions before the 1590s.

In the seventeenth century there took place a tremendous change in the nature of equity. From merely supplying in personam remedies and procedures to supplement the administration of the common law, it began to develop in rem procedures and its own body of substantive law which was different from that of the common law courts. This change was secured by the work of Lord Chancellor Nottingham during the reign of Charles II. This trend was continued in all of the eighteenth-century courts of equity including the equity side of the exchequer. The momentous reforms of the courts of equity in the nineteenth century were not made until after the equity jurisdiction of the exchequer was abolished in 1841.

This is quite enough introduction; it is, of course, much easier to pose questions than to answer them. As Sir Edward Coke once said, 'Questions in the exchequer are wont to be resembled to spirits, which may be raised up with much facility but suppressed or vanquished with great difficulty.' With this caveat, let us now attempt to describe the exchequer equity court, to answer some of the questions, and to suggest where the answers to others may be found.

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