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Cases Concerning Equity and the Courts of Equity 1550-1660

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CASES CONCERNING
EQUITY AND THE COURTS
OF EQUITY 1550-1660

VOLUME I

EDITED FOR
THE SELDEN SOCIETY
BY

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INTRODUCTION

A. SCOPE

This volume of previously unpublished equity reports in the period 1550–1660 includes cases of substantive equity prosecuted by English bill procedure, cases that explain the jurisdiction, procedures, and practices of the courts of equity in England, and a few cases from the courts of common law that touch on and consider the jurisdiction of the equity courts. Also included are cases in the equity courts that involve equitable remedies needed to protect common law rights. Frequently the equity judge had to determine a common law right before an equitable remedy could be granted.

The following classes of cases have not been included: cases from the Latin side of the Court of Chancery (for example, traverse of office, *scire facias* relative to patents, and *monstrans de droit*) and cases from the plea side and the revenue side of the Court of Exchequer. The Court of Star Chamber and the Court of Wards and Liveries used English bill (equity) procedure, but since their substantive jurisdictions concerned common law rights and duties, cases from these courts have not been included.

I have included all the unpublished cases that I could identify as equity cases from all the manuscripts of reports that I could find within the period, with the exception of two manuscript books of John Lisle, lord commissioner of the great seal from 1649 to 1659,¹ which are currently being edited elsewhere. As most of the manuscripts have a few equity reports interspersed within a large quantity of common law reports, to find the equity ones has been as much a matter of chance as anything else. Certainly, some equity reports have been missed, and therefore what is printed here is a selection consisting of all that I could identify and not a complete corpus.

This book includes reports of the judges' opinions but not orders and decrees. The formal written orders and decrees were drafted by the attorneys for the parties not by the judges, and thus they do not often give the reasons for the decision,² and although orders and decrees may give additional information about a

¹ University of Kansas Library MS. D87; LI MS. Misc. 576. These manuscripts are described in A. J. Busch, 'The John Lisle Chancery Manuscripts: The "Abridgements"' (1989), 10 *Journal of Legal History*, 317–326, and A. J. Busch, 'The John Lisle Chancery Manuscripts: The "Pleas and Demurrers"' (1989), 10 *Journal of Legal History*, 327–342.

² Numerous Chancery decrees and orders have been published in C. Monro, *Acta Cancellariae* (1847), which covers the period 1545 to 1625, and in J. Ritchie, *Reports of Cases Decided by Francis Bacon* (1932), which covers the period 1617 to 1621. Numerous Exchequer decrees have been published in H. Wood, *A Collection of Decrees by the Court of Exchequer in Tithe Causes* (1798), which covers the period 1650 to 1798.

case, those corresponding to a report cannot always be confidently identified, and where they can be identified they are often so bulky that it is impractical to print them. The exception to this rule of exclusion is *Venables' Case* (Ex. 1608)³ because it is very well known and often cited, but no report has been found of it. Also, one of the orders in *Fenton v. Blomer* (Ch. 1580)⁴ provides an early illustration of an important principle of equity practice.

A fortiori, cases in collections of extracts from records have not been included. The exception to this rule is No. 165.⁵ The reason for this exception is to publish here this collection of cases illustrating the power of equity courts to grant injunctions after final judgments at common law. These cases balance the numerous cases that were included in BL MS. Lansdowne 1110, ff. 1-33v, on the subject of writs of prohibition directed to courts of equity from common law courts. In addition, at the beginning of the volume are transcripts of some of the earliest equity records to have survived from the Court of Exchequer. These give additional examples in print of equity pleadings and jurisdiction, and also aid in dating the evolution of the equity side of the Exchequer to the last years of the reign of Henry VIII.

Copies of reports that are now in print, and extracts from them, have not been used. The exception to this rule is the celebrated *Case of the Impropiators* (Ex. 1633),⁶ which was printed some time ago in a book that is now out of print.⁷ The editor was baffled by some of the legal references; furthermore, this case fits in here along with the other equity reports of the period.

Commonplace books and abridgments have not been used. At some point notes of cases, such as Tothill's *Reports*, become too brief to be valuable, but doubts have been resolved in favour of Richard Powle's collection and of several others,⁸ which are printed as a whole rather than dispersed chronologically.

The equity reports printed here for the first time expand considerably the bulk heretofore in print for this period.⁹ Only the following printed sources, including both reports *stricto sensu* and collections of extracts or notes from the record, contain more than a few equity cases before 1660:¹⁰

Cary, 402 short cases from 1557 to 1604

Choyce Cases in Chancery, 253 short cases from 1557 to 1606

Reports in Chancery, 133 cases from 1615 to 1659

³ No. 144.

⁴ No. 24.

⁵ BL MS. Add. 48097, ff. 61v-66.

⁶ No. 379.

⁷ I.M. Calder, *Activities of the Puritan Faction of the Church of England 1625-1633* (1957), pp. 105-124.

⁸ No. 117 to No. 120. No. 118 starts off as an index or digest and then almost imperceptibly turns into reports similar in character to Powle's reports. These four collections and Tothill's are similar in format; they copy from each other and, no doubt, from other reports, digests, commonplace books, and indexes.

⁹ W. H. Bryson, 'Law Reports in England from 1603 to 1660' in C. Stebbings ed., *Law Reporting in Britain* (1995), pp. 113-122.

¹⁰ For Chancery reporting before the 1660s see M. Macnair, 'The Nature and Function of the Early Chancery Reports' in C. Stebbings ed., *Law Reporting in Britain* (1995), p. 123. *

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Tothill, approximately 125 short cases from 1559 to 1646 interspersed in what is essentially an index

Nelson, 47 cases from 1625 to 1659

Hardres, 40 cases from 1655 to 1660

Leonard, 13 cases from 1588 to 1590

Lane, 12 cases from 1609 to 1611

Coke, 10 cases from 1598 to 1613

Dickens, 7 cases from 1559 to 1637

B. THE MANUSCRIPT REPORTS

1. General reports

The majority of the reports printed in this volume were transcribed from manuscript books that include cases from all courts but in which the vast majority are common law cases. Despite the large and significant addition here to the number of printed equity cases, the vast majority of as yet unprinted manuscript reports are from the common law courts of Common Pleas and King's Bench. This is true also of the printed reports from this period: Coke, Leonard, Moore, Lane, and Savile have only a few equity cases interspersed among the large quantity of common law cases. It is to be noted that the year-books occasionally report cases concerning equity, thus some equity cases may be found in the section entitled 'Sub pena' in Fitzherbert's *Abridgement*, and in the sections entitled 'Conscience & subpena & injunctions' and 'Feffements al uses' in Brooke's *Abridgement*.

2. Richard Powle's reports

Richard Powle was a deputy register of the Court of Chancery during the time of Elizabeth I. He was a member of Clement's Inn and then of Lincoln's Inn, being admitted to the latter on 26 February 1577.¹¹ He was acting as deputy register as early as 1578,¹² and was reporting cases as late as 1600. His notes of Chancery cases¹³ are the earliest collection of equity reports known to have been made. Because each case is so short, they have been printed here together as a collection.¹⁴

¹¹ *Records of the Hon. Society of Lincoln's Inn*, I (1896), 85: sub nom. 'Richard Powell'.

¹² T. D. Hardy, *Catalogue of Lords Chancellors* (1843), p. 120; W. J. Jones, *The Elizabethan Court of Chancery* (1967), p. 145, n. 3; see also *Powle's Case* (C.P. 1581), No. 26.

¹³ Oxf. Bodl. MS. Rawl.C.647; L. W. Abbott, *Law Reporting in England* (1973), p. 303; J. H. Baker, *English Legal Manuscripts*, II (1978), 170.

¹⁴ No. 117.

Powle's reports are similar in format and date to Cary's reports, which are only extracts from the decree books, and to *Choyce Cases in Chancery*. The Bodleian manuscript of Powle's reports is a fair copy; this is shown by the repetition of the cases from Trinity term, 37 Elizabeth I (1595), No. 117-[187] to No. 117-[191] as No. 117-[192] to No. 117-[196].

3. *Chancery cases from the time of Ellesmere*

Two manuscript collections of cases from the Court of Chancery during the judicial tenure of Thomas Egerton, Lord Ellesmere, are here printed.¹⁵ Both of these collections contain a large quantity of short notes of opinions by Egerton. They are both in the same format and style, but the handwriting is not the same. Only a small number of cases are found in both collections, and this leads to the conclusion that both are copies from a larger collection that has not yet been located. Because of the relative brevity of each note, they are presented here as collections, rather than interspersed chronologically among the other reports of the same dates. The reporter was a barrister and apparently was in court and making notes of opinions that were being delivered orally from the bench; he obviously enjoyed Egerton's sarcastic sense of humour.

4. *Arthur Turnour's reports*

Arthur Turnour's reports cover all of the high courts of England during the reigns of James I and Charles I. Of the several manuscript books, BL MS. Hargrave 30 is particularly valuable in that it contains a significant number of equity cases from the Court of Exchequer.¹⁶

Arthur Turnour entered Christ's College, Cambridge, in July 1603. He then went to New Inn, was admitted to the Middle Temple on 22 January 1606, and was called to the bar in 1613. He was made a bencher in 1633, and gave a reading on jointures in the following year.¹⁷ In January 1637 he was created a serjeant. He died on 1 July 1651 and was buried in the Temple Church.¹⁸ His son, Sir Edward Turnour (1617-1676), was lord chief baron of the Exchequer from 1671 to 1676.¹⁹

¹⁵ CUL MS. Gg.2.31, ff. 437-479v (No. 119), and Herts. R.O. MS. Verulam XII.A.50, ff. 59-76 (No. 120).

¹⁶ Other Turnour manuscripts are HLS MS. 106, HLS MS. 109, CUL MS. Dd.5.51(i), ff. 64-64v, and LI MS. Misc. 491; see J. H. Baker, *English Legal Manuscripts*, I (1975), 11, 13-15, II (1978), 113; J. H. Baker, *English Legal Manuscripts in the United States*, II (1990), 101; W. R. Prest, *The Rise of the Barristers* (1986), p. 398.

¹⁷ J. H. Baker, *English Legal Manuscripts in the United States*, II (1990), 106, 107.

¹⁸ J. Peile, *Biographical Register of Christ's College*, I (1910), 244; J. H. Baker, *The Order of Serjeants at Law* (1984), pp. 186, 376, 541; J. H. Baker, 'The Dark Age of English Legal History, 1500-1700' in *The Legal Profession and the Common Law* (1986), p. 445; H. A. C. Sturgess, *Register of Admissions to the Hon. Society of the Middle Temple*, I (1949), 85; J. Venn and J. A. Venn, *Alumni Cantabrigienses*, part I, IV (1927), 273; W. R. Prest, *The Rise of the Barristers* (1986), p. 398.

¹⁹ D.N.B.; E. Foss, *Judges of England*, VII (1864), 177-179.

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5. Robert Paynell's Exchequer reports

Robert Paynell was the son of Henry Paynell, Esquire, of Belaugh in Norfolk. He matriculated at Christ's College, Cambridge, in December 1617, and was admitted to Gray's Inn on 2 June 1619. He died in 1658 and was buried in the church of St. John the Baptist in Norwich.²⁰

Judging from the bibliographical evidence of surviving manuscript reports, it appears that in the early years of the reign of Charles I, Robert Paynell, Thomas Widdrington (d. 1664),²¹ William or George Allestree,²² and Humphrey Mackworth²³ entered into a joint reporting venture. Paynell covered the Exchequer, Widdrington the King's Bench,²⁴ and Allestree and Mackworth the Court of Common Pleas.²⁵ They must have known each other very well. Paynell and Widdrington both matriculated at Christ's College, Cambridge, in 1617, and both were admitted to Gray's Inn in 1619. Mackworth was admitted to Gray's Inn in 1621, William Allestree in 1618, and George Allestree in 1623.²⁶

There are numerous manuscript copies of these reports; there are in fact more manuscript copies of Paynell's reports than of any other Exchequer collection. The reports commonly attributed to Winch are only an abbreviation of Allestree's reports; those called Hetley's *Reports* are probably a part of Mackworth's reports.²⁷ Littleton's *Reports* include some cases taken from Mackworth, and one term of Paynell's reports is also printed in *Littleton* 85–146, 124 *English Reports* 149–179.²⁸ Some cases from Widdrington's reports were printed many years later in F. K. Eagle and E. Younge, *Cases Relating to Tithes* (1826).

²⁰ J. Peile, *Biographical Register of Christ's College*, I (1910), 321; J. Venn and J. A. Venn, *Alumni Cantabrigienses*, part 1, III (1924), 324; J. Foster, *Register of Admissions to Gray's Inn* (1889), p. 154; C. E. Wright, *Fontes Harleiani* (1972), p. 271.

²¹ T. Widdrington was admitted to Christ's College, Cambridge, in April 1617 and to Gray's Inn on 14 February 1619. J. Peile, *Biographical Register of Christ's College*, I (1910), 313–314; J. Foster, *Register of Admissions to Gray's Inn* (1889), p. 153; J. Venn and J. A. Venn, *Alumni Cantabrigienses*, part 1, IV (1927), 401; D.N.B.; E. Foss, *Judges of England*, VI (1857), 513–518. Widdrington and Paynell must have known each other very well.

²² William Allestree was admitted to Gray's Inn on 16 November 1618 (Foster, p. 152); George Allestree was admitted to Gray's Inn on 7 August 1623 (Foster, p. 170); William Allestree matriculated at St. John's College, Cambridge, in the Lent term 1619; J. Venn and J. A. Venn, *Alumni Cantabrigienses*, part 1, I (1922), 21. BL MS. Hargr. 362 contains the reports of Allestree and Mackworth; BL MS. Lansd. 1091 contains the reports of Allestree.

²³ Mackworth was admitted to Gray's Inn on 24 October 1621 (Foster, p. 164); he matriculated at Queens' College, Cambridge, in 1619 (J. Venn and J. A. Venn, *Alumni Cantabrigienses*, part 1, III (1924), 124); R. Spalding, *Contemporaries of Bulstrode Whitelocke* (1990), p. 183.

²⁴ Manuscripts of Widdrington's reports are listed in J. H. Baker, *English Legal Manuscripts*, II (1978), 85.

²⁵ Mackworth's reports are found in BL MS. Hargr. 362, ff. 94–217; BL MS. Add. 35962; BL MS. Lansd. 1085; CUL MS. Mm.6.67; CUL MS. Dd.3.46; CUL MS. Ii.5.35.

²⁶ J. Peile, *Biographical Register of Christ's College*, I (1910), 313–314, 321; J. Foster, *Register of Admissions to Gray's Inn* (1889), pp. 152, 153, 154, 164, 170.

²⁷ J. H. Baker, 'The Dark Age of English Legal History, 1500–1700' in *The Legal Profession and the Common Law* (1986), p. 453, n. 95. J. H. Baker, *A Catalogue of English Legal Manuscripts in Cambridge University Library* (1996), pp. 13–14.

²⁸ Note the comments of Edward Umfreville in BL MS. Hargr. 362, fo. 3v; J. W. Wallace, *The Reporters Arranged and Characterized* (4th ed. 1882), pp. 261–262 (re Allestree).

The reports of Paynell and Mackworth are interspersed by term in BL MS. Additional 35962. Those of Paynell and Widdrington are interspersed by term in BL MS. Additional 35961 and BL MS. Lansdowne 1083, the manuscripts identifying the reporters responsible for them.

My opinion that these four members of Gray's Inn were acting in concert and for a wider circulation than themselves is based on several grounds. Many of the manuscripts attribute the reports to a specific person; the reports are interspersed by term in several manuscripts;²⁹ there is no overlapping of cases or competition;³⁰ a comparatively large number of copies of these reports have survived considering the few reports from the reign of Charles I. It is also interesting to note that on the title page of 'Hetley' in 1657, the reporter was said to have been Sir Thomas Hetley (d. 1637), one of the two official law reporters appointed in 1617 upon the initiative of Sir Francis Bacon (d. 1626). Hetley was described as a reporter in 1623, though the printed reports ascribed to him were probably made by Humphrey Mackworth. The other official reporter appointed in 1617 was Edward Writington. Hetley, Writington, and Bacon were all members of Gray's Inn.³¹ Perhaps further research will show that Paynell, Mackworth, Widdrington, and Allestree were the successors, officially or otherwise, of Hetley and Writington.

The best exemplars of Paynell's reports are BL MS. Additional 35961 (Trinity term 1627 to Hilary term 1629) and BL MS. Harley 4816, ff. 8–26v (Easter term 1629 to Hilary term 1631). Less accurate copies are to be found in the following books: CUL MS. Ii. 5.22; BL MS. Add. 35962; BL MS. Add. 25193, ff. 79–93; BL MS. Add. 11764, ff. 120–214; BL MS. Hargr. 41; BL MS. Lansd. 1083; LI MS. Maynard 21, ff. 367–402; Exeter Coll. Oxf. MS. 179, ff. 1–96; Exeter Coll. Oxf. MS. 179, ff. 1–96; HLS MS. 5051; Free Library, Philadelphia, MS. LC 14.62, ff. 163–280; YLS MS. G.R. 29.3, ff. 404–421 [8 cases only]; YLS MS. G.R. 29.23, ff. 254–272 [2 cases only]; BL MS. Add. 36081, ff. 78–84 [4 cases only].

C. EQUITY

'Equity is that body of rules which is administered only by those courts which are known as courts of equity'.³² This circular definition is admittedly unsatisfactory, but it is the best that I can find and certainly better than any that I can create. 'The life of the law has not been logic; it has been experience'.³³

²⁹ Umfreville noted that they 'united their collections'. BL MS. Hargr. 362, fo. 3v.

³⁰ Turner speculated that Paynell and Widdrington 'may have arranged not to compete with one another, and to make their notes in different courts'. G. J. Turner ed., *Year Books of 4 Edward II (1310–1311)* (1914), 26 Selden Soc., p. xxii.

³¹ J. H. Baker, 'The Dark Age of English Legal History, 1500–1700' in *The Legal Profession and the Common Law* (1986), pp. 453–454; Turner, *Year Books*, pp. xix–xxiii.

³² F. W. Maitland, *Equity: A Course of Lectures* (2nd ed. 1936), p. 1.

³³ O. W. Holmes, Jr., *The Common Law* (1881), p. 1.

