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The Development of Principles in Equity in the Seventeenth Century: An Introduction for Non-Lawyers

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The Development of Principles and Rules in Equity in the Seventeenth Century: An Overview

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Introduction

Legal history is an important part of the history of ideas—a part that historians of ideas overlook too often. For, the law provides many of the institutions that enable a society to operate. It is one of the main means by which a minimum content is given to ideas about how one person should treat another, and to ideas about how a society should work—a minimum content because it identifies those obligations that can be enforced, rather than being merely matters of exhortation. It has the advantage over many theories of ethics and political philosophy that it descends to particulars, and can provide specific answers to questions about what is to be done in a particular situation.

English legal history is the product not only of events in the court system, but also of events in English history, indeed sometimes European history, that happened outside the court system. Many contingent factors have shaped the strand of English law known as equity. The more important ones include the huge religious dislocation of the Reformation, and the rise of scientific knowledge and the doubts it brought about how certain knowledge could ever be obtained. Other influences came from changes, most acutely expressed in events leading to the English Civil War, in theories about how the King and the church related to each other, the source of law, and the proper roles of the monarch and the parliament.

This paper gives an outline of the distinctive role that the Court of Chancery played in the system of English law, the external forces that caused the Court to come to rely on principles and rules, and the general nature of its principles and rules. It does not give the detail of the specific changes that occurred concerning the multitude of different topics that fell within the jurisdiction of Chancery.

In particular the paper examines how, in the course of the seventeenth century, the Court of Chancery underwent a paradigm shift. It moved from deciding cases using relatively unformed criteria of conscience, to deciding them by reference to articulated principles and rules. For centuries after the Chancellor first began to decide disputes as the King's delegate, he based his jurisdiction on the King's obligation and prerogative right to administer justice. But after the violent political struggles of the seventeenth century had confined the royal prerogative, it was only if the prerogative was exercised in accordance with particular rules and principles that it provided an acceptable basis for the court's operation.

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Originally Chancery had used the requirements of conscience, understood to be objectively knowable, as its standard of judgment. But during the late sixteenth century and the seventeenth century ideas from the Reformation and the scientific revolution had the effect that the concept of conscience could no longer provide an objective standard of judgment. It was ascertainable rules and principles that provided the objective standard of judgment that Chancery came to use instead.

But a rule or principle of equity operated differently to the rules and principles of the sciences. It arose through a casuistical process, and could provide a standard of decision for a factual situation different to the one concerning which it had been formulated in only a provisional way. However, other equitable rules and principles, and the procedures by which equity litigation was conducted, set limits to the extent to which the rule or principle could be departed from. These characteristics of equitable rules and principles, first clearly visible in the seventeenth century, persist in the law of equity today.

1. Lightning sketch of role of Court of Chancery in English law

About 100 years after the Norman Conquest Henry II set about establishing some royal courts[1] that were open to any of his subjects. Part of the justification for doing so was that the King claimed to be the fount of all justice. The coronation oaths of kings traditionally included an oath to dispense justice to all[2]. This obligation of the King had as its converse that the King had a prerogative power to create courts and to decide how they would operate.

[1] There were three such courts, the Court of Kings Bench, the Court of Common Pleas and the Court of Exchequer

[2] The precise words of the oath changed from time to time, but the central ideas in it had a remarkable consistency for over a millennium. It is accurate enough to say, "The king bound himself by a threefold promise to preserve peace and protect the church, to maintain good laws and abolish bad, to dispense justice to all. This oath had been taken by English kings from the tenth century: it was taken by William the Conqueror and by his successors," H G Richardson, H. G. "The English Coronation Oath," (1941) ***Transactions of the Royal Historical Society***, Vol 23 at 129–158. C Condren ***Argument and Authority in Early Modern England,*** Cambridge: Cambridge University Press 2006 (hereinafter Condren, ***Argument and Authority***) at 254 distills the central obligations as, "to act justly, and maintain law, custom, religion and the office itself." The earliest extant version of the oath, administered by Dunstan, Archbishop of Canterbury in the period 959–988, includes words translated as, "I promise and command justice and mercy in all judgments": http://www.earlyenglishlaws.ac.uk/laws/texts/sacr-cor/view/#edition,1/translation,1. The oath of Edward II included a promise, "to do equal and right justice and discretion in mercy and truth": *Statutes of the Realm*, 1: 168, cited in J H Baker, ***An Introduction to English Legal History***, 4th edn, Oxford: Oxford University Press (hereinafter Baker ***IELH***) at 98. The coronation oath of Henry VIII included an affirmative answer to the question, "Will you so far as in you lies, cause justice to be rendered rightly, impartially and wisely, in compassion and in truth?," C Stephenson and F G Marcham, eds. (1937) ***Sources of English Constitutional History***, vol. 1, New York: Harper Brothers 1937 at 192. For the accession of William and Mary in 1688 Parliament's victory over the Stuarts concerning the prerogative led to the *Coronation Oaths Act 1688* prescribing a different version of the second promise in the oath, to make clear that the monarch was bound to govern "according to the statutes in Parliament agreed upon, and the laws and customs of the same."

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There had previously been local courts, which treated local customs as having the force of law. Those customs could differ from one local court to another. The law that the royal courts applied was, in theory, custom that was common to the whole of England. Hence it was known as the common law. English customary law was different to the civil law, based on Roman law, which came to be applied in many parts of Europe.

However the royal courts did not provide a remedy for every type of legitimate complaint of wrongdoing. Every action in the royal courts had to be initiated by a writ, issued from the office of a royal official akin to the King's secretary, the Lord Chancellor[3]. There was a limited number of types of writs available, for a limited number of types of complaint.

At first the royal courts granted a wide range of remedies[4]. However by the early fourteenth century the royal courts had restricted themselves so that they provided only a limited range of remedies. Broadly, they could order the defendant to pay monetary compensation (damages), or they could order that the sheriff put the plaintiff into possession of a particular parcel of land.

The limited types of complaints that the royal courts would hear, and the limited remedies provided for those types of complaints that they did hear, led to people petitioning the King that the justice offered in his courts was inadequate, and that he should render them justice himself. As the fount of justice, the King had the power to fix defects in the way in which his own system of justice had operated in the common law courts. As well, because of his coronation oath he had a sacred obligation to do so[5]. The King delegated the hearing of those petitions to the Chancellor[6].

The Chancellor dealt with the petitions in a systematic way, and by the fifteenth century it came to be recognised that the Chancellor was holding his own court in doing so[7]. The Chancellor's court was called the Court of Chancery. In time the Chancellor came to have power to issue orders to fix defects in how the common law courts had operated in particular cases, or to satisfy a complaint

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However the 1688 version continued to contain a promise to "cause law and justice in mercy to be executed in all your judgments." Also see text at footnote 45 below

[3] The Lord Chancellor held the Great Seal, a symbol of royal authority, which was used to authenticate the writs he issued. Holding the Great Seal became a symbol of exercising the functions of the Lord Chancellor.

[4] The judges of the common law courts were also often clerics, and were influenced by Church moral teaching. This affected the comparatively broad approach they adopted to available remedies in the first two or three hundred years of the existence of the common law courts. See Harold Potter, ***Historical Introduction to English Law*** (3rd ed 1948) (hereinafter "Potter, ***Historical Introduction***") p 551-552, Sir William Holdsworth ***A History of English Law Vol V*** (3rd ed Methuen & Co London 1945) (hereinafter "***Holdsworth V***") p 215.

[5] See below at footnote 31 for the significance in medieval England of an oath

[6] Sir William Holdsworth ***A History of English Law Volume 1*** (7th edition 1956 Methuen & Co London) (hereinafter "***Holdsworth I***") p 403. Sometimes the Chancellor's legal duties would be carried out by a temporary Chancellor, called the Lord Keeper of the Great Seal. Because their legal functions were the same, throughout this paper I will refer to the *Chancellor* as covering both Lord Chancellor and Lord Keeper, unless a distinction is explicitly made between a Lord Chancellor and a Lord Keeper.

[7] ***Holdsworth I*** p 404 – 407

about a type of wrongdoing that the common law did not recognise. The Chancellor came to have power to do this himself, rather than merely advising the King what the King should do[8].

From the Norman Conquest until the reign of Henry VIII the Chancellors were nearly always clerics. Sometimes a cleric appointed as Chancellor was also trained in the common law, but usually not. Their views about proper behaviour were moulded by the moral teaching of the Church.

By the time the Chancellor was holding his own court the Church's moral teaching was significantly influenced by St Thomas Aquinas. A central notion in Thomist ethical teaching is that of conscience[9]. Conscience was the guiding principle that the Chancellor used in dealing with petitions, and the Court of Chancery was referred to as a court of conscience.

In keeping with the clerical training of Chancellors the primary objective of the Court of Chancery was cathartic – to save the soul of the defendant by not permitting him to engage in the mortal sin of acting contrary to conscience. It did this by sometimes ordering a defendant not to engage in an action that was contrary to conscience, sometimes by ordering him actually to carry out actions that conscience required. Sometimes conscience required a defendant to act in a way that was different from the way in which the common law would hold he was either entitled, or at liberty, to act.

The justification for Chancery requiring action that differed from the common law's requirements is found in the common medieval view about the nature of law. It was that

> "the law of God governed the universe, and hence His law and the law of nature and reason, which was nearly synonymous, predominated over the rules of any State. The human law could not be valid in contradiction to divine law."[10]

Thus it was not only permissible, but necessary, for the Chancellor (or the King on the advice of the Chancellor)

> "to interfere with the course of the law in a particular instance, even where the general rule was just, if according to conscience it would work against the law of God."[11]

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[8] The Chancellor was assisted by 12 Masters, and a large number of clerks: ***Holdsworth I*** p 417, 421-423.

