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Reports of Cases in the Court of Chancery in the Middle Ages (1325 to 1508)

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This book is dedicated to

DAVID J. SEIPP

without whose scholarly analysis
of the English yearbooks
this book would not have been feasible.

INTRODUCTION

If the history of the law is to be properly written, it must be based upon the primary legal sources. One of the primary source materials of the law is the reports of cases. These are particularly important because here is the best evidence of the judges' legal reasoning. The court records kept by the clerks of the courts do not give this information as, indeed, it is not their purpose to do any more than record the results of a particular lawsuit for future use.[1] They primarily serve the purpose of *res judicata*; their value as judicial precedent is secondary and tangential. The main purpose of the law reports, on the other hand, is to record the judges' opinions, both holding and *dicta*, for future use as legal precedents. Note that the records are official documents, but the reports are mere private compilations.

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1 Note that 147 pleadings in cases on the equity side of the Court of Chancery dating from 1364 to 1471 have been edited by W. P. Baildon, in *Select Cases in Chancery* (1896), Selden Society, volume 10. There are also some examples of medieval Chancery pleadings dating from the reigns of Richard II through Henry VII in J. W. Bayley, ed., *Calendars of the Proceedings in Chancery in the Reign of Queen Elizabeth* (1827, 1830), vol. 1, pp. i-cxxvi, vol. 2, pp. i-lxxvi; and G. Wrottesley, ed., 'Early Chancery Proceedings, Richard II to Henry VII [1377-1509]', *Collections for a History of Staffordshire*, new series, vol. 7, pp. 240-293 (1904).

The major problem for historians of the medieval Court of Chancery is that its official records of orders and decrees do not begin until 1534,[1] in the middle of the reign of Henry VIII, the first renaissance king of England.[2] Thus, the law reports of cases in the medieval Court of Chancery are of particular value. Therefore, this book presents an English edition of them, and it is hoped that these primary sources of the law in this court will be useful to the future scholars who may pursue the history of the English Court of Chancery.

It is to be noted that many of the cases here are not of arguments and judgments in the Court of Chancery itself but are discussions of Chancery cases that occurred in the Exchequer Chamber, where the judges and lawyers assembled to argue about points of law. However, this is the same in substance as when common law judges were invited into the Court of Chancery to assist the Lord Chancellor by advising him on points of law. In both situations, the cases are cases pending in the Court of Chancery.

It is a tenet of the law of England that the king wills that no wrong be done in his name.[3] However, if one of the king's officers, agents, or servants acting on the king's behalf committed a wrong, there was no remedy in the common law courts, because no writ lay against the king in his own courts. This is a fundamental principle of royal or governmental prerogative or privilege, which is necessary to prevent the disruption of the efficient operation of the government. The result, however, was a wrong without a remedy; this is unconscionable. Thus, the wronged party was permitted to petition the Chancellor for a remedy as a matter of the king's grace, the king being the fount and origin of the administration of justice to his people. The kings of England, in their coronation oaths, swore to do 'equal law and justice with discretion and mercy'.[4] This principle of access to the Court of Chancery became so well settled as to be expressed as a maxim, *i.e. nullus recedat e*

1 The Chancery decree rolls, C.78; *Guide to the Contents of the Public Record Office* (1963), vol. 1, p. 30.

2 While the periodization of history is arbitrary, the craft of the historian would be impracticable without it.

3 This maxim is sometimes misstated as the king can do no wrong.

4 *Statutes of the Realm* (*SR*), vol. I, p. 163, and so in 1689, Stat. 1 Will. & Mar., c. 6 (*SR*, VI, 57), and so up to the present day.

Curia Cancellariae sine remedio.[1] The most frequent remedies in the Court of Chancery in the middle ages were the petition of right, *scire facias*, *monstrans de droit*, and traverse of office.[2]

These petitions regarding common law rights and wrongs were handled on the Latin side of the Court of Chancery as a matter of general conscience. This, then, is the origin of the jurisdiction of the Court of Chancery. There are no religious or theological issues involved. When the court expanded its jurisdiction to private acts of wrong where the common law courts did not grant a complete and adequate remedy to do justice, this was an easy and logical progression, and, thus, the Latin side of the court was the origin of the equity or English side of the Court of Chancery.[3] Thus, the equity side of the court is seen to have grown out of the common law side as extraordinary also, where the ordinary remedy of the common law courts was inadequate or incomplete. Likewise, this is to remedy an unconscionable legal situation. And again, there is no theology involved. In only a few cases is there any reference at all to God,[4] but there is much discussion of what is good in conscience with no reference to theology, with only three exceptions.[5] These

