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Modernisation through Process

The Rise of the Court of Chancery in the European Perspective

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I developed first ideas for this dissertation in summer 2012. The research on the primary sources took place in 2013. The thesis was finally successfully defended on 2 November 2015. With the exception of a few highly noteworthy publications, literature up to that date has been considered.

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David Harbecke

Chapter I

Introduction

The existence of a separate equitable jurisdiction long remained a seemingly idiosyncratic feature of the common law tradition. It is a source of continuous fascination and irritation for common law students and continental legal historians alike. The Court of Chancery was not the only but by far the most prominent of the equitable courts. It thus came to dominate the development of the equitable jurisdiction in the English legal system and our understanding thereof.

Much has been said about the evolution of the Court of Chancery and yet the historical accounts have commonly failed to explain the reason for the singularity of the English development satisfactorily for the modern reader. It is my strong belief that recourse to legal theory carries the potential to facilitate a better understanding of a seemingly inscrutable late medieval phenomenon. The theorisation of the historical developments also opens the way towards comparisons to other legal systems – present and past – and thus provides links for both contemporary common lawyers and continental legal historians.

The dialogue between legal theory and legal history has often been neglected in the literature on the common law tradition. That is not necessarily due to ignorance or a lack of interest from capable scholars. It is rather the result of a conscious decision by numerous 20th century legal historians. This decision is best understood as a reaction to late 19th century scholarship. The classical legal historians of that period were deeply invested in offering a theoretical framework for the development of law through the centuries. A special focus lay on establishing the continuity of English legal instruments – from Anglo-Saxon times into the 19th century.[1] Many scholars thus uncritically transferred contemporary theory and doctrine to earlier periods without much respect for specific historical circumstances.[2]

1 See most prominently the works of *O. W. Holmes*, The Common Law (1881), Transaction Publishers, New Brunswick, NJ, 2005; *H. Adams et al.*, Essays in Anglo-Saxon Law (1876), Rothman, South Hackensack, NJ, 1972.

2 Also *M. J. Horwitz*, The Historical Contingency of the Role of History, Yale Law Journal, Volume 90 (1981), p. 1057–1059; *R. W. Gordon*, Critical Legal Histories, Stanford Law Review, Volume 57 (1984), p. 57–125; *D. Rabban*, The Historiography of the Common Law, Law and Society, Volume 28 (2003), p. 1161–1201, especially p. 1187–1188.

This undifferentiated and uncritical historiography has understandably given a bad name to combinations of legal theory and legal history. The reaction of many 20th century legal historians was to isolate their research from other areas of law and focus on its historical dimension instead.[3] This has allowed for a far better understanding of normative contexts through the course of history. On the other hand, however, it has also mostly banished the legal historians' perspective from the discussion of contemporary legal issues. That is especially regrettable since argumentation with history remains common and often lacks the contextualisation that could be offered by legal historians.

I will attempt to overcome this schism with regard to the specific case of the development of the separate equitable jurisdiction in the English Court of Chancery. The major part of this work will therefore be devoted to a thorough examination of the documentation from the early phase of the Court of Chancery. Based upon this study, however, I will then reflect my findings from the perspective of modern legal theory. The aim is twofold: First, I want to identify the concrete role of the Court of Chancery in the English legal system in its origin. Second, I aim to explain why the development of a separate equitable jurisdiction seemingly remained unique. Why did other European legal systems not develop a similar jurisdictional bifurcation and how did they address problems that the Court of Chancery addressed in England?

An early caveat is in order: Throughout the 14th and 15th the century, in which the Court of Chancery established itself as a central royal court, the term 'equity' was rarely used in proceedings before the court and never in relation to the court itself. During the timeframe under consideration, the Court of Chancery was instead commonly referred to as a 'court of conscience'. The respective meanings of equity and conscience and their usefulness for the understanding of the role of the court will be recurrent issues in the following chapters.

My examination will begin with an introduction to the history of the Court of Chancery (chapter II). This will include an identification of my research period and its relevance for the development of the bifurcated English legal system. I will then present an overview over the existing literature on the early phase of the court (chapter III) with a view to identifying neglected areas and delineating my own research. The next chapter will then be devoted to a presentation of the primary sources underlying my research (chapter IV). Based upon these sources,

3 This reproach was already foreshadowed by *F. W. Maitland*'s programmatic statement that legal history is history not law in: Why the History of English Law is not Written, in: H. A. L. Fisher (ed.), The Collected Papers of Frederic William Maitland, Cambridge University Press, Cambridge, Volume 1, 1911, p. 480–497, p. 491–494.

