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FRANCIS FORBES SOCIETY AUSTRALIAN LEGAL HISTORY TUTORIALS

'THE HISTORY OF EQUITY'*

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INTRODUCTION

1. What amounts to the 'law of equity' is difficult to define. The oft-stated definition is that equity is the body of law which would have been applied in the UK by the Court of Chancery prior to the Judicature Acts of 1873-5.¹ But that is a poor thing to call a definition and leads to the inevitable question of what 'law' Chancery was applying prior to the Judicature Acts. In order to understand the present definition of this body of law, it would thus seem necessary to go through the history of the long extinguished court of Chancery and the law applied by it.
2. That is what I will attempt to do in a few words today. As you will see, the law of equity is very much a creature of history, developed both in response to the state of the common law at various points in time and the individual personalities of the Lord Chancellors overseeing its implementation. As stated by one commentator:

“... the accidents of history made equity a fragmentary thing. First one point, then another, was developed, but at no time was it the theory or the fact that equity would supplement the law at all places where it was unsatisfactory; consequently it has never been possible to erect a general theory of equity.”²

* I express my thanks to my Judicial Clerk, Ms Sarah Schwartz, for her assistance in the preparation of this address.

¹ See FW Maitland, *Equity: A Course of Lectures* (1947, Cambridge University Press) p 1; JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015, LexisNexis Butterworths) p 5.

² See e.g. Theodore FT Plucknett, *A Concise History of the Common Law* (5th ed, 1956, Butterworth & Co (Publishers) Ltd) p 673; cited in Heydon, Leeming, Turner, *Meagher Gummow & Lehane*, p 5.

3. The passing of time has also made it difficult to accurately trace the development of equity. The great majority of early petitions in Chancery remain unpublished and the few reports that we do have do not go back further than 1557, proper records only being kept from the 17th century.³ I am indebted to legal scholars and historians for dissecting early historical records and texts so that today I can outline a broad history of the development of the body of law that we now call 'equity'.

EQUITABLE PRINCIPLES IN ANCIENT ROME

4. I will start with a very brief acknowledgment of the existence of so-called equitable principles in ancient Rome, if only to appease our new acting Justice Emmett. Equity is often discussed as having been developed in response to oppressive 14th century common law courts. However, the application of, what we would now consider to be, 'equitable principles' to mitigate the harsh effects of the common law can be traced back to ancient Rome.
5. In ancient Rome, the law was developed on the basis of certain doctrines and modes of procedure. The solidification of these modes of procedure and the development of a series of precedents, or *responsa*, soon made the law of ancient Rome less accommodating to individual cases. As such, at the same time as applying the law, Consuls and Praetors were empowered by edicts to correct "the scrupulosity and mischievous subtlety of the Law" through the application of certain principles of natural justice.⁴ Aristotle described this form of equity as "a correction of the law where it is defective owing to its universality".⁵ Hadrian, the Roman emperor from 117 to 138 AD is attributed with compiling a formal code of such principles from the edicts of Consuls and Praetors.⁶ As you will see, this Roman system of supplying the means for addressing the deficiencies of the law was later adopted by the English system through the Chancery granting relief from the common law and the

³ See Maitland, *Equity*, p 8.

⁴ G Spence, *The Equitable Jurisdiction of the Court of Chancery* (vol I) (1877, Stevens and Norton) p 322.

⁵ WJV Windeyer, *Lectures on Legal History* (1938, The Law Book Co of Australasia Pty Ltd) p 212.

⁶ Spence, *Equitable Jurisdiction of the Court of Chancery*, p 322.

issuing of the royal prerogative in cases where the law provided an inadequate remedy.⁷

THE DEVELOPMENT OF THE MEDIEVAL CHANCERY

6. Racing forward a few centuries, it was the medieval period which saw the creation of an independent court of Chancery with jurisdiction to hear pleas to the King to mitigate the harsh effects of the common law. The earliest known Chancellors that we can trace were monks who came with St Augustine from Rome at the end of the 6th century. These monks functioned as clerical advisors to Kings across Europe.⁸ Indeed, throughout the medieval period, Chancellors were eminent churchmen and ecclesiastics.
7. Prior to the 11th century, local courts in England dispensed justice based on local customs. During this century, the Chief Justicar performed the function of sitting in judgment over pleas made to the King. Chancellors performed functions akin to tax collectors, assisting the Norman Kings to consolidate their hold on the country.⁹
8. One hundred years after the Norman Conquest, in the 12th century, Henry II established three royal courts, the Court of the Kings Bench, the Court of Common Pleas and the Court of Exchequer. The purpose of these courts was to uniformly apply English customary law, founded in Roman law, to the whole of England. During the reign of King Henry II, the Chancellor, Thomas a Becket is attributed with raising the status of Chancellor beyond that of a tax collector. Becket had trained in Bologna and Burgundy in civil and canon law and was appointed Chancellor in 1154. During his tenure, no Chief Justicar was appointed and he came to hold the highest judicial position in England.¹⁰
9. At this time, the Chancery performed functions akin to that of the secretarial department of the State, with its ordinary jurisdiction lying largely in the administration of justice. The Chancellor was the highest legal officer in the State and, in order to bring a suit in a common law court, a plaintiff needed to

⁷ Ibid, p 325-6.

⁸ Timothy AO Endicott, 'The Conscience of the King: Christopher St. German, Thomas More, and the Development of English Equity' (1989) 47 *University of Toronto Faculty of Law Review* 549, 550.

⁹ Ibid, 550-1.