[9] An important and thorough account of the role that conscience played in the Court of Chancery, particularly in the sixteenth and seventeenth centuries is Dennis R Klinck, ***Conscience, Equity and The Court of Chancery in Early Modern England*** (Ashgate Publishing, Farnham 2010) (hereinafter "Klinck, ***Conscience***")

[10] Potter, ***Historical Introduction*** p 559. This was made explicit in St Germain's ***Doctor and Student*** (discussed at page 10 below): "When the law eternal or the will of God is known to his creatures reasonable by the light of natural understanding, or by the light of natural reason, that is called the law of reason: and when it is showed of heavenly revelation … then it is called the law of God. And when it is showed unto him by order of the Prince, or any other secondaries governor, that has power to set a law upon its his subjects, then it is called a law of man, though originally it be made of God" "For if any law made of men bind any person to anything that is against the said laws (the law of reason or the law of God) it is no law but a corruption and a manifest error": quoted Potter, ***loc cit***

[11] Potter, ***loc cit***

There was yet another system of courts, the ecclesiastical courts. These courts were held by officials of the Church. Rights of appeal went from them, ultimately, to the Pope. They had jurisdiction over the passing of personal property upon death (whether through a will or through an intestacy)[12], over matters concerning marriage, and over matters that related to the financing and internal administration of the church. The law that they applied was canon law.

The English Reformation in the 1530s sowed seeds that would later influence the development of Chancery. It ended the medieval theory of the relations between Church and State, under which the Church was supreme concerning spiritual matters and the King supreme concerning temporal matters. The Reformation made the King the supreme authority in both temporal and spiritual matters[13]. The making of new canon law without permission from the King was forbidden[14], the teaching of canon law in the universities was discouraged, and doctors of the civil law (rather than canon lawyers) were permitted to exercise authority in the ecclesiastical courts[15]. The King, rather than the Pope, became the ultimate source of authority for the ecclesiastical courts.

The Reformation had the effect that the King became the fount of justice for the ecclesiastical courts. Therefore after the Reformation the common law courts increasingly issued writs of prohibition to keep the ecclesiastical courts within their jurisdictions. As well the King, through his Chancellor, came to exercise a similar power to correct shortcomings of the ecclesiastical courts as he exercised to correct shortcomings of the common law courts[16].

2. Pre-Reformation Chancery and the Thomistic Understanding of Conscience

[12] This jurisdiction came about because the Church regarded a man as having an obligation of conscience to make a will that disposed of his personal property. Real property passed on death in accordance with fixed rules of law, but a man was free to dispose of his personal property as he wished.

[13] The ***Statute of Appeals 1533*** declared the King to have power in both spheres, and outlawed appeals to the Pope in ecclesiastical matters. The ***Act of Supremacy 1534*** declared the King the head of the English Church. See generally ***Holdsworth 1*** p 588 – 592.

[14] The ***Submission of the Clergy Act 1532***

[15] ***Holdsworth 1*** p 592

[16] Much of the supervision of the administration of deceased estates came to be carried out in Chancery. For example, the ecclesiastical courts would require an executor to pay a legacy only if the legatee gave security to refund it if then-unknown creditors emerged; Chancery developed a remedy of requiring an overpaid legatee to refund, which enabled it to order payment of the legacy without any security: ***Ministry of Health v Simpson*** [1951] AC 251 esp at 266 – 267. Chancery permitted a creditor of a deceased to apply to it to compel an executor to pay a debt of the deceased: Dennis Browne (ed), ***Ashburner's Principles of Equity***, 2nd ed London Butterworths 1933 (hereinafter "***Ashburner***") p 410.

Up to near the end of the sixteenth century the way conscience was spoken of, concerning the Chancery, was not as an attribute of an individual person. Rather, an action was alleged, or found, to be "against conscience" - not against the conscience of the defendant, or of any other particular individual. The requirements of conscience were treated as being objectively ascertainable.

The objectivity of the requirements of conscience arose through the account the scholastics gave of moral obligation. It involved two separate concepts, *synderesis* and *conscientia*. *Synderesis* was seen as being a faculty or disposition[17] that was innate in people by which they perceived the moral law. The moral law had an external, objective existence, being laid down by God. To some extent it was part of the natural law, to some extent it was revealed in both the Old Testament and the New Testament.

Conscientia "involves the application of the knowledge afforded by *synderesis* to actual, particular situations"[18]. When the moral law ascertained by *synderesis* was objective, and the facts of the particular situation under examination were known, the requirement of conscience in that situation was itself an objective matter.

This usage in the late medieval law is illustrated by remarks of Fortescue CJ (c. 1394 – 1476) in an Exchequer case. He said "We are not to argue law in this case but conscience"[19], and said the word:

> "comes of *con* and *scioscis*. And so together they make 'to know with God' to wit: to know the will of God as near as one reasonably can."

One of the few recorded pre-Reformation Chancery judgments contains Chancellor Morton's[20] response to an executor who relied upon having no liability at common law for having released a debt that was owing to the testator:

> "Every law should be in accordance with the law of God; and I know well that an executor who fraudulently misapplies the goods and does not make restitution, will be damned in hell, and to remedy this is, as I understand it, in accordance with conscience."[21]

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[17] There was some debate about whether it was a faculty (ie a potentiality of the human mind to apprehend a particular type of thing, in the way the faculty of sight enables visible things to become known) or a disposition (ie a habit or inclination). The difference does not matter in understanding the medieval notion of conscience for present purposes.

[18] Klinck, ***Conscience***, p 33

[19] my translation. The case is reported under the heading "conscience" in Nicholas Statham's Abridgement des libres annals, published 1490, recounted in Klinck, ***Conscience***, p 15 – 17. The Exchequer was a court whose particular concern was disputes that related to the royal revenues. From at least a decade before the accession of Queen Elizabeth it applied both common law and equity: W H Bryson, ***The Equity Side of the Exchequer***, Cambridge University Press 1975 p 3.

[20] John Morton was Chancellor 1487 - 1500, at a time when he was also Archbishop of Canterbury.

[21] Cited ***Holdsworth V*** at 222. Slightly different words, to the same effect, are cited from Y.B. Hil. 4 Hen. 7, f.4, p.8 (1489), in C.H.S. Fifoot, ***History and Sources of the Common Law: Tort and Contract*** (Stevens & Sons London 1949) 326.

That Chancery required defendants to act to carry out their obligations of conscience was consistent with the Church's teaching. For many sins the Church required not just penitence and reformation, but also taking action to undo or compensate for the wrong that had been done[22]. A priest vicariously exercised God's powers concerning conscience, so confession to a priest and performance of the penance the priest required gave the possibility of obtaining absolution. This was consistent with the pre-Reformation Chancellor (a priest, though with judicial authority) being able to ascertain what conscience required a particular litigant to do, and ordering him to do it.

3. Types of inadequacy of the common law corrected by Chancery

The inadequacy of the common law manifested itself concerning the substantive legal obligations that it recognised a person as owing, concerning the remedies available if an obligation had been breached, and concerning the procedure through which litigation was conducted.

3.1 Substantive law

Chancery supplemented the common law by recognising obligations unknown to the common law about the ways in which rights and duties that the common law recognised should be exercised. For example, if property had been transferred to X on the basis that X would use the property for the benefit of Y, Chancery would require the property to be used in that way; if a mortgagee of land had a common law right keep the land because the mortgagor did not repay punctually the debt secured over the land, Chancery would sometimes require the mortgagee not to exercise his right to forfeit the land.

Chancery also recognised obligations that did not relate to common law rights and duties. For example, if X had taken on the task of administering Y's business affairs, Chancery would require X to provide detailed accounts of what he had spent and received in administering those affairs, and to correct any shortcomings in his administration of Y's affairs. In each case Chancery created these obligations because it saw the defendant as having an obligation of conscience to act in the way that Chancery required.

[22] Klinck, ***Conscience*** p 27

One of the effects of the pervasive influence of the concept of conscience in Chancery was that the emphasis of the common law was on the plaintiff's right, but the emphasis of Chancery was on the defendant's duty[23].

3.2 Remedies

Once rigidity had set in in the fourteenth century, the only remedy that the common law offered was damages, or an order restoring possession of land. The Chancery had a far more extensive range of orders. Unlike the common law, Chancery's orders were moulded to fit the facts of the particular case, and stated with considerable precision what the defendant must do to undo his particular breach of the requirements of conscience. Without being exhaustive, they included orders requiring specific performance of obligations that the defendant had undertaken[24], injunctions directing a defendant to do or to not do some specific act, orders for the undoing of transactions that had been procured by means that were contrary to conscience like fraud or misrepresentation or undue influence, and orders stripping a defendant of any profit he had made through unconscientious dealing with the plaintiff. The common law could offer a remedy only once a wrong had been done, but Chancery could issue an injunction to prevent a wrong being done. The common law allowed fraud as a defence to an action, but only the Chancery could order the delivery up and cancellation of documents that had been entered as a result of fraud[25].

3.3 Procedure

The common law required a plaintiff to prove his case by evidence that he mustered himself. All the evidence had to be given on the one occasion, at a trial before a jury, either by witnesses giving oral testimony or by the tendering of documents and other physical objects as exhibits. The parties were not permitted to give evidence. If the facts were known only to the plaintiff, the defendant or to other people who would not co-operate with the plaintiff, the allegations could not be proved.

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[23] This expressed itself in the forms of the orders of the respective courts. "Upon a decree in Chancery the Chancellor directed that the defendant to pay the money due: the Court of law adjudged the plaintiff entitled to recover a certain sum.": DEC Yale (ed) Introduction to ***Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity*** (Cambridge University Press 1965) p 20. I will refer to the introduction in that book as "Yale, ***Introduction***", to the book as a whole as "***Two Treatises***", and to the treatises individually as "***Manual***" and "***Prolegomena***".

[24] Ie, an order that the defendant actually do what he had undertaken to do

[25] ***Holdsworth 1*** p 457

The Chancery's procedure for conducting litigation derived from the canon law[26]. Unlike the common law not permitting the parties to give evidence, Chancery *required* the defendant to attend at court and to answer questions on oath concerning the allegations, and to disclose documents that related to them. Usually the plaintiff was required to swear to the correctness of his allegations. Chancery could require witnesses who were not parties to attend court to answer questions on oath[27]. There was no jury. The evidence might be given on different occasions rather than at a single trial. If someone was too ill to attend the court [28], or might die before the hearing could take place[29] Chancery could order that evidence on oath in written form be taken from him. It could require someone to disclose the identity of a person he had dealt with, so that the plaintiff could sue that person[30].

