Archaeologia Cantiana Vol. 76 1961

CHANCERY AND THE CINQUE PORTS IN THE REIGN OF ELIZABETH I

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The court of Chancery at Westminster,[1] which embraced a common law jurisdiction, is best remembered as an equitable tribunal. In a common law court, process was begun by original writ, implying a grant of jurisdiction in the specific case from the sovereign. The plaintiff would put in a declaration or statement of his claim to which the defendant had to plead. This might be followed by a reply and a rejoinder. Such pleadings would be terminated either by a demurrer —that is, admittance of the facts and basing the issue on the law—or in a conclusion on a question of fact, with trial of the issues by a jury. In equity, however, apart from written pleadings in English, procedure required the personal summons of the defendant by *subpoena* and his examination on oath. Judgement would be given both on the facts and the law. Again, whereas at common law judgement was pronounced on the authority of the judges, as conferred by original writ, the Lord Chancellor—or Lord Keeper as the case might be—made his order or decree by the advice and consent of those sitting with him : members of the Council, masters of Chancery, specified judges, and " the whole court of Chancery ".

Although equity, as in trusts and charitable uses, could be a body of law in itself, it was, in essence, based upon a doctrine of procedure. The vast majority of suits determined by the court were eventually decided on principles of common law. Equitable procedures—e.g. discovery of evidences—had merely made the common law remedy possible. Excepting the High Court of Parliament, Chancery could claim to be the greatest court in the realm. Throughout the reign of Elizabeth and in subsequent years its relations with the courts of common law were fairly good. Indeed a high degree of co-operation was often achieved. This situation was not greatly disturbed in the early seventeenth century by the comparatively superficial disputes of Common Pleas and Chancery, of Coke and Ellesmere.

The legal structure of Elizabethan England was by no means perfect. Although the various judicial tribunals had a mutual interest in the dispensation of justice, they were too often encroaching on each

[1] For the procedure, jurisdiction and practice of the court of Chancery and its relations with other courts, see my unpublished London Ph.D. Thesis, " The Elizabethan Court of Chancery " (1958) and my forthcoming article, " Conflict or Collaboration ? ", in *American Journal of Legal History*.

others jurisdictions. However, such competition as did occur seems not to have arisen between equity and common law courts, but between courts offering a similar remedy. The Queen's Bench quarrelled with the Common Pleas, and Chancery cavilled at other equitable tribunals. In particular, the central courts at Westminster gradually adopted a policy of mutual antagonism towards provincial courts and franchises.

A number of local units, liberties and franchises claimed a privilege whereby inhabitants might prosecute their affairs, or any contract made within the precincts, in the local court. It followed, that the country was littered with equitable jurisdictions, great and small. Equity courts existed in the council in the North, the council in the Marches of Wales, the County Palatinate of Chester, the city of York, the great sessions of Wales and, theoretically, in every manorial unit. Although Chancery could often work in close agreement with local jurisdictions, it obviously regarded these equity courts with disfavour and spared no efforts to denigrate their competence. In the 1590's, Lord Keeper Puckering, in advance of any such moves by the common lawyers, initiated an open attack on these rival equitable jurisdictions and singled out the busy courts of the two great provincial councils as his special target. When Puckering declared that " no other court within this realm hath authority to stay the proceedings for matter of equity " in Chancery, he was referring not to the common lawyers but to certain courts of equity.[1] Egerton, the next Lord Keeper, carried on this policy and established beyond doubt the supremacy of the Chancery at Westminster. The greater the competition, the more extreme was Chancery's reaction. Even with lesser jurisdictions, the Westminster court was determined to ensure that its primacy was recognized. Its hostility towards interference by another court of equity is therefore evident even in minor localities. This policy is reflected in its attitude towards the Cinque Ports.

The privileges of the Cinque Ports were very extensive and, like other franchises, it had developed into a fairly good—if minor—imitation of the royal or central judicial system. " The Cinque Ports ", writes Holdsworth, " were indespensable to the crown ; and so could insist upon getting almost what privileges they pleased."[2] This may well have been true of the thirteenth or fourteenth centuries, but by the reign of Elizabeth the Ports had fallen somewhat from their former high estate and indispensability. Nonetheless, most authorities[3]

[1] C. Monro, *Acta Cancellariae* (1847), 670-2 ; Tothill (*English Reports* XXI), 153 ; B. M. Egerton MS. 2254 f. 88 ; Lansdowne MS. 163 ff. 66-8. Charleton v. Bridgman, 1595.

