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CHAPTER THREE

A HOUSE BUILT ON SAND:
EQUITY IN EARLY MODERN ENGLISH LAW

D. Ibbetson*

INTRODUCTION

One of the most distinctive features of English legal history is the existence of the Court of Chancery, alongside the normal courts of Common law and not bound by their rules and procedures. In the course of the 16th century it came to be said that the Chancellor’s jurisdiction was based upon ‘equity’, replacing the earlier formulation that it was predominantly based on ‘conscience’.¹ That said, although the use of the terminology of equity was commonplace before the end of the 16th century, its meaning was wholly unstable, providing no solid theoretical foundation for the work of the Court of Chancery.² Recent work has stressed this instability. In his examination of the idea of equity in different contexts, Mark Fortier has shown the breadth of meaning, or meanings, that it had: it was ‘a contested concept’, with no definable core;³ even in its usage in legal contexts it is multi-faceted.⁴ Focusing more on the language of conscience than of equity, Dennis Klinck has argued that the usage of the word in case-law in the late 16th century is as untheorised as the usage of the word equity;⁵ and that even those late-Elizabethan commentators who dealt with the subject produce no clear conclusions.⁶ The present chapter does not aim to question any of this. Its purpose is rather to reinforce others’

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⁴ Fortier, Culture of Equity, ch. 2.
⁶ Klinck, Conscience, 88–106.
conclusions by looking more closely at the writings on equity (in its legal context) dating from the late-16th and early-17th centuries, with a view to seeing both how and why there was such a lack of theoretical focus. The case law of the Court of Chancery will be largely ignored, since nowhere in this is there anything even purporting to give a theoretical insight into the nature of the Chancellor’s equity; the one exception is the Earl of Oxford’s Case (1615), which, it is argued, is not really a report of a decision at all, but rather a justificatory essay on the nature of the Chancery’s jurisdiction by the Lord Chancellor, Lord Ellesmere.

An additional preliminary point is necessary. From a legal standpoint, the description of a court or tribunal as doing ‘equity’ did not necessarily imply a positive statement either about the rules and principles which it adopted or about its reasoning processes. When, in the 1570s, London merchants described mercantile courts as ‘courts of equitie’, it was merely another way of saying that strict law would not be applied.7 It is in this sense, of courts not hamstrung by Common law rules and processes, that such courts as the Court of Requests could be described as equitable. ‘Equity’ continued to have this negative aspect for many centuries. Hence, an important aspect of the development of equity in the 16th- and early 17th-century Chancery is the attempt to impose a positive meaning onto ‘equity’ alongside its essentially negative sense of something that was not Common law.

THE ENGLISH FOUNDATIONS

Behind the later Elizabethan notion of equity there were two distinct strands which had become substantially intertwined: the idea that statutes should be interpreted according to their ‘equity’, and the analysis of Christopher St German in his Doctor and Student.

Equity and Statutes: The Middle Ages

The idea that a statute might be interpreted according to its ‘equity’ appeared in England in the latter part of the 14th century and soon became well-established.8 The word ‘equity’ here had no overtones of justice or

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7 BL MS. Add. 48020, f. 356.
8 The earliest reference of which I am aware is YB M 48 Edw III f. 28 pl. 4 (1374). The terminology was entrenched by the start of the 15th century: YB T 7 Hen IV f. 16 pl. 6 (1406); YB P 12 Hen IV f. 20 pl. 5 (1411). See in particular S.E. Thorne, ‘The Equity of a Statute and
fairness, a principal sense of the word in the later Middle Ages. A statute giving an action to an executor was held to give one to an administrator too; a statute giving a remedy for the disturbance of ‘titles and possessions’ was held to apply to the disturbance of a reversionary right; a statute giving a remedy against a gaoler who permitted the escape of a prisoner who was under his custody for arrears of account was held to give a remedy where the prisoner was in custody for a debt. Rather, it connoted the principle underlying a statute, its ratio, which justified a slight analogical extension outside its express terms. The core idea was that of similarity; ‘equipollens lex est, for similar cases are adjudged by the equity of the statute’.

**Christopher St German’s Doctor and Student**

St German was more concerned with conscience than with equity; indeed, his *Dialogue in English between a Doctor of Divinity and a Student in the Laws of England* was originally published as *A Dyaloge bytwyxt a Doctour of Dyuynite and a Student in the Lawes of Englande* of the Groundes of the Sayd Lawes and of Conscyence, in Latin *Dialogus de Fundamentis Legum Anglie et de Conscientia*. After an exposition of the grounds of English law, the question is raised how they stand with conscience, focusing on the way in which in an action of debt on a sealed bond the Common law would not allow a defence that the money had been paid already, leaving the hapless debtor who had failed to take a proper acquittance to seek relief in Chancery. The discussion of this is complex, and not helped by

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9 Middle English Dictionary, s.v. ‘equity’.

10 YB M 3 Hen VI f. 14 pl. 18 (1425); YB T 4 Hen VI f. 25 pl. 4 (1426); YB H 15 Edw IV f. 18 pl. 8, at f. 20 (1476).


its being substantially abbreviated and reordered in the English version by comparison with the Latin, whose logic is easier to follow.\textsuperscript{14} For St German, conscience was something distinct from \textit{synderesis}, the natural sense of good and evil, and from \textit{ratio} or reason, the power to deliberate between right and wrong.\textsuperscript{15} Its core sense fell to be determined by what he saw as its etymology, the prefix \textit{con} pointing to its being knowledge of one thing \textit{with} another thing.\textsuperscript{16} In the present context it was knowledge used in conjunction with the law, so that a default in conscience might arise through ignorance of the law or through a failure to apply it properly.\textsuperscript{17} Thirdly, one—but only one—aspect of conscience was the doing of equity in the application of general rules of law to specific cases.\textsuperscript{18} In effect, therefore, equity was subordinated to conscience.

