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THOMAS JEFFERSON'S EQUITY COMMONPLACE BOOK*

EDWARD DUMBAULD**

As a law student, Thomas Jefferson followed the customary practice of keeping a commonplace book in which he recorded his notes of law reports and other legal authorities which he perused in the course of his reading and study.¹ Two such volumes have been preserved. Because of the nature of their contents, one is commonly called his Legal Commonplace Book and the other his Equity Commonplace Book.

The distinction between those branches of Anglo-American law known as "common law"² and "equity" was important until recent years because each was a separate system of rules applied by separate courts. Modern law seeks to amalgamate in a single body of law administered in a single tribunal the doctrines developed by both types of courts in the course of their histories.³ Nevertheless, as a renowned historian of English Law has explained, the distinction is basically rooted in history:

Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature

* Dedicated to the memory of John W. Davis, superb lawyer and pioneer in scholarly scrutiny of Thomas Jefferson's career in the legal profession.

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1. E. DUMBAULD, *THOMAS JEFFERSON AND THE LAW* 8, 15 (1978). Chief Justice Matthew Hale regarded the practice as "the best expedient that I know for the orderly and profitable study of the law." *Id.* at 15. Jefferson advised law students:

In reading the Reporters, enter in a Common-place book every case of value, condensed into the narrowest compass possible which will admit of presenting distinctly the principles of the case. This operation is doubly useful, inasmuch as it obliges the student to seek out the pith of the case, and habituates him to a condensation of thought, and to an acquisition of the most valuable of all talents, that of never using two words where one will do. It fixes the case too more indelibly in the mind.

Id. at 8.

2. Probably the term "common law" originally meant the nationally applicable law (common to the whole kingdom) fashioned by the king's central courts at Westminster as distinguished from local customary rules (such as the custom of Kent). *See id.* at 12 & nn.60-63, 80 n.55. Hence the term often is used to distinguish judge-made law from statutory enactments by legislative bodies. The term also is used to signify the entire Anglo-American legal system, in contrast to the civil or Roman law system in force on the Continent. Here, however, we are concerned with use of the term "common law" as distinguished from "equity." Perennial popular complaints against common law and its practitioners criticized the law's voluminous complexity, uncertainty and expense. *See id.* at 146, 148, 154. Many sympathized with William Penn's quip: "Certainly, if the common law be so hard to be understood, it is far from being very common." *Id.* at 154 n.123.

3. *Id.* at 15 n.84, 149 n.63.

Acts, would be administered by those courts which would be known as Courts of Equity. . . . Equity is a certain portion of our existing substantive law, yet in order that we may describe this portion and mark it off from the other portions we have to make reference to courts that are no longer in existence. Still I fear that nothing better than this is possible.⁴

From the substantive standpoint, equity seeks to mitigate the rigor of strict application of technical common law rules by an infusion of ethical and moral standards of equity and fairness. In early times the chancellor was normally a high ecclesiastical dignitary and as "keeper of the king's conscience" undertook to temper the impact of common law formalism by decrees more adequate to the exigencies of justice.⁵ Likewise in Roman law the praetor acted *juris civilis adjuvandi aut supplendi aut corrigendi causa* (to support, supplement, or correct the civil law) to mitigate the rigor of the strict civil law.⁶

Against equity's advantages of flexibility and fairness must be weighed the disadvantages of uncertainty and possible arbitrariness. Those who value certainty above justice⁷ might consider equity a "roguish thing," as capricious a measure as the length of the chancellor's foot, as the learned John Selden wittily observed.⁸ Jefferson himself thought that Lord Mansfield's innovations in equity made the law more uncertain "under pretence of rendering it more reasonable."⁹

Jefferson's Legal Commonplace Book, dealing with judicial decisions and authorities relating to common law, is well known to historians by virtue of Gilbert Chinard's edition published in 1926.¹⁰ Chinard's chief concern was with the development of Jefferson's ideas on government. Hence he prints in full only those portions which are of political interest. Of those dealing with "strictly legal matters" ordinarily only the subject or title is listed, though occasionally brief extracts are given.¹¹ Chinard determines, by analysis of the contents, that of the 905 numbered items in the Legal Commonplace Book, Jefferson wrote items 1-550 while he was a law

4. F. MAITLAND, *EQUITY* 1 (1913).

5. A typical instance of intervention by equity occurs where the holder of a bond which has been paid in full but not returned to the obligor is compelled to surrender it, and thus prevent its fraudulent use to bring suit at law for a second payment of the same debt. See Dumbauld, *Judicial Interference With Litigation in Other Courts*, 74 *DICK. L. REV.* 369, 378-83 (1970). See also *infra* note 6.

6. 1 R. POUND, *JURISPRUDENCE* 406-21 (1959).

7. See E. DUMBAULD, *supra* note 1, at 31 & n.145.

8. *Id.* at 16 & n.102.

9. *Id.* at 9 n.28. This statement appears in a letter to a foreign friend of Italian extraction, dated November 28, 1785, in which Jefferson explained in detail the distinction in American jurisprudence between common law and equity. See *id.*

10. See G. CHINARD, *THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT* (1926). The manuscript volume of Jefferson's Legal Commonplace Book is in the Library of Congress.

11. *Id.* at 14, 67.

student or a young lawyer; items 550-881 (on feudalism, federalism, Montesquieu, Beccaria, Voltaire, and the like) between 1774 and 1776, when he was interested in matters "worthy of attention in constituting an American congress"; items 882-900 after 1781; and items 901-904 after 1801.¹² Item 905 refers to a debate in the House of Commons on March 23, 1824.¹³ Chinard does not attempt to date items by the ink or handwriting.¹⁴ However, Marie Kimball concludes from analysis of paper and handwriting that the first 174 items were written in 1766, and items 175-695 after August, 1767.¹⁵ She likewise states that Jefferson began the Equity Commonplace Book in 1765, and that entries in the Equity Commonplace Book and in the Legal Commonplace Book were made concurrently.¹⁶ Abstracts from the reports of Salkeld¹⁷ and Lord Raymond¹⁸ constitute the most substantial portion of the Legal Commonplace Book.¹⁹ Other legal matters, and the political material which chiefly interests Chinard, complete the volume.

The Equity Commonplace Book contains 2018 items, all dealing with legal rather than political topics. Salkeld furnishes the source for the first twenty-one items. Items 22 through 618 consist of abstracts from Vernon.²⁰

12. *Id.* at 13-14, 26-27.

13. *Id.* at 12-13.

14. *Id.* at 12.

15. M. KIMBALL, *JEFFERSON: THE ROAD TO GLORY 1743 TO 1776* 87-88 (1943). See also F. KIMBALL, *THOMAS JEFFERSON ARCHITECT* 106-16 (1916) (discussing watermarks of paper used by Jefferson).

16. M. KIMBALL, *supra* note 15, at 89. The Equity Commonplace Book has never been published. The manuscript volume is in the Huntington Library, Brock Collection, BR 13. Later research on dating the Equity Commonplace Book (from 1765 or 1766 through 1766 or 1768), during the period of Jefferson's study of law, is documented in Wilson, *Thomas Jefferson's Early Notebooks*, 42 WM. & MARY Q. 433, 444, 449-51 (Third Series, No. 4, Oct. 1985). As to its contents, Wilson regards the Equity Commonplace Book as "a source of the first importance" since its focus is upon a theme congenial to Jefferson's philosophy, "the application of natural law to practical affairs." *Id.* at 449.

17. Jefferson used the first two volumes of the reports of William Salkeld (1671-1715), which were first published in 1717 under the supervision of Lord Hardwicke. Volume III appeared in 1743 (the year of Jefferson's birth). Salkeld's reports cover the period 1689-1712, with a few earlier and later cases. See E. DUMBAULD, *supra* note 1, at 15 n.87.