¹⁰ Endicott, 'The Conscience of the King', 551-2.

purchase a royal writ from the Chancery, which would allow for the commencement of proceedings.¹¹

10. During the medieval period, the 'King's law', made by the King under his prerogative, generally prevailed in local courts and institutions. The creation of the royal courts did not exhaust the King's prerogative and the King maintained "a reserve of justice" by royal oath "to do equal and right justice and discretion in mercy and truth".¹² The King exercised this residual prerogative power by responding to petitions made to the "King in Council" which sought "exercise of the prerogative of grace".¹³ This jurisdiction was exercised on the advice of a permanent council attendant on the King's person.¹⁴
11. By the late 13th to early 14th century, the common law which was applied by the royal courts began to abandon its discretionary aspects, which had enabled orders to be made granting equitable relief, in favour of a more rigid system of rules and regulations governed by precedent and the prohibition of new writs.¹⁵ By the early 14th century, the royal courts could only grant two remedies, namely, an order that the defendant pay monetary compensation or damages, or an order that the sheriff put the plaintiff in possession of particular land.
12. The limitation on the remedies that could be granted by the royal courts in the 14th century led to a growing number of petitions to the King to administer executive justice where either "the common law was seen to be defective in a point of justice such that it could not grant a remedy in the particular instance; or, because for reasons of poverty or apprehended violence or influence, the common law courts would not be available or impartial to the plaintiff".¹⁶ As

¹¹ Maitland, *Equity*, p 2; FT Roughley, 'The Development of the Conscience of Equity' in JT Gleeson, JA Watson, RCA Higgins (eds), *Historical Foundations of Australian Law* (vol I) (2013, Federation Press) p 142.

¹² Maitland, *Equity*, p 3.

¹³ Roughley, 'Development of the Conscience of Equity', pp 140-1.

¹⁴ *Ibid*, p 140.

¹⁵ WS Holdsworth, *Some Makers of English Law* (1966, Cambridge University Press) pp 91-2.

¹⁶ *Ibid*, p 144. As stated by Maitland, "In this period one of the commonest of all the reasons that complainants will give for coming to the Chancery is that they are poor while their adversaries are rich and influential – too rich, too influential to be left to the clumsy processes of the old courts and the verdicts of juries": Maitland, *Equity*, p 6.

stated by the British jurist, AV Dicey, the King exercised such jurisdiction when “There was too great might on one side, and too great unright on the other” or “[b]ecause the grievance referred to them was one which the technical rules of law did not meet”.¹⁷

13. The increase of petitions made to the King in the 14th century prompted the King to start referring exceptional matters to special sessions of the Council, Parliament or individual councillors, such as the Chancellor. Due to this practice, a number of courts emerged which exercised the King’s prerogative power, known as the ‘Conciliar Courts’. These included the Chancery.
14. The large number of petitions made during the 14th century forced the Chancery to develop an ordinary procedure. However, this procedure differed significantly from the common law courts. The Chancery was known for its flexibility and the informal nature of its proceedings, allowing it to respond to the individual circumstances of a case, unrestrained by the common law requirements for a writ, technical pleadings, a jury and strict adherence to precedent. Petitions to the Chancellor usually alleged some wrong, contained a request for relief in piteous terms, usually leaving this to the “good graces” of the Chancellor, and contained a writ to bring the defendant before the Chancery.¹⁸ Few of the final decrees of the Chancellor from the 14th and 15th centuries have been preserved. However, surviving plea records cover petitions for relief from fraud, specific performance for breach of contract, bills *quia timet*, equities of redemption, the enforcement of uses or trusts and relief from unconscientious bargains.¹⁹
15. The passing of time has made it difficult to accurately pin down when the Chancery officially split from the King’s Council and started exercising exclusive equitable jurisdiction. However, there seems to be a general consensus that by the time of Richard II, who was King from 1377, the Chancellor could independently exercise judicial functions and grant

¹⁷ AV Dicey, *The Privy Council* (1860, T&G Shrimpton) pp 8-9.

¹⁸ Roughley, ‘Development of the Conscience of Equity’, p 142; Maitland, *Equity*, p 4.

¹⁹ *Ibid*, p 145.

extraordinary remedies, regardless of whether there were pending common law proceedings.²⁰

16. In the early 14th century, petitions to the Chancellor were couched in piteous terms, seeking “charity” and appealing to notions of “right” and the Chancellor’s “love of God”.²¹ However, by the 15th century, Chancery began to be referred to as the “court of conscience”, Chancellors came to be referred to as “keepers of the King’s conscience” and petitions started to incorporate appeals to ‘conscience’.²² While there is a dearth of evidence on the reasoning used by the Chancery during the medieval period, as most Chancellors were ecclesiastics, commentators have argued that their reasoning drew heavily on canon law and the procedure of *denunciatio evangelica*, aimed at denouncing sin, based on natural and divine law.²³ According to former Justice Campbell, “[i]n keeping with the clerical training of Chancellors the primary objective of the Court of Chancery was cathartic – to save the soul of the defendant by not permitting him to engage in the mortal sin of acting contrary to conscience.”²⁴

SIXTEENTH CENTURY DEVELOPMENT OF THE COURT OF CHANCERY

17. The implication that *may* be made from the medieval Chancellors acting on principles of ‘conscience’ is that they simply “did what they felt like”.²⁵ While this may have been the case throughout the medieval period, in the 16th century, the modern system of equity began to develop. The growing popularity of the equitable jurisdiction exercised by Chancery led to the growth in the 16th century of a separate court of Chancery, with its own clerks and staff and more formal modes of procedure.

²⁰ Roughley, ‘Development of the Conscience of Equity’, p 143; P Tucker, ‘The Early History of the Court of Chancery: A Comparative Study’ (2000) 115(463) *The English Historical Review* 791, 808.

