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LORD NOTTINGHAM'S CHANCERY CASES

VOLUME II

Edited, with an introduction by
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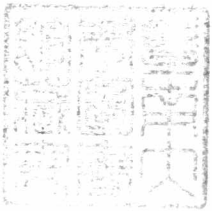

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INTRODUCTION

AN ESSAY ON MORTGAGES AND TRUSTS AND ALLIED TOPICS IN EQUITY

WHEN LORD NOTTINGHAM received the Great Seal in 1673, equity had reached its critical point of development. The future administration of the Court held two possibilities, either an increasing fixity in its rules and doctrines or a retained emphasis on the moral and therefore relatively unstable impulse in judicial decision, which would be reached, therefore, in Blackstone's language, "with more probity of intention than knowledge of the subject".[1] Blackstone indeed then described both law and equity as equally artificial systems in his day, but this must be taken only in a general sense. In the event, these possibilities both received their just emphasis in different branches of the equitable jurisdiction. In certain parts of their jurisdiction, notably fraud,[2] the Chancellors were well aware that the detailed enunciation of rules would only in the course of time bind their own hands and not the hands of those whose frauds deserved disclosure and frustration. As late as Lord Hardwicke's time, too, there was a feeling that equity might well endanger itself by excessive rigidity. Thus Lord Hardwicke, in writing to Lord Kames in 1759,[3] considered that a binding force attaching to general rules "might lay a foundation for an equitable relief even against decrees in equity, and create a kind of superfoetation in courts of equity". It was in the field of trusts and mortgages that the rules were more frequently stated and more easily fixed in contrast with that of frauds and deceits. Here again Lord Hardwicke happily expresses the difference when he says in another passage of the same letter to Lord Kames: "In the construction of trusts, which are one great head of equity, the rules are pretty well ascertained. So they are in the cases of redemptions of mortgages, which makes another great branch of that business. But as to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped, and

[1] Comm. iii. 433.

[2] Fraud from very early times received a wider construction in equity than at law. This was recognized by the common lawyers, at least implicitly: thus Coke would have confined the Chancellor's jurisdiction to "all covins, frauds and deceits for the which is no remedy by the ordinary course of law". 4 Inst. 84.

[3] Yorke's *Life of Lord Chancellor Hardwicke* (Cambridge, 1913), ii. 550; see Lord Kames' *Principles of Equity* (Edinburgh, 1760), x–xi.

be perpetually eluded by new schemes, which the fertility of man's invention would contrive."[1]

Mortgages and trusts, therefore, lend themselves as subjects to an examination of the detailed working of equitable rules in a manner which the decisions on fraud and such topics do not. This introduction is concerned with the development of mortgages and trusts and it is only necessary at the outset to offer a warning against inferring from fields of jurisdiction which shew the greatest development a similar movement in all fields of equity jurisdiction. Some general considerations on the development of equity in relation to the jurisdiction over fraud will be found in the introduction to the first volume of these reports.

Blackstone, like Hardwicke, considered that the twin pillars of substantive equity were the rules relating to mortgages and trusts.[2] Though these two bodies of doctrine derive from distinct principles of equity, at many points in their developed form they incidentally influence the growth of one another. They are nevertheless more conveniently considered separately, though their mutual influences will be noted; moreover, they had this in common, that *ex concessis* even on the part of the common lawyers they were in the seventeenth century universally recognized heads of Chancery jurisdiction. Therefore the tripartite division of the old rhyme will be followed:

> "These three give place in court of conscience,
> Covin, accident and breach of confidence."

While covin has been touched upon in the earlier introduction, accidents, particularly in relation to forfeitures, will now be considered, then breaches of confidence or trusts.