18. Robert Raymond (1672-1733) became Chief Justice of the Court of King's Bench in 1724. His reports, published in 1743, cover the period 1694-1732. See *id.* at 15 n.88.

19. Of the 905 items, 407 are abstracts from Salkeld or Lord Raymond. There are 111 cases abstracted from other law reports (items 588-693, 744, 899-903). The remainder of the compilation is composed of extracts from numerous authors, mainly on feudalism, federalism, and other political topics. See *id.* at 15 n.89. For details, see G. CHINARD, *supra* note 10, at 14-52.

20. The two posthumous volumes of Thomas Vernon (1654-1721), *Cases Argued and Adjudged in the High Court of Chancery*, were published in 1726-28, and cover the period 1681-1720. His reports are brief and often inaccurate. A better edition by Raithby appeared in 1806-1807. See E. DUMBAULD, *supra* note 1, at 16 & nn.110-11. I used the first American edition of Vernon from the third London edition (by Raithby) published in Brookfield, Massachusetts, in 1829. In researching all the equity reports cited herein, I have used editions available at the Allegheny Bar Association Library at Pittsburgh (for assembling which I am grateful to Joel Fishman, its librarian) rather than searching for the particular editions probably

Items 619 through 1063 are derived from Peere Williams.²¹ Items 1064-1076 are derived from *A General Abridgment of Cases in Equity* (cited by Jefferson as "Abr. ca. eq."). This collection, often called *Equity Cases Abridged* was published in 1732, with a second part published in 1756.²²

Henry Home, Lord Kames (which Jefferson always spelled "Kaims") was a Scottish judge and philosopher greatly esteemed by Jefferson, and his *Principles of Equity* published in 1760 was the source of items 1077-1131 in Jefferson's Equity Commonplace Book.²³ In the familiar plan of law study which Jefferson prescribed for young friends whose legal studies he supervised, this volume by Lord Kames was listed: "In the department of the Chancery . . . [Kames] has given us the first digest of the principles of that branch of our jurisprudence, more valuable for the arrangement of matter, than for it's exact conformity with the English decisions."²⁴

Items 1132-1402 are derived from *Cases Argued and Decreed in the High Court of Chancery* (cited "Ca. Ch." by Jefferson).²⁵ Items 1403-1586 are derived from Freeman ("Fr. Ch. R.").²⁶ Items 1587-1779 are from *Reports . . . in . . . Chancery* ("Ch. Rep.").²⁷ Items 1780-1811, 1813, and

used by Jefferson. I have used Jefferson's characteristic abbreviations in citing them. Vernon is referred to herein as "Vern."

21. William Peere Williams (1664-1736) has been described as "the first full and clear reporter of Chancery cases." His *Reports of Cases Argued and Determined in the High Court of Chancery* (cited herein as "P.W.") were published by his son (two volumes in 1740, and a third in 1749). They cover the period 1695-1736, and are digested in both of Jefferson's commonplace books. See E. DUMBAULD, *supra* note 1, at 16 & nn.98-100. I used the third London edition (1768) of volumes I and II, and the first edition (1749) of volume III.

22. See E. DUMBAULD, *supra* note 1, at 15-16 & n.97. This collection contains cases from the "earliest time" to 1756, and Jefferson included the collection in his list of required reading for law students. See *id.* at 8.

23. See *id.* at 15 & nn.94-96. Note that there are two items numbered 1082 and 1210. Irregularities of numbering also occur in other portions of the commonplace book. Items 266-274 and 1717 are omitted, and there are two sets of items numbered 989-998. Continuations of many items are found out of sequence, probably representing Jefferson's subsequent reflections regarding those cases, perhaps after reading them in a different reporter. Alternative citations for the same case ("S.C.") often have been added and references to other cases standing for the same principles ("S.P.") also are frequently inserted.

24. See *id.* at 8.

25. See *id.* at 16 & nn.112-13. Three volumes of *Cases Argued and Decreed in the High Court of Chancery* (of which Jefferson used only the first two) were published in 1697-1702, covering the period 1660-1688. I used the London edition of 1735 (3rd edition for volume I, 2nd edition for "The Second Part," 30 Charles II—4 James II).

26. See E. DUMBAULD, *supra* note 1, at 16 & n.114. One volume of *Cases Argued and Decreed in the High Court of Chancery, From 1676 to 1706*, by Richard Freeman, was published in 1742 and was edited by Thomas Dixon. Freeman had been Lord Chancellor of Ireland. See *id.* This volume is cited as "Freeman" from the 1742 London edition.

27. Three volumes of *Reports of Cases Taken and Adjudged in the Court of Chancery* were published in 1693, 1697, and 1716, respectively, covering the period 1625-1710. Jefferson used only the first two volumes. See E. DUMBAULD, *supra* note 1, at 16 & n.112. On the title page of the London 1693 edition of volume I, which I used, are the signatures of "Alexr Addison, 1793" and "James Ross, 1887." On Alexander Addison, see 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 46-47, 163-64 (1919); on Addison's impeachment, see *THE TRIAL OF*

1817-1999 are from *Precedents in Chancery* ("Pr. Ch."), published in 1733.²⁸ Item 1812 is from Vernon, and items 1814-16 from Peere Williams. Items 2000-2017 are from Atkyns ("Atk.").²⁹ Item 2018, the last item in the Equity Commonplace Book, deals with interpretation of acts of Parliament.³⁰

In each item of his Equity Commonplace Book, Jefferson usually first states briefly the facts of the case and the issues argued (abbreviating plaintiff as pl. and defendant as def.). Then follows the decision by the court ("cur."), the Lord Chancellor ("L.C."), the Lord Keeper ("L.K."), the Master of the Rolls ("M.R."), or occasionally, the House of Lords ("D.P.", or *Domus Procerum*). Finally Jefferson cites the source where the report of the case is published.

In that connection the reader must remember, in order to avoid confusion, that in the case of some reporters (e.g., Vernon and Peere Williams) Jefferson, when writing, for example, "2 Ver[non]. 326" in item 386 is referring to the case number, not the page number, in Vernon's second volume, whereas his citation of the same case in Freeman refers to the page number, 228 (the case number in Freeman is 299). His citations to reports which do not contain case numbers, such as *Cases . . . in . . . Chancery* ("Ca. Ch.") and *Reports . . . in . . . Chancery* ("Ch. Rep."), are of course to page numbers, but he also cites Atkyns ("Atk.") and *Precedents in Chancery* ("Pr.Ch."), as well as Freeman, by page numbers. The citations given in footnotes of this article are uniformly to page numbers.

Analyzing the Equity Commonplace Book in extensive detail would be tedious and unprofitable. Like any law student's notebook, the Equity Commonplace Book is a collection of brief abstracts of cases examined by the student in the course of his study. Because the equity reports utilized by Jefferson are available to readers today, anyone could make a similar digest of them himself, in all probability just as satisfactory a compilation as the one Jefferson prepared. Discussing certain significant and distinctive aspects of the materials contained in the volume, particularly as they illustrate Jefferson's own legal thinking and his comments on the topics treated, will be more useful.

ALEXANDER ADDISON . . . TAKEN IN SHORT HAND BY THOMAS LLOYD (2d ed. 1803). Addison's *Reports of Cases* (Washington, 1800) is bound with his *Charges to Grand Juries* in Western Pennsylvania, the partisan animus of which led to his impeachment.

28. See E. DUMBAULD, *supra* note 1, at 16 & nn.115-16. This volume covers the period 1689-1722. I used the 1786 London edition by Thomas Finch, of which Jefferson owned a copy, and which now is in the Library of Congress.

