

The Evolution of Justice, Equity, and Equality

Practical Wisdom from the Past

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Chapter 9

Equity and Equality in Richard Francis's *Maxims of Equity*

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9 Equity and Equality in Richard Francis's *Maxims of Equity*¹

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This chapter presents various patterns of using the term “equity” in Richard Francis’s book entitled *Maxims of Equity*² and its affinity with both law and equality. The initial part of this chapter, primarily addressed to the reader not educated in a common law jurisdiction, presents the specific features of equity law in England (1). The next section lists the maxims of equity as found by Richard Francis (2). The focus is then directed to those cases in which that author considered equality issues (3). The fourth part of the text indicates the meanings of Francis’s use of the term “equity” (4) and is followed by conclusions (5).

The book’s author, Richard Francis (1698/1700–1742) was born in Dublin, Ireland, of Anglo-Irish descent. He studied law in Dublin (Trinity College) and London (the Middle Temple). After being called to the bar in 1724, he practiced law in London. Then he moved to Virginia in the 1730s, where he practiced law in Williamsburg. His masterpiece *Maxims of Equity* proved highly successful, with four English editions from 1727 to 1812 and a final one – the “Americanised” edition – in Richmond, Virginia, in 1823. Apart from being the author of *Maxims of Equity*, Francis is not known to legal history.³

The book’s first edition, published in 1727, abounds with many different and inconsistently applied meanings of equity. There are common footprints of Aristotle’s *epieikeia*, on the one hand, of natural justice, on another, not to

1 The author would like to thank Professor James R. Gordley (Tulane Law School) and Professor John H. Langbein (Yale Law School) for their comments on the draft of this article.

2 Richard Francis, *Maxims of Equity: Collected From and Proved by Cases, Out of the Books of the Best Authority in the High Court of Chancery. To Which is Added the Case of the Earl of Coventry, Concerning the Defective Execution of Powers. Lately Adjudged in the High Court of Chancery*, London: In the Savoy: printed by E. and R. Nutt, and R. Gosling (assigns of E. Sayer, Esq) for J. Stephens, 1727.

3 William H. Bryson, “Francis, Richard,” in *Oxford Dictionary of National Biography*, vol. 20 (Oxford: Oxford University Press, 2004), 748; Zechariah Chafee, Jr., “Coming into Equity with Clean Hands I,” *Michigan Law Review* 47 (1949): 880.

mention references to equity as a set of rules applied in courts.⁴ What is striking is Francis's use of that term in an *aequitas*-like pattern and his focus on the aspect of equality.

9.1 What Is Equity?

The English word "equity" can be juxtaposed with various meanings of this term that have emerged throughout history. The list most often begins with a number of concepts of *epieikeia*, by which Aristotle specified, among others, a way for rectification of law. As the law provided general solutions for the majority of cases, there were others where a ruling had to be adjusted to fit particular features of a case according to the lawmaker's intention. The Aristotelian concept of equity, transfused by the intermediation of Thomas Aquinas and Jean Gerson, was publicised in the 16th century in England by Christopher St German's dialogue *Doctor and Student*.⁵ At that time, equity law and the Court of Chancery had been developing for a long time.

Back in the ancient world, Roman jurists developed the concept of *aequitas*, which meant equality and emphasised the need to decide like cases alike and thus to treat individuals equally: to give to each his own (*suum cuique tribuere*, D.1.1.10pr). In the words of Fortier, *aequitas* implied "evenness, equality, sameness, justice and fairness." This meaning was known to medieval lawyers. It is worth noting that equity is indeed an anglicised term for *aequitas*, i.e., equality.⁶

On the other hand, medieval canon lawyers employed a notion of *aequitas canonica*, which stood for the power to show clemency in certain circumstances. In Antiquity as well as during the Middle Ages, the term *aequitas* was also referred to in another context as a prerogative of a Roman or medieval emperor (or later in canon law: a pope) to impose unwritten law in place of the wording of written law.⁷ In the end, the notion of equity was used to describe

4 While the most prominent one was the Court of Chancery, it was not the only court that administered equity, another example being the "equity side" of the Court of Exchequer.

5 Alan Cromartie, "Epieikeia and Conscience," in *The Oxford Handbook of English Law and Literature, 1500–1700*, ed. Lorna Hutson (Oxford: Oxford University Press 2017), 320ff; Mark Fortier, *The Culture of Equity in Early Modern England* (Burlington, VT: Ashgate, 2005), 17–19, 61–63; Stephen Humphreys, "Equity before 'Equity,'" *Modern Law Review* 86, no. 1 (2022): 89–90; Lorenzo Maniscalco, *Equity in Early Modern Legal Scholarship* (Leiden: Brill 2020), 33–34.

6 Cromartie, "Epieikeia," 321, 324; Fortier, *The Culture of Equity*, 3; Humphreys, "Equity before 'Equity,'" 86ff; Marek Kuryłowicz, "Aequitas i iustitia w rzymskiej praktyce prawnej [Some Reflections on Aequitas and Iustitia in Roman Jurists' Concepts]," *Annales Universitatis Mariae Curie-Skłodowska Sectio G* 66 (2019): 179–180.

7 Cromartie, "Epieikeia," 324; Fortier, *The Culture of Equity*, 7; Humphreys, "Equity before 'Equity,'" 87, 103; Maniscalco, *Equity*, 28.

precepts of natural justice. The multiplicity of these meanings was known to some English lawyers at the time Francis's book was published.⁸

Despite painstaking efforts of scholars, it is difficult to grasp a proper definition of equity in English law. Most often, authors describe only how it applies and where it originated. Thus, many still refer to Maitland's classic work that reduced equity to "that body of rules which is administered only by those Courts which are known as Courts of Equity" with the caveat that after the Judicature Acts of 1873–1875 the past tense should be substituted in place of the present.⁹

Until that time, a dual system of administration of justice was in place in England, with courts of law and of equity acting separately. To some extent, this was also the case in other common law jurisdictions.¹⁰ Although reforms led to the fusion of court organisation and procedure, they did not reach the level of substantive law everywhere, and, therefore, the division between law and equity is still recognised.¹¹

9.1.1 *Common Law Writs and Chancery*

Common law developed in the Westminster courts starting in the 12th and 13th centuries. Proceedings could begin before those courts provided that an original writ was issued by the chancery. Each writ was applicable only to a particular set of typical facts and triggered a formalised procedure that *a priori* prescribed how parties should exchange their arguments and prove the

8 Fortier, *The Culture of Equity*, 7–8, 67–69 (William West's *Symbolography* from the 16th century); David Ibbetson, "A House Built on Sand: Equity in Early Modern English Law," in *Law & Equity. Approaches in Roman Law and Common Law*, eds. E. Koops and W.J. Zwalve (Leiden: Brill, 2014), 76–77; Maniscalco, *Equity*, 4–6.