1. *Origin of the jurisdiction*

The English procedures and doctrines that are called equity evolved during the period of roughly 1350 to 1450. It was a process of evolution that occurred as the royal chancery became a court of law. (The chancery, of course, remained the royal secretariat also.) It occurred as part of the legal jurisdiction of the king's Council (*curia regis*) was regularly delegated to one of its *ex officio* members, the lord chancellor. As the delegation or referral of that class of litigation that was later called equity became routine, the chancellor began to handle it through the Chancery rather than the Council. The Chancery by the fourteenth century was an elaborate and well-established bureaucracy compared to the king's Council, and the chancellor found in the Chancery the clerical support for his new legal jurisdiction that was lacking in the *curia regis*.³⁴

The substantive doctrines of equity began to evolve in the king's Council before the rise of the Court of Chancery. The origins of equity were the deficiencies of the English common law and its administration by the established courts in the fourteenth century. These various and miscellaneous deficiencies led aggrieved persons to address petitions for relief to the king or to the king's Council; the crown was the ultimate and the residual administrator of justice. The petitions praying for civil, as opposed to political,³⁵ relief created the miscellaneous generalizations known as equity. These equity cases were usually referred to the chancellor, and as this process became routine the petitions came to be addressed to the chancellor alone. What the chancellor heard at first as a member of the king's Council, he came to decide independently of it.³⁶ There was no desire on the part of the *curia regis* or the king to settle private disputes that did not concern the kingdom or themselves.

Equity thus came into existence in order to supplement and complement the common law. The necessity for this process was the evolution of the common law and its administration into a posture of inflexibility.

The reasons for the increasing inflexibility of the common law in the late thirteenth and in the fourteenth centuries were several. In 1258, the Provisions of

³⁴ See generally R. C. Palmer, *English Law in the Age of the Black Death, 1348-1381* (1993), pp. 130-132; J. H. Baker, *An Introduction to English Legal History* (3rd ed. 1990), pp. 112-134; J.L. Barton, 'Equity in the Medieval Common Law' in R.A. Newman ed., *Equity in the World's Legal Systems* (1973), p. 139; T.F.T. Plucknett and J.L. Barton eds., *St German's Doctor and Student* (1974), 91 Selden Soc., pp. xxxix-xliv; F. W. Maitland, *Equity: A Course of Lectures* (2nd ed. 1936), chaps. 1 and 2; J. F. Baldwin, *The King's Council in England During the Middle Ages* (1913), pp. 236-255; W. P. Baildon ed., *Select Cases in Chancery, 1364-1471* (1896), 10 Selden Soc., pp. xi-xlv; C. Robinson, *History of the High Court of Chancery*, I (1882), 734-743; J. Story, *Commentaries on Equity Jurisprudence*, I (1836), ss. 38-52.

³⁵ E.g. maladministration of local officials, rebellions, riots, intimidation of royal judges and officers and of juries. These matters remained within the jurisdiction and control of the king's Council and later within the Privy Council and the Court of Star Chamber.

³⁶ It has also been argued that equity in the Court of Chancery grew out of the Latin side of the Court of Chancery. A. D. Hargreaves, 'Equity and the Latin Side of Chancery' (1952), 68 Law Quarterly Review 481-499. Professor Milsom traces the origin of the Court of Chancery to the position of the lord chancellor as the head of the office that issued writs and generally supervised the royal judiciary: S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), pp. 82-84. These approaches are more matters of emphasis than fundamental disagreement.

Oxford³⁷ forbade the issuance of new and unprecedented writs.³⁸ The accession of Henry II in 1154, one hundred years earlier, had marked the beginning of the serious growth of the royal courts of justice and, as a result, of a law that was common to all of England. In this hundred year period, the common law came into being. This was the law that *Bracton* expounded. In order to meet and cure the problems of society, it must have been flexible and creative. It must have been administered in a flexible and imaginative way. However, to grant new types of writs and new remedies is to grant new substantive rights; to recognize new rights is to change the existing law; for the minor Chancery clerks, officers of the king, to issue new writs that were allowed by the royal courts was to encroach upon the rights of the people. Thus the barons, led by Simon de Montfort, put an end to this exercise of legislative power by the royal Chancery. Although Henry III was released from his oath³⁹ to abide by the Provisions of Oxford and this document was not part of the legislative canon, the Chancery did cease issuing new classes of writs.⁴⁰

The rise of parliament as a legislative body during the reign of Edward I (1272–1307) was, perhaps, another brake upon the growth of the common law. Where the courts of common law grant new rights and remedies, they infringe on the function of parliament to legislate.⁴¹ Only the entire community of the kingdom through their representatives assembled in parliament can change the law that governs all. *Quod omnes tangit, ab omnibus debet supportari*. Law reform may have been in principle the function of parliament; however, the parliaments of the Middle Ages were not up to the task. Parliament met only when it was called into session by the king, and the king did this only on an irregular basis; the usual motivation was to have a vote for taxation. Law reform by the legislature was rare and clumsy until the time of Henry VIII and Thomas Cromwell. Thus, parliament in the fifteenth century did not do enough to remedy the obvious defects of the common law of England.

Perhaps the inflexibility of the common law grew within the system itself. The

³⁷ 'And that he [the chancellor] seal nothing out of course by the sole will of the king. But that he do it by the council which shall be around the king'. W. Stubbs, *Select Charters* (9th ed. 1921), pp. 378–389. 'That he will seal no writ, except routine writs, without orders from the king and those of his council who shall be in attendance'. R. F. Trehearne and I. J. Sanders, *Documents of the Baronial Movement of Reform and Rebellion, 1258–1267* (1973), p. 103.

³⁸ On the other hand, it can be argued that this prohibition does not refer to original writs in respect to private litigation but to royal decrees or fiats of a political nature. The main purpose of the Provisions of Oxford was to put the king under the control of the baronial party, i.e. Simon de Montfort and his followers. Cf. R. F. Trehearne, *The Baronial Plan of Reform, 1258–1263* (1932), p. 93.

³⁹ W. H. Bryson, 'Papal Releases from Royal Oaths' (1971) 22 *Journal of Ecclesiastical History* 19, 28–29.

⁴⁰ J. H. Baker, *An Introduction to English Legal History* (3rd ed. 1990), p. 66; J. F. Baldwin, *The King's Council in England During the Middle Ages* (1913), p. 238. Perhaps there was an overreaction in the Chancery, which prompted the section '*in consimili casu*' of the Statute of Westminster II (1285), Stat. 13 Edw. I, c. 24 (SR, I, 83–84).

⁴¹ F. Pollock and F. W. Maitland, *The History of English Law*, I (2nd ed. 1968), p. 196; W. S. Holdsworth, *The History of English Law*, I (7th ed. 1956), 398.

very nature of law is that it is known and that one can rely upon it. If it is not known before it is stated, then it is not law. If it is known but not enforced, then one cannot rely on it, and there is no rule of law but a rule by the whim of whoever is the judge. Surely, everyone must agree that a sense of justice demands that like cases be decided in like ways. Therefore, one aspect of the law is the existence of binding authority. The creation of the English common law from the accession of Henry II in 1154 to the Provisions of Oxford in 1258 was an accumulation of legal authority. At some point, there is enough, and if the pendulum does not swing back in the direction of *stare decisis*, then the authority will not be binding nor can one rely upon it. The conservatism of the fourteenth century was a self-correcting mechanism of the growth of the prior century.

This conservatism was put into effect by the operation of the growth of court records and by the rise of the legal profession in the thirteenth century.⁴² The bureaucracy of England, including that of the common law courts, began keeping records seriously during the reign of Richard I, who was absent from England for most of his reign. His officers had to keep records to defend their actions when and if he returned to England and brought them to account. Once they were begun, bureaucratic inertia kept them going. By the time of the Provisions of Oxford, there was a large and substantial body of written precedent in the English legal archives.

There is a natural tendency in the legal profession to legal conservatism and what is sometimes called legal formalism. The legal counsellor is called upon to give advice as to what the law is and how it will be administered by the courts if the situation deteriorates to the point of litigation. Therefore, the lawyer, whether representing the plaintiff or the defendant, is going to argue to the court that his client should win because of the settled principles of the law which the court cannot change just because of personal or social sympathy for the other side. Justice does not always require that the poorer or weaker party should prevail. Where a party in court shows that his actions were taken in reliance on the common law as demonstrated by certified copies from the records of the same court, the judges cannot easily rule against him; and, of course, that ruling itself becomes a precedent for some future argument. And so it goes until the courts are totally boxed in by their own precedents and the growth of the law stops. Judicial restraint is a good thing, but it can be carried too far, for there is no such thing as a general rule (or a statute) that cannot be avoided or perverted by persons with evil intentions. When the doctrines of precedent and *stare decisis* get to the point of creating injustice, then the pendulum will start to swing back in the direction of justice in the individual case.

In the fourteenth century, the rigidity of the common law and its courts was ripe for reform and moderation, but it happened not within the courts of common law themselves, but externally in the new Court of Chancery. There

⁴² For the rise of the English legal profession see P. Brand, *The Origins of the English Legal Profession* (1992).

were jurisdictional, procedural, and substantive problems with which the courts of common law were unable to cope. The king's Council had to step into the breach, but soon these matters devolved upon the new Court of Chancery.

Most of the deficiencies of the medieval common law were procedural. However, considering the particularistic nature of the writ system and the unplanned growth of the forms of action, this should not be surprising. 'So great is the ascendancy of the law of actions in the infancy of courts of justice that substantive law has at first the look of being gradually secreted in the interstices of procedure.'⁴³ However, people at that time did have a sense of justice and substantive rights. The various procedures of the various forms of action were imperfect and did not always produce a just result. The resort to other courts was needed because by 1300, perhaps by 1258, the procedures of the common law were becoming settled, fixed, inflexible, and in some cases immutable. Not only could they no longer be regularly adapted to deal with new problems, but also they could be manipulated to unjust ends.

2. Scope of the jurisdiction

The scope of the equity jurisdiction was closely connected to deficiencies in the common law, of which the following may be noted.

(i) Relief upon sealed instruments

The medieval law of evidence created injustice in certain situations. In the action of covenant based on a specialty, a document under seal, the production in court of the instrument itself entitled the plaintiff to a judgment. The defendant could attack the genuineness of the instrument itself, but there was no opportunity to raise any excuse or justification for non-performance. Therefore, if one were induced to execute a sealed instrument through fraud and were then sued at common law in an action of covenant, the only way beyond the plea of *non est factum* in which the defence of fraud in the inducement could be raised was to resort to a court of equity. The equity court would order the plaintiff at common law to discontinue the action there and recommence in the court of equity, where the defendant could assert the alleged fraud.⁴⁴

In the area of contracts, justice required that each party receive 'consideration', something of value for the performance of his part of the agreement.

⁴³ H. S. Maine, *Early Law and Custom* (1886), p. 389. Professor Milsom argues that '[t]here was no common law, no body of substantive rules from which equity could be different . . . Failures were mechanical'. S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), p. 84; this is a slight exaggeration.

⁴⁴ E.g. *Craddock v. Dowse* (Ch. 1602), No. 120-[27] (fraud, overreaching, and threats); *Herbert v. Lownes* (Ch. 1628), No. 310 (fine, trust, and will set aside for fraud); *Gresham v. Gresham* (Ch. 1651), No. 446; see also *Calendar of Proceedings in Chancery in the Reign of Elizabeth, I* (1827), xxix (a person of weak intellect was induced to become intoxicated before executing a bond and a conveyance).

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The common law courts required proof of consideration 'flowing' from the plaintiff to the defendant (the obligor) before a plaintiff (the obligee) could recover on an oral contract. However, if the contract was in writing under the defendant's seal, the written and sealed instrument was sufficient proof for a common law recovery, even though there was no consideration. A sharp dealer would be able to take advantage of others by always having such an unfair bargain reduced to writing with an eye to future litigation, relying on well-established common law precedent. The common law courts could not change their law in response to the justice of an individual case, but the courts of equity came to require the unconscionable obligee to forgo the unfair gain. The courts of equity required that all contracts be supported by consideration on both sides.⁴⁵

Where an action of debt on a specialty was brought but there had been a total lack of consideration in that the bond was given to the plaintiff in return for an assignment of a chose in action that was worthless as a matter of common law, the Court of Chancery ordered the plaintiff at common law to execute a release to the obligor or to deliver the bond to the court for cancellation.⁴⁶

At common law a plea of payment could be proved against a sealed obligation only by a release under seal from the obligee. However, the court of equity would hear parol evidence of the payment⁴⁷ or accept a release that was not under seal.⁴⁸ This was necessary in order to prevent an unjust double recovery to the obligee who was trying to take advantage of the obligor's negligent failure to recover the bond upon the payment of it.

As a matter of the law of evidence, no person who was a party to a lawsuit was competent to testify as a witness; not only was a defendant forbidden to testify for himself, but also the plaintiff could not testify. In order to prevent mechanical failures of justice arising from this rule, the courts of equity provided the plaintiff at common law with a bill of discovery. From the beginning of its existence, the Court of Chancery had required defendants to appear in court and answer under oath to the plaintiff's bill of complaint. (At first the answer was given orally and afterwards in writing, but it was always to be sworn to.) Thus, the common law plaintiff could sue the defendant in equity and then take the written, sworn answer and read it to the jury in the common law action and thus prove his case. Later the courts of equity also allowed depositions of non-party witnesses to be taken upon bills of discovery, and these

⁴⁵ E.g. *Browne v. Newhole* (Ch. 1597), No. 118-[247]; *Smith v. Gawdy* (Ch. 1599), No. 118-[326]; *Pickering v. Keeling* (Ch. 1640 x 1641), 1 Chan. Rep. 147, 21 E.R. 533.

⁴⁶ *J.R. v. M.P.*, YB Hil. 37 Hen. VI, fo. 13, pl. 3 (C.P. 1459), trans. in E. D. Re, *Cases and Materials on Remedies* (2nd ed. 1987), pp. 46-48, sub nom. *Reynolde v. Knott*, 51 Selden Soc. 147. A release to avoid the penalty of a bond was ordered in *Zouch v. Lord Zouch* (Ch. 1548), No. 165-[5].

⁴⁷ E.g. *Anon.* (Ch. temp. Eliz. I), Cary 2, 21 E.R. 1, which distinguished *Anon.* (Ex. Cham. 1482), YB Pas. 22 Edw. IV, fo. 6, pl. 18, 64 Selden Soc. 53, by allowing parol evidence of the parties themselves under oath, rather than that of any other witnesses (who might be paid to perjure themselves), against the written instrument.

⁴⁸ E.g. *Hurd v. Dodington* (Ch. 1598), No. 118-[273].

depositions could also be read to common law juries.⁴⁹ No final decree could be entered upon a bill of discovery.⁵⁰

(ii) Specific performance

Another shortcoming of the common law which was aided by the courts of equity, was the practical limitation of execution of final judgments to the payment of money or to the transfer of possession of property. It is true that the action of covenant had once resulted in an order of specific performance, but this remedy had disappeared at common law by the fifteenth century. Perhaps the reason for this was the practical inability of the sheriff (or any other officer of the court), even aided by the *posse comitatus*, to do any more than take by force a person's (defendant's) property, whether real or personal, moveable or immoveable, and give it to the plaintiff or sell it and give the proceeds to the plaintiff. In the thirteenth century when the common law was solidifying, the courts of law apparently lacked the machinery or the political or administrative power to force a person to do something himself.

The solution to this problem was for the lord chancellor to issue a personal order to the defendant to perform some act or refrain from specified conduct.⁵¹ This injunction was backed up by the threat of imprisonment for so long as the defendant was not in compliance with it. This usually worked.⁵² It is a matter of conjecture why the chancellor's orders were more effective than those of the royal justices or why the justices did not issue injunctions. When the common law remedies were being devised and settled, the country was less under the actual control of the royal administration than when the equitable remedies came into being. Perhaps the political power and prestige of the office of lord chancellor was greater than that of a royal justice. In any case, the availability of the remedy of injunction attracted various classes of litigation to the courts of equity.

The best example of the superiority of an injunction over an order to pay money is in the area of breach of contracts. In some situations, the common law solution to a breach of contract, compensation by the payment of money, is clearly an inadequate remedy. Where the object of the contract of sale is a unique item or a specific piece of land, the plaintiff cannot take the money received as damages and buy the equivalent object or land from another person. Thus the courts of equity will by means of an injunction specifically

⁴⁹ E.g. Note (Ch. 1598 × 1602), No. 119-91 (discovery and production of documents); Note (Ch. 1602), No. 120-[30] (discovery of secret incumbrances on land); Note (Ch. 1608 × 1620), No. 167-540 (discovery of defendants to a common law action of dower); *R. v. Christian's Ex'r* (Ex. 1627), No. 282 (discovery of decedent's estate); *Hammond v. Shaw* (Ch. 1652), No. 453 (discovery of assets of a judgment debtor); *Clarke v. Southcott* (Ch. 1652), No. 454 (discovery of debts of a deceased person); *Ingram v. Copley* (Ch. 1653), No. 456 (discovery of estates of tenants); Note (C.P. 1655), No. 458 (depositions can be read to a common law jury).

⁵⁰ *Herbert v. Herbert* (Ch. 1651), No. 447.

⁵¹ This is not to argue that the injunction was invented for this purpose. The usual process of injunction, however, was put to this purpose when needed.

⁵² For an example of the defendant going to gaol rather than obey an injunction, see *J.R. v. M.P.* (C.P. 1459), cited above.

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(iv) Bills *quia timet* and bills of peace

Another problem with the common law was the requirement of damage having been done to the plaintiff before the court would take cognizance of the action. Where a person was threatening to harm another or another's rights, the courts of common law could not do anything until the harm had been done. If the threatened harm was not remediable by common law damages, such as the imminent destruction of property whose ownership was in dispute⁵⁸ or waste,⁵⁹ then the courts of equity would order the defendant not to do the act threatened. Because the plaintiff feared (*quia timet*) a future harm, the equity court would enjoin its happening.

A good example of the need for a bill *quia timet* is where a defendant has instruments or deeds belonging to the plaintiff. The plaintiff fears that the defendant will put bonds in action or transfer deeds to *bona fide* purchasers to the damage of the plaintiff. The courts of common law provided an action for detinue of charters only if the plaintiff could name the documents with exactitude and say where they were, and because of this inadequacy the equity courts ordered the defendant to deliver up the documents to the plaintiff.⁶⁰ Courts of equity could require the cancellation of forged bonds⁶¹ and bonds that had been paid or were presumed to have been paid.⁶² The equity court could also enjoin a threatened assault,⁶³ the payment of money to anyone but the plaintiff,⁶⁴ or a slander of title.⁶⁵

Similar to a bill *quia timet* is a bill of peace. The purpose of a bill of peace is to enjoin a multiplicity of common law actions by or against the plaintiff in equity.⁶⁶ Multiple litigation was required by the common law rules of proce-

Proceedings in Chancery in the Reign of Elizabeth, I (1827), xiii, xxi, xxxv, lxii. For cases from about 1465 to about 1555, see R. Brooke, *La Graunde Abridgement*, 'Feffements al uses'. See generally in the 'Subject Index' under 'Trusts and uses'.

