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## Fusion and Theories of Equity in Common Law Systems

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## INTRODUCTION

The following essays address the idea that moved major law reform beginning two centuries ago and in most jurisdictions ending by 1940:<sup>1</sup> that of the ‘fusion’ of the common law and equity. Under the names of ‘fusion’, ‘merger’ or ‘union’, similar moves were made in several common law jurisdictions to assimilate the courts and procedures of equity with the courts and procedures of the common law. Past complications and problems were to make way for rational simplicity. Separate law and equity courts with distinct procedural rules were brought under one roof, where law and equity would be administered concurrently under uniform procedures. Single courts with distinct law and equity sides operating under different procedures were likewise simplified. These reforms inaugurated the form of superior court now typical in common law jurisdictions.

The reforms also had a side-effect. Fusion became the portal to discussions of equity’s very nature and its place in common law systems. To decide how modern judicatures ought to be structured and administered, the reformers and all interested others had pursued large questions: the nature of the laws and courts then operating and, therein, the nature of equity, the source of courts’ equity powers and the bearing of equity on common law. Fusion became a byword for matters beyond the reform of courts and their processes that the reforming statutes then made. Once the institutions and their administration had been reformed, fusion was no longer a prospect: it had succeeded, even if that success was understood differently between the United

<sup>\*</sup> Dr Jamie Glister, Dr Lorenzo Maniscalco, Dr Rose Melikan, Professor Richard Nolan, Professor Henry Smith and Dr Andreas Televantos generously discussed this chapter with the author, saving him from numerous errors and infelicities.

<sup>1</sup> Contrast Law Reform (Law and Equity) Act 1972 (N.S.W.), s. 5.

States and Commonwealth jurisdictions.<sup>2</sup> But afterwards, fusion would still be associated with the larger questions the reformers had discussed, which had troubled lawyers for centuries. Discourse on fusion slid into theorising on equity. Discourse on equity theories slid into discussions of fusion. To enquire into fusion was to enquire into the relationship of equity doctrines to doctrines of common law, and so into the nature and place of equity in common law systems. This intellectual inheritance shapes the modern lawyer's mind today.

Measured by how seldom a judge must decide a point about fusion, questions about fusion and equity's place in common law systems might seem unimportant. But there is more to consider. In unsettled times, legal systems receive scrutiny – and historically, equity and the common law, and the courts, judges and officials administering them, have received such scrutiny. Thus, the reformers' studies of equity in the nineteenth century were done amidst reforms spurred by the French Revolution and the upheavals and progress of industrialisation. Earlier, theories of equity, *epieikeia*, conscience and courts of equity were scrutinised in seventeenth-century England around civil war, revolution and the threat of absolute monarchical power. Similar enquiries were stimulated earlier still, in Tudor England, by the Protestant Reformation and the break with Rome. And the scrutiny of equity courts and the equity jurisdiction amidst the famous crisis of 1616 between Coke C.J. and Lord Ellesmere L.C. is notable.<sup>3</sup> The questions about equity raised at such moments are basic and weighty even in settled times, whatever the statistics on how often fusion is currently a ground of judicial decisions. Similarly, theories of equity and fusion are of practical importance, which such raw statistics cannot show.

As fusion and theories of equity are paired together in the traditions of most common law jurisdictions, readers will find them paired together throughout this book. In presenting this collection of essays, the editors mainly wish to show how one might gain a perspective on both fusion and equity that will enable the modern lawyer to pursue, if not to reach, answers to basic questions. What is equity's place in a modern common law system? Is equity's purpose, as a distinct ingredient of common law systems, spent? Should equity be distributed through the law? If equity should remain a distinct ingredient, in what form? History, doctrine and theory all speak to these enquiries. Studies of the institutional accommodation (or not) of equity in specific jurisdictions,

<sup>2</sup> See Bray, Chapter 2; Funk, Chapter 3; and Lobban, Chapter 4.

<sup>3</sup> C. M. Gray, 'The Boundaries of the Equitable Function' (1976) 20 A.J.L.H. 192; Baker, 'The Common Lawyers and the Chancery: 1616'; Knafla, *Law and Politics*, ch. 7, and this chapter, text to nn. 13–28.

studies of doctrines where law and equity are rivals, and studies of equity using one theoretical approach or another: all these mark points in the wide perspective this book is intended to open on fusion and equity's place in common law systems.