4. Chancery procedures and conscience

A significant reason why Chancery adopted these procedures arose from the way in which *synderesis* and *conscientia* were understood to interact. It was only if the Chancellor was confident that he knew the facts concerning a case that he could apply the revelations of *synderesis,* and so ascertain what conscience required in the case. If the Chancellor was to know the facts correctly he could not leave it to the chance of whatever evidence the parties might put before him. He followed the example of the canon lawyers, of extracting confessions upon oath from the defendant, and requiring evidence on oath from the plaintiff and witnesses. The evidence was required to be given on oath because the litigant would understand that a lie on oath was sinful[31], and that sin could lead to eternal damnation.

[26] ***Ashburner*** p 22

[27] Originally the questioning of both the defendant and the non-party witnesses was oral, but by the reign of Elizabeth the questioning was done before examiners, with the questions and answers recorded in depositions: ***Ashburner*** p 24

[28] Eg ***Wade v Gwye*** (1558-59) Cary 41, 21 ER 22; ***Bagnold v Green*** (1559-60) Cary 48, 21 ER 26

[29] Eg ***Barentine v Harbert*** (1559) Cary 42, 21 ER 23

[30] ***Holdsworth V*** p 332

[31] Its sinfulness was shown by Numbers 30: 1-2 "Moses said to the heads of the tribes of Israel: "This is what the Lord commands: When a man makes a vow to the Lord or takes an oath to obligate himself by a pledge, he must not break his word but must do everything he said." It was also shown less directly by Exodus 20:7 and Numbers 32: 20 – 24.

Further, even non-parties were required to provide information and documents that were relevant to a piece of litigation. This was because for a person to remain silent about a matter that he knew about, where his silence prejudiced another, was seen as being a mortal sin[32].

Conscience also affected the way in which Chancery enforced its decrees. A person who did not obey an order of Chancery was in contempt of court, and could be committed to prison until he had purged his contempt. His failure to obey the decree meant that he had not yet acted as conscience required, so strong means were justifiable to save his soul.

Chancery never enquired whether a judgment that had been given at common law had wrongly applied the common law. Rather, it enquired whether, by reason of circumstances that were not taken into account in the judgment, it was against conscience to enforce it. Similarly, if judgment had not been given, Chancery enquired whether there were matters beyond those which gave someone a right under the common law, which provided a reason why in conscience that right ought not be exercised. Chancery could issue a common injunction, an order to a litigant not to enforce a common law judgment that had been given, or an order to a litigant not to proceed with a common law case that he had started, or not to rely on some particular argument in the common law case. In this way a significant part of the scope for operation of conscience in Chancery was very firmly rooted in the common law – Chancery interfered in the common law only to the extent that the common law was inadequate to comply with the requirements of (objectively determined) conscience. Further, in connection with a defendant's exercise of his common law rights Chancery operated *in personam* – by commanding the defendant what he was to do concerning his legal rights.

5. Equity

The word *equity* has multiple shades of meaning. Even concerning the law, it has been used in varying ways. Without being exhaustive, it has meant treating like cases alike[33], construing statutes in accordance with their purpose, an intrinsic aspect of the common law[34] whereby all laws are interpreted in a way that is just[35], a filling of gaps in the law, and a power of ameliorating harsh consequences of rigid laws. In the course of the sixteenth and seventeenth centuries *equity* came to

[32] James Q Whitman, "***The Origins of Reasonable Doubt": Theological Roots of the Criminal Trial***" (Yale University Press 2008) (hereinafter "***Reasonable Doubt***") at 94 and 104 attributes this view to Vincent of Beauvais, Hostiensis, Giuliemi Durandi (in ***Speculum Iuris***, Venice, 1576), and to a work Ordo Judicarius "Scientiam".

[33] Cicero, Topica 4 23: "Valeat aequitas, quae paribus in causis paria iura desiderat.". The glossator Martinus in 12th century Bologna paraphrased it as "Aequitas est rerum convenientia, quae paribus in causis paria jura desiderat", and Martinus' language was adopted by Bracton in the 1250s in ***De Legibus et Conuetudinibus Angliae*** Vol 2 p 25

[34] Hake, cited in Klinck, ***Conscience***, p 100

[35] the Roman law concept of *aequitas*

be used in England to refer to the principles that were applied in the Chancery court[36] to supplement and correct the common law.

It is in the writing of Christopher St Germain (1460 – 1540) that the notion of equity being administered by Chancery gains currency. In 1528 he published, in Latin, *Dialogus de fundamentis legume Anglie et de conscientia*[37]. This text is more commonly known as *Doctor and Student* because it takes the form of a dialogue between a Doctor of Divinity and a student of common law. It was the first extended account of the role of equity in English law. An English translation appeared in 1530 or 1531, and was regularly reprinted into the seventeenth century. It continued to be relied on even after the seventeenth century[38]. St Germain continued to regard the role of conscience as fundamental, but he also gave currency to the notion that Chancery was a court of equity. By the end of the seventeenth century conscience had by no means disappeared from the discourse about the Court of Chancery, but the notion that Chancery administered equity was well established.

6. Equity's Change to More Being Based on Identifiable Principles in the Seventeenth Century

Well before the seventeenth century there had been recognised types of cases concerning which equity would grant relief. Sir Thomas More said that:

> three things are helped in conscience,
>
> fraud, accident and confidence[39]

[36] A variety of English courts have administered equitable jurisdiction – Chancery, the Court of Requests at Whitehall, the equity side of the Exchequer, and minor courts like the courts of the Palatinates and the City of London. However by far the most significant was Chancery, and I will confine attention to that court.

[37] An accessible translation is Saint-German, C. (1974) *Doctor and Student*, eds. T. F. T. Plucknett and J. L. Barton London: Selden Society, Vol. 91.

[38] St Germain's notion of equity was not confined to the role of the Chancery - he also has a concept of equity of a statute (something like its purpose) which is administered by the common law courts. One of his examples of this was that if there is a statute that forbids citizens to open the city gates before dawn, but the gates are opened to allow in some citizens fleeing an enemy, the statute is not breached. Another is that there is no breach of a statute forbidding the giving of alms to sturdy beggars if the gift is of clothing to protect a beggar in imminent danger of freezing to death. At other times he speaks as though the common law courts as well as Chancery dispensed equity - see Klinck, ***Conscience***, p 44 – 50.

[39] 1 ***Rolle's Abridgement*** 374. "Accident" refers to a person losing a legal right through a misfortune not of his own making. "Confidence" is the type of confidence that a person displays in transferring land to X to the use of Y, or in giving X power to administer business affairs on his behalf.

As well, from the fifteenth century Chancery had a recognised jurisdiction to relieve against mistake, and against penalties and forfeitures. It had a recognised jurisdiction to enforce "uses" of land[40]. Chancery's ground for interfering in all these areas was to prevent behaviour contrary to conscience, but the topics concerning which it could grant remedies operated as a primitive statement of the principles which it applied – for example, it operated to undo breaches of conscience concerning forfeitures of mortgaged land, or operated to undo breaches of conscience concerning fraud. Furthermore, there was some predictability about the sorts of circumstances that would be seen as being contrary to conscience concerning those topics.

Holdsworth says that in the period after 1616:

> "Equity tended to become less a principle or a set of principles which assisted, or supplemented, or even set aside the law in order that justice might be done in individual cases, and more a settled system of rules which supplemented the law in certain cases and in certain defined ways. We can see the beginnings of this change in the first half of the seventeenth century. But, during this period, its progress was hindered by the victory of the Parliament, because Parliament suspected the equity administered by a Chancellor in intimate relations with the King. Thus, although we can see the origins of some of our later equitable rules, they are, as yet, very rudimentary. We must wait till the latter half of the seventeenth century for marked progress in this process of transformation. It is not till then that the lineaments of our modern system of equity begin to emerge with any distinctness."[41]

The change occurred concerning the substantive obligations that Chancery enforced: the court continued to grant the remedies and use the procedures that it had previously developed.

The judge who made the greatest contribution to this transformation of Chancery in the seventeenth century was Lord Nottingham, Chancellor from 1673 to 1682. He is rightly referred to as the father of modern equity[42].

The transmutation of Chancery into a court governed by identifiable principles and rules is illustrated by comparing accounts of Chancery given in 1615 and around 1674. In 1615 the Chief Justice of the Court of Common Pleas said that the common law courts and Chancery

> " … are fundamental Courts, as ancient as the kingdom itself, and known to the law, for all kingdoms in their constitution are with the power of justice both according to the rule and of law and equity, both which being in the King as sovereign, were after settled in several Courts, as the light being first made by God, was after settled in the great bodies of the sun and moon. But that part of equity being opposite to regular law, and in a manner an arbitrary disposition is still administered by the King

[40] See page 6 above .

[41] ***Holdsworth, V*** p 217 -218.

[42] Strictly Nottingham was Lord Keeper 1673 – 1675, and Lord Chancellor 1675 – 1682. Yale, ***Introduction***, says "The nine brief years during which he held the Great Seal were decisive for the future of Equity". Some but not all of Lord Nottingham's judgements were published in the early 19th century, in Swanston's reports (reproduced in volume 36 of the English Reports). All his judgements, edited by DEC Yale, were published in 1957 and 1961 respectively in volume 73 and 79 of the Selden Society. I refer to those volumes as ***LNCC 1*** and ***LNCC 2***.

> himself and his Chancellor, in his name ab initio, as a special trust committed to the King, and not by him to be committed to any other. And it is true, that the one is bound to rules, the other absolute and unlimited, though out of discretion they entertain some forms, which they may justly leave in special cases.[43]

This passage continues to recognise the King as the fount of justice, and that he has delegated his power to dispense justice to the courts. It also sees Chancery as arbitrary, and not bound by rules as the common law courts are – that the power of the Chancery is unlimited, and that while there are some usual practices ("forms") in Chancery they are not binding, but rather are adhered to or departed from as a matter of discretion.