²¹ Roughley, ‘Development of the Conscience of Equity’, p 143.

²² Dennis R Klink, *Conscience, Equity and the Court of Chancery in Early Modern England* (2010, Ashgate) pp 13-14. One petition from the late 15th century asked the Chancellor to summon the defendants “to come before you in the King’s Chancery, which is the Court of Conscience, there to answer thereto as reason and conscience demand ...”: William Paley Baildon (ed), *Select Cases in Chancery A.D. 1364 to 1471: Case 123* (1896, Bernard Quaritch) p 121.

²³ Helmut Coing, ‘English Equity and the *Denunciatio Evangelica* of the Canon Law’ (1955) 71 *Law Quarterly Review* 223, 230-1.

²⁴ J Campbell, ‘The Development of Principles in Equity in the Seventeenth Century’ (2014) *Principles in Early Modern Thought 2014: University of Sydney*, Sydney, NSW: Presentation, p 3.

²⁵ Klink, *Conscience*, p 39.

18. The principles on which the ecclesiastical Chancellors acted were summarised and made intelligible in the text *Dialogues between the Doctor and the Student*,²⁶ hailed as the first time concepts similar to modern notions of equity were put in written form. The *Doctor and Student* was written by the barrister St Germain and first published in Latin in 1523.²⁷ St Germain was a barrister of the Inner Temple whose interest in both English and canon law led him to study the development of equitable principles by the ecclesiastical Chancellors.²⁸ The purpose of the dialogues was to identify “the principles or grounds of the laws of England, and how conscience ought in many cases to be formed”.²⁹
19. The *Doctor and Student*, took the form of two dialogues between a Doctor of Divinity, representing religious teachings and canon law from an equitable perspective, and a student of common law, representing English law. According to St Germain, ‘conscience’ was the application of “innate rational faculty to seek good and eschew evil”.³⁰ The thesis propounded in the text was that rather than being in conflict with the common law, notions of conscience were inherent to the common law and Chancery operated to ensure the continued operation and utility of the common law itself.³¹
20. According to Holdsworth, there are three reasons why the dialogues reached such precedential importance. First, the dialogues put the reasons for a system of equity into a popular and intelligible form. These reasons tended to relate to the generality of the law. As stated by St Germain, “since the deeds and acts of men, for which laws have been ordained, happen in divers manners infinitely, it is not possible to make any general rule of the law, but that it shall fail in some case.”³² This injustice was to be cured through the Chancery’s application of principles grounded in conscience.

²⁶ TFT Plucknett and JL Barton (eds), *St. German’s Doctor and Student* (1974, Selden Society).

²⁷ The work was published in English in 1530 and revised and translated in 1532. There is no known copy of the 1523 version in existence: Plucknett, *Concise History of the Common Law*, p 279.

²⁸ Holdsworth, *Some Makers of English Law*, p 96.

²⁹ Plucknett and Barton, *Doctor and Student*, p 3 (Preface to the First Dialogue).

³⁰ Roughley, ‘Development of the Conscience of Equity’, p 149.

³¹ *Ibid*, pp 148-9.

³² Plucknett and Barton, *Doctor and Student*, p 47 (First Dialogue).

21. Second, the book appeared at an opportune time when the Chancery was beginning to be guided by common lawyers, as opposed to ecclesiastical Chancellors. In this way, the book promoted the continuity of the development of equity. Third, the expression of canonist principles in a popular form and their connection to the rules of English law facilitated the development of these principles and demonstrated that the development of law and equity must be linked if equity was to redress injustices caused by the generality of the common law.³³
22. By the middle of the 16th century, Chancery was a court of specific jurisdiction with set procedures for bringing pleadings, which differed from common law procedures. Litigation was commenced by the issue of first, a *subpoena*, second, a *writ*, requiring the defendant to go to court and answer questions on oath, and third, a *bill*, which was a statement of facts providing the basis for Chancery to grant a remedy. The bill had to 'show an equity', i.e., state facts which would entitle the plaintiff to a particular type of relief from Chancery. The defendant could respond by filing a *demurrer*, a document admitting the truth of the facts in the bill, but denying that those facts established any grounds of relief in equity. The defendant could respond by filing a *plea*, alleging that there were additional facts beyond those in the bill. Or, the defendant could respond by filing an *answer*, disputing one or more facts claimed in the bill. The filing of demurrers fostered the growth of a set of defined equitable principles, as it meant that the limits of Chancery's jurisdiction were decided in court at an early stage of the proceedings.³⁴
23. During the mid-16th century, common lawyers became a powerful and influential group in the House of Commons. In order to gain support in the House of Commons, Henry VIII appointed the eminent common lawyer and son of a common law judge, Sir Thomas More, as Chancellor in 1529. More's appointment marked the transition from equity being administered by canonists and ecclesiastics to its administration by common lawyers. His appointment also saw an increase in harmony between the common law

³³ Holdsworth, *Some Makers of English Law*, pp 96-7.