It is only after having established that doing equity was an aspect of conscience that St German turned to the explanation of what equity was.\textsuperscript{19} At the core of his analysis was the Aristotelian notion of \textit{epieikeia},\textsuperscript{20} already known to English lawyers in the middle of the 15th century\textsuperscript{21} but which had come to St German mediated through Jean Gerson and St Thomas Aquinas: the first three sentences of the relevant chapter of \textit{Doctor and Student} are a close paraphrase of a passage from Gerson’s \textit{Regulae Morales}, followed by a similarly close copying of a passage from the \textit{Summa Theologica}.\textsuperscript{22}

\textsuperscript{14} For the theoretical primacy of the Latin version, see Vinogradoff, “Reason and Conscience”, 374.

\textsuperscript{15} St German, \textit{Doctor and Student}, 78, 79. \textit{Synderesis} is dealt with in ch. 11 (Latin) and ch. 13 (English), 80–83, and reason in ch. 12 (Latin) and ch. 14 (English), 82–87.

\textsuperscript{16} St German, \textit{Doctor and Student}, 86–87.

\textsuperscript{17} St German, \textit{Doctor and Student}, 90–91.

\textsuperscript{18} St German, \textit{Doctor and Student}, 94–95.

\textsuperscript{19} St German, \textit{Doctor and Student}, 94–107. The discussion of equity constitutes ch. 14 of the Latin edition, ch. 16 of the English. For discussion, see xlv–li.


\textsuperscript{22} Gerson, \textit{Regulae Morales} (or \textit{Regulae Mandatorum}), S. 3, in P. Glorieux ed., \textit{Jean Gerson Oeuvres Complètes} IX (Paris: Desclée, 1960–73), 95–6; Aquinas, \textit{Summa Theologica} 2\textsuperscript{a} 2\textsuperscript{ae}, 120.1 (Dominican edition vol. 41, Cambridge: Cambridge University Press, 2006, 278). For Gerson’s influence on St German, see Z. Rueger, “Gerson’s Concept of Equity and Christopher St German”, \textit{History of Political Thought} 3 (1982), 1, esp. at 10–11. The subsequent parts of the chapter bear some relation to Gerson’s discussions in \textit{Regulae Morales}, S. 36 and S. 92, in \textit{Oeuvres Complètes} IX, 104 and 116 (reflecting topics discussed by Gerson elsewhere in his works), and to Aquinas, \textit{Summa Theologica} 1\textsuperscript{a} 2\textsuperscript{ae} 96.1.1 (Dominican edition vol. 28, 138–39).
The problem for Aristotle was that laws were inevitably general in their formulation, and consequently did not always respond appropriately to concrete situations: ‘and this is the nature of the equitable, a correction of law where it is defective owing to its universality’. The correct thing to do when faced with such a situation, according to Aristotle, was to put oneself in the position of the legislator and say what he would have said had he been present. St German did not go so far as this, but followed Aquinas in delimiting the role of *epieikeia* to situations in which the positive law, if applied literally, would have gone against the common good or involved a conflict with divine law or natural law. Alongside this narrow approach, though, St German incorporated a very different (and perhaps inconsistent) idea, the Canon law-approach that equity was mitigation or tempering of the rigour of the law; in this again he followed Gerson. Finally, St German applied the Aristotelian approach to oaths as well as written laws, denying them strict force according to their letter but rather treating them as implicitly containing exceptions when required by circumstances: a vow not to eat meat might be broken if this was the only way to save one’s life.

Only now (in the original Latin) did the student return to the question of the debtor who would be forced by Common law to pay his debt again. This has been described as the ‘stock example’ of the situation in which the Chancery would intervene to prevent an injustice at Common law, and St German’s student gave the stock explanation. It was not the law of England that the debtor who had failed to take an acquittance had to pay

25 St German, *Doctor and Student*, 96–97; Gerson, *Regulae Morales* S. 3 (Oeuvres Complètes IX, 96); *De Vita Spirituali Animae*, lect. 5 (Oeuvres Complètes III, 189–90). For the Canon law I have relied upon the brief study of P. Fedele, “Equità Canonica”, in *Encyclopedic del Diritto* XV (Milan: Giuffrè, 1966), 147–51, and the more elaborate analysis of Caron, “Aequitas” Romana, 1–87 (showing the way in which this idea of *benignitas* or *misericordia* was intertwined with the ideas of equity-as-justice and of *epieikeia*). See also the discussion in L. de Luca, “Aequitas Canonica ed Equity Inglese alla Luce del Pensiero di C. Saint German”, *Ephemerides Iuris Canonici* 3 (1947), 46.
26 St German, *Doctor and Student*, 96–97; Gerson, *De Vita Spirituali Animae*, lect. 6 (Oeuvres Complètes III, 194–96).
the debt a second time, only a consequence of a procedural rule applied by the Common law courts in order to avoid ‘inconvenience’. Hence, following the earlier discussion of equity and asking what the legislator would have done had he thought of this case, the debtor might be helped by equity.28 ‘Can he be helped in the same court?’, asks the doctor. ‘Not unless there is some subsidiary maxim of law’, answers the student, ‘but effect can sometimes be given to such an equity in the Chancery by a writ of subpoena’.

As has already been pointed out by others, St German’s treatment of equity and conscience was not easily able to deal with his pivotal case of the Chancery’s giving relief against bonds.29 This was not really a case of a generally framed rule having to be moulded in order to fit the circumstances of a particular case; rather it was a situation in which the Common law—perhaps for good reason—refused to give a defence, but where the different processes and rules of proof available in the Chancery allowed the debtor to be relieved.30 But this was not the theoretical path that St German took. If the Common law courts were acting rightly, then Chancery should not intervene; if they were acting wrongly, then they should alter their own practices rather than leave it to a different court to act.31 St German’s argument could not easily defend the Common law and at the same time justify the intervention of the Chancery.

St German’s problem, it is fairly clear, is that he was attempting to deal with the situation which obtained in English law primarily by the use of foreign models which had been developed in very different contexts. The tools in his tool-box were simply not the right ones for the job. However, his use of the language of equity, and the Aristotelian theory underpinning that use, was to be of central importance in the derailing of potential theories about the equity of the Chancery.