This is to be contrasted with Lord Nottingham's account of Chancery jurisdiction, written in about 1674, near the beginning of his period of judicial office[44]. Nottingham explained the origin of the power of Chancery:

> "… kings being sworn at their coronation to deliver their subjects *aequam et rectam justitiam*, the King must either reserve to himself or refer to others a power to supply or correct the rigor of positive law, which neither is nor can be a perfect rule in all cases.'[45]

However he immediately went on[46] to qualify the absoluteness of the power that Chancery could exercise:

> "And now the matter is so settled that it is become a maxim in our books that the Chancery can only relieve in such cases where the party has no remedy at the Common Law …
>
> And yet all cases that are without remedy at common law, are not relievable in equity; nor is the rule *nullus recedat a cancellaria sine remedio*[47] so to be understood: for some cases are only to be considered between a man and his confessor. As for example, a man swears off a true debt by wager of law[48], or the grand jury affirm a false verdict in an attaint[49], no court of conscience can help these

[43] ***Martin v Marshall*** (1615) Hobart 63; 80 ER at 212. Hobart was Chief Justice of the Court of Common Pleas 1613 - 1625

[44] Yale, ***Introduction***, p 76

[45] ***Prolegomena*** Ch III [25], in Yale (ed) ***Two Treatises*** p 193

[46] ***Prolegomena*** Ch III [26] and [27], in Yale (ed) ***Two Treatises*** p 193-194

[47] "No-one should depart from the Chancery without a remedy".

[48] Wager of law was a medieval procedure where the defendant in a criminal trial swore that he was innocent, or the defendant in a civil claim swore that the claim was not well founded, and other people swore that he was a credible person. It survived concerning actions for debt until the 19th century: Theodore Plucknett, ***A Concise History of the Common Law*** (5th ed Butterworths 1956) (hereinafter Plucknett, "***Concise History***") p 115-116.

[49] The grand jury was a body of men drawn from the locality where a crime had been committed who had the responsibility of deciding whether a person should be required to stand trial for the crime. They were required to swear that they would give a true verdict. They acted on the basis of notorious local knowledge, rather than evidence in the modern sense, and were a combination of compelled witness and compelled accuser: Whitman, ***Reasonable Doubt***, 136 – 137. A grand jury was also used in medieval times to decide civil claims on

> cases. Yet the party is bound to restitution *sub periculo animae*[50]. *Angusta est innocentia ad legem bonam esse*[51]. And God forbid, a man should use no better conscience than the Chancery can compel him, however the rule must always hold, that 'tis not fit for a court of equity to do everything that is fit to be done; for there is a twofold conscience, *viz conscientia politica et civilis, et conscientia naturalis et interna*. Many things are against inward and natural conscience, which cannot be reformed by the regular and political administration of equity: for if equity be tied to no rule, all other laws are dissolved, and everything becomes arbitrary. Some say, he is called *cancellarius, qui intra cancellos agit*[52] "

In 1676 Nottingham echoed these thoughts in his decision in ***Cook v Fountain***[53]:

> "If after all this a man will still suppose that there was a secret trust, security, or agreement between the parties to repurchase this rent, which no bill charges, no proof can make out, and the defendant denies upon oath, then it must be such a trust, security or agreement as is only between a man and his confessor. With such a conscience as is only *naturalis et interna* this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures[54]; and it is infinitely better for the public that a trust, security or agreement, which is fully secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor."

Concerning the need for equity to be rule-based, in 1678 he wrote:

> "But yet Justice is a severe thing and knows no compliance nor can bend itself to any man's conveniences, and equity itself would cease to be Justice if the rules and measures of it were not

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the basis of the local knowledge of the jurors. An attaint was, in general terms, the loss of all civil rights suffered by someone who was convicted of treason or a felony. It had a particular meaning concerning decisions by a grand jury in a civil trial, namely that a second jury was empanelled to decide whether the first jury had given an inaccurate verdict. It was also an inquiry into whether the members of the first jury had perjured themselves, by giving a verdict they knew to be false. If it was found that the members of the first jury had perjured themselves they suffered the usual punishment for an attaint: Plucknett, ***Concise History*** p 131-133.

[50] "At the peril of his soul"

[51] "What narrow innocence it is to be good only according to the law" (Seneca, De Ira II 27)

[52] "The Chancellor, who acts within barriers/boundaries/limits"

[53] (1676) 3 Swans 585 at 600, 36 ER 984 at 990. Nottingham was considering a contention that counsel for the plaintiff had advanced in the course of argument even though it had not been alleged in the bill. The contention was that a rent-charge (a type of interest in land) that the plaintiff's deceased father had given to the defendant was given on the basis that it was to be a security for the father later making a substantial gift to the defendant, and that when that gift was later made the rent-charge came to be held on trust for the father, because the purpose of transferring the rent-charge had then been accomplished.

[54] By "certain measures" he means clear known standards. One wonders if he was trying to answer Sir John Selden's parody of Chancery, quoted in text at note 98 below.

> certain and known. For if conscience be not dispensed by the rules of science, it were better for the subject that there were no Chancery at all than that men's estates should depend upon the pleasure of a Court which took upon itself to be purely arbitrary."[55]

Nottingham applied the notion of the difference between private conscience and the principles enforced in his court in a case where a son had given a note in which he promised to pay his father's debts:

> "If this note were voluntary and without consideration[56], though it did bind the son in honour and private conscience, with which I had nothing to do, it could not bind him in legal and regular equity …"[57]

7. Causes of the Development of Principles and Rules in Seventeenth Century Equity

Several quite heterogeneous causes of Chancery's change to being governed by principles and rules can be identified. Some of the causes predated the 17th century, but it was only in the course of the 17th century that they came to interact with other causes to result in Chancery acting in a much more principled fashion.

7.1 Chancery's Jurisdiction to Issue Common Injunctions Finally Established

The significance of Holdsworth's nominating 1616 as the start of the time during which Chancery became more rule-bound [58] is that it was then that King James issued a proclamation that settled a long-running jurisdictional battle between Chancery and the common law courts over whether Chancery had power to issue an injunction requiring a defendant not to enforce a common law judgment that he had obtained[59]. James's decision was in favour of the Chancery having the power to make that sort of order[60]. It is an irony that James granted Chancery superiority over the

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[55] ***Earl of Feversham v Watson***, ***LNCC 2*** p 637 at 639.

[56] "voluntary" is used in the lawyers' sense of being done when there was no obligation to do it, "without consideration" in the sense of without a price or other benefit having been provided to the son in exchange for his executing the note.

[57] ***Honywood v Bennett*** (1675), ***LNCC 1***, case 307, p 214

[58] See text on page 11 above

[59] The issue had been simmering since the early sixteenth century, but came to a head in the ***Earl of Oxford's Case*** in 1615 – 1616.

[60] The text of his order is found at (1616) 1 Chan Rep at 48, 21 ER 588

common law courts so that his royal prerogative to relieve against the harshness of the common law could be exercised, but by the time of Lord Nottingham even if the prerogative continued to be acknowledged as the basis of Chancery's power, that prerogative was required to be exercised in accordance with known principles and rules.

7.2 Common Lawyers Replace Clerics as Chancellors

Sir Thomas More (Chancellor 1529 – 1533) was an eminent common lawyer. His chancellorship marks the beginning of an almost unbroken line of lawyers, rather than clerics, being appointed as Chancellors.

The appointment of trained lawyers as Chancellors meant that they were familiar with the common law, and with its methods of reasoning. In the sixteenth and seventeenth centuries there was no rigid split between the Chancery and common law bars, so any barrister was likely to be familiar with both types of courts. Indeed many of the seventeenth century Chancellors had been high public officials whose office required them to appear in the common law courts, or had been judges of common law courts, before their appointment as Chancellor[61]. It was fairly common for the Chancellor to ask common law judges to hear a case with him.

Negatively, the discontinuance of appointment of clerics contributed to a decline in the influence of Catholic moral teaching and of the Canon law. Conscience as a generative notion continued to be important, but, as I discuss below, there was a shift in the meaning of the word.

One of the characteristics of common law reasoning is that it seeks to confine statements of principle to what is necessary for the decision of the case at hand. This encourages the statement of principles in terms closely connected to the facts of the case. Sometimes the reasoning proceeds by consideration of precedents without explicit statement of a principle to be drawn from them, and the instant case decided as an exercise in analogy. These characteristics came to be part of the way Chancery cases were often decided.

7.3 Precedent

Up to and during most of the Tudor period the record-keeping relating to the business of Chancery was very patchy. Most of the petitions that the Chancellors dealt with have not been kept, and there are only very incomplete records of the reasoning by which decisions were arrived at. Orders of Chancery were recorded in the Year Books from the time of Henry VI[62], but they give little guide to

[61] Ellesmere (Chancellor 1596 – 1617) had been Solicitor-General, then Attorney-General from 1581. Francis Bacon (Chancellor 1618 – 1621) had been Attorney-General from 1613. Thomas Coventry (Chancellor 1625 – 1640) had been Attorney-General from 1621. John Finch (Chancellor 1640 – 1641) had been Chief Justice of the Common Pleas from 1634. Sir Orlando Bridgman (Chancellor 1667-1672) had been Chief Baron of the Exchequer for several months in 1660, from which position he was appointed Chief Justice of the Common Pleas. Nottingham (Chancellor 1673-1682) had been first Solicitor-General, then Attorney-General from 1660. North (Chancellor 1682-1685) had been Chief Justice of Common Pleas from 1674.

[62] Spence, ***Equitable Jurisdiction*** (London, V and R Stevens and G S Norton, 1846) p 416

the reasons for the order. This had the effect there was no basis on which a doctrine of precedent could have operated in Chancery, even if having such a doctrine had seemed desirable.

There was no abrupt change, but from about the beginning of the reign of Elizabeth records of pleadings came to be better kept, so that it became possible for judges and barristers to identify to what had been the issues in earlier cases, as well as the result of the case, embodied in the court order. The availability of the records meant that it became possible for a doctrine of precedent to operate in Chancery, and the training and mindset of the common lawyers who had come to be the Chancellors and barristers predisposed them to a doctrine of precedent. Gradually, one came to operate[63].