[2] W. S. Holdsworth, *A History of English Law* (1956), i. 532.

[3] E. Coke, *2nd Institute* (1671), 556-7 ; *4th Institute* (1671), 223 ; F. Cowell, *Law Dictionary* (1727), sub. tit. ; J. Rastell, *Les Termes de la Ley* (1629), sub. tit. ; T. Wood, *Institute of the Laws of England* (1720), 897-8 ; K. D'Anvers, *A General Abridgement of the Common Law* (1705), i. 793-4.

seem to have agreed that the Lord Warden of the Cinque Ports—whose strength was partly based on his office as Constable of Dover Castle—had jurisdiction and authority as Admiral and could hold plea by bill concerning the guard of the castle according to the common law. It was agreed that the mayors and jurats of each constituent port exercised a common law jurisdiction and that the various jurisdictions of the Cinque Ports covered all forms of action—personal, real or mixed. In short, the privilege was established that no inhabitant need be impleaded beyond the borders of the locality. An exclusive jurisdiction of this nature could scarcely survive without the development of a court of equity in the Ports. Otherwise, litigation would have filtered through to the Chancery.

The equity court of St. James's, dating back at least to the fourteenth century, appears to have originated as a supplement to the infrequent sessions of the court of Shepway. The court of St. James's had no seal. The Lord Warden sent out writs in his own name and under the seal of the office of Dover Castle. Strictly speaking, therefore, no original writ issued from the equity court at Dover.[1] Although the proper business of St. James's was to provide equitable remedies comparable to those of Chancery, it exercised a variety of functions and no clear diversion of business seems ever to have been achieved. Although often called " a court of chancery ", this title seems merely to have been an imitation, comparable to those adopted in other franchises. In the seventeenth century, it was referred to as a " mixed court of star chamber, exchequer and chancery ". It also acted as the Lord Warden's central administrative court. In 1629, he tried to show that the courts of Shepway and St. James's were identical and asserted that evidence could be produced proving that the Shepway had been held in St. James's. Certainly it is true that, at least a few years earlier, St. James's had accepted bills of error, properly assignable to the Shepway.[2]

Cases concerning the jurisdiction of the Cinque Ports which were decided by the Chancery at Westminster fall into distinct categories. Firstly, as a court of equity, Chancery was naturally concerned when limitations of process endangered or delayed the course of justice. This could occur when lands in dispute were only partly within the Cinque Ports, or when only one party to a litigious quarrel was an inhabitant of the Ports. Secondly, Chancery during the 1590's evidently conceived a dislike, albeit temporary, for the jurisdiction exercised by the court of St. James's at Dover. Deciding that the latter—although it cannot have posed a major threat—was an

[1] K. M. E. Murray, *The Constitutional History of the Cinque Ports* (Manchester, 1935), 104-6, 108 ; Coke, *4th Institute*, 222 ; D'Anvers, i. 793.

[2] Murray, 106 seq.

interloper, Chancery made a brief essay to deny privilege of the Cinque Ports in equitable causes. The attempt succeeded and was followed by a compromise. Chancery having made its point, St. James's was left with those cases where all the parties and the premises were within the Cinque Ports. In a limited sense, Chancery proved effective as a support to the Lord Warden's court. In this, the third category of cases, we find the Westminster court bolstering up the Lord Warden's jurisdiction when it came under attack from Portsmen themselves or from other quarters. It should, of course, be said that in all these categories everything depended on the initiative of the litigant. Chancery could never assume cognizance of a cause unless somebody took the trouble to file a bill before it.

Much of Chancery's work, partly with the professed intention of preventing multiplicity of litigation, was concerned with the regulation and direction of trials at law. It was therefore interested in those instances where disputed lands lay both within and without the Cinque Ports, perhaps forming an unbroken estate. Here there was a real danger that several writs and actions might ensue.[1] Chancery, to remedy the position, was willing to create a partial fiction and take the lands out of the Cinque Ports, temporarily locating them in either Sussex or Kent. Thus, in 1561, it was ruled that " for the benefit of the trial of such title at the common law, [the lands] shall be admitted to be as out of the liberties of the said town of Winchelsea and of the said Cinque Ports ; and to be within the body of the county of Sussex ".[2] Chancery, on grounds of equity, often exercised its right to change the venue of a trial at law ; sometimes, as here, it was ready to redefine the location of the premises. This equitable practice was soon to be incorporated as standard practice in the common law. For, although the royal writ did not run in the Cinque Ports, it was held that, unlike Counties Palatinate, they were not " *iura regalia* " but part of the county of Kent. It followed that if a writ for land was brought outside the locality and the defendant appeared and pleaded, then a judgement against him was binding. " For the land is not exempted out of the county and the tenant may waive the benefit of his privilege." This ruling covered lands entirely, as well as only partly, within the Cinque Ports. The record of such a judgement would be certified into Chancery. The judgement would then be sent by *mittimus* to the Lord Warden who would be required to execute it.[3] However, the option of whether to appear and plead still lay with the defendant. If he did not plead,

[1] B.M. Additional MS. 48056, p. 97.