28 St. German, Doctor and Student, 98–100. The English version, at 77–79, is subtly different: where the Latin has subvenire debet per talem equitatem de qua superius tractasti, the English version reads ‘yet he may be holpen by a sub pena’.
30 On the centrality of the greater flexibility of the Chancery’s rules of proof, in particular its power to examine the defendant on oath and thereby to elicit a judicially relevant confession, see Macnair, “Conscience and Equity”, 672–677.
31 Further debate on the point occurred in the anonymous Replication of a Serjeant at the Laws of England and St German’s Little Treatise on the Subpoena: J.A. Guy, Christopher St German on Chancery and Statute (London: Selden Society Suppl. 6, 1985), 99–105, 106–126. These works were not published until 1787 and seem not to have had any wide circulation in manuscript; they cannot have had any effect on the later treatments of Equity.

Although St German himself regarded his theory of equity as something different from the application of statutes according to their equity as discussed above, there were very clear similarities between the two. A generation later the Aristotelian approach was being used to ground this approach to statutory interpretation. In Stowel v Lord Zouch Catlyn CJ used Aristotle to set limits on the power of the courts to extend statutes according to their equity, and hence on the facts of the case refusing any equitable extension:

And Catlyn said, that Aristotle defines equity thus, Aequitas est correctio justae legis qua parte defecit quod generatim lata est. But, he said, this law here is special, and limits a certainty of time in every point, and it is defective in no part as to time, for which reason the time limited shall not be altered or enlarged by equity.

Yet more explicit are the notes of Edmund Plowden to the case of Eyston v Studd. Equity, for him, might operate in two ways in the exposition of a statute. On the one hand, as in the 15th century, it might justify the extension of a statute to a case beyond its literal meaning; on the other, and quite differently, equity might warrant reading an exception into the statute. Here the statute in question, the Statute of Chantries of 1547 (Stat 1 Edw VI c 14), if taken literally would have given to the King all parsonages and vicarages, something which (it was said) was not intended. Hence ‘equity or epichaia’ excludes these cases as much as if they had been expressly stated: ‘of mere necessity it seems to have a place in the exposition of laws’. This he justified by two references: the first to Aristotle’s Nicomachean Ethics V.10, quoted from the Latin edition of Perionius, and the second to Gerardus Odonis’s commentary on the Ethics.

By the 1570s, therefore, the Aristotelian theory of epieikeia was being used to justify two completely distinct aspects of English law. First, as
a result of St German’s *Doctor and Student*, it had become linked to the equity of the Court of Chancery; secondly, through *Stowel v Lord Zouch* and Plowden’s notes to *Eyston v Studd*, it provided an intellectual underpinning for the 200 year-old interpretation of statutes according to their equity. The latter was plausible, but, as we have seen, the former was not. However, the fact that both of these aspects of English law could be justified by a single theory, rightly or wrongly, made it possible for them to seem no more than different facets of the same legal phenomenon. The very plausibility of the Aristotelian explanation of the principle of statutory interpretation gave it greater credibility as an explanation of the equity of the Chancery. This served only to exacerbate the incoherence of the treatment of equity in the discursive works of the late 16th and early 17th centuries.

**Building on the Foundations**

In the latter years of the 16th century and the first few years of the 17th century there were a number of works in which the nature of Chancery equity in English law was discussed. A study of these shows the way in which the incoherence in the earlier works remained unresolved. We may divide them into two groups: those which took as their starting point, either explicitly or implicitly, the interpretation of statutes, and generalised from there to the equity of the Chancery; and those which were concerned with the nature of equity, with an explicit or implicit focus on the Chancery.

**Statutes and Equity**

(i) *Rastell's Exposition of Termes*

John Rastell’s *Exposiciones Terminorum* was first published between 1523 and 1525. It was a legal dictionary, explicitly aiming to explain legal terms to ‘yong beginners whych intend to be studyentys of the law’, yet...
contained no entry for ‘equity’. The work was frequently reprinted, but it was not until the edition of 1579 that this lack was remedied. This was the first edition to appear after the second part of Plowden’s Commentaries (1579), and the definition of equity closely followed the approach of Plowden in his note on Eyston v Studd which appeared there. It focused on the interpretation of statutes, repeating without acknowledgment the Aristotelian definition of equity which had been put forward by Catlyn CJ in Stowel v Lord Zouch and in its turn quoted by Plowden in his note, and summarising closely the structure of Plowden’s treatment: equity both abridges the law and expands it. But while the focus was on the interpretation of statutes, it was not explicitly so limited. The impression given is that the dual function of abridgment and expansion applied generally to equity’s relationship with law, not simply to its relationship with statutes. This approach remained in Rastell’s work right up to its last edition in 1742.

(ii) Edward Hake’s Epieikeia

Edward Hake’s dialogue Epieikeia was written in the latter part of the reign of Queen Elizabeth, and though it was not at the time published it did have some (perhaps limited) circulation. Like Rastell’s work, it purported to cover the whole of the ground of equity but did so very much from the standpoint of Plowden’s treatment of statutes.