Francis Bacon provided an account of the significance of previously decided cases: they provided the raw material from which a legal rule could be derived:

> "It is a sound precept not to take the law from the rules, but to make the rule from the existing law. For the proof is not to be sought in the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law but does not settle it"[64]

Here, by "rule" he means a statement by a judge that in cases of type X result Y follows. To paraphrase Bacon, a judge deciding a case should not apply the rules stated in earlier cases as though they were binding, but rather should take decided cases as evidence of the operation of a guiding legal principle ("the law"), and ascertain that principle by an inductive process from the cases. From it the judge should then formulate a rule appropriate to decide the case at hand.

Lord Nottingham also held this view, at the time he was a law officer:

> " … there are precedents that prove too much and that it will concern the Lords as well as the Commons to resort to the good and wholesome rule *Judicandum est legibus non exemplis*[65]. For precedents do not make law; they are only evidences of it, and no few evidences neither. He that thinks so [ie that precedents make law] must first conclude there was never an illogical thing done in former times and so every precedent must pass for demonstrated and a general rule may be built upon one or two examples. What is this but to argue *a particulari ad universales* and to put a fallacy upon all the laws and liberties of England? "[66].

[63] On one occasion Ellesmere found that a trust "was not so fully proved as the Lord Chancellor would make a full decree thereupon, so as it should be a precedent for other causes, yet so far forth proved, as it satisfied him as a private man; and therefore … he thought fit to write his letters to the defendant to conform himself to reason; and affirmed, that if you should find the defendant obstinate, then would he rule this cause specifically against the defendant , *sans la tires* consequence.": ***Mynn v Cobb*** (1604) Cary 25, 21 ER 14 .

[64] ***De Augmentis Scientiarum*** Bk viii c 3 Aph 85, as translated by Spedding, and quoted in ***Holdsworth, Vol V*** page 240

[65] A quotation from Justinian ***Codex.*** 7.45.1 – roughly, "decide in accordance with the law, not previous cases"

[66] Finch Papers, quoted in Yale, Introduction to ***LNCC 1*** p xlix

The acceptance of the importance of precedent made the outcome of particular cases more predictable. In a 1670 case where the Lord Keeper sat with three common law judges Vaughan CJ[67] (a common lawyer), was voicing a view of equity that had already become *passé* when he said:

> "I wonder to hear of citing of precedents in matters of equity. For if there be equity in a case, that equity is an universal truth, and there can be no precedent in it. So that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself. And if the precedent be not the same case with this, it is not to be cited, being not to that purpose."

Bridgman LK disagreed, saying:

> "In them we may find the reasons of the equity to guide us; and besides the authority of those who made them is much to be regarded … It would be very strange and very ill if we should distrust and set aside what has been the course for a long series of times and ages."[68]

Notice that he accepts the authority of like cases decided in the same way over a period of time, but says nothing about the authority of a single decision or a very recent decision.

7.4 Books Explaining Chancery

After *Doctor and Student* other theoretical writing about the basis on which Chancery operated appeared from the late fifteenth century. Robert Snagg[69] , William West[70] and Edward Hake[71] all wrote treatises on Chancery. Richard Crompton wrote a work on the jurisdiction of the various Royal courts, which included a section on the Chancery[72], including an account of the orders recorded in the Year Books.

7.5 Law Reports

[67] Sir John Vaughan was Chief Justice of the Court of Common Pleas 1668 – 1674.

[68] ***Fry v Porter*** (1670) 1 Mod 300 at 307; 86 ER 898 at 902. Counsel were ordered to attend on the judges with precedents. These "precedents" were likely to have been records of the court, particularly those in the books of decrees and orders, rather than published reports of cases: Yale, Introduction to ***LNCC 1*** p xliv.

[69] died 1605. His work was a reading to the Middle Temple in 1581, part of which was reduced to writing in 1587 and presented to Sir Christopher Hatton on his becoming Chancellor. It was published decades later as ***The Antiquity & Original of the Court of Chancery, and authority of the Lord Chancellor of England*** (London 1654).

[70] William West, 'Of the Chauncerie', in ***Three Treatises, of the Second Part of Symbolaeographie*** (London 1594). It was republished in 1637: Spence, ***op cit*** p 416

[71] Edward Hake, ***Epieikeia: A Dialogue on Equity in Three Parts*** (ed DEC Yale, New Haven 1953). Hake lived c 1545 – c 1604. His treatise was written in the reign of Elizabeth, and presented to James I in 1604. That he used the Greek word for equity in the title is indicative of the extent to which Aristotle's treatment of equity had become known in English legal circles at the time.

[72] Richard Crompton, ***L'Avthoritie et Iurisdiction ndes Covrts de la Majestie de la Roygne*** (London 1594)

The use of precedents in Chancery was assisted by the publication in the mid-seventeenth century of summaries of the results of decided cases, and indexes to decided cases arranged by subject matter, with occasional terse notes concerning the reason why the court reached its conclusion[73]. Notwithstanding the mid-century publication dates for these summaries, before then "many manuscript copies circulated, especially of Cary"[74].

There were no regular published reports of the reasons for judgment in Chancery cases until 1693[75]**.** Even so, before then the summaries and indexes of the decisions made the court records of the decisions locatable.

7.6 Effects of Seventeenth Century Struggles over the Prerogative

When James I became King of England in 1603 he was already influenced by Continental notions that in a State a particular body or person was sovereign, in the sense of having a right to command that was not bound by any civil law[76], and that in England it was the King who was sovereign. In Tudor times it had been recognised that the monarch had prerogative powers, but the question of how those prerogative powers related to the powers of the courts and of the Parliament had not arisen[77]. James came believing that the King was both "supreme ruler and supreme judge; that he was above

[73] William Tothill (1560 – 1620), who had been one of the Six Clerks, composed an index of Chancery cases, divided into topics that were arranged alphabetically. Often it gave just the name of the case and the year it as decided, though for about half of the entries there is also a one or two sentence summary of the principle involved in the case, and for very occasional entries a longer note concerning the case. It was published in 1649. Brief summaries of Chancery decisions in the period 1557 - 1604 were collected by Sir George Cary. They were printed in 1650. ***Choyce Cases in Chancery*** consisted of a 103-page treatise on the practice of the Court of Chancery, and 75 pages of case summaries, covering cases from 1576 to 1605. The case summaries had marginal notes that identified the topic of the case. It was printed in 1652.

[74] Yale, Introduction to ***LNCC 1*** p xlii

[75] The first thing approaching proper reports was "***Reports and Cases taken and adjudged in the Court of Chancery in the reign of King Charles I, and to the 20th year of King Charles II"***. It covered cases decided in 1625 – 1668, and appeared in 1693. (1668 was the 20th year of King Charles II because, notwithstanding the political realities, he was regarded as having become King immediately after the death of Charles I in 1649.) A second volume in the same series, covering decisions from 1668 to 1693, appeared in 1694. The third and final volume, covering 1660 – 1688, appeared in 1716. ***Cases Argued and Decreed in the High Court of Chancery*** was published in 1697. It contained cases from 1662 to 1679. A second part appeared around 1700, containing cases up to the third year of the reign of James II (1687-1688). Lord Nottingham kept detailed records of his own reasons for judgment, but they were not published until long after his death – see footnote 42 above.

[76] Eg Jean Bodin, ***Six Livres de la République*** 1576 (abridged and translated by M J Tooley, Basil Blackwood Oxford 1955), Book I Chapter 8, Book II chapter 5; Sir William Holdsworth, A History of English Law Vol VI (2nd ed 1937) (Methuen London) (hereinafter "***Holdsworth VI***") p 11 – 13, 273 - 276

[77] ***Holdsworth VI*** p 20

the law, which he could make, mitigate, or suspend; and that he was answerable for his acts to God alone."[78] .

This led to protracted disputes with both the common law courts led by Sir Edward Coke[79], and the Parliament, about whether the Royal prerogative was the supreme power in England. The judges took the view that the common law was the supreme law, and the judges the sole expounders of that law; the King took the view that the judges were officers of the Crown who decided cases unless the King decided that he should decide the case himself[80]. The Parliament took the view that it had privileges of its own, that the King could not remove.

The dispute with Parliament led to the Kings ruling without summoning Parliament from 1629 to 1640. The Long Parliament, 1640-1658, passed legislation that limited various aspects of the prerogative[81]. The ongoing dispute about the extent of the prerogative became a fundamental cause of the English Civil War which lasted, on and off, from 1642 to 1651.

During the Commonwealth period there was no Lord Chancellor actually exercising judicial functions[82]. Instead Parliament issued its own Great Seal of Parliament in November 1643. It was held by a succession of groups of men called Commissioners, usually three at a time, until the Restoration in 1660. During these seventeen years the Commissioners carried out the functions that the Chancellor had formerly carried out.

Dislike of the Chancery during the Commonwealth resulted in pressure for it to become more like an ordinary court. Part of the basis for the attack on it was its slowness and expense, but as well it was attacked for its absolutism and arbitrariness and interference with ordinary legal rights.[83] When the basis of Chancery's existence had been the King's prerogative power, it was a natural target for the men who had found the King guilty of treason and cut off his head in 1649.

Procedural reforms of the Commissioners in 1649 dealt with some of the Parliamentarians' objections, but even so the Barebone Parliament of 1653 voted to abolish the Court of Chancery.

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[78] ***Holdsworth VI*** p 20

[79] Chief Justice of Common Pleas 1606 – 1613, Chief Justice of Kings Bench 1613 – 1616. James removed him as a judge in November 1616, but until 1628 Coke used Parliament as his forum to oppose James's views concerning the prerogative.

[80] ***Holdsworth V*** p 428 – 440

[81] ***Holdsworth VI*** p 112-119

[82] Charles II appointed Lords Keepers of the Great Seal during the period of his exile, but the Great Seal had been captured and destroyed by Parliament on 11 August 1646, and it was only upon the Restoration in 1660 that Charles's appointees actually exercised power.

[83] An illustration of the departure from the ordinary course of the law, which attracted the ire of the parliamentarians, was that Lord Keeper John Finch in 1641 remarked that an order of the Council was sufficient ground for issuing a decree in Chancery: Yale ***Introduction*** p 9

However that vote did not come to be embodied in legislation. Chancery survived because by then it was recognised to "occupy an integral part in the machinery of the law"[84].