29. The first volume of John Tracy Atkyns' *Reports of Cases Argued and Determined in the High Court of Chancery, in the Time of Lord Chancellor Hardwicke*, which Jefferson used, was published in 1765. Two subsequent volumes were issued in 1767 and 1768. Atkyns' reports, considered somewhat unreliable, cover the period 1736-1755. A second edition was published in 1781. Atkyns, of Lincoln's Inn, was an English judge who died in 1773. See E. DUMBAULD, *supra* note 1, at 16 & nn.117-19. I used the Dublin edition of 1765.

30. See E. DUMBAULD, *supra* note 1, at 16-17 & n.120. Sir Edward Coke, Sir John Fortescue, Sir Thomas Siderfin, and George Petyt's *Lex Parliamentaria* are cited.

Before reviewing any specific topics found in the commonplace book, a summary of some of the technical features of equity practice which will be encountered repeatedly in the cases digested by Jefferson may be helpful. Blackstone gives a good explanation of the general procedures followed in the courts of equity.³¹ The first peculiarity of equity which Blackstone enumerates is the mode of proof, which requires the oath of the parties in order to discover facts and circumstances known only to them.³² Such compulsory discovery upon oath enables the court of equity to undo the effects of fraud and enforce matters binding in conscience, though concealed. This authority includes prohibiting the parties from taking advantage of judgments obtained at law by suppressing the truth.

A second distinctive feature is the mode of trial.³³ The first pleading filed in an equity suit is called a bill. The next step is issuance of a subpoena calling upon the defendant to answer the bill under oath. Before answering, the defendant may demur or plead. A demurrer puts before the court the question whether the plaintiff, upon his own showing, lacks any right or ground for equitable relief. A demurrer also will be sustained if the bill seeks discovery of any circumstance which may cause a forfeiture of any kind or result in self-incrimination. A plea may question the court's jurisdiction or the plaintiff's capacity to sue or set forth matters barring relief, such as a release or a former decree. After answering, the plaintiff may file a reply, and the defendant may file a rejoinder. Proofs are then taken by the court.

Instead of trial by jury and examination of witnesses *viva voce* (orally), equity resorts to written interrogatories in response to which the parties' depositions are taken in writing wherever they happen to live. If the parties live in London, there is an examiner's office; if they live in the country, four commissioners are appointed. If a party resides abroad, or is about to depart, or if a party is aged or infirm, a commission to examine the party for the perpetuation of the party's testimony may be granted. Depositions are kept secret until all witnesses have been examined, when they are made public. After publication all parties may inspect the depositions and make copies. The case is then heard before the Lord Chancellor or Lord Keeper or the Master of the Rolls. The decision is called a decree. Often the first decree is interlocutory rather than final. If a question of fact is strongly controverted, the court will refer it to the Court of the King's Bench upon a feigned issue. A pure question of law may also be referred to the judges of the Court of the King's Bench or Court of Common Pleas upon a case stated. Matters of accounting always are referred to a master in chancery

31. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 436-55 (Oxford 1768). This account may be supplemented by the description of the development and scope of equity in the seventeenth century given by Holdsworth. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 640-71 (1927). The cases in the Equity Commonplace Book are typical of the content of equity jurisprudence as set forth by Holdsworth.

32. 3 W. BLACKSTONE, *supra* note 31, at 436-38.

33. *Id.* at 438.

to examine and report to the court. When a final decree is signed and enrolled, the decree can not be reheard or rectified except by a bill of review, or upon appeal to the House of Lords.

The third distinctive feature is the mode of relief.³⁴ Instead of an award of pecuniary damages for non-performance of a contract, the usual mode of relief in equity is to order specific performance of the contract (if the contract is one relating to land or a unique chattel where damages would not be an adequate remedy). Equity likewise, in appropriate cases, prevents or forestalls the occurrence of injury by granting injunctive relief. An injunction may either require or prohibit the performance of an act. Mortgages and trusts comprise the remaining topics of distinctive equity jurisdiction mentioned by Blackstone.³⁵

In view of Jefferson's proclamation in the Declaration of Independence of "unalienable Rights" derived from "the Laws of Nature and of Nature's God,"³⁶ it will be of interest to discuss cases where he noted that the courts of equity based their decisions upon tenets of natural law and justice. Such instances also will illustrate the infusion of moral principles which Dean Pound has described as characteristic of equity.³⁷ Singling out for examination passages where Jefferson's own comments or queries are set forth, and where he is not simply chronicling the rulings of the court as recorded by the reporter, also will be useful. A third category of cases worthy of notice includes those dealing with peculiar features of equitable relief as administered by English chancery judges.

I. NATURAL JUSTICE

The cases abstracted in the Equity Commonplace Book frequently refer to natural justice.³⁸ Where lands had been sold to a bankrupt and part of the purchase money had not been paid, it was held that the vendor had

34. *Id.* at 438-39.

35. *Id.* at 439-40.

36. E. DUMBAULD, *THE DECLARATION OF INDEPENDENCE* 35-45, 58-59, 63, 69 (1950). For specific categories of natural rights recognized by Jefferson, see E. DUMBAULD, *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* xxvii-xxix (1955).

37. See R. POUND, *supra* note 6, at 407.

38. In this article, cases ordinarily will be treated in the sequence in which they appear in the Equity Commonplace Book, and will be cited by item number, followed by a citation in the customary form, giving the name of the case, the name of the reporter preceded by volume number and followed by page number, and the date of decision. I have accepted dates given by Jefferson. Dates calculated from the table in 8 A. BROWNING, *ENGLISH HISTORICAL DOCUMENTS* 949 (1966), when only the term of court and the regnal year are known, may be inaccurate. As historians are aware, "Old Style" years (up to 1700) began March 25, rather than January 1. Most of the calculations herein involved the reign of Charles II, which began January 30, 1649. Language attributed to judges comes from Jefferson's paraphrase, except when quotations from the reports are given for comparison. Contrary to Jefferson's practice, capital letters are used at the beginning of sentences. But his peculiarities of spelling (such as "paiment" for "payment" and "it's" for "its") are preserved. Some abbreviations are expanded in brackets.

priority over the general creditors for the unpaid balance. The Lord Keeper is reported as saying: "There is a natural equity that the lands shall be charged with the purchase money not paid, tho' there was no special agreement."³⁹

Where a son had quarreled with his mother, and settled his mansion on his brother, taking from him a bond not to permit the mother to come into the house, the court ordered the bond to be delivered up and cancelled, for "it is ag[ains]t the law of nature to prohibit a son from cherishing his mother."⁴⁰ Likewise, when an infant recovered by a decree, the court "allot[ed] him a maintenance out of it, by natural equity."⁴¹ And where a mortgage was devised to a wife for her separate use and her husband, in writing, granted her the benefit of it, and the mortgagor then devised the land to the husband to pay debts, it was held that the wife "shall have the interest as well as principal, because of the husband's note, which tho' voluntary is grounded on natural justice."⁴²

In another case, articles of agreement provided that £200 belonging to a wife, forming part of a settlement upon the spouses for life and then in tail to the heirs of their bodies, was to go to the wife's brother and sister if no settlement were made during the spouses' joint lives. No settlement was made, and the wife died during her husband's lifetime, leaving issue. The court held that the words "without issue" should be supplied, for "the intent of the articles was to provide for the issue in obedience to the law of nature." Although the letter of the articles provided that the money was to go to the brother and sister "if the wife died, leaving the husband, yet they must have meant, if she died 'without issue.'"⁴³

Similarly, in the case of defective execution of a power to create a jointure by *deed* under hand and seal, the holder of the power having undertaken to execute it by *will* under his hand and seal, the Master of the Rolls explained that equity would come to the aid of such defective execution of a power. Equity would not interfere, however, in case of non-execution of a power, "because it was at the election of the party to execute or not, and perhaps he chose not to do it." But defective execution will be aided "where it is for paim[en]t of debts, or provision for a wife or child unprovided for, these being acts of duty."⁴⁴ In a similar case the Lord

39. Item 123, *Chapman v. Tanner*, 1 Vern. 267 (1684).

40. Item 177, *Traiton v. Traiton*, 1 Vern. 413, 414 (1686).

41. Item 323, *Englefield v. Englefield*, 2 Vern. 236 (1691). See also item 1160, *Rennessey v. Parrot*, 1 Ca. Ch. 60 (1665).