³⁴ Spence, *Equitable Jurisdiction of the Court of Chancery*, pp 367-82.

courts and Chancery and a decline in the influence of Catholic moral teaching and canon law on the Chancery.³⁵

24. More was known to be strictly impartial and efficient and worked hard to restore harmonious relations between the Chancery and common law courts. According to Holdsworth, he “made it a rule never to grant a subpoena till he was satisfied that the plaintiff had some real ground of complaint. When he heard that the common law judges were still complaining that injunctions were too frequently issued to stop litigants from proceeding in the common law courts, he invited them to dinner, and explained the principles on which he acted. He explained to them that if they would not mitigate the rigour of the law he must issue injunctions ‘to relieve people’s injury’.”³⁶

THE DISPUTE BETWEEN SIR EDWARD COKE AND LORD ELLESMERE

25. Despite attempts at harmonisation between the common law and Chancery, from as early as the 1380s, complaints were made in Parliament about Chancery’s jurisdiction and its interference with the common law. Such complaints increased in frequency as plaintiffs moved from common law courts to the Chancery, particularly during the Chancellorship of Cardinal Wolsey from 1515 to 1529. Wolsey had a reputation for encouraging petitioners to seek out the jurisdiction of Chancery and was of the view that the common law needed to be tempered by conscience.³⁷

26. In the late 16th century, during the Chancellorship of Lord Ellesmere from 1596-1617, Chancery began interfering more and more with the finality of common law judgments. Lord Ellesmere was a strong royalist who maintained a close relationship with both Queen Elizabeth and James I during his Chancellorship. He was known for refusing to hear any argument against the royal prerogative.³⁸ During his time, many conflicting judgments were made regarding the jurisdiction of Chancery. For example, in 1598, in the case of *Finch v Throgmorton*,³⁹ the judges of England resolved that Chancery “could

³⁵ Holdsworth, *Some Makers of English Law*, p 98.

³⁶ *Ibid*, p 99, citing William Roper, *Life of Sir Thomas More* (1905, Burns & Oates) p 31.

³⁷ Roughley, ‘Development of the Conscience of Equity’, p 147.

³⁸ Holdsworth, *Some Makers of English Law*, p 100.

³⁹ (1598) 3 Inst 124, 4 Inst 86, cited by Roughley, ‘Development of the Conscience of Equity’, p 152.

not after judgment given [at common law] relieve the party in equity”, rather, the “sole and proper” remedy was for an aggrieved party to petition the King directly. This judgment, if abided by, would effectively have abolished the Chancery’s main weapon in mitigating the harsh effects of the common law, namely, the common injunction, which restrained the enforcement of a judgment at common law or halted common law proceedings.

27. In 1606, Sir Edward Coke was appointed the Chief Justice of Common Pleas. According to him, the ambit of Chancery’s jurisdiction was defined by the common law.⁴⁰ In 1607, Coke famously stated to James I that “the King in his own person cannot adjudge any case ... but this ought to be determined and adjudged in some Court of Justice, according to the Law and Customs of England [sic]”.⁴¹ While Coke and Parliament took the view that the common law was supreme and judges were the sole expounders of the law, the King and Chancery took the view that judges were servants of the Crown who only decided cases if the King did not determine them himself.⁴²

28. Despite the decision in *Finch*, Chancery continued to issue common injunctions and hear cases. In response, common law judges encouraged suits of *praemunire* against plaintiffs who sought common injunctions from Chancery. These suits sought to prohibit litigants from contesting civil actions brought in common law courts in other jurisdictions.⁴³ The Court of the King’s Bench also made it known that it may grant writs of *habeus corpus* where a person had been imprisoned for failure to answer a subpoena in the Chancery.⁴⁴ Barrister, Fiona Roughley describes how during this period, “deserving litigants rebounded from one court to the other in [a] jurisdictional ping-pong match.”⁴⁵

⁴⁰ Holdsworth, *Some Makers of English Law*, p 99.

⁴¹ *Prohibitions del Roy* (1607) 77 ER 1342, cited in Roughley, ‘Development of the Conscience of Equity’, p 152.

⁴² Sir William Holdsworth, *A History of English Law* (vol V) (3rd ed, 1945, Methuen & Co) pp 428-40.

⁴³ Roughley, ‘Development of the Conscience of Equity’, p 153.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

29. This 'jurisdictional ping-pong match' played out in the case of *Glanville v Courtney*⁴⁶ in 1614-1615. In that case, Glanvil sold Courtney a topez, misrepresenting that it was a diamond. When Courtney refused to pay the purchase price of 360 pounds, rather than the 20 pounds it was worth, Glanvil succeeded in getting a judgment against him at common law. In Chancery, where Courtney brought proceedings for fraud, the Master of the Rolls ordered a rescission of the sale, fixed a price for the stone and ordered that steps be taken to prevent the enforcement of the judgment at common law. When Glanvil was imprisoned by Chancery for refusing to obey this decree, Chief Justice Coke granted him *habeus corpus*, citing the judgment in *Finch*. This was repeated when Lord Ellesmere re-imprisoned Glanvil. Only for common law judges to grant another writ of *habeus corpus*. Following his second release, Glanvil visited Fleet prison, a famous prison where persons were imprisoned for contempt by Chancery, to "spread the news that they might all be freed if they brought *habeus corpus* as he had done".⁴⁷ He also brought proceedings against Courtney and his legal counsel for *praemunire*, petitioned the Privy Council regarding the matter, and sued the warden of Fleet prison and his gaolers for false imprisonment.

30. Concurrent to these proceedings were the well-known proceedings in the *Earl of Oxford's Case*. For those who are unfamiliar, in that case, an action for ejectment was brought to determine whether the Earl of Oxford or Magdalen College had title to land known as "the Covenant Garden" to the east of London. The land was originally owned by the College. At the time of the case, a statute was in force which prohibited sales or leases of land by masters and fellows of colleges. In an attempt to avoid the statute and sell the land to the Earl of Oxford, the College sold the land to the Crown, which, following a series of transactions, sold it to the Earl of Oxford. In support of its title, the College argued that the purported sale of the Garden to the Crown

⁴⁶ *Glanville v Courtney* (1614) 2 Bulst 301; 80 ER 1139; Cro Jac 343; 79 ER 294; 1 Rolle 111; 81 ER 365; 1 Rolle 219; 81 ER 444; Moo 838; 72 ER 839; 118 SS 440; cited in Roughley, 'Development of the Conscience of Equity', p 153.