The relief afforded by equity against penalties and forfeitures and unconscionable insistence on legal rights generally brings into focus perhaps

[1] He goes on to attribute the increase of Chancery business "to this fertility of invention and luxuriant growth of fraud" rather than encroachment upon the field of common law: and quotes Bacon's forty-third aphorism. The idea is not altogether forgotten by modern Chancery judges. Thus Lord Evershed, M.R., in *Re Downshire's Settled Estates*, [1953] 1 All E. R. 109 says: "The Court of Chancery has over many centuries evolved in relation to its peculiar and 'extraordinary' jurisdiction many salutary powers including the 'inherent' jurisdiction invoked in the present case. It has not in general been the practice of the court to attempt precise definitions of such powers and thereby to run the risk of imposing undue fetters on their future application: see, for example, *per* Lord Chelmsford, L.C., in *Tate* v. *Williamson* (1866), 2 Ch. App. 55, 60, in reference to the court's jurisdiction to give relief in cases of undue influence."

[2] Comm. iii. 436. But he significantly finds the principal distinction between the common law and equity jurisdictions "in the different modes of administering justice in each", and trusts and mortgages to be "two other accidental grounds of jurisdiction".

better than any other branch of the Chancellor's jurisdiction the relations between equity and the common law. "Perhaps", says Barbour,[1] "no situation is better calculated to reveal the antithetical attitude of equity and the common law than the simple one which arises when an obligor has satisfied his obligation but has taken no acquittance." The natural justice of the Chancellor's order in such circumstances is clear, and, as Holdsworth comments,[2] the relief here "rests at bottom upon the idea that it is not fair that a person should use his legal rights to take advantage of another's misfortune, and still less that he should scheme to get legal rights with this object in view".

It is not possible in the sixteenth century and earlier to distinguish in clear outline the jurisdiction which was later formulated to cover the cases of penalties and forfeitures: but the principles supporting the jurisdiction go back a great distance. That the position remained long ill defined is probably due to the fact that the early law round this topic was a constant shifting and evasion of the prohibition of the canon law against usury.[3] It was not until the influence of the canon law was broken by the Reformation that it became possible for the majority of those transactions which carried penal clauses to come into the light and become the subject of settled rules. In medieval times the bond with a penal clause was closely scrutinized and narrowly construed, perhaps partly owing to its foreign associations and even origins.[4]

[1] See his essay on the fifteenth century Chancery in 31 Harvard L.R. 834. He gives variations of this position in *Oxford Studies in Social and Legal History*, iv. 85–97.

[2] Holdsworth, v. 330. Relief against penalties and paying one's debts twice are of course distinct, but the principle of relief is the same.

[3] The eighteenth-century view is expressed in the argument of Mr Solicitor Murray for the defendant in *Chesterfield* v. *Janssen*, 1 Atk. 331: "A notion prevailed for many years that it was not lawful to take any hire for money; this was adopted from the canon law, and even prevails to this day [1750] in many catholick countries. It is astonishing how prejudice should have kept common sense so long out of the world. Why is not money a commodity as well as anything else? . . . Harry the Eighth, towards the latter end of his reign, had the mind to get the better of it, not in a direct way, but by fixing the rate of usury, which continued down to Queen Ann's time." He then quotes Locke against restraining rates of interest. 37 H. 8, c. 9, pegged the valid rate of interest at 10 per cent. In the latter part of the seventeenth century the rate was 6 per cent, and by 12 Anne, st. 2, c. 16, it was fixed at 5 per cent. See Bl. Comm. iv. 156; Co. Lit. 4a (1). Examples of usury are given in Viner, tit. Usury, (C). He also sets out the relevant statutes, (D).

[4] Before the end of the thirteenth century instances are rare and it is conjectured that the device of the penal bond came in with Italian bankers. Maitland (2 Pollock & Maitland 222), speaking of charters of feoffment, says that they sometimes contained penal clauses which were designed to create money debts. "Occasionally there was an agreement for a penal sum which was to go to the King or to the sheriff, to the fabric fund of Westminster Abbey or to the relief of the Holy land." The heavy disabilities suffered by the usurer are described by Glanville, bk. 7, ch. 16, and bk. 10, ch. 3. Also *Dialogus de Scaccario*, bk. 2, s. 10.