9 Frederic W. Maitland, *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge: Cambridge University Press, 1910), 20. Joshua Getzler, "Patterns of Fusion," in *The Classification of Obligations*, ed. P. Birks (Oxford: Clarendon Press, 1997), 157, 164; Jamie Glister and James Lee, *Hanbury & Martin Modern Equity*, 22nd ed. (London: Sweet & Maxwell, 2021), 4; Humphreys, "Equity before 'Equity,'" 87; Mike Macnair, "Equity and Conscience," *Oxford Journal of Legal Studies* 27 (2007): 680; Willem J. Zwalve and Egbert Koops, "Introduction: The Equity Phenomenon," in Koops and Zwalve, *Law & Equity*, 5.

10 The Supreme Court of Judicature Act 1873, c. 66, the Supreme Court of Judicature Act (1873) Amendment Act 1875, c. 77. In the United States, reforms were initiated even earlier: Kellen Funk, "The Union of Law and Equity: The United States, 1800–1938," in *Equity and Law: Fusion and Fission*, eds. J. Goldberg, H. Smith, and P. Turner (Cambridge: Cambridge University Press, 2019), 46ff. Australia followed suit at the turn of the 19th century: Roderick P. Meagher, John D. Heydon, Mark J. Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines, and Remedies* (Chatswood, NSW: LexisNexis Butterworths, 2002), 1–17.

11 There are, however, ongoing disputes over this issue between supporters of equity separate-ness (Glister and Lee, *Hanbury & Martin*, 14, 18–23; Meagher, Heydon, and Leeming, *Meagher*, 52–54; Henry E. Smith, "Equity as Meta-Law," *The Yale Law Journal* 130 (2021): 1150ff; Graham Virgo, *The Principles of Equity and Trusts* (Oxford: Oxford University Press, 2023), 8, 27) and its alignment with law (Getzler, "Patterns of Fusion," 158, 191). The latter view holds sway in the United States.

relevant facts. Dozens of specific writs were developed in the chancery's work, but, at the end of the 13th century, the catalogue of writs became closed. In cases that fell outside it, would-be plaintiffs were not deprived of justice, but they had to file their suit in another (local, feudal, or ecclesiastical) court.

Still, there were cases where the royal writs did not fit and there were no prospects of obtaining effective protection in another court. A recurring scenario was that local courts were often corrupted or biased.¹² In such hopeless instances, a petitioner could beg the king to dispense justice as an act of grace. These requests were actually entrusted to the chancellor, who "became keeper of the king's conscience."¹³ His activity in this regard already had a recognised status at the end of the 14th century and led in the next one to the development of the Court of Chancery wherein equity – then still known under the name of "conscience" – was applied.¹⁴

9.1.2 *Chancellor Picks Up the Call*

One might consider an analogy between the way the Westminster courts and the chancellor worked in the matrix of medieval writs, on the one hand, and the modus operandi of a modern customer call center service, on the other.

Today, in order to get things done when a problem arises, one calls customer service. After a while, an AI bot orders the caller to dial a certain digit, depending on the purpose of the customer's call. If one's case doesn't fit into any of the preassigned subjects, nothing will be accomplished. It was the same with the medieval court applying writ procedures. If today's customer's case indeed fits into one of the set categories, then he/she has to communicate very precisely, using specific phrases, which will be understood by the AI protocol. Again, that was just like in the medieval writ procedure, where parties had to follow strict rules of pleading that organised the communication between them and a court. Moreover, in order to prove facts, they had to comply with specific models of proof. By calling a customer service number today, one can usually solve only one problem. Common law likewise recognised the single-issue principle: a litigant could not dispute both facts and law at the same

12 Francis noted that that prompted equity's intervention (Francis, *Maxims of equity*, 24–26 [cases no. 1, 2, 5]).

13 William Blackstone, *Commentaries on the Laws of England*, v. 3 (Oxford: Clarendon Press 1765–1769), 47.

14 Blackstone, *Commentaries*, 51–52. John H. Baker, *An Introduction to English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), 110–114; J. Baker, *The Oxford History of the Laws of England. Volume VI, 1483–1558* (Oxford: Oxford University Press, 2003), 40; Ibbetson, "A House Built on Sand," 55; John H. Langbein, Renee Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Austin, New York: Wolters Kluwer Law & Business, Aspen Publishers, 2009), 105, 272–281; Mike Macnair, "Arbitrary Chancellors and Problem of Predictability," in Koops and Zwolve, *Law & Equity*, 82–83; Macnair, "Equity and Conscience," 670. Cf. Guido Rossi's contribution in this book.

time. The idea was that a legal argument had to be resolved by a court, while a dispute over facts was resolved by an ordeal, a duel, a compurgation, or by a trial by jury. Contacting customer service and dealing with an AI bot to solve problems is often a nightmare. An unfortunate plaintiff may have had the same feeling with common law procedure in the Middle Ages. Today the bright side is that at least sometimes a customer can dial zero and connect directly with an operator, who is still a human being. In the past, the chancellor was such an “operator” and was able to resolve hopeless cases if a plaintiff still wanted to avoid local or feudal court.