I will characterise the typical structure of the 15th century Chancery process from its opening to the final decree (chapter V). In order to illustrate the novelty of the Chancery process in the English legal system, I will constantly refer to corresponding stages in the established common law trial. The identification of the Chancery process will then allow a first comparison with contemporary Roman-canon law. I will discuss in how far the Chancery process originated in Roman-canon law procedure and thus exhibited ties to the legal developments on the European continent (chapter VI). Building upon the knowledge of the 15th century process, I will then identify central functions of the Court of Chancery in the developing English legal system with the help of modern legal theory (chapter VII). This will finally facilitate a comparison with supreme courts in surrounding jurisdictions that should answer the question whether the establishment of a separate jurisdiction in the Court of Chancery indeed constituted an idiosyncratic English development (chapter VIII).

Chapter II

A short history of the Court of Chancery

In this chapter, it is my aim to sketch out the historical context, in which my work, which will focus on the 15th century, is situated. The Court of Chancery existed as a separate institution from the 14th to the 19th century. The earlier history provides the background (1.) against which the court originally developed and thus marks the starting point for my explanations. As neither the formation nor the later role of the court can be adequately explained without recourse to the contemporary jurisdictional landscape, I will present the most important institutional developments between the 12th and 14th century in some detail. The later history, on the other hand, serves as a point of reference for the development which was set in motion during the period of my research.

For better orientation, I will differentiate five stages of development in the Court of Chancery. These stages are designed to allow a sensible positioning of my own research as well as to reflect far-ranging public perceptions of the court through time. The first stage will cover the institutional formation of the Court of Chancery (2.). I will then proceed to what I will call the expansion period of the court in the 15th and 16th century (3.). Since this period forms the basis for my research, I will limit myself to some facts that will underline the relevance of my research. I will then present the systematisation efforts in the 17th and 18th century (4.), which lead directly into the deterioration phase of the 18th and 19th century (5.). At last, I will address the fusion process in the second half of the 19th century (6.) that resulted in the institutional integration of the Court of Chancery and the common law courts and marks the end of the strict bifurcation of the English legal system.

1. Background

The formation of the Court of Chancery – like most developments in English constitutional history – is a result of pragmatic reaction rather than of systematic action. It can thus only be understood against the background of the existing medieval institutions for conflict resolution and their respective functions, developments and relationships. The period between the Norman Conquest of 1066 and the settlement of the Court of Chancery as a separate court in the late 14th century was characterised not only by a great variety of jurisdictions but also by a highly dynamic development of legal institutions.

1.1 Medieval legal pluralism

The late medieval English legal landscape was highly fragmented. What would eventually develop into a distinct and unified legal system was, at that stage, best characterised as a multitude of complementary and competing jurisdictions. There was certainly no shortage of institutions for conflict resolution. Most major power-holders – individuals, organisations or communities – adjudicated the conflicts of their vassals or members. In the countryside, conflicts were commonly resolved in local courts of tribal origin, such as the county courts and hundreds, or in manorial courts. In the more populated areas, markets, city councils and universities usually maintained self-governing courts.[1] A classification of these institutions from our modern perspective is almost impossible. Were these courts and tribunals performing public or private functions? Premodern institutions hardly allow for such differentiations. Even though the administrative control over the country by central authorities was comparatively advanced,[2] it did not allow for a comprehensive regulation of conflict resolution in the localities. Nevertheless, royal officers were often involved in the adjudication process and royal interests played an ever-greater role in the outcome.[3]

1.2 Ecclesiastical jurisdiction

The two centralised institutions of adjudication – the ecclesiastical courts and the courts of the common law – are much easier to classify, partly because they have essentially survived until today and have thus shaped our conceptions of legal institutions.

The ecclesiastical courts of the Roman-Catholic church had successfully monopolized a sizeable extent of conflict resolution in the late medieval

1 See also *J. H. Langbein / R. T. Lerner/B. P. Smith,* History of the Common Law – The Development of Anglo-American Legal Institutions, Aspen Publishers, New York, NY, 2009, p. 4.

2 Compare *R. C. van Caenegem*, The Birth of the English Common Law, Cambridge University Press, Cambridge, 2nd edition, 1988 (repr. 1989), p. 92–93, p. 107–110.