Some early Year Book cases display a cautious policy towards the penal bond. Thus in 1308 there is a case[1] that afforded Chief Justice Bereford an opportunity for a characteristic speech. The condition of the bond before him was to deliver a writing by a certain day and this the defendant failed to do, being in the East, and his wife likewise failed though she had been instructed. Bereford remarked: "You demand this debt because this writing was not delivered, and he says that before now he has tendered it, and that he was always ready, and that he tenders it now. Therefore it is well that you receive it. Moreover, this is not, properly speaking, a debt; it is a penalty; and with what equity [look you!] can you demand this penalty?" It is clear which way the court leaned here, but judgment was not given against the plaintiff: he was only told he must wait seven years before the court would concede it to him.[2] And in 1313/14 a case in the Eyre of Kent is reported in which Staunton, J., was prepared to take a liberal view.[3] The whole administration of common law practice, however, hardened in the fourteenth century and by 1352 the Common Bench were prepared to enforce a penal clause without visible misgivings.[4] The attitude reflects the growing professional spirit on the Bench. Though Chief Justice Bereford was certainly not clerical in sympathies, the Bench only became wholly secular in the course of the fourteenth century.[5] The change

[1] *Umfraville* v. *Lonstede*, 2 & 3 Edw. 2, 19 Sel. Soc. 58.

[2] The MSS. accounts of the end of the case are rather confused. Maitland (Introduction, xiii) comments that relief is granted in the name of "equity", though it takes the clumsy form of an indefinite postponement of the judgment which the rigour of the law requires. Most year-book references to equity are in the most general sense. Thus when Account is called "equitable" (*e.g.* in 19 Edw. 2, 656, *per* Stonore, J.; 3 E. 3, f. 10, pl. 10, *per* Herle, C.J.) this may refer to the machinery of accounting than to the action itself.

[3] *Scott* v. *Hamon*, 6 & 7 Edw. 2, 27 Sel. Soc. 24 *seq.* Debt for 30 *l.*, the action being on a bond for submission to an arbitration. Passeley (who also appeared, *semble*, for the plaintiff in *Umfraville's case*) said for the defendant: "This action of Debt is based upon a penalty and savours of usury ('soune de usurer') of which the law will not permit you to have recovery. For example, if I say that I hold myself bound to you to pay to you ten pounds upon such a day, and if I do not pay them to you upon that day, I am then bound to you in forty pounds; and if I fail to pay the ten pounds to you upon the appointed day, the law will not allow you to recover, by way of usury, the forty pounds." Staunton, J.: "Penalty and usury are only recoverable where they grow out of the sum in which the obligee is primarily bound, but what is claimed is claimable as a debt arising out of covenant as appears from what has gone before."

[4] YB. Mich. 26 E. 3, f. 71, pl. 9. Debt on a bond in which the debtor was bound to pay 17 marks if 9 marks were not paid by a certain day. Skipwith argued this was usury, but the court gave judgment for the 17 marks and added 6 marks as damages.

[5] It was the clerical influence and the canon law which denounced usury as the sin of avarice. Laymen, especially merchants, did not take kindly to the interference of churchmen in matters of business. Tawney in his lectures on Religion and the Rise of Capitalism describes how petitioners would appeal to Chancery for redress on the ground that they could not secure justice in the ecclesiastical courts, where actions on cases of debts or usury had been begun before "spiritual men".

in the judiciary carried with it a general increase in rigidity and formalism, and so some of the conditions and justification for the Chancellor's interposition appear. Conveyancing practice, too, was moulded to the exigencies of the usury laws.[1] Titles were often warranted by such bonds. Moreover, in the absence of any effective scheme of limitations[2] the common law had a distinct leaning towards any solvent formula which would clear off old titles, and consequently forfeitures in general were favoured.

Forfeitures of estates and interests, as well as penalties, therefore flourished, though on the whole the word "penalty" was scrupulously avoided.