[2] PRO. Chancery Entry Books : C33/23. f. 80. Guildford v. Thompson, 1561. *Cf.* C33/23. f. 135, Allen v. Swanne, 1561. Decree for the plaintiff until the defendant recovered at common law, in the Queen's Bench or Common Pleas, but not in the Cinque Ports.

[3] Coke, *2nd Institute*, 557 ; *4th Institute*, 223 ; Wood, 897-8.

then judgement could scarcely go by default since he had not waived his privilege. In such a situation, therefore, there would still be need for a recourse to equity.

An inhabitant of the Cinque Ports did not have to answer process outside the locality. On the other hand, a "stranger" could not be sued at common law for an action committed by him within the Ports although, once outside, he could not be reached by process of the Cinque Ports. In other words, there was ample room for these varying provisions to come into opposition and create a real hiatus of justice. On one occasion, Henry Gaymer, as Mayor of Rye, accepted non-residents as sureties for the payment of a debt. The debt was not honoured and it was discovered that the sureties were worthless: they could not be sued within the Cinque Ports. Finding no way out of this impasse, the creditors sued Gaymer in Chancery, hoping to make him responsible for his error. That gentleman promptly demurred, claiming privilege of the Cinque Ports.[1] Chancery's decision is not known, but the situation illustrates the kind of difficulty that could so easily arise in Elizabethan England. Unless checked, causes could assume the movements of an endless roundabout. Fortunately, the common lawyers recognized the problem and, before the end of the reign, had freed inhabitants of the Cinque Ports from any restrictions on their right to go to law if they wished to sue an offending stranger for some action done within the Ports. If a stranger came into the Cinque Ports, committed a "transitory trespass" and departed, it was held that the sufferer, against whom the trespass was done, could have an action at common law. Otherwise he would be without a remedy. "For they can call none in who are out of their jurisdiction and the privileges were granted for the ease and benefit, and not the prejudice, of the inhabitants."[2]

The common lawyers had created other provisions whereby the deadlock of jurisdiction could be broken and so lessened the necessity for applying to equity for the mitigation of any unfairness. Thus a writ of *quominus* lay to the Cinque Ports. According to this fiction the plaintiff surmised that due to the defendant's behaviour he was unable to pay his debt (usually mythical) to the Queen. Such a surmise was sufficient to give jurisdiction of the cause to the court of Exchequer. The argument was that the Queen's interest could not be hindered by any local privilege.[3] On an analogous principle, it was

[1] *Cf.* my thesis, p. 403.

[2] D'Anvers, i. 793; G. Croke, *Reports*: *Elizabeth* (1661), 910-11. Crisp v. Verral, 1602; Coke, 2*nd Institute*, 557.

[3] Croke, *Rep. Eliz.*, 910-11. Crisp v. Verral, 1602. The Cinque Ports could not award process of outlawry. To have any meaning, outlawry—whether in the first or second degree—had to be valid throughout the whole kingdom. This was obviously beyond the scope of Cinque Ports process.

established, at least during the reign of James I, that a *habeas corpus* could be issued with respect to someone imprisoned at Dover. " For the privilege that the King's writ lies not there is intended between party and party, and there can be no such privilege against the King ; and an *habeas corpus* is a prerogative writ by which the king demands an account of the liberty of the subject."[1]