42. Item 559, *Harvey v. Harvey*, 2 Vern. 659, 660 (1710), 1 P.W. 125, 126.

43. Item 642, *Kentish v. Newman*, 1 P.W. 234 (1713).

44. Item 897, *Tollet v. Tollet*, 2 P.W. 489 (1728). To the same effect see item 1269, *Smith v. Ashton*, 1 Ca. Ch. 264 (1675); item 1464, [Anon.], *Freeman* 63 (1680); item 1766, *Sale v. Freeland*, 2 Ch. Rep. 242 (1680). An obligation *ex maleficio* (from malice or wrongdoing) was viewed as less sacred than a contractual debt. "The pl. sued the def. for intimacy with his wife. The def. conveys his estate to trustees for the payment of his debts. After which pl. recovered of him 5000. lib. The bill is to set aside the conveyance as fraudulent, and designed

Chancellor said that circumstances may be supplied generally in favor of a *bona fide* purchaser, and also where a settlement is "made on some moral consid[eratio]n, as the paim[en]t of debts, or providing for children, which is in nature of a debt, every man being bound by the law of nature to provide for his children."⁴⁵

In kindred vein is the pronouncement that to her dower a widow has not only a legal right but "a moral right: because the husband is bound not only by the law of God to provide for her during her life," especially "where the civil laws vest all her property in him on marriage and render her incapable of acquiring property of her own during the coverture." Likewise she has "an equitable right: arising from a contract made on a valuable consideration; a contract in it's nature civil, in it's celebration sacred; and such a one as is a foundation for relief in a court of equity."⁴⁶ Similarly, the Lord Chancellor declared that "a man cannot be deprived of the natural right of guardianship of his own children because another thinks proper to give them legacies however great." The children were with the executor of their uncle who had left them substantial gifts.⁴⁷

Where an act of Parliament prohibited dealings in shares of a "bubble" company, the Master of the Rolls held that a buyer was released from his bargain to purchase shares. "It is against natural justice that any one should

to defeat him." But the court held that

it is not fraudulent tho' intended to prefer the creditors before the pl. But it was conscientious in him so to do, the debt to the pl. being only founded in maleficio. Nor was there any debt to him at the making of the deed. However the pl. may contest the debts and come in on the surplus after paim[en]t of those which shall be proved just.

Item 1562, *Leukener v. Freeman*, *Freeman* 236 (1699); *Lawkner v. Freeman*, Pr. Ch. 105.

45. Item 1495, *Duchess of Albemarle v. Earl of Bath*, *Freeman* 121, 195-96 (1692). To the same effect see item 1655, *Thin v. Thin*, 1 Ch. Rep. 162 (1650); item 1956, *Piggot v. Penrice*, Pr. Ch. 471 (1717). However, the Lord Chancellor refused to supply the lack of surrender to the use of a conveyance of copyhold by deed to a natural child, "Because tho' the father was obliged by the law of nature to provide for her, yet in this, and every other court she is considered as nullius filia (daughter of no one)." Item 1958, *Fursaker v. Robinson*, Pr. Ch. 475 (1717). However, provision for a seduced "modest woman" and her child was upheld in another case. The Lord Chancellor said: "If a man misleads an innocent woman, it is both reason and justice he should make reparation." Item 88, *Marchioness of Annandale v. Harris*, 2 P.W. 432 (1727). A bond to leave £1000 to a second wife who had no knowledge of the prior marriage was postponed until all simple contract creditors were satisfied. Said the Master of the Rolls:

Had the bond been given on the first discovery and by way of recompence for the injury, and they had thereon parted, it had been a meritorious consid[eratio]n. But as it was over 5 years after the discovery, it was most probably to induce her to continue to live in adultery with him which is a wicked consideration. Had this been given to a lawful wife after marriage, it would have been a voluntary bond, and void ag[ains]t creditors: and much rather shall it here, when given in an illicit consid[eratio]n. Let it be postponed to all the simple contract debts.

Item 1031, *Lady Cox's Case*, 3 P.W. 339 (1734).

46. Item 940, *Banks v. Sutton*, 2 P.W. 700 (1732).

47. Item 981, *Ex parte Hopkins*, 3 P.W. 152 (1732).

pay for a bargain which he cannot have: there should be a quid pro quo; the money cannot be said to be due in conscience if the purchaser cannot come at what it was to be paid for."⁴⁸

Upon a bill by a widow against her husband's heir (but where his executors were not parties) for rebuilding her jointure house which he had wrongfully pulled down, the Lord Chancellor refused relief in the absence of the executors, because "The personal estate is the natural fund for the payment of debts; and I will not decree the heir to perform the covenant first and then put him to his bill ag[ains]t the ex[ecuto]r to be reimbursed, when had both been before the court, one decree would have been sufficient, ag[ains]t the ex[ecuto]r as far as the personal estate would go, and then ag[ains]t the real assets in the hands of the heir."⁴⁹ Natural justice also is the basis of the right to offset mutual debts, and to redeem after failure to make punctual payment of a debt secured by mortgage. According to natural justice, "The m[ortga]gee has a right to the money, and his right to the land is only as a security."⁵⁰

The foregoing references to natural law and natural justice, in connection with the rulings routinely made by equity courts in the normal course of business (quite apart from the discussions of those topics contained in the long extracts from Lord Kames⁵¹), support the conventional wisdom that Jefferson and many outstanding eighteenth century lawyers applied those principles in actual practice, and that the infusion of morals which Dean Pound speaks of as characteristic of equity did indeed take place and shape the course of Anglo-American jurisprudence.⁵²

II. JEFFERSON'S COMMENTS

Since the Equity Commonplace Book, unlike the Legal Commonplace Book,⁵³ contains no material relating to political topics and does not include any specimens of Jefferson's own original legal writing,⁵⁴ it is difficult to

48. Item 816, *Stent v. Bailis*, 2 P.W. 217, 219, 222 (1724). On a rehearing before Lord Chancellor King, the chancellor advised an "accommodation."

49. Item 1027, *Knight v. Knight*, 3 P.W. 331, 333-34 (1734). However, a bill to foreclose a mortgage is against an equity in the heir alone. A marginal note by the reporter calls attention to the "diversity where the ex[ecuto]r as well as heir is liable to the demand, on account of his having the natural fund for debts, and where the bill is only to bar an equity of redemption which is in the heir alone." When lands are devised in trust to pay debts, "the land being debtor," all debts, specialties, simple contracts, and legacies share equally. It is otherwise with respect to judgments, which affect land by their own strength and nature. Item 1525, *Croft v. Long*, *Freeman* 175 (1663). See also item 1179, *Smith v. Smoult*, 1 Ca. Ch. 88 (1668).

50. Item 665, *Lord Lanesborough v. Jones*, 1 P.W. 325, 326 (1716); item 1274, *Thornborough v. Baker*, 1 Ca. Ch. 283, 285 (1676).