The procedure applied in the Court of Chancery differed significantly from the common law procedure in the Westminster courts. The chancellor – like an operator today – could “step outside the box.” To begin with, he didn't need an original writ – a “bill in equity” was sufficient. He could resolve questions of law and fact at the same time. He could, to a much greater extent than other judges, determine what were the facts of a case. He could also, by means of a “subpoena,” examine parties or witnesses and order them to deliver documents or written submissions. This way of proving facts and therefore this knowledge was unavailable to judges sitting in other courts. This, in turn, allowed the Court of Chancery to arrive at sounder decisions because they were based on real facts. This court's procedural advantages allowed it to decide cases on the basis of facts that could not be proven through the strict channels of common law procedure. The knowledge gathered by these means was thus the chancellor's private knowledge that, in turn, prompted frequent contemporary references to his conscience as the basis of the decision-making. According to Macnair, the conscience-based adjudication characteristic of equity was – as indicated above – procedural in nature.¹⁵

9.1.3 *Chancery under Siege*

If a case was pending or had already been decided before any other court, the chancellor was able to stay it (or its enforcement) by an injunction.¹⁶ This power led to conflict with other judges, which culminated in the Earl of Oxford's Case (1615). That ruling determined that the Court of Chancery could trump the Westminster courts and hijack some of their cases.¹⁷

15 Blackstone, *Commentaries*, 436ff. Baker, *An Introduction*, 110–112; Baker, *The Oxford History*, 41–42, 48; Getzler, “Patterns of Fusion,” 176–177, 191; Ibbetson, “A House Built on Sand,” 59–60; Langbein, Lerner, and Smith, *History of the Common Law*, 289–295, 320–328; Macnair, “Equity and Conscience,” 659, 672–678.

16 *Some observations in the practice of the Court of Chancery under the late Ordinance of Regulation*, London, 1653–1658, 14. Francis, *Maxims of equity*, 3 (c. 5), 4 (c. 8), 72 (c. 17).

17 *Earl of Oxford's Case* (1615) 1 *Reports in Chancery* 1. Much later the prevalence of equity law over common law was recognised by the Supreme Court of Judicature Act 1873 (s. 25, 11). Blackstone, *Commentaries*, 53–54; Baker, *An Introduction*, 117, 123; Getzler, “Patterns of

Undoubtedly, the Chancery had its own flaws. The innovative procedural devices failed in practice. A report advocating the reform of the Court of Chancery pointed out that witness's hearings were conducted by "examiners' deputies" who were so poorly paid that they subsisted solely on voluntary donations from litigants, which obviously could affect the outcome of hearings. Proceedings were not transparent. Like other institutions, this court was affected by notorious bribery of clerks.¹⁸

Ultimately, the chancellor's one-man adjudication was also perceived as suspect. Chancellor was accused of acting arbitrarily, which resulted in uncertainty of law and unpredictability of decisions: his rulings were not based on a clear set of rules but on his own unspecified "conscience." Thus, each time a change in the chancellor's office took place, a change in decision-making followed ("either the Humor of the Judge, or the Judge himself being changed").¹⁹

9.2 Fourteen Maxims of Equity

These criticisms stand out clearly in the preface of *Maxims of Equity*.²⁰ Francis's work seems to be an answer to these charges, which he proclaimed as straightforward lies.²¹ The book is very concise and laconic²² and demanding laborious reading. Perhaps the material that made up this book was collected as part of Francis's own studies of the law – it could be a student's book. It shows how unsystematic and chaotic judge-made law was before the era of Blackstone.

Fusion," 182; Ibbetson, "A House Built on Sand," 56–60, 74; Langbein, Lerner, and Smith, *History of the Common Law*, 329–335.

18 *Some observations*, 1–22.

19 Cf. fn 20. Baker, *An Introduction*, 118; Langbein, Lerner, and Smith, *History of the Common Law*, 316; Macnair, "Arbitrary Chancellors," 83–92.

20 Francis, *Maxims of Equity*, 1 (preface): "It is a common Objection against our Courts of Equity, that their Power being absolute and extraordinary, their Determinations must consequently be uncertain and precarious: That not being bound by any established Rules or Orders, nor circumscribed within the Limits of positive Laws, the unhappy Suitor must enter into a Court of Equity with Doubts and Fears; and if he has succeeded once, 'tis great Chance but he may fail upon a Second Trial, either the Humor of the Judge, or the Judge himself being changed; and that this is true in Fact, for that after the most solemn arguing of Causes in all their Niceties and Circumstantial, Decrees made thereon have been frequently reversed by the same, and more often by succeeding Chancellors."

21 Francis, *Maxims of Equity*, 1 (preface): "It is Pity that Englishmen, who are so wont to boast of that invaluable Blessing of Freedom of Property, should be heard to give themselves so broad a Lye, as to say, that those Courts of Justice, where Matters of Property of the greatest Value are daily determined, are arbitrary and precarious in their Determinations."

22 The book is 112 pages in total and consists of: a preface (5 pages), list of maxims (1 page), main text (72 pages), index (12 pages), and the Case of the Earl of Coventry (22 pages). Note that pagination starts anew in the main text, and, again, but only from its third page, anew in the Case of the Earl of Coventry. The index is not paginated.

Francis discussed each maxim in separate chapters by presenting case studies that illustrated circumstances in which the Court of Chancery would or would not intervene. He did not directly give names of cases, but they can be identified by his references to the reports (e.g., Salkeld's *Reports*, or Vernon's *Cases* printed in Dublin). An extremely succinct presentation of facts was followed by an equally concise commentary on the rulings. Arguments in favor of a given decision were sometimes presented in glosses, which often rephrased and clarified the main text. Most of the chapters consist of from four to twelve cases, with the exception of the three plausibly most important ones: the maxim "Equality is Equity" is scrutinised by 21 cases, while "Where Equity is equal, the Law must prevail" by 18, and "Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made" by 15. These three maxims consumed 40% of all examples used by the author.²³

