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# The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion

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## I. Introduction

The history of equity and the Court of Chancery in the 19th century has been subject to apparently conflicting interpretations. On the one hand, there has been a strong argument that procedural problems, which beset the Court in the 19th century, and the transformation of the Chancery from a discretionary to a precedent based jurisdiction lead to its inevitable decline.<sup>1</sup> The abolition of the Court of Chancery and the introduction of the Judicature System in 1873<sup>2</sup> merely confirmed the demise of Chancery as a source of discretionary justice. On the other hand, some writers on equity have noted that there was a considerable advancement of the equitable jurisdiction by Chancery during the 19th century and that this development greatly enhanced the legal system's overall capacity to support Britain's unprecedented industrial expansion.<sup>3</sup> The purpose of this article is to reconsider the Court of Chancery in the 19th century prior to the implementation of the Judicature System. It will be argued that whilst in some respects Chancery and notions of traditional equity did decline (and this deterioration was enhanced by 19th century attitudes to judicial decision-making), Chancery creatively contributed to the development of equitable doctrines, which still operate today. This simultaneous decline and expansion of equity prior to the implementation of the Judicature System was a complex and paradoxical process, which has been largely overshadowed by the historical emphasis on the new administrative system.<sup>4</sup> Accordingly, it must be emphasised that the effect of Judicature System on equity in the 19th century is beyond the scope of this article.<sup>5</sup>

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1 For example, eminent historians of the law of contract have articulated this view: see Atiyah PS, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979 at 392-393; Horwitz MJ, 'The Rise of Legal Formalism' (1975) 19 *The American Journal of Legal History* 251 at 259-262; Horwitz MJ, 'The Changing Common Law' (1984) 9 *Dalhousie Law Journal* 55 at 61. Although Horwitz examines the rise of contract in the United States, his conclusions about the decline of equity in the 19th century shows that both jurisdictions demonstrated a similar pattern. It is not the purpose of this article to consider the ongoing debate about the Atiyah and Horowitz theses concerning contract in the 18th and 19th centuries — for a critical commentary see for example Simpson AWB, 'The Horwitz Thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 533.

2 Judicature Act 1873 (UK). For a helpful discussion about the Judicature System see Martin JE, *Hambury and Martin: Modern Equity*, 15th ed, Sweet & Maxwell, London, 1997 at 14-16; note also Browne D, *Ashburner's Principles of Equity*, 2nd ed, Butterworths, London, 1933 at 15-19; Meagher RP, Gummow WMC, and Lehane JRF, *Equity Doctrines and Remedies*, 3rd ed, Butterworths, Sydney, 1992 at paras [201]-[207].

3 Martin, n 2 at 14; Browne, n 2 at 38.

4 For example, even the great equity lawyer, Maitland FW, *Equity: A Course of Lectures*, 2nd ed, University Press, Cambridge, 1936 at 15 concentrates on the procedural developments towards and the implementation of the Judicature System to the exclusion of the developments in the substantive law. A similar criticism can be made of other works which consider Chancery in the 19th century including Martin, n 2 at 14-16; Meagher, Gummow and Lehane, n 2 at Chapters 1 & 2; McGhee J, *Snell's Equity*, 13th ed, Sweet & Maxwell, London, 2000 at paras 1-15 — 1-17.

5 There has been much debate about what has been labelled 'fusion fallacy': see for example Martin, n 2 at 20-25; McGhee n 4 at para 1-25; Browne, n 2 at 15-19; Meagher, Gummow and Lehane, n 2 at paras [254]-[263]; Pound DR, 'The Decadence of Equity' (1905) 5 *Columbia Law Review* 20.

In Part II, important factors which support the contention that the Court of Chancery (and consequently equity) declined in the 19th century will be outlined. In Part III, the factors indicating decline in Part II will be evaluated. In Part IV, the transformation of Chancery, and in particular the transition from pure discretion to a precedent-based system, will be considered. It will be argued that whilst the importance of precedent cannot be underestimated as a constraining influence on judicial decision-making, the emergence of a precedent based system did not totally eliminate Chancery's capacity for innovation. Indeed, the existence of a corpus of precedent formed a strong basis for the extension of equitable doctrine. In order to substantiate these claims, in Part V there is a survey of some areas of law where Chancery in the 19th century made a significant and often a lasting contribution to legal doctrine. In Part VI some concluding remarks are made.

## II. The Decline of the Court of Chancery in the 19th Century

It has been well argued that the Court of Chancery (which had been set up in the medieval period)<sup>6</sup> and equity's discretionary approach declined in the 19th century to the extent that neither was ever to recover.<sup>7</sup> This impression of stagnation can be supported by four broad and interrelated features, which appear to overshadow other facets of Chancery during the period.

### 1. *The Procedure of the Court of Chancery*

The operation of the Court of Chancery during the 19th century has been generally portrayed as inefficient and simply behind the times. In particular, it is pointed out that Lord Eldon's Chancellorship (1801–1806 and 1807–1827) contributed greatly to the jurisdictional stasis. For example, Atiyah has commented that:

Partly, if not chiefly, this decline was due to the purely fortuitous nature of Lord Eldon's disposition. Eldon's unwillingness to come to a final decision, his tendency to procrastinate endlessly, had, during his twenty-five year tenure of the Great Seal, combined with the growth of business in the Courts generally, to bring the work of Chancery almost to a grinding halt.<sup>8</sup>

Thus, Lord Eldon's Chancellorship sealed the fate of a Court, which was unable to overcome its inherent malaise. Moreover, despite the appointment of Vice-Chancellors to assist in the mounting number of cases, the downward trend was reinforced by the withdrawal of the Lord Chancellor from decision-making in the mid-19th century.<sup>9</sup> The introduction of the Judicature System assured the demise of Chancery.

There is much contemporary evidence to support this evaluation. The Court's archaic procedures were the subject of numerous complaints to the House of Commons<sup>10</sup> and several important investigations by Parliamentary Commissions.<sup>11</sup> The Court of Chancery was plagued by the presence of unnecessary officials and fees, which increased the cost

6 Meagher, Gummow and Lehane, n 2 at para [104].

7 For example Atiyah, n 1 at 392–393.

8 Atiyah, n 1 at 393.

9 Note 8.

10 Kerly DM, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, University Press, Cambridge, 1890 at 270.

11 In particular, the Commissions Appointed in 1824 and 1850 which were charged with the responsibility of making recommendations for the improvement of the procedural process. For helpful discussions of the involvement of Lord Eldon see Melikan RA, *John Scott Lord Eldon, 1751–1838: The Duty of Loyalty*, Cambridge University Press, Cambridge, 1999 at Chapter 16. For a detailed discussion of the complex reforms recommended to and undertaken by Parliament see n 10 at 272–289.

of proceedings<sup>12</sup> and a cumbersome procedure (particularly in the taking of evidence).<sup>13</sup> In the early 19th century, the judicial responsibilities of the Lord Chancellor comprised the Speakership of the House of Lords as well as sitting as a judge on the Court of Chancery.<sup>14</sup> It was not possible for one person to discharge both functions effectively.<sup>15</sup> All these lamentable defects combined to produce a Court which lacked the capacity to discharge expeditiously the burdens placed on it.<sup>16</sup> In addition, Lord Eldon's penchant for procrastination, particularly when seeking the appropriate precedent, was well known.<sup>17</sup> Jeremy Bentham sarcastically referred to him as 'Lord Endless.'<sup>18</sup> Moreover, Lord Eldon refused to accept significant alterations to the office of Chancellor or the practice of the Chancery because he genuinely believed that the system at the time served the country well.<sup>19</sup> Charles Dickens immortalised the stagnation of Chancery in *Bleak House*<sup>20</sup> published in 1853 well after the conclusion of Lord Eldon's Chancellorship. Despite the various legislative reforms, which took place well before the introduction of the Judicature System, the ambience of decadence, corruption and stuffy inactivity would haunt Chancery and overshadow its doctrinal contribution to 19th century English law.<sup>21</sup>

## 2. *The Decline of Discretion and the Rise of Precedent*

By the time of the implementation of the Judicature System, traditional equity had declined. Traditional equity, as it had been articulated and practised in the formative Medieval and Tudor periods was different from the common law.<sup>22</sup> First, equity traditionalists believed that natural law still remained an important source of influence and justification for a decision.<sup>23</sup> Secondly, the Aristotelian function of equity was to ameliorate the harshness of the common law. The generality of the common law meant that its insensitive application could lead to injustice in a particular case. In equity, relief was framed in the light of the particular circumstances of the case.<sup>24</sup> Thirdly, each case

12 Note 10 at 267; Baker JH, *An Introduction to English Legal History*, 3rd ed, Butterworths, London, 1990 at 129–130

13 Note 10 at 267–270. There was the well-known *Jennings* litigation which began in 1798 and lasted eighty years: see Polloczek DP, *Literature and Legal Discourse: Equity and Ethics from Sterne to Conrad*, Cambridge University Press, Cambridge, 1999 at 171.

14 Melikan, n 11 at 295; Baker, n 12 at 128.

15 Melikan, n 11 at 297–298.

16 Note 10 at 272.

17 Melikan, n 11 at 307; Baker, n 12 at 130.

18 Melikan, n 11 at 313.

19 Melikan, n 11 at 314–315. According to Melikan (at 355), Eldon was 'hostile to change.'

20 Dickens C, *Bleak House*, 3rd ed, Collins, 1953 at Chapter 1. In the first chapter, Dickens set an atmosphere scene of '(f)og everywhere' and the Court of Chancery is 'at the very heart of the fog.' In a very famous passage he describes the Chancellor with 'a foggy glory round his head' and counsel 'mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents.' Later, he states that 'there is not an honourable man amongst its practitioners who would not give — who does not give — the warning, 'Suffer any wrong that can be done you, rather than come here!' Dickens had personal experience of the problems associated with Chancery procedure. In 1844, he sued publishers for plagiarism and breach of copyright and was required to pay more in legal fees than he obtained in compensation. Even in 1850, *The Westminster Review* complained about delays and huge costs: Polloczek, n 13 at 133 and 171.

21 Problems of delay also affected Chancery Courts in the colonies: see for example, Smith ML, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72 *Australian Law Journal* 799; Brown E, 'Equitable Jurisdiction and the Court of Chancery in Upper Canada' (1983) 21 *Osgoode Hall Law Journal* 275.

22 For a helpful discussion of the traditional conception of equity in English Chancery practice see Kroger JR, 'Supreme Court Equity: 1789–1815, and the History of American Judging' (1998) 34 *Houston Law Review* 1425 at 1433–1436.