⁵⁸ E.g. *Bush v. Field* (Ch. 1579 × 1580), Cary 90, 21 E.R. 48; see also *Kidnere v. Harrison* (Ch. 1559 × 1560), Cary 48, 21 E.R. 26.

⁵⁹ E.g. *Finch v. Throckmorton* (Ex. 1590), No. 63 (preliminary injunction pending an action at common law); *Watson v. Johnson* (Ex. 1628), No. 298 (preliminary injunction pending an action at common law); *Cole v. Peyson* (Ch. 1636 × 1637), 1 Chan. Rep. 106, 21 E.R. 521; *Roberts v. Roberts* (Ex. 1657), Hardres 96, 145 E.R. 399.

⁶⁰ E.g. *Milner v. Leche* (Ch. 1388), 10 Selden Soc. 8; *Bokelond v. Blount* (Ch. 1394) (semble), 10 Selden Soc. 12; *Wilton v. Kemle* (Ch. 1396 × 1403), 10 Selden Soc. 81; *Bodenham v. Halle* (Ch. 1456), 10 Selden Soc. 137; Note (Ch. 1596), No. 117-[252]; *Lord Buckhurst v. Fenner* (Ch. 1598), No. 87; Note (Ch. 1598), No. 117-[317]; *Moulton v. Younger* (Ch. 1599), No. 118-[305]; Note (Ch. 1598 × 1602), No. 119-91; Note (Ch. 1599 × 1604), No. 120-[78]; *Smith v. Delves* (Ch. 1604), No. 121. See also *Calendar of Proceedings in Chancery, I* (1827), xxix, xlv, lxxvi. Where two persons have a right to possession of a document, one cannot sue the other in detinue, but the court of equity will compel discovery: *Worsley v. Which* (Ch. 1469), YB Mich. 9 Edw. IV, fo. 41, pl. 26 (argument of counsel).

⁶¹ E.g. *Stampe v. Longworth* (Ex. 1561 × 1572), PRO E 112/2/36; *Hawter v. Longworth* (Ex. 1561 × 1572), PRO E 112/36/28; *Barnes v. Longworth* (Ex. 1561 × 1572), PRO E 112/36/30.

⁶² E.g. *Carpenter v. Tucker* (Ch. 1634 × 1635), 1 Chan. Rep. 78, 21 E.R. 512; *Geoffrey v. Thorn* (Ch. 1634 × 1635), 1 Chan. Rep. 88, 21 E.R. 515; *Rogers v. Hawkesworth* (Ex. 1664), Hardres 378, 145 E.R. 506.

⁶³ E.g. *Fraunceys v. Clifford* (Ch. 1396 × 1403), 10 Selden Soc. 68.

⁶⁴ E.g. *Craven v. Salvayn* (Ch. 1415 × 1417), 10 Selden Soc. 110.

⁶⁵ E.g. *Loterell v. Hayme* (Ch. 1396 × 1403), 10 Selden Soc. 80.

⁶⁶ E.g. *Pynell v. Underwood* (Ch. after 1396), 10 Selden Soc. 20.

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enforce contracts for the sale of agricultural land.⁵³ No farm is like any other one, and thus the disappointed buyer cannot go and buy another farm to replace the lost bargain, as can the purchaser of a ton of gravel. In agricultural England, the specific enforcement of land sales contracts became so much the normal remedy that all land is now considered unique as a matter of law, and the remedy of specific performance is always available no matter how indistinguishable one unit of a condominium may be from another.⁵⁴

(iii) Uses and trusts

A use or a trust, was a type of contract, usually in reference to land, which was invented after the common law writs (which controlled the jurisdiction and procedures of the common law courts) had become fixed and unchangeable. A trust, in broad terms, is the contractual situation in which the common law ownership of property is given to a person (the trustee) to hold and manage for the benefit of another person (the beneficiary). Since there was no common law writ available adequately to enforce trusts,⁵⁵ and since the Chancery clerks and the common law judges could not change the law by inventing a new one without unconstitutionally usurping the legislative power of parliament, the chancellor enforced them. It was clear to the entire legal profession that justice required the enforcement of uses and trusts. Since the common law courts could (or would) not, it was accepted that equity should.

Contracts under seal creating uses and trusts may have been actionable at common law by a writ of covenant, but the successful plaintiff was not given an adequate remedy,⁵⁶ and the beneficiary of an oral trust did not even have an action. Thus the courts of equity were called on to enforce uses and trusts by means of injunctive orders.⁵⁷

⁵³ E.g. *Wace v. Brasse* (Ch. after 1398), 10 Selden Soc. 43; *Brook v. Giles* (Ch. 1396 × 1403), 10 Selden Soc. 78; *Badwell v. Clopton* (Ch. 1413 × 1417), 10 Selden Soc. 111; *Cokayn v. Hurst* (Ch. 1456), 10 Selden Soc. 141; *Stewkly v. Lady Lutterel* (Ch. 1576), No. 15; *Hutton v. Prince* (Ch. 1582), No. 32; *Salisbury v. Salisbury* (Ch. 1585), No. 118–[110]; *Browne v. North* (Ch. 1594), No. 118–[150]; *King v. Ridon* (Ch. 1597), No. 118–[238]; Note (Ch. 1598 × 1602), No. 119–206; *Watson v. Bailiff of Sould* (Ch. 1599 × 1604), No. 120–[5]; *Jackson's Case* (Ex. 1609), Lane 61, 145 E.R. 299; *Otway v. Heblethwait* (Ch. 1615), No. 238; *Wiseman v. Roper* (Ch. 1649), No. 437; see also *Calendar of Proceedings in Chancery in the Reign of Elizabeth, I* (1827), xx; II (1830), xl.

⁵⁴ See G. Jones and W. Goodhart, *Specific Performance* (2nd ed., 1996), pp. 32–33.

⁵⁵ It was at times suggested that an action on the case might lie for breach of trust, though the argument depended upon the availability of a remedy in Chancery. See N.G. Jones, 'Uses, Trusts, and a Path to Privity' (1997), 56 *Cambridge Law Journal* 175.

⁵⁶ Though the absence of specific performance was less significant in the case of money, and the action of account and the action for money had and received may be regarded as providing common law actions for breach of trusts of money. See J.H. Baker, 'The Use of Assumpsit for Restitutionary Money Claims 1600–1800' in E.J.H. Schrage ed., *Unjust Enrichment: the comparative legal history of the law of restitution* (1995), p. 31 at 32 and 47–48.

⁵⁷ E.g. *Godwyne v. Profyt* (Ch. after 1393), 10 Selden Soc. 48; *Holt v. Debenham* (Ch. 1396 × 1403), 10 Selden Soc. 69; *Chelmewyke v. Hay* (Ch. 1396 × 1403), 10 Selden Soc. 69; *Messynden v. Pierson* (Ch. 1417 × 1424), 10 Selden Soc. 114; *Williamson v. Cook* (Ch. 1417 × 1424), 10 Selden Soc. 115; *Prioress of Thetford v. Wychyngham* (1422 × 1426), 10 Selden Soc. 119; *Annors v. Alford* (Ch. 1422 × 1429), 10 Selden Soc. 129; *Rous v. FitzGeffrey* (Ch. 1441), 10 Selden Soc. 132; *Bale v. Marchall* (Ch. 1456), 10 Selden Soc. 143; *Revelle v. Gower* (Ch. 1471), 10 Selden Soc. 155; *Anon.* (Ex. Cham. 1459), YB Trin. 37 Hen. VI, fo. 35, pl. 23, 51 Selden Soc. 173; *Calendar of*

where in many situations. Where the sheer expense of it, as a practical matter, will defeat a party, the courts of equity will grant relief in the form of an injunction appropriate to the situation. A bill to quiet title⁶⁷ is a bill of peace.

A bill of interpleader can be classified as a bill of peace since it combines two common law claims against the same person into a single suit in equity.⁶⁸ However, a more typical bill of peace is one to abate a nuisance. The common law allowed self-help to abate a nuisance, an assize of nuisance, an action of redisseisin, a writ of *quod permittat prosternere*, or an action of trespass on the case.⁶⁹ Self-help is an unsatisfactory remedy in that it may result in a breach of the peace, and the injured person will himself be liable for trespass if he takes steps beyond the minimum necessary to remove the nuisance. An action on the case will produce damages up to the time of filing the action but will not force an abatement of the nuisance; the injured party will be put to a multiplicity of such actions as new damage will accrue daily in the future. The other common law remedies were types of *praecipe* actions which were extremely slow and procedurally clumsy; moreover, while the sheriff could be ordered to abate a nuisance and charge the cost to the defendant, this was more difficult than simply ordering the defendant to do it himself; furthermore, if the sheriff (and an undisciplined posse) went too far in the abatement, the sheriff, who would be primarily liable, would look to the plaintiff for indemnification.⁷⁰ Thus all the common law remedies were clearly inferior to a personal order to the defendant himself to abate the nuisance and not commit any nuisance in the future.⁷¹

(v) The equity of redemption

The equity of redemption was a substantive creation of the courts of equity in the context of mortgages. The mortgage is a common law conveyance of land to secure a loan; the mortgage contract provides that if the loan is repaid in full, the debtor gets his land back; if it is not repaid in full, the creditor keeps the land and the partial repayment, even if only one payment is not made or if payment is made only one day late. In many cases a debtor may be in technical default only, but the common law courts must enforce the contract that was freely entered into by the debtor. To prevent such harsh results, penalties, and forfeitures, the courts of equity allowed the debtor to redeem the land by making the payments late (with appropriate additional interest); thus, the equity courts cre-

⁶⁷ E.g. *Denis v. Carew* (Ch. 1618 × 1619), Tothill 63, 21 E.R. 124.

⁶⁸ E.g. *Verney v. Lee* (Ch. 1535), No. 165-[1]; *Alnet v. Bettam* (Ch. 1559 × 1560), Cary 46, 21 E.R. 25; *Earl of Carlisle v. Gobe* (Ch. 1660), No. 464; *Owen v. White* (Ch. 1667), 2 Freeman 126, 22 E.R. 1102, 3 Chan. Rep. 20, 21 E.R. 716; *Anon.* (Ch. 1685), 1 Vernon 351, 23 E.R. 516, 1 Eq. Cas. Abr. 2, 80, 21 E.R. 828, 893.

⁶⁹ W. Blackstone, *Commentaries*, III (1768), pp. 5-6 and 220-222.

⁷⁰ See generally, J. Story, *Commentaries on Equity Jurisprudence*, II (1836), ss. 925-927.

⁷¹ E.g. *Attorney-General v. Bond* (Ex. 1587), No. 42; *Swayne v. Rogers* (Ch. 1604), Cary 26, 21 E.R. 14 (semble); *Attorney-General v. Taylor* (Ex. 1631), No. 343 (purpresture ordered to be demolished or arrented).

ated what is called an equity of redemption.⁷² (To protect fair-minded creditors, the courts of equity allow a creditor to come into the equity court and prove the hopeless insolvency of his debtor, whereupon the equity judge will foreclose the debtor's equity of redemption; this will give the creditor clear title to the land that is being held as security so that he can sell it and recoup the amount of the defaulted loan.⁷³) Although the general common law rule that contracts should be kept is well respected by society, everyone's sense of justice will acknowledge that the equity of redemption is a fine tuning by the courts of equity that results in substantial justice in the individual case where the debtor is acting in good faith but has suffered misfortune.

This concept as applied in the equity of redemption provided an additional weapon in equity's armoury against forfeitures⁷⁴ and double recoveries.⁷⁵ Thus, while performance bonds were enforced in liquidated damages, penal bonds for the payment of a lesser sum of money were relieved against.⁷⁶

(vi) Waste

The common law prohibition on waste forbids tenants of land who have less than fee simple interests from doing permanent damage to the land to the prejudice of future owners. However, there are some serious gaps in the scope of the substantive common law. These unintended omissions have been supplied by the courts of equity, and injunctions forbidding waste lie against various classes of tenants overlooked by the common law prohibitions,⁷⁷ persons who have been granted permission to commit waste,⁷⁸ and persons who commit waste maliciously.⁷⁹

⁷² E.g. *Anon.* (Ex. temp. Eliz. I), No. 111 (enforced by an executor); *Hurd v. Dodington* (Ch. 1598), No. 118-[273]; *Barker v. Norton* (Ch. 1629), No. 318; *Holmixon v. Lemman* (Ch. 1651), No. 444; *Theobalds v. Nightingale* (Ch. 1651), No. 449 (enforced by an executor); *Cowley v. Patron* (Ch. 1656), No. 461; see generally R. W. Turner, *The Equity of Redemption* (1931), pp. 22-42.

⁷³ E.g. *Edwards v. Woolfe* (1626), Benloe 160, 73 E.R. 1025; *How v. Vigures* (Ch. 1628 × 1629), 1 Chan. Rep. 32, 21 E.R. 499; *Earl of Carlisle v. Gobe* (Ch. 1660), No. 464.

⁷⁴ E.g. *Legges v. Heath* (Ch. temp. Hen. VIII), No. 165-[3] (penal bond for the payment of rent); *Anon.* (Ch. 1595), No. 118-[178] (penal bond for the payment of an annuity); *Stokes v. Mason* (Ch. 1610), No. 165-[21] (penal bond to pay an arbitral award). However, wilful and negligent forfeitures will not be remedied: Note (Ch. 1599 × 1604), No. 120-[74]. Note also *Attorney-General v. Walthew* (Ex. 1646), No. 431.

⁷⁵ E.g. *Legges v. Heath* (Ch. temp. Hen. VIII), No. 165-[3]; *Dove v. Holmes* (Ch. 1551), No. 165-[6]; *Derbyshire v. Dampts* (Ch. 1556), No. 165-[7]; *Pill v. ap David* (Ch. 1581), No. 165-[12]; *Soare v. Poyncell* (Ch. 1588), No. 165-[18]; *Ayliffe v. Duke* (Ch. 1655), No. 459.

⁷⁶ *Capell's Case* (Ch. 1494), 102 Selden Soc. 13; *Johnson v. Cooke* (Ch. 1598), No. 117-[331].

⁷⁷ E.g. *Songhurst v. Dixon* (Ch. 1594), No. 118-[146] (tenant 'by covenant'); *Rotherham v. Rotherham* (Ch. 1596), No. 118-[187] (lessee of holder of mesne life estate); Note (Ch. 1599), Moore K.B. 554, 72 E.R. 754 (life tenant succeeded by a remainder for life); Note (Ch. 1598 × 1602), No. 119-55 (lessee succeeded by a remainder for life); Note (Ch. 1604), Cary 26, 21 E.R. 14 (life tenant succeeded by a remainder for life).

⁷⁸ E.g. *Morgan v. Perry* (Ch. 1595), No. 118-[159]; *King v. Bhundaville* (Ch. 1629 × 1630), Tothill 83, 21 E.R. 130.

⁷⁹ Note (Ch. 1598 × 1602), No. 119-56.

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(vii) Joint liability and contribution

According to the common law of contracts, joint obligors are each liable to the obligee for the full amount of the debt. Thus the obligee may collect the entire sum due from any one of the joint obligors. Typically, the obligee elects to proceed against only one obligor, usually the wealthiest, who is most likely to pay. In addition to this, if the obligee has a judgment against some or all of the obligors, he may execute the judgment against any one or some or all of them up to the full amount of the debt due. Since this is the substance of the contractual relationships between the obligee and the joint obligors, the common law is satisfied by the full payment to the obligee. If the joint obligors have paid different amounts, this was only what they agreed to, each being liable for the full sum.⁸⁰

This latter situation is clearly unfair as to the joint obligors among themselves. The courts of equity, therefore, evolved the maxim that equality is equity. The courts of equity will equalize the payments and obligations of joint obligors among themselves by means of the doctrine of contribution. Moreover, secondary liability to the obligee will result in repayment by means of indemnity or subrogation.⁸¹

Suits in equity are thus available to enforce a joint obligor's right of contribution in cases, for example, of rents,⁸² payments by co-sureties,⁸³ co-executors and co-trustees,⁸⁴ co-parties liable for court costs,⁸⁵ dower rights,⁸⁶ and repairs to bridges, seawalls, drainage ditches, and streets.⁸⁷ However, no right of contribution lies against the crown.⁸⁸

A bill in equity may also be sued to vindicate a surety's right of indemnity.⁸⁹ However, sureties are discharged by any extension of time granted to the principal debtor without their acquiescence;⁹⁰ this is because the extension of time

⁸⁰ E.g. *Wormleighton v. Hunter* (C.P. 1614), Godbolt 243, 78 E.R. 141.

⁸¹ E.g. *R. v. Ratliff's Ex'r* (Ex. 1609), Lane 39, 145 E.R. 281 (subrogation); Note (Ch. 1631), No. 356 (subrogation).

⁸² E.g. *Anon.* (Ch. temp. Eliz. I), Cary 2, 21 E.R. 1; *Gardiner v. Lynsell* (Ch. 1585 × 1587), No. 118-[307]; *Edwards v. Atkinson* (Ch. 1597), No. 118-[236]; *Morgan v. Anon.* (Ch. 1603), Cary 23, 21 E.R. 13.

⁸³ E.g. *Whalley v. Mounson* (Ex. 1553 × 1554), No. Pld-7; *Fleetwood v. Charnock* (Ch. 1629), Tothill 41, 21 E.R. 117; *Morgan v. Seymour* (Ch. 1637 × 1638), 1 Chan. Rep. 120, 21 E.R. 525; *contra Lovelace v. Cole* (Ch. c. 1614), No. 167-557.

⁸⁴ E.g. *Connock v. Rowe* (Ch. 1630), No. 332.

⁸⁵ See Note (Ch. 1598 × 1602), No. 119-219.

⁸⁶ E.g. *Tenants of the Countess of Kent's Case* (Ch. c. 1588), No. 55; *Watkins v. William* (Req. 1620), No. 256.

⁸⁷ E.g. *Attorney-General v. Mewtis* (Ex. 1627), No. 283 (bridge); *Williams's Case* (Ex. c. 1635), No. 385 (seawall); *Rich v. Barker* (Ex. 1658), Hardres 131, 145 E.R. 416 (tenants of a manor are not liable for contribution for repairs to a public bridge); *Earl of Devonshire v. Gibbons* (Ex. 1660), Hardres 169, 145 E.R. 435 (drainage ditch); *Merial v. Wymondsold* (Ex. 1661), Hardres 205, 145 E.R. 454 (streets paved) (semble).