Chancery continued to play a role by providing relief when non-residents of the Ports still found themselves deprived of any remedy. This formed part of its jurisdiction to carry out the common law when other courts lacked the power or machinery to attain the desired end. The problem was fully discussed in 1601. Two plaintiffs, living in London and Ireland respectively, had bought corn from certain inhabitants of Dover which they proposed to transport to Waterford. The purchase price was in the region of £300 ; over half of this had already been paid and the remainder of the account was to be settled in London. The defendants defaulted on their part of the contract and, on being sued in Chancery, claimed privilege of the Cinque Ports. They also argued that a bill had been put in, and answered, at the court of St. James's. On 4th July, the master of Chancery, Dr. John Hunt, to whom the matter had been referred, reported his findings to the court. " This cause cannot well be sentenced and judged there [at Dover], for that they have no compulsory means against *foreigners*, to force them thither, out of Ireland or London, for the proving or disproving the surmises of the said bill, as this court has, and therefore is more competent herein, than that is." Hunt's argument was accepted and on 2nd October the defendant's plea was overruled.[2] Now there is something casuistical about this decision. The argument seems to be that the court of St. James's should not have jurisdiction of the cause in case it went *against* the plaintiffs. Yet these were obviously willing to press their suit in either court. It seems clear, therefore, that Chancery wished to confine Cinque Port jurisdiction to cases in which *all* the parties were inhabitants of the locality. This policy had become apparent several years earlier.

The very limitations of its process presented the equity court of St. James's as a possible nuisance, a likely blockage in the path of justice. Now, in all honesty, it must be admitted that this was only a small corner of the legal structure of England. Nevertheless, at a time when Chancery was being inspired by Lord Keeper Puckering into an assault on the greater provincial courts of equity, it is hardly surprising that Chancery lawyers should look askance even at Cinque Ports privilege. Indeed, it is clear that Chancery was determined to find a

[1] G. Jacob, *Law Dictionary* (1729), sub. tit. ; G. Croke, *Reports* : *James* (1658), 543-4. Richard Bourn's case, 1617.
[2] Monro, 23-4. Lucar v. Godwin, 1601.

way round this privilege even when no normal equitable reason existed to support its interference. To achieve this end it was necessary to find a flaw in the Lord Warden's authority.

" By the reign of Elizabeth it was stated generally that a court equity existed in the Ports by prescription".[1] It was precisely this element of prescription, openly admitted as it was, that was to be seized on by the Chancery lawyers. Unlike the other privileges of the Cinque Ports, the equity jurisdiction of Dover had no basis in grant or charter. As early as 1593, in Shetterdon v. Nowell, privilege of the Cinque Ports was not allowed but, as it happened, this can hardly have been a momentous decision. The defendant had already sat out process of contempt, been imprisoned and, on release, seems to have remembered this privilege as yet another delaying tactic. Chancery could therefore reject his plea as an impertinence, without raising the question of prescription.[2] In 1595, an apparently genuine plea of privilege came up and was referred to William Lambard—there cannot have been a more knowledgeable lawyer and historian of the area to call upon—and Mathew Carew, one of the oldest, wisest and delightfully cranky masters around the Chancery bench. They came down heavily against the privilege, arguing, in effect, that equitable jurisdiction was a royal prerogative which could only be delegated by express grant.

> We suppose it [the equity court of St. James's] to take the authority by prescription, to have jurisdiction of causes in equity, which are not guided by rules of law, but are determinable *pro arbitratu*, and much less can they by prescription demand cognizance thereof, which is not grantable without charter in the courts of the common law.

Referring to allowance of previous demurrers in Chancery, it was held that this had been done,

> rather *in partem solicitudinis* than *in supplimentum potestatis* of this high court, which has the dispensation of her Majesty's own pre-eminent equity and absolute judgment, from which no subject is or can be excused. And, as touching this grant, that they shall not be impleaded out of the said ports or their members, we think that the same ought to be restrained to pleas or suits at the common law, and that, without express words, it may not be extended to causes in equity.[3]

[1] Murray, 107.

[2] Monro, 629. Shetterdon v. Nowell, 1593. However the case was later to be remembered as a precedent. B.M. Egerton MS. 2254 f. 66 v. It was also a rule that a demurrer to the jurisdiction of the court had to be made before a certain stage in the proceedings else the opportunity was lost for ever. Such a limitation was a necessary precaution ; otherwise defendants might often think up claims of privilege when they saw a cause going against them.

[3] Monro, 25-6. Cheyney v. Godfrey, 1595.

Indicative of this determination to confine the local jurisdiction is a later case in which the above report was firmly cited as a precedent.[1]

Nonetheless, if Chancery was unwilling to accept prescription as being good enough in the above cases, it was quite willing to use that very same argument of prescription to show that the Lord Warden had authority in cases which only concerned inhabitants of the Ports.