51. Items 1077, 1078, and 1081.

52. See, e.g., H.T. COLBOURN, *THE LAMP OF EXPERIENCE* 77, 190 (1965):

53. See *supra* text accompanying note 11.

54. The Legal Commonplace Book includes, for example, Jefferson's "disquisition" on Christianity as part of the common law, which comprises items 873 and 887. See E. DUMBAULD, *supra* note 1, at 17, 76-79.

identify passages in the Equity Commonplace Book which typify Jefferson's own legal reasoning or rumination as distinguished from his conspectus of the rules laid down by the court decisions contained in the reports which he utilized as a law student. However, throughout the Equity Commonplace Book, especially in its early pages, there are numerous interlineations and marginal notes where Jefferson added additional material derived from authorities encountered in the course of his later research. Most often he merely added an additional citation where the same case ("S.C.") is found in another report, or where the same principle ("S.P.") is followed in another case.

Sometimes Jefferson remarked that the case is "more fully reported" in the newly added citation. Thus, to an item⁵⁵ originally reading: "The def. had confessed at a former trial that a marriage settlement had come to his hands, but now denied it, tho' it was proved. Decreed the pl. should enjoy the estate on a presumption that the def. suppressed the settlement. *Eyton v. Eyton* 2 Ver. 346" the following interlineation was added:

S.C. Pr. Ch. 116. (1700) more fully reported, where no such presumption is mentioned, but the M.R. [Master of the Rolls] and L.C. [Lord Chancellor] seem to have considered the former answer and a counterpart of the settlement which the pl. had preserved as sufficient evidence. Nor could they have gone on the presumption of fraud in one def. when the decree equally affected other defs who were clear of the imputation of fraud.

This comment clearly embodies the results of Jefferson's comparison of the two reports of the case. The point which he makes in the last sentence quoted (that other defendants affected by the decree were not parties to any possible suppression of the settlement) seems to be his own conclusion from the facts set forth in the more detailed account of the case given in "Pr. Ch." [*Precedents in Chancery*]. That proposition is nowhere explicitly stated in the report, although the report discusses data from which Jefferson's conclusion can be derived.

In the case described above, plaintiff David's claim was based upon a settlement supposedly made by his grandfather Thomas, who left three sons, the eldest (Benjamin) being a lunatic, and the second (Randall) having died without issue. Plaintiff David and defendant John were the offspring of Thomas's third son. At an earlier stage in the litigation David sued his brother John, as well as John's wife Jane, and Benjamin her father, seeking discovery. John admitted having possession of the settlement, and set forth its terms, but was unwilling to part with it because it belonged to Benjamin.

Several years later, after Benjamin had died without male issue (leaving only his daughters Jane and Anne), David amended his bill, adding Anne as a defendant. John answered, saying that he had delivered the settlement to Benjamin and kept no copy, and did not know whether the terms were

55. Item 395, *Eyton v. Eyton*, 2 Vern. 346 (1700).

correctly stated in his previous answer, but that he knew of no other settlement. Jane and Anne answered separately, insisting on their title as heirs to Benjamin and Thomas. Plaintiff had procured and offered in evidence a counterpart of the deed of settlement. Some proof existed that Randall had sold some land, but there was no other proof of the settlement.

Disregarding the settlement, Thomas's lands would descend by primogeniture to Benjamin and then to his two daughters as coparceners, and John would hold *jure uxoris* (by the right of his wife) his wife's share. But under the settlement, he being apparently the younger son, the entire estate would go to David as tenant in tail male upon the death of both his uncles without male issue. There would thus be an economic motive for John to suppress the settlement, but if he had succumbed to temptation he would hardly have disclosed the terms of the settlement as he did in the previous proceedings.

At the hearing, the ampler report in *Precedents in Chancery* states, "It was insisted that the husband's answer, *whereby he had confessed the settlement*, was not evidence against his wife (being in a matter of inheritance) and that without other evidence of the settlement" they could not make use of the document "pretended to be a counterpart." But the Lord Keeper thought that as the record stood "the counterpart would of itself be evidence enough at law of the settlement. *Sed quaere de hoc* (but query as to this)."⁵⁶

Possibly the court was convinced that John's admission sufficiently proved the existence of a settlement, and that the proffered counterpart probably could be relied on for precise delineation of the settlement's terms since it followed the pattern of standard provisions for entailing land successively to several sons in tail male. In any event, the account in *Precedents in Chancery* leaves one with the impression that the defendant John was probably a bumbling squire rather than a scheming plotter planning the perpetration of a fraud. And (as Jefferson deduced from the facts) even if he had been guilty of suppressing the settlement, the other parties affected by the decree were not co-conspirators with him, and the court's decision could not have rested primarily on a presumption of fraud.

A case found three items further on in the commonplace book warrants a similar inference of original reflection on Jefferson's part.⁵⁷ The original entry in that item recorded a ruling which denied the prayer of a plaintiff who, in lieu of a jointure at marriage, had received a rent-charge with power of distress. Because the arrears were so great that distress was insufficient, plaintiff desired to hold the land until satisfaction could be forthcoming. The reason given for the decision was that "the law gives no remedy but what the party has provided himself."

Jefferson's interlineation adds "nor does there appear any fraud in the def. to prevent the pl. of his legal remedy, which might entitle this court

56. *Eyton v. Eyton*, Pr. Ch. 116, 118-19 (1700).

57. Item 398, *Champernoon v. Grubbs*, 2 Vern. 382 (1700), Pr. Ch. 126.

to give him any other.” This passage is an extract from the court’s opinion as reported in the supplemental citation. But Jefferson then cites another case where “on a bill by a devisee of a rentcharge with power of distress, setting forth that the annual profits of the lands were not more than half sufficient, the Ch[ancello]r relieved, going principally on the intention of the test[ato]r.” A bracketed passage follows, stating that “perhaps tho['] it might weigh that the pl. in this case being a devisee had been guilty of no laches.”⁵⁸ In other words, the plaintiff in the second case, being a mere transferee of the right held by the previous owner of the rent-charge, could not be blamed, like the plaintiff in the first case who was himself an original party to the marriage settlement agreement, for having failed to negotiate a more advantageous bargain or a more adequate remedy. This comment may be ascribed to Jefferson’s comparison of the cases.⁵⁹

An even stronger inference of originality is justified when a bracketed comment speaks in the first person: “I should infer from this case that one who has general letters of attorney may answer without oath.” In the case to which Jefferson referred,

J.S. residing at Tunis sues J.N. at law in England. J.N. brings a bill in chancery against him and gets an order that service on J.S.’s attorney at law should be good, but a commssion shall go to Tunis to take his answer, for the answer of this attorney without oath shall not be sufficient.