The starting point of the work is promising, asking what it meant for a lawyer to say to his client, ‘Yowe have no remedy for this or that at the Common lawe but yowe must seeke your remedy in Equity’, signalling that he was concerned with the function of the Court of Chancery. Moreover, Hake further says that the equity of the Chancery is to his mind

43 An Exposition of Certaine Difficult and Obscure Words, and Terms of the Lawes of this Realme (1579).
44 Supra, 61–62. The connection between Plowden and Rastell is noted by Fortier, Culture of Equity, 65–66, though he reverses the influence. We cannot be sure that Plowden was published before Rastell (the colophon to Plowden’s Table of Cases is dated 15 June 1579, but there is no similarly accurate dating for Rastell), but I think it more likely that the simpler text was derived from the more complex rather than vice-versa. Also see Sir Christopher Hatton, A Treatise concerning Statutes, or Acts of Parliament, and the Exposition Thereof (London, 1677, but seemingly based on a late 16th-century source), 31–74 (note the reference to epicaia and St German at 31–32). It is not clear that Hatton was in fact the author.
45 Edward Hake, Epieikeia: A Dialogue on Equity in Three Parts, ed. D.E.C. Yale (New Haven: Yale University Press, 1953). The dialogue form was clearly influenced by St German’s Doctor and Student.
46 Hake, Epieikeia, 5.

the ‘most speciall and principall’ aspect of the subject.\textsuperscript{47} However, after a general introductory chapter, the chapter on equity in Common law covers 74 pages in the modern edition while that on the Chancery covers only 26. Given the dominant role of Common law, and especially the application of statutes, in the work, it is unsurprising that the introductory chapter on ‘Equity in General’ is largely based on Aristotle as interpreted and applied by Plowden: equity operates as a correction to a generally framed law. It is not something separate from the law, but already implicit within it as a ‘secrete exception’.\textsuperscript{48}

Moving from equity in Common law to the equity of the Chancery, Hake’s argument rather falls apart. He tried, perhaps conventionally, to avoid the problem by suggesting that there was very little to say about the Chancery given the recent appearance of two books, by Richard Crompton and William West,\textsuperscript{49} but showed himself as being prevailed upon by his interlocutors to continue. But there is nothing he can say about the equity of the Chancery which fits with the theory of his introductory chapter. Chancery equity is not something already within the law by implication or secret exception. Rather, for Hake, it operates when there are collateral circumstances affecting the application of the Common law rule.\textsuperscript{50} This was probably an accurate insight into the nature of equity as it was applied in the Chancery, but it bore no relation to the theoretical foundations which he had put down.

(iii) \textit{Thomas Ashe’s Epieikeia}

Unlike Hake’s work, Ashe’s \textit{Epieikeia} was expressly concerned with equity as it applied to statutes; however, its preface \textit{To the Courteous Reader} began with a few pages on equity in general.\textsuperscript{51} Superficially learned, this consisted of a few passages from \textit{Doctor and Student} and West’s \textit{Symboleography}, interlarded with quotations from Aristotle’s \textit{Ethics} (with the commentary of Magirus),\textsuperscript{52} Pseusippus, Calepinus, Bracton, Budaeus, ‘civilians’, St. Cyprian, Cato (seemingly via Coke), Erasmus, Coke, the Bible, Cicero, Lavater’s commentary on the Book of Proverbs, Justinian’s

\textsuperscript{47} Hake, \textit{Epieikeia}, 6.

\textsuperscript{48} Hake, \textit{Epieikeia}, 15, 16, 21.

\textsuperscript{49} R. Crompton, \textit{L’Authorite et Jurisdiction des Courts} (London, 1594); W. West, Second Part of the Symboleography (London, 1594). Crompton had said a good deal about the Chancery but nothing about equity. For West, see infra, 66–68.

\textsuperscript{50} Hake, \textit{Epieikeia}, 123.

\textsuperscript{51} T. Ashe, \textit{Epieikeia} (London, 1609), preface (unpaginated).

\textsuperscript{52} J. Magirus, \textit{Corona Virtutum Moralium} (Frankfurt, 1601).
Digests and Institutes, and St Gregory, as well as Plowden and the authors cited by him. Some of the references can be traced into Magirus—Ashe's quote from 'civilians' is attributed to iurisconsulti by Magirus—but not all, even of the non-English ones. One quotation by Ashe from Cicero's De Officiis which is found in Magirus is continued by him after Magirus's quotation ends, pointing to Ashe having gone to Cicero himself. But the mixture of English and foreign materials, ancient and modern writers, and of legal, theological and philosophical texts, suggests that he used multiple sources; and since he is known to have collected definitions and mottoes of this sort it is not improbable that he had brought them together himself.

Ashe's style of sewing together quotations does not make it easy to follow anything like an argument in his writing, but we may see it as being divided into two aspects. At first he brings together fragments identifying equity with not pressing one's strict rights, with rectitude, with treating all people equally, with justice tempered with mercy. After this, though, he moves into the Aristotelian framework, with fragments saying that one should act according to the spirit of the law rather than its letter and that rules framed generally cannot be applied rigidly to particular cases. This is all in his section on equity in general, and it is only after this that he makes the transition—explicitly—to discussion the equity of statutes. Yet, as with Hake's work, most of the general principles are germane to the question of statutory interpretation rather than to the equity of the Chancery.

In their different ways, Rastell (or, more accurately, the person responsible for the 1579 edition of his work), Hake and Ashe were attempting to treat generally of equity, but took as their starting point the role of equity in statutory interpretation. Refracted through this lens, there was practically nothing of any value they could say about equity as it applied in the Court of Chancery, at least nothing that was consistent with the general principles they were claiming to be uncovering.

53 Ashe, Epieikeia, fourth unnumbered page; Magirus, Corona Virtutum Moralium, 546.
54 Ashe, Epieikeia, sig, Aii; Magirus, Corona Virtutum Moralium, 553.
55 See in particular his Fasciculus Florum (London, 1617), a collection of sayings culled from Coke's Reports.
Equity in General

(i) William West’s Symboleography

William West’s Symboleographia, or Symboleography when titled in English, appeared in two parts, the first in 1590 and the second in 1594. The volumes themselves were largely collections of precedents of documents, drawn in part—perhaps largely—from his practice as an attorney. As well as these, though, there were some sections of a more discursive nature, including one on the Chancery. It has been known for some centuries that the section in the first part dealing with the nature of obligations was drawn from the work of the German jurist Hermann Vulteius. Sections 2 to 37 of the First Part of the Symboleography, from the second edition of 1592 onwards, are almost direct translations of paragraphs taken from chapters 26 to 44 of Vulteius’s Jurisprudentiae Romanae a Justiniano Compositae; the adaptation of Vulteius’s text to English law is largely through abbreviation and omission, with hardly any positive alteration—apart from changing the age of majority for contracting from 25 to 21 and the inclusion of a few references to Year Book cases, West’s text is almost pure Vulteius. We should not be shocked therefore to find that the section on the Chancery is similarly unoriginal.