The jurisdiction of St. James's was periodically attacked by the Portsmen themselves. In general, however, they seem to have been even more emphatic in not wishing to go to Westminster. Assuming an uncomplicated case there was, of course, no reason why they should wish to commence suit in London, unless there was some pressing, personal reason of the moment. Such emotions usually occurred to defendants. As Murray noticed—with reference to the somewhat isolated people of Faversham—they were willing to seek remedies of Dover as plaintiff, but not to answer these as defendants.[2] This, after all, was the normal human instinct to seek every legal escape possible and, still more, to perceive some special equity in one's own cause. Nevertheless, when a serious challenge to St. James's did arise from within, it was to be the Chancery at Westminster that decided the issue, giving a decisive verdict in favour of the Lord Warden. In 1599, a man of Faversham was imprisoned for refusing to make answer to a bill filed at Dover. His fellow townsmen claimed that Faversham was exempted by charter and that the proper place for relief in equity was the Chancery at Westminster.[3] The case came before Lord Keeper Egerton, assisted by Justice Gawdy. It was decided that,

> the said court of St. James's at Dover hath, time out of mind, been called the chancery court of Dover to give relief to any person dwelling within the Cinque Ports, and their members there, and is still used for that purpose, and was never contradicted until now.[4]

Elisabeth Murray says of the disturbance that " the danger of allowing a claim of this kind was that suits would be drawn to Westminster, and this was of far more danger than troubles arising out of abuses connected with St. James's court ".[5] In point of fact this case was drawn to Westminster, and it was the Chancery there which decided against Faversham and for the Lord Warden. The time for worrying about the loss of litigation had passed beyond redemption since Cheyney v. Godfrey, 1595. In effect, the court of St. James's at Dover owed its jurisdiction to a decree of the Chancery and, in a sense, it had been

[1] P.R.O. Supplementary Reports: C 39/24. Hill v. Ellwood; *cf.* B.M. Egerton MSS. 2254 f. 66v.

[2] Murray, 111-12.

[3] The mayor and jurats of Faversham had sought equitable relief in Chancery before. *Cf.* Monro, 410.

[4] Monro, 730-1. Hudson v. Taylor, 1599.

[5] Murray, 111.

deprived of the right to determine what matters it might deal with in equity. As with York or Ludlow, any defendant at Dover could commence suit at Westminster and it would be up to Chancery to determine jurisdiction. Egerton could afford to be conciliatory, even magnanimous. Chancery (compare its good relations with the court of Requests) had no wish to be inundated with all and sundry pleas in equity. As it was, the recognition supplied in Hudson v. Taylor still left the way open for Chancery to intervene in obvious cases of miscarriage and delay, or where one of the parties to a suit was not an inhabitant of the Ports.

Chancery played a notable part in confirming another privilege of the locality. Indeed it often bolstered up minor jurisdictions and liberties when they did not clash with its own interests. The mayor and jurats of each Cinque Port had the power to hold pleas, without any writ of error lying to the Queen's Bench. This position was challenged in the 1570's but any doubts were washed away by Chancery's rulings in Mercer v. Tolkyn, 1578-81. It was declared, with the agreement of the two Chief Justices, that no writ of error lay out of Chancery to any of the Cinque Ports. Instead, errors—by a bill in the nature of a writ of error—were to be reversed by the Lord Warden in the court of Shepway.[1] In such instances, the mayor and jurats were liable to be fined and the mayor removed from office. This somewhat stringent system was naturally unpopular with many of the Portsmen who would have preferred a different method of reversing false verdicts. In 1581, pointed reference was made to " the Queen's justices who are not punished for those things they do . . . "[2] It may well be that the judgement in Mercer v. Tolkyn, although confirming a major privilege, was a considerable disappointment to some leading inhabitants of the Cinque Ports.

Chancery's relations with the Cinque Ports reflect a prevalent pattern. Throughout the country there was a real need for equitable remedies to offset the inadequacies of common law procedure, but these remedies were rapidly being adopted by the common law courts themselves. On the other hand, Chancery, in an attempt to establish a near-monopoly of equitable jurisdiction, lashed out at all provincial rivals but, having gained its point, was content to leave them with the bulk of their former business : litigation that was entirely local in origin, trivial in content or relatively uncomplicated. All this did not prevent the Chancery at Westminster from playing some part in maintaining the *status quo* of provincial privileges.

[1] " Choyce Cases " (*English Reports*, XXI), 127 ; Monro, 477, 505 ; C33/60. ff. 2v., 41v., 154, 223, 402v. Mercer v. Tolkyn, 1578-81. Rye was the port concerned.

[2] Murray, 112 ; Coke, *2nd Institute*, 557 ; *4th Institute*, 224 ; J. Dyer, *Reports* (1672), 376a.