The timing is of particular interest because the book was published in 1727 and thus in the middle of equity's transformation. It was at that time that, in order to refute the charges of their critics, the chancellors attempted to formalise equity and started following their own precedents.²⁴ The publication of the book was probably a result of this transformation rather than its cause or catalyst. Between the end of the 17th century (Lord Nottingham) and the beginning of the 19th century (Lord Eldon), equity crystallised into a set of rules.²⁵ Francis attempted to show his reader, a law student, what were the foundations of equity.²⁶ For the purpose of justifying its presence alongside common law²⁷ and countering the charges of unprincipled arbitrariness shown in the book's preface,²⁸ he resorted to the maxims of equity, citing extensively Bacon's *The elements of the common lawes of England*.²⁹

23 In total, Francis presented 137 cases.

24 As evidenced in one of the cases: Francis, *Maxims of Equity*, 64 (c. 8): "It was strongly insisted, at the Bar, that this (...) was in Truth a Thing against Conscience, and contradictory to many established Rules of Law and Equity. But Lord Keeper declared he would not change the Rule, that so long prevailed in this Case". Nevertheless, the binding force of precedent was not absolute before the Court of Chancery, see Francis, *Maxims of Equity*, 3 (preface): "the Court of Law, rigidly adheres to its own established Rules, be the Injustice arising from thence, ever so apparent; whereas the Court of Equity will not adhere to its own most established Rules, if the least Injustice arises from thence."

25 Blackstone, *Commentaries*, 55. Baker, *An Introduction*, 118–119; Getzler, "Patterns of Fusion," 175–176, 185; Langbein, Lerner, and Smith, *History of the Common Law*, 316–317, 351–355; Macnair, "Arbitrary Chancellors," 95ff; Meagher, Heydon, and Leeming, *Meagher*, 1–11; Smith, "Equity as Meta-Law," 1060.

26 Francis, *Maxims of Equity*, 4 (preface): "Some of the Principal of those Rules of Equity, are attempted to be shown in the following Work. If the Imperfectness of it should be objected; to that it is answered, that the Intent was only to lead the young Student into a proper Method of his Enquiries into this Science of Equity."

27 Cf. fn 55 and text above it.

28 Cf. fn 20, fn 21.

29 Francis, *Maxims of Equity*, 4 (preface): "That he could not confer so profitable an Addition unto the Science of the Law, as by collecting the Rules and Grounds, dispersed throughout

Although maxims had already appeared in earlier works (such as St German's *Doctor and Student* or in Bacon's *The elements of the common lawes of England*, which he quoted in the preface), Francis's book was the first to refer to maxims of equity in its very title.³⁰ As his work was created in the period of equity transformation, that was also the time when these maxims began to emerge. Their particular wording was not used before. Many of them were coined by him, in particular "Equality is equity," which is still recognised today.³¹ On the other hand, he did not refer to several others because they were not yet known.³²

Modern scholars are divided over their relevancy today. Some take maxims seriously, as significant guidelines either for the application of equitable doctrines in practice or for teaching equity in law schools.³³ There are others who approach them with tongue in cheek.³⁴ Francis highlighted fourteen maxims of equity, which are listed below, in order according to their supposed relevance today:

the Body of the same Laws; ... to see more profoundly into the Reason of such Judgments and ruled Cases...; so that the Incertainty of Law, which is the principal and most just Challenge that is made to the Laws of our Nation at this Time, will by this new Strength laid to the Foundation, be somewhat the more settled and corrected."

- 30 On the collection of maxims as a genre in English legal literature, see Alfred W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review* 48 (1981): 644–651.
- 31 The maxim "equality is the highest Equity" can be found in *Ward v Lant* (1701), a case printed in *Precedents in Chancery* published in 1733, and thus after Francis's book. *Precedents in Chancery, being a collection of cases, argued and adjudged in the High Court of Chancery; from the year 1689, to 1722*, London: In the Savoy: printed by E. and R. Nutt, and R. Gosling (assigns of Edward Sayer, Esq) for Arthur Bettesworth, and Charles Hitch, at the Red-Lyon in Pater-Noster Row, 1733.
- 32 However, among those omitted by Francis was also the maxim "Equity follows the law," which was in legal circulation even before his time. Chafee, Jr., "Coming into Equity," 880–881; Roscoe Pound, "On Certain Maxims of Equity," in *Cambridge Legal Essays*, eds. P.H. Winfield and A.D. McNair (Cambridge: W. Heffer, 1926), 262–275.
- 33 Francis himself explicitly referred to this teaching goal – cf. fn 26. Gino E. Dal Pont, *Equity and Trusts in Australia* (Pymont, NSW: Lawbook Co., 2023), 14; Meagher, Heydon, and Leeming, *Meagher*, 85; Sham Qayyum, "Some New Maxims of Chancery: 'Explicated for the More Facile Introduction of Such as Are Studiously Addicted to That Noble Profession,'" *Trusts & Trustees* 27, nos. 1–2 (2021): 91; Smith, "Equity as Meta-Law," 1058, 1130 ("They are, after all, at the heart of equity"); Virgo, *The Principles*, 29–30. There is a correlation between the notion of separateness of law and equity and the emphasis on maxims of equity: Meagher, Heydon, and Leeming, *Meagher*, 52–54 (they refer to "fusion fallacy"); Smith, "Equity as Meta-Law," 1058.
- 34 Roger Young, Stephen Spitz, "SUEM – Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose," *South Carolina Law Review* 55 (2003): 175–177. Ben McFarlane, "The Maxims of Equity," in *Snell's Equity*, ed. John McGhee and Steven Elliott (London: Sweet & Maxwell, 2020), 91–92 ("limited utility of maxims"). Chafee, Jr., "Coming into Equity," 877ff, 1065ff, analysed English and American case law on "clean hands" and found this maxim useless.

“Equity suffers not a Right to be Without a Remedy” (No. 6) – the sixth on his list; recognised today by the majority, often in rephrased form with “right” replaced by “wrong” (Hanbury; Meagher; Smith).³⁵

“Equality is Equity” (No. 3) – with two variants of its wording conveying similar meaning, one with the original word order (Smith) and one reversed, “Equity is equality” (Hanbury; Meagher; Virgo).