⁸⁸ *Rotherham v. Nutt* (Ex. 1589), No. 56; *Anon.* (Ch. 1597), No. 117-[292].

⁸⁹ E.g. *Kirkham v. Taverner* (Ex. 1554 × 1558), No. Pld-12 (a prayer that the principal debtor be forced to pay the creditor); *Hychcok v. Dean of Norwich* (Ex. 1568), PRO E 112/29/87; *Harris v. Dean of Exeter* (Ex. 1558 × 1572), PRO E 112/10/7.

⁹⁰ E.g. *Joulles's Case* (Ch. c. 1614), No. 167-666; *Hare v. Michell* (Ch. 1614 × 1615), Tothill 182, 21 E.R. 162; *Moile v. Roberts* (Ch. 1629 × 1630), Tothill 182, 21 E.R. 162.

changes the surety's original agreement. A surety will also be discharged where the creditor obstructs the surety's performance.⁹¹

(viii) Equitable defences

As to suits to enforce contracts, there are many defences of equitable origin. Dilatory conduct that harms another may result in the refusal of an equitable remedy.⁹² A grossly unfair and harsh bargain that 'shocks the conscience' will be set aside by principles of equity even though the common law rules of making the contract were followed.⁹³

The courts of equity will grant relief, both affirmative and defensive, against unavoidable accidents⁹⁴ and surprise.⁹⁵ Moreover, clerical mistakes will be remedied in equity by reformation of written instruments.⁹⁶

Where the plaintiff has himself been guilty of dishonest or inequitable conduct, which later generations will call 'unclean hands', the courts of equity will not be a participant in the injustice and will refuse a remedy and leave the plaintiff to whatever common law remedy may be available. Thus, the Court of Chancery refused to enforce contracts whose object was to defraud the crown⁹⁷ or the church.⁹⁸ The courts refused to enforce trusts made to defraud creditors⁹⁹ or other third parties,¹⁰⁰ or to enforce a trust the purpose of which was to deceive a lord of a manor into accepting a tenant whom he disliked.¹⁰¹ Furthermore, concealed titles and estates will not be protected in equity.¹⁰²

(ix) Cy-près

The doctrine of prerogative cy-près was developed in the equity courts during this period. One of the results of the Reformation in England was a statute suppressing chantries and the endowments of masses to be said for the soul of a deceased person. Protestant theology did not include the existence of purgatory, and thus masses for the dead in purgatory were considered useless and superstitious, and were suppressed by statute.¹⁰³ What to do with the endow-

⁹¹ *Giles v. Beresford* (Ch. 1631), No. 351.

⁹² E.g. *Sedgwick v. Evan* (Ch. 1582 × 1583), Choyce Cases 167, 21 E.R. 97; *Randall v. Tynney* (Ch. 1612), No. 207; *Winchcomb v. Hall* (Ch. 1629 × 1630), 1 Chan. Rep. 40, 21 E.R. 501; *Popham v. Desmond* (Ch. 1639 × 1640), 1 Chan. Rep. 135, 21 E.R. 530.

⁹³ E.g. *Allen's Case* (c. 1610), No. 174.

⁹⁴ E.g. *Ingram's Case* (Ch. c. 1629), No. 314.

⁹⁵ E.g. *Ramsey v. Goslin* (Ch. 1631), No. 349.

⁹⁶ E.g. *Anon.* (Ch. 1533 × 1544), Cary 16, 21 E.R. 9; *Ston v. Collar* (Ch. 1596), No. 118–[188]; *Dyke v. Foxwell* (Ch. 1597), No. 118–[220]; *Pedley v. Brady* (Ch. 1597), No. 118–[242]; *Thompson v. Stanhope* (Ch. 1642), No. 421; *Thin v. Thin* (Ch. 1650), 1 Chan. Rep. 162, 21 E.R. 538. However, a scrivener's error in a will makes it void: *Note* (Ch. 1595), No. 117–[189].

⁹⁷ E.g. *Orrell v. Eccleston* (Ch. 1601), No. 119–222.

⁹⁸ *Note* (Ch. 1612), No. 167–255.

⁹⁹ E.g. *Flatman v. Flatman* (Ch. 1599 × 1604), No. 120–[13]; *Note* (Ch. 1613), No. 167–279.

¹⁰⁰ *Pomery v. Ford* (Ch. 1600), No. 118–[341].

¹⁰¹ *Gobe v. Dore* (Ch. 1604), No. 120–[68].

¹⁰² E.g. *Clement v. Sherley* (Ch. 1612), No. 202.

¹⁰³ Stat. 1 Edw. VI, c. 14 (SR, IV, 24).

ments was a new problem to be solved by the courts of equity. The first solution was that land devised to superstitious uses was forfeited to the crown.¹⁰⁴ Then the Court of Chancery ruled that grants to illegal religious uses were void *ab initio* and were not forfeited but passed to the heir at law of the grantor.¹⁰⁵ This concept was further developed and refined so that charitable trusts for illegal purposes were to be redirected to legal objectives as closely¹⁰⁶ within the intention of the donor as possible.¹⁰⁷

(x) Trusts and forfeiture for treason and felony

Another problem of trusts that was being worked out at this time concerned the law of forfeiture for treason and felony. By 1600, it was well settled law that persons convicted of felony forfeited their goods and chattels to the crown, and their lands and tenements were escheated or forfeited to their feudal lords. In the case of traitors, their lands and chattels were all forfeited to the crown.¹⁰⁸ However, in the more complicated area of uses and trusts where common law ownership of property, both real and personal, is separated from equitable or beneficial ownership, it was not always clear at that time when a person was convicted of a common law crime what was forfeited and by whom. The resolution of the problem was that the beneficial interest of land of inheritance held in trust was not to be forfeited to the crown upon the attainder of the beneficiary, but that of a leasehold so held would be forfeited.¹⁰⁹ '[W]here the tenant of the land is attainted of felony or treason, the use and trust for this land are extinguished; for the King, or the lord to whom the escheat belongs, comes in in the *post*, and paramount [to] the trust; and upon a title elder than the use or trust, viz. the right of his lordship by escheat for want of a tenant'.¹¹⁰ Thus beneficial ownership was taken to be the true ownership for the purposes of forfeiture upon conviction of a crime.¹¹¹ On the other hand, there was no problem with the setting aside of fraudulent conveyances made to avoid forfeitures to

¹⁰⁴ E.g. *Bell v. James* (Ex. 1554 × 1558), No. Pld-11; *Mantell v. Mayor of Chipping Wycombe* (Ex. 1558), No. Pld-14; Note (Ex. 1577), No. 16; *Waterchin v. Finch* (Ch. 1580), No. 117-[60x]; *Hotham v. Eynus* (Ex. 1583), No. 33 (de facto chantry); *Anon.* (Ex. 1585), No. 40; *R. v. Palmer* (Ex. 1588), Moore K.B. 263, 72 E.R. 569; *Hampden v. Dyott* (Ex. c. 1589), No. 59; *Town of Springfield v. Mildmay* (Ch. 1597), No. 117-[280]; *Town of Diss v. Mildmay* (Ex. 1611), No. 180; note also *R. v. Hutchins and Belman* (Ex. 1586), No. 41 (copyhold land surrendered to superstitious uses).

¹⁰⁵ *Croft v. Evet* (Ch. 1605), No. 124; note also *Anon.* (Ch. 1597), No. 84.

¹⁰⁶ I.e. *cy-près*.

¹⁰⁷ *Venables' Case* (Ex. 1608), No. 144; *The Case of the Impropriators* (Ex. 1633), No. 379; G. H. Jones, *History of the Law of Charity 1532-1827* (1969), pp. 12-15, 76-81.

¹⁰⁸ M. Dalton, *The Country Justice* (1619), pp. 212, 266-268.

¹⁰⁹ *Attorney-General v. Abington* (Ex. 1613-1619), No. 210; *Goddard v. Goddard* (Ch. 1590), No. 117-90 (dictum); *contra* Note (temp. Eliz. I), No. 109. *Attorney-General v. Carr* (Ex. 1618), No. 251 (the interest of a beneficiary of a trust of a lease of a patent to provide wine for the royal household forfeited to the crown upon his attainder of felony).

¹¹⁰ *Anon.*, Jenkins 244, 145 E.R. 172.

¹¹¹ However, in *Attorney-General v. Wikes* (Ex. 1609), Lane 54, 145 E.R. 294, it seems that where the trustee of a lease of land is attainted of treason but the beneficiary is innocent, the lease is forfeited to the king.

the crown, and they were regularly set aside to protect the crown's rights and the fisc.¹¹²

The overwhelming bulk of the cases edited here deal with some aspect of the common law of real property.¹¹³ These cases came to the courts of equity because equitable remedies were needed to protect common law rights. It was necessary for the equity courts to determine the litigants' substantive common law rights in order to determine their rights to equitable remedies in aid and support thereof. Where the common law issues were particularly knotty, the equity judges would ask the common law judges for advice or assistance.¹¹⁴

3. The equity courts

(i) The Chancery

The original court of equity was the High Court of Chancery. It had a general equity jurisdiction over all people for all types of civil cases. In addition, the officers of the chancery department, like the officers of the other high courts at Westminster,¹¹⁵ had the privilege to sue and be sued in their own court.¹¹⁶ The reason for this privilege was that the normal and orderly business of the court would be interfered with if its officers were absent while being sued in other courts.¹¹⁷ It is to be remembered that many types of actions at common law began normally with a writ of *capias* for the arrest and imprisonment of the defendant. Accordingly, the privilege was allowed to a servant of a deputy register,¹¹⁸ an examiner's clerk,¹¹⁹ and a servant attendant on the chancellor,¹²⁰ but not to a member of the family of an officer.¹²¹

(ii) The Exchequer

The other high court having equity jurisdiction was the Court of Exchequer. The Exchequer had financial authority over England, Wales, and the Town of Berwick, and its jurisdiction was equally extensive. The equity side of the Court of Exchequer was as broad in subject matter jurisdiction as the Court of Chan-

¹¹² E.g. *Attorney-General v. Raleigh* (Ex. 1609), No. 161; *Attorney-General v. Bowes* (Ex. 1609), Lane 39, 145 E.R. 281; *Attorney-General v. Long* (Ex. 1632), No. 374 (a fraudulent trust to avoid a fine payable to the crown).

¹¹³ See generally in the 'Subject Index' under 'Conveyances', 'Copyholds', 'Land', 'Leases', 'Wills'.

¹¹⁴ See below, p. xli.

¹¹⁵ E.g. *Anon.* (C.P. 1597), No. 82; *Bale v. Browne* (C.P. 1608), No. 167-166; *Yelverton v. Dewes* (K.B. 1612), No. 192.

¹¹⁶ See generally, *Marshall's Case* (K.B. 1600), No. 93; W. J. Jones, *The Elizabethan Court of Chancery* (1967), pp. 340-347.

¹¹⁷ E.g. *Cage v. Marwood* (K.B. 1609), No. 156; Note (C.P. 1605 × 1610), No. 168.

¹¹⁸ *Hawkins's Case* (C.P. 1569), No. 8.

¹¹⁹ *Anon.* (K.B. temp. Eliz. I), No. 101.

¹²⁰ *Anon.* (K.B. 1604), No. 122.

¹²¹ E.g. *Anon.* (C.P. 1551), No. 1 (wife); *Powle's Case* (C.P. 1581), No. 26 (wife); *Anon.* (Ch. c. 1628), No. 311 (son); cf. *Lowe's Case* (Ex. 1582), No. 29 (wife).

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cery. However, originally, the jurisdiction of the Court of Exchequer was limited to matters and persons concerned with the revenue of the crown. Any dispute that involved the royal revenue or the rights of the sovereign, directly or indirectly, could be litigated in the Court of Exchequer.¹²² Thus claims for tithes could be litigated in the Court of Exchequer since the king was the supreme head of the Church and was entitled to receive first-fruits and tenths from the clergy.¹²³ Matters involving royal manors,¹²⁴ fines and taxes,¹²⁵ public works,¹²⁶ and leases of royal rights and revenues¹²⁷ came often to the Exchequer.

In the course of the fifteenth and sixteenth centuries, there evolved four classes of persons privileged to sue in the Exchequer: the officers of the Exchequer, royal accountants, debtors to the crown, and informers for the king.¹²⁸ It was the officers and their servants who were specifically mentioned in the ordinances,¹²⁹ but, even if they had not been, they would have been privileged by virtue of the custom which gave this privilege to the officers of the other high courts.¹³⁰ There was no problem in allowing the privilege to the officers themselves, but disputes arose over which of their servants were privileged vicariously through them. It appears to have been settled that the privilege extended to those servants who were attendant upon an officer while he was per-

¹²² E.g. *Attorney-General v. Hoord* (Ex. 1606), No. 131; *Attorney-General v. Warder* (Ex. 1626), No. 269; *Attorney-General v. Bindlos* (Ex. 1628), No. 301; *Attorney-General v. Waltham* (Ex. 1631), No. 348; *Attorney-General v. Long* (Ex. 1632), No. 374.

¹²³ Stat. 26 Hen. VIII, c. 3, s. 8 (SR, III, 495); Stat. 1 Eliz. I, c. 4 (SR, IV, 359-364). E.g. *Anon.* (Ex. 1611), Lane 100, 145 E.R. 332; *Garth v. Moore* (Ex. 1627), No. 285; *Bancroft v. Doyly* (Ex. 1637), No. 396; *Knight v. Brett* (Ex. 1639), No. 403; however, the Court of Exchequer was at first hesitant to accept jurisdiction over tithe cases: see *Dean of Windsor v. Beverley* (Ex. 1588), No. 54; *Anon.* (Ex. c. 1591), No. 65; *Burgess v. Symons* (Ex. 1628), No. 307. For first-fruits and tenths see W. Blackstone, *Commentaries on the Laws of England*, I (1765), pp. 276-278; for their collection and for the Court of First-Fruits and Tenths established in 1540 and amalgamated with the Exchequer in 1554 see G.R. Elton, *The Tudor Revolution in Government* (1953), pp. 189-203, 240-241, and 248-249.

¹²⁴ E.g. *Cotton v. Hammond* (Ex. 1554 × 1558), No. Pld-13; *Attorney-General ex rel. Raleigh v. Jessop* (Ex. 1609), No. 157; *Wright v. Pleasance* (Ex. 1613), No. 215; *Attorney-General v. Howard* (Ex. 1627), No. 289; *Sainthill v. Bendell* (Ex. 1627), No. 290; *Watson v. Johnson* (Ex. 1628), No. 298; *Attorney-General ex rel. Ward v. Burgesses of Wenlock* (Ex. 1628), No. 309; *Wortley v. Sylvester* (Ex. 1640), No. 413.

¹²⁵ E.g. *Capull v. Ardern* (Ex. 1543 × 1545), No. Pld-1; *Manfield v. Wyer* (Ex. 1547 × 1549), No. Pld-2; *Scrace v. Shelley* (Ex. 1547 × 1552), No. Pld-6; *Sled's Case* (Ex. 1588), No. 53; *Burgh v. Hickman* (Ex. 1612), No. 186.

¹²⁶ E.g. *Blagrove v. Mayor of Hull* (Ex. 1589), No. 60; *Wardens of Rochester Bridge v. Cromer* (Ex. 1590), No. 61; *Martin v. Attorney-General* (Ex. 1613), No. 217; *Attorney-General v. Mewtis* (Ex. 1627), No. 283; *Rives v. Lady Walter* (Ex. 1631), No. 341; *Attorney-General v. Inhabitants of Middlesex* (Ex. 1637), No. 392.

¹²⁷ E.g. *Attorney-General ex rel. Gifford v. Bishop of Bangor* (Ex. 1557), No. Pld-10 (ferry); *Mantell v. Mayor of Chipping Wycombe* (Ex. 1558), No. Pld-14 (land and house); *Bycliffe v. Hennage* (Ex. 1584), No. 38 (land); *Attorney-General ex rel. Waller v. Hanger* (Ex. 1608, 1610), No. 146 (prisage); *Swinerton v. Thornhill* (Ex. 1609), No. 152 (prisage); *Swinerton v. Wolstenholme* (Ex. 1627), No. 276 (tunnage); *Compton v. Garway* (Ex. 1628), No. 300 (subsidies, customs, tolls); *Chutterbuck v. Clerke* (Ex. 1629), No. 325 (Worcester Castle); *Watkinson v. Coney* (Ex. 1639), No. 409 (prisage).

¹²⁸ Note (Ex. 1627), No. 277; *Clapham v. Lenthall* (Ex. 1664), Hardres 365, 145 E.R. 499.

¹²⁹ Stat. 12 Edw. I (SR, I, 70); Stat. 5 Edw. II, c. 25 (SR, I, 163).

¹³⁰ E.g. *Anon.* (K.B. 1643), No. 423.

forming his official duties; it was ruled, for example, that butlers and cooks were privileged but that agricultural workers and bailiffs were not.¹³¹

Accountants to the crown were the royal officers who had a duty to account in the Exchequer for moneys received on behalf of the sovereign. In theory, if not in practice also, the accounting had to be done in person in the Exchequer at Westminster. Since the accountant's presence was required there as a part of the collection of the royal revenue, then he must be granted the privilege to sue and be sued there and only there.¹³² Once the accountant had appeared in the Exchequer and made a settlement of his account, he thereupon became a debtor to the crown for that sum and lost his status as an accountant.¹³³

The third type of Exchequer privilege was that of the simple debtor to the crown. Anyone who owed money to the crown could avail himself of this general privilege. The privilege in the equity side of the court was based on precisely the same grounds as the so-called *quo minus* allegation of the common law side. In theory, the plaintiff was less able to pay his debt to the crown because the defendant was withholding money due to him. The king could sue his debtors' debtors, and so it was a reasonable extension of his prerogative to allow his debtors to sue their debtors for his ultimate gain, thus furthering the collection of the royal revenues.¹³⁴

It might appear at first glance remarkable that such a comprehensive and popular jurisdiction as was that of the Exchequer in the sixteenth century could be based solely on exceptions to the prohibition to its existence. Yet it must be remembered that the staff of the Exchequer in the sixteenth century was large; it was one of the largest departments of the English royal administration. In addition, each officer had a retinue of personal servants; even the clerks had cooks, and the highest had households of dozens. A considerable number of royal officers from many departments, sheriffs, and customs officers were accountants in the Exchequer.¹³⁵ This number increased greatly in the sixteenth century when the revenue courts and most revenue duties of the Cham-

¹³¹ E.g. *Abbot v. Sutton* (C.P. 1443), YB Mich. 22 Hen. VI, pl. 36, fo. 19 (dictum); *Leventhorp's Case* (C.P. 1455), YB Mich. 34 Hen. VI, pl. 28, fo. 15; *Anon.* (C.P. 1597), No. 82.