23 See for example, Selden Society, *St German's Doctor and Student*, London, 1974 vol 91 at 97; Earl of Oxford's Case (1612) 1 Ch Rep 1; 21 ER 485.

24 *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485. For a discussion of the Aristotelian basis of Equity see Zahnd EG, 'The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law' (1996) 59 *Law and Contemporary Problems* 263.

was decided on its own merits without recourse to binding precedent. A commentator has succinctly stated:

There was no abstracting methodology, no doctrine of strict binding precedent, and, accordingly, no commitment to the values of continuity, consistency, uniformity and predictability which support and justify that doctrine at common law. Rules were not abstracted from previous cases in Chancery, and justice between the parties could therefore be done in consonance with the Chancellor's conscience without fear of distorting any rule or introducing a new and dangerous precedent.<sup>25</sup>

The result was that there was little record of decisions before the middle of the 17th century.<sup>26</sup> Fourthly, linked to the discretion of the judge and the mitigation of the harshness of the common law, there was the fundamental principle of equity, 'conscience.' Whilst early chancellors were influenced by canon law, a later concept (increasingly secularised) developed, ensuring that a defendant acted in accordance with good conscience appropriate to the situation.<sup>27</sup> The extent of Chancery's jurisdiction was summarised in a couplet attributed to Thomas More<sup>28</sup> that:

These three give place in Court of conscience  
Fraud, accident and breach of confidence<sup>29</sup>

Finally, equity was administered in a separate court, the Court of Chancery, which continued to exist until the implementation of the Judicature System<sup>30</sup> and which according to Atiyah 'marked the virtual demise of Equity as a separate source of discretionary justice.'<sup>31</sup>

It is true that by the mid-19th century, traditional equity had considerably waned. Judicial discretion and idiosyncratic notions of justice and mercy gave way to the application of immutable and fixed principles.<sup>32</sup> Judges increasingly eschewed discretion in favour of the application of fixed precedent, even if the result appeared harsh. This transformation of Chancery's decision-making had begun under the leadership of Lord Nottingham in the 16th century<sup>33</sup> but Lord Eldon was a central figure in the further decline of traditional equity in the 19th century. He emphasised the importance of principle and precedent in the operation of Chancery, sometimes at the expense of judicial efficiency:

The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles . . . Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot.<sup>34</sup>

In this often quoted statement from *Gee v Pritchard* commentators have identified the express rejection of traditional equity in favour of a system bound by clear rules and

25 Loughlan P, 'The Historical Role of the Equitable Jurisdiction' in Parkinson P (ed) *The Principles of Equity*, LBC Information Services, Sydney, 1996 at para [103].

26 Note 25.

27 *Earl of Oxford's Case* (1615) 1 Ch Rep 1 at 7; 21 ER 485 at 486.

28 Ricketson S, *The Law of Intellectual Property*, Law Book Co, Sydney, 1984 at para [42.3].

29 Note 28; Evershed, Sir R, *Aspects of English Equity*, Magnes Press, Jerusalem, 1954 at 18. The couplet was quoted by Megarry J in *Coco v AN Clark (Engineering) Ltd* [1969] RPC 41 at 46.

30 Meagher, Gummow and Lehane, n 2 at para [101].

31 Atiyah, n 1 at 671–672. Note in this regard that Atiyah also cites in support Horwitz MJ, *The Transformation of American Law*, Oxford University Press, New York, 1977 at 265.

32 Atiyah, n 1 at 671.

33 Loughlan, n 25 at para [106]. These were highly strategic and successful moves, because they addressed earlier criticisms of the jurisdiction and ensured its survival for a long period. Indeed it has been suggested that reduction of discretionary power, the adherence to precedent and the objectification of conscience lead to a 'constitutional calm' in England: see Vernon Valentine Palmer, 'May God Protect Us from the Equity of Parlements': Comparative Reflections on English and French Equity Power' (1999) *Tulane Law Review* 1287 at 1307.

34 *Gee v Pritchard* (1818) 2 Swans 402 at 414; 36 ER 670 at 674.

precedent.<sup>35</sup> Certainly, there is evidence that Lord Eldon took a conservative approach to judicial decision-making. He applied the substantive law, as he understood it operated<sup>36</sup> and believed that changes in law ought to be undertaken by the Parliament.<sup>37</sup> He read contracts strictly in accordance with the parties' express intentions.<sup>38</sup> Where there was no allegation of fraud in a commercial matter, he insisted on the existence of a precedent supporting a party's contention.<sup>39</sup> Finally, he also undertook the systematisation and streamlining of principles in order to give them an internal coherence and greater certainty. For example in *Morice v Bishop of Durham*,<sup>40</sup> he hardened the distinction between trust and bare powers, and held that a trustee could not exercise a trust power where all the objects of the trust power were unascertainable.<sup>41</sup>

### 3. *The Rise of Laissez-faire Capitalism and Will Theory*

It has been argued that laissez-faire capitalism of the age led to greater calls for individual autonomy at the expense of judicial intervention. Increasingly in the 19th century, courts were reluctant to impose liability on the basis of morality or equity or interfere with the expressed intentions of individuals.<sup>42</sup> Instead, 'will theory' which progressively dominated judicial decisions, emphasised that obligation and liability were grounded in a person's intention and promise, often in the form of a contract. This reasoning did temper Chancery's tendency to provide relief in situations where there was a 'bad bargain'. Whereas in the 18th century, Chancery would intercede in order to redress the making of a bad bargain (such as notorious catching bargain in which a young heir would obtain finance on exorbitant terms),<sup>43</sup> the Court was less likely to do so in the 19th century.<sup>44</sup> Accordingly, Chancery's proactive approach to the fairness of economic exchange revealed in such doctrines as relief against penalties<sup>45</sup> and forfeiture<sup>46</sup> declined.

### 4. *The Rise of the Treatise*

Finally, there were the determined efforts of textbook writers to either fit law, including equity, into a pre-existing schema or to deduce a scientific logic from it.<sup>47</sup> As Horwitz succinctly states:

35 See for example Loughlan, n 25 at para [107] fn 60; Browne, n 2 at 35; Martin, n 2 at 13–14.

36 See for example *Glaister v Hewer* (1802) 8 Ves Jun 195; 32 ER 329.

37 Melikan, n 11 at 163.

38 Note here the decision of Lord Eldon in *Astley v Weldon* (1801) 2 Bos & Pul 346 at 351; 126 ER 1318 at 1321–1322 whilst still Lord Chief Justice of the Common Pleas. In that case he held that except in cases of evident inequality of bargaining power, sums which were nominated by parties as payable on breach should be treated by courts as damages assessed and agreed by the parties and ought to be characterised as damages and not as a penalty. This case set the beginning of a period in which the role of the equitable doctrines of penalties and forfeiture were limited.

39 For example, in *Grierson v Eyre* (1804) 9 Ves Jun 341; 32 ER 634 the King's Printer in Ireland insisted that it had the right to print and distribute the copies of Statutes for Ireland and that the King's Printer in England ought to account to it for copies printed and distributed in Ireland. However, Lord Eldon refused the application of the plaintiff because as he stated (at 347; 636) 'whatever natural Equity there might be upon the subject, there was no such Equity as this Court can administer.' Note also in this regard *Burrough v Elton* 11 Ves Jun; 32 ER 998; *Glaister v Hewer* (1802) 8 Ves Jun 195; 32 ER 329.

40 (1805) 10 Ves 522; 32 ER 947.

41 For a helpful discussion of this decision see Alexander GS, 'The Transformation of Trusts as a Legal Category, 1800–1914' (1987) 5 *Law and History Review* 303 at 333–336.

42 See for example Atiyah, n 1 at 213.

43 For a helpful discussion of catching bargains as the foundation of the modern doctrine of unconscionable dealing see Meagher, Gummow and Lehane n 2 at paras [1602]; [1608].

44 Although there are a number of 19th century English cases — see Meagher, Gummow and Lehane n 2 at [1601], the doctrine against unconscionable dealings fell into decline in the United Kingdom whereas in Australia it is still actively applied: see *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

45 Rossiter CJ, *Penalties and Forfeiture*, Law Book Co, Sydney, 1992 at 3–12.

46 Note 45 at 20–23.

47 A.W.B. Simpson has described this process in relation to contract in 'Innovations in Nineteenth Century Contract Law' (1978) 91 *The Law Quarterly Review*, 247 at 250–257 and 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *The University of Chicago Law Review* 632.

The subjection of Equity to formal rules was a prominent article of faith within the orthodox nineteenth century movement to conceive of law as science. Indeed, Equity was regularly attacked by the treatise writers as inherently discretionary and 'political'.<sup>48</sup>

Although, Horwitz's comment was made in the light of the American experience, he identified a trend which was strong in Britain as well. As Alexander has illustrated,<sup>49</sup> the law of trusts was subject to treatises, which categorised and rationalised trusts with apparently great success.<sup>50</sup> For example, Lewin's *Practical Treatise of The Law of Trusts*, commenced with an extensive tabular or diagrammatic analysis of all the parts of the law of trusts<sup>51</sup> before a detailed examination and internal classification of trusts. This highly schematic approach continued throughout the 19th century<sup>52</sup> and was adopted by Costigan in his classification of trusts in the early 20th century.<sup>53</sup> Yet as Yale has pointed out, the quest for scientific order was at the expense of the real law.<sup>54</sup> Sometimes schemes were borrowed from ancient legal systems and artificially imposed on pre-existing equity in order to substantiate the view that equity, like the common law, was 'scientific'.<sup>55</sup> Later, the schemes were critically reappraised in the 20th century and the systematic structure began to unravel.<sup>56</sup>

### III. Evaluation

When considering the development of equitable principles during the early years of the US Supreme Court, Kroger has perceptively stated that:

... epochal generalizations about judicial style, spanning lengthy fifty-year periods and purporting to explain the behavior of a broad range of American... courts, do not hold up well when subjected to precise, in-depth analysis. A more realistic approach to legal history would acknowledge that different styles of legal reasoning surface during the same time frame in different contexts and courts.<sup>57</sup>

The same can be said about the Court of Chancery. Despite the persuasiveness and helpfulness of the theory that Chancery, and consequently equity, declined prior to the introduction of the Judicature System, the main weakness of the theory remains that it portrays only part of the picture and does not address the paradoxical nature of Chancery in the 19th century. More particularly, the inadequacies of this interpretation are discernible at two levels.

48 Horwitz MJ, 'The Rise of Legal Formalism' (1975) 19 *The American Journal of Legal History* 251 at 263.

49 Alexander, n 41.

50 See for example a discussion of the 19th century tradition of the treatise in relation to the trust see Waters DMW, 'The Role of the Trust Treatise in the 1990s' (1994) 59 *Missouri Law Review* 121; Alexander, n 41.