“He that will have Equity done to him, must do it to the same person” (No. 1) – today in rephrased wording: “He who seeks equity must do equity.”³⁶

“He that hath committed Iniquity, shall not have Equity” (No. 2) – significantly rephrased with the focus on “clean hands”: “He who comes to equity must come with clean hands.”

“Equity regards not the Circumstance, but the Substance of the Act” (No. 13) – today rephrased as: “Equity looks to the intent rather than to the form.”

“Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made” (No. 12) – no longer referred to by the majority, with some exceptions (Pound; Smith).³⁷

“Where Equity is equal, the Law must prevail” (No. 14) – still recognised today in slightly rephrased wording.³⁸

“Equity regards Length of Time” (No. 10) – this maxim is caught today by another one “Where there are equal Equities the first in time shall prevail” (Hanbury; Smith) or by various others (Hanbury: “Delay defeats equities”; Meagher: “Equity assists the diligent, not the tardy”; Virgo: “Equity assists the diligent”).

“It is Equity that should make Satisfaction, which received the Benefit” (No. 4); “It is Equity that should have Satisfaction, which sustained the Loss” (No. 5); “Equity relieves against Accidents” (No. 7); “Equity prevents Mischief” (No. 8); “Equity prevents Multiplicity of Suits” (No. 9)³⁹; “Equity will not suffer a double Satisfaction to be taken” (No. 11) – these six are no longer referred to today. In turn, modern scholars have added several other maxims, in particular: “Equity follows the law”; “Equity acts in personam”; “Equity regards that as done which ought to be done”; and “Equity imputes an intention to fulfil an obligation.”⁴⁰

35 Some authors (Virgo) find this maxim obsolete as it no longer distinguishes equity from law.

36 Smith, “Equity as Meta-Law,” 1126 (referring to the feminine gender: “She who seeks equity must do equity”).

37 Pound, “On Certain Maxims,” 259, and Smith, “Equity as Meta-Law,” 1119 (“Equity abhors a forfeiture”).

38 Not listed by Virgo.

39 That one is listed by Smith, “Equity as Meta-Law,” 1123 (“Equity delights to do justice and not by halves”).

40 The last one is not listed by Virgo, who, in turn, (invents and) adds several others. Dal Pont, *Equity and Trusts*, 15–20; Glister and Lee, *Hanbury & Martin*, 23–27; Meagher, Heydon, and Leeming, *Meagher*, 85–121; Smith, “Equity as Meta-Law,” 1115–1127; Virgo, *The Principles*, 29–43.

9.3 Cases on Equality

From the perspective of this book's theme, the chapter on the maxim "Equality is equity" is particularly interesting. Reading Francis's work allows one to conclude that the scope of this maxim's application in the 18th century was significantly different from what it is today.⁴¹ The scope's breadth emphasises one of the ways in which equity was understood: like the Roman notion of *aequitas*.

Francis gathered two categories of cases. The first one, which I would call "Equality between Parties," consists of cases that focus strictly on equality in relations between parties. Like parties should be treated alike (thus equally), but they would not be so treated but for the chancellor's intervention because of the lack of an adequate remedy at law. The foregoing shows that the concept of equality was behind yet another maxim: "Equity suffers not a Right to be Without a Remedy," which resulted in the belief that a lack of adequate remedy at common law should not prevent a petitioner from protecting his rights if his position was similar to that of an individual having such a remedy. In such instances, equity was to step in as a safety net of the administration of justice. This category fits into the modern understanding of what is covered by the maxim "Equality is equity." The meaning it conveyed is a tendency of equity law to treat equally those who acquired rights or assumed liability together. A presumption follows that, in equity, co-owners' or co-sureties' respective rights or duties are equal. A number of Francis's case studies referred to the contribution between co-debtors that was required in order for them to participate equally in liability.⁴² There were other cases which dealt with equality if the payment of estate debts was affected by the insufficiency of funds to cover them all.⁴³ Nowadays, the focus on equality also leads to a preference for "tenancy in common" over "joint tenancy." In the former type of co-ownership, a right of survivorship is excluded, under which a co-owner's death results in an incremental increase in the rights of the other co-owners.⁴⁴ One could find such cases also in Francis's book.⁴⁵

The second category of cases, which could be called "Equality against Windfall," seems at first glance to be a heterogeneous group and includes the remainder of Francis's cases illustrating that maxim. The common denominator emerging from these cases, though, was a prevention of windfall. Equity

41 On the other hand, such issues as (in)equality depending on citizenship, religion, race, ethnicity, and non-marital origin were outside the scope of Francis's interest.

42 Francis, *Maxims of Equity*, 14–16 (c. 12, 14, 16, 18).

43 Francis, *Maxims of Equity*, 10–14 (c. 5-9, 11, 13; c. 11: "For a Debt without Specialty, is as much a Debt Jure Naturali, and in Conscience, as a Debt by Specialty; and there shall be Equality where Conscience is the Judge").

44 Glistler and Lee, *Hanbury & Martin*, 25–26; Meagher, Heydon, and Leeming, *Meagher*, 103–106; Virgo, *The Principles*, 42–43.

45 Francis, *Maxims of Equity*, 16 (c. 19: "The Advantage of Survivorship is against Equity").

attempted to intervene if as a result of a fortuitous event (an accident),⁴⁶ or in consequence of an opportunistic act of a party, that party would gain a benefit at the expense of the other in unjustifiable circumstances, or, to paraphrase, such a gain or loss was against conscience.⁴⁷

Thus, cases illustrating the maxim involved an “insider” who entered into a transaction concerning an asset belonging to the estate of a deceased person in order to obtain a benefit at the expense of other stakeholders. The Court of Chancery, guided by the precept of “Equality is equity,” sought (proportional) equality between them.⁴⁸

This category also accommodated contract law cases dealing with a change of circumstances as we would call it today.⁴⁹ Here, equality was intended to even out the legal consequences of actual facts with a hypothetical situation that would occur unless the litigant against whom equity was sought to be applied did not act in an opportunistic way (causing or utilising certain facts). The “accident” that disturbed the balance between litigants might be the death of one of the parties to a contract or third parties taking over a piece of real property that was subject to a tenancy. In that latter case, equity, following the maxim “Equality is equity,” demanded a proportional reduction in rent.⁵⁰ Again, the intervention of equity, applied as a safety net, provided an exception to the law.