¹³² E.g. *Forde v. N.B.* (C.P. 1469), YB Mich. 9 Edw. IV, pl. 20, fo. 40 (dictum); *Yong v. Clerk of the Hamper* (Ex. Cham. 1470), YB Hil. 9 Edw. IV, pl. 18, fo. 53, Case 67, Jenkins 131, 145 E.R. 92; *Kemsey v. Dalton* (Ex. 1545 × 1552), No. Pld-4; Note (C.P. 1605 × 1610), No. 168; *Anon.* (K.B. 1612), 2 Bulstrode 36, 80 E.R. 939; *Anon.* (Ex. 1627), No. 280; *Constable of Gloucester Castle's Case* (Ex. 1628), No. 308; *Anon.* (K.B. 1643), No. 423.

¹³³ Note (Ex. 1613), No. 211 (semble); *Clapham v. Lenthall* (Ex. 1664), Hardres 365, 145 E.R. 499, 500.

¹³⁴ E.g. *Randell v. Tregyon* (Ex. 1547 × 1552), No. Pld-5; *Poynes's Case* (Ex. 1613), No. 213 (debt must be alleged specifically); *Garth v. Moore* (Ex. 1627), No. 285; *Anon.* (Ex. c. 1628), No. 296 (debt must be alleged specifically); *Anon.* (Ex. c. 1627), No. 294. See generally, H. Wurzel, 'The Origin and Development of Quo Minus' (1939), 49 *Yale Law Journal*, 39-64; R. Crompton, *L'Autorité et Jurisdiction des Courts* (1594), ff. 105-109.

¹³⁵ For the classes who were '*de gremio scaccarii*' in the thirteenth century, see C. Gross, 'The Jurisdiction of the Court of Exchequer under Edward I' (1909), 25 *Law Quarterly Review* 138-144; for a list of the non-judicial officers in 1641, see W. H. Bryson, ed., 'A Book of All the Several Officers of the Court of Exchequer . . . by Lawrence Squibb', *Camden Miscellany*, vol. XXVI, *Camden Fourth Ser.*, XIV (1975), 77-136.

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ber and the Wardrobe were absorbed by the Exchequer. Moreover, the revenue collecting machinery was at that time generally inefficient and dilatory. Arrears might be outstanding for many years before some energetic official would get to work on them; debts would not be paid if no pressure were applied. The class of debtors to the crown was, as a result, huge. The copyhold tenants on the royal demesne and on the other lands in the hands of the monarch deserve special notice as debtors to the crown since their litigation occupied so much of the time of the equity side of the Exchequer in this period. Thus the number of people who could fit themselves into one or another of these classes who were privileged to sue in the Exchequer came to be considerable.

The high courts of Chancery, Exchequer, King's Bench, and Common Pleas stood on an equal footing in regard to the removal of suits out of one court and into another. The writ of prohibition did not travel between them. The removal of suits was based on the various privileges of the courts which related to their jurisdictions. Privileges were of two sorts: special and general. The officers of the Exchequer and accountants had the benefits of the special privilege of the Exchequer, but mere debtors to the crown had only a general privilege.

General privileges only gave the plaintiff the right to sue in a certain court. A general privilege could not be used by the defendant as the grounds for removing a case into another court.¹³⁶ Moreover, if a plaintiff had a general privilege and the defendant had a special privilege in another court, the general privilege deferred to the special, and the defendant could insist on being sued in his own court.¹³⁷ When both parties had special privileges but of different courts, then the court in which priority of suit was established heard the case.¹³⁸ The courts were not anxious to lose business in this way, and so they insisted on the general rule that this jurisdictional point be raised before a general appearance or pleading to issue.¹³⁹ Moreover, where there was a plurality of defendants, all of them must have been privileged for the request for removal to have prevailed.¹⁴⁰

The traditional method of removing suits into the Exchequer was by a writ of

¹³⁶ *Hunt's Case* (C.P. 1573), 3 Dyer 328, 73 E.R. 742 (semble) (a *supersedeas* declaring the defendant to be a debtor to the crown not allowed).

¹³⁷ E.g. *Clapham v. Lenthall* (Ex. 1664), Hardres 365, 145 E.R. 499; *Castle v. Lichfield* (Ex. 1669), Hardres 505, 145 E.R. 570; Note, 3 Salkeld 281, 91 E.R. 825.

¹³⁸ E.g. *Anon.* (C.P. 1601), No. 96; *Ognell's Case* (K.B. 1614), No. 223; *Baker v. Lenthall* (Ex. 1658), Hardres 117, 145 E.R. 409; *Clapham v. Lenthall* (Ex. 1664), Hardres 365, 145 E.R. 499; Note, 3 Salkeld 281, 91 E.R. 825.

¹³⁹ E.g. Note (C.P. 1443), YB Mich. 22 Hen. VI, pl. 9, fo. 7; *Yong v. Clerk of the Hamper* (Ex. Cham. 1470), YB Hil. 9 Edw. IV, pl. 18, fo. 53, Case 67, Jenkins 131, 145 E.R. 92; Case 31 (C.P. 1561), Dalison 36, 123 E.R. 253; *Jervas' Case* (Ex. 1582), Savile 33, 123 E.R. 996; *Taylor's Case* (C.P. 1595), No. 75; *Anon.* (C.P. 1601), No. 96; Note (C.P. 1605 × 1610), No. 168; *Anon.* (Ch. 1612), No. 189; *Ognell's Case* (K.B. 1614), No. 223.

¹⁴⁰ E.g. *S. v. T.B.* (C.P. 1455), YB Mich. 34 Hen. VI, pl. 13, fo. 29; *Anon.* (C.P. 1551), No. 1; *East v. Bittenson* (Ch. 1578), Cary 67, 21 E.R. 36, C. Monro, *Acta Cancellariae* (1847), p. 457; *Powle's Case* (C.P. 1581), 3 Dyer 377, 73 E.R. 846, Godbolt 10, 78 E.R. 6; *Gayer's Case* (Ex. 1614), No. 219; *Vendall v. Harvey* (Ch. 1633), No. 377; D. E. C. Yale ed., *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (1965), p. 336.

supersedeas.¹⁴¹ However, a *supersedeas* could not be sent to the King's Bench because the pleas there were held *coram rege*, and writs did not lie against the king;¹⁴² therefore, the cursitor baron took the *Red Book of the Exchequer*¹⁴³ into the King's Bench and asserted that the defendant was an officer or accountant in the Exchequer and should be sued only there. The cursitor baron showed the copy of the writ of privilege which was in the *Red Book*, an official record, at folio 36. Thereupon the case was dismissed to the Exchequer without any plea or prayer from the defendant.¹⁴⁴

There were alternative methods of asserting the Exchequer privilege in the seventeenth century. It could be pleaded by the defendant,¹⁴⁵ or the *Red Book* could be sent into the Court of Common Pleas.¹⁴⁶ However, in the eighteenth century, it became customary to assert the Exchequer privilege by means of an injunction out of the Exchequer to the plaintiff; this was a personal order not to sue in the other court, but liberty was given to sue in the Exchequer.¹⁴⁷ This was a far superior procedure to the clumsy and embarrassing traditional methods of *supersedeas* and direct claim of jurisdiction *in facie curiae*.

Returning to the scope of the jurisdiction of the Exchequer, it remains to deal with the final phase of the expansion, the use of the fictional allegation of jurisdiction, which opened the court to all comers. It has been seen how the jurisdiction began in the middle of the sixteenth century and was soon greatly employed by the increasing number of privileged litigants during the last quarter of that century. There was a further increase in the quantity of litigation during the reign of James I, and this continued until the outbreak of the Civil War in 1642. Until the middle of the seventeenth century, the requirement that the allegation of jurisdiction be genuine appears to have been strictly maintained.¹⁴⁸ In fact, in at least one equity case, *Ragland v. Wildgoose* (1580),¹⁴⁹ the defendant paid the plaintiff's debt to the crown and thereby ousted the Exchequer from its jurisdiction. Sir Thomas Ragland was indebted to the queen for £300; he appears to have enfeoffed Brasbridge and another with certain lands in trust either for his own use

¹⁴¹ E.g. *Anon.* (C.P. 1442), YB Mich. 21 Hen. VI, pl. 44, fo. 22; Note (C.P. 1605 × 1610), No. 168; *Anon.* (K.B. 1643), No. 423; *contra Taylor's Case* (C.P. 1595), No. 75.

¹⁴² *Bracton*, fo. 5b, S. E. Thorne, ed. (1968), p. 33. Note also *Anon.* (K.B. 1604), No. 122; *Yelverton v. Dewes* (K.B. 1612), No. 192.

¹⁴³ PRO E 164/2; transcribed in H. Hall ed., *The Red Book of the Exchequer*, (Rolls Ser.) III (1896), pp. 823-824.

¹⁴⁴ E.g. *Walrend v. Winroll* (K.B. 1601), Noy 40, 74 E.R. 1010; *Guy v. Reynel* (C.P. 1609), 2 Brownl. and Golds. 266, 123 E.R. 934 (dictum); *Anon.* (K.B. 1612), 2 Bulstrode 36, 80 E.R. 939; *Anon.* (K.B. 1627), No. 275; *Wilson v. Rokesby* (Ex. 1627), No. 279 (dictum); *Anon.* (K.B. 1643), No. 423; *Foster v. Barrington* (K.B. 1659), 2 Siderfin 164, 82 E.R. 1313, Hardres 164, 145 E.R. 433 (dictum).

¹⁴⁵ E.g. *Foster v. Barrington* (K.B. 1659), 2 Siderfin 164, 82 E.R. 1313, Hardres 164, 145 E.R. 433; *Wentworth v. Squibb* (C.P. 1701), 1 Lutwyche 43, 125 E.R. 23; *Phips v. Jackson* (K.B. 1705), 6 Modern 305, 87 E.R. 1045.

¹⁴⁶ E.g. *Wentworth v. Squibb* (C.P. 1701), 1 Lutwyche 43, 125 E.R. 23.

¹⁴⁷ *Cawthorne v. Campbell* (Ex. 1790), 1 Anstruther 205, 145 E.R. 846; J. Manning, *Practice of the Court of Exchequer, Revenue Branch* (1827), p. 191.

¹⁴⁸ E.g. *Williams v. Griffin* (Ex. 1619), PRO E 126/2, fo. 176v.

¹⁴⁹ (Ex. 1580), Savile 11, 123 E.R. 984; see also Case 39, Savile 15, 123 E.R. 986, which is the same case.

or to sell and pay off his debt; then the trustees seem to have sold the land to the defendant Wildgoose. Afterwards Ragland sued Wildgoose in the equity side of the Exchequer alleging his debt to the crown as the basis of the court's jurisdiction. Before responding to the bill, the defendant paid off the plaintiff's debt to the crown thereby removing the incumbrance on his title and defeating the jurisdiction of the court. The barons held that 'the cause of [the] privilege [to sue in the Exchequer] was in respect of the debt which Sir Thomas Ragland owed to the queen, which debt is now paid, [and] the court dismissed the case because when the cause ceases, the effect ceases'.¹⁵⁰

However, from the beginning of the Interregnum in 1649, the allegation of the Exchequer general privilege, that the plaintiff was a crown debtor, came to be used in a fictitious manner, the court disallowing all traverses of this ground of jurisdiction. Unfortunately, the first cases which allowed this fiction do not appear to have been reported. This fictional jurisdiction was asserted at the beginning of each bill by adding after the plaintiff's name the following phrase: 'debtor and accountant to his majesty as by the records of this honourable court and otherwise it doth and may appear'.¹⁵¹ An examination of the files of the bills of complaint discloses the fact that although this formula of jurisdiction was used occasionally during the last years of Charles I, immediately after 1649 most equity bills after stating the plaintiff's name alleged that he was a crown debtor¹⁵² by using this rigid formula. Moreover, in many bills it appears as an interlinear addition. The evidence of the records thus points with some precision to the year 1649 for the introduction of the wider jurisdiction based on the fictitious and non-traversable allegation of indebtedness to the crown.¹⁵³ The first references to the fictitious basis of the Exchequer equity jurisdiction appear to be by Sir Matthew Hale writing in August 1665 in 'Considerations Touching the Amendment or Alteration of the Lawes',¹⁵⁴ and in *The Compleat Solicitor* (1666), p. 389.

(iii) *Res judicata* and the relationship between jurisdictions

If a defendant in an action at common law had an equitable defence, he could remove the case to a court of equity by means of a common injunction to the plaintiff at common law. The injunction ordered the plaintiff to cease his action in the common law court and to sue his claim in the court of equity if

¹⁵⁰ 'Et pur ceo que le cause de privilege fuit in respect del det que Sir Thomas Ragland owe al Roigne, que det est ore paye, le Court dismis le cause, *quia cessante causa cessat effectus*'. p. 11; 'devant ascun respons fait. Wildgoose pay le dett, et donques demand Judgment si le Court voet ouster tener plea, entant que le cause del privilege fuit determine, que est le dett due al Roigne. Et tenus par le Court, que sans cest reason le Court doit dismis le cause, et issint fuit fait . . .'. p. 15.

¹⁵¹ D. B. Fowler, *The Practice of the Court of Exchequer upon Proceedings in Equity*, I (1795), p. 29; see also *The Compleat Solicitor* (1666), p. 389; W. Bohun, *The Practising Attorney* (1724), p. 292; *The Compleat Clerk in Court* (1726), p. 149; S. Turner, *An Epitome of the Practice of the Equity Side of the Court of Exchequer* (1806), p. 2.

¹⁵² Or a debtor to the Commonwealth.

¹⁵³ This accords with the tentative conclusions in regard to the Exchequer common law fiction in H. Wurzel, 'The Origin and Development of Quo Minus' (1939) 49 *Yale Law Journal*, 39, 61, 64.

¹⁵⁴ In F. Hargrave ed., *Collection of Tracts* (1787), p. 278; the date is given in BL MS. Harl. 711, fo. 187v.

he wished to proceed. With the case removed into a court of equity, the defendant could then assert whatever equitable defence he might have. However, since such an interlocutory injunction was granted as a matter of course by a court clerk without any hearing, a litigant acting in bad faith for the purposes of delay or harassment could use this device with ease because it would take time for the other party to get a hearing before a judge to have the injunction vacated. This was a constant source of irritation to the common law courts. On the other hand, such interlocutory injunctions were often ignored in bad faith by the plaintiff at common law who continued his proceedings in contempt of the injunction.¹⁵⁵ There was then as now much forum shopping and general harassing of opposing parties; the courts did what they could to control it,¹⁵⁶ but judges cannot act before hearing arguments on both sides, and this takes time (which may be all that a particular defendant can hope for).

A suit in equity that was pending in one of the lower equity courts could be removed into the Court of Chancery or the Court of Exchequer. This was done by means of a writ of prohibition¹⁵⁷ or *certiorari*.¹⁵⁸ Alternatively, the parties could be enjoined.¹⁵⁹ On the other hand, a suit in one of the high courts for a small sum that was beneath the dignity of the court would be dismissed to the appropriate lower court.¹⁶⁰ There could be no removal after the defendant in the lower court had appeared generally.¹⁶¹ And, of course, there could be no removal where the higher court lacked jurisdiction. Thus since neither the Chancery nor the Exchequer had jurisdiction over land in the county palatine of Chester where the parties lived there, those courts could hear cases touching such land only if there was some independent ground for jurisdiction.¹⁶² The same principles applied to land within the duchy of Lancaster.¹⁶³

¹⁵⁵ E.g. *Jones v. Purse* (Ch. 1538), No. 165-[2]; *Dove v. Holmes* (Ch. 1551), No. 165-[6]; *Calverwell v. Vought* (Ch. 1560), No. 165-[14]; *Man v. Southwell* (Ch. 1589), No. 165-[20]. In fact, the common law courts occasionally encouraged such contempt of the equity courts; e.g. *Humfrey v. Humfrey* (C.P. 1572), 3 Leonard 18, 74 E.R. 513, Dalison 81, 123 E.R. 291; *Anon.* (C.P. 1601), No. 97.

¹⁵⁶ Ellesmere once menacingly said that he would like to have the names of the lawyers who 'occupied their wits to jostle jurisdictions of courts together'. *Grobham v. Stone* (Ch. 1612), No. 188 (in reference to Exchequer jurisdiction).

¹⁵⁷ E.g. *Attorney-General v. Bawne* (Ex. 1568), PRO E 123/4, fo. 5 (Council in the North); *Fleetwood v. Pool* (Ex. 1660), Hardres 171, 145 E.R. 436 (Court of Duchy Chamber).

¹⁵⁸ E.g. Note (Ch. 1599 × 1604), No. 120-[48]; *Hilton v. Lawson* (Ch. 1559 × 1560), Cary 48, 21 E.R. 26.

¹⁵⁹ E.g. *Cholmeley v. Baldwin* (Ex. 1607), PRO E 124/4, fo. 71 (Court of Requests); *Duckett v. Brookesby* (Ex. 1618), PRO E 124/27, fo. 171v (Court of Requests).

¹⁶⁰ E.g. *Eastcourt v. Tanner* (Ch. 1579), Cary 74, 21 E.R. 39, Choyce Cases 139, 21 E.R. 83; Note (Ch. 1598 × 1602), No. 119-14; Note (Ch. 1598 × 1602), No. 119-158; *Darcy v. Arden* (Ex. 1609), No. 162; Note (Ch. 1612), No. 191; *Anon.* (Ch. 1612), No. 203.

¹⁶¹ *Anon.* (Ch. 1612), No. 189; *Vernon v. Crewe* (Ex. 1628), No. 299.

¹⁶² *Davenport v. Deane* (Ch. 1570), Tothill 117, 21 E.R. 141; *Willoughby v. Brearton* (Ch. 1576 × 1577), Cary 59, 60, 21 E.R. 32; *Smith v. Delves* (Ch. 1604), No. 121; *Egerton v. Earl of Derby* (Ch. 1614), 12 Coke Rep. 114, 77 E.R. 1390; *Anon.* (Ex. c. 1627), No. 294; *Vernon v. Crewe* (Ex. 1628), No. 299; *Calvely v. Holcroft* (Ex. 1628); No. 302; *Hulse v. Daniell* (Ch. 1629), No. 326; *Anon.* (Ch. 1631), No. 364; see generally W. J. Jones, *The Elizabethan Court of Chancery* (1967), pp. 370-374.