The contributors stress one or the other of those twin topics according to how each perceives it best to show something true about fusion or equity. This chapter looks at equity and fusion from a greater distance. Depictions of modern equity and deliberations over fusion seldom acknowledge that the place of equity in common law systems is constitutional in character, both in positive law and in the jurisprudence of common law systems. The chapter will outline how equity acquired this position, and then recall great failed theories of equity and suggest what a theory of equity today might include. The final portion of the chapter shows the practical significance of how modern equity is understood, particularly as influenced by theories of equity and how discussions of fusion are framed. Through a study of the theory that equity is common law travelling by another name, it will be shown that a fusion of substantive common law and equity is unappealing for reasons which – contrary to what is sometimes thought – do not depend on unsubstantiated anti-fusion dogma.

#### CONSCIENCE AND EQUITY IN THE CONSTITUTION

All legal systems seem to employ moral equity.<sup>4</sup> Many also employ the variety of equity called *epieikeia*, after Aristotle's exposition.<sup>5</sup> Both those recurring forms of equity are given a place by modern common law systems. In most common law jurisdictions,<sup>6</sup> the specialised equity traceable to the equitable jurisdiction of the traditional role of Lord Chancellor,<sup>7</sup> and the Court of Chancery as abolished in England in 1875, holds a place for those and other senses of equity. It is convenient to call this specialised equity 'Chancery equity'.

In England and most jurisdictions based on English law, the position of Chancery equity is constitutional owing to its place in the judicature and its dependence on the crown or state. The early stages in which equity gained this position are unclear. As departments of state, the medieval Chancery and Exchequer depended on royal power, like the *curia regis* and its progeny, the

<sup>4</sup> R. A. Newman, *Equity in the World's Legal Systems* (Brussels: Bruylant, 1973).

<sup>5</sup> Aristotle, *Nicomachean Ethics*, trans. by C. D. C. Reeve (Indianapolis, IN: Hackett Publishing, 2014), ¶ 1137a–1138a.

<sup>6</sup> India is the major exception. <sup>7</sup> Preceding the Constitutional Reform Act 2005 (U.K.).

Courts of Common Pleas and King's Bench.<sup>8</sup> However, the work in what became Chancery's equity side<sup>9</sup> soon differed from elsewhere. Adjudication and process were conciliar in being delegated from the king's council<sup>10</sup> and standing outside the common law writ system and applied to complaints informally narrated in English bills unlimited by formulaic Latin or French. Until 1534 the resulting judgment was unrecorded<sup>11</sup> because '[e]ach case had to be decided solely on its own merits; the Chancellors simply must not remember their former decisions'.<sup>12</sup> If there was Chancery law, it was 'not the law of the land'.<sup>13</sup>

The status of the Chancery and its decisions changed in the early modern period, by which time Chancery business had considerably grown.<sup>14</sup> The common law was weakened by the quantities of litigation occurring in prerogative courts without regular legal safeguards. Although efforts were made during the tenures of Sir Thomas More,<sup>15</sup> Sir Nicholas Bacon<sup>16</sup> and Sir Thomas Egerton (later Lord Ellesmere and Viscount Brackley)<sup>17</sup> to regularise the Chancery's proceedings, litigation in the Chancery was part of the cause.<sup>18</sup> In one effort to halt the slide, the common law judges decided in 1597 that judgments of the king's common law courts could not be re-examined by the Chancery after judgment.<sup>19</sup> According to Sir Edward Coke, they also decided that re-examination was prohibited by the Acts of

<sup>8</sup> Baker, *I.E.L.H.*, 4<sup>th</sup> edn, 12, 98–99.

<sup>9</sup> On its 'Latin side', the Chancery issued writs: A.D. Hargreaves, 'Equity and the Latin Side of the Chancery' (1952) 68 *L.Q.R.* 481.

<sup>10</sup> J. F. Baldwin, 'The King's Council and the Chancery' (two parts) (1910) 14 *Am. Hist. Rev.* 496 and 744.

<sup>11</sup> J. H. Baker, 'English Law and the Renaissance', in J. H. Baker (ed.), *The Reports of Sir John Spelman* (London: Selden Society, 1978) (94 S.S.), vol. II, 39. See S. E. Thorne, 'Courts of Record and Sir Edward Coke' (1937–8) 2 *U.T.L.J.* 24, 47–49.