Jefferson’s comment appears to be a conclusion which he derived from the court’s remark: “If there had been a general Letter of Attorney to one to appear in and defend Suits, the Court would have ordered such Attorney to appear for the Principal, and that Service on him should have been good Service.” But it may be an incorrect conclusion, for the court also said: “Plaintiff is entitled to a Discovery and Answer without Oath is nothing.” In the case at bar the plaintiff had obtained an order that service of summons on the plaintiff’s Attorney would be good service. The court’s comment about a general letter of attorney may mean that under such a

58. Jefferson spells “laches” as “lachesse.” Item 398, *Foster v. Foster*, 2 Vern. 386 (1700).

59. Other bracketed passages or interlineations, however, specifically refer to the comments of the reporter or editor (or to the arguments of counsel) as the source of the comment or query set forth. Item 650, *Perkins v. Micklethwaite*, 1 P.W. 85 (1714); item 705, *Short v. Wood*, 1 P.W. 470 (1718); item 1012, *Piddock v. Brown*, 3 P.W. 288, 294 (1734); item 1027, *Knight v. Knight*, 3 P.W. 331, 333 (1734); item 1178, *Frank v. Frank*, 1 Ca. Ch. 84 (1667); item 1179, *Smith v. Smoult*, 1 Ca. Ch. 88 (1668); item 1184, *Gore v. Blake*, 1 Ca. Ch. 98 (1668); item 1199, *Nelthrop v. Hill et al.*, 1 Ca. Ch. 135 (1669); item 1216, *Bovey v. Skipwith*, 1 Ca. Ch. 201 (1671); item 1217, *Rich v. Sydenham*, 1 Ca. Ch.202 (1671); items 1325 and 1326, *Hele v. Hele*, 2 Ca. Ch. 28, 29, 87 (1682); item 1559, *Penhay v. Hurrell*, *Freeman* 231, 235, 258 (1698), 2 Vern. 370 (1699). In item 1348, *Davies v. Moreton*, 2 Ca. Ch. 127 (1682), the parenthetical comment calls attention to a circumstance appearing in the facts as stated by the reporter. The bracketed material in item 1199, *Nelthrop v. Hill et al.*, 1 Ca. Ch. 135, 137 (1669), is of similar character, and a query by the reporter is ignored by Jefferson.

letter, service on the attorney without such an order would have been good service, or perhaps also that under such a letter the attorney was authorized to answer under his own oath.⁶⁰

Bracketed passages in the lengthy extracts from Lord Kames appear to be Jefferson's notations of the English or Virginia equivalents of Scotch practice described by Lord Kames.⁶¹ Queries also appear in the text.⁶² Some of these probably are indicative of Jefferson's own doubts. "Qu. would not one, who pais money to an ex[ecuto]r before probat[e], be obliged to pay it a second time, if the will is proved to be forged?";⁶³ "Qu. if it is not the S.C. carried by appeal from the M.R. to the L.K.?";⁶⁴ "qu. if decree is not somewhat different?";⁶⁵ "but qu. if the words 'of his body' are not omitted by mistake?";⁶⁶ "the M.R. declared the rule in these cases

60. Item 716, [Anon.], 1 P.W. 523 (1718). *See also* item 1402 (Jefferson's comment "as I take it; for the report is almost unintelligible"). In that case, plaintiff was executrix of defendant's employer. Defendant married the daughter of one Harrison and contended that his employer promised to contribute to her portion as much as her father did. Plaintiff's bill was to discover how much the father had given. Defendant got a special verdict at law finding that Harrison gave £2000. Plaintiff's amended bill alleged that a smaller sum had been given. Defendant pleaded the verdict and on a demurrer the plea was held good. Notwithstanding that ruling, plaintiff examined with respect to the value of Harrison's contribution and defendant pleaded surprise. The Lord Chancellor said "Where there is right and equity, forms of the Court and orders shall not hinder me to examine it; and it was so ordered." *Shuter v. Gilliard*, 2 Ca. Ch. 250, 251 (1677). The report is indeed obscure but it would seem that Jefferson misinterprets the court's language when he says "The def. coming into chancery would have examined the grounds of the verdict but [the court] refused." In item 1740, *Brond v. Gipps*, 2 Ch. Rep. 98 (1674), Jefferson says: "it does not appear from the book that the lands were charged by the will, but we must suppose they were." In item 1968, *Coleman v. Wince*, Pr. Ch. 511 (1718), he says: "qu. whether if the purchaser had had notice of the bond debt, it might have altered the case? I beleive [sic] not."

61. *See* items 1122 and 1128.

62. *See* item 539 ("sed Q."), *Bretton v. Lethurier*, 2 Vern. 653 (1710); item 1160 ("but Qu."), *Rennessey v. Parrot*, 1 Ca. Ch. 60 (1665). No query appears in the report of those cases. But in item 579 ("Qu. tamen"), the query is in the report, and thus did not originate with Jefferson. *Basse v. Grey*, 2 Vern. 692, 694 (1715).

63. Item 1173, *Smallpiece v. Anguish*, 1 Ca. Ch. 75 (1666). The court enjoined debtors of the estate from making payments to an insolvent personal representative trying to collect debts before determination of whether the will, alleged to be forged, was valid.

64. Item 1563, Jefferson's query, after citing *Kingslader v. Courtney*, Freeman 228 (Case 309, Trinity term 1700), and for the same principle *Kimpland v. Courtney*, Freeman 250 (case 318, Hilary term 1700), is supported by a marginal note in the latter case "Upon an Appeal. Ante Case 309." In item 1012, referring to a case mentioned in the marginal note to *Piddock v. Brown*, 3 P.W. 288, 294 (1734), Jefferson (in one of the rare instances where he cites P.W. by page number; *see also* item 1027) asks: "Qu. if not S.C. as Pr. Ch. 266 (1708)." It is possible that the case reported there as *Woodman v. Skute*, Pr. Ch. 266 (1708), is the same case as *Piddock v. Brown*.

65. Item 443, *Baskerville v. Baskerville*, 2 Vern. 448 (1703); *Baskerville v. Gore*, Pr. Ch. 186 (1701).

66. Item 1686, *Shelley v. Earsfield*, 1 Ch. Rep. 206, 213-14 (1661). *See also supra* note 43. Likewise, a remainder in a marriage settlement to the children of the wife's body was held to be a provision for children of that marriage only, and not to include a son by a second marriage. Item 386, *Dafforne v. Goodman and Bolt et ux.*, 2 Vern. 364 (1699); *Dafforne v. Bolt and Goodman*, Freeman 288 (1698); *Daffern v. Bolt*, Pr. Ch. 96 (1699).

was to be taken from the civil law, and not from the common law (qu. canon law?);⁶⁷ and “a bill to be relieved against a verdict for excessive damages was dismissed but Q. whether the Ld. K. did not argue as if he would have done it in some cases.”⁶⁸

III. PECULIAR FEATURES OF EQUITABLE RELIEF

Lastly, it will be of interest to note some striking features of the equitable relief afforded by English judges. An outstanding illustration of the infusion of natural justice and moral principles is the equitable rather than literal interpretation of documents, so as to give effect to the real intent and purpose of the parties.

Thus a bequest to testator’s “younger children” was interpreted as meant for the benefit of daughters, and as excluding a younger son, who was testator’s heir at law. Said the Lord Chancellor: “He is no younger child within the devise, and shall not take as such.”⁶⁹ Similarly, a bequest to the testator’s “post-humous daughter” was construed by Lord Chancellor Somers to include a daughter born during the testator’s lifetime, it appearing that the will was written when the testator was ill and his wife pregnant, and never was altered before his death.⁷⁰ In another case a devise in trust, to be conveyed to such of the testator’s relatives as the trustee should think best and most reputable for the testator’s family, was awarded to the heir at law, even though it was proved that the testator did not intend that his heir should have it.⁷¹ Likewise, when property was left to the testator’s brothers’ and sisters’ children “at the discretion of his ex[ecuto]rs,” the Lord Chancellor decreed that “they should take equal shares.”⁷² And legacies to the testator’s “poor kindred” were treated as extending to

67. Item 1998, *Mentney v. Petty*, Pr. Ch. 593 (1722).

68. Item 144, *Barker v. Holder*, 1 Vern. 316 (1685).

69. Item 1522, *Bretton v. Bretton*, Freeman 158 (1659). However, in a devise to “poor relations” the Countess of Winchelsea, who was as close a relation as any, claimed a share and it was decreed, she was intitled thereto, in regard the Word [poor] was frequently used as a Term of *Indearment* and *Compassion*, rather than to signify an *indigent* Person; as one speaking of one’s Father, often says my *Poor Father*, or of one’s Child, my *poor Child*. But this seems to have been a strained interpretation, in Favour of the Earl and Countess of *Winchelsea*, who had not an Estate any Ways proportionable to their Quality.