Penalties and forfeitures apppear at first sight to deal with largely different circumstances. The penal bond no doubt had its main use in supplying credit for the purposes of commerce; the incidence of forfeitures was largely bound up with feudal relations and the obligations of tenure. Notwithstanding this the common law appears to have applied similar rules to each variety of condition whether attached to personal obligations or to landholders and tenants as such. It is hardly to be wondered at that the rules at length jarred badly. The courts of common law did, however, make a praiseworthy attempt to rationalize some of their rules on these topics, by endeavouring to put cases to the test of whether it was contemplated that the plaintiff should be able to discharge himself by payment at a certain date or whether it was intended that in any event he should be liable for a sum additional to the present debt. Thus in *Burton's case*[3] in 1591 the King's Bench unanimously "resolved . . . that if it had been agreed between the grantor and the grantee, that notwithstanding such power of redemption, that the 100 *l.* should not be paid at the day, and that the clause of redemption was inserted to make an evasion out of the Statute, then it had been an usurious bargain and contract within the said

[1] To avoid the imputation of usury the ordinary form adopted was a single bond drawn for usually twice the sum specified in a clause of defeasance. This clause of defeasance might be contained in a separate document. If the lesser sum were paid on a certain day, the obligation was to be void. This condition being collateral and in favour of the debtor had to be strictly performed to discharge the obligation: 2 Wms. Saunders 47. If, however, the clause of defeasance were in the same deed, it was not construed so strictly against the obligor or debtor. Nevertheless, to draw the obligation thus might be safer for the obligee in the event of the obligor tendering payment. Co. Lit. 207a, and authorities there cited. *Cotton* v. *Clifton* (1600), Cro. Eliz. 755. Also Willes, 107, 110. These shew that a tender correctly made might in the case of an obligation with a separate defeasance discharge the obligation. Generally a bond had several advantages as a security, *e.g.* it avoided the dangers of a wager of law.

[2] There was, as Cruise (*Digest*, vol. 3, tit. xxxi, 4) points out, before 32 H. 8, c. 2, "scarce any limitation at all".

[3] 5 Co. Rep. 69a.

statute". The Common Bench, too, in 1598[1] gave it as their opinion that "the corrupt agreement (which is confessed by the demurrer) makes it usury; and it is the intent makes it to be so or not so". Despite this reliance on the intention of the parties the rules worked harshly and hardly especially where, in an age which did not distinguish sharply between rules of contract and real property, personal obligations were affected by rules devised to work forfeitures, usually drastically and usually without discrimination.[2] No doubt there was an attraction in having a workable rule even if it worked hardly in individual cases. Originally, too, there was excuse, if not a justification, for the rigorous enforcement of penalties which might be considered, owing to "the absurdity of those monkish constitutions which prohibited taking interest for money",[3] as the real debt inclusive of interest and costs. The medieval judges could not, as Blackstone pointed out, award a sum due as illegal interest specifically as such, and even after the law changed with the new secular outlook of the Reformation "their narrow-minded successors still adhered wilfully and technically to the letter of the antient precedents, and refused to consider the payment of principal, interest and costs, as a full satisfaction of the bond". The trouble was acute in early Tudor times, if Lord Mansfield is to be believed, for in the case of *Wyllie* v. *Wilkes* in 1780,[4] having remarked that "all forfeitures are odious if carried beyond their true intent", he relates the tale of Sir Thomas More's attempted reconciliation with the judges in the time of Henry VIII. The Chancellor "summoned them to a conference concerning the granting relief at law, after the forfeiture of

[1] *Button* v. *Downham*, Cro. Eliz. 643. The intention of the parties continued to be the test applied. *E.g.* Viner, *Usury*, (E), 298, 9: "If the agreement of the parties be honest, but is made otherwise by the mistake of the scrivener, yet it is not usury. 2 Mod. 307. Pasch. 30 Car. 2. C.B. in case of *Ballard* v. *Oddey*." A widely used test also was that of Doddridge, J., in Cro. Jac. 508, pl. 20, namely, that there was no usury where both principal and interest were in hazard; only "if I lend 100 *l.* to have 200 *l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury."

[2] The fusion is best seen by glancing at books of practice and abridgments. Legal authors generally lumped together the law about conditions whether annexed to interests in realty or to personal obligations. See Lord Nottingham's *Prolegomena*, c. 7; the Abridgments under appropriate titles, *e.g.* conditions; Co. Lit. 206; Shepherd's *Touchstone*, ch. 21 (the author does at the beginning of chapter 22 on defeasances say that a defeasance "in a large sense doth sometimes signifie a condition annexed to an estate, and sometimes the condition of an obligation made with and annexed to the obligation at the time of making thereof", but he prefers the meaning which restricts a defeasance to the avoidance of some statute, recognisance and such like conditional instruments. Like the headings in Sheppard's *Abridgment*, the author states the principle or definition but does not pursue it systematically).