<sup>12</sup> F. Metzger, 'The Last Phase of the Medieval Chancery', in A. Harding (ed.), *Law-Making and Law-Makers in British History* (London: Royal Historical Society, 1980), 87. The Chancery decree rolls begin in 1534, the Chancery decree and order books in 1544.

<sup>13</sup> Anon., Reading on Magna Carta c. 29, prob. Lincoln's Inn, c. 1491/1508 in J. Baker (ed.), *Selected Readings and Commentaries on Magna Carta 1400–1604* (London: Selden Society, 2015) (132 S.S.), 252; also the reading attr. W. Fletewood (c. 1558), *ibid.*, 372–73; but contrast Sir Edward Coke's 1604 memorandum on c. 29: *ibid.*, 396 (Chancery proceedings within jurisdiction are justifiable by the law of the land).

<sup>14</sup> J. A. Guy, 'Introduction', in J. A. Guy (ed.), *Christopher St German on Chancery and Statute* (London: Selden Society, 1985), 64–68; P. Tucker, 'The Early History of the Court of Chancery: A Comparative Study' (2000) 115 *E.H.R.* 791.

<sup>15</sup> L.C. 1529–32. <sup>16</sup> L.K. 1558–79. <sup>17</sup> M.R. 1594–96, L.K. 1596–1603, L.C. 1603–16.

<sup>18</sup> Knafla, *Law and Politics*, ch. 7.

<sup>19</sup> *Throckmorton v. Finch* (1597) B.L. MS Harley 6686A f.224, printed in J. Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge University Press, 2017), 287.

*praemunire* 27 Edw. III st. 1 c. 1 (1353) and 4 Hen. IV c. 23 (1403), which provided penalties for suing after judgment at law.<sup>20</sup> Lord Keeper Egerton made no immediate protest. But in 1606, as Lord Ellesmere L.C., he refused to follow the judges' 1597 ruling. The political and legal status of the Chancery – and therefore the common law – would be formally unsettled for the next decade.

The political settlement of 1616 was announced in lawyers' words that established the constitutional position of the Chancery and its law. Ellesmere had studied the major statutes touching the Chancery. Those, he said,<sup>21</sup> legitimated the Chancery jurisdiction; and the Acts of *praemunire* went solely against interference from the papal courts at Rome. Ellesmere briefed the king's advisors to that effect and they assented.<sup>22</sup> In his judgment in the *Earl of Oxford's Case*,<sup>23</sup> Ellesmere successfully claimed royal authority for the Chancellor, influenced by relatively new ideas of sovereignty.<sup>24</sup> He considered the Chancellor the keeper of the king's conscience – an idea not seen in Christopher St German's writings of the 1530s, nor other known sources of early Tudor England<sup>25</sup> – and claimed the Chancellor's authority in the Chancery – and the king's authority in matters of equity and conscience – was absolute.<sup>26</sup> James I vindicated Ellesmere's account, ultimately by decree.<sup>27</sup> Ellesmere's theory of the Chancery's authority became law. Orders of the Chancery became dominant over judgments of the common law courts.

<sup>20</sup> Ibid., ff. 223v. –224r.; Baker, *Reinvention*, 287. St German had thought so: Plucknett and Barton, *Doctor and Student*, 106–9 (even-numbered pages in the first dialogue give the Latin, odd-numbered pages the English translation and later inclusions not written in Latin; the second dialogue was originally printed in English).

<sup>21</sup> Lord Ellesmere, 'A Breviate or Direccion for the Kinges Learned Councell Collected by the Lord Chauncellor Ellesmere, *Mense Septembris* 1615. *Anno Jacobi Regis*', in Knafla, *Law and Politics*, 319–36 (analysed at 164–67, 174–75). Coke's corresponding interpretations are discussed: J. P. Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1941) 36 Ill. L. Rev. 127.

<sup>22</sup> Knafla, *ibid.*, 175–76.

<sup>23</sup> (1615) 1 Ch. Rep. 1. The judgment may have been a tract: Ibbetson, 'The Earl of Oxford's Case'.