⁴⁷ John Baker, 'The Common Lawyers and the Chancery: 1616' in JH Baker, *The Legal Profession and the Common Law: Historical Essays* (1986, Hambledon Press) p 216.

was rendered void by the statute. In support of his title, the Earl argued that the statute did not apply where the sale was to the Crown.⁴⁸

31. At common law, in the King's Bench, the College's title was upheld.⁴⁹ In Chancery, where the Earl of Oxford brought proceedings against the College, the Master or Bursar of the College refused to answer the proceedings and demurred on the basis that the matters raised by the Earl should be raised at common law not in Chancery.⁵⁰ The Chancery held that the demurrer was insufficient and ordered the College to answer the substance of the claim. When the defendants refused, they were imprisoned for contempt. In his discussion of Chancery's jurisdiction, Lord Ellesmere famously stated that: "The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law."⁵¹

32. Both the cases of *Glanville v Courtney* and *The Earl of Oxford* resulted in direct intervention from King James I, following Lord Ellesmere's petitioning of the King for his personal resolution of the matter. In June 1616, speaking in the Star Chamber, the King confirmed that Chancery was the "dispenser of the Kings conscience [sic]" and "exceeds other Courts" by "mixing Mercy with Justice, where other courts proceed only according to the strict rules of Law: And where the rigour of the Law in many cases will undo a Subject, there the Chancery tempers the Law with equity and so mixes mercy with justice, as it preserves men [and women] from destruction [sic]".⁵² In July 1616, James I made a royal decree confirming that Chancery had the power to issue common injunctions, thus confirming Chancery's superiority over common law courts. This decision was obviously justifiable, as without it, courts of equity would not be able to function.

⁴⁸ Roughley, 'Development of the Conscience of Equity', p 154.

⁴⁹ *The Case of Magdalen College (Warren v Smith)* (1615) 11 Co rep 66b; 77 ER 1235, 70.

⁵⁰ David Ibbetson, 'The Earl of Oxford's Case (1615)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (2012, Hart Publishing) p 17.

⁵¹ *The Earl of Oxford's Case in Chancery* [1615] 1 Ch Rep 1, 6; 21 ER 485, 486.

⁵² Roughley, 'Development of the Conscience of Equity', p 156, citing *His Majesties Speech in the Starre Chambers*, D3.

33. While some discontent remained regarding Chancery's jurisdiction, with the dismissal of Coke in October 1616 and the death of Lord Ellesmere in March 1617, the debate regarding parallel jurisdictions settled.

THE SETTLEMENT OF EQUITABLE PRINCIPLES IN THE 17TH CENTURY

34. In May 1617, Sir Francis Bacon, who had been attorney general from 1613, replaced Lord Ellesmere as Chancellor. Bacon is attributed with settling the principles for the exercise of Chancery's jurisdiction.⁵³ He reformed many of Chancery's procedures by issuing a consolidated set of orders. Bacon is also attributed with bringing a certain degree of harmony between the common law and Chancery. In regard to litigation brought in Chancery following a judgment at common law, he promised only to exercise equitable jurisdiction to "correct the corrupt conscience of the party, and rule him to make restitution or perform other Acts, according to the equity of the Cause [sic]" but not "to make void or weaken the Judgment [sic]" at common law.⁵⁴

35. Throughout the 17th century, the Court of Chancery shifted from determining cases on the basis of broad principles of conscience to determining them by reference to articulated principles and established rules of law.⁵⁵ Records from the 17th century give us the ability to identify a number of basic equitable principles that were applied by Chancery at the time. These include principles such as not obtaining any benefit out of fraud or an accident, that obligations on several people should be shared fairly and that the substance, rather than form, of a commercial arrangement should be respected.⁵⁶ It was also during this period that trusts were recognised as being able to perform a function similar to uses, or the double use. Throughout the 17th century, these principles were developed such that there became a certain degree of predictability in the outcomes of Chancery's cases.

⁵³ See B Shapiro, 'Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform' (1980) 24 *American Journal of Legal History* 331.

⁵⁴ Roughley, 'Development of the Conscience of Equity', p 156, citing *Ordinances made by the Right Honourable Sir Francis Bacon for the better and more regular Administration of Justice in the Chancery, to be daily observed saving the Prerogative of this Court*, Ordinance No 34, 8. See also Holdsworth, *Some Makers of English Law*, p 107.

⁵⁵ Campbell, 'Development of Principles in Equity in the Seventeenth Century'.

⁵⁶ See Campbell, 'Development of Principles in Equity in the Seventeenth Century', p 21.