¹⁶³ *Levington v. Woton* (Ch. 1631 × 1632), 1 Chan. Rep. 52, 21 E.R. 505; *contra Anon.* (Ch. 1612), No. 189 (dictum).

During the ascendancy of Sir Edward Coke in the courts of common law, those courts removed cases out of the lower courts of equity by means of writs of prohibition.¹⁶⁴ For example, the common law courts sent writs of prohibition to the inferior courts of equity to prevent them from hearing cases where there was an adequate remedy at common law.¹⁶⁵ However, if there was no adequate remedy at common law, the request for a prohibition would be refused.¹⁶⁶ Sometimes one is led to the conclusion that the purpose of the prohibitions was merely to take business out of the other courts without any regard to the substance of the legal dispute in issue.¹⁶⁷ In any case, this limited very significantly the Court of Requests¹⁶⁸ and the various prerogative courts. It was also a means of the common law courts' pronouncing on the substance of equitable principles.¹⁶⁹ It was the opportunity to say when a common law remedy was inadequate and thus when the lower court of equity should proceed to hear the case. The result of this was the diminishing of the lower courts of equity, but even so the common law courts did not gain control over the doctrines of equity.¹⁷⁰

The modern doctrine of election of remedies was more or less settled in the late sixteenth century. Thus, if a plaintiff sued at common law and in equity at the same time for the same matter, the equity court would dismiss the suit in equity in order to avoid multiplicity of litigation, inconsistent results, and harassment of defendants.¹⁷¹ In practice, however, the courts were hard pressed to enforce this rule.

The concept of appeals of equity cases from a lower to a higher court was barely considered at all during the period of these cases. The appellate jurisdic-

¹⁶⁴ E.g. *Gray v. Sedgwick* (C.P. 1612), No. 208.

¹⁶⁵ E.g. *Rearsby v. Cuffer* (C.P. 1613), Godbolt 219, 78 E.R. 133 (Court of Requests); *Vautry v. Pannell* (K.B. 1615), No. 236 (a King's Bench prohibition to the 'chancery' of Chester); *Cooke v. Cotton* (K.B. 1616), No. 243 (the King's Bench prohibited the Council in the Marches of Wales from hearing part of a suit in equity); *Watts v. Hyde* (temp. Jac. I), No. 154 (Court of Requests); *Harwood v. Jewell* (K.B. 1615), No. 232; *Grubbe v. White* (C.P. 1641), March 102, 82 E.R. 430 (Court of Requests).

¹⁶⁶ E.g. *Strong's Case* (K.B. 1611), 1 Bulstrode 158, 80 E.R. 850; *Anon.* (K.B. 1614), No. 225; *Beverley v. Beverley* (K.B. 1625), 3 Bulstrode 315, 81 E.R. 262; *Edwards v. Woolfe* (1626), Benloe 160, 73 E.R. 1025.

¹⁶⁷ E.g. *Wormleighton v. Hunter* (C.P. 1614), Godbolt 243, 78 E.R. 141 (suit in the Court of Requests for contribution between co-sureties prohibited because 'it would be a great cause of suits . . .'); *Bromage v. Genning* (K.B. 1616), 1 Rolle Rep. 368, 81 E.R. 540 (suit in the Council in the Marches of Wales for specific performance of a contract to lease land prohibited 'car dunque a quel purpose est l'action sur le case et covenant' and because it would subvert the intent of the lessor to pay damages if he wished to change his mind after having entered into a contract).

¹⁶⁸ See in the 'Subject Index' under 'Requests, court of, Prohibition to'.

¹⁶⁹ E.g. *Waller v. Heyford* (K.B. 1614), No. 227 (a decree in equity against a decedent does not bind his executor); *Harris v. Powell* (K.B. 1615), No. 234 (suits against executors).

¹⁷⁰ See generally L. M. Hill, 'Introduction', *The Ancient State and Authority, and Proceedings of the Court of Requests by Sir Julius Caesar* (1975); C. M. Gray, *The Writ of Prohibition: Jurisdiction in Early Modern English Law*, I (1994), pp. lvi-lx; C. M. Gray, 'The Boundaries of the Equitable Function' (1976), 20 *American Journal of Legal History* 192-226.

¹⁷¹ Note (Ch. 1582), No. 31; *Osborne v. Barter* (Ch. 1583 × 1584), Choyce Cases 176, 21 E.R. 102; *Cotton v. Evans* (Ch. 1599), PRO C 38/3; *Cooper v. Rewe* (Ch. 1601), PRO C 38/4; *contra Bull v. Bodie* (Ch. 1559), Dickens 1, 21 E.R. 166, Cary 50, 21 E.R. 27, 1 Eq. Cas. Abr. 131, 21 E.R. 936; *Cardinal v. De La Brocke* (K.B. 1606), No. 130.

tion of the House of Lords in equity cases had its first very tentative beginning in 1621, though the House heard only a very few equity appeals before 1649 and none from then until 1660.¹⁷² An appeal from the Council in the North was heard in the Court of Chancery in the 1590s,¹⁷³ and a decree in the Court of Requests had been 'confirmed' in Chancery in 1616.¹⁷⁴ However, the general rule was that there was no appeal from any court of equity on a point of equity except to the king himself¹⁷⁵ until the House of Lords became active in the field.

The next question is whether a decree in a court of equity was *res judicata*. The concept of *res judicata* or estoppel by judgment, that a thing once fully adjudicated cannot be reconsidered in the same or another court, was understood in the sixteenth and seventeenth centuries as a general principle.¹⁷⁶ It was specifically held that a final judgment at common law could not be later re-examined in a court of equity.¹⁷⁷ Also, the Court of Chancery could enjoin a common law action for the same matter as a final decree in equity.¹⁷⁸

However, the concept of *res judicata* was not fully worked out by the seventeenth century.¹⁷⁹ Thus, in 1631, the Court of Chancery accorded *res judicata* effect to an equitable decree in the court of chancery of Durham,¹⁸⁰ but five years later, the Court of Exchequer refused it to a decree in the Court of Requests, a lower court of equity.¹⁸¹ Nevertheless, in 1670, no precedents could be found of a final equity judgment on the merits in the Exchequer having been reconsidered in the Court of Chancery, nor should they have been since they were courts of equal rank.¹⁸²

¹⁷² J. S. Hart, *Justice Upon Petition: The House of Lord and the Reformation of Justice 1621-1675* (1991), pp. 44-51, 110-114, describes the first beginnings of equity appeals, which were between 1621 and 1649. See also J. S. Hart, 'The House of Lords and the Appellate Jurisdiction in Equity 1640-1643' (1983) 2 *Parliamentary History* 49-70. In *Herbert v. Lownes* (Ch. 1628), No. 310, the losing defendant 'complained in parliament against the decree, which was erroneous as he said', but whether this was a conventional appeal or a political petition is unclear.

¹⁷³ *Witham v. Waterhouse* (Ch. 1596), No. 80.

¹⁷⁴ *Ramsey's Case* (K.B. 1616), No. 244; it may have been confirmed *pro forma* without any rehearing.

¹⁷⁵ *Glascok's Case* (Ch. 1613), No. 167-237, 2 Bulstrode 142, 80 E.R. 1018; Note (Ch. 1608 × 1620), No. 167-375; e.g. *Finch's Case* (Ch. 1603 × 1617), No. 249.

¹⁷⁶ E.g. *Ferrer's Case* (C.P. 1598), 6 Coke Rep. 7, 77 E.R. 263, Cro. Eliz. 668, 78 E.R. 906; Note (Ch. 1598 × 1602), No. 119-188; Note (Ch. 1599 × 1604), No. 120-[86]; Note (Ch. 1612), No. 167-278; Note (Ch. 1613), No. 118-[348]; Note (Ch. c. 1615), No. 118-[352].

¹⁷⁷ E.g. *Heal's Case* (K.B. 1588), 2 Leonard 115, 74 E.R. 405; *Anon.* (K.B. 1614), No. 221; *Davies's Case* (K.B. 1615), No. 235; *Cotts and Suckerman v. Warner* (K.B. 1615), No. 237; Note (Ch. 1612), No. 167-278 ('[i]f a bill be not exhibited until a verdict be had in [an action of] debt, the court [of equity] will not stay judgment nor execution nor abate any part of the forfeiture'); see also below.

¹⁷⁸ E.g. *Anon.* (Ch. 1631), No. 360.

¹⁷⁹ Indeed, the scope of the doctrine of *res judicata* continues to invite litigation; see W. H. Bryson, 'Equity Reports and Records in Early-Modern England' and 'Virginia Law Reports and Records, 1776-1800' in A. Wijffels ed., *Case Law in the Making*, vol. I (1997), pp. 53 and 99.

¹⁸⁰ E.g. *Anon.* (Ch. 1631), No. 360.

¹⁸¹ *Leppington v. Moody* (Ex. 1636), No. 389; the common law courts also refused to acknowledge as *res judicata* the decrees of the Court of Requests: e.g. *Bacon's Case*, (temp. Eliz. I), No. 103; *Ady's Case* (K.B. c. 1602), No. 119-280; *Ramsey's Case* (K.B. 1616), No. 244; and the Council in the North: e.g. *Portington v. Beamont* (C.P. 1624), Winch 79, 124 E.R. 67.

¹⁸² *Anon.* (Ch. 1670), 1 Chan. Cas. 155, 22 E.R. 740 (dictum).

4. *Nature of the jurisdiction*

Thus did equity supplement and complement the common law. Equity does not compete with the common law but tunes it more finely. The common law is, in theory, a complete system; equity is not a system within itself but rather relates to the common law and aids the common law. English justice came to consist of both common law and equity, and would be defective without both. This was recognized as early as the fifteenth century, and so lawyers and judges had to work out in the pleading stage of litigation whether justice in a particular case was to be served in a court of common law or a court of equity. The chancellor frequently consulted the common law judges on points of law,¹⁸³ equity cases were also adjourned into the Exchequer Chamber for debate among the common law judges and practitioners.¹⁸⁴

Equity does not deny the validity of the common law but rather recognizes it and fulfils it. Equity does not change the common law, but where a person is using the common law to an unjust purpose, the equity judge will order that person not to sue in the common law court or not to enforce a common law judgment.¹⁸⁵ The court of equity does not change the common law or reverse, overrule, or annul any common law judgment,¹⁸⁶ for to do so would be an unconstitutional usurpation of legislative power and an illegal appellate power over the common law courts. But all disinterested people would agree that the common law courts should not be used in an unjust manner, and thus, the equity court orders that would-be unjust person not to do so. It is against good conscience to do injustice. Equity courts simply force defendants to act according to conscience;¹⁸⁷ consequently, they have frequently been called courts of conscience.¹⁸⁸

Christopher St. German was the first scholar to attempt to explain the activities and jurisdiction of the chancellor's court. He spoke in terms of *epikeia* and conscience.¹⁸⁹ The former concept is that, although all law must be framed in

¹⁸³ E.g. *Bodenham v. Halle* (Ch. 1456), 10 Selden Soc. 137; *Bale v. Marchall* (Ch. 1457), 10 Selden Soc. 143; *Peckham v. John C., Chamberlain of England* (C.P. 1464), YB Mich. 4 Edw. IV, fo. 37, pl. 20; *Anon.* (Ch. 1468), YB Trin. 8 Edw. IV, fo. 5, pl. 1; *Charnock v. Sherrington* (Ch. 1596), No. 118–[185]; *Atkins v. Temple* (Ch. 1625 × 1626), 1 Chan. Rep. 12, 21 E.R. 493; *Anon.* (Ch. 1564), No. 3; *Anon.* (Ch. 1584), No. 36; *Lord Clanrickard's Case* (Ch. 1610), No. 170; *Hunt v. Bancroft* (Ch. 1621), No. 260; *Earl of Suffolk v. Grenville* (Ch. 1631), No. 353; see generally W. J. Jones, *The Elizabethan Court of Chancery* (1967), pp. 481–484.

¹⁸⁴ E.g. *Anon.* (Ex. Cham. 1411), 51 Selden Soc. 14; *J.R. v. M.P.* (C.P. 1459), see above; *Anon.* (Ex. Cham. 1459), YB Trin. 37 Hen. VI, fo. 35, pl. 23, 51 Selden Soc. 173; *Anon.* (Ex. Cham. 1482), YB Pas. 22 Edw. IV, fo. 6, pl. 18, 64 Selden Soc. 53.

¹⁸⁵ This was done by means of a common injunction directed to the plaintiff in the common law court. Common injunctions were interlocutory orders that were issued automatically by the clerks of the equity courts upon a simple request to them without any prior hearing before a judge. (A litigant could request a hearing to vacate a common injunction, but it would take time to get a hearing date.)

¹⁸⁶ 'Though the court [of equity will] examine not a judgment [at common law], yet they will examine the corrupt conscience of the party', *Ward v. Fulwood* (Ch. 1596), No. 118–[201]; see also Note (Ch. 1598 × 1602), No. 119–152; *Earl of Oxford's Case* (Ch. 1615), 1 Chan. Rep. 1, 21 E.R. 485.

¹⁸⁷ E.g. *Finch's Case* (Ch. 1579 × 1587), No. 22; Note (Ch. 1598 × 1602), No. 119–152.

¹⁸⁸ The word conscience is used synonymously with equity in *Anon.* (1608 × 1620), No. 167–255.

¹⁸⁹ See C. St. German, *Doctor and Student*, ed. by T. F. T. Plucknett and J. L. Barton, 91 Selden Soc. (1974), pp. xliv–xlvii, and 77–99; E. Hake, *Epieikeia*, ed. D. E. C. Yale (1953).

general terms, it should be applied to individual cases with flexibility and mitigation. The concept of conscience is the same today as it was in the sixteenth century, a sense of absolute right versus wrong. A party should not be allowed to use the common law to perpetrate a wrong. For example, if a person made a written contract under seal, an agreement to pay money for an assignment of contract rights, and then it turned out that the assignment was invalid and worthless, the general common law rules allowed the enforcement of the written contract. However, the injustice of enforcing this contract was obvious, because while contracts should be kept as a general rule, where one party does not get what he thought he was getting, he should not have to give up what he promised to pay. The remedy for the mistaken person is to sue in equity for an order to the other party not to sue on the contract and to return the written agreement to him or, if he has already been sued, an order not to ask the sheriff to execute the common law judgment. Thus the contract and the common law judgment remain in force, but if they are taken advantage of, the obligee will be imprisoned for contempt of the equity court's order.¹⁹⁰

The peaceful coexistence of law and equity continued until the chancellorship of Cardinal Wolsey during the early years of Henry VIII. Thomas Wolsey, a person of modest social background, came to the notice of Henry VIII, who recognized in him a competent administrator. He attained the highest seats of power in the kingdom, civic and ecclesiastical; and as lord chancellor, archbishop of York, cardinal, and papal legate, he was exalted over all men in England except only the king himself. The power went to Wolsey's head, and he alienated many people. The odium that became attached to Wolsey personally spilled over onto his Court of Chancery and from there to the rules of equity that were administered in that court.¹⁹¹

In 1529, Wolsey, having failed to obtain Henry VIII's divorce from Queen Catherine, was stripped of his offices and wealth,¹⁹² and died shortly thereafter. He was succeeded as lord chancellor by the common lawyer Sir Thomas More. This was an interesting succession in that More was the first layman to be appointed chancellor since 1454; he had not been, and was not to become, the king's prime political adviser, and was a well-known practising lawyer. It was believed that he would restore the proper relationship between common law and equity. Soon after his appointment, he called the judges together to settle this relationship. He proposed not to enjoin common law litigation if the judges would reform the common law, but the judges said that they did not have the power to change the law, and this forced More to continue to grant injunctions, *in personam* orders, as Wolsey and all earlier chancellors had done. Thus, More's appointment did not change or restore anything; but he was

¹⁹⁰ *Doctor and Student*, pp. 78-79; C. St German, *A Little Treatise Concerning Writs of Subpoena*, printed in J.A. Guy ed., *Christopher St German on Chancery and Statute* (1985) Selden Soc. Suppl. Ser. 6, p. 106 at pp. 110-112.

¹⁹¹ This antagonism led to the pamphlet warfare that produced St. German's *Doctor and Student*, 91 Selden Soc., and the tracts published in Guy, *Christopher St. German on Chancery and Statute*.

¹⁹² See E. Coke, *Fourth Institute* (1644), pp. 89-95, where the charges against Wolsey are printed *in extenso*.

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a courteous man, and the antagonisms between common law and equity which were to surface again in the time of Lord Chancellor Wriothesley, and in the time of James I were for a while submerged.¹⁹³

From the time of Sir Thomas More onwards, the chancellors were chosen from the ranks of the common lawyers. The only exceptions in our period were the chancellors during the reactionary reign of Mary I (1553–1558), Sir Christopher Hatton (1587–1591), and Bishop Williams (1621–1625).

There was no specialized 'chancery' bar before 1660, the terminus *ad quem* of this volume, thus both bench and bar had been or were practitioners indiscriminately in the courts of common law and of equity. Only the attorneys and clerks of the various courts lacked this broad exposure.

It is interesting to note that it was not until 1534, during the lord chancellorship of Sir Thomas Audley, a common lawyer, that the formal decree rolls of the Court of Chancery were first begun, and the Chancery decree and order books were not begun until 1544,¹⁹⁴ though before this time some decrees were endorsed on the pleadings. Ellesmere, complaining about the verbose decrees that were being drafted in the first decade of the seventeenth century, said that in former times the final decrees were simply for one party or the other, without any recitals.¹⁹⁵ However, even though before the 1530s those decrees of which the court kept a record were simply endorsed on the pleadings, they were sometimes (and must have been) more elaborate than Ellesmere allowed.¹⁹⁶

The first clear example of a suit in equity in the Court of Exchequer dates from this same period, *Tenants of Berkhamstead v. Rector of Ashridge* (Ex. 1531).¹⁹⁷ There were at least five equity Exchequer cases in the reign of Edward VI (1547–1553).¹⁹⁸ The earliest known order book from the equity side of the Court of Exchequer covers the period 1556 to 1558.¹⁹⁹ However, it was during the reign of Elizabeth I that the equity side of this court matured into a permanent jurisdiction.

Although there are a few equity cases in the yearbooks,²⁰⁰ the earliest reported equity case in this collection is *Bartie v. Herenden* (Ch. 1560).²⁰¹ Equity cases before 1579 were very rarely reported.

¹⁹³ J. A. Guy, *The Public Career of Sir Thomas More* (1980).

¹⁹⁴ *Guide to the Contents of the Public Record Office*, I (1963), 30.