[3] Comm. iii. 434.

[4] Douglas, 523: but he gives the story a narrower scope than it had in its original telling by Roper's *Life of More*, where injunctions generally are the topic. Plucknett, *Concise History*, 687.

bonds, upon payment of principal, interest and costs; and when they said they could not relieve against the penalty he swore by the body of God he would grant an injunction". Whether or not this story is strictly accurate, it is clear that the common law had reached a position from which it could not, or at least was not willing to disentangle itself.

Credit was very largely raised in the Elizabethan age by such bonds. Apart from there being no notion of limited trading liabilities the cumulative effect of a failure upon a series of these bonds was ordinarily complete financial collapse. Generally the risk was heavy and the incidence of casualties high. There are occasional faint indications of a more liberal attitude, but they come to nothing.[1] The common law insisted on a literal performance, and the judges, like Shylock, merely pointed to the wording of the bond.

The position at common law by the seventeenth century clearly demanded some mitigation, and gradually equity intervened. The early history of this equitable intervention is naturally closely allied to the jurisdiction concerned generally with preventing unconscionable claims in other ways, notably the prevalent trick of suing upon a deed which, though the debt it secured were repaid, had not been cancelled nor acquittance taken in discharge. This had been a very common case for equitable relief in the year-book period.[2] Nevertheless, during the fourteenth century it does appear that the courts of law had not quite closed their ears to pleas of accident and mistake. In 1366 it was said in argument[3] that "if you are bound to pay me a certain sum of money, and you are robbed on the way, you are not excused and absolved by this": but this evoked an emphatic denial from the other side. But this hesitancy cannot have lasted with any permanence, for Coke[4] in defining what he considered to be the proper field of equity gives as the typical case for relief: "Accident, as when a

[1] *E.g.*, the curious and, as Lord Hardwicke once called it, the ludicrous case of *James* v. *Morgan*, 1 Levinz 111: "Assumpsit to pay for a horse a barley-corn a nail, doubling it every nail; and avers that there were thirty-two nails in the shoes of the horse, which being doubled every nail, came to five hundred quarters of barley: and on non assumpsit pleaded, the cause being tried before Hyde at Hereford, he directed the jury to give the value of the horse in damages, being 8 *l.*, and so they did: and it was afterwards moved in arrest of judgment for a small fault in the declaration, which was overruled and judgment given for the plaintiff." But compare this *nisi prius* decision with *Thornborow* v. *Whiteacre* (1705), 2 Ld. Raymond 1164, where in an action upon a case of a similar nature, the case was compromised, the court inclining against the debtor. Holt, C. J., remarked (p. 1165): "Suppose A for money paid him by B will undertake to do an impossible thing, shall not an action lie against him for not performing it; as in case of a bond with such an impossible condition, the bond is single. So where a man will for a valuable consideration undertake to do an impossible thing though it cannot be performed, yet he shall answer damages."

[2] The common law attitude is exemplified in YB. 17 E. 3 (R.S.) 298.

[3] YB. Hil. 40 E. 3, f. 6, pl. 11. Brooke, *Obligation*, 9.

[4] 4 Inst. 84.

servant of the obligor, mortgagor, etc., is sent to pay the money on the day, and he is robbed etc., the remedy is to be had in this court [*i.e.* Chancery] against the forfeiture." At first, though, the Chancellor did not afford relief on general grounds but considered every circumstance of the application. Among these circumstances would be the plaintiff's[1] diligence in looking after his interests at law. One of the few year-book cases to be reported on this matter occurs in 1482[2] when one who was bound by statute merchant paid his debt without taking a release. The recognizee then sued out execution and the conusor complained to the then Chancellor, Archbishop Rotherham of York, who took the opinion of the judges in the Exchequer Chamber. He was strongly advised not to contradict the record on which the statute was enrolled and at length he acceded to this pressure of argument. However, in 1491 Archbishop Morton clearly remarks[3] that "if one pays a debt on obligation and does not take a receipt, it is good conscience and yet no bar at law". And Chief Justice Hussey, who advised in the earlier case, appears to have accepted this statement. It is significantly very largely on this point that the controversial literature which followed upon the publication of St Germain's *Doctor and Student* centred. But the pressure of human failings was too strong for the generalizations propounded by the learned Serjeant in his replication[4] to stand in the way of relief. The seventeenth-century Chancery freely relieved the plaintiff in these circumstances from the consequences at law of his negligence.[5]

[1] That is, the plaintiff in equity.