<sup>24</sup> Knafla, *Law and Politics*, 72–73; I. Williams, 'Developing a Prerogative Theory for the Authority of the Chancery: The French Connection', in M. Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900* (Cambridge University Press, 2016).

<sup>25</sup> Baker, *Reinvention*, 411 n. 6; Williams, *ibid.*, 51–52.

<sup>26</sup> *Earl of Oxford's Case* (1615) 1 Ch. Rep. 1, 14–15. By 'absolute', he may merely have meant that the power was exercisable free of a specific procedure or rules, in contradistinction to an 'ordinary' power subject to such procedure or rules: Williams, 'Developing a Prerogative Theory', 36–37; Baker, *Reinvention*, 413 (Coke's drawing of the distinction).

<sup>27</sup> See James I, 'A Speech in the Starre-Chamber, *The xx. of Jvne. Anno* 1616', in J. P. Sommerville (ed.), *King James VI and I: Political Writings* (Cambridge University Press, 1994), 204–28 and the decree printed in Cary 133–35.

1616 formally settled the Chancery's place in the judicature, but the stability of the settlement took the efforts of subsequent presidents of the Chancery.<sup>28</sup> Sir Francis Bacon,<sup>29</sup> Bishop Williams,<sup>30</sup> Sir Thomas Coventry,<sup>31</sup> Sir Edward Hyde<sup>32</sup> and Sir Heneage Finch<sup>33</sup> all cultivated good relations with the common law courts by ensuring not to subvert common law.<sup>34</sup> Corrupt officers and abuses of procedure still soured litigants' encounters in Chancery, though such problems were not Chancery specialisms. Parliament knew these shortcomings when it considered proposals to abolish the Chancery under Cromwell in 1653<sup>35</sup> and at the Glorious Revolution. But Parliament considered that Chancery equity could not be done without.<sup>36</sup>

Finch, later Lord Nottingham,<sup>37</sup> worked prodigiously in the later seventeenth century to bring Chancery practice and laws into the form ordained in 1616. He established new doctrines while following his forebears' doctrines on the place of Chancery in the judicature. He wrote: 'all men agree, that the King is the fountain of justice and mercy, of law and equity'.<sup>38</sup> Afterwards 'justice and equity . . . were . . . settled in courts, as God, who is the fountain of light, did settle it in the sun and moon'.<sup>39</sup> Drawing on opinions of the judges early that century, Nottingham said equity was 'opposite to regular law', 'in a manner an arbitrary disposition' emanating from 'a special trust committed to the King'<sup>40</sup> in 'a fundamental constitution' of the state.<sup>41</sup> This was maintained as good constitutional theory and doctrine in England,<sup>42</sup> colonial North

<sup>28</sup> See D. E. C. Yale, 'Introduction', in Finch, *Manual and Prolegomena*, 69–74; Macnair, 'Imitations of Equitable Relief. For prohibitions against equity courts after 1616, see Gray, 'Boundaries of the Equitable Function'.

<sup>29</sup> L.K. 1617–18; L.C. 1618–21 (Lord Verulam 1618, Viscount St Albans 1621). <sup>30</sup> L.K. 1621–25.

<sup>31</sup> L.K. 1625–40 (Lord Coventry 1628).

<sup>32</sup> L.C. 1658–67 (Lord Hyde 1660, Earl of Clarendon 1661).

<sup>33</sup> L.K. 1673–75, L.C. 1675–81. See n. 37 in this chapter.

<sup>34</sup> See Yale, 'Introduction', 69–74; Baker, 'The Common Lawyers and the Chancery: 1616', 507–10.

<sup>35</sup> J. Parkes, *A History of the Court of Chancery* (London: Longman et al., 1828), 148–58.

<sup>36</sup> H. S. Holdsworth, *A History of English Law*, 7th edn (London: Methuen, 1956), vol. 1, 463–65; Yale, 'Introduction', 73. The same was true of Cromwell, whose short-lived Chancery Ordinance left the court in place: Chancery Regulation Ordinance 1654 (Eng.), in C. H. Firth and R. S. Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (London: H.M.S.O., 1911), vol. 2, 958. See [B. Whitelocke], *Memorials of the English Affairs* (London: Ponder, 1682), 601–08; Parkes, *A History of the Court of Chancery*, 167–72.