The first part of West’s discourse on the Chancery, sections 2 to 11, is on the face of it a work of some erudition, with references to Aristotle and Justinian’s Digests, Budaeus, Corasius, Oldendorp and Donatus. It is, however, almost completely drawn from the titles Ius Summum and Aequitas of Simon Schardius’s Lexicon Iuridicum, translated by West from Latin into English. Schardius himself was heavily dependent on the Lexicon Iuris of the German Lutheran Johannes Oldendorp, his entries

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56 References are to the pagination and section numbering in the 1641 edition, which differs from that in the 1594 edition; but the texts are the same.
60 I have used the 1610 edition of Vulteius, available at babel.hathitrust.org, http://hdl.handle.net/2027/njp.32101066467240. The work was first published in 1590, the same year as the first edition of West.
61 S. Schardius, Lexicon Iuridicum (Basle, 1582).
62 J. Oldendorp, Lexicon Iuris (Frankfurt, 1553).
on *aequitas* largely copying it verbatim.63 Behind this, in its turn, was Oldendorp’s *De Iure et Aequitate Forensis Disputatio*,64 building on his earlier German work.65 Underpinning this part of West’s treatment, therefore, was Oldendorp’s distinctive theory of equity.66 While Luther himself had seen equity—*aequitas, epieikeia*—as something which might come into play from time to time in exceptional cases, for Oldendorp it was integral to legal interpretation: *all* laws had to be interpreted through equity, since in every instance human judgement was necessary to apply the general rule to the concrete case. Equity and law were therefore not distinct, but inseparably joined.

West’s use of Schardius’s treatment of equity breaks off after the first paragraph of section 11, moving seamlessly on to a borrowing—duly acknowledged—from *Doctor and Student*.67 But, as we have seen, St German’s analysis of equity was rather different, applicable only when the positive law was in conflict with the law of God or the law of nature.68 Hence, we might reasonably think it was somewhat tendentious to begin the borrowing from *Doctor and Student* by saying that St German was writing ‘to the like effect’ as what had been said until that point. West may have been aware of this difficulty: at one point he makes an otherwise incomprehensible alteration in his translation from Schardius. Where Schardius had written that the material cause of equity was ‘ius naturae, ius civile, boni mores’, West writes that it was ‘the law of nature, the law of nations, and good manners’ (emphasis added).69 In theoretical terms, the reference to the law of nations does not make a great deal of sense, since this would never have been a source of any principle of equity. However, it did avoid the otherwise enormous problem of seeing the positive law of the state as a source of equity—something that was central

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63 We can rule out the possibility that West used Oldendorp directly, since he follows Schardius in referring explicitly to Oldendorp where the latter does so.

64 J. Oldendorp, *De Iure et Aequitate Forensis Disputatio* (Cologne, 1541).

65 J. Oldendorp, *Wat Bylich unn Recht Ys* (Rostock, 1529), in Quellenbuch zur Geschichte der Deutschen Rechtswissenschaft, ed. E. Wolf (Frankfurt: Klostermann, 1949), 51. Its inclusion in Wolf’s collection, alongside pieces by Savigny and Jhering among others, testifies to the importance of the work in the history of German legal thought.


68 Supra, 59.

to Oldendorp’s understanding, but quite at odds with St German, and (of course) quite at odds with West’s apparent purpose of writing about the Court of Chancery.

After a very brief section dealing with conscience, the rest of West’s discussion is impeccably English; its focus is on the Chancery, its sources the Year Books and the early 16th-century *Diversite de Courtes*. The contrast between the treatment of equity and the treatment of the Chancery is very marked. Equity is clearly seen as an essential feature of the Chancery, but West’s use of a foreign dictionary to describe it suggests that he had no clear idea what it was.

(ii) On Equitie
The anonymous author of a short tract on equity,70 seemingly dating from the late 16th century, agreed about the difficulty of identifying what equity was: ‘There is nothing more usual than the name of equitie and scarce any thing more obscure and difficult then the matter it selfe.’ His response, like that of West, was to look abroad, turning explicitly to the writings of civil and canon lawyers, and giving express citations to Duarenus, Oldendorp, Covarruvias, Baldus and Zasius as well as to the Digests and Cicero. The only English source used, and that not explicitly, would seem to be *Doctor and Student*. The perceived similarity between Roman law and its derivatives and English law is underscored by the presence of English-oriented headings opposite purely Roman text: ‘Chancery Commission against the Roman’, ‘Chancery power’, and ‘Chancery’, for example, in a single paragraph dealing with the difference between *stricti iuris* and *bonae fidei iudicia* in Roman law.71 The tract is not polished, so we should not expect to see any well-developed argument in it. What is significant, though, is its location of equity between positive law and natural law: ‘[B]y tempering the rigor of the one with the sanctity of the other, upon consideration of all due circumstances to frame out of both a moderate just and conscionable censure.’72 This middle course we may identify with what the author of the tract calls ‘civil’ equity, by contrast with ‘natural’ equity. Whereas natural equity consists of very general principles known to all men, civil equity is known only to those ‘wise, learned and experienced in civil affairs’; and while it should not directly conflict

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70 Cambridge University Library MS. Gg 2.31 f. 12–17.
71 At f. 13–13v.
72 At f. 12v.
with natural equity, it is not to be identified with it. This approach was derived directly, and almost literally, from Duarenus, the mid-century French humanist.