Of particular importance is a case in which the chancellor’s authority to check the correctness of a trustee’s distribution of funds from an estate (or a trust) was acknowledged. There have been cases in which a trustee was to divide assets among beneficiaries (often the trustor’s children) according to either their merits or their needs. This may at first glance seem noncontroversial because the trustor had empowered the trustee with full discretion to allocate funds among beneficiaries. Nevertheless, in the case cited by Francis,⁵¹ it was resolved that the distribution could be controlled, and amended, if necessary, by the Court of Chancery ensuring that the trustee’s powers were exercised properly. One might wonder whether the trustee’s power was abused in that specific case and that fact caused equity to step in.

46 The maxim in question could operate in tandem with the maxim “Equity relieves against Accidents” in this type of case. It seems that in others the same could be said of maxims: “It is Equity that should make Satisfaction, which received the Benefit” (No. 4), “It is Equity that should have Satisfaction, which sustained the Loss” (No. 5), “Equity will not suffer a double Satisfaction to be taken” (No. 11), and “Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made” (No. 12).

47 Cf. fn 61.

48 Francis, *Maxims of Equity*, 9–10 (c. 1-3): “for the taking away one Man’s Gain, to make up another’s Loss, is making them both equal.” The facts of c. 1 are similar to the one reported as anon. (1707) 1 Salkeld 155.

49 While only a minor number of Francis’s cases on “Equality is equity” involved contract cases, many more of them are to be found in other chapters of his work.

50 Francis, *Maxims of Equity*, 13 (c. 10), 15 (c. 15).

51 Francis, *Maxims of Equity*, 17 (c. 20).

The discussed maxim was also consulted in the context of jettison. Indeed, if goods were thrown off a ship in “Stress of Weather, or in Danger or just Fear of Enemy” in order to save a ship and the remainder of the cargo, then a contribution had to be made between the shipowner and all merchants who had their cargo onboard. In a gloss on this point, Francis presented a case in which a contribution was not allowed, however. Expecting to be hijacked by enemy forces, a shipmaster ordered that the more valuable part of the cargo (silks) be unloaded (and presumably hidden) on the coast. The ship, along with the remaining cargo (olive oil), was seized and lost. Still, the chancellor refused to grant a bill in equity that would allow the oil merchants to demand a contribution from the silk merchants because (to paraphrase) the olives did not save the silks and the salvage of the silks did not cause the loss of the olives.⁵² One might wonder whether the maxim “Equality is equity” should not be applied here as well.

9.4 What, After All, Is Equity?

Although most frequently the term “equity” was used by Francis inconsistently⁵³ and in an ambiguous way,⁵⁴ there are several patterns of its usage in his book. In the preface, he presented law and equity as sets of rules that were applied, respectively, by various courts operating in full symbiosis. He seemed to be touched by it: “the Beauty of this Contrivance, whereby Justice is produced from such jarring Jurisdictions; and what neither strict Form and Order or absolute Latitude in judging, can separately produce, is effected by the excellent Temperature of both together. This hath been judiciously compared to the mingling of two Herbs, which of themselves are Poison, but together make a wholesome Medicine.” This herbal comparison came from Lord Ellesmere (*Arguments proving from antiquity the dignity, power and jurisdiction of the Court of Chancery*), who, as Fortier indicates, had borrowed it from William Lambarde’s *Archeion* from the late 16th century.⁵⁵

Francis continued by stating that judges who sit in the Westminster courts were resolving disputes according to the strict rules of law and were not given any discretion.⁵⁶ However, it was not possible to introduce *ex ante* rules that

52 Francis, *Maxims of Equity*, 18 (c. 21). Cf. Roman doctrine of *lex Rhodia de iactu*.

53 The inconsistency of that use was a common pattern in the past: Fortier, *The Culture of Equity*, 60, 77; Ibbetson, “A House Built on Sand,” 55, 76–77; Maniscalco, *Equity*, 219; Macnair, “Equity and Conscience,” 661, 671; Willem J. Zwolve, *The Equity of the Law: Law and Equity since Justinian*, in Koops and Zwolve, *Law & Equity*, 30–31.

54 Francis, *Maxims of Equity*, 1 (c. 1: “to pray Equity against”), 3 (c. 6: “there is no Equity, that his Security should be enlarged”), 3 (c. 6: “that relief (...) was not proper in Equity”), 26 (c. 5: “If a Man hath Cause to complain In Equity”). Maxims nos. 10 and 13 might be added here as well.

55 Francis, *Maxims of Equity*, 3 (preface). Fortier, *The Culture of Equity*, 80.

56 Francis, *Maxims of Equity*, 2 (preface): “The Judges in our Courts of Law, are bound by their Oaths to observe the strict Rules of Law; and therefore as upright Judges, they must deter-

would fit all cases that might arise.⁵⁷ A court of law was bound by its own rules even if they led to injustice, while a court of equity was not. Thus, it was the Court of Chancery where the rigors of the law were mitigated. This sounded like a direct reference to Aristotle's *epieikeia*. The need to adjust (to rectify) general laws to the circumstances of a case was a safety net of the administration of justice. It created space for the chancellor's "equitable" intervention.⁵⁸

An analysis of the case studies reveals that often the use of the term "equity" indeed bore the hallmarks of Aristotle's thought. Although it may not have been directly apparent from the literal content, the legal context of cases indicated it. The recurring pattern of these cases was that a petitioner's interests would be violated if general law (i.e., common law) was applied, but equity rectified the law and protected the petitioner.⁵⁹ This was the meaning conveyed by the term in a number of verb phrases,⁶⁰ which could also be seen as indicating another meaning (equity as a set of rules), as discussed below.