Even though the Restoration in 1660 was in form a restoration of the monarchy as it had been at the time of the execution of Charles I, the political reality was that it was no longer possible for there to be personal rule by a monarch, in the way the Tudors and the first two Stuarts had ruled. It was no longer possible for the King to override, or to dispense with, the Parliament. Parliament had attained a power to mould even the way in which the prerogative was exercised[85]. "[T]he experience of the nation under a Protectorate, which had constantly found itself under the necessity of violating the law, had increased the national desire to see the law really supreme."[86]

When the Restoration occurred Chancery had been functioning with judges whose authority did not derive from the King for 17 years. The old theory that Chancery operated as a delegate of the King, who had a personal power and responsibility – and the Stuarts would add, a God-given right – to administer justice could not explain how Chancery had continued during this time. Some other justification for its operation was needed.

7.7 Changes in the Concept of Conscience

While Thomas More's appointment as Chancellor preceded the Reformation[87], continuing to appoint lay Chancellors after the Reformation was consistent with the Reformation. After the Reformation everyone had access to the Scriptures, one of the ultimate sources of the moral law, so clerical Chancellors were in no better position than lay Chancellors to understand the requirements of conscience[88].

At first the account of conscience, as dependent on God's law apprehended through *synderesis*, was not changed. The change was rather that every individual had both the means, and the responsibility, of ascertaining God's law, and therefore of ascertaining what conscience required.

But there came to be a multiplicity of views about the content of God's law. By the seventeenth century the Reformation had led to there being no longer a single Catholic Church but a proliferation of religious opinions, many of them stressing the importance of the individual deciding what God required him or her to do. Notwithstanding Henry VIII's initial intention that the English Reformation

[84] Yale ***Introduction*** p 8. ***Holdsworth 1*** p 431 – 434 gives some detail of the attack on Chancery during the Commonwealth. A further attempt to limit the jurisdiction of Chancery, in 1690, also failed because it would produce great hardships and injustices: ***Holdsworth, 1***, page 464

[85] ***Holdsworth VI*** p 162

[86] ***Holdsworth VI*** p 162

[87] His appointment may well have been motivated by Henry VIII needing to mollify the dissatisfaction of the common lawyers (who were an influential element in the House of Commons) at the high-handed way in which Cardinal Wolsey had overridden the common law in the name of conscience, and to gain the support of the common lawyers for his matrimonial and ecclesiastical policy: ***Holdsworth Vol V*** p 219 – 220.

[88] Edward Hake, ***op cit,*** footnote 71 above, makes this point at 141 – 142 – cited in Klinck, ***Conscience***, p 102

should change the governance of the Church of England without changing its doctrine, the doctrine changed from previous Catholic doctrine to give greater emphasis to the importance of an individual reading and seeking to understand the Bible.[89] As well there continued to be Catholic recusants, Puritans contended that the Church of England needed further purification, there were Calvinist-influenced Presbyterians, and there were many minor sects. When different interpreters of the Scriptures came to different conclusions about what the law of God was, this had the potential to undermine the objectivity of conscience. It also had the potential to undermine the view that human laws were justifiable because they approximated to the law of God.

A more fundamental problem for the pre-Reformation account of conscience came from a shift in the epistemological zeitgeist that occurred from about the middle of the seventeenth century. It acknowledged the difficulties in having certain knowledge concerning many subject matters, and recognised that in many subject matters only probable knowledge was attainable[90]. Even in natural philosophy[91] certainty was not attainable, and other subject matters, including moral and civic ones, were in their nature even less able to provide certain knowledge[92]. It was a logical consequence of this that *synderesis* - traditionally seen as a means of gaining knowledge – must be on shaky ground. Practicing lawyers did not fully appreciate or adopt this logical consequence, and in any event the law has never regarded logic as its sole inspiration[93], so the old language of equity being based on conscience continued. But even so, it is hard to believe that lawyers would be totally immune to such an important shift in the climate of intellectual opinion in their country.

The major premise of a pre-Reformation argument about the requirements of conscience was the content of the moral law; its minor premise was what the facts of the instant situation were. It was not only different possible views of the content of the moral law that led to an undermining of the pre-Reformation view that conscience provided the basis for the intervention of the Chancellor; the minor premise became unreliable too. One emphasis in Protestant casuistic writing was that, consistent with conscience being "knowing with another," the relevant "other" was God. But it was only the person himself, and God, who could know *all the facts* that related to what conscience required of that person. Thus, on the Protestant account it was only the person himself and God who could know what conscience required him to do. Any Protestant could say: "No person can tell me what conscience requires me to do. And that means that a judge cannot tell me what conscience requires me to do."

[89] A law of 1538 required every parish to purchase a copy of the Bible in English, and keep it available for anyone to read. King James commissioned a new English translation of the Bible, which was published in 1611, and widely used.

[90] Klinck, ***Conscience***, p 184 ff

[91] Those areas of study that we would call now the physical sciences

[92] John Tillotson, ***The Rule of Faith*** (London 1688) p 96, EEBO image 107809:51, cited Klinck, ***Conscience***, p 185

[93] In ***Tatham v Huxtable*** (1950) 81 CLR 639 at 649 Fullagar J referred to the law as "a system which has never regarded logic as its sole inspiration".

The potential for the objectivity of conscience to be undermined had become a reality in the early seventeenth century. Sir John Selden[94] wrote:

> "if we once come to leave that out-loose, as to pretend conscience against law, who knows what inconveniency may follow? For thus, suppose an anabaptist comes and takes my horse; I sue him, he tells me he did according to his conscience; his conscience tells him all things are common among the saints, what is mine is his; therefore you do ill to make such a law, if any man take another's horse he shall be hanged. What can I say to this man? He does according to his conscience. Why is not he as honest a man as he that pretends a ceremony, established by law, is against his conscience? Generally to pretend conscience against law is dangerous …"

The language that came to be used concerning Chancery was that, instead of it being an objective and impersonal conscience, it was the conscience of an individual person that Chancery applied. However there was vacillation about exactly whose conscience it was. Sir Christopher Hatton, Chancellor 1587 – 1591, spoke of it as being the conscience of the Queen[95]. Similarly, a letter of advice from Sir Francis Moore to Bishop John Williams in 1621[96] says that the Chancery has:

> "A power of jurisdiction according to Equity and Conscience which burden his Lordship is to take upon himself and undergo. But that Conscience is the King's committed to the Chancellor and if the Chancellor shall in his own private Conscience be of another opinion then he is persuaded the King his master would be, he is to judge according to the King's Conscience and not his own, which rules he means ever to hold."

Sometimes, though, the language used was that it was the conscience of the Chancellor that should be applied[97], and the conscience of the litigant that should be corrected. But regarding the relevant conscience as being that of the Chancellor produced difficulties concerning the legitimacy of the Chancellor's orders. It led to Sir John Selden's jibe:

> "Equity is a roguish thing: for law we have a measure, [and] know what to trust to. Equity is according to the conscience of him, that is Chancellor; and as that is larger, or narrower, so is Equity. 'Tis all one, as if they should make the standard for the measure we call a Foot, a Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot; another a short foot; a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience."[98]

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[94] (1584-1654). ***The Table Talk of John Selden*** (ed Samuel Harvey Reynolds Oxford 1892) , Title 26, Conscience.

[95] Spence, ***op cit*** p 414. In ***Lenthall v Waring*** (1676) ***LNCC 1*** Case 466, p 333 Lord Nottingham said "all courts which hold pleas in equity by any kind of pretence administer the conscience of the King, for the subject is not to be governed by the conscience of a corporation, or of any court but what depends upon the King …"

[96] Yale, ***Two Treatises***, p 78. The letter is advice about what Williams should say in his speech upon becoming Lord Keeper. Given that context, the references to "his Lordship" and the "he" in "rules he means ever to hold" are references to Williams in his role as Lord Keeper.

[97] Klinck, ***Conscience***, p 124 - 125

[98] ***The Table Talk of John Selden***, title 37 Equity (ed. S H Reynolds, Clarendon Press, Oxford 1892);also quoted in 3 Black. Comm. 432, note (y).

While these remarks are not precisely dated, they necessarily precede the date of Selden's death in 1654. They illustrate clearly the dangers there would have been in conscience remaining the sole standard by which Equity acted.

Before the English Reformation conscience had been a theoretically suitable standard for a law because it was understood to be objective, and applied to everyone regardless of their consent. But once conscience had its objectivity undermined, if equity was to be part of a body of law, rather than a manifestation of the individual will or power of the King or the Chancellor, some other sort of objectivity was required. It came in the form of stating principles and rules, more specific than a bare invocation of conscience, which applied in deciding cases of particular types. This was done in a piecemeal fashion, case by case, and with greater concreteness concerning some topics than others. The aim of the principles and rules might well be to articulate what conscience was likely to require in a particular type of case, but they still had an existence of their own, and could count as law. It was these principles and rules that made up the "civil and political conscience" that Chancery applied. Their historical origins in the Church's notions of what conscience required gave them the distinctive ethical flavour that equity continues to have.

7.8 Casuistry

There was a mass of writing in seventeenth-century England, in contexts separate from the law, about how to reconcile the claims of conscience with other general principles of conduct. Mostly it was in religious and political works. Much of this writing involved *casuistry*. Starting with writings of the Penitentials in the sixth century and significantly added to by Jesuits in the sixteenth and early seventeenth centuries there was already a body of Catholic casuistic writing, written to provide guidance to a priest who had to decide what to require of a person who made confession to him. In the latter part of the sixteenth century and in the seventeenth century a body of Protestant casuistic writing grew up, that applied the more individualistic Protestant concepts of conscience.