<sup>37</sup> Lord Finch 1674, Earl of Nottingham 1681. <sup>38</sup> Finch, *Manual and Prolegomena*, 191.

<sup>39</sup> *Ibid.*, 190. <sup>40</sup> *Ibid.*, 189.

<sup>41</sup> *Ibid.*, 192. These passages elaborate Hobart's report of *Martin v. Marshal* (1615) Hob. 63, where opinions of Popham C.J.K.B. (d. 1607), Anderson C.J.C.P. (d. 1605), Gawdy C.J.C.P. (d. 1605) and Walmsley J. (d. 1612) were canvassed.

<sup>42</sup> *R. v. Hare and Mann* (1719) 1 Str. 146, 158–59.

America<sup>43</sup> and Australia<sup>44</sup> and, afterwards, the United States<sup>45</sup> and Canada.<sup>46</sup> It required adaptation to the republican constitution of the United States,<sup>47</sup> in which a sovereign's conscience – let alone a king's prerogative – is alien. Indeed, it must now be untenable to consider the modern equity jurisdiction to be a prerogative power anywhere.<sup>48</sup>

Otherwise equity's constitutional aspects continue. The decree of James I effectively became parliamentary legislation in England in 1875, and is so in England and former colonies today.<sup>49</sup> The distinctness of equity and its primacy over the common law in England was acknowledged in American colonies before the Declaration of Independence in 1776. Unless ordinary colonial courts were invested with equitable jurisdiction, the jurisdiction was typically exercisable only by a colonial governor alone or in council.<sup>50</sup> If the governor or colonial council or assembly were not invested with equity jurisdiction, then it was exercisable only by the king in council at London.<sup>51</sup> The doctrine of primacy also carried into the new American republic and through the reform era. For all the distaste that the reformer David Dudley Field felt for equity,<sup>52</sup> his legacy – the Field Code of Civil Procedure and its progeny, including the federal Rules of Civil Procedure of 1938<sup>53</sup> – depended on equity continuing and taking primacy over the common law in New York

<sup>43</sup> *Simpson v. Smyth* (1847) 1 E. & A. 172, 194; *A.-G. (Upper Canada) v. Grasett* (1860) 8 Gr. 130, 155.

<sup>44</sup> *R. v. Bank of Victoria (in liq.)* (1895) 1 Arg. L.R. 1, 4.

<sup>45</sup> *McCartee v. Orphan Asylum*, 9 Cow. 437, 471, 481–83 (1827) (Court for the Correction of Errors of New York); *Fontain v. Ravenel*, 17 How. (58 U.S.) 369, 385 (1854) (subject to the American authorities, n. 48).

<sup>46</sup> *Re Bulger* (1911) 21 Man. R. 702, 705; *Aherne v. Chang* (2011) 106 O.R. (3d) 297, [16]; 2011 ONSC 2067.

<sup>47</sup> *Fontain v. Ravenel*, 17 How. (58 U.S.) 369, 385 (1854).

<sup>48</sup> In England, see *R. (Miller) v. Secretary of State for Exiting the European Union* [2018] A.C. 61, [45]; [2017] UKSC 5. In the United States, see e.g., *The Will of Sarah Zane* printed as *The Opinion of the Circuit Court of the United States in and for the Eastern District of Pennsylvania on the Will of Sarah Zane* (Philadelphia, PA: Kite, 1834), 19, 33–34, 59, 62, 65, 70; *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 56–59 (1890).

<sup>49</sup> Senior Courts Act 1981 (U.K.) s. 49, re-enacting Judicature Act 1873 s. 25(11). Equivalent provisions are found on the statute-books of Commonwealth common law jurisdictions generally.

<sup>50</sup> W. Smith, *The History of the Province of New-York*, 2nd edn (Philadelphia, PA: Carey, 1792), 45, 112–13, 122, 130, 148–49, 166–67, 183, 188–89, 191, 253, 268–71, 274–76; D. Ramsay, *Ramsay's History of South Carolina* (Newberry, SC: Duffie, 1858), vol. II, 72; A. Laussat, *An Essay on Equity in Pennsylvania* (Philadelphia, PA: Desilver, 1826), 17–31. In Upper Canada, see Girard, Chapter 5.

<sup>51</sup> A. M. Schlesinger, 'Colonial Appeals to the Privy Council' (two parts) (1913) 28 P.S.Q. 279 and 432.