3 For a short discussion of the revenue dimension of local criminal adjudication, see *J. H. Langbein / R. T. Lerner / B. P. Smith,* History of the Common Law – The Development of Anglo-American Legal Institutions, p. 66–67, with reference to *F. W. Maitland*, Introduction, in: F. W. Maitland (ed.), Pleas of the Crown for the Country of Gloucester A. D. 1221, Macmillan, London, 1884, p. xxxiv. *R. C. van Caenegem*, The Birth of the English Common Law, p. 103–104, classifies the revenue dimension as insignificant in comparison to the royal household.

period – their jurisdiction extended far beyond matters we might be inclined to consider religious these days.[4] The church had been the first organisation to establish a court hierarchy in England. Judgments from the parish or diocesan level could be appealed in the archiepiscopal court or even in Rome. A prerequisite for any such structure is the existence of a written procedure. The ecclesiastical courts applied the procedure and substantive rules of the canon law as it had been collected and systematised in the European universities since the 12th century.[5] This systematic application of written law stood in marked contrast to the traditional domestic courts, which based their judgments on – mostly local – customs. The ecclesiastical courts were thus able to offer functioning and comprehensive institutions, procedures and substantive principles – a feat only much later achieved by English law.

1.3 Common law

The common law courts, on the other hand, had developed in Westminster from the 12th century onwards.[6] They represented the main institutional embodiment of growing royal control over conflict resolution. The two most important common law courts, the Court of Common Pleas and the King's Bench, originated in the *curia regis*, the king's council. Even in Anglo-Saxon times, the king had already provided residual justice in cases where local adjudication had failed or where royal interests were involved. This tradition lived on under Norman rule – the task of dispensing royal justice was then commonly fulfilled by the king and his chief advisors in the council. With the rising power of the central administration and its growing interference with local practices after the Conquest, recourse to the council became more and more common. The legalisation of originally administrative processes – like the enforcement of the king's peace and the settlement of land disputes – heavily contributed to this development. Adjudication by the council became impractical. The chief

4 *R. H. Helmholz*, The Oxford History of the Laws of England, Volume 1: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s, Oxford University Press, Oxford, 2004, offers a comprehensive portrayal of the application of Roman-canon law in the English church courts.

5 For a more detailed account of the universal foundations of the late medieval ecclesiastical jurisdiction, see *P. Prodi*, Eine Geschichte der Gerechtigkeit: Vom Recht Gottes zum modernen Rechtsstaat, C. H. Beck, Munich, 2003, transl. by A. Seemann, especially p. 48–81.

6 As in introduction into the formative period of the common law courts, *F. Pollock / F. W. Maitland*, The History of English Law before the Time of Edward I, Cambridge University Press, Cambridge, Volume 1 & 2, 2nd edition reissue, 1968, remains unrivalled.

advisors were powerful Norman feudal lords with an interest in politics rather than in administrative detail. The task of dispensing royal justice in most regular cases was thus – whether through explicit delegation or evolving custom – transferred to specialists of the administrative process: Clerks served as the new justices.

At the end of the 12th century, the Court of Common Pleas was the first common law court to grow out of the jurisdiction of the *curia regis*. It quickly became the preeminent medieval court as it monopolised the adjudication of land disputes – the very basis of feudal economy.[7] The Court of King's Bench retained – as its name would suggest – a closer proximity to the *curia regis* and commonly followed the royal household before its institution in Westminster in the 14th century. Even then, the king would eventually be involved in its high-profile decisions.[8] At the outset, King's Bench mostly adjudicated trespass cases before encroaching more and more strongly on the criminal jurisdiction of local courts.[9] The third major common law court, the Court of the Exchequer, grew out of the administrative department of the same name during the 12th century. As such, it was chiefly concerned with revenue issues.[10]

Just like the local jurisdictions, the common law courts adjudicated on the basis of unwritten customary rules. However, they offered manifest advantages to both the king and common litigants, which elevated them above local jurisdictions and guaranteed their expansion throughout the Middle Ages.

