

For one view on how the story came out, see Henry Smith, ‘Equity as Meta-Law’, *Yale Law Journal*, 130 (2021) 1050–1144; for another, Henry Bray, ‘The System of Equitable Remedies’, *Univeristy of California Los Angeles Law Review*, 63 (2016) 530–593.

THE ORIGINS AND DEVELOPMENT OF EQUITY

1. Central royal courts at the end of the 13th century:
 - a. Bench before the King (*coram rege*, later King’s Bench)
 - b. Common Bench (*bancum commune*, later Common Pleas)
 - c. Exchequer of Pleas (*placita in scacario*, later Court of the Exchequer)
 - d. The High Court of Parliament
2. Local and ecclesiastical courts
 - a. county, hundred
 - b. seigneurial, manor
 - c. borough, fair
 - d. ecclesiastical
3. *Memoranda de Parlamento* of 1305 (Mats. p. V–40):

“To our lord the king, Adam Kereseye and Joan his wife show that when they impleaded Sir John de Ferrers and Avis his wife of a certain piece of land before the justices of the Common Bench on the ground that the land is Joan’s inheritance from her cousin who died seised of it, John and Avis pleaded that the king gave the land to a man whose heir Avis is, and they showed a charter of our lord the king about it and said that they could not reply without him, for which reason the justices dismissed the case. Wherefore Adam and Joan pray the lord our king, if it pleases him, that the justices proceed in the plea according to the law and usage of the realm notwithstanding the aforesaid charter such that their right not be further delayed nor the said Joan disinherited.”

The absence of a remedy in the regular courts. Relationship of this idea to c. 29 of Magna Carta (the ‘due process’ clause).
4. The Latin side of the Chancery (from temp. Edward III): Appeal from Inquisitions post Mortem; interpretation of royal grants; petitions of right against the crown and against royal officers.
5. Structure of the medieval Chancery
 - a. Twelve *clerici ad robas*. Chief is the Master of the Rolls.
 - b. Twelve bougiers (crown grants clerks and petty bag on the Latin [IPM] side)
 - c. Twenty-four cursitors
 - d. 6 clerks to help the MR with the equity business (10 clerks for each)
6. In the late fourteenth century, perhaps because of the troubled nature of the times, the council began to receive more and more petitions, alleging that something had gone seriously wrong with the normal course of justice, riots and affrays, the poverty of the petitioner, something with which the common law courts could not deal substantively. It may be one of just those serendipitous happenings, but people start to petition the chancellor directly about these things

rather than stopping off at the council on the way. Out of this was born the English side of the Chancery.

7. In the early 15th century the petitions to the chancellor grow into the hundreds per year. Examples of them may be found in sec. 9C of the *Mats.*, pp. IX–65 to IX–71. Riots and affrays, poverty, predominate as the reasons for seeking the chancellor’s help, but we begin to see more of special kinds of substantive claims:
 - a. My land is held to use and the feofees to uses haven’t done what they’re supposed to do.
 - b. Someone has agreed to convey land to me and he won’t do it.
 - c. I discharged my bond but I have no acquittance and am being sued to pay again.
8. Although relatively few documents tell us what happened, a few do, and a number of the petitions give us enough to indicate what the petitioners hoped the chancellor would do: subpoena the defendant, take his deposition and that of the witnesses, issue an injunction or an order.
9. Throughout the fifteenth century the jurisdiction of the Chancellor continued to expand both numerically and as to subject matter. Until the late fifteenth century there is no indication that the common lawyers are at all concerned about any of this. The problem became a matter of public debate during the chancellorship of Cardinal Wolsey (1515–1529). Wolsey was particularly free in granting inhibitions to the common-law courts. Thomas More became chancellor after Wolsey’s fall, and More was the first chancellor trained in the common law since the 14th century. More, however, also began to issue inhibitions to the common-law courts, and the judges protested. He had them all to dinner and told them that would be happy to cease issuing inhibitions if their courts would consider the arguments that his court was hearing. The justices refused (they would have had to change the nature of their operations entirely to do so), and the Chancellor’s Court became a permanent feature of the English legal landscape.
10. Inhibitions to the common-law courts and the statute of 4 Henry IV c. 23 (1403)
11. Meanings of the word “equity”
 - a. Latin *aequitas* <– *aequus*, flat, plain, like or similar, equal
reasonable, similar, in ordinary language, in legal writing:
like cases to be judged alike—rule of law
body of principle that lay beyond the law—natural equity
a principle of interpretation = *epieikeia* Aristotle, *Nichomachean Ethics* (5.10): “The data of human behavior simply will not be reduced to uniformity. So when a case arises where the law states a general rule, but there is an exception to the rule, it is then right . . . to fill the gap by such a modified statement as the lawgiver himself would make if he was present at the time, and such an enactment as he would have made, if he had known the special circumstances.”
 - b. Medieval meanings
All three Classical technical usages

Natural equity = Christian morality, but not all moral principles can be judicially enforced

Canonical equity: equity is justice tempered with the sweetness of mercy

Equity of the statute

12. A case from a Year Book of 1482 (IX–71)

In the Exchequer Chamber before all the Justices of the one Bench and the other and in the presence of several Serjeants and Apprentices, the Archbishop of York, then Chancellor of England (Thomas Rotherham, Chanc., 1474–1483) sought the advice of the Justices upon the grant of a Subpoena.