<sup>52</sup> See text to nn. 83–85.

<sup>53</sup> These replaced the Federal Equity Rules and the Conformity Act, 28 U.S.C. 724 [1934].

state, where Field's work was concentrated, and in the federal courts. The established principle of judicature that, when a new remedy enters the common law, the equitable jurisdiction to grant relief in the same type of case is undiminished also emerged from these various developments.<sup>54</sup> And in different ways, written constitutions such as those of the United States<sup>55</sup> and the Commonwealth of Australia<sup>56</sup> constitutionalise equity afresh and confirm equity's status in the common law inheritance from which those new world polities were made.

What cannot yet be assessed is how far the laws and institutions of Courts of Chancery might have helped form the ideas that shape the modern democratic state.<sup>57</sup> If the contribution was minimal, it seems curious that Chancery equity was retained through the trouble in early modern England over the uncertain reach of Chancery jurisdiction, the corruption of its officers and the expense of Chancery litigation. Chancery equity was found indispensable, once divorced from sovereign absolutism. The Court of Chancery was one of the developing institutions of state, and Chancery equity and the common law were part of the developing system of government. These institutions and systems formed a basis for government in British colonies and, under the further influence of the Enlightenment, were adjusted to new life after American independence and, later again, when modern representative democracy was born in common law jurisdictions.<sup>58</sup> Also notable was the culture of equity and conscience in law and society in the early modern period,<sup>59</sup> particularly the 'atmosphere of trust' which Maitland still saw surrounding the societies, corporations and of course private and public express trusts in the twentieth century.<sup>60</sup> The culture of responsibility generated in that

<sup>54</sup> E.g., *Kemp v. Pryor* (1802) 7 Ves. Jun. 237, 249–50; *Greenshields v. Barnhart* (1851) C.R. 2 A.C. 91, 185 (aff'd *sub. nom. Barnhart v. Greenshields* (1853) 9 Moo. P.C. 18).

<sup>55</sup> United States Constitution, Art. III §2 and Seventh Amendment (1791).

<sup>56</sup> Commonwealth Constitution, s. 75(v); see *Plaintiff S157/2002 v. Commonwealth* (2003) 211 C.L.R. 476, [5]–[6]; [2003] HCA 2.

<sup>57</sup> For a preliminary hint: Metzger, 'The Last Phase of the Medieval Chancery', 82.

<sup>58</sup> Parkes, *A History of the Court of Chancery*, 148–58; Publius [A. Hamilton], *Federalist, on the New Constitution, Written in the Year 1788* (Hallowell, ME: Glazier, Masters & Smith, 1837), No. 81, 377–79 and No. 83, 393, 396; Rules of the Supreme Court, 2 Dall. 411, 413–14 (1792): 'The Court Considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court'.

<sup>59</sup> D. R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate: Farnham, 2010); M. Fortier, *The Culture of Equity in Early Modern England* (London: Routledge, 2016); M. Fortier, *The Culture of Equity in Restoration and Eighteenth-Century Britain and America* (London: Routledge, 2016).

<sup>60</sup> F. W. Maitland, 'Trust and Corporation', in D. Runciman and M. Ryan (eds), *F. W. Maitland: State, Trust and Corporation* (Cambridge University Press, [1904] 2003), 126–27.

atmosphere has direct lines to the legal and political responsibilities of those who now govern local authorities and, through modern administrative law,<sup>61</sup> those who now govern the state. The common law receives credit for its contribution towards the development of modern law and government. It would be odd if that credit went alone to courts of common law defined in opposition to equity courts, and to the common law defined to exclude equity.

#### GREAT FAILED THEORIES

Scrutiny led lawyers to formulate theories of the Court of Chancery and adjudication on its equity side from the sixteenth century onwards to grasp at questions of Chancery's origins, authority and especially its review of common law judgments. Lawyers today typically reach fundamental questions about equity through discussion of fusion, but certain past theories of the Chancery and its equity have left impressions even if no single theory of equity has come down to lawyers today. The lack of a perfect theory of equity is sometimes counted against Chancery equity and, indeed, given as a reason to abandon equity as it is currently known.<sup>62</sup> What should one take from the failure of great equity theories? Four will be mentioned.