Francis objected to charges of arbitrariness, stating that the chancellor was directed by "Conscience"⁶¹ (capitalised) and "guided by an infallible Monitor within his own Breast." He was adjudicating disputes according to the "original and eternal Rules of Justice."⁶² Was it, though, a call for deciding cases on the basis of natural justice? The answer seems to be affirmative.

Equity as an equivalent of justice was to be found in the majority of Francis's maxims (Nos. 1–6, 11, 12, 14), in particular in: "He that will have Equity

mine according to the known Customs and Statutes of the Realm, although they are sensible, that even is so judging, they do an Act of manifest Injustice."; 3: "the Court of Law, rigidly adheres to its own established Rules, be the Injustice arising from thence, ever so apparent; whereas the Court of Equity will not adhere to its own most established Rules, if the least Injustice arises from thence."

57 Francis, *Maxims of Equity*, 2 (preface): "human Providence is too weak, to make Laws, which shall prove just in all Cases."

58 Francis, *Maxims of Equity*, 3 (preface): "On the other Hand the Judge in a Court of Equity, is bound not to suffer an Act of Injustice to prevail, tho' it be warranted by the Forms and Proceedings of Law; and therefore he moderates the Rigour of several Penalties; relaxes the strict Ties of unreasonable Conditions; aids against unavoidable Losses, clandestine Frauds and the like; and thence it is, that Judgment shall be given in the same Case against a Man on one Side of Westminster-Hall, and quite contrary for him on the other; and yet both these agreeable to Justice."

59 Francis, *Maxims of Equity*, 15 (c. 14: "Sureties shall be compelled in Equity to contribute"), 51 (c. 12: "dismissed the Bill, as containing no Equity"), 17 (case 20: "Equity will in many Cases controul the unequal Distribution"), 53 (c. 1: "But Equity seems not much regard the Consideration"), 55 (c. 2: "Even mistakes in Deeds are amended in Equity").

60 Francis, *Maxims of Equity*, 11 (c. 5: "Equity will place"), 15 (c. 15: "Equity will apportion"), 11 (c. 5) and 16 (c. 19: "Equity will decree"), 34 (c. 11: "Equity will bind"), 52 (c. 15: "Equity will relieve"), 53 (c. 1: "Equity will enforce").

61 There were other references to this notion which show grammatical similarity in the use of both equity and conscience: Francis, *Maxims of Equity*, 6 (c. 2: it would be "against Conscience to insist upon it"), 55 (c. 2: "shall be compelled in Conscience"), 17 (Case of the Earl of Coventry: "bound in conscience").

62 Francis, *Maxims of Equity*, 1–5 (preface).

done to him, must do it to the same person” (No. 1); “He that hath committed Iniquity, shall not have Equity” (No. 2); “It is Equity that should make Satisfaction, which received the Benefit” (No. 4). As the context of the preface indicated, the expression “Courts of Justice” used there referred to the Court of Chancery and those other courts where equity was applied as well.⁶³ In the Case of the Earl of Coventry, which was annexed to the book, both Baron Gilbert and Baron Parke indicated that the inconsistency of common law with natural justice triggered the intervention of the court.⁶⁴ In the preface, Francis drew attention to the injustice that might result from strict observance of the law.⁶⁵ Both terms “Equity” and “Justice” (in capital letters) were set as equivalents in the case studies: “It is the constant Justice of a Court of Equity” and, most plausibly: “ought in Equity and Justice to be esteemed a Marriage.”⁶⁶

Francis rarely used negations of the terms “equity” and “equitable,” but, when he did, they (“iniquity” and “iniquitous” instead of “unequitable”) referred to either an unacceptable act or the status quo: “he shall not have it, because he has committed Iniquity” or to such feature of, for instance, an agreement: “unreasonable and iniquitous.”⁶⁷ One could find negation in the maxim “He that hath committed Iniquity, shall not have Equity” as well. This usage provokes again the thought that the equity Francis was referring to had to be understood as justice.

While the notion of equity law was not yet used, the term “equity” frequently referred to a set of rules: “Rules of Equity.”⁶⁸ These provided for particular doctrines of a substantive or procedural nature⁶⁹ that were applied in the Court of Chancery, which was – at this time – referred to circularly as the

63 Francis, *Maxims of Equity*, 1 (preface).

64 Francis, *Maxims of Equity*, 3–9 (Case of the Earl of Coventry).

65 Francis, *Maxims of Equity*, 2–5 (preface: “an act (manifest) of Injustice”; “Temper of Justice” jeopardised by strictness of law).

66 Francis, *Maxims of Equity*, 2 (preface: “Rules of Equity ... never been found to be unjust”), 26 (c. 5: “failure of justice” if equity do not step in), 60 (c. 4), 62 (c. 2). Note that in the herbal comparison (see text above fn 55) justice was to be achieved by the cooperation of law and equity. By the way, explicit references to the term “fairness” are scarce: Francis, *Maxims of Equity*, 4 (c. 7: “such Bargains may be fair”), 37 (c. 4: “a fair Claim”), 53 (c. 1: “not obtained with all imaginable Fairness”).

67 Francis, *Maxims of Equity*, 4 (c. 7), 6 (c. 2: “For that would be to decree Iniquity”; “the Iniquity of the Bargain”; “the Bargain is plainly iniquitous”).

68 Francis, *Maxims of Equity*, 3–4 (preface), 6 (c. 2 “The Doubtfulness of Equity may be here objected since no Rule is settled”; “common Equity to decree Specifick Performances of Agreements”), 15 (c. 14: “Sureties shall be compelled in Equity to contribute”), 17 (c. 20: “case proper and relievable in Equity”), 23 (c. 7: “sued in Equity”), 31 (c. 2: “otherwise (...) Equity would do a Mischief”), 47 (c. 7: “Shall not be relieved in Equity”), 53 (c. 1: “deviseth the lands, they pass in Equity”; “But Equity seems not much regard the Consideration”), 58 (c. 3: “shall be good in Equity”), 68 (c. 13: “shall be executed in Equity”).