[2] YB. 22 E. 4, f. 6, pl. 17. The common law judges were asked to advise and both Fairfax, J., and Hussey, C. J., made interesting contributions to the debate in the Exchequer Chamber. Hussey would have excepted any sealed instrument from the testimony of mere naked breath and surmise upon a subpoena, especially where the complainant had to rely upon his own folly and negligence. But the judges were not always consistent in their advice: see the decree of 1456 (10 Sel. Soc. 140) where on advice a statute was ordered to be quashed, annulled and cancelled.

[3] YB. Pasch. 7 H. 7, f. 10, pl. 2 at f. 12: cf. *Strong's case* (1611), 1 Bulstrode 158, where the K.B. refused to grant a prohibition to the Court of Requests, there being just cause to proceed there for relief against an uncancelled bond. So they granted a procedendo. But some common law judges were reluctant to allow more than a limited measure of relief even in the conciliar jurisdictions: *e.g.*, in *Brightman's case*, Latch 148, in an action before the Council at York to enforce an annuity, the proof of which had disappeared into Ireland, Dodderidge said: "il ne serra relieve icy; quia fuit son folly mesme a deliver ses escripts a tiel person que n'ad pluis care de ceux." But he recognized the possibility of equitable relief "si le fait ad estre perde casualment", citing *Vincent* v. *Beverlye*, Noy 82.

[4] The Serjeant in his Replication (Hargrave, *Law Tracts* (Dublin, 1787), 324) comments thus upon the twelfth chapter of the first dialogue: "it is not reasonable that for a particular manne's cause, which hath hurte himselfe by his own negligence and by his owne folly, that the good common lawe of the realme (which is this, that the matter in wrightinge with or without condition cannot be answered but by matter in writing or by matter of recorde) should be made voyd or be set at nought by the suite of any particular person made in the chauncerie or any other place."

[5] *Prolegomena*, c. 7, ss. 2, 9.

It was about the middle of the seventeenth century that the Court of Chancery found itself with an established jurisdiction in relieving against penalties and forfeitures, a practice derived from the wide and undifferentiated jurisdiction of earlier times to relieve against the unconscionable use of legal rights generally. Spence[1] dates the regular jurisdiction in relief against penalties from early Stuart times, that is, the same period during which the equity of redemption came into being. There was some hesitation in cases where there had been negligence on the part of the party seeking relief, but at length this was ignored if the party had nothing serious upon his conscience to disentitle him to equitable relief.[2] The Chancellors gradually turned their attention from the well-known cases of accidents apt for relief, for example, where compensation had been made, that is, the debt paid, to cases where compensation could be made.

By the Restoration the jurisdiction was well established. "It is a common case to give relief against the penalty of such bonds to perform covenants, etc., and to send it to a trial at law to ascertain the damages in a *quantum damnificatus*."[3] Heneage Finch in his *Prolegomena*[4] describes the contemporary practice to award an injunction "till a trial at law be had either upon an action of Covenant or upon a special issue *quantum damnificatus*. So that a penal bond to secure the performance of covenants is not much better security than a mere covenant, as equity now orders the matter." Richard Francis in 1728 was able to state as his twelfth maxim of equity

[1] Spence, i, 630. Lord Ellesmere would not relieve apart from exceptional circumstances, *e.g.* extraordinary misfortune and accident. See Norbury in Hargrave, L.T. 431–2, where he says in quoting the practice of awarding costs both in law and equity that "of late much lenity has been used to ill debtors, so that many [creditors] after four or five years suit were glad to go away with their principal without either costs or damages".