Lawyers long studied the theory of St German, who wrote in the 1530s.<sup>63</sup> He wrote the first theory of English equity, thereby connecting equity with conscience-based adjudication by the Court of Chancery. St German rooted equity in concepts familiar among medieval theologians. At base was *synderesis*, 'that rational faculty which compels our assent to self-evident propositions, [and] shows us that good is to be done and evil eschewed'.<sup>64</sup> Conscience was the derivation from that general rule of rules of conduct applicable in particular situations.<sup>65</sup> If the particular derived rules diverged from a human law – say, a law concerning deeds – the Court of Chancery might find cause to do equity, relieving from the human rule to meet the exigencies of the case.<sup>66</sup>

<sup>61</sup> W. Gummow, 'Equity in the Modern Administrative State', in *Equity and Administration*, ch. 16. See also B. Hilton, *A Mad, Bad, and Dangerous People? England 1783–1846* (Oxford: Clarendon, 2006), 169–70.

<sup>62</sup> J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon, 1991), ch. 9; P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *U.W.A.L. Rev.* 1, 22–25; Worthington, *Equity*, 2nd edn.

<sup>63</sup> Vinogradoff, 'Reason and Conscience in Sixteenth-century Jurisprudence', 373–74; L. A. Knafly, 'Conscience in the English Common Law Tradition' (1976) 26 *U.T.L.J.* 1, 8.

<sup>64</sup> Plucknett and Barton, 'Introduction', xxvi.

<sup>65</sup> *Ibid.*, xxvi–xxvii; N. Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge University Press, 1990), 133.

<sup>66</sup> *Ibid.*; Baker, 'English Law and the Renaissance', 37–39.

Conscience was not arbitrary. Moreover, St German thought that the common law largely squared with conscience. He took the example of the obligor on a bond. Where an obligor was sued after having paid the sum due without obtaining a deed of acquittance, the obligee could still recover at law. In Chancery the obligor could be relieved of paying twice – which, a modern lawyer might assume, was because Chancery proceeded according to conscience while the common law did not. However, following the medieval common lawyers, St German thought it contrary to conscience *and* to common law that the obligor should pay twice. It was not common law that the obligor ought to pay the money again; ‘that law were both against reason and conscience’. Rather, the obligor must pay twice because ‘a general ground’ of English law was that ‘great inconvenience’ and ‘hurt’ would come of allowing the obligor to avoid an obligation through pleading payment ‘by a bare word’.<sup>67</sup> This accorded with conscience except where the obligor was neither careless nor defaulted, in which case the obligor might be helped in Chancery. St German’s innovation was to call ‘equity’ the relief the Chancery awarded from such general rules where, by its informal procedures, conscience was found to lie outside the general rule.

St German’s theory contained other influential ideas. Because the common law could be consistent with conscience, the Court of Chancery need not always intervene.<sup>68</sup> And some matters were non-justiciable by Chancery and any court, since they were properly matter for a person’s private conscience.<sup>69</sup> St German considered the Chancery’s jurisdiction special, even if Chancery principles made it a court of constant resort from sealed instruments, the denial of uses and the like. Had all lawyers understood Chancery equity as special, many complaints about the overlapping jurisdictions of Chancery and other courts in the seventeenth century would have been prevented.<sup>70</sup> The concurrent jurisdiction of law and equity courts was too large to pretend that disputes in that terrain did not attract two systems of law relating to the one subject, in courts of law and courts of equity.<sup>71</sup>

<sup>67</sup> Plucknett and Barton, *Doctor and Student*, 77, 79 (first dialogue, orthography modernised). This discussion continues at 189–90 (second dialogue); in the anonymous *Replication of a Serjeant at the Laws of England*, printed in Guy (ed.), *Christopher St German on Chancery and Statute*, 99–101; and in St German’s reply in *A Little Treatise Concerning Writs of Subpoena*.

<sup>68</sup> Especially *Doctor and Student*, 120–31.

<sup>69</sup> *Ibid.*, 113; Finch, ‘Manual’ and ‘Prolegomena’, 194.

<sup>70</sup> See James I, ‘A Speech in the Starre-Chamber’, 213. See also Knafla, *Law and Politics*, 108–09, 120–22.

<sup>71</sup> See Gray, ‘Boundaries of the Equitable Function’.