36. Sir Heneage Finch, later Lord Nottingham, held the position of Chancellor from 1673-1682. Lord Nottingham has come to be associated with the regularisation of the system of equity and was known to place great emphasis on “institutional consistency and certainty”.⁵⁷ For example, in the case of *Howard v Henry, Duke of Norfolk*,⁵⁸ Lord Nottingham systematically went through a series of precedents to arrive at what would become the modern rule of perpetuities.⁵⁹ In another case, *Cook v Fountain*,⁶⁰ Lord Nottingham analysed various types of trusts and stated the conditions in which Chancery should permit the existence of constructive trusts. In such cases, Nottingham began to settle the principles of equity that have persisted to the present day. As stated by Holdsworth, while Ellesmere and Bacon “had organized and systemized the court of Chancery, its practice and procedure”, Nottingham “began the work of organizing and systemizing the principles upon which the court acted; and, as a result of his work, equity began to assume its final form”.⁶¹

37. Former Justice Campbell compares two statements, one from 1615 and one from 1674, to demonstrate the transformation of Chancery into a court governed by identifiable principles and rules.⁶² In 1615, the Chief Justice of the Court of Common Pleas said that while the common law courts were “bound to rules”, Chancery’s jurisdiction was “absolute and unlimited, though out of discretion they entertain some forms, which they may justly leave in special cases”.⁶³ In contrast, in 1674, Lord Nottingham explained Chancery’s jurisdiction as follows, “the Chancery can only relieve in such cases where the party has no remedy at the Common Law ... And yet all cases that are without remedy at common law, are not relievable in equity ... the rule must always hold, that ‘tis not fit for a court of equity to do everything that is fit to be done

⁵⁷ Roughley, ‘Development of the Conscience of Equity’, p 162; DEC Yale (ed), *Introduction to Lord Nottingham’s ‘Manual of Chancery Practice’ and ‘Prolegomena of Chancery and Equity’* (1965, Cambridge University Press), p 194.

⁵⁸ (1683) 3 Ch Cas 1; 2 Ch Rep 229 (21 ER 665); 79 Selden Society 905 (Case No 1145).

⁵⁹ See Roughley, ‘Development of the Conscience of Equity’, p 164.

⁶⁰ (1672) 3 Swanst. 586.

⁶¹ Holdsworth, *Some Makers of English Law*, p 150.

⁶² Campbell, ‘Development of Principles in Equity in the Seventeenth Century’, pp 10-11.

⁶³ *Martin v Marshall* (1615) Hobart 63; 80 ER at 212 (Chief Justice Hobart).

... for if equity be tied to no rule, all other laws are dissolved, and everything becomes arbitrary".⁶⁴

CHANCERY AS A 'BLEAK HOUSE' IN THE 18TH AND 19TH CENTURIES

38. In the 18th century, Chancery started to be plagued by defects and abuses in its practice and procedure, which came to be lengthy, technical and expensive. According to Holdsworth, Chancery's procedures became defective for three reasons.⁶⁵ First, the dependency of Chancery's officials, called 'clerks', on the fee system meant that Chancery's hundreds of clerks were paid out of the fees paid by suitors, rather than by a salary. This provided clerks with little incentive to complete cases and a large incentive to extract heavy fees from suitors and take bribes. As stated by the legal historian, John Baker, "Gold or silver could open paths through the Chancery morass, and by long usage many 'presents' became fees which could be demanded as of right with an untroubled conscience ... since every step in litigation attracted more fees, there was no incentive to expedition, let alone procedural reform ... The masters were not accountable for funds in court ... The sixty clerks were paid by the page for drawing documents; and so they developed such large handwriting, and used such wide margins, that it was said a skilful clerk could spread six ordinary pages into forty".⁶⁶ I think some of us judges might be quite pleased if we were paid by the page today. Certainly, at the time, corruption was rife. Indeed, two distinguished Chancellors, Francis Bacon and Lord Macclesfield were dismissed for accepting bribes from suitors.

39. The defects of the fee system were perpetuated by the shortage of judicial staff. The inadequacy of judicial staff meant that the Chancellor and Master of Rolls did not have the capacity to adequately supervise officials of the Court. According to Baker, the root of much of Chancery's trouble was that responsibility for everything done by Chancery rested on the shoulders of the Chancellor, who was not a full time judge, but spent a substantial portion of

⁶⁴ DEC Yale (ed), *Lord Nottingham's 'Prolegomena of Chancery and Equity'* (1965, Cambridge University Press), Ch III, pars [26]-[27].

⁶⁵ See Holdsworth, *Some Makers of English Law*, pp 185-6.

⁶⁶ JH Baker, *An Introduction to English Legal History* (4th ed, 2002, Butterworths), p 112.

time managing the affairs of the State, administrative matters and the business of the House of Lords.⁶⁷

40. Finally, Chancery's system of pleading had developed in an illogical manner. Not only did all of the evidence presented in Chancery have to be in written form, but Chancery had a mandate to do complete justice between many persons, not just the parties before it, thus making it necessary to take accounts, make inquiries and administer estates.⁶⁸ Throughout the 17th and 18th centuries, "estimates of causes depending reached figures [of] 10,000 to 20,000 and the time taken to dispose of them could be as long as thirty years".⁶⁹
41. In 1801, Lord Eldon was appointed Chancellor, after holding the position of Chief Justice of Common Pleas from 1799-1801. Holdsworth describes Eldon as having "all the qualities of a great judge – a subtle mind, great sagacity, great learning, much patience".⁷⁰ Lord Eldon settled many leading principles of equity that we apply to this day. In *Ackroyd v Smithson*,⁷¹ he settled the operation of the doctrine of conversion. In *Ellison v Ellison*,⁷² he confirmed the basis on which the court would assist a volunteer. In *Howe v Earl of Dartmouth*,⁷³ he stated the duties of trustees in relation to wasting and reversionary property.
42. However, these leading judgments came at a cost and Lord Eldon was renowned for his procrastination. While as the Chief Justice, Lord Eldon was lauded for giving quick and learned decisions, as Chancellor, where the system of pleading did not make his decision depend on a single issue, but on the effect of many complicated transactions and the conduct of numerous parties, his conscientiousness led him to delay delivering his decisions for years. For example, the case of *Morgan v Lord Clarendon* commenced in

⁶⁷ Ibid, p 111.

⁶⁸ Holdsworth, *Some Makers of English Law*, pp 185-6.