51 Lewin T, *Practical Treatise of the Law of Trusts*, 5th ed, 1867 at vii-x.

52 For a helpful discussion see Alexander, n 41 at 336-340.

53 Costigan G, 'The Classification of Trusts as Express, Resulting and Constructive' (1914) 27 *Harvard Law Review* 437.

54 Yale D, 'Trichotomy of Equity' (1985) 6 *Journal of Legal History* 194.

55 Note 54.

56 Alexander n 41 at 322. Alexander has argued that Lord Eldon's decision in *Morice v Bishop of Durham* (1805) 10 Ves 522; 32 ER 947 transformed flexible principles for determining whether a power was a trust power or a mere power into a formal rule requiring list certainty. The result was that the intentions of donors under trusts were sacrificed in an effort to provide a legally certain rule for distinguishing powers. In the 20th century, the artificially 'sharp distinction': was reappraised by the House of Lords in *Re Baden Deed Trusts* [1971] AC 424; [1970] 2 All ER 228 and this Court re-established a degree of flexibility. See Austin RP, 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66. For an interesting discussion of Lord Eldon's conservative restrictions on the capacity of the Court of Chancery to order damages as a remedy in lieu of specific performance which were subsequently recorded as textbook writers as the Chancery's lack of jurisdiction to do so and for which the Parliament provided statutory powers under s 2 of the *Chancery Amendment Act* 1858 (UK) see: McDermott PM, *Equitable Damages*, Butterworths, Sydney 1994 at paras [1.5]-[1.6]

57 Kroger, n 22 at 1480.

### 1. Reform of the Court System

First, whilst the procedure of the Court of Chancery was in great need of urgent reform, its defects were part of a wider malaise involving the legal system generally. A brief overview of the wide-ranging reforms to courts and procedure in the 19th century reveals that the problems experienced by Chancery were not peculiar to that Court. Rather, they were symptomatic of a legal system fashioned in earlier eras unable to keep pace with economic, social and philosophical developments. In the common law courts, old procedural practices also resulted in slow and increased costs.<sup>58</sup> Prior to the passing of the *Judicature Act*, there were substantial and broad ranging reforms of the common law including the abolition of old forms of action<sup>59</sup> and the simplification of the system of pleadings.<sup>60</sup> The separation of courts was addressed. The *Common Law Procedure Act* 1854 enabled the courts of common law to grant injunctions and to plead defences on equitable grounds and the *Chancery Amendment Act* 1858 conferred jurisdiction on Chancery to award damages. The ancient equity jurisdiction of the Exchequer was transferred to Chancery in 1841.<sup>61</sup> Appeals from Ecclesiastical Courts and the Court of Admiralty were transferred to the Privy Council.<sup>62</sup> New courts of Divorce and Matrimonial Causes, and Probate were created in 1857.<sup>63</sup> Thus, the implementation of the Judicature System was the culmination of nearly a century of adjustments to the court system to make it more efficient and access less costly. Whilst one of the effects of the Judicature System was that Chancery was no longer a separate court but simply a separate division, significant aspects of its procedural apparatus were retrieved and adapted in the new Judicature System.<sup>64</sup>

### 2. Evidence of the Inventiveness of Chancery and an Expansion of Equity

Secondly, there has been a tendency to emphasise Chancery's procedural problems and the implementation of the Judicature System at the expense of developments in the substantive law. However, it has been suggested that there were considerable developments in equity during the 19th century. Martin<sup>65</sup>, restating comments in earlier editions in *Hanbury & Maudsley's Modern Equity*,<sup>66</sup>, succinctly encapsulated this view:

The nineteenth century was a period of great development of the equitable jurisdiction, based upon the principles established by the end of Lord Eldon's tenure. The enormous industrial, international and imperial expansion of Britain in this period necessitated developments in equity

58 Note 10 at 265.

59 *Uniformity of Process Act* 1832; *Common Law Procedure Act* 1852.

60 Note 10 at 275. Significant changes were made in the law of evidence: Windeyer WJ, *Lectures on Legal History*, 2nd ed, Law Book Co of Australasia, Sydney, 1957 at 285.

61 Note 10 at 277.

62 Note 10 at 267–277.

63 Note 62.

64 Baker n 12 at 130. It has been pointed out that it has not been adequately appreciated that modern procedure was equitable in derivation: see Gummow WMC, *Change and Continuity*, Oxford University Press, Oxford, 1999 at 38–39. For example, unlike the modern system, at common law there was no general power to order the discovery of documents and discovery by interrogatories. At common law, the case for each party depended on the formulation of pleadings which became so inflexible that it became difficult for parties to know what were the real issues which they had to consider. Instead, equity intervened and rectified the defects of the legal process. If a plaintiff wished to exercise general discovery, he would temporarily stay the proceeding in common law and proceed by bill in equity for the purpose of discovering the defendant's case. Clearly, this prolonged the overall proceedings. However, such extensions were attributable to the defects in the common law procedure and the artificial separation of various courts. Nevertheless, discovery and interrogatories were utilised extensively in litigation. Accordingly, these equitable devices were incorporated into the legal processes of the Judicature System: Simpson SD, Bailey DL and Evans EK, *Discovery and Interrogatories* Butterworths, Sydney, 1984 at 6–8. For an interesting consideration of the impact of equity on the modern trial process see: Gibson G, 'Fusion or fission' (2000) 20 *Australian Bar Review* 70.

65 Martin, n 2 at 14.

66 See for example Maudsley RH, *Modern Equity*, 9th ed, 1969 at 12–13.

to deal with a host of new problems. The accumulation of business fortunes required rules for the administration of companies and partnerships; and the change in emphasis from landed wealth to stocks and shares necessitated the development of new concepts of property settlements.<sup>67</sup>

Unfortunately Martin did not refer to specific cases or rules to support her assertions.<sup>68</sup> Instead, she proceeded to consider the procedural innovations leading to the implementation of the Judicature System.<sup>69</sup> However, the statement still challenges two assumptions underpinning the view that Chancery and equity simply declined. One assumption is that Lord Eldon was only instrumental in the hardening of equitable rules with the consequence that Chancery became a moribund jurisdiction. Far from portraying Lord Eldon's stewardship as retrogressive, Martin has suggested that Lord Eldon settled a framework in which both the Court of Chancery and equitable principles could contribute towards the industrial progress of Britain. In the same vein, Holdsworth praised Lord Eldon following in the doctrinal footsteps of Lord Hardwicke.<sup>70</sup> Holdsworth noted:

The thorough and conscientious work, coupled with a vast legal knowledge, which he applied to the decision of the cases which came before him, completed the systematisation of equity.<sup>71</sup>

Therefore, it appears that Lord Eldon's systematic approach to equity may, in the long term, have also been constructive and stabilising, despite the long delays at the Court of Chancery.

Martin's statement has also implicitly challenged the view that the influence of will theory, the growth of precedent and legal formalism led to a contraction in Chancery's jurisdiction and capacity to innovate. There has been a tendency to project the rigid formalism evident at the end of the 19th century on Chancery in the first half of the 19th century.<sup>72</sup> Instead, it appears that even on a modest level, Chancery remained a creative and proactive institution. In a country where there was unprecedented industrialisation and a burgeoning empire, fresh ways of undertaking business required new commercial vehicles and rules. As will be illustrated below, judicial decision-making in Chancery was more complicated than simply enforcing the intention of parties to contracts and strictly following earlier higher authorities. On some occasions, Chancery made bold policy decisions and set the foundation for new and progressively influential doctrines. Therefore, it is necessary to understand how the Court of Chancery creatively used precedents and in what circumstances judges may have actively engaged in the development and extension of equitable doctrines.

It has been generally accepted that the rise of the legal treatise simply had a deleterious effect upon Chancery and equitable reasoning. Equity, like law was rationalised into a series of 'scientific' and immutable rules contained in legal treatises which were based on authoritative precedent. However, notwithstanding the weaknesses of the treatise method<sup>73</sup> and the restraints of precedent, the process of systematisation ensured the survival and durability of equitable principles, recorded the reasoning and outcome of cases and provided the foundation for future doctrinal expansion. Without the legal treatise and recourse to earlier precedents, equitable principles may not have had the same influence and impact after the implementation of the Judicature System because there would not have been such a reliable body of material upon which judges could have referred for guidance.<sup>74</sup>

67 Martin, n 2 at 14; note also Browne n 2 at 38.

68 A similar criticism can be made of FW Maitland's discussion n 4 at 14.

69 Martin, n 2 at 14–15.

70 Holdsworth WS, *Sources and Literature of English Law*, Clarendon Press, Oxford, 1925 at 198.

71 Note 70.

72 An excellent example of such rigidity is the judgment of Wills J in *Allen v Flood* [1898] AC 1 at 46 where he states that 'any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right.'

73 Above, pp 202–203 of this article.

74 Note Loughlan, n 25 at para [107]. Indeed traditional equity lawyers have contended that notwithstanding the body of precedent and well established equitable principles which existed before the implementation of the Judicature System, there was the unnecessary confusion engendered by the 'fusion fallacy': see for example Meagher, Gummow and Lehane, n 2 at paras [254]–[263]; Pound, n 5.



#### IV. Decision-making in the Court of Chancery in the 19th Century

In the light of the arguments raised in Part III above, it is necessary to reconsider Chancery in the 19th century from a doctrinal perspective. In order to achieve a balanced evaluation, two preliminary matters require examination, namely:

- (i) The nature and extent of a precedent based system in Chancery prior to and at the beginning of the 19th century; and
- (ii) The methodology applied by Chancery judges (such as Lord Eldon) to determine a case.