7 Chapter 17 of the Magna Carta of 1215 guaranteed a settled Court of Common Pleas for the adjudication of land disputes in Westminster – geographically and functionally removed from the *curia regis*. Since the aristocracy made King John (1199–1216) sign the Carta under duress, this can be seen as an early manifestation of (limited) judicial independence from the king, compare *J. H. Langbein / R. T. Lerner / B. P. Smith,* History of the Common Law – The Development of Anglo-American Legal Institutions, p. 123–124. The 800th anniversary of the signing of the Magna Carta has renewed popular interest in the classical document. For a comprehensive introduction, see *J. C. Holt*, Magna Charta, Cambridge University Press, Cambridge, 3rd edition, 2015 or R. Griffith-Hill / M. Jones (eds.), Magna Carta, Religion and the Rule of Law, Cambridge University Press, Cambridge, 2015.

8 *B. Wilkinson*, Constitutional History of Medieval England 1216–1399, Longmans, Green and Co., London, Volume 3, 1958, p. 153; *J. H. Langbein / R. T. Lerner / B. P. Smith,* History of the Common Law – The Development of Anglo-American Legal Institutions, p. 120.

9 *J. H. Langbein / R. T. Lerner / B. P. Smith,* History of the Common Law – The Development of Anglo-American Legal Institutions, p. 120.

10 Compare *P. Brand*, The Formation of the English Legal System, 1150–1400, in A. Padoa-Schioppa (ed.), Legislation and Justice, Clarendon Press, Oxford, 1997, p. 103–121, p. 112; *H. Langbein / R. T. Lerner / B. P. Smith,* History of the Common Law – The Development of Anglo-American Legal Institutions, p. 120–122.

While they provided royal oversight and influence over the resolution of substantial conflicts throughout the realm (for the king), they also offered greater predictability and superior enforceability mechanisms than local courts (for the litigants).

It would far exceed the scope of this work to provide a detailed picture of the common law at any stage during the late Middle Ages. I will therefore focus on the two most influential institutional developments in the medieval period – and also those most closely related to the rise of the Court of Chancery: the emergence of jury trial and the establishment of the writ system.

Both jury trial and writ system represent conscious efforts to bring conflict resolution in the periphery of the English countryside under greater central control. While both institutions have substantial earlier roots,[11] Henry II's (1154–1189) comprehensive judicial reforms initiated the decisive steps for their uniform countrywide recognition.

1.4 Jury trial

1.4.1 Assize of Clarendon

On behalf of "King Henry II with the assent of the archbishops, bishops, abbots, earls and barons of all England", the first article of the Assize of Clarendon from 1166 declares that "for the preservation of peace, and for the maintenance of justice, […] inquiry shall be made throughout the several counties and throughout the several hundreds through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill upon oath that they will speak the truth, whether there be in their hundred or vill any man accused or notoriously suspect of being a robber or murderer or thief, or any who is the receiver of robbers, murderers or thieves, since the lord king has been king".[12] The article clearly refers to what we would consider criminal proceedings. It furthermore describes a jury that decides – like the American Grand Jury these days – about the opening of a trial rather than about its outcome.[13] Nevertheless, the recognition of a criminal jury of accusation in the Assize of

11 See for a more detailed account *F. Pollock / F. W. Maitland*, The History of English Law before the Time of Edward I, Volume 1, p. 138–144 for the jury and p. 150–151 for writs.

12 Assize of Clarendon (1166), cited in D. C. Douglas / G. W. Greenaway (eds.), English Historical Documents, Volume 2: 1042–1189, Eyre & Spottiswoode, London, 1968, p. 408.

13 Compare *T. F. T. Plucknett,* A Concise History of the Common Law, Butterworth, London, 5th edition, 1956, p. 112.

Clarendon represents a crucial step on the way towards jury trial in all common law proceedings.[14]

1.4.2 Jury of Accusation

The jury of accusation was a reaction to the failings of the appeal of felony that had been the standard procedure for severe disruptions of the king's peace in the 12th century.[15] The appeal of felony was opened through the accusation of a victim or a close family member of the victim.[16] The mode of trial was commonly by battle.[17] Both these features naturally discouraged the effective sanctioning of crimes. The victim might not be able to accuse a powerful or violent perpetrator unharmed and might also fear the unpredictability of a battle.[18] By officialising the accusation procedure, the risks of prosecution were reduced.[19]

The jury of accusation was composed of twelve lawful men from the vicinity of the conflict. They assumed the role of witnesses rather than judges. The jury thus also introduced a fact-finding element into the criminal process that was suspiciously absent in the appeal of felony.[20] The inquiry under oath mentioned in the first article of the Assize took place before a royal justice, who would annually travel the different counties of the realm.[21] This process embodies two features that might be considered characteristic for English administration – the

14 Compare *J. H. Langbein / R. T. Lerner / B. P. Smith*, History of the Common Law – The Development of Anglo-American Legal Institutions, p. 41–42.