⁶⁹ Baker, *Introduction to English Legal History*, p 112.

⁷⁰ Holdsworth, *Some Makers of English Law*, p 195.

⁷¹ (1779) 1 Bro. C.C. 503.

⁷² (1802) 6 Ves 656.

⁷³ (1802) 7 Ves 137.

1808 and, after sixteen years, was still in the interlocutory stage, no counsel had been briefed, and costs had reached £3,719.⁷⁴

43. The defects of Chancery in the 18th and early 19th centuries were popularised in Charles Dickens, *Bleak House*, set in 1827, when Chancery was at its worst. The novel centres around the fictional case of *Jarndyce v Jarndyce*, involving a legal dispute surrounding a testator who has inexplicably created two wills. The fictional dispute drags on for many generations so that when it is finally resolved, legal costs have consumed the entire estate. Every character in the novel associated with the case suffers some tragedy. Miss Flite has already lost her mind by the time the novel begins and Richard Carstone, who has dedicated much of his life to trying to win the inheritance for himself, dies before the case is determined. In the Preface to *Bleak House*, Dickens cites two Chancery cases as inspirations.
44. Commentators have identified the first of these cases as involving a dispute over the will of a boot blacking manufacturer who died in 1836. Proceedings commenced in 1837 and had only concluded by 1854, a year after Dickens's Preface. According to Dickens, in that case, "thirty to forty counsel [had] been known to appear at one time" and "costs [had] been incurred to the amount of seventy thousand pounds".
45. The second case is often identified as a dispute over the will of William Jennens, the 'Acton Miser', which commenced in 1798 and had been ongoing for 55 years when *Bleak House* was published. The dispute was finally abandoned in 1915, 117 years later, when legal fees had exhausted the estate.⁷⁵
46. While many claim that *Bleak House* provided inspiration for the Judicature Acts, as stated by Justice Leeming,⁷⁶ the glaring imperfections of Chancery brought to light in *Bleak House* had already been largely addressed by the time the book was published in 1852. Through reforms which began in 1850,

⁷⁴ See Baker, *Introduction to English Legal History*, p 113.

⁷⁵ Leslie Katz, 'Bleak House in Australian Reasons for Judgment' (3 October 2015, SSRN Research Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315862.

⁷⁶ See Mark Leeming, 'Equity, the Judicature Acts and Restitution' (2011) 5(3) *Journal of Equity* 199; MJ Leeming, 'Five Judicature Fallacies' in JT Gleeson, JA Watson, RCA Higgins (eds), *Historical Foundations of Australian Law* (vol I) (2013, The Federation Press), p 169.

by 1852 there had been a complete overhaul of Chancery's procedure. These reforms included abolishing absentee office holders from Chancery to whom suitors paid fees and conferring new powers on Chancery to determine questions of law, hold jury trials and award damages. As stated in the Chambers' Journal in 1857, "the various times for taking the necessary proceedings were considerably shortened, printed pleadings were substituted for written ones, and unnecessary offices, such as those of the masters in Chancery, which had long been causes of delay and expense to suitors, were abolished. In many cases, too, relief may now be had by a summary mode of procedure. Also fees are paid by stamps, and officers of the court are remunerated by salaries instead of fees ..."⁷⁷

THE JUDICATURE ACTS

47. While the reforms of 1850-1852 cured many of the defects which appear in *Bleak House*, some defects remained. According to Justice Leeming, these remaining defects "flowed from two considerations: First, there were still cases where 'double litigation' was required, because of the limited jurisdiction of the common law courts and Chancery, and secondly, there were procedural differences between the courts (notably, as to pleadings and mode of trial)".⁷⁸

48. Prior to the Judicature Acts, in many cases, Chancery found that suits brought in equity would be more conveniently and effectively heard at common law. To use an example provided by Justice Leeming, in 1872, in the case of *Gaunt v Fynney*,⁷⁹ a stable owner sought an injunction and damages due to noise and vibration caused by a neighbouring steam engine and the encroachment on the foundation and walls of the stable. In Chancery, Lord Selbourne found that while equity could grant an injunction due to the nuisance caused by the noise and vibrations, the encroachment gave rise to an issue of ejectment, which was to be tried at common law. Thus, the bill

⁷⁷ 'The Court of Chancery as it is' (4 July 1857) 28 *Chambers' Journal of Popular Literature Science and Arts* 16; cited in Leeming, *Equity, the Judicature Acts and Restitution*, p 204.

⁷⁸ Leeming, *Equity, the Judicature Acts and Restitution*, p 204.

⁷⁹ (1872) WN 199; 21 WR 129; LR 8 Ch 8; 42 LJ Ch 122; 27 LJ 569.

was dismissed with costs and the matter was remitted to a court of common law.⁸⁰

49. In order to remedy these defects, in 1873 Lord Selbourne's Judicature Act⁸¹ sought to achieve 'fusion' between various superior common law and equity courts and avoid double litigation by creating a single appeal court. It also sought to abolish the double appeal by removing the judicial functions of the House of Lords. Due to a change in government before the 1873 Act came into force, a suspending Act was passed in 1874⁸² and the *Judicature Act*, which amended some parts but preserved most of the 1873 Act, came into force on 1 November 1875.⁸³ The amending act preserved the first function of the 1873 Act and fused the courts of equity and common law, but did not preserve the second function, to remove the judicial functions of the House of Lords.⁸⁴ Indeed, this was only recently achieved in 2009.⁸⁵