A similar duality exists between equity and conscience: conscience is identified with the canonists' internal forum, which cannot mislead provided it is properly understood, whereas equity is identified with the external forum, where judges may err through their application of presumption and probability—that is to say, because of the need to discover the facts. The unpolished nature of the text means that we do not find in it anything approaching a coherent argument, but underpinning it we may see three pairs of interconnected ideas:

<table>
<thead>
<tr>
<th>Stricti iuris actions in Roman Law</th>
<th>Bonae fidei actions in Roman Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict law</td>
<td>Equity</td>
</tr>
<tr>
<td>Common law courts</td>
<td>Chancery</td>
</tr>
</tbody>
</table>

The use of the category of ‘civil’ equity, known only to the wise, learned and experienced, provided a justification for marking out equity as something to be applied by professionals—presumably professional lawyers—rather than being left to the natural understanding of all human beings. Still, though, there were two principal unanswered questions. What exactly was equity, once separated from natural and divine law? And why need there be a separate court to apply it?

(iii) William Lambarde’s Archeion

The small tract On Equitie is in a collection associated with Sir Thomas Egerton, Lord Keeper between 1596 and 1603 and (as Lord Ellesmere) Lord Chancellor between 1603 and 1616. A second work associated with Egerton is the Archeion of William Lambarde, antiquarian, Master

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73 At f. 14.
74 In Primam Partem Pandectarum sive Digestorum Methodica Enarratio, titles De Pactis and De Iudiciis (in Opera Omnia (Lyons 1584), 54, 211). There is an explicit reference to him as providing some resolution to the problem, at f. 15. For Duarenus’s approach to equity see V. Piano Mortari, “Aequitas e lus nell’ Umanesimo Giuridico Francese”, in Atti della Accademia Nazionale dei Lincei, Memorie della Classe di Scienze Morali, Storiche e Filologiche, series IX vol. IX (Rome, 1997), 142, at 184–87.
75 For this collection, which exists in a number of copies (though normally not containing this item), see P.L. Ward, “William Lambarde’s Collections on Chancery”, HLB 7 (1953), 271; J.H. Baker, Catalogue of English Legal Manuscripts in Cambridge University Library (Woodbridge: Boydell and Brewer, 1996), 265–75. For Lambarde’s reliance on Bodin in his section on Chancery, see Ian Williams, “Developing a Prerogative Theory for the Authority of the Chancery: the French Connection” (forthcoming).
in Chancery, and the person responsible for bringing together Egerton’s collection of Chancery materials.\textsuperscript{76} Archeion was only published posthumously in 1635 (twice, the first time in a pirated edition), but its creation can be traced back to the 1570s and the author’s dedicatory epistle to Sir Robert Cecil is dated 1591.\textsuperscript{77} The manuscript tradition of the work is complex, and there are marked differences between the two printed editions; but although the section on equity and the Court of Chancery shows variation over time, some parts having seemingly been added after Egerton’s appointment as Lord Keeper in 1596, the core of the ideas expressed there was probably fixed by 1591.\textsuperscript{78}

The heart of Lambarde’s treatment is unequivocally Aristotelian: written laws cannot be framed to deal with all eventualities, so equity is needed as a corrective to fit cases to circumstances.\textsuperscript{79} There is nothing here that goes beyond what had been said by St German or Plowden, though Lambarde’s section is closer to Aristotle’s text than are St German’s or Plowden’s; in particular, here we find the use of the Greek \textit{epieikeia} and not simply a bastardised Latin form of it, as well as a reference to the so-called Lesbian rule, a rule of lead which would bend to any shape by contrast with the rigid rule of iron or steel. It is possible therefore that Lambarde was working directly from Aristotle, and not simply reproducing the already commonplace ideas.

The treatment of equity in Archeion is closely in the tradition of that in Doctor and Student. There is no hint of Plowden’s discussion of equity in statutory interpretation, though it is highly likely that Lambarde would have been aware of it. Rather, it is concerned with the use of equity alongside the Common law and as a corrective to it. As well, the headings of this section of the work seem to show a hardening of the equation of equity with the work of the Chancery. In the 1591 version of the manuscript it is The Chauncerie Court; after the alterations made after Egerton’s appointment it has become The Chancery Court for Equity, and by the time of the (second) printed version of 1635 it had mutated into The Court of Equitie, or Chancerie.\textsuperscript{80} Similarly, the post-1596 version of the text has sub-headings

\textsuperscript{76} Supra, 69, fn. 75.
\textsuperscript{77} I have used the edition of C.H. McIlwain and P.L. Ward (Cambridge Mass.: Harvard University Press, 1957), based on the edition of 1635 by ‘TL’ with references to the Frere printing of 1635. In order to ease the lot of the reader who may not have access to the modern edition, I also give references to the pagination of the TL edition, in square brackets.
\textsuperscript{78} McIlwain and Ward, Lambarde’s Archeion, 145–176, especially at 152–6.
\textsuperscript{79} McIlwain and Ward, Lambarde’s Archeion, 43 [69–70].
\textsuperscript{80} McIlwain and Ward, Lambarde’s Archeion, 37 [58], with n. 6.
not found in the earlier version, *Necessity of a Court of Equitie* and *Use of a Courte of Equitye*.\(^{81}\) But while the headings testify to an increasing crystallisation of the identity of the Chancery and equity, the idea is clearly present in the text in its 1591 form. This is implicit in the way in which the discussion of equity is dominant in the section of *Archeion* on the Court of Chancery, but in addition there are many places where the argument slips from the Chancery to equity and vice versa. To take just one example, a sentence dealing with the antiquity of the Chancery moves on to speak of the lack of evidence before the reign of Henry IV of causes in equity before the Chancellor.\(^{82}\)

There are two major points at which Lambarde departs from St German’s model. The first lies in his argument that in every ‘well-policied’ state there was a need for an officer equivalent to the Chancellor.\(^{83}\) Whereas for St German the separation between the Chancery and the courts of common law was simply a fact, for Lambarde it was a necessity. Secondly, whereas *Doctor and Student* had treated equity as a means of ensuring that positive law did not transgress natural or divine law,\(^{84}\) *Archeion* stresses its function as a means of softening the rigour of positive law, though saying that it should only be used in ‘few or singular cases’, ‘rare and extraordinary matters’.\(^{85}\) Nonetheless, despite this difference, it retains the incoherence of *Doctor and Student* in its reproduction of Aristotle’s theory of the need for a mechanism to apply general rules to specific cases, while at the same time treating equity as a device to mitigate the common law. Since the latter is for Lambarde the principal function of equity and the Chancery, it follows that the incorporation of the Aristotelian theory was redundant at best and misguided at worst. Moreover, without the justification based in natural and divine law, it was not clear where the legitimacy of equitable intervention came from. In a section omitted from some manuscripts he seems to face up to this in asking whether there should be fixed rules of equity,\(^{86}\) but no answer to the question is given.