15 *T. F. T. Plucknett*, A Concise History of the Common Law, p. 117; *J. H. Langbein / R. T. Lerner / B. P. Smith*, History of the Common Law – The Development of Anglo-American Legal Institutions, p. 38.

16 *T. F. T. Plucknett*, A Concise History of the Common Law, p. 117; *J. H. Langbein / R. T. Lerner / B. P. Smith*, History of the Common Law – The Development of Anglo-American Legal Institutions, p. 32–33.

17 *F. Pollock / F. W. Maitland*, The History of English Law before the Time of Edward I, Volume 1, p. 466; *T. F. T. Plucknett*, A Concise History of the Common Law, p. 117.

18 The emergence of the inquisitorial procedure in Roman-canon law rested on a similar rationale. Compare *A. Krey*, Inquisitionsprozess, in: A. Cordes / H. Lück / D. Werkmüller (eds.), Handwörterbuch zur deutschen Rechtsgeschichte, Schmidt, Berlin, Volume 2, 2nd edition, 2012, col. 1243–1248.

19 However, they were not completely erased. Numerous Chancery petitions from the 14th and 15th century complain about the ineffectiveness and factual unavailability of common law remedies against a powerful or notorious defendant, see below chapter V, 2.5.1.

20 *J. H. Langbein / R. T. Lerner / B. P. Smith*, History of the Common Law – The Development of Anglo-American Legal Institutions, p. 33–34.

21 Assize of Clarendon (1166), article 5, cited in D. C. Douglas / G. W. Greenaway (eds.), English Historical Documents, Volume 2: 1042–1189, p. 408.

reliance on private cooperation for the fulfilment of public functions and their central control from Westminster. Once the accusation had been made and the justice had considered eventual points of law, the standard mode of proof was by ordeal.[22] The accused was put to tests of either water or fire. In medieval thinking, the final judgment over a person belonged to God. However, the articles of the Assize of Clarendon show certain safeguards against the unpredictability of the ordeals: they would not be invoked after a confession[23] and absolved suspects could be outlawed in the event of their notoriety within the community.[24] The jury of accusation already fulfilled an adjudicative role in so far as it would only present defendants who it deemed sufficiently suspicious or notorious.[25]

1.4.3 Abolition of ordeals

The adjudicative role of the jury became all the more important when clerical involvement in ordeals was sanctioned by the Fourth Lateran Council in 1215.[26] Without the proper invocation of a divine judgment, the ordeals lost their justification. They were now seen more and more for what they actually were: random inflictions of pain and suffering with no bearing on the question of guilt. The continued adjudication of criminal cases required the acknowledgement of a different mode of trial. The continental European answer to this dilemma was the strengthening of the role of the judge whose discretion was in turn restricted through strict evidentiary rules and appellate control.[27] The

22 The Assize of Clarendon, article 2, cited in D. C. Douglas / G. W. Greenaway (eds.), English Historical Documents, Volume 2: 1042–1189, p. 408, specifically ordered the ordeal of water. For an illustrative introduction into the different types of ordeals, see *T. F. T. Plucknett*, A Concise History of the Common Law, p. 113–115.

23 Assize of Clarendon, article 13, cited in D. C. Douglas / G. W. Greenaway (eds.), English Historical Documents, Volume 2: 1042–1189, p. 409.

24 Assize of Clarendon, article 14, cited in D. C. Douglas / G. W. Greenaway (eds.), English Historical Documents, Volume 2: 1042–1189, p. 409–410.

25 *R. D. Groot*, The Jury of Presentment before 1215, The American Journal of Legal History, Volume 26 (1982), p. 1–24, especially p. 10; *J. H. Langbein / R. T. Lerner / B. P. Smith*, History of the Common Law – The Development of Anglo-American Legal Institutions, p. 41–42.

26 Canon 18 of the decree reads: "No cleric may pronounce a sentence of death, or execute such a sentence, or be present at its execution. […] Neither shall anyone in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing", cited in H. J. Schröder (ed.), Disciplinary Decrees of the General Councils – Text, Translation, and Commentary, Herder, St. Louis, Mo., 1937, p. 258.

27 *J. H. Langbein*, Torture and the Law of Proof – Europe and England in the Ancien Régime, The University of Chicago Press, Chicago, Il., 1977, p. 5–8.