50. The effect of the Judicature Act was that the old courts were abolished and in their place was a High Court of Justice with a Court of Appeal above it. The High Court of Justice had 5 divisions, Chancery, Queens Bench, Common Pleas, Exchequer and Probate and Divorce and Admiralty. Certain business was assigned to each division, for example, Chancery was assigned the execution of private and charitable trusts. However, the assignments were a matter of convenience only and the distribution of business was capable of being changed at any time by Parliament. Indeed, in 1880, the Common Pleas and Exchequer divisions were abolished by Parliament. Each judge, no matter what division they were in, was bound to administer all rules of law, including rules of common law and equity.⁸⁶

51. Under s 24 of the Judicature Act, all judges could award both equitable and common law remedies and were to recognise common law and equitable rights, titles, liabilities and duties, as they saw fit, so as to avoid a multiplicity of legal proceedings. The common injunction was abolished and every matter

⁸⁰ See Leeming, 'Equity, the Judicature Acts and Restitution', p 206.

⁸¹ *Supreme Court of Judicature Act 1873* (36 & 37 Vict c 66).

⁸² *Supreme Court of Judicature Act 1873 Suspension Act* (37 & 38 Vict c 83).

⁸³ *Supreme Court of Judicature Act 1873 Amendment Act 1875* (38 & 39 Vict c 77).

⁸⁴ See Leeming, 'Equity, the Judicature Acts and Restitution', p 207.

⁸⁵ *The Constitutional Reform Act 2005* (Commencement No. 11) Order 2009 (UK).

⁸⁶ Maitland, *Equity*, p 15.

on which an injunction would have been granted was pleaded as an equitable defence.

THE JUDICATURE ACTS IN AUSTRALIA

52. In Australia, most states were fairly quick in enacting legislation modelled on the 1875 Judicature Act: Queensland in 1876;⁸⁷ South Australia in 1878;⁸⁸ Western Australia in 1880;⁸⁹ Victoria in 1883⁹⁰ and eventually Tasmania in 1932.⁹¹

53. New South Wales famously took until 1970 to implement the Judicature Acts. However, the changes made in NSW in 1970 were less substantive than those which were effected in England. The Australian colonies, including NSW, never had separate superior courts of common law and equity. The Supreme Court of NSW already possessed full common law and equitable jurisdiction, so there was no need to amalgamate separate common law and equitable courts. Further, many of the rules in the Judicature Acts had already been enacted and the judicature pleading system had already been introduced in equity in NSW in 1880.

54. However, the equity and common law jurisdictions did have different forms of pleadings and different modes of trial. It was not possible for common law proceedings to resolve some equitable claims and some common law questions arising in equity proceedings were transferred to common law. In very rare cases, a common injunction was issued so that a suitor's equitable rights were not defeated in a common law action.⁹²

55. Thus, in 1970, the *Supreme Court Act 1970* (NSW) repealed the *Common Law Procedure Act 1899* (NSW) and the *Equity Act 1901* (NSW) and enacted the provisions which remained to be implemented of the 19th century UK Judicature Act.

⁸⁷ Judicature Act 1876 (40 Vict No 6) (s5(11)).

⁸⁸ Supreme Court Act 1878 (41 & 42 Vict No 116) s 6(11).

⁸⁹ Supreme Court Act 1880 (WA) (44 Vict No 10).

⁹⁰ Judicature Act 1883 (Vic) (36 & 37 Vict c66) s 9(11).

⁹¹ Supreme Court Civil Procedure Act 1932 (Tas) s 11(10).

⁹² See Leeming, 'Equity, the Judicature Acts and Restitution', pp 212, 216.

CONCLUSION

56. Even into the 21st century, debates continue regarding the effect of the Judicature Acts and so-called 'fusion'. As stated by Justice Leeming, "no one seriously asserts that the Judicature legislation *itself* effected a substantive fusion of equity and common law", however, "[w]hat is contestable is whether the fused administration of common law and equity has made it possible, and appropriate, no longer to rely on historical distinctions, and for there to be a programme of change in substantive law, with common law and equity each drawing on the other by analogy, something which is central to much of the modern restitution project."⁹³ Issues regarding the fusion of law and equity continue to create sleepless nights for students, academics and judges alike. However, I will leave the exploration of these continuing debates to others and won't attempt to embark on a discussion of the 'fusion fallacy' in my historical overview today.

57. Let me leave you with this final thought. The historical developments in equity have not yet reached the end of the line. There are many areas which are still in need of reform and clarification. Areas such as estoppel, quistclose trusts, the calculation of Lord Cairns Act damages and causation in the assessment of compensation upon a breach of trust, continue to frustrate and confuse both law students and many legal practitioners.

58. As stated by Sir Anthony Mason:

"To generations of law students seduced by the beguiling subtlety of Maitland's *Lectures on Equity* it seemed that the elaboration of equitable doctrine had achieved such a peak of perfection at the end of the 19th century that it would be sacrilege to suggest its improvement. ... [M]ore recently equity has returned to its traditional path of cautious, yet continuous, development. It has done this by re-working existing doctrine in the light of general concepts and traditional objectives ... The enduring vitality of equitable doctrine ... has its roots in its natural law origins and in the goals of equity and justice, equality and fairness

⁹³ Ibid, p 218

which have always shaped its principles and its broad range of discretionary remedies. It is for this reason that equity has succeeded in moulding its doctrines so as to make available an appropriate remedy when a transaction or relationship is affected by any one of the elements which have attracted an exercise of its jurisdiction, such as fraud, unconscionable conduct, accident or mistake.”⁹⁴

⁹⁴ Sir Anthony Mason, ‘Themes and Prospects’ in PD Finn (ed), *Essays in Equity* (1985, The Law Book Company Limited) p 242.