[Anon.], 1 P.W. 327 (1716). See *infra* note 73.

70. Item 1873, *Jaggard v. Jaggard*, Pr. Ch. 175, 176-77 (1701).

71. Item 1537, *Clarke v. Freeman*, Freeman 198 (1694). “This court will judge it most reputable for the family that the heir at law shall have it.” *Id.*

72. Item 1477, *Griffith v. Jones*, Freeman 96 (1686). Jefferson adds that according to another report of the case (2 Ch. Rep. 394) “it shall be distributed by the ex[ecuto]rs according to their discretion.” In another case a wife having under her husband’s will a power “to devise her estate among his three dau[ghte]rs in such prop[ortio]ns as she sh[oul]d think fit” must divide it equally “unless a good reason be given for doing otherwise.” Item 1901, *Astry v. Astry*, Pr. Ch. 256 (1706).

relatives "one degree further than he had expressed, and no further, and all shall have equal shares."⁷³

In another case, however, the Lord Chancellor testily rejected a claim by children for equal distribution. The will in question gave the residuary estate to *A* in trust to give to his children and grandchildren "according to their demerits." *A* gave it all to one. The others brought suit seeking a share. The Lord Chancellor exclaimed "I sit not here to make wills for men nor can interpret them farther than they go." He explained that

every demand must be certain before it can be decreed, but here is uncertainty in the persons who may demand, and in the time and size of their demands. . . . The children here are not to come in by the will immediately, but by the act of the devisee, who is appointed to judge and distribute according to their merits.⁷⁴

Equity relieved against a gaming debt, where fraud was shown, even in the absence of statute.⁷⁵ In another case where morality affected the decision, "the testator had one child, but was connected with a lewd woman. He bequeathed his estate to his ex[ecuto]rs: two of whom swore he did it in trust for the woman, the third swore he understood it was for his child." The court declared that "as it was not proved strictly to be for the former, and she being a lewd woman and having abused the test[at]or, the child should not be deprived of it."⁷⁶

Little extension of the ordinary meaning of the words used was required in holding that when a son was *en ventre sa mere* at the obligor's death, his daughter could not collect on a bond to pay her £900 "if he should have no son living at his death."⁷⁷ Similarly, "an infant *en ventre sa mere*

73. Item 1477, *Griffith v. Jones, Freeman* 96 (1686). But here again Jefferson notes that according to another report of the case, "it was deemed to extend only as far as stat. distribn [the statute of distributions] and that their shares shall be at the ex[ecuto]rs discretion." See also [Anon.], 1 P.W. 327 (1716).

74. Item 1284, *Civil v. Rich*, 1 Ca. Ch. 309 (1679). Similarly, the Lord Keeper exclaimed, when refusing to enjoin vexatious litigation, that "it belongs to the parliam[en]t, not to me to reform the law." Item 1902, *Lord Bath v. Sherwin*, Pr. Ch. 261, 262 (1706).

75. Item 1553, *Humfryes v. Rigby, Freeman* 223 (1688). The Lord Chancellor applied the rule "once a fraud, always a fraud" in a case where a woman borrowed £160 from her brother to make her marriage portion sufficient to satisfy her husband, and gave a bond for the amount. Both spouses died without issue, and the brother also. The brother's executor sued the wife's executor, who sought equitable relief, contending that there would have been fraud only against the husband or his issue, and that the bond was good against the wife. The Lord Chancellor decreed that "the husband and his wife might have been relieved on their bill, ag[ain]st the fraud, and that which was once a fraud will alwais [sic] be so. Deliver up the bond." Item 1977, *Gale v. Lindo*, 1 Vern. 475 (1687). For another application of the same rule, see item 1482, *Gay v. Wendow, Freeman* 101 (1687).

76. Item 1629, *Aynsworth v. Pollard*, 1 Ch. Rep. 181 (1625).

77. Item 1554, *Gibson v. Gibson, Freeman* 223 (1698). Nor did the court hesitate to rearrange the order in which remainders following a life estate to a father should stand, in order that a remainder to trustees to support contingent remainders to the first and other sons might have its effect, although in the will as written it came after, instead of before, the devise to the sons. See item 1761, *Green v. Rooke*, 2 Ch. Rep. 169 (1679).

(in its mother's womb) at the death of the father shall come in on distrib[utio]n, for he is a child in the eye of the law, and ought to be provided for as well as the rest."⁷⁸

Equitable considerations came emphatically to the fore when the Lord Chancellor discharged a Quaker who had been committed for not answering because his conscience was "too tender" to swear or affirm. The Lord Chancellor declared that "it was a perversion of justice to make it's process a means of oppression. Take his answer without oath or affirmation."⁷⁹ Another procedural ruling based on substantive justice was formulated as follows: "Tho['] a purchase *pendente lite* [during the pendency of litigation], for a valuable consid[eratio]n without notice, shall be set aside, yet as it is a hard case, if there be any flaw at hearing on the pl's side, he shall not amend, or make any new proof after publication."⁸⁰

Technicality in pleading received short shrift when, after a demurrer to the bill had been filed because no administrator was party, the plaintiff took out administration and filed an amendment to the bill. To the objection that "this should have been done by a supplemental, not an amended bill, because the latter is annexed to and becomes a part of the original bill; and then it will be a bill by an adm[inistrato]r when there was none," the Lord Chancellor decreed that "the letters of adm[inistratio]n pl. has taken out refer [*i.e.*, relate back] to the death of the intestate, like the case where an ex[ecuto]r brings a bill, before probat[e] a subsequent probat[e] makes the bill good, and in the present case, either a supplemental, or amended bill was proper."⁸¹ But in another case a bill of review was ruled to be the

78. Item 1558, *Ball v. Smith*, Freeman 230 (1698).

79. Item 770, *Wood v. Story and Bell*, 1 P.W. 781 (1721). A Jew was permitted to swear on the Pentateuch. See item 126, [Anon.], 1 Vern. 263 (1684). When sending a commission to the East Indies to take the answer of a person "of the Gentou religion" the Chancellor declined to "appoint a solemn form of oath lest it should be contrary to their notions of religion," but he ruled that the "comm[issio]n[er]s should administer such solemn oath as in their discretions should seem meet, and that if it were any other than the Christian oath they should certify it to the court at large." Item 2009, *Ramkissenseat v. Barker*, 1 Atk. 19, 20-21 (1739). See also item 2011, *Omychund v. Barker*, 1 Atk. 21, 40 (1744).

80. Item 894, *Sorrell v. Carpenter*, 2 P.W. 482 (1728).

81. Item 1035, *Humphreys v. Humphreys*, 3 P.W. 349, 350-52 (1734). The report shows that "his Lordship resented this plea as an affected Delay." *Id.* at 351. In another case a deed was referred to by a depo[sitio]n, and it being said that it was now become a part thereof, the M.R. had ordered leave to inspect it; but discharged by L.C. for that the def. before hearing is not to see strength of pl's cause, or any deed to pick holes in it.