##### 1. Precedent in Chancery

Commentators have argued that from the time of the Chancellorship of Lord Nottingham, Chancery began to objectify the 'conscience' of equity<sup>75</sup> and utilise precedent to set the parameters of Chancery's jurisdiction.<sup>76</sup> However, it must be emphasised that this process of transition, doctrinal systematisation and development of precedent continued into the 19th century.<sup>77</sup>

Whilst the significance of precedent based system at the beginning of the 19th century cannot be understated, it cannot be assumed that a complete modern system of precedent operated. According to the modern principle of stare decisis:

Every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts . . . are bound by their previous decisions.<sup>78</sup>

Cross and Harris have pointed out that the modern rule was the outcome of the hardening of precedent from the mid-19th to the early 20th century, when law reporting had attained an excellent level of professionalism and the hierarchy of courts had become settled.<sup>79</sup> During the 17th and 18th centuries, the system of precedent operating in Chancery was, compared with modern times, still in a rudimentary state. The reporting of Chancery decisions in the 18th century and the early 19th century was often unsatisfactory and the availability of the reports insufficient to meet the rising demand. Therefore, manuscript reports and Registrar Books were used, when available, instead.<sup>80</sup> Moreover, whilst appeal to the House of Lords was possible,<sup>81</sup> the original structure of Chancery did not foster a hierarchy of precedent. In 1800 a single Chancellor and a Master of the Rolls decided the cases.<sup>82</sup> It was only in 1813 that the office of Vice-Chancellor was created and in 1851 that the Chancery Court of Appeal was set up.<sup>83</sup> Thus, as Winder has pointed out, it was only in the later half of the 19th century that the vexing question of the status of a single decision made in a higher court in the hierarchy was addressed directly and fully in the Court of Chancery.<sup>84</sup>

A modern doctrine of stare decisis also requires a corpus of reliable precedent. It is true that important doctrines had been authoritatively established before the 19th century. Indeed, Kerly has illustrated the establishment of doctrines prior to the 19th century which were influential in that period.<sup>85</sup> However, Chancery was still engaged in a precedent building exercise. As Winder points out, sometimes Chancery was faced with gaps in the

75 *Cook v Fountain* (1676) 3 Swans App 585 at 600; 36 ER 984 at 990.

76 Winder WHD, 'Precedent in Equity' (1941) 57 *The Law Quarterly Review* 245 at 249; Browne n 2 at 35–38; Loughlan n 25 at para [107].

77 Martin, n 2 at 12–13; Loughlan, n 25 at para [107]; Meagher, Gummow and Lehane, n 2 at para [115].

78 Cross R and Harris JW, *Precedent in English Law*, 4th ed, Clarendon Press, 1991 at 6.

79 Note 78 at 24.

80 Winder, n 76 at 249.

81 Such a right was jealously guarded: see Meagher, Gummow and Lehane, n 2 at para [206].

82 Jacobs IH, 'Civil Procedure since 1800' in Allsop P (ed) *Then and Now 1799-1974: Commemorating 175 years of Law Bookselling and Publishing*, Sweet & Maxwell, London, 1974, 159 at 169.

83 Baker, n 12 at 131; McGhee n 4 at para 1–12.

84 Winder, n 76 at 263.

85 Note 10 at 184–263.

law in the sense that, despite the use of reported decisions and records, there were questions about the applicability of a particular rule to a new situation.<sup>86</sup> Alternatively, on other occasions there were situations where there was no reported precedent to follow or even consider. The question had not been determined or, even if it had been considered and determined previously, the report of the case may not have been available. For example, Martin has pointed out that even in the 19th century Lord Eldon faced situations for which there were no pre-existing rules which he could follow.<sup>87</sup> Such problems would have required the Court to explore a variety of reasoning processes in order to sustain the legitimacy of its decision-making in the transitional period. As will be shown, these reasoning processes did not simply vanish as equity's volume of reported decisions increased. Chancery would utilise these earlier approaches, enabling and enhancing Chancery's doctrinal contribution to 19th century case law. Accordingly, it is inaccurate to portray Chancery in the 19th century as blindly constrained by an immutable body of precedents. By necessity, Chancery continued the process of precedent building by not only recording equitable doctrine, but by sometimes creating new equitable doctrines. In *Re Hallett's Estate*,<sup>88</sup> a significant case after the implementation of the Judicature System, Jessel MR reminded lawyers that:

... if we want to know what the rules of Equity are, we must look of course rather to the more modern than the more ancient cases.<sup>89</sup>

And, a leading author in equity, Ashburner perceptively pointed out:

Down to the Judicature Act the court retained and exercised the power of enlarging its jurisdiction by the application of its established principles to new combinations of facts. Some of its most important doctrines date from the nineteenth century.<sup>90</sup>

## 2. Judicial Decision-making in Chancery

In order to understand how Chancery both adhered to precedent and constructively used it to expand equitable doctrines, it is helpful to examine briefly the respective approaches of two eminent Chancellors during the transitional period, Lord Hardwicke and Lord Eldon. Both judges acknowledged the need for responsible decision-making and extensively applied and referred to precedent. However, both were also acutely aware of Chancery's traditional protective jurisdiction and its role in preventing fraud and breach of confidence. Therefore, judicial decision-making became a complex amalgam of varied approaches to different situations.

Whilst Lord Hardwicke's Chancellorship predates the period under consideration, an analysis of his judgments is a useful introduction to Lord Eldon. Lord Hardwicke was committed to the logical, conservative and authoritative development of equity.<sup>91</sup> However, it is equally clear that Lord Hardwicke did not simply and slavishly adhere to a single precedent, utilising instead various judicial decision-making approaches.<sup>92</sup> It is true that in relation to property interests and the law of trusts, Lord Hardwicke was disinclined to depart from established rules and practices as evidenced by cases because this would have a destabilising effect on established norms of legal practice.<sup>93</sup> In these matters, Lord Hardwicke strictly adhered to precedent. However in contrast, Lord Hardwicke, extensively

86 Winder, n 76 at 252–253.

87 Martin, n 2 at 13.

88 (1880) 13 Ch D 696.

89 Note 88 at 710.

90 Browne, n 2 at 38.

91 Winder, n 76 at 251.

92 Croft C, 'Lord Hardwicke's Use of Precedent in Equity' (1989) 5 *Australian Bar Review* 29.

93 Note 92 at 50. Lord Hardwicke's predecessors had also adopted this general approach as well: see Winder, n 84 at 255.

applied a flexible judicial discretion in cases where fraud was proved<sup>94</sup> or where the jurisdiction of equity was called upon to protect vulnerable persons such as lunatics<sup>95</sup> and infants.<sup>96</sup> Previous decisions were not regarded as binding, but at most they were cited as a means of establishing broad principle and as useful factual analogies.<sup>97</sup> The principle (rather than the previous authorities) was the influential factor.<sup>98</sup> Therefore, Lord Hardwicke would even refer to and follow what he regarded as a well-established principle without finding it necessary to cite cases in support.<sup>99</sup> Equally important, Lord Hardwicke would reason by analogy, particularly in relation to the construction of documents,<sup>100</sup> the interpretation of statutes<sup>101</sup> and situations where he considered that the facts were such that they were materially similar to the facts of a previous decision and thus, useful examples of past approaches.<sup>102</sup> The use of analogy was a helpful method of creating consistency in decision-making, legitimising what was otherwise a novel decision or effectively extending the law to a new factual situation. In short, as Croft has argued although the existence of precedents was fundamental in Lord Hardwicke's judicial decision-making, Lord Hardwicke retained a degree of flexibility, particularly in cases which did not involve the application of property law or trust rules.

Surprisingly, Lord Hardwicke's approaches were reflected in some of Lord Eldon's judgments. In comparison to Lord Hardwicke, Lord Eldon has had a reputation for establishing a *rigor aequitatis*<sup>103</sup> in which equitable rules were as fixed and immutable as that of the common law. However, recent investigations of his decisions have indicated that Lord Eldon's attitude was more complex and subtle than generally supposed. In a helpful article,<sup>104</sup> Klinck has shown that Lord Eldon's statement in *Gee v Pritchard*,<sup>105</sup> which is quoted above<sup>106</sup> does not comprehensively disclose Lord Eldon's approach to all aspects of judicial decision-making.<sup>107</sup> He has argued that Lord Eldon's explicit statements demonstrate that Lord Eldon did believe that equity and common law remained distinct jurisdictions,<sup>108</sup> there were occasions where there was a need to exercise a judicial discretion,<sup>109</sup> the concept of conscience had a role to play in equity<sup>110</sup> and Chancery had a moral jurisdiction.<sup>111</sup> Klinck has noted that Lord Eldon was 'prepared to invoke 'looser' notions, at least on occasions, and in ways not dissimilar from say, Lord Hardwicke'<sup>112</sup> and concludes that:

94 Note 92 at 54–55; see for example *Hutchins v Lee* (1737) 1 Atk 447; 26 ER 284; *Man v Ward* (1741) 2 Atk 228; 26 ER 541.

95 Note 92 at 55–56; see for example *Ex parte Ludlow* (1742) 2 Atk 407; 26 ER 645; *Sergeson v Sealey* (1742) 2 Atk 412; 26 ER 648.

96 Note 92 at 56–57; see for example: *Hill v Turner* (1737) 1 Atk 515; 26 ER 326; *Butler v Freeman* (1756) Amb 301; 27 ER 204. In a famous letter to Lord Kames, Lord Hardwicke unequivocally distinguished his approach to fraud from property and trust transactions: see generally Sheridan LA, *Fraud in Equity: A Study in English and Irish Law*, Sir Isaac Pitman & Sons Ltd, London, 1957 at 1–2.

97 Note 92 at 36 and 52–53. In *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 155–7; 28 ER 82 at 100–101, a classic statement of the kinds of fraud which equity would address, Lord Hardwicke did not set down precise rules, but general categories which Chancery in the 19th century and generations since have used as bases for classifying, explaining and expanding the scope of equitable fraud: see generally Sheridan, n 96.

98 Note 92 at 41–44; see for example *Hall v Terry* (1738) 1 Atk 502; 26 ER 317.

99 See for example *Durant v Prestwood* (1738) 1 Atk 454; 26 ER 289.

100 *Leeke v Bennett* (1737) 1 Atk 470; 26 ER 300.

101 *Stanley v Stanley* (1739) 1 Atk 455; 26 ER 289.

102 Croft n 92 at 40.

103 McGhee n 4 at para 1–13. See also n 10 at 181–182; Windeyer, n 60 at 268–269.

104 Klinck DR, 'Lord Eldon on 'Equity'' (1999) 20 *Journal of Legal History* 51.

105 (1818) 2 Swans 402 at 414; 36 ER 670 at 674.