¹⁹⁵ *Hanbury v. Arden*, No. 120–[77].

¹⁹⁶ E.g. *Farendon v. Kelsey* (Ch. 1407 × 1409), 10 Selden Soc. 107, 108; *Rous v. FitzGeffrey* (Ch. 1441), 10 Selden Soc. 132, 133; *Bodenham v. Halle* (Ch. 1456), 10 Selden Soc. 137, 140; *Cokayn v. Hurst* (Ch. 1456), 10 Selden Soc. 141, 142; *Bale v. Marchall* (Ch. 1456), 10 Selden Soc. 143, 150; *Revelle v. Gower* (Ch. 1471), 10 Selden Soc. 155, 158.

¹⁹⁷ PRO E 111/49, E 111/35-B, E 111/35-C.

¹⁹⁸ *Manfield v. Wyer* (Ex. 1547 × 1549), No. Pld-2; *Roberts v. White* (Ex. 1549), No. Pld-3; *Kemsey v. Dalton* (Ex. 1545 × 1552), No. Pld-4; *Randell v. Tregyon* (Ex. 1547 × 1552), No. Pld-5; *Scrace v. Shelley* (Ex. 1547 × 1552), No. Pld-6. W. H. Bryson, *The Equity Side of the Exchequer* (1975), pp. 14–15.

¹⁹⁹ PRO E 111/56.

²⁰⁰ The yearbook cases can be found through R. Brooke, *La Graunde Abridgement*, titles 'Conscience & Subpoena & Injunctions' and 'Feffements al Uses'.

²⁰¹ No. 2. The report was written by Nicholas Barham, serjeant-at-law, in 1572.

Perhaps there was no need for equity records because the equity court acting *in personam* forced the parties, usually the defendant, to create a document that the common law courts would recognize or to do a common law act, such as enfeoff another person or make a payment. The court of equity by forcing the creation of a deed created a common law document or record so that the successful petitioner in equity had no need for a record to be preserved in the equity court. A transfer of money or property is a common law event. Equity decrees, even when enrolled, were only evidence of a *res judicata* and not documents of title, as were the common law plea rolls.

The reports herein primarily illustrate the activities of the equity courts during the second half of the reign of Elizabeth I and during the reigns of James I and Charles I. (Apart from the John Lisle manuscripts,²⁰² not much was found from the period of the Interregnum.) Except for the tussle between Ellesmere and Coke, the courts of common law and equity were working together harmoniously in this period, and though by the sixteenth century each had developed different aspects of the law as their special functions, they respected the necessity of the other courts as parts of the general scheme in the administration of justice.²⁰³

However, in the first decade of the seventeenth century, two ambitious and aggressive men came to compete for personal dominance of the English legal system. The two were Thomas Egerton, Lord Ellesmere, who became lord chancellor, and Sir Edward Coke, a common law judge who became lord chief justice of England. The chancellor has always been the administrative head of the English judiciary, but tradition was for Coke a servant, not a master. When Coke became lord chief justice of England in 1613, he began an attack on the Chancery's intervention in litigation by common injunction after judgment at law.²⁰⁴

If the suit in equity for an injunction to stay execution of a common law order was to relitigate the same issue that had been finally determined by the court of common law, this would violate the principles of *res judicata* – the doctrine that once a court has decided a matter, it cannot be litigated again – because the courts of equity did not have and did not claim to have appellate jurisdiction over the Courts of King's Bench or Common Pleas. Indeed it was said in the Court of Chancery that '[i]f a bill be not exhibited until a verdict be had in [an action of] debt, the court [of equity] will not stay judgment nor execution nor abate any part of the forfeiture'.²⁰⁵ If defendants attempted to try their luck with a common law jury and then, if unsuccessful, sued in equity to assert equitable defences, they would not be successful there either because they would be barred by the plea of *res judicata*. Such a bad faith suit in

²⁰² Above, p. xiii.

²⁰³ See, for example, *Stokes v. Mason* (Ch. 1610), No. 165–[21].

²⁰⁴ The personal and professional rivalries between Coke and Ellesmere have been analyzed at length in, among others, D. E. C. Yale, *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (1965), pp. 7–16, and L. A. Knafla, *Law and Politics in Jacobean England* (1977), pp. 155–181.

²⁰⁵ Note (Ch. 1612), No. 167–278; see also Note (Ch. c. 1601), No. 119–236.

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equity could, of course, be brought in order to delay execution of a common law judgment before the equity judge could hear the plea of *res judicata*, but the courts of equity had no control over that except to dismiss the case after a hearing. This was the theory, but it was not and still is not always easy to apply the doctrine in practice.²⁰⁶

On the other hand, however, an injunction after a common law judgment was not necessarily a reconsideration of the substance of the common law result. Where it was, this was inappropriate, being against the rules of *res judicata*, unless it was an appeal to a higher court. However, where the common law judgment was the result of extrinsic or collateral fraud,²⁰⁷ accident, mistake, or adventitious circumstances²⁰⁸ beyond the control of the common law court and which was itself inequitable in effect though within the rules of the common law, then a court of equity should hear the prayer for equitable relief and grant an appropriate remedy.²⁰⁹ Reported in this volume are many cases on the subject of equitable injunctions after judgments at common law.²¹⁰ In such cases, a court of equity should relieve against the judgment in the same manner as against a contract or any other inequitable situation.²¹¹ The common law judgment is not attacked, relitigated, or appealed from, but the inequitable conduct surrounding it is. The alleged inequitable conduct has not been adjudged but is currently being brought before the court for the first time. Equity acts *in personam* and not *in rem*; equity requires the party to act, but the courts of equity do not declare common law rights or alter common law judgments.²¹² This distinction was well understood in the early seventeenth century. For example, in *Stokes v. Mason* (Ch. 1610),²¹³ Justice Williams of the Court of King's Bench, while sitting in the Court of Chancery, granted an

²⁰⁶ See above; note also *Ayloff v. Duke* (Ch. 1655), No. 459, which relieved against a double payment and fraud after a common law judgment, which I believe was wrongly decided because Mrs. Ayloff was aware of the fraud before the common law action was begun. However, the reports are almost all too brief to know exactly what was pleaded and exactly why the judges ruled the way they did.

²⁰⁷ E.g. *Legges v. Heath* (Ch. temp. Hen. VIII), No. 165-[3] (double recovery); *Zouch v. Lord Zouch* (Ch. 1548), No. 165-[5] (double recovery); *Dove v. Holmes* (Ch. 1551), No. 165-[6] (double payment after an injunction); *Ayloff v. Duke* (Ch. 1655), No. 459 (double payment and fraud).

²⁰⁸ E.g. *Jones v. Lachbury* (Ch. 1557), No. 165-[9] (theft of evidence before trial).

²⁰⁹ See W. H. Bryson, 'Equity Reports and Records in Early Modern England' and 'Virginia Law Reports and Records, 1776-1800' in A. Wijffels ed., *Case Law in the Making* (1997), pp. 66 and 99.

²¹⁰ E.g. Note (Ch. 1599), No. 120-[79]; Note (Ch. c. 1599), No. 120-[80]; *Cardinal v. De La Brocke* (K.B. 1606), No. 130; Extracts of Decrees (Ch. 1535-1610), No. 165; *Birde's Case* (1612), No. 206; *Heath v. Heath* (K.B. 1614), No. 220; *Anonymous* (K.B. 1614), No. 221; *Fowler v. Wright* (K.B. 1614), No. 226; *Glanville's Case* (K.B. 1615), No. 230; *Gouge and Smith's Case* (K.B. 1615), No. 233; *Davies's Case* (K.B. 1615), No. 235; *Cotts and Suckerman v. Warner* (K.B. 1615), No. 237; *Ruswell's Case* (K.B. 1615), No. 240; *Apsley's Case* (K.B. 1615), No. 241. See 'Subject Index' at 'Equity, Judgments at law' for additional cases.

²¹¹ See W. H. Bryson, 'Equity Reports and Records in Early Modern England' and 'Virginia Law Reports and Records, 1776-1800' in A. Wijffels ed., *Case Law in the Making* (1997), pp. 69 and 99.

²¹² E.g. *Ward v. Fulwood* (Ch. 1596), No. 118-[201]; *Hurd v. Dodington* (Ch. 1598), No. 118-[273]; Note (Ch. 1598 x 1602), No. 119-152; Note (C.P. 1627), Littleton 37, 124 E.R. 124.

²¹³ No. 165-[21].

injunction after a common law verdict and judgment. This was not a new or unusual practice,²¹⁴ but it was at least arguably contrary to statute, in particular the statute 4 Hen. IV, c. 23, which formed the centre-piece of Coke's argument against the common injunction. St German's student of the laws of England had concluded that the statute stood with good conscience as it 'does not prohibit equity but it prohibits only the examination of the judgment',²¹⁵ but in *Finch v. Throgmorton* (1598) all the judges in Exchequer Chamber had ruled that Chancery could not re-examine matters after judgment at law.²¹⁶ Thus supported, and galled because the equity order, the injunction, might appear to be an appeal to his rival the lord chancellor, Coke let it be known that he was prepared to stop this practice, and proposed to grant writs of *habeas corpus* to persons imprisoned for contempt of a common injunction granted by the Chancery after judgment at law.²¹⁷ This would deprive the equity courts of their powers of enforcement in such cases and lead to control of them by the common law judges, including Coke, who subordinated as many of the other courts to his own as he could.²¹⁸

Soon a most unworthy plaintiff, Richard Glanville, appeared in the Court of Common Pleas and entered a judgment by confession on a contract, a *cognovit* bond, that was the result of his gross fraud and deceit. (He had sold a topaz, representing it to be a diamond.) He thus got a common law judgment; the Court of Chancery issued an injunction to stop the enforcement of it because it and the bond were obtained by fraud; the injunction was disobeyed; Ellesmere imprisoned Glanville for contempt of court; and Coke ordered him to be released on a writ of *habeas corpus*.

This matter ended inconclusively, but this case and several others made a public issue of this problem of the practice of law and the administration of justice. The whole matter of the boundaries between common law and equity was then referred to the king's council for full debate and resolution.²¹⁹ The result was in favour of the courts of equity,²²⁰ as should have been expected. It is ironic that *Glanville's Case* is the perfect example of the need for injunctions

²¹⁴ See the collection of examples from the Chancery decree books: 'Judgments at the common law examined in the High Court of Chancery', No. 165; see also Note (Ch. 1598 x 1602), No. 119-152 ('that judgments [at common law] are so often examined in Chancery . . .').

²¹⁵ C. St German, *Doctor and Student*, ed. by T.F.T. Plucknett and J.L. Barton, 91 Selden Soc. (1974), p. 109 (orthography modernised). See also J.A. Guy ed., *Christopher St German on Chancery and Statute* (1985), Selden Soc. Suppl. Ser. 6, pp. 67-69.

²¹⁶ Discussed in J. H. Baker, 'The Common Lawyers and the Chancery: 1616' in *The Legal Profession and the Common Law* (1986), p. 205 at pp. 208-209.

²¹⁷ See Baker, 'The Common Lawyers and the Chancery: 1616' at pp. 211-215.

²¹⁸ If this grab for power had succeeded, the rest of English legal history might very well have been quite different from what it is. J. P. Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1941), 36 *Illinois Law Review* 127-152.

²¹⁹ *Glanville's Case*, No. 230; note also *Allen's Case* (c. 1610), No. 174; *Fowler v. Wright* (K.B. 1614), No. 226; *Gouge and Smith's Case* (K.B. 1615), No. 233; *Cotts and Suckerman v. Warner* (K.B. 1615), No. 237; *Ruswell's Case* (K.B. 1615), No. 240; *Earl of Oxford's Case* (1615), 1 Chan. Rep. 1, 21 E.R. 485; *Rusell's Case* (K.B. 1482), YB Mich. 22 Edw. IV, fo. 37, pl. 21.

²²⁰ 'The King's Order and Decree in Chancery' (1616), Cary 115, 21 E.R. 61, though James's resolution of the dispute was later said to have been illegal. See J.H. Baker, 'The Dark Age of English Legal History, 1500-1700' in *The Legal Profession and the Common Law* (1986), p. 435 at p. 438.

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after final judgments at common law. The judgment in *Glanville's Case* was a judgment by confession, and the debtor had had no prior opportunity to plead the fraud; the same issue of Glanville's fraud had not been nor could it have been litigated at common law as the case was framed.

Even though equity practice was not perfect, it was more modern and more flexible than the common law. The old rule was thus re-established in 1616.²²¹ Simply stated, the rule was that where the results of an equity order and a common law order are in disagreement, the equity rule and decree will prevail. Were this not so, the courts of equity would be unable to perform their proper and traditional functions,²²² though in performing those functions the courts of equity were not operating as a rival system to the courts of common law: at 'every point equity presupposed the existence of common law'.²²³ Shortly after *Glanville's Case* Sir Edward Coke was removed from his judgeship, Lord Ellesmere died, and life returned to normal in the English courts.

A generation later, personalities and politics, rather than jurisprudence, again impinged on the relationship between common law and equity. Soon after his accession in 1625, Charles I, inclined to follow the French theories and methods of government, attempted to rule England without the interference of parliament. When parliament was removed as a political forum, the opponents of the king's policies took their opposition to the arena of the law courts. Lord Coventry, the lord chancellor, was identified with the king and his policies, and again the dislike of the chancellor resulted in dislike of his court and of its jurisprudence.

It was during this period that John Selden, the famous legal scholar and anti-royalist, published his well-known jibe at equity: 'Equity is a roguish thing; for [in] law we have a measure [we can] 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 to be the chancellor's foot; what an uncertain measure this would be . . .'²²⁴

²²¹ E.g. *Huet v. Conquest* (K.B. 1616), No. 245; *Ayliffe v. Duke* (Ch. 1655), No. 459; but see Note (c. 1629), No. 322; *Morehead v. Douglas* (Ex. 1655), No. 460; the issue was fully re-litigated in *Harris v. Colliton* (Ex. 1658), Hardres 120, 145 E.R. 411, and *R. v. Standish* (K.B. 1670), 1 Modern 59, 86 E.R. 730, 1 Siderfin 463, 82 E.R. 1218, 1 Levinz 241, 83 E.R. 387, 2 Keble 402, 661, 787, 84 E.R. 251, 415, 497, Gray's Inn MS. 35, fo. 679.

²²² See generally 'Arguments Proving from Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery', 1 Chan. Rep. 1, 21 E.R. 576; D. W. Raack, 'A History of Injunctions in England Before 1700' (1986), 61 *Indiana Law Journal* 539-592.

²²³ F.W. Maitland, *Equity* (2nd ed., 1936), p. 19.

²²⁴ J. Selden, *Table Talk* (Pollock ed. 1927), p. 43. Selden's jibe was perhaps also aimed at Lord Keeper Williams, who was not a lawyer and believed in a personal and theological 'conscience' in Chancery according to G. W. Thomas, 'James I, Equity and Lord Keeper John Williams' (1976), 91 *English Historical Review* 506-528, esp. 522-523. Or perhaps, Selden had in mind Ellesmere, who was not a likeable person. In any case, Selden's sarcasm has been quoted ever since as a chide to judges who fail to follow the established law. In *Gee v. Pritchard* (Ch. 1818), 2 Swanston 402 at 414, 36 E.R. 670 at 674, Lord Eldon said 'Nothing would inflict on me greater pain . . . than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot'.

The political, military, and personal defeats of Charles I are well known. As the king, the bishops, and the aristocracy were one by one removed from power, the radicals turned against Oliver Cromwell and the moderate Puritans, and in their zeal and ignorance attacked the law itself. One of their proposals was to abolish the Court of Chancery. This attack was surely the low point of the history of equity.²²⁵ This ill-conceived movement failed in parliament, but it was by a close vote.²²⁶ During the Interregnum, the Court of Chancery was presided over by a committee of three commissioners, and this assured that it would have no political power. However, the normal course of equity jurisprudence in the courts of Chancery and Exchequer continued unabated during the time of Cromwell.

After the Restoration, England's commercial empire began to grow by leaps and bounds, the naval power of the Dutch having been recently defeated. As English wealth became more and more based on commerce, the patronage of the lord treasurer became greater than that of the lord chancellor, and so the politician closest to the king sought to be appointed treasurer rather than chancellor. The result was that the chancellor became less important politically than he had been in the past and thus had more time for the performance of his judicial duties. Furthermore, the legal ability of the candidate for the position of lord chancellor became as important as his political connections. Thus, from the Restoration onwards, there was a succession of scholarly and legally adept chancellors whose opinions were systematically reported.

First and foremost was Heneage Finch, earl of Nottingham, a lawyer and a judge without equal. Since the Middle Ages, the Court of Chancery had been loosely called a court of conscience. Lord Nottingham put the theory of conscience into its proper perspective when, in *Cook v. Fountain* (Ch. 1676), he stated that he was not ruling according to the personal conscience of any particular party litigant, of himself, or of the king, but according to the civic conscience of the English legal system.²²⁷ The concept of conscience as administered in the courts of equity is general and institutional; it is to be found in the established practices and precedents of the courts of equity; it applies equally to all persons; it is an objective not a subjective concept in law. Since Nottingham expounded equity doctrine in lucid and rational opinions based on precedent and since his opinions were the first to be

²²⁵ It was at this period that the Court of Exchequer expanded its jurisdiction to cover all civil cases without regard to the public fisc. Perhaps it was done to assure to the bar and the general public the availability of equitable remedies should the Court of Chancery be taken away.

²²⁶ S. E. Prall, *The Agitation for Law Reform During the Puritan Revolution 1640-1660* (1966), pp. 81-90; N. L. Matthews, *William Sheppard, Cromwell's Law Reformer* (1984), pp. 98, 110; G. B. Nourse, 'Law Reform Under the Commonwealth and Protectorate' (1959), 75 *Law Quarterly Review* 512, 514, 524-525.

²²⁷ 'With such a conscience as is only *naturalis et interna*, this Court [of Chancery] has nothing to do; the conscience by which I [the lord chancellor] am to proceed is merely *civilis et politica*, and tied to certain measures', *Cook v. Fountain* (Ch. 1676), 3 Swanston 585 at 600, 36 E.R. 984 at 990. In 1709, Chief Baron Ward said '[I]n equity we must be guided and governed by the rules and reasons of other cases', *Packington v. Wyche* (Ex. 1709), HLS MS. 1169, pt. 2, pp. 125 at 130.