[2] In *Cook* v. *Orwell* (or Orrell) (1579), *Choyce Cases in Ch.*, 136, the plaintiff in paying his debt had neglected to recover his bond. At first the court dismissed the bill, "but after it was retained", perhaps because of the plaintiff's "perswasion and underdealing". See in the same year *Owen* v. *Jones*, Cary 74, 5. In 1634/5, Tothill notes (p. 180), "a surety relieved here where a bond is contained in use without his privity, he thinking the same to be paid". The general rule was that small or trifling defaults were overlooked: *e.g.* in Cary 1, it is said that equitable relief is "extendable against them that will take advantage upon any strict condition, for undoing the estate of another in lands, upon a small or trifling default". *E.g.* such a default as paying all the debt of 100 *l.* but 4 *l.* and that being tendered: R.L. 7 & 8 Eliz. f. 359.

[3] The issue of *quantum damnificatus* might be referred to a Master of the Court or to a sheriff's jury. When early Chancery cases speak of awarding damages they refer to indemnities or to payment of interest and costs. *E.g. Cleaton* v. *Gower* (1674), R. *t.* Finch 164. The quotation is from 1 Eq. Cas. Ab. 91, quoting 1 Sid. 441–2; which turns on a point of pleading. But there is no doubt that such was the course: *Hall* v. *Higham* (1663), 3 Ch. Rep. 3, relief on terms of paying interest and costs "which will extend unto the Defendant's costs at Law as well as in Chancery". *Wilson* v. *Barton* (1671), Nelson 148. *Friend* v. *Burgh* (1679), R. *t.* Finch 437.

[4] C. 20, s. 5.

that "Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made". By his time equity had evolved rules which were beginning to distinguish between penalties and forfeitures, and in so doing was beginning to settle some significant rules which affected the notion of equitable proprietary rights no less than equitable doctrines of contract. Indeed, it is possible to distinguish in the cases two main trends corresponding roughly with notions of property, on one hand, and, on the other, notions of personal obligation. The test which came to be applied, as will be seen, was certainly more congenial with the latter notion, and the distinction based on the feasibility of compensation was more flexible and workable as a test than a difference based on the nature of the condition in question.

Equity, first, in setting out to relieve against penalties had to define the nature of a penalty, and in distinguishing between such and liquidated damages anticipated the common law by more than a century. The Restoration Chancellors arrived at a workable rule, though not formulated in the several presumptions which the modern law applies to analyse a monetary clause. They did, however, adopt some rather illogical strains of reasoning. An early attempt was made by Sir Orlando Bridgman, L.K., in the case of *Tall* v. *Ryland*[1] in 1670 which concerned a dispute between two fishmongers. They held contiguous shops and quarrelled. In a reconciliation one gave the other a bond in 20 *l.* not to disparage the other's wares and "to behave himself civilly and like a good Neighbour to the defendant". The plaintiff later asked a customer of the defendant's, "whilst cheapening a Parcel of Flounders", why he went to the defendant, whose fish, he said, stunk. The defendant lost the customer and sued on the bond. On a bill in equity for relief the obligee, the defendant, demurred for reasons which included "the bond being to preserve amity and neighbourly friendship, for the breach of which the plaintiff did submit to pay that Penalty". He also objected that there could be no trial to assess damages other than the sum to which the parties had submitted. The Lord Keeper allowed the demurrer, but "declared this was not to be a precedent in the case of a bond of £100 or the like". The defendant, however, did not receive his costs.

Though the Lord Keeper appears to have been influenced in this case by the modest estimate of liability, there are a number of cases which shew the judges endeavouring to discern what amounts to a genuine pre-estimate and what is merely *in terrorem*. In *Small* v. *Lord Fitzwilliam*[2] in

[1] 1 Ch. Cas. 183.

[2] Prec. Ch. 102. Also *Woodward* v. *Gyles* (1690), 2 Vernon 119, where the Court said "the parties themselves have here agreed the damage, and have set a price for plowing" and refused to grant an injunction against the ploughing. Nor, they said, would they have relieved against payment of the compensation agreed. Lord Mansfield in 1768 (4 Burrow 2225,