106 Above p 201 of this article.

107 Klinck n 104 at 66.

108 Note 104 at 53–54.

109 Note 104 at 55–56.

110 Note 104 at 57–59.

111 Note 104 at 61–63.

112 Note 104 at 61.

... in different contexts, he was prepared to adopt different kinds of more or less conventional discourse about equity — ranging from allusions to ‘natural justice’ to insistence upon ‘fixed rules’ — and in this he was not atypical.<sup>113</sup>

Unfortunately, Klinck has not fully categorised the different contexts nor explained why Lord Eldon was not atypical in his approach. However, it is submitted that Lord Eldon, like Lord Hardwicke, distinguished cases which involved contractual and property matters (sometimes with unusual consequences)<sup>114</sup> requiring adherence to strict precedent from those which involved allegations of fraud or breach of confidence<sup>115</sup> or the protective jurisdiction of equity.<sup>116</sup>

Lord Eldon did not believe that he had the constitutional capacity to change the law. In *Gee v Pritchard*,<sup>117</sup> Lord Eldon emphasised the obligation to restrict the exercise of judicial discretion in civil cases. However, this did not mean that a judge could never exercise judicial discretion. Lord Eldon believed that judicial discretion could be exercised in criminal cases<sup>118</sup> and that in civil law a judge ought to exercise discretion in order to redress fraudulent behaviour. In *Pulteney v Warren*<sup>119</sup> Lord Eldon said:

If the application is founded in fraud, or concealment, or misrepresentation, I am not prepared to say, a Court of Equity might not find the means of relief in that sort of case . . .<sup>120</sup>

Indeed, on occasions, Lord Eldon took a proactive approach to fraud using various justifications for judicial intervention. For example, in *Ex parte Yonge*<sup>121</sup> Lord Eldon reasoned analogously. A partner of a firm had fraudulently, without consent of his partners, obtained credit for the partnership and then applied these funds to his own use. After the bankruptcy of the errant partner, the fraud was discovered and the remaining solvent partners repaid the debt. They sought proof of the debt in bankruptcy proceedings against their former partner. Lord Eldon found that at law, the partners were not creditors of one another and accordingly could not maintain an action for debt. However, he acknowledged that there was a need to redress the ‘moral Justice of this Case’<sup>122</sup> and provide the honest solvent partners with some avenue of address against their fraudulent co-partner. Lord Eldon searched for guidance from trends which could be gleaned from other bankruptcy decisions in analogous situations. Having found that the bankruptcy legislation of the day had been interpreted broadly to protect a wide group of creditors under the rubric ‘surety,’ Lord Eldon held that equity would be available to adjust the standing of the solvent partners so that they were also able to prove as creditors. He asserted:

... but Equity will modify the Transaction; and put it in such Circumstances that the equitable Remedy of the two solvent Partners shall not be defeated by the Fact, that they may not have the legal Remedy; and it is clear, that an equitable Debt may be proved in Bankruptcy; though it cannot be the Foundation of the Commission as the petitioning Creditor’s Debt.

Upon these Grounds it appears to me that the plain, moral, Justice of this Case is not met by any legal Principle, calling upon me to refuse to give Effect to the moral Justice; and therefore these Parties are entitled to hold this Proof.<sup>123</sup>

113 Note 104 at 66.

114 Melikan n 11 at 255 and 258. For a discussion of Lord Eldon’s sympathy for slave traders as property owners see Melikan, n 11 at 254–255.

115 Note 11 at 21–23.

116 See for example *Wellesley v Duke of Beaufort* (1827) 2 Russ 1; 38 ER 236; *Priestley v Lamb* (1801) 6 Ves Jun 421; 31 ER 1124.

117 (1818) 2 Swans 402; 36 ER 670.

118 Melikan, n 11 at 255–257.

119 (1801) 6 Ves Jun 73; 31 ER 944.

120 Note 119 at 92; 954.

121 (1814) 3 V & B 31; 35 ER 391.

122 Note 121 at 39; 394.

123 Note 121 at 40; 394. In another case, *Ex parte Stephens* (1805) 11 Ves Jun 24; 32 ER 996, bankers had sold the

Alternatively, in *Abernethy v Hutchinson*,<sup>124</sup> Lord Eldon presaged the development of the doctrine of breach of confidence. In this case, the plaintiff wanted to restrict the publication of lectures which he had delivered *ex tempore*. Such *ex tempore* lectures were not protected by the copyright laws of the time nor by the equitable protection of the common law right of property.<sup>125</sup> The defendant argued that there had been no restrictive stipulation imposed by the plaintiff preventing publication, that the material was not original and that it was only *ex tempore*. On the facts, this was true. Therefore, it was open to Lord Eldon to find that the plaintiff had no rights whatsoever. Nevertheless, Lord Eldon held that the students were bound by an implied contract not to publish the lecture notes and issued an injunction preventing the publisher from doing so.<sup>126</sup> In relation to this early case, one author has opined that:

Implicit in his Lordship's judgment . . . is a strong feeling that what the defendants intended to do was unconscionable, even if it derived from the unconscionable action of another person in breaching his contractual obligations. Accordingly, equity should intervene to prevent the defendant carrying out their intention.<sup>127</sup>

At the beginning of the 19th century Lord Eldon's complex approach to judicial decision-making had three main consequences. First, it indicated that even in his hands, Chancery retained a degree of flexibility. It is not suggested that Lord Eldon advocated a return to traditional equity or untrammelled judicial discretion. Rather, Chancery had not become entirely rigid in the application of precedent in all cases. Moreover, precedent was not simply used to constrain judicial intervention but also to adumbrate and expand equitable jurisdiction. Secondly, Lord Eldon's attitude indicated that despite the growing influence of will theory, freedom of contract and the binding nature of precedents, there were still some kinds of behaviour which remained legally unacceptable and that Chancery's intervention was appropriate in such situations. Whilst Lord Eldon resiled against interfering in contract cases (except under strict legal rules),<sup>128</sup> he recognised that Chancery had an important role addressing wrongdoing and this underpinned the development of some significant doctrines in the 19th century. Thirdly, as the decision in *Ex parte Yonge* reveals,<sup>129</sup> judicial decision-making based on broad principles and analogous reasoning (which had characterised many of Lord Hardwicke's judgments) remained a powerful and legitimate means of establishing and extending Chancery's jurisdiction.<sup>130</sup>

plaintiff's property and assured her that the funds which they had received had been invested in annuities in accordance with her instructions. The bankers provided false documentation that they had made the investments when in fact they had not done so. Later she provided a security for her brother's liability on the basis that she had stock standing in her name. Lord Eldon held that the case did not raise the application of set-off in a technical sense. However, he found *inter alia* that (at 27: 998) 'it was against conscience' for the bankers to prevent her dealing with her money in the way in which she had wished and that they were required to hold her moneys to discharge her brother's debt. Here, the decision was based on a broad principle that the banker's fraudulence, of which the plaintiff was understandably ignorant, had raised an equity which entitled the plaintiff to be treated as if she held a property in the form of annuities. The fraud could not be used to the advantage of the bankers and undermine the benevolent intentions of the plaintiff.

124 (1824) 1 H and Tw 28; 47 ER 1313.

125 Meagher, Gummow and Lehane, n 2 at para [4106].

126 (1824) 1 H and Tw 28 at 39-40; 47 ER 1313 at 1317-1318.

127 Note 28 at para [42.8]; cf Meagher, Gummow and Lehane, n 2 at para [4106].

128 See for example Lord Eldon's decision in *Hill v Barclay* (1810) 16 Ves Jun 402; 33 ER 1037; (1811) 18 Ves Jun 56; 34 ER 238 where he held that equitable relief against forfeiture of a lease was limited to cases where there was a failure to pay a stipulated sum.

129 (1814) 3 V & B 31; 35 ER 391.

130 Browne, n 2 at 35-36.

## V. Some Contributions by Chancery During the 19th Century to the Modern Law

It is submitted that the Court of Chancery in the 19th century made at least two major lasting contributions to the development of substantive law before the implementation of the Judicature System.<sup>131</sup> First, on the basis of its inherent jurisdiction to redress fraud and abuse of relationships of dependency and confidence (encapsulated in the general jurisdiction described above)<sup>132</sup> Chancery laid the foundations of undue influence, breach of confidence and fiduciary obligations. Secondly, in response to Britain's expanding economy and urbanisation, Chancery took some critical steps towards protecting business interests and the regulation of land dealings. Sometimes the parameters and the description of the doctrines remained incomplete and did not address all possible applications. Later cases would settle such matters. Nevertheless, the establishment of such important doctrines reveal a jurisdiction which was far from simply being in decline. It must be emphasised that the survey below is neither complete nor comprehensive. Rather, it highlights some of the important doctrinal contributions Chancery made in the 19th century which have made a lasting impact on the modern law.

### 1. *Fraud and Breach of Confidence*

As discussed above,<sup>133</sup> Lord Hardwicke and Lord Eldon still regarded the Court of Chancery's capacity to remedy fraud and to protect relationships of dependency and confidence as a salient feature of its discretionary jurisdiction.

#### a. *Undue Influence*

From this broad discretionary jurisdiction, Lord Hardwicke had identified general categories of fraud, one of which was to inform the modern doctrine of undue influence, namely:

Fraud, presumed from the circumstances and conditions of the parties contracting.<sup>134</sup>

However, Lord Eldon's judgment in *Huguenin v Baseley*<sup>135</sup> has been regarded as the pivotal foundation of the doctrine of undue influence<sup>136</sup> and the first case containing a modern exposition of it.<sup>137</sup>

The particular difficulty which Lord Eldon faced in *Huguenin v Baseley* was that there was no English authority dealing with allegations of undue influence exercised by a religious advisor.<sup>138</sup> It was also argued in the case that Chancery lacked the capacity to set aside a voluntary but 'absurd disposition of property.'<sup>139</sup> On these bases, it would have been open for Lord Eldon to hold that it was not appropriate for the Court to intervene and set aside the gift. However, Lord Eldon clearly indicated that he was not confined by the artificial perimeters of existing English case law.<sup>140</sup> There were previous English authorities which confirmed a general principle of public utility that persons in relationships of trust and confidence managing the affairs of another (such as a guardian managing the interests of a ward), were not allowed to take a gift (or 'transaction of bounty').<sup>141</sup> Taking

131 Browne, n 2 at 38 and 177–178 also suggests that Chancery also made decisions which protected married women and their property in an era when a married woman was not entitled to own her own property.

132 Above, p 201 of this article.

133 Above, pp 207–210 of this article.

134 *Earl of Chesterfield v Janssen* (1750) 2 Ves Sen 125 at 155; 28 ER 82 at 100.

135 (1807) 14 Ves Jun 273; 33 ER 526.

136 Keeton GW and Sheridan LA, *Equity*, 2nd ed, Professional Books Limited, Oxford 1976 at 230.

137 Meagher, Gummow and Lehane, n 2 at para [1503].

138 McGhee, n 4 at para 38–18; Martin, n 2 at 829; Meagher, Gummow and Lehane, n 2 at para [1511].

139 (1807) 14 Jun 273 at 281; 33 ER 526 at 529.