And he said that a complaint had been made to him that one was under obligation by Statute Merchant to another and had paid the money but had taken no release; and, notwithstanding this payment, the creditor sued out execution.

And he said that the creditor, if he were examined, could not deny the payment.

How then, Sirs, should I grant a Subpoena or not?

FAIRFAX, J.: It seems to me against all reason to grant a Subpoena, and by the evidence of two witnesses to subvert matter of record. For, where one is bound in this manner, he need not pay without acquittance or release. So, where a man is obliged on an obligation, he need not discharge his duty unless the obligee will make him an acquittance; and so it seems to me that this is his folly.

THE CHANCELLOR said that it was the common course in the Chancery to grant relief against an obligation; just as in the case of a feoffment upon trust, where the heir of the feoffee is in by descent or otherwise. For we find record of such cases in the Chancery.

HUSSEY, the Chief Justice of the King's Bench: When I first came into Court, which is not yet thirty years ago, it was agreed in a case by all the Court that, if a man had enfeoffed another on trust and if he died seised, so that the heir was in by descent, then the Subpoena would not lie; and there is good reason for this. For, just as, by a Subpoena, one descent might be disproved in the Chancery by two witnesses, so by the same reasoning twenty descents might be disproved; which is against reason and conscience. And so it seems to me that it is less harmful to make him who suffers his feoffee to die seised of his land to lose his land than to work a disinheritance by evidence in Chancery. And so, in the case of the Statute Merchant and also in that of the obligation, it is less harmful to make him pay again through his negligence than by two witnesses in the Chancery to disprove a matter of record or a matter in speciality. For it is all due to his negligence, since he need not have paid on the obligation before taking an acquittance or release from the plaintiff. Such is the law.

Whereupon the Chancellor said that it would seem great folly to enfeoff others of one's land.

And then the Chancellor agreed to the Statute Merchant, because it was matter of record.

(The Chancellor agreed that he would not follow the usual practice of granting relief to debtor who did not have a sealed acquittance in the case of a statute merchant, an obligation that was recorded and thus was a matter of record. In this case a desire to secure stability for transactions overcomes the inequity of allowing the creditor to sue twice. What the case has to

say about uses (which it calls trusts) is said by way of analogy. We will return to it in the lecture on uses.)

13. A case from a Year Book of 1489 (*Mats.* (IX–72):

A *Subpoena* was sued in the Chancery on this, that there were two executors and one, without the assent of his companion, released a man who was indebted to their testator. And it was argued that his intent should not in these circumstances be fulfilled, and a *Subpoena* was sued against the executor who released and against the debtor who was thus released.

Fineux [serjeant from 1486, later CJKB, 1495–1525] said that no remedy lay here; for each executor has full and complete power and one may do everything that his companion might do, and so the release made by him was good.

THE CHANCELLOR [John Morton, archbishop of Canterbury, Chanc. 1486–1500]: *Nullus recedat a Curia Cancellariae sine remedio* [No one leaves the Chancery without a remedy]; and it is against reason that one executor shall have all the goods and shall make a release by himself.

Fineux: *Si nullus recedat sine remedio, ergo nullus indiget esse confessus*. [If no one leaves without a remedy, then no one has to go to confession. (Loose trans., but I think it captures the gist of it. CD)] But, Sir, the law of the land covers many things, and many things are sued here which are without remedy at the common law, and so these latter lie in conscience between a man and his confessor; and this is such a case.

THE CHANCELLOR: Sir, I know well that each law is, or ought to be, in accord with the law of God; and the law of God is that an executor, who is of evil disposition, must not waste all the goods, etc. And I know well that if he does so waste and makes no amends or satisfaction, so far as he is able, or will not make restitution, so far as he is able, he shall be damned in hell.

And to make remedy for such an act as this, as I think, is well done according to conscience. And the will says, *constituo tales esse executores meos, ut ipsi disponant*, etc. [I make such and such persons my executors, so that they may dispose, etc.]; and so their powers are joint and not several, and, if one acts without his companion, he does so without authority. ...

(The issue is, of course, fundamental: How far can human law go in enforcing the moral law?)

14. 17th-century developments. Equity, so much a matter of discretion even in the 16th century, becomes a matter of rule. Reports of equity cases become regular in 17th century. Francis Bacon when he was chancellor from 1618–1621 played a key role in establishing the procedural rules. Heanage Finch, lord Nottingham, Chancellor from 1675–1682, played an equally important role in establishing the substantive rules.

15. The Chancery c.1700:

a. Substantive jurisdiction:

trusts

equitable interests in land (family settlements)

mortgages, the equity of redemption, equitable mortgages, liens

infants, guardianship

supervision of accounts and administration of decedents' estates

equitable relief (rescission, reformation) for fraud, mistake, accident, undue influence

b. Equitable remedies

injunction/specific performance

quia timet → quiet title → declaratory judgment

rescission, restitution and reformation

accounting

receivership

c. Equitable defenses

set-off

release and waiver

acquiescence and laches

equitable estoppel :: estoppel in pais

d. Equitable concepts

fraud, mistake and accident in contracts

relief against penalties and forfeitures

equity in property, whereby an obligation may attach to a piece of property

e. Maxims

he who seeks equity must do equity

equity does not aid a volunteer

equity regards as done what ought to have been done

equity delights to do justice and that not by halves

equity follows the law

equity suffers not a right without a remedy

16. From equity in the reign of Queen Anne to *Bleak House*