69 Francis, *Maxims of Equity*, 1 (c. 1: “Rebutter in Equity”, “Equity of Redemption”), 11 (c. 5: “Equity will place”), 13 (c. 9: “Bill in Equity”), 25 (c. 2: “Remedy in Equity”), 26 (c. 5: “Cause to complain in Equity”), 28 (c. 7: “Relief in Equity”).

“Court of Equity.”⁷⁰ To this category one can add the maxims “Equity relieves against Accidents” (No. 7); “Equity prevents Mischief” (No. 8); “Equity prevents Multiplicity of Suits” (No. 9); as well as the repeated use of active verb phrases such as “Equity will relieve,” forecasting what the chancellor is going to do in a given case.⁷¹ Very rarely, this meaning was conveyed in an adjective form, as in the index: “Feme, her equitable Estate,” where the focus was on the protection of wives’ interests that was provided particularly in equity as a set of rules applicable in the Court of Chancery.⁷² In multiple cases, that usage allowed equity to be juxtaposed with common law (“Rules of Law and Equity”).⁷³

What is striking is that there are many cases where the term “equity” strongly emphasised the need to treat parties equally.⁷⁴ The book’s index is stocked with items on who with whom had or did not have “equal Equity.”⁷⁵ This usage recalls that the English noun “equity” comes from the Latin *aequitas*. In Antiquity, Roman lawyers emphasised the need to decide like cases alike and to treat individuals equally. As indicated above, Francis’s elaboration on the maxim “Equality is equity” was the longest in his work and used the highest number of cases as an illustration. While the maxim itself “Equality is equity” drew attention to *aequitas*, which is Latin for “equality,”⁷⁶ the phrase “Science of Equity”⁷⁷ recalled Roman jurist Celsus’s statement that law is the art of the good and the equitable (*Ius est ars boni et aequi*, D.1.1.1pr).

Besides the references to equity as a measure allowing like cases to be treated alike, there were others where equity would be weighed as a measure

70 Francis, *Maxims of Equity*, 1ff.

71 Francis, *Maxims of Equity*, 4 (c. 1: “Equity will relieve”), 11 (c. 5), 16 (c. 19) and 21 (c. 1: “Equity will decree”), 14 (c. 12: “Equity will make the Tenant pay”), 15 (c. 15: “Equity will apportion”), 26 (c. 6: “Equity gives Aid”), 34 (c. 11: “Equity will bind”), 53 (c. 1: “Equity looks upon Articles”; “Equity will enforce”). Though cf. text *supra* fn 60.

72 Francis, *Maxims of Equity*, 50 (c. 12: “equitable Excuses”), 11 (Case of the Earl of Coventry: “equitable interest”).

73 Francis, *Maxims of Equity*, 51 (c. 12: “both in Law and Equity”), 55 (c. 2: “For if the Assurance is bad, and yet there is Remedy in Equity, to what purpose is the Common Law?”), 62 (c.2) and 65 (c. 9: “he shall not account in Equity otherwise than at Law”), 68 (c. 8: “Rules of Law and Equity”), 71 (c. 17: “the Surety who was not liable in Law, should be liable in Equity”).

74 Francis, *Maxims of Equity*, 1 (c. 1: “the same Equity for the Mortgagee to have both debts be paid to him”), 11 (c. 6: “there is the same Equity in case of younger Children”), 22 (c. 2: “there is the same Equity if the Purchaser takes”), 53 (c. 1: “equal Equity with either of them”).

75 “Heir, has not equal Equity with a Jointress”; “...with a Purchaser”; “...with a Creditor”; “...with younger Children”; “Heir, has equal Equity with a Volunteer.”

76 There are other concepts of this maxim’s background. Cf. Pound, “On Certain Maxims,” 265 (Aristotelian origin); Smith, “Equity as Meta-Law,” 1125 (“This maxim sounds in fairness”).

77 Francis, *Maxims of Equity*, 4 (preface).

for assessing (valuing) a person's rights, in particular vis-à-vis the other litigant ("Consideration to give the Grantor greater Equity than the Heir").⁷⁸

9.5 Conclusion

The procedural advantages of equity over common law often become obvious when one analyses Francis's cases.⁷⁹ Because of them, the chancellor was able to scrutinise thoroughly the multifaceted context of a case and investigate relations between all involved stakeholders. Thus, equity as a set of rules emerged in the course of the exercise of his powers allowing him to use extraordinary methods of fact-finding.⁸⁰ By these means, the Court of Chancery was capable of making decisions which, judged from either a moral or common sense perspective, were sounder than those of other courts.

The chancellor assessed cases from a *post factum* perspective. As a result, the Court of Chancery was more likely to reach fair decisions than other courts which resorted to *a priori* programmed, straightforward (and thus clumsy) rules of common law. While the latter applied general law, equity came to rectify it – as Aristotle would understand it. Equity law and common law were (and are) designed to perform various functions in the legal system with equity being a meta-law,⁸¹ or a safety net that could be employed to provide exceptions to the law wherever needed.

Francis referred to equity in various ways and one can only wonder whether he was aware of that diversity and, if so, of the sources of particular usages. While in the preface the traces of Aristotle's *epieikeia* prevailed, on the one hand, in the main body of the book equity most often meant either justice or a set of rules applied in the Court of Chancery, on the other. What strikes civil lawyers is the *aequitas*-like pattern that is found occasionally in the *Maxims* and that draws attention to Roman law heritage. At this stage, one can only wonder whether it was a coincidence or a lingering subconscious leftover brought into the Chancery long ago by university teaching when chancellors were still clergymen?

78 Francis, *Maxims of Equity*, 68 (c. 13).

79 Francis, *Maxims of Equity*, 7 (c. 5), 33 (c. 7), 53-54 (c. 1), 72 (c. 17), 17 (Case of the Earl of Coventry).

80 Although at a certain stage in the 17th century the Westminster courts also began to apply these methods, the Court of Chancery's jurisdiction over a certain spectrum of cases was never surrendered.

81 Smith, "Equity as Meta-Law," 1054 ("Equity is law about law, or meta-law"), 1125.

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