140 Note 139 at 289–299; 532–536.

141 Note 139 at 279–280; 528–529. It appears that Chancery was also influenced by earlier French authorities and writings: see n 136 at 230. Note also in this context earlier cases about or referring to solicitor-client relationships: *Gibson v Jeyes* (1801) 6 Ves Jun 266; 31 ER 1044; *Hatch v Hatch* (1804) 9 Ves 292; 32 ER 615.

into account the trend of previous authorities having analogous facts, the broad principle of 'public utility' and the particular facts of the case,<sup>142</sup> Lord Eldon laid the foundation for a general principle of undue influence. He effectively established the need to find a relationship of influence before applying the proscriptive rule against gifts and other favourable transactions.

The judgment has been criticised because it did not deal with such matters as the appropriate standard of independent advice to dispel the presumption of undue influence or clarify the special categories of relationships which give rise to a presumption of undue influence.<sup>143</sup> However, in the light of the broad foundations which were established and the judicial reasoning which Lord Eldon employed, this appraisal appears too harsh. The historical significance of the case outweighs its impediments. Despite the dearth of direct authority and calls to rigorously limit Chancery's authority to intervene in such a transaction, Lord Eldon asserted Chancery's function to redress an abuse of trust and confidence. He used analogous reasoning to legitimate his decision and adumbrate the potential scope of undue influence. He was content to leave the incremental development of undue influence to take place in the future.<sup>144</sup>

After *Huguenin v Baseley* and prior to the implementation of the Judicature System, the general principles of public policy against persons in relationships of trust and confidence taking 'bounty' developed into a fully-fledged doctrine of undue influence. The doctrine subtly combined general equitable principles and reliance on a growing body of precedents. Increasingly, it was accepted that there was a general principle of undue influence which was applicable to all proven relationships of confidence. Therefore, it was open to a person to prove actual undue influence<sup>145</sup> or raise a presumption of special influence on the facts of the case.<sup>146</sup> However, the development of the doctrine also yielded to a more fixed and certain scheme, thereby automatically establishing equitable jurisdiction in some cases.<sup>147</sup> It was possible to prove that the facts presented one of several well-known relationships which were deemed to be automatic relationships of trust and confidence.<sup>148</sup> According to Ashburner, the development of a presumption of special relationships of undue influence was a particular development in the 19th century.<sup>149</sup> In

142 Note 139 at 300; 536. The facts of the case amply disclosed that a clergyman had exercised influence to obtain a gift of property for himself and his family.

143 Note 137.

144 Note 136 at 230.

145 See for example *Collins v Hare* (1828) 1 Dow & Cl 139; 6 ER 476; *Williams v Bailey* (1866) LR 1 HL 200; *Sercombe v Sanders* (1865) 34 Beav 382; 55 ER 682; *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103. Note the later important authority of *Allcard v Skinner* (1887) 36 ChD 145 at 181 per Lindley LJ.

146 *Dent v Bennett* (1839) 4 My & Cr 268; 41 ER 105; *Tate v Williamson* (1866) 2 Ch App 55.

147 Note here *Hoghton v Hoghton* (1852) 15 B 278; 51 ER 545.

148 Such as parent and child or guardian and ward which had already been considered by Lord Eldon in the early case *Hatch v Hatch* (1804) 9 Ves 292; 32 ER 615. Note also *Archer v Hudson* (1844) 7 Beav 551; 49 ER 1180; *Savery v King* (1865) HLC 627; 10 ER 1046; *Wright v Vanderplank* (1856) 8 De GM & G 133; 44 ER 340; *Chambers v Crabbe* (1856) 34 Beav 457; 55 ER 712; *Hoghton v Hoghton* (1852) 15 Beav 278; 51 ER 545. The category of religious advisor and devotee began with Lord Eldon's acceptance of the plaintiff's submissions in *Huguenin v Baseley* (1807) 14 Ves Jun, 273; 33 ER 526 although it can be argued that in that case that the relationship was one of influence because the donor relied upon the donee for advice in the management of her affairs: see Cope M, *Duress, Undue Influence and Unconscientious Bargains*, Law Book Company, Sydney, 1985 at para [177]; note also *Allcard v Skinner* (1886) 36 ChD 145. The category of solicitor and client was considered a relationship of confidence in early cases *Gibson v Jeyes* (1801) 6 Ves Jun 266; 31 ER 1044; *Hatch v Hatch* (1804) 9 Ves 292; 32 ER 615; *Wood v Downes* (1811) 18 Ves 120; 34 ER 263; *Cane v Allen* (1814) 2 Dow PC 289; 3 ER 869; *Jones v Thomas* (1837) Y & C Ex 498; 160 ER 493; *Rhodes v Bates* (1865) LR 1 Ch 252. Other categories were: a man to the woman he is engaged to marry: *Lovesey v Smith* (1880) 15 ChD 655; and a medical advisor and patient: *Dent v Bennett* (1839) 4 My & Cr 268; 41 ER 105; *Ahearne v Hogan* (1844) Dru t Sugd 310, 323; *Pratt v Barker* (1827) 1 Sim 1; 57 ER 479; 4 Russ 507; 38 ER 896.

149 Browne, n 2 at 38 and 304–305.

all cases of undue influence, the recipient bore the onus of proving that the making of the contract or the gift was the voluntary act of the other party.<sup>150</sup>

### b. Fiduciary Obligations

It has been pointed out that the term 'fiduciary' 'is a relative latecomer to the vocabulary of English law.'<sup>151</sup> The concept of relationships subject to fiduciary obligations only became current around the mid-19th century.<sup>152</sup> It may appear unusual that in an era in which autonomy was highly valued, fiduciary obligations became firmly established, particularly in commercial relationships. However, in the light of Chancery's historic role in preventing fraud and abuse of relationships of confidence, the emergence of fiduciary obligations becomes more understandable. Moreover, as one author has suggested in relation to the rise of fiduciary obligations:

Judges from the Victorian era delighted in extolling superogatory behaviour . . . It was an age of moral certitude.<sup>153</sup>

It is submitted that fiduciary obligations arose from serious concerns that a party may be tempted to place his personal commercial interests ahead of a person to whom he owed clear responsibilities. Therefore, the development of fiduciary obligations was informed by two equitable sources. First, the germ of fiduciary obligations can be found in the broad principle (which also underpinned the doctrine of undue influence) that Chancery would provide relief if it were found that confidence reposed by one party in another had been abused.<sup>154</sup> Secondly, as Sealy has pointed out, in the late 18th century, the word 'trust' was loosely used to describe various relationships which were considered analogous to trusts such as agency and guardianship.<sup>155</sup> Whilst such relationships were not created by an express trust, there were similarities to the traditional trust in the sense that one party entrusted the care of his business or affairs to the other.<sup>156</sup> Lord Eldon's statement in *Cholmondeley v Clinton*<sup>157</sup> signalled that analogous reasoning had discovered these trust-like relationships and that increasing recognition and systematisation of equity would lead to the separation of real trusts from trust-like relationships. He opined:

. . . there is a vast difference between things to which we give the same denomination, I mean trusts. You have a trust expressed; you have a trust implied; you have relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a *cestui que trust*; and yet you cannot deny, that to some intents and some purposes one is a *cestui que trust* and the other a trustee.<sup>158</sup>

This separate category became known generically as fiduciary relationships. Some persons were like trustees under an express trust because they had limited title to property, the management and control of property or undertook to act in the interests of another.<sup>159</sup> The recognition of trust-like relationships increasingly gave rise to a body of sophisticated

150 Factors which were considered in determining whether the presumptions was rebutted included the presence of a power of revocation: *Huguenin v Baseley* (1807) 14 Ves Jun 275; 33 ER 526 and independent advice: *Rhodes v Bates* (1865) 4 Giff 669; 66 ER 875.

151 Finn PD, *Fiduciary Obligations*, Law Book Company, Sydney; 1977 at para [2] referring to Sealy LS, 'Fiduciary Relationships' [1962] *Cambridge Law Journal* 69 at 70–71.

152 Note 151.

153 Glover J, *Commercial Equity Fiduciary Relationships*, Butterworths, Sydney, 1995 at para [2.5].

154 See for example *Gartside v Isherwood* (1788) 1 Bro CC 558; 28 ER 1297.

155 Sealy, n 151 at 70–71.

156 Note 155.

157 (1821) 4 Bli PC 1; 4 ER 721.

158 Note 157 at 96; 754.

159 Parkinson P, 'Fiduciary Obligations' in Parkinson P (ed), *The Principles of Equity*, Law Book Company, Sydney, 1996 at para [1010]. For example, directors of companies were eventually described as trustees because they managed the company's property on behalf of the shareholders: see the later 19th century cases *Great Eastern Railway Co v Turner* (1872) LR 8 Ch App 149; *Re Exchange Banking Co; Flitcroft's Case* (1882) 21 Ch D 519.



precedents in which some relationships became recognised as status-based relationships where fiduciary obligations were automatically owed.<sup>160</sup> In this way, like the law of undue influence, Chancery's jurisdiction was given a degree of predictability.

The analogy of the trust also informed the relief available. Thus, the remedies against a trustee in breach of trust became available against an errant fiduciary.<sup>161</sup> Like the trustee, a fiduciary was prohibited against self dealing<sup>162</sup> and secret profits.<sup>163</sup> A fiduciary was also required to act in the best interests of the party to whom the fiduciary obligation was owed and not allow his personal interests to conflict with his duty.<sup>164</sup>

In particular, two remedial advances in Chancery, sustained by the analogy with the trust, forecast later legal developments and ensured the endurance of fiduciary obligations. First, by the early 1840s third party liability emerged in *Fyler v Fyler*<sup>165</sup> and *Attorney-General v The Corporation of Leicester*<sup>166</sup> as a significant aspect of breach of trust. Chancery had presaged the third liability rules later established in *Barnes v Addy*.<sup>167</sup> The Court recognised that in principle, persons knowingly inducing trustees to breach the terms of the trust deed<sup>168</sup> and an agent assisting in a breach of trust were accountable to the beneficiaries under the trust.<sup>169</sup> By a further extension of the trust analogy, Lord Langdale held in *Fyler v Fyler* that the Court 'will impute to them the character of trustees.'<sup>170</sup>

Secondly, in the mid-19th century, Knight Bruce LJ in *Pennell v Deffell*<sup>171</sup> and Page Wood VC in *Frith v Cartland*,<sup>172</sup> held that where trust funds were mixed with the trustee's own funds, the whole fund would be treated as a trust fund except to the extent that the actual trust fund was distinguishable. These decisions laid the foundation for equitable tracing in the well-known authority of *Re Haller's Estate*.<sup>173</sup> In this case Jessel MR of the Court of Appeal of the Chancery Division held that persons to whom fiduciary obligations

160 At first the kinds of cases where trust-like obligations were imposed included personal representatives: *James v Dean* (1808) 15 Ves Jun 236; 33 ER 744; partners: *Featherstonhaugh v Fenwick* (1810) 17 Ves Jun 298; 34 ER 115; *Clegg v Fishwick* (1849) 1 Mac & G 294; 41 ER 1278 and agents: *Charter v Trevelyn* (1844) 11 Cl & Fin 714; 8 ER 1273; *Lees v Nuttall* (1829) 1 Russ & M 53; 39 ER 21; affirmed (1834) 2 My & K 819; 39 ER 1157. As the 19th century progressed, status-based categories were entrenched and extended including solicitors and clients; *Re Hallett's Estate*; *Knatchbull v Hallett* (1879) 13 Ch D 696; directors of companies: *Great Eastern Railway Co v Turner* (1872) LR 8 Ch App 149; *Re Exchange Banking Co*; *Flitcroft's Case* (1882) 21 Ch D 519; *Re Forest of Dean Coal Mining Co* (1878) 10 ChD 450; company promoters: *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218; receivers: *Seagram v Tuck* (1881) 18 Ch D 296; *Re Gent*, *Gent-Davis v Harris* (1888) 40 ChD 190; and agents: *Burdick v Garrick* (1870) 5 Ch App 233; *Lyall v Kennedy* (1889) 14 App Cas 437.