At the time "casuistry" did not have the overtone it now has of sophistry, or excessively clever or cynical moral reasoning. The name derives from *casus*, Latin for a case. It is a type of reasoning about what proper behaviour in a particular case requires, when the decision about what to do is arrived at by exploring the limits of a general proposition about how a person should behave. Typically it accepts that in a paradigm case a particular result should apply, but then considers whether that result should continue to apply in the particular factual situation concerning which a decision must be made. It does so by focusing on the detail of the particular case, and on the circumstances that explain why the general proposition correctly states how one should usually behave, rather than on general theories or concepts.[99]

[99] Condren ***Argument and Authority*** at 172 describes seventeenth-century casuistry as "too complex phenomenon to be seen as any single school, or doctrine of moral reasoning. It was, rather, a constellation of propensities sharing the recognition that principles under-determine conduct."

The method of the common law in the seventeenth century was casuistic,[100] taking the rules[101] articulated in previous decisions as given, then considering whether the detail of the facts of the present case was such that the rule should not be applied, and if necessary articulating a modified rule that could be applied in the instant case.

The Chancery adopted the casuistical method of the common law. In so doing it started from Chancery's imprecisely expressed historical notions of what conscience required, tested how and the extent to which they applied in particular situations, and arrived at more precisely stated principles of conduct[102].

By the end of the seventeenth century or beginning of the eighteenth conscience had come to be regarded as such an internal and personal thing that casuistry itself stopped being part of the public debate.[103] But at least it was in accord with the casuistic theory on foot for much of the seventeenth century, and also with its assimilation of common law methods of reasoning, for Chancery in the course of the seventeenth century to develop its method of reasoning consistently with the casuistic approach. This had, and continues to have, a profound influence on the nature of the principles and rules that the law of equity implements.

7.9 Effects of Chancery's Pleading Practices and Changes to them

By the middle of the sixteenth century Chancery had developed well understood procedures for pleading—identifying the issues for decision in a case—which differed from those of the common law.[104] A plaintiff began a Chancery suit by a *bill*, which was required to "show an equity"—i.e. set out facts that if true, and the only relevant facts, would justify Chancery in granting him a remedy. For example, if a person wished to sue to enforce a right arising under a bond or other document under seal, but that document had been lost, the common law gave no remedy because tendering of the document was essential.[105] However Chancery would allow a remedy, if it was established that

[100] And still continues to be.

[101] In the sense used by Bacon at note 64 above.

[102] In so doing Chancery was also staying close to its pre-Reformation origins, when the Chancellor was a priest deciding what conscience required in the particular case.

[103] Klinck ***Conscience*** p 216; E Leites, "Casuistry and character" in E. Leites (ed.) *Conscience and Casuistry in Early Modern Europe*, Cambridge: Cambridge University Press 1988, p 119 - 133.

Leites 1988: 119–120.

[104] Aspects of Chancery's distinctive process of pleading can be found much earlier (see Spence ***op cit*** p 338, 345, 349, 362), but what matters for the development of principles is that the procedural frame in which litigation occurred was already in place by the reign of Elizabeth (see Spence ***op cit*** p 379) which was before the detailed development of many of the principles.

[105] Joseph Story, ***Commentaries on Equity Jurisprudence as administered in England and America*** 6th ed (Boston: Little, Brown and company 1853) p 99.

the document had indeed been lost.[106] The facts that the bond had once existed, had not been paid, and had been lost gave the plaintiff the entitlement to approach Chancery for relief—i.e. constituted the plaintiff's equity. Nottingham recognized this equity when he wrote:

> a bill founded upon no other equity but oath made of the loss of the bond or deed is not to be admitted unless all who are concerned in law or equity be made parties[107]

Once a plaintiff had filed a bill the defendant then had several courses of action open to him. One was to file a *demurrer*, by which he could seek to have the case dismissed at that stage because the bill did not show an equity. A bill might fail to show an equity because it did not allege all the facts that were necessary to make out a type of relief that Chancery could give, or because it claimed relief concerning a type of situation for which Chancery lacked jurisdiction to give any relief at all.

Having an equity was necessary but not sufficient for a plaintiff to win—there was always the possibility that a set of facts that was recognized as giving rise to an equity when that set of facts stood alone might not entitle the plaintiff to win if some additional facts were added. Thus, another course of action open to a defendant was to file a *plea*—a document alleging that there were facts beyond those alleged in the bill which, when taken together with those alleged in the bill, showed that the situation was one concerning which Chancery would not grant the remedy that the plaintiff claimed.

One type of facts alleged by a defendant that, if made out, would show that the plaintiff was not entitled to a remedy, or not entitled to the remedy he claimed, were known as *defensive equities*.[108] Typically a defensive equity was stated in language of high generality, and that defensive equity could be applied to counter a wide variety of different equities. But it was also possible for a plea to allege extra facts that did not amount to a defensive equity of a general type, but were more closely connected to the facts alleged in the bill, or to other dealings between the plaintiff and the defendant.

One defensive equity was known as *unclean hands*—conduct of the plaintiff relating to the facts on which his claim was made that showed that he ought not be granted relief because of his own bad conduct. An eighteenth-century statement said that before unclean hands provided an equitable

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[106] Nottingham, ***Prolegomena***, Ch. VII [2], at Yale p 213; Nottingham, ***Prolegomena***, Ch. VIII [1], at Yale p 217.

[107] Nottingham, ***Manual***, Title III [10] at Yale p 94

[108] The defendant's equity could in turn be qualified or obliterated by still further facts that the plaintiff established. For example facts that, by themselves, would suffice to establish a defence of laches could fail to do so if the defendant had encouraged the plaintiff to delay in bringing his claim. In principle, this countering of one party's equity by an equity of the other party could go on indefinitely, though in practice it hardly ever went beyond two or three steps. Other alternatives open to a defendant were to file an *answer*—a document that disputed one or more of the facts that the plaintiff alleged, and stated what the defendant asserted was the truth concerning that matter—or a *disclaimer*—a statement that he had no interest in the matter (Spence ***op cit*** p 372). However answers and disclaimers had no consequences for the development of equitable principles.

defence "it must have an immediate and necessary relation to the equity sued for."[109] However, Nottingham had earlier recognized in substance this requirement for the defendant's unworthy conduct to be closely related to the facts that constituted the plaintiff's equity:

> Williams sued the Countess of Arundel to be relieved against the forfeiture of a lease for non-payment of rent. The Countess showed many injuries the plaintiff had done her against conscience, as felling of timber, selling lead, forging acquittances, and refusing to account on pretence of some releases, which were given in trust not to be used if his account could be falsified; and [she] offered to confirm his lease, if he would account. Yet decreed for the plaintiff, for no ill conscience of a plaintiff in collateral matters shall foreclose him of relief, but it should be *in eâdem*; else no sinner should be relieved in equity.[110]

Another defensive equity expressed in unspecific language and able to counter a wide variety of equities was *laches* (long delay on the part of the plaintiff in bringing the claim).). A Statute of Limitations was introduced in 1623 to provide a time limit for the bringing of common law claims. It did not apply to equitable claims. Even so, Chancery would not grant relief to a plaintiff who had delayed a long time in seeking to enforce a claim[111].

In the course of the seventeenth century a procedure was introduced requiring that a demurrer be decided in open court rather than by a Master.[112] Inevitably this practice fostered the growth of known rules, because the limits of the principles concerning the matters that the court had authority to hear, and what facts were sufficient for the plaintiff to have an equity, were decided in court, at an early stage of proceedings. Furthermore the judge's decision concerning the demurrer would be recorded in the court's records. In this way what it decided about whether the bill disclosed an equity would become known to practitioners.

Somewhat analogously to this procedure for deciding the adequacy of a bill, if a defendant filed a plea, frequently the court decided the case by determining the adequacy of the plea without having

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[109] ***Dering v Earl of Winchelsea*** (1787) 1 Cox 318 at 321; 29 ER 1184 at 1185.

[110] Nottingham, ***Prolegomena***, Ch. XXV [7], at Yale p 305

[111] *Sedgwick v Evan* (1582–1583) Choyce Cases 167, 21 ER 97 (mortgagor not entitled to recover possession of mortgaged land when mortgagee had been in possession for 40 years), *Sibson v Fletcher* (1632–1633) 1 Ch. Rep 59, 21 ER 507 (mortgagee, not in possession of the mortgaged land, who had made no claim for payment for 17 years, refused relief), *Hales v Hales* (1636–1637) 1 Chan Rep 103, 21 ER 520 (similar, but neither interest paid nor claim made for payment of principal for forty years); *Garford v Humble* (1618) Tothill 27, 21 ER 113 ("ancient bonds" ordered to be cancelled when holder attempted to sue on them), *Simons v Lee* (1613) Tothill 129, 21 ER 144 (action for payment of legacy fails when not pursued for sixty years).

[112] The Commissioners' rules 4, 7, Lord Clarendon's rules 12, 17, Lord Nottingham's Rules title Pleadings, rule 36 (Yale p 101). Even earlier than these rules, in the advice to Bishop Williams about what to say in his induction speech in 1621 Sir Francis Moore suggested that he say that "if any man demur upon a bill presented in Chancery and rest upon the demurrer, his Lordship mindeth to have the bill and demurrer brought before him and to take conusance thereof himself," Yale p 79. Under earlier Chancery procedure if a defendant demurred to a bill the demurrer would be decided by a Master. It was only if there was an appeal from the Master's decision that the matter would be considered by the Chancellor.

a full argument of the case.[113] If that happened, the only enquiry the court engaged in was whether the extra facts that the defendant alleged showed that the plaintiff's bill lacked an equity:

> When a plea is allowed and replied to, the defendant has nothing to do at the hearing but to prove his plea; and therefore if the plaintiff prove all the equity suggested in his bill, yet he shall not be suffered to read, because nothing is material but the truth or falsehood of the plea, so the defendant never examines to the equity suggested in the bill…[114]

The practice of often deciding the adequacy of a plea before any full hearing had the effect of producing decisions on what combination of facts constituted a successful defensive equity, or a reason for some specific type of equity to fail.

8. Nature of Equity's Principles and Rules

At the start of the seventeenth century, it was possible to identify, from previous decisions and from some of the writing about the operation of the court, principles expressed in quite open-textured and imprecise language that the Chancery required people to adhere to in their dealings in matters of property and business. These included not obtaining a benefit by fraud or accident, that a person should faithfully carry out tasks concerning the performance of which another had reposed confidence in him, that an obligation to which several people were subject should be shared fairly, and that the substance of a commercial arrangement should be respected rather than its legal form. These principles are expressed in language that contains an element of evaluation, either explicitly ("fairly," "faithfully") or implicit in its terminology (what counts as "fraud" or "accident"). They had all originated as general statements of what conscience required in certain types of circumstances.