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1 *E.g.* YB Hil. 4 Hen. VII, f. 4, pl. 8 (1489), see below, Case No. 120; *Cook v. Fountain* (1676), 73 Selden Soc. 362, 371, 3 Swanston 585, 601, 36 E.R. 984, 990; T. Branch, *Principia Legis et Aequitatis* (1818), p. 92; *Heiskell v. Galbraith* (Tenn. App. 1900), 59 S.W. 346.

2 W. S. Holdsworth, 'The History of Remedies against the Crown', *Law Quarterly Review*, vol. 38, pp. 141-164, 280-296 (1922).

3 *Acherley v. Vernon* (Ch. 1732) (*per* Lord King), Forrester 40; F. W. Maitland, *Equity* (rev. ed. 1936), p. 6; A. D. Hargreaves, 'Equity and the Latin Side of Chancery', *Law Quarterly Review*, vol. 68, pp. 481-499 (1952).

4 The only cases herein where God is even mentioned at all are *Earl of Kent's Case* (Ch. 1405), Case No. 45 (gift of God); *Anonymous* (Ch. 1452), Case No. 57 (defines conscience in reference to God); *Anonymous* (Ch. 1468), Case No. 79 (*Deus est procurator fatuorum.*); *Barrowwick v. Hawes* (Ch. 1471), Case No. 85 ('in conscience and before God'); *Skrene's Case* (Ch. 1474-1476), Case No. 90 (a gift was given to God and the Church); *Anonymous* (Ch. 1489), Case No. 120 ('right ought to be in accord with the law of God'); *Rede v. Capel* (Ch. 1492), Case No. 123 (act of God, i.e. unavoidable accident).

5 *Anonymous* (Ch. 1452), Case No. 57; *Barrowwick v. Hawes* (Ch. 1471), Case No. 85; *Anonymous* (Ch. 1489), Case No. 120.

latter three cases are not sufficient, in my opinion, to undergird the theory that equity in the English courts is a matter of theology. If the Chancellor was a bishop, he could keep his court jurisdictions separate, just as he kept his Latin and English jurisdictions separate. In the Chancery cases reported herein, there is no serious discussion of theology. Thus, the medieval judges well understood the distinction drawn by Sir Francis Bacon (1561-1626) and by Lord Nottingham (1621-1682) between a personal conscience and a civic or public conscience.[1] Lord Nottingham's comment was not his own innovation, but an observation of a timeless truism.

The relationship with the common law courts was close and mutually supportive. Where there was a question of fact to be decided, the case was sent by an issue out of Chancery into the King's Bench for a trial by a jury with the verdict to be sent back into the Chancery. But they are Chancery cases, and the judgments were rendered by the Chancellors. This procedure was copied later on for the equity cases where the evidence in the written depositions was conflicting or unclear. Also, it was frequent that common law judges were asked to come into the Chancery to advise the Chancellor on questions of common law, and difficult issues of law were adjourned for debate in the Exchequer Chamber by all of the judges and the leading lawyers. Both of these procedures remained common throughout the seventeenth century at least.

In contrast, in the Court of Exchequer, which was a common law court, the court itself could send a writ to a sheriff to empanel a jury, whether for a trial at common law or for an advisory verdict to inform the conscience of the court in an equity case. Thus, there was no need for the Court of Exchequer to request a judge of the Common Pleas or the King's Bench to come and advise or to order an issue out of the court.

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1 'Uses . . . are guided by conscience, either by the private conscience of the feoffee or the general conscience of the realm, which is Chancery.' J. Spedding, *et al.*, *The Works of Francis Bacon*, 'Reading on the Statute of Uses', vol. 7, p. 401 (1872); '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), 73 Selden Soc. 362, 371, 3 Swanston 585, 600, 36 E.R. 984, 990.

