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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

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PREFACE

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.

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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

¹ T. F. T. Plucknett, *Concise History of the Common Law* (5th ed. 1956) p. 185.

² See G. R. Elton, *Political History* (1970) chap. 3, esp. p. 108.

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.¹ 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.

The method of research to be used for the study of this court will be to examine closely everything in the archives up to 1572. This was the date of the death of the Marquess of Winchester, the lord high treasurer. It is chosen because before 1580 pleadings were not dated and one can only place them within the terms of office of the treasurer, chancellor of the exchequer, and chief baron, to whom the bills were addressed. Since the exchequer equity records were not systematically kept or preserved before 1558, very little remains before this date. These thirteen years of records provide an adequate standpoint from which to view the early equitable jurisdiction of the court. However, the jurisdiction arose at least a decade before the accession of Queen Elizabeth and the proper preservation of the court archives; therefore it is necessary to examine closely the miscellaneous documents which have survived by luck from before 1558.

The administration and procedures of the equity side of the exchequer were not fully settled by 1572, and so it will be necessary to use extensively the records to the end of the sixteenth century. This will be done by the generous use of random samples from all counties.¹ By the accession of James I in 1603 the jurisdiction was clearly established and flourishing. A fair amount of printed information is available from the second part of the seventeenth century; this is in the form of reported cases, rules of court, and manuals for clerks and solicitors.² Since the seventeenth century was not a period of radical change in the procedure of the exchequer court, these sources are valid as general descriptions of the court in the earlier part of the century. Thus recourse to the records is less necessary, and the samples to be examined need include only several random counties at intervals of ten to twenty years.

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.

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

² See bibliography.

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 it is reasonable to suppose that, where there is no evidence to the contrary, there was no change in the procedures. And even where there was change, it was a slow change. Thus a case can be considered as evidence of the preceding practice and of the subsequent practice, unless it states that it changed the practice or was a case of first impression.

Much will be said about the equity records of the exchequer because from them can be gathered much information about the procedures of the court. Furthermore, 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 substantive 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 exchequer, 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 principle 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 participation 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

¹ See G. H. Jones, *History of the Law of Charity* (1969) pp. 76, 77.

² Hardr. 465, 145 *Eng. Rep.* 550 (Ex. 1667) per Hale; see W. S. Holdsworth, 'History of Remedies against the Crown', *L.Q.R.*, vol. 38, pp. 141 at 280-3 (1922).

³ 1 Cox 318, 29 *Eng. Rep.* 1184, 2 Bos. and Pul. 270, 126 *Eng. Rep.* 1276 (Ex. 1787) 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.¹

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.² It led to the beginning of the rolls of the solicitors³ and the solicitors oath roll.⁴ 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.⁵

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.⁶ 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

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. 22 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. 109/1 and 2.

⁴ E.200/1 (1772-1841); see also *Lists of Attornies and Solicitors* (1729) pp. 3, 4; *Additional Lists of Attornies and Solicitors* (1731) pp. 225-54.

⁵ Stat. 25 Geo. 3 [1785] c. 80, ss. 1, 4; E.108/1 is the register for the equity side of the exchequer for 1788, 1795-1841.

⁶ See G. E. Aylmer, *The King's Servants* (1961) pp. 162-5, 167, 168.

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.¹ These courts, the courts of wards and liveries, augmentations, first fruits and tenths, and

¹ See generally G. R. Elton, *Tudor Revolution in Government* (1962).

general surveyors, appear to have been modeled upon the court of duchy chamber; they all used equity procedures.

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.¹

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.² 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.'³ 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.

¹ W. H. D. Winder, 'Equity in the Courts of Great Sessions', *L.Q.R.*, vol. 55, pp. 106 at 107 (1939).

² See generally the introductions of D. E. C. Yale to *Lord Nottingham's Chancery Cases*, Selden Society, vols. 73 for 1954 and 79 for 1961, and *Lord Nottingham's Treatises* (1965).

³ *Sutton's Hospital Case*, 10 Co. Rep. 1 at 29, 77 *Eng. Rep.* 937 at 968 (K.B. 1612).

THE EQUITY JURISDICTION OF THE EXCHEQUER

DEFINITION

Equity was a system of curial remedies which evolved in England in the fifteenth century in the court of the lord chancellor. It was, like any other system, fundamentally a combination of the theoretical principles of justice and the practical problems of putting them into operation. The important difference between equity and common law was that the latter arose in the twelfth century when judicial administration was vastly more difficult. By the fifteenth century the art of government was much more developed, and so, although the general conceptions of justice had not changed, they could be better implemented by the officers of the crown. By the fifteenth century the courts of common law were rigidly set in their ways; as a result a new court of law was needed to take advantage of the improvements of government for the better administration of justice.¹ The procedures and remedies of the court of chancery, equity, in the sixteenth century came to be administered also in the court of exchequer. How this happened is the subject of the next section of this chapter.

The mediaeval exchequer, which came to be settled at Westminster, had financial jurisdiction over all of England, Wales, and the town of Berwick-upon-Tweed. When the exchequer developed its equity side, its equity jurisdiction was, naturally, geographically co-extensive with its revenue side.

The types of cases heard were, in general, equity cases according to the usages and traditions of chancery. The early equity cases, those before 1558, were founded on a broad range of equitable grounds. The most frequent prayer was for an injunction for quiet possession of property rights.² There were several cases involving uses, trusts,

¹ Compare S. F. C. Milsom, *Historical Foundations of the Common Law* (1969) pp. 74-9.

² E.g. *Vaughan v. Twisden*, E.111/46-K (1554-5); *Gyfforde v. Bishop of Bangor*, E.111/46-D (1557); *Bell v. James*, E.111/45 (1554-8); *Cotton v. Hamond*, E.112/20/50 (1554-8); *Mantell v. Mayor of Wickham*, E.112/3/22 (1558); see also *Randell v. Tregyon*, E.111/42-B (1547-52) which prayed a subpoena in a dispute over a crown lease.