Chancery applied these very general principles, like requiring faithful performance of tasks concerning which confidence had been reposed, to different types of subject matter, for example, to the responsibilities of an executor and to the duties of a person who was administering the business affairs of another person. Uses of land[115] had largely faded from significance in the sixteenth century of as a consequence of some legislation of Henry VIII,[116] but in the course of the late sixteenth century and the seventeenth century Chancery recognized that if property was conveyed to X (the trustee) on trust for Y (the beneficiary) there were obligations of conscience on X similar to those

[113] Sometimes the adequacy of the plea was left to be decided at a hearing. On occasion Nottingham said he would order a defendant to answer the bill "saving the benefit of his plea at hearing, but would not stifle the equity of this case upon a plea": *Shermar v Cox* (1674) in Yale 1957: 76 (Case 124).

[114] Nottingham, *Prolegomena*, Ch. XXIII [8], at Yale p 298

[115] Explained on page 39 above.

[116] The *Statute of Uses*, 1536.

that the use had imposed[117]. Once the trust was recognized, the general principle requiring faithful performance of a task undertaken was applied to the trustee.

There were other principles of a high general level of generality that Chancery applied in granting its own remedies. They have come to be referred to as the equitable maxims. For example, by reference to the maxim that "he who seeks equity must do equity," Chancery would grant relief to a plaintiff only if the plaintiff carried out his own obligations of conscience concerning the subject matter in question.[118]

In the course of the century these principles were developed by successive decisions so that the principles themselves, and rules derived from them, became sufficient to provide a fair measure of predictability of the outcome of most disputes, without any need for the invocation of conscience.

It is possible to identify three different ways in which Chancery developed these principles. One was by Chancery making decisions about whether in a particular set of facts a general principle had been infringed. The multiplication of instances gave greater content to the evaluative terminology in the principle, by acting as a kind of ostensive definition[119] of what counted as fraud or accident, of when a task of a particular kind had not been faithfully carried out, or of when a common obligation had not been fairly shared. However, the multiplication of instances did not deprive the original principle of its force, so that if, for example, some new method of obtaining a benefit by fraud arose, it was possible for Chancery to give a remedy concerning it.

Similarly, the course of decisions provided a multiplication of instances of what type of factual situation was enough to give rise to a defensive equity. For example, Chancery refused to assist a plaintiff who had obtained a security from the defendant while the defendant was drunk,[120] and the cases gave some specificity to how long a delay in enforcing a particular type of claim, in what circumstances, could give rise to a defence of laches.

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[117] The recognition of the trust is traced in Simpson, ***An Introduction to the History of Land Law***, OUP 1961 p 183 - 191 and in Baker, ***IELH*** p 290 - 292

[118] Yale Introduction to *LNCC 1* p lxi–lxii. The chapter heading to Ch. XXV in the ***Prologemena*** was, "He that seeks relief in equity must proceed equitably." For example, Chancery would set aside a transaction procured by fraud only if the plaintiff refunded whatever he had received under the transaction, with interest: ***Vere Essex v Muschamp*** (1684) 1 Vern, 23 ER 438.

[119] Ostensive definition is conveying the meaning of a word or term in a non-exhaustive way by giving examples. See ***Sanpine v Koompahtoo Local Aboriginal Land Council*** [2005] NSWSC 365 at [177], ***Re GHI (a protected person)*** [2005] NSWSC 581 at [20]**;** ***Certain Lloyds Underwriters v Giannopoulos*** [2009] NSWCA 56 at [106]**;** ***Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Limited*** [2009] NSWCA 263 (2009) 77 NSWLR 360 at [230]; ***Waugh Hotel Management Pty Ltd v Marrickville Council*** [2009] NSWCA 390 171 LGERA 112 at [119]; ***Jimmy v R*** [2010] NSWCCA 60 (2010) 77 NSWLR 540 at [138]; ***Arena Management Pty Ltd (Receiver & Manager Appointed) v Campbell Street Theatre Pty Ltd*** [2011] NSWCA 128 at [94]; ***Brighton v Australia and New Zealand Banking Group Ltd*** [2011] NSWCA 152 at [95]; ***Lym International Pty Ltd v Marcolongo*** [2011] NSWCA 303 at [239], [253]

[120] ***Rich v Sydenham*** (1671) 1 Chan Cas 202, 22 ER 762 ("He who has committed Iniquity, shall not have Equity").

A second way in which principles were developed is that the broad open-textured principles generated some more specific statements of the type of outcome that the law would require in a particular type of case. These more specific statements were of the type, "When there is a factual situation of type A, result B will follow." These more specific statements are sometimes referred to as rules of equity. For example, in the course of the seventeenth century equity developed specific rules about the rights and obligations of trustees and beneficiaries, and the rights and obligations of mortgagors and mortgagees. One such rule is that a trustee is entitled to a full indemnity from the trust property for his costs of bringing litigation concerning the trust.[121] Another is that an executrix who used estate money to trade on her own account was liable for any loss of the money, and also obliged to pay interest on it even if it was not lost.[122] These rules were statements of what one of Chancery's general principles would require in a particular type of factual situation. For example, the general principle that a trustee must faithfully perform the office he had undertaken requires that he take no more care of the trust property than he would take of his own property; thus when a trustee of gold was robbed of that gold and also of some of his own property he was not liable for the loss.[123]

A third way in which the principles were developed was by the recognition of exceptions to a rule, so that the rule did not apply in a certain type of situation. Thus one co-trustee was not liable for breaches of trust by his co-trustee—but there was an exception if he took part in them,[124] or by his own breach of duty made them possible.[125] A trustee was not obliged to account for more than he has actually received from the investment or utilization of the trust property—but there was an exception if there was a "very supine negligence," in which case he could be charged for what he would have received if he had not acted negligently.[126] The exceptions just mentioned can all be seen as arising from considering what qualifications to the rule were required to give effect to the more basic principle, that there should be faithful performance of a task concerning which trust had been reposed.

However these principles and rules do not have their full significance revealed by the language in which the judges expressed them. Nottingham frequently stated, in terms that look absolute, propositions about the result that a court would arrive at in a particular set of circumstances—e.g., "a purchaser shall be charged with an incumbrance though it be defective in law, if he had an allowance for it in the price";[127] "A man pays a statute[128] or obligation without acquittance, and is

[121] ***Amand v Brasdbourne*** (1682) 2 Chan Cas 138; 22 ER 884.

[122] ***Ratcliff v Graves*** (1683) 1 Vern 196, 23 ER 409, also reported (1683) 2 Chan Cas 152, 22 ER 890.

[123] ***Morley v Morley*** (1678) 2 Chan Cas 2, 22 ER 817.

[124] ***Townley v Shurborne*** (1633) Tothill 88, 21 ER 132.

[125] ***Capell v Gostow*** (1614–1615) Tothill 88, 21 ER 132.

[126] ***Palmer v Jones*** (1682) 1 Vern 144; 23 ER 376.

[127] Nottingham, ***Prolegomena*** Ch. VI [14], at Yale p 211.

sued again; he shall be relieved in Chancery";[129] "If one joint tenant takes all the profits, his companion may sue him in equity, for in conscience he has a right but to a moiety."[130] Such statements cannot be treated as though they are universally applicable. They must be understood bearing in mind that all the judges and lawyers realised that they were made in the context of a contest between particular opposing claims in litigation, that their purpose was to state a principle or rule that would resolve the issues that had been identified by the process of pleading in that particular case, and that the law of equity worked through the recognition of equities asserted in a particular piece of litigation by the opposing parties. Each of the apparently absolute propositions can be transposed as a standard for deciding a different case only if it is understood as being subject to an implied "unless some equity is shown why that result should not arise," and an implied "unless there are extra facts that show that the equity asserted does not arise." Thus, each of the principles and rules articulated by the judges provided a guide to the result that the court would come to in a particular type of factual situation, but that guidance was only ever provisional: it was dependent on the "unless" not arising.

Further, the principles and rules themselves might sometimes prove inadequate to dictate what was required in a particular factual situation. It remained possible that two general principles that Chancery had developed led to different results when applied to a particular factual situation. It remained possible that in a particular factual situation a rule that Chancery had developed was in conflict with a different equitable principle to the one that had generated the rule. It remained possible that a principle of the Chancery led to a different result to a principle of the common law. In each of these sorts of situations it was necessary for the judge to decide which principle or rule should prevail.

In time, decisions about which of two general principles, or which of a particular rule and a general principle, would prevail when they were in conflict, themselves became precedents, capable of providing a new principle about which in which circumstances one of two competing claims should prevail. But the principles and rules themselves were always capable of being re-examined in the light of the very general statements of principle that had been derived from Chancery's earlier reliance on conscience as its standard of judgment.

By the end of the seventeenth century rules and principles already established were enough to provide a fair measure of certainty of the outcome of most litigious disputes in Chancery. They could not always provide certainty because Chancery's casuistic method inevitably left open some possibility of pre-existing principles and rules not dictating a single outcome concerning some factual situations. However the extent to which this created uncertainty was not a serious obstacle to equity providing a workable and intelligible system for dispute resolution. This was because these conflicts

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[128] A statute, in this context, means a bond given with particular formalities in a trading town, pursuant to the statute *De Mercatoribus* 1285 or the *Statute of the Staple* 1353. There were special procedures for enforcing such bonds, designed to provide quick remedies to traders for payment of debts.

[129] Nottingham, ***Prolegomena*** Ch. VI I [1], at Yale p 213. In other words, if a person pays a statute or a debt, and does not take a written acknowledgement that he has paid, and is sued for it, Chancery will prevent that action from proceeding.

[130] Nottingham, ***Prolegomena***, Ch. VI I [3], at Yale p 213.

between principles or rules did not arise often, and when they did the area of any dispute was limited to which, of the principles and rules already recognized in decisions of the court, should prevail.