It has been argued that the equity jurisdiction of the English Court of Chancery, which was later copied by the Court of Exchequer, was derived from the Roman law or the canon law of medieval Europe. However, to the best of my knowledge and belief, I assert that it was an outgrowth and a further development of the English common law. The original jurisdiction of the Court of the Chancery was to administer the common law of England. Because the protections of the English common law could not be boldly demanded in the king's common law courts against the king himself or his agents, it had to be humbly requested as a matter of the king's grace and favor in the Court of Chancery. The common law was administered there against the officers and agents of the crown because the king willed that no wrong should be done, or should have been done, in his name. Since the Chancery gave remedies where the jurisdiction of the common law courts did not, would not, and was unable to do so, then the Chancery began, later, to give remedies where, in disputes between two or more private persons, the common law courts were unable to do complete justice for some rule of procedure, evidence, or common law right. This latter is the system of remedies called conscience in the middle ages and, today, called equity. But note that, if the common law courts granted an adequate and complete remedy in their ordinary course of proceeding, then an extra-ordinary remedy in Chancery was unneeded and thus unavailable.[1]

In the middle ages, the main needs by private parties in private disputes for resort to the extraordinary jurisdiction of the Court of Chancery were created by the clumsy and dilatory common law rules of civil procedure and evidence. However, the Court of Chancery, being of more recent vintage, used more modern procedures that were adopted in part from the Romano-canonical practices of the continental courts, such as written pleadings and written evidence. But these modest borrowings were not a wholesale reception and incorporation of the practice and procedure of the civil and canon law courts, and certainly not of the substantive law of those courts. In the fifteenth century, the doctors of the civil and the canon laws were occasion-

1 *E.g. Walwin v. Brown* (Ch. 1460), Case No. 67; *Rede v. Capel* (Ch. 1492), Case No. 123.

ally consulted in reference to litigation, but it was much more frequent in the common law courts than in the Court of Chancery.[1]

Thus, the foundation of the law in the Court of Chancery is the English common law as found and developed by the judges. The judges in the Chancery, the Chancellors and the Masters of the Rolls, were voices that were heard in this process, but their individual contributions were perhaps not so great in the middle ages, as they were not at that time trained at the bar in the law. However, in the eighteenth century, some of the best legal minds in England sat in the courts of equity, and their opinions were then heard and reported.

This collection of cases includes all of the cases from the medieval Court of Chancery that I could identify. There are undoubtedly many more. Most of the reports in this collection are from the Latin side of the Court of Chancery, *i.e.* they are common law cases. This book does not include cases from the other courts which comment on the jurisdiction of the Court of Chancery, nor which contain dicta on equitable procedures and remedies.[2] These cases are important to demonstrate the development of equity, but yet this book is only a collection of Chancery cases.

The headnotes are of this editor's own composition. They are brief, being designed only to point out some of the points of law that were adjudicated. However, the thorough scholar will give the reports themselves a close and careful reading in order to appreciate their full value.

I would like to thank Sir John Baker, Carol F. Lee, David J. Seipp, and the Selden Society for their kind and generous permissions to use their translations of these reports.

1 The only two known examples where doctors appeared in the Court of Chancery are *Anonymous* (Ch. 1428), Case No. 55, and *Corbet v. Corbet* (Ch. 1482), Case No. 106, where experts on the canon law of marriage came into court. (In the first of these cases, the reporter thought it noteworthy that the doctor argued in Latin.)

2 Some of these cases can be found in A. Fitzherbert, *La Graunde Abridgement* (1577), in title 'Sub pena', and R. Brooke, *La Graunde Abridgement* (1573), in titles 'Conscience & Subpena & Injunctions' and 'Feffements al Uses'.

TABLE OF NAMED CASES REPORTED

[These references are to case numbers, not page numbers.]

REPORTS OF CASES IN THE COURT OF CHANCERY IN THE MIDDLE AGES

1

Prior of Hatfield's Case
(Ch. 1325)

The Court of Chancery has the power to hear and determine disputes over tithes.

1 Eagle & Younge 11,
Rot. Parl., 19 Edw. II, vol. 1, p. 433

To our lord the king and his council, pray his devout chaplains the prior and convent of Hatfield Brodok, parsons of the church of Hatfield Brodok, that whereas they have all manner of tithes, as well of the young of animals and other small tithe, as great, within the bounds of all the parish of the church aforesaid, and, now of late, our lord the king has established a breed of mares in the park of Hatfield, which belonged to Humphrey de Bohun, earl