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81 McIlwain and Ward, *Lambarde’s Archeion*, 43, with n. 52 and n. 53.
82 McIlwain and Ward, *Lambarde’s Archeion*, 42 [67].
83 McIlwain and Ward, *Lambarde’s Archeion*, 40 [65] (not in the 1591 version of the text).
84 Supra, 59.
85 McIlwain and Ward, *Lambarde’s Archeion*, 44 [71].
86 McIlwain and Ward, *Lambarde’s Archeion*, 46–47 [74–76].
(iv) Samuel Daniel’s Epistle to the Lord Keeper

Also associated with Egerton is a poetic epistle by Samuel Daniel, whose patron Egerton was. This was published in 1603, though a reference to the Chancery’s ‘provident injunctions’ (line 155) might point to its having been written in 1597–8, when the legitimacy of granting injunctions against the enforcement of Common law judgments was a much-debated question.

A conventionally laudatory address to a patron is perhaps not the natural place to look for discussion of abstract ideas, but Daniel’s poem is more about equity than it is about Egerton. Its core idea is unoriginally Aristotelian, that equity does not depend on a strict (‘stern and unaffable’, line 133) adherence to written law but is rather moulded to the circumstances of the case (lines 121–136); and, in line with the narrow approach of St German rather than the broad one derived from Oldendorp, it should operate by reference to the law (a ‘gentle relaxation’ of it, line 140) rather than by applying unconstrained principles of justice or fairness (lines 137–144).

It is possible that Daniel had access to a version of Archeion when he was writing the poem. His Aristotelian stanzas bear some resemblance to Lambarde’s treatment of epieikeia; and his stanzas on the moderating force of equity (lines 137–144) follow closely Lambarde’s argument that equity should only rarely operate against the common law and that the common law should be allowed to retain its ‘just honour’.

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90 Seronsy, Samuel Daniel, 93–4.

91 Supra, 59 and 67.

92 Daniel may, perhaps, have borrowed Sir Robert Cotton’s copy (now BL MS. Add. 46410). He is known to have used Cotton’s manuscripts when writing his History of England: M. McKisack, “Samuel Daniel as Historian”, Review of English Studies 23 (1947), 226, 231 n.5. Daniel’s unfavourable views of the law and lawyers are in part derived from Montaigne (Essays III, no. 13).

93 McIlwain and Ward, Lambarde’s Archeion, 44–45 [71–73].
Alongside this, however, there are ideas which parallel those in *On Equitie*. Equity is described as the isthmus between the two oceans of ‘rigor’ and ‘confused uncertainty’ (lines 4–5), an image which Daniel had used elsewhere in his works as a metaphor for something standing between two otherwise warring groups.\(^94\) It is therefore not to be identified with the tract’s principles of ‘natural’ equity, which would equate to the ocean of ‘confused uncertainty’, but rather with its ‘civil’ equity.\(^95\) Equity must have some such meaning if the poem is to work as a panegyric to Egerton—it would hardly be a matter for praise if he was simply applying the natural reason that was the God-given possession of every man—but that is not quite the point. What is important in the developing interpretation of equity in the last decade of the reign of Elizabeth is that the distinction between the general ideas of right and wrong and the technical criteria for ‘equitable’ decision-making is sufficiently well-rooted that it can be found in a poem written by a well-connected non-lawyer.

The second feature, presenting a parallel both with *On Equitie* and *Archeion*, is the identification of equity with the Court of Chancery. Nowhere in the poem is the Chancery mentioned. Instead, Egerton is addressed as the ‘Great Keeper of the state of equity’ (line 58),\(^96\) his virtues sit on ‘this seat of equity’ which has been ordained as a ‘sanctuary, whereunto / Th’oppressed might fly’ (lines 117–20). Hence the antinomies found in *On Equitie* between equity and strict law, and between the Court of Chancery and the Common law courts, are compacted into a single antinomy between equity and the common law together with its courts. Hence the barbarous French, the subtleties of pleading and the delaying processes of the common law can be contrasted with the purity and simplicity of equity (lines 41–56, 65–72). As in the tract, there is no hint that there might be any court of equity other than the Chancery.

Daniel’s poem is of little independent worth in understanding the development of the theory of equity at the end of the 16th century, but taken in conjunction with *Archeion* and *On Equitie* it is a valuable piece of evidence of the way in which a certain set of ideas about equity and its relation to Common law were becoming fixed in the circle around Sir Thomas Egerton, the Lord Keeper of the Great Seal. In particular, although Aristotle continued to be an explicit point of reference, his theory of *epieikeia* had

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\(^95\) *Supra*, 68–69.
\(^96\) Contrasted with the ‘state of law’ (line 77).
little or no explanatory force. Instead, equity as it was practised in the Court of Chancery was seen as operating at the periphery of the Common law, in some unspecified way preventing it from doing injustice.

THE EARL OF OXFORD'S CASE

*The Earl of Oxford's Case*\(^97\) is commonly taken to be the decision in which the legitimacy of Chancery intervention to set at nought judgments at Common law—and hence the practical primacy of Chancery and equity over Common law—was established. I have argued elsewhere that the reported ‘decision’ was not in truth a decision at all, but rather a set-piece justification of Chancery practice put together by Lord Ellesmere (formerly Sir Thomas Egerton), the Lord Chancellor, and that the true source of the Chancery’s predominance was the political act of King James I in resolving that it should be so.\(^98\) More significant than its precise legal status, perhaps, is that while legal decisions normally represent judicial responses to arguments put to them, there is nothing to suggest that Ellesmere had heard any arguments at all on this point. We may realistically treat it as a text coming from Ellesmere himself.