161 Finn, note 151 at paras [183]–[184]; *Re West of England & South Wales District Bank*; *ex parte Dale & Co* (1879) 1 ChD 772.

162 Early cases on self dealing include *Ex parte Lacey* (1802) 6 Ves 625; 31 ER 1228; *Ex parte James* (1803) 8 Ves 337; 32 ER 385.

163 *Fawcett v Whitehouse* (1829) 1 Russ & M 132; 39 ER 51.

164 *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471; 2 Eq R 1281; 23 LT (OS) 315; Parkinson, n 159 at para [1010].

165 (1841) 3 Beav 550; 49 ER 216.

166 (1844) 7 Beav 176; 49 ER 1031.

167 (1874) LR 9 Ch App 244. In this case, Lord Selborne held that a third party could be liable if he acted as a trustee (although not formally appointed a trustee), if he knowingly received trust property or if he knowingly assisted in a dishonest and fraudulent design. It has been pointed out that in relation to recipient liability, Lord Selborne 'failed to give any pedigree for the principle he expressed': Glover, note 153 at para [7.21] and that in relation to accessorial liability he did not follow earlier precedents because he limited liability to fraudulent breaches of trust and fiduciary obligations: for a helpful comment on this issue see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; Harpum C, 'The Basis of Equitable Liability' in Birks PBH (ed), *The Frontiers of Liability*, Oxford University Press, Oxford, 1994, 9 at 12; Martin, note 2 at 294–295.

168 *Fyler v Fyler* (1841) 3 Beav 550; 49 ER 216.

169 *Attorney General v The Corporation of Leicester* (1844) 7 Beav 176; 49 ER 1031.

170 *Fyler v Fyler* (1841) 3 Beav 550 at 561; 49 ER 216 at 221.

171 (1853) 4 De GM & G 372; 43 ER 551.

172 (1865) 2 H & M 417; 71 ER 525.

173 (1880) 13 Ch D 696; see also *Lyall v Kennedy* (1889) 14 App Cas 459.

were owed were able to trace trust property mixed with the fiduciary's own assets. The significance of the judgment did not lie in the enunciation of a new principle. Rather, what Jessel MR confirmed was that principles, which were applicable to trustees, also applied to persons who were not trustees but who owed fiduciary obligations.

Notwithstanding the strong impact of laissez-faire individualism and the doctrinal pre-eminence of will theory, the Court of Chancery remained committed to its traditional role of safeguarding parties against fraud and the exploitation of relationships of trust and confidence. The development of fiduciary obligations indicated that the Court insightfully recognised that such wrongdoing could take place in commercial contexts and required the systematic intervention of the Court.

### c. Breach of Confidence

Consistent with Chancery's traditional role of protecting relationships of confidence, Chancery began to formulate and systematise those situations where it could intervene to protect secret information which had been confided outside traditional relationships of trust.<sup>174</sup> The general basis for Chancery's jurisdiction was the relationship of trust and confidence between the confider and the confidant.<sup>175</sup> Two early and separate strands of authority appeared.<sup>176</sup> First, in the 18th century, Chancery began to restrain the use or publication of unpublished literary and artistic work such as private letters or the plots of plays.<sup>177</sup> The doctrine was limited to situations where the information was in a literary or artistic form.<sup>178</sup>

It was in the first half of the 19th century that the second strand of cases began to appear.<sup>179</sup> These authorities represent the true beginnings of the modern action of breach of confidence.<sup>180</sup> In particular, *Prince Albert v Strange*,<sup>181</sup> decided in 1849, contained the first clear exposition of the doctrine.<sup>182</sup> Lord Cottenham recognised the first strand of cases<sup>183</sup> and indicated the Court's jurisdiction was not limited to the protection of legal title to literary or artistic works.<sup>184</sup> Chancery's traditional role of preventing abuse of confidence laid the foundation of the modern equitable doctrine of breach of confidence.<sup>185</sup>

In comparison to the expansive development of undue influence and fiduciary obligations during the 19th century, the equitable action for breach of confidence remained dormant. Until the mid-20th century, the number of cases dealing with breaches of confidence was small and generally arose in the context of employment contracts.<sup>186</sup> It was only in the second-half of the 20th century that courts began to clearly fashion the

174 Martin, n 2 at 744.

175 Richardson M and Stuckey-Clarke J, 'Breach of Confidence' in P. Parkinson (ed) *The Principles of Equity*, Law Book Company, Sydney, 1996 at para [1202].

176 Note 28 at para [42.4].

177 Note 28 at para [42.5]. Note for example *Pope v Curl* (1741) 2 Atk 342; 26 ER 608; *Gee v Pritchard* (1818) 2 Swans 402; 36 ER 670; *Macklin v Richardson* (1770) Amb 694; 27 ER 451.

178 See for example n 28 at para [42.6] and Browne, n 2 at 374.

179 See for example *Abernethy v Hutchinson* (1824) 1 H & Tw 28; 47 ER 1313.

180 Cornish WR, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 4th ed, Sweet and Maxwell, London, 1999 at para 8-06; Richardson and Stuckey-Clarke, note 175 at para [1203]; Meagher, Gummow and Lehane, n 2 at para [4106]; Ricketson, n 28 at para [42.7].

181 (1849) 1 Mac & G 24; 41 ER 1171.

182 Gurry F, *Breach of Confidence*, Clarendon Press, Oxford, 1984 at 3 fn 2; Cornish, n 180 at para 8-06; Martin, n 2 at 744; McGhee, n 4 at para 45-75; Meagher, Gummow and Lehane, n 2 at para [4106].

183 (1849) 1 Mac & G 24 at 43-44; 41 ER 1171 at 1178.

184 Note 183 at 46-47; 1179.

185 See also *Morison v Moat* (1851) 9 Hare 241; 68 ER 492.

186 Note 28 at para [42.11].

modern elements needed to prove breach of confidence.<sup>187</sup> Nevertheless, the ‘basic requirements of the action’<sup>188</sup> had been recognised by Chancery during the 19th century.

## 2. Industrialisation and Urbanisation

The Court of Chancery also extended and developed equitable principles to address economic change and urbanisation. This discussion briefly highlights the far-reaching effect of Chancery’s contribution to the modern doctrines of passing off and the enforceability of restrictive covenants in land law. In the former, Chancery embraced a broad concept of fraud to protect members of the public from mistaking one trademark for another. In the latter, contrary to the common law, Chancery effectively recognised that the burden of covenants would run with the land when the assignee had notice.

### a. Passing Off

Producers of goods often indicate to the consumer the origins of the goods by means of a mark or name. ‘Passing off’ is the principle that a person has no right to represent that his goods are the product of another party.<sup>189</sup> Passing off had been recognised as a common law tort in the 18th and 19th centuries. An aggrieved trader could bring an action at common law based on deceit to prevent use or imitation of his mark. The trader had to prove that the passing off was the result of the deliberate fraud on the part of the defendant.<sup>190</sup>

During the mid-19th century, increased industrialisation led to sharp practices and the misuse of marks imitating the goods of another manufacturer. There was a growing demand for the protection of producers against the unfair imitation of the marks and names, particularly those which were associated with products of high quality,<sup>191</sup> packaging and labels.<sup>192</sup> In response, the Court of Chancery audaciously fashioned a jurisdiction wider than the common law. The Court redirected its attention away from the deliberate fraud of a trader to the protection of the property of the owner of the mark and the prevention of ‘fraud’ perpetrated on the public.<sup>193</sup> In 1838 in *Millington v Fox*,<sup>194</sup> Cottenham LC ordered a perpetual injunction to prevent one tradesman from using the trademark of others where there was no evidence of deliberate deceit or a fraudulent intention to imitate the plaintiffs’ mark.<sup>195</sup> In *Edelsten v Edelsten*,<sup>196</sup> Lord Westbury held that the plaintiff was entitled to injunctive relief when the defendant used a trademark which was deliberately similar to the mark used by the plaintiff.<sup>197</sup> Moreover, he confirmed that in equity there was no need for the plaintiff to show that a member of the public had been deceived. A court would order relief if it could be shown that the resemblance of the two marks was such that it was likely that one mark would be mistaken for the other.<sup>198</sup> Chancery’s new

187 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 *Seagar v Copydex* [1967] 1 WLR 923; Cornish, n 180 at para 8–07; Richardson and Stuckey-Clarke, n 175 at paras [1205]–[1207]; Finn, n 151 at para [301]. It should be noted that in more recent years the action has been explained on the basis of unjust enrichment, but it is beyond the scope of this article to deal with this issue: see Lord Goff of Chieveley and Jones G, *The Law of Restitution*, 5th ed, Sweet and Maxwell, London, 1998 at 752–753.

188 Note 28 at para [42.11].

189 See generally *Reddlaway v Banham* [1896] AC 199.

190 See for example *Perry v Truefitt* (1842) 6 Beav 66; 49 ER 749 and *Edelston v Edelston* (1863) 1 De G J & S 185, 199; 46 ER 72, 78.

191 Cornish, n 180 at para 15–04.

192 See for example *Knott v Morgan* (1836) 2 Keen 213; 48 ER 610; *Blofeld v Payne* (1833) 4 B & Ad 410; 110 ER 509; *Croft v Day* (1843) 7 Beav 84; 49 ER 994.