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systematically reported, he has been called 'the father of equity'.²²⁸ By the end of his chancellorship, there was a specialized equity practice among the bar.²²⁹

Thus, equity has become an integral part of the law. The major misconception about equity – that it is administered at the whim or caprice of the judge²³⁰ – is not, and never has been, true. The 'discretion' exercised by the equity judge is a sound judicial discretion regulated by the established principles of equity that have, over time, come to play an invaluable role in legal practice.²³¹

The sound judicial discretion of the equity judges has always been guided by statutes and judicial precedents, both common law and equity, so far as they are available. The old maxim that where the equities are equal, equity follows the law²³² is evidence of this. The equity judge follows the common law in granting equitable remedies in support of it. Only where there is inequity afoot does the equity judge depart from the common law.

Although there was an incipient right of appeal from the high courts of equity in the early seventeenth century,²³³ and there were only a few cases in parliament that were binding precedents before 1660, the equity courts certainly believed that like cases should be decided in like ways. This is the concept of persuasive precedent. And indeed the equity judges of this period not only listened to precedents cited to them by the litigant's counsel in court,²³⁴ but referred to precedents themselves in support of their rulings.²³⁵ Furthermore, they would ask for precedents to be searched for and presented to them,²³⁶ and Baron Trevor, sitting on the equity side of the Court of

²²⁸ See generally, D. E. C. Yale, 'Lord Nottingham and Precedent in Equity', *Lord Nottingham's Chancery Cases* (1957), 73 Selden Soc., pp. xxxvii–cxxiv; D. E. C. Yale, 'Introduction', *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (1965).

²²⁹ It was said that in 1682 'all the posse of the Chancery bar appeared in the Exchequer to argue that . . .'. *Attorney-General v. Herring* (Ex. 1707), IU Lilly MS. Parker, 'Cases in the Exchequer, vol. 4', p. 136.

²³⁰ Where this is so, it is the action of a bad judge behaving improperly.

²³¹ W. J. Jones wrote in reference to Ellesmere: 'he insisted that equity was an aspect of law rather than a figment of discretion'. *The Elizabethan Court of Chancery* (1967), p. 98.

²³² 'Aequitas sequitur legem'; e.g. *Attorney-General v. Abington* (Ex. 1613–1619), No. 210(II); *Ruswell's Case* (K.B. 1615), No. 240(IV); *Anon.* (C.P. 1641), March 106, 82 E.R. 432; *James v. Blunck* (Ex. 1656), Hardres 88, 145 E.R. 395; R. Francis, *Maxims of Equity* (1727), pp. 61–72.

²³³ J. S. Hart, *Justice Upon Petition: The House of Lords and the Reformation of Justice 1621–1675* (1991), pp. 44–51, 110–114, describes the first beginnings of equity appeals, which were from 1621 to 1649. See also J. S. Hart, 'The House of Lords and the Appellate Jurisdiction in Equity 1640–1643' (1983), 2 *Parliamentary History* 49–70.

²³⁴ E.g. *Lowe's Case* (Ex. 1582), No. 29; *R. v. Palmer* (Ex. 1588), Moore K.B. 263, 72 E.R. 569.

²³⁵ E.g. *Wardens of Rochester Bridge v. Cromer* (Ex. 1590), No. 61(II); *Anon.* (Ch. t. Ellesmere), No. 119–56; *Anon.* (Ch. t. Ellesmere), No. 119–57; *R. v. Earl of Nottingham* (Ex. 1609), Lane 42, 47–48, 145 E.R. 284, 288–289; *Jackson's Case* (Ex. 1609), Lane 60, 145 E.R. 299; *Arden v. Darcy* (Ex. 1610–1614), No. 218(II); *Humphreys v. Sotherton* (Ex. 1629), No. 319(II); *Vendal v. Harvey* (Ch. 1633), No. 377; *Walsingham v. Baker* (Ex. 1656), Hardres 49, 145 E.R. 375; see generally, W. H. D. Winder, 'Precedent in Equity' (1941), 57 *Law Quarterly Review* 245–279.

²³⁶ E.g. *Anon.* (Ex. 1611), No. 178; *Arden v. Darcy* (Ex. 1610), No. 218(I); *Sheriff v. Tompkins* (Ex. 1623), E.126/2, fo. 270v; *Clench v. Burman* (Ch. 1650), No. 442; *Clarke v. Southcott* (Ch. 1652), No. 454; *Vaughan v. Mansel* (Ex. 1656), Hardres 67, 145 E.R. 384; *Hatred v. Devaux* (Ch. 1660), No. 465.

Exchequer, once smugly noted that he had found a precedent that counsel had overlooked.²³⁷

That more precedents were not being cited before 1660 reflects the great lack of equity reports in print at the time. This may be accounted for by a contemporary preference for reporting common law cases. Law students at the time, as they had for centuries before, attended the common law courts of Common Pleas and King's Bench as a vital part of their legal education. Some of the notes taken in court ended up as formal reports of cases. We do not hear of students regularly attending the courts of Chancery or Exchequer. Secondly, even the more frequent common law reports were not properly printed because of the monopoly on printing law books and because of the vagaries of the printing trade at the time.²³⁸

It is to be noted that with the exception of the four large collections of short Chancery cases or notes of cases,²³⁹ there are almost an equal number of equity cases reported here from the Court of Exchequer and the Court of Chancery. Considering that the Exchequer was also a court of common law, one might be tempted to argue that the idea of reporting equity cases arose in the Exchequer in imitation of the reporting of its common law cases. However, a few Chancery cases had been reported earlier, some in the yearbooks. My opinion is that law reporting at this time was a very haphazard matter and the proportionately large number of equity cases from the Court of Exchequer is a matter of coincidence; that is where Arthur Turnour and Robert Paynell, who happened to make reports, happened to practise. The total number of cases filed and heard in the Chancery was much greater than in the equity side of the Exchequer. Maybe the lord chancellors, and the barons of the Exchequer, were not as highly regarded before 1660 as they came to be afterwards and so the legal community was less interested in their opinions. It is interesting to note the lack, both here and in the older printed reports, of opinions by the world-famous chancellor, Sir Francis Bacon.

The courts are constantly working out new solutions to new legal problems as society and commerce develop. This is, or should be, done within the context of existing precedents and statutes in order to avoid frustrating legitimate expectations and planning based on the established law. Old problems and solutions should not be re-litigated, in theory, because the parties should know ahead of time how the court will rule; these cases should be settled out of court. A case involving a mere dispute of fact, as opposed to law, is of little concern to anyone but the parties themselves and thus need not be reported. Even so, most of the cases in this book report rulings on motions dealing with routine

²³⁷ *Swinerton v. Wolstenholme* (Ex. 1627), No. 276(I). For the role of precedent in Chancery in this period see M. Macnair, 'The Nature and Function of the Early Chancery Reports' in C. Stebbings ed., *Law Reporting in Britain* (1995), p. 123.

²³⁸ W. H. Bryson, 'Law Reports in England from 1603 to 1660' in Stebbings, *Law Reporting in Britain*, pp. 113-122.

²³⁹ No. 117 to No. 120.

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questions of procedure (not at all dissimilar to those of modern practice and of all times in between).

Since the courts of equity grant remedies only when the ordinary common law remedies are inadequate, the jurisdiction of the equity courts is said to be extraordinary. The term 'extraordinary' is used here in the sense of going beyond the basic rather than in the sense of unusual; equity is both extraordinary and quite usual and frequent.

One aspect of extraordinary equity powers involves the personal order. A personal order does not change the law or the parties' strict common law rights and is enforced by the court's holding the defendant in contempt and keeping him in prison until he obeys. Thus, equity is said to act *in personam*. A common law court acts *in rem* (that is, on the property of the defendant) declaring the money or land in dispute to belong to the successful plaintiff. The common law court thus changes ownership and orders the sheriff to take the money or land from the defendant and to give it to the plaintiff. Since the equity court acts only *in personam* on the parties, it neither changes the common law nor reviews a common law judgment.²⁴⁰

The procedure of the equity courts, sometimes referred to as English bill procedure, which was developed in the fifteenth-century Chancery, was clearly more modern and much more efficient than the common law procedure, with its writs and forms of action and trial by jury. Every court that was set up by act of parliament or evolved on its own in England from the fifteenth century onward used this English bill procedure rather than the procedure of the common law courts.²⁴¹ The Court of Requests was a court of equity that was set up to hear the disputes of poor people involving small sums of money. Even though it later came to hear cases where large sums were disputed, it was not a high court and its decrees were not well respected by the other royal courts. It fell into disuse in the 1640s.²⁴² Two regional courts with origins in the fifteenth century provided justice conveniently to the inhabitants of the northern and western parts of England and Wales. These were the Council in the North, which sat at York, and the Council in the Marches of Wales, which sat at Ludlow. Both courts administered equitable remedies. They fell into disuse when their criminal jurisdictions were abolished by statute in 1641.²⁴³ Moreover, for disputes involving land lying in Durham, Lancashire, and Cheshire, and land which was parcel of the Duchy of Lancaster, equitable remedies were available in the Chancery Court of the County Palatine of

²⁴⁰ *Ward v. Fulwood* (Ch. 1596), No. 118-[201]; Note (Ch. 1598 × 1602), No. 119-152.

²⁴¹ The only exception was the common law Court of Great Sessions of Wales which was established in 1543 as a part of the integration of Wales into the English political and legal system. W. H. D. Winder, 'Equity in the Courts of Great Sessions' (1939), 55 *Law Quarterly Review* 106.

²⁴² I. S. Leadam ed., *Select Cases in the Court of Requests*, 12 Selden Soc. I, li.

²⁴³ Stat. 16 Car. I, c. 10, ss. 2, 7 (SR, V, 110-111); R. R. Reid, *The King's Council in the North* (1921), pp. 445-449; C. A. J. Skeel, *The Council in the Marches of Wales* (1904), pp. 158-165; note also P. Williams, *The Council in the Marches of Wales under Elizabeth I* (1958).

Durham,²⁴⁴ the Chancery Court of the County Palatine of Lancaster, the Court of Duchy Chamber of Lancaster,²⁴⁵ and the Court of Exchequer of the County Palatine of Chester. These courts were abolished in modern times. In addition, there were several revenue courts that administered common law rights by means of equitable remedies. These were the short-lived Court of Augmentations,²⁴⁶ the Court of First-Fruits and Tenths, and the important Court of Wards and Liveries.²⁴⁷ The first two were merged into the Court of Exchequer in 1554, and the latter disappeared in the middle of the seventeenth century when military tenure of land was abolished. Finally there was the Court of Star Chamber, a court of criminal and civil jurisdiction, which also used English bill, equity, procedure. It was abolished in 1641.²⁴⁸

The period under consideration saw the beginning of the serious reporting of equity cases. It was the time of professional lawyers sitting in the Court of Chancery as a general rule, the Court of Exchequer assuming an equitable jurisdiction, and the new lesser courts hearing cases using equity procedure. The beginning of the reporting of equity cases was the beginning of the serious discussion and debate of the principles and practice of equity; this led to their being settled in similar fashion to those of the common law. By the end of the eighteenth century, the process was complete to the point that equity was as well settled and well defined by precedent as was the common law in the Middle Ages, and the growth of the law in the nineteenth century was stimulated by the legislature rather than by the courts.

D. EDITORIAL PRINCIPLES AND PRACTICES

It has been decided to translate all the cases in law French into English and not to print any of the original cases *literatim*. There are several reasons for this. Primarily, the law French of the late sixteenth and the seventeenth centuries is linguistically artificial, and it is clear from both the vocabulary and the syntax that although writing in law French the reporters were thinking in English. The quirks of their French are matters of legal jargon, not of linguistics. The precise English words in the mind of the writer are often transparently obvious, and the true original language is English. The difficulties of translation come from the law and not the language, from elliptical writing, from poor handwriting, poor copying,²⁴⁹ and the bad state of the manuscripts; the problems would have been as difficult had the original been in English.

²⁴⁴ See *The Practice of the Court of Chancery of the County Palatine of Durham* (1807); K. Emsley and C. M. Fraser, *The Courts of the County Palatine of Durham* (1984), pp. 75–90.

²⁴⁵ R. Somerville, 'The Palatinate Courts in Lancashire', in A. Harding, *Law-making and Law-makers in British History* (1980), pp. 54–63.

²⁴⁶ See generally, W. C. Richardson, *History of the Court of Augmentations 1536–1554* (1961).

²⁴⁷ See generally, H. E. Bell, *An Introduction to the History and Records of the Court of Wards and Liveries* (1953).

²⁴⁸ Stat. 16 Car. I, c. 10, s. 1 (SR, V, 110–111).

²⁴⁹ E.g. BL MS. Harl. 1576.

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Where there were serious doubts as to the meaning of the law French, a transcription of the original has been given in a footnote. Secondly, several reporters alternated law French and English sentences within a single case without any discernible logic or system. All the reporters used English words when they did not know the French one. Thirdly, to publish the law French original would substantially increase the costs of this volume. Fourthly, many of the original manuscripts are available in microfiche copy. Passages in Latin have in general not been translated, and abbreviated Latin has been expanded.

Those reports that were originally in English have been transcribed using modern spelling and punctuation. As a matter of law, a word is a spoken thing not a written thing, and thus spelling is of no legal significance so long as the word sounds correctly. This is the rule of *idem sonans*. In the seventeenth century, writers were careful to spell Latin according to the standard conventions, but felt no such constraints when writing in English and would quite happily spell the same English word, even proper nouns,²⁵⁰ differently within the same sentence. Thus, to transcribe the English cases *literatim* instead of using modern, standard orthography is valueless. Even after standardising spelling and punctuation, this volume of reports lacks a uniformity of style and appearance, but no more can be done in this direction without compromising the integrity of the substance of the original reports.

Given this volume's departure from the usual practice of printing the original text as well as its translation, it is appropriate to make some observations upon practice in translation and transcription of the law French texts. The tenses and moods of the original have been followed more closely than is common where the original text is printed, though some variation has been admitted where necessary to avoid artificiality in the translation and to allow for the fact that the reporters themselves were flexible in their usage. There was a strong tendency among the reporters to omit definite and indefinite articles, the of-genitive, and the pronoun subject. To avoid cluttering the translation with brackets these have been silently supplied, except in cases where there might be a change in sense. The modern forms of i, j, u, and v have been used, as this is a matter of calligraphy and typography rather than orthography.²⁵¹ The thorn has been transliterated as th. Save in the case of sums of money, numerals have generally been rendered into words. Abbreviations for money have been standardized to superscript l, s, and d, following contemporary usage. References to regnal years have been rendered into standard form. Since modern usage in spelling, paragraphing, capitalization, and punctuation has been followed for the material translated into English from law French,

²⁵⁰ The printer Richard Tottell spelled his own surname at least eleven different ways in the books printed by himself: J. H. Beale, *A Bibliography of Early English Law Books* (1926), p. 196, note also pp. 52–104; Valentine Simmes, the Elizabethan printer, occasionally printed his own surname with different spellings: W. C. Ferguson, *Valentine Simmes* (1968), p. 80; see also R. Munter, *Dictionary of the Print Trade in Ireland 1550–1775* (1988), p. 6.

²⁵¹ H. Maxwell Lyte, '“u” and “v”, a Note on Palaeography' (1925), 2 *Bulletin of the Institute of Historical Research* 63–65.

names of persons and of places have been put into modern spelling unless there is some doubt or uncertainty. Names in the original were frequently spelled differently in the same report. Where the name of a party has been found in the official record of the case, this version has been used instead of a garbled version as frequently found in the manuscript report.

Each report is a transcription (of a report originally in English) or a translation (of a report originally in law French) of a single manuscript rather than a composite of several versions of the report. The manuscript used is noted after the style of the case, followed by a note in square brackets of whether the report was originally in law French or in English. Single words or short passages in a language other than the dominant language of a given report are not noted. Significant variations in other manuscripts are given in footnotes, but minor verbal variations are not noted.

Square brackets have been used to enclose matter added by the editor to supply a deterioration or omission in the original manuscript, to aid the flow of the text, or to make an abbreviated note into a grammatical sentence. Where a word in the original has been replaced or omitted in order to make sense of the report the replacement word or ellipses are enclosed in square brackets, and the word replaced or omitted is indicated in the notes.²⁵² Ellipses set off by square brackets, and unaccompanied by a note, indicate that the editor was unable to decipher a word or words in the manuscript and declined to speculate on what is missing. A question mark between square brackets warns the reader that the editor was unsure of the correctness of the transcription or translation of the preceding word. Repetitions in the original have been silently omitted.

Marginalia, endorsements, erasures, and cancellations have in general not been transcribed. Transcribed marginalia are indicated in the notes. Erasures which have been transcribed are enclosed within angle brackets.

Dates are all given in Old Style since New Style was not adopted in England until 1752.²⁵³ The year is taken to have begun on 1 January, though transcribed dates have not been altered.

In making footnotes to the citations to authority in the cases transcribed, I have given parallel references to the *English Reports* reprint since this is the edition of the older printed reports that is most widely available today, but the statutory references are generally limited to the *Statutes of the Realm*. Where a case or a statute is referred to more than once in a particular case, only the first reference has been identified in a footnote.

I have attempted to locate the official decrees or orders that correspond to the unofficial reports published here. The general problem is that equity cases nor-

²⁵² Certain frequent substitutions have been made silently in translating from French, either in response to loose usage by the reporters or to aid the sense and avoid circumlocution. These include: 'from' or 'of' for French 'a'; 'had' for French 'ad'; 'at the', 'for the', 'of', or 'at' for French 'al'; 'to' for French 'de'; 'said' for French 'dist'; 'remainderman' and 'reversioner' for French 'cestui in remainder' and 'cestui in reversion'; 'to take' for French 'pur prendre' (and similar formations). To aid the sense (e.g.) 'X's house' has been substituted for the English 'X his house'.

²⁵³ Stat. 24 Geo. II, c. 23, s. 1.

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mally took several years from filing to final decree. During the pendency of the litigation, numerous interlocutory orders would be entered, some were orders of course, others followed interlocutory hearings. The reports could have been of proceedings at interlocutory or final hearings; in most cases, one cannot know which. Where there is such uncertainty I have noted all the possible orders that I was able to identify. In many cases, there were no orders for the term of the report (where the term is known), and so references to orders from preceding or following terms have been noted where possible. The existence of an enrolled decree generally renders identification of the record easier, but the parties may never have had a formal decree drafted and entered in the order books following an oral ruling from the bench. Where a final decision was for the defendant or where the parties settled the case out of court, for example, money was to be saved by omitting this formality.²⁵⁴

²⁵⁴ For the record-keeping practices of the Chancery see W.J. Jones, *The Elizabethan Court of Chancery* (1967), pp. 286–302 and H. Horwitz, *A Guide to Chancery Equity Records and Proceedings 1600–1800* (2nd ed.1998).