Fortier has read the text this way, revealing the various roots of the ideas of equity and conscience within it, drawn out of theology, philosophy, political theory and law.\(^99\) For him this diversity of sources ‘fosters the power of equity, fosters a culture of equity’.\(^100\) There is no reason to dissent from this; we should rather see it too as a facet of the legal discussions of the late 16th and early 17th centuries, underpinning the power of the idea of equity there.

For all its intellectual resonances, there is nothing about equity in Ellesmere’s argument that cannot be traced back to *Doctor and Student* and which would not have been familiar to anyone acquainted with the legal thinking of the previous three decades, in particular that which was crystallising in the Egerton circle in the 1590s. The Chancery is always open, and not bound by the law terms, the periods in which Common law

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\(^98\) D. Ibbetson, “The Earl of Oxford’s Case (1615)”, in *Landmark Cases in Equity*, ed. C. Mitchell and P. Mitchell (Oxford: Hart, 2012), 1, 27–29. The Chancery records, which are very full, show nothing but routine appearances occurring through Michaelmas Term 1615, the period to which the reported *Earl of Oxford’s Case* is attributed.

\(^99\) Fortier, *Culture of Equity*, 4–8.

\(^100\) Ibid., 8.
business could be done. Equity is always ready to render every man his due. It is impossible to frame a general law to apply properly to all particular acts. The function of the Chancellor is to correct consciences for frauds, breaches of trust, wrongs and oppression. He should soften the rigour of the law. Equity and Law work together to achieve justice. Equity can be done at Common law as well as in the Chancery, provided that there is a Common law process available to fit the circumstances. Perhaps the most striking thing about Ellesmere’s reasoning here is just how theoretically unsophisticated it is, little more than a collection of standard points which could be said to justify equitable intervention, and in particular the intervention of the Chancery.

Many of these elements are also found in a discourse defending Chancery jurisdiction, written by the lawyer Anthony Ben. Although his arguments on the function of equity are largely commonplace, his discourse brings out a further aspect which should not be ignored, the rhetorical function of the language of ‘equity’. Taking the example of Common law judgments obtained by an attorney’s fraud or negligence, Ben asks whether the equity of these should not be examined by the Court of Chancery. ‘Equity’ here can mean little more than ‘justice’, and of course it was easy to slip into the assertion that the law should be just. The rhetorical step involved here is important, for whilst it might have been easy to accept that equity (in this broad sense) be done, without that step it would have been less easy to accept that the Chancery should have the power to determine whether judgments had been properly given at Common law.

The King’s intervention, on the side of equity and the Chancery, made any further argument unnecessary. Ellesmere’s ‘speech’ in The Earl of Oxford’s Case circulated widely in manuscript, and was later put into print. Whatever its analytical qualities, and even if it remained largely unread, it could be treated as providing the intellectual base for the jurisdiction of

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104 This can already be seen in the Earl of Oxford’s Case, if not quite so transparently: G. Watt, Equity Stirring (Oxford: Hart, 2009), 71–72.
105 BL MS. Lansd. 174, f. 208v.
the Chancery in equity, relieving later English lawyers of the necessity of grounding this purely upon the political fact of a royal decision.\textsuperscript{106}

**Conclusions**

Quoting Maitland, Hamilton Bryson has rightly pointed to the incoherence of the idea of ‘equity’ found in the early modern period:

‘Equity is that body of rules which is administered only by those courts which are known as courts of equity.’ This circular definition is admittedly unsatisfactory, but it is the best that I can find and certainly better than any that I can create.\textsuperscript{107}

The present chapter provides several reasons for this confusion. First, as a matter of history, the Court of Chancery had developed without concern for any underlying theoretical framework. In attempting to provide a framework St German was inevitably faced with the problem of imposing a theory on what was an essentially ragged practice. ‘Equity’ was perhaps not ideal as an interpretative tool; conscience may have been better, though it too would have had its own problems of forcing complex practice into a single mould.

Secondly, within the law, ‘equity’ had two wholly distinct functions: to allow the application of statutes beyond their literal meaning, and to formulate the basis of the intervention of the Chancery (and other courts) against the rules of the Common law. These two functions were not properly separated. In particular, Aristotle’s \textit{epieikeia}, which provided a workable theoretical basis for statutory extension and limitation, was used by writers from St German onwards to explain the working of the Chancery. Once the two separate functions of equity were run together, after the publication of the second part of Plowden’s \textit{Commentaries} in 1579, all coherence was lost.

Thirdly, those writers whose works we have examined were largely content to reproduce what had been written before and to supplement this by the uncritical addition of foreign materials. But the nature of

\textsuperscript{106} I have argued elsewhere that the power of an (apparently) authoritative decision can sometimes lie in the very incoherence of its underpinning arguments, allowing later lawyers to accept its conclusions without the risk of its reasoning being picked apart: D. Ibbetson, “Coggs v Barnard (1703)”, in \textit{Landmark Cases in the Law of Contract}, ed. C. Mitchell and P. Mitchell (Oxford: Hart, 2008), 1.

equity was contested territory across the Channel just as much as it was in England, so that the incorporation of foreign fragments into English texts served only to add to the confusion. It is hard to avoid the impression that these writers believed that there was a single notion of equity—\textit{aequitas, epieikeia}—whose essence could be uncovered if only one looked hard enough.

The consequence was that, after \textit{The Earl of Oxford's Case} and the forced settlement of the dispute between the Common law courts and the Chancery, English law was left with little more than a set of situations in which Chancery intervention was recognised to be available,\textsuperscript{108} expliable in terms of ‘equity’, but with no theorised basis to say what this equity was.

\textsuperscript{108} For these, see Bryson, \textit{Cases Concerning Equity} I, xxii–xxxii.