193 Cornish, n 180 at para 15–05; Meagher, Gummow and Lehane, n 2 at para [4203].

194 (1838) 3 My & Cr 338; 40 ER 956.

195 Note 194 at 352–353; 961–962.

196 (1863) 1 De G J & S 185; 46 ER 72.

197 Note 196 at 203–204; 79.

198 Note 196 at 199–200; 78.

approach led to a possible conflict between equity and common law, particularly when a court awarded monetary compensation (rather than an injunction) in cases where no fraud had been proved.<sup>199</sup> However, by the end of the 19th century, this was settled in favour of courts awarding damages or monetary compensation where there was no proof of fraud.<sup>200</sup> Indeed, it has been argued that without the remedial intervention of Chancery, the tort may have been an ineffective regulator of economic activity<sup>201</sup> and this may have led to its disappearance.

Therefore, the development of passing off challenges the view that Chancery simply declined. Some Chancery judges responded to the urgent need to broaden the scope of passing off and extend the relief available. In so doing, they presaged the importance of safeguarding goodwill and quality products in later eras.<sup>202</sup> Their proactive and interventionist attitude reflected Chancery's broad notion of fraud (which went well beyond actual fraud)<sup>203</sup> and its well-established role of preventing exploitation of weaker parties. In these early passing off cases Chancery wisely realised that despite the commercial context, both innocent traders and an unsuspecting public needed protection from possible exploitation by unscrupulous traders.

#### *b. Restrictive Covenants — The Doctrine in Tulk v Moxhay*<sup>204</sup>

It is well known that at common law, the burden of a covenant does not run with the land.<sup>205</sup> However, Chancery was to take a different approach leading to '[o]ne of the most revolutionary contributions made by equity in the area of property.'<sup>206</sup> Commenting on the development of modern equity, the author of the most recent edition of *Snell's Principles of Equity* has commented:

... equity does not seem to be altogether past the age of childbearing. There has been at least one new invention since Lord Eldon's day, namely the doctrine whereby the burden of restrictive covenants may run with the land.<sup>207</sup>

When *Tulk v Moxhay* was decided in 1847, Britain was undergoing not only massive industrialisation, but also urbanisation on an unprecedented scale. In relation to land development, there was a tension:

... between the desire to keep land unfettered by private covenants (and therefore profitable for industrial development) and the conflicting desire to curb the effects of commercial and urban growth (by preserving residential amenity for the private householder).<sup>208</sup>

Contrary to will theory and the emphasis on a free market, the decision in *Tulk v Moxhay* resolved the tension in favour of a moderate degree of regulation and presaged the need for comprehensive schemes of land control. In *Tulk v Moxhay*, the plaintiff sold land to a purchaser who entered into covenants which required the repair of the land<sup>209</sup>

199 Morison WL, 'Unfair Competition and Passing Off' (1956) 2 *Sydney Law Review*, 50 at 54–55.

200 *Powell v Birmingham Vinegar Brewery Co Ltd* (1896) 2 Ch 54; *Liebig's Extract of Meat Co Ltd v The Chemist's Co-op Society Ltd* (1896) 13 RPC 736; *Daniel & Arter v Whitehouse* (1898) 15 RPC 134.

201 Morison, note 199 at 50.

202 *Erven Warnink BV v Townsends & Sons (Hull) Ltd* [1979] AC 731; *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429; [1980] 2 NSWLR 851.

203 See for example *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82.

204 (1848) 2 Ph 774; 41 ER 1143.

205 See for example, *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; *Rhone v Stephens* [1994] 2 WLR 429.

206 Gray K, *Elements of Land Law*, 2nd ed, Butterworths, London, 1993 at 1136; see also George EF, 'Property and Equity' in Allsop P (ed) *Then and Now 1799–1974: Commemorating 175 years of Law Bookselling and Publishing*, Sweet & Maxwell, London, 1974, 203 at 207.

207 McGhee, n 4 at para 1–14; see also Martin, n 2 at 41.

208 Gray, n 206 at 1136; see also Browne, n 2 at 38 and 368–369.

209 (1848) 2 Ph 774 at 774; 41 ER 1143 at 1143.

and which limited its use.<sup>210</sup> The land was conveyed to the defendant who, having notice of the covenants, decided to act in breach of them. Lord Cottenham made a radical break from earlier decisions.<sup>211</sup> He held that the plaintiff was entitled to injunctive relief because it would be unconscionable for the defendant to avoid an obligation of which he had notice. In comparison, judges influenced by common law will theory and privity of contract had determined that such covenants would not bind a covenantor's successor in title.<sup>212</sup>

Lord Cottenham expressed dissatisfaction with the practical consequences of the common law and explained the unconscionable outcome if the covenant were not enforced.<sup>213</sup> Central to Lord Cottenham's judicial reasoning was the fact that the purchaser had bought the land with actual notice of the terms of the covenant. Lord Cottenham's statement of principle drew on and was influenced by the well-established equitable doctrine of notice in land dealings.<sup>214</sup> In this regard, he confirmed that as a general principle:

'if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased'.<sup>215</sup>

He analogously applied this general principle to a new situation where a party had notice of covenants which had bound a predecessor in title.

The enormous scope<sup>216</sup> of the equitable doctrine in *Tulk v Moxhay* was gradually curtailed during the 19th century.<sup>217</sup> The general principle of notice, which had justified equitable intervention and laid the foundation for it, was replaced by fixed rules setting out restrictions on when covenants would constitute equitable interests in land.<sup>218</sup> For example, it was held that the burden of a covenant would only run with the land when the covenant was negative.<sup>219</sup> This requirement still operates today.<sup>220</sup> Nevertheless, *Tulk v Moxhay* remains a bold decision which profoundly extended the role of equity and provided a long lasting basis for equitable intervention to uphold restrictive covenants. It is another example where Chancery proactively changed the law. In so doing, Chancery went beyond the prevailing legal trends of the day. Lord Cottenham drew on a general principle of notice and analogous reasoning to sustain a decision which was at variance with will theory and privity of contract.

210 Note 209.

211 See *Keppel v Bailey* (1834) 2 My & K 517; 39 ER 1042. Although Gray, n 206 at 1137 fn 7 and Simpson AWB, *A History of the Land Law*, 2nd ed, Clarendon Press, Oxford, 1986 at 257–258 have pointed out in that earlier decisions by Sir Lancelot Shadwell VC had suggested that a burden of a covenant could run in equity: see *Whatman v Gibson* (1838) 9 Sim 196 at 207; 59 ER 333 at 338; *Mann v Stephens* (1846) 15 Sim 377 at 378; 60 ER 665 at 666.

212 *Keppel v Bailey* (1834) 2 My & K 517; 39 ER 1042.

213 For a criticism of the decision see Simpson, n 211 at 259.

214 In the early years of Chancery, Chancellors held that a legal purchaser of land who had acquired with notice of a use was bound by the use: see for example, McGhee, n 4 at paras 1–25 and 4–18; Martin, n 2 at 19; Butt P, *Land Law*, 4th ed, Law Book Company, Sydney, 2001 at para [705]. The doctrine continued to be applied in the 19th century both before and after the implementation of the Judicature System: see Browne, n 2 at 51–63; Meagher, Gummow and Lehane, n 2 at paras [851]–[853].

215 (1848) 2 Ph 774 at 778; 41 ER 1143 at 1144.

216 For a discussion of the application of the original scope of the decision see Simpson, n 211 at 259.

217 Note 211 at 259–260.

218 As to the limited efficacy of the doctrine of notice see Jessel MR, *London and South Western Railway Company v Gomm* (1881) 20 Ch D 562, 583. For Simpson, n 211 at 260, there is 'no historical truth' in the attempts of Jessel MR to rationalise the basis of the equitable jurisdiction.

219 *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *London and South Western Railway Company v Gomm* (1881) 20 Ch D 562 at 583.

220 Gray, n 206 at 1140–1141; Butt, n 214 at para [1728].

## VI. Conclusion

The history of the Court of Chancery in the 19th century is a complex and sometimes paradoxical one. There is ample evidence showing that in some important aspects it declined. The Court was unable to keep pace with the growing demands for streamlined and efficient decision-making. Moreover, reliance on judicial discretion to determine a case was no longer acceptable. Increasingly, Chancery adhered to a body of rule based and 'scientific' precedent as an authoritative statement of equitable principles. In this regard, Chancery became more like its common law counterparts. As 19th century lawyers lauded the rise of contractual autonomy, Chancery retreated from interfering with freely made, albeit poorly made, bargains.

Nevertheless, despite the pervasiveness of will theory, laissez-faire individualism and precedent, in the first half of the 19th century, the Court of Chancery remained sometimes surprisingly active in curtailng some of the unacceptable excesses of 19th century capitalism. In this article, it has been suggested that there remained a core of counter-intuitive values which some Chancery judges clung to fiercely in the heyday of laissez-faire individualism. There was a view that there ought to be minimum standards of good conduct or fair play and this traversed a wide variety of personal relationships and business situations. For example, Lord Eldon retained a strong conviction that Chancery must redress wrongdoing and protect vulnerable parties such as wards, minor and lunatics. When setting down the doctrinal foundations of the modern law of breach of confidence and passing off, Lord Cottenham evinced a clear desire to protect innocent parties from the wrongdoing of others. Faced with new forms of unscrupulous behaviour, Chancery judges, aided by the growing body of precedent, applied general principles and analogous reasoning to legitimate judicial intervention and adumbrate new equitable doctrines, such as undue influence and fiduciary obligations. The fruits of Chancery's doctrinal creativity became part of the staple law, yielding to fixed rules, precedents and analysis by eminent textbook authors. In this way, equitable doctrines achieved durability. Therefore, well after the abolition of the Court of Chancery and the implementation of the Judicature System, modern courts have continued to use and extend doctrines which were originally established and affirmed by that Court.

Whilst it cannot be denied that in significant respects Chancery declined in the 19th century, it is submitted that for too long Chancery's doctrinal contribution to the modern law has been overshadowed by its well publicised procedural malaise and its final abolition. Perhaps in the future, a more balanced appreciation of 19th century Chancery may arise from a scholarly review of historical sources. For example, Klinck's timely revision of Lord Eldon's approach to judicial decision-making and precedent has revealed that it may be useful to revisit and re-evaluate the decisions of such eminent judges as a full body of work rather than rely on statements in a single case.<sup>221</sup> It is also submitted that innovators like Lord Cottenham deserve close attention in charting the complex process of legal reasoning and the establishment of doctrines during the period. A clearer understanding of the legacy of Chancery in the 19th century will improve our overall knowledge of 19th century approaches to law and judicial decision-making.

221 Klinck, n 104.