Item 875, *Davers v. Davers*, 2 P.W. 410 (1727). To the same effect see item 951, *Hodson v. Earl of Warrington*, 3 P.W. 5 (1729). However, in a later case the Lord Chancellor held that "the defendant[s] by referring in their answers to deeds which were in their own possessio]n had made them a part of their answer, and that, tho' they were the heir, they should produce them." Item 1040, *Bettison v. Farringdon*, 3 P.W. 363 (1735). One gathers the impression that the chancellor felt that the case would be terminated promptly upon production of the deeds, for

as at the Hearing you admit the Court would do what has been desired; so it is for

only means of attacking a decree which has become final. If relief could be had by bringing an original bill,

the decisions of this court would be contradictory and breed great confusion. The only remedy in such case is by bill of review, which must be either for error appearing on the face of the decree, or on some new matter as a release, receipt &c proved to have been discovered since. For unless this relief were confined to such new matter, it might be used to vex and oppress the other side, and prevent the cause from being ever at rest.⁸²

On the other hand, where a defendant pleaded a parol agreement in bar to a suit to enforce a prior decree, the Lord Chancellor held that an original bill must be brought in order to take advantage of such a defense. For otherwise, by waiting to be sued and pleading in defense, "he makes one witness to the argument serve; but if he brings an original bill and the then def. denies the agreement two witnesses are necessary. So that by the present method the now pl. loses the benefit of answering which he would then have."⁸³

An unfair result, at least in the view of modern critics, was sanctioned when it was decreed that an agreement, made by deed in writing between a prospective husband and a widow with a jointure, that she should "dispose of her jointure as she pleased," was immediately extinguished by the marriage when it took place.⁸⁴ Another widow lost her claim to diamonds and jewels worth £200 "which she pretended (but did not prove) to have bo[ugh]t with money allowed by an agreement previous to the marriage as a separate maintenance." The husband's creditor succeeded in subjecting them to his debt. The Lord Chancellor said that

had the widow proved the agreement for separate maint[enan]ce and that these things were purchased with that money, they w[oul]d not be liable to the husb[an]d's debts: but they are now to be consid[ere]d as paraphernalia, which being only superfluities and ornaments to the wife, the law has subjected them to the husband's debts rather than his creditors should starve.⁸⁵

the Benefit of all Parties that it should be done before the Hearing; for if the Deed be a proper one . . . the plaintiff will go no further, which will put an End to the Suit.

Id. at 364.

82. Item 1046, *Taylor v. Sharp*, 3 P.W. 371 (1735). When a bill of review to reverse a decree was grounded on the fact that the plaintiff, a woman, had married before the decree, and so the suit abated, it was decided "that a decree made in point of right ought not to be reviewed on the point of a dilatory plea, which might have been pleaded in abatement." Item 1524, *Cranborne v. Delahay*, *Freeman* 169, 170 (1662).

83. Item 1292, *Wakelin v. Walthal*, 2 Ca. Ch. 8 (1679).

84. Item 1134, *Darcy v. Chute*, 1 Ca. Ch. 21 (1663). *Cf.* item 821, *Cannel v. Buckle*, 2 P.W. 243 (1724).

85. Item 1912, *Willson v. Pack*, Pr. Ch. 295 (1710). The Chancellor ordered the jewels "to be sold to satisfy the plaintiff, unless the lady, whom he believed would be unwilling to part with them, should pay the plaintiff his debt, and the costs of this suit." *Id.* at 298.

Reasons of public policy dictated denial of a request that defendant disclose the names of witnesses to a deed under which he claimed, the plaintiff contending that the deed was antedated. The Lord Chancellor denied it "because it might tend to tamper[ing] with witnesses; but it might be [granted] if there were apparent suspicion."⁸⁶ Similarly, in another case plaintiff's father was committed for "advertising a reward to any person who would prove a particular point in a suit depending here, because it tended to subornation [of perjury]."⁸⁷ Another practice frowned upon by the court and regarded as "dangerous" for public policy reasons was that of matchmaking by busybodies with a financial axe to grind. "A bond given to the def. to procure a match between the pl. and his present wife was set aside as a dangerous precedent."⁸⁸

Public policy and ethical principle likewise dictated the decision that a bond was void which had been given by an appointee as supervisor of excise to pay to the person procuring his appointment £10 per year as long as he should continue in office. Said the Lord Chancellor: "Merit, industry, and fidelity should recommend to these places: the taking from the office part of the reasonable reward of his trouble will induce him to make it up by unlawful means."⁸⁹

Discovery was granted with respect to goods purchased from a bankrupt after bankruptcy. The defendant pleaded purchase for value and without notice. Lord Keeper North said: "If the sale were at extreme undervalue, the plea shall not stand; therefore, either set forth the goods or what you paid for them." The defendant urged that upon discovery the bankruptcy commissioners will assign the goods or the money "and so this court shall wound a bona fide purchaser." The Lord Keeper said "Set forth the goods and what you paid, on cond[itio]n the pl. consents to take no advantage of the discovery but in this court, and not at law." The plaintiff accepted these terms and subscribed his consent with the register.⁹⁰

Discovery of lands was denied when sought by the holder of a judgment against property sold to a bona fide purchaser without notice of the judgment. The Lord Chancellor "would not force a purchaser for valuable consid[eratio]n without notice to discover any thing which might affect his title."⁹¹ Similarly, a demurrer was sustained on behalf of a woman to a bill to discover whether she was married, for "if she was married it would forfeit an estate devised to her by her late husband during widowhood."⁹²

86. Item 1324, [Anon.], 2 Ca. Ch. 84 (1681).

87. Item 748, Pool v. Sacheverel, 1 P.W. 675, 677 (1710).

88. Item 1622, Arrundel v. Trevillian, 1 Ch. Rep. 87 (1634).

89. Item 1055, Law v. Law, 3 P.W. 391 (1735). Plaintiff was the official's widow, suing to be relieved from the bond. Defendant was his brother, who had sued on the bond at law, where the widow made a sham plea of payment, and sought relief in equity.

90. Item 1361, Wagstaff v. Read, 2 Ca. Ch. 156 (1683).

91. Item 1314, Snelling v. Squib, 2 Ca. Ch. 47 (1680). See also item 1288, [Anon.], 2 Ca. Ch. 4 (1679); *supra* note 81.

92. Item 1730, Monnins v. Monnins, 2 Ch. Rep. 69 (1672). For other cases on discovery,

Courts of equity were touchy regarding any affront to their authority. Thus when an executor pleaded *plene administravit* (fully administered) at law and then confessed judgment in favor of another person while a bill in equity brought by a creditor for discovery of assets was pending, the Chancellor "decreed him to pay the complainant's whole debt; for he shall not be defrauded while he is proceeding in this court."⁹³ And when parties signed, in the presence of the court, an order to submit to an award intended to be a final disposition of the controversy, but afterwards one of them revoked the agreement, the court declared that while "nothing less than a legislative power can make irrevocable a submission which in its nature is revocable" that sort of behavior "is such an abuse of the court as that we may justly lay the party by the heels."⁹⁴

Propriety was required in court proceedings. Where "an answer, and also exceptions to the master's report were very scandalous, the def. was therefore ordered to pay the pl. 100 lib. for his reparation and costs, and the solicitor to pay 20. lib. and be committed till he pay."⁹⁵ But "if a witness on an interrogatory deposes scandal, he shall not pay costs, for it was the fault of the commrs. to take it down."⁹⁶

Obstructing the course of justice by interfering with participants in court proceedings was a particularly serious transgression. "A party attending his suit here was arrested in an action. The court committed the bailiff who arrested him."⁹⁷ After the prisoner had been released by order of court, "an action of escape was brought ag[ains]t the sheriff. The court ordered the action to be discharged."⁹⁸ Other bailiffs offended by serving an execution "in breach of an injunction of this court." They "find money hid in the house and carry it away." The court's reaction was peremptory: "Let the party at whose suit the ex[ecutio]n was taken out make good this money, and all the damage which the pl. shall swear he hath sustained."⁹⁹

Service of a subpoena on a party, provided a bill be later actually filed, creates a *lis pendens*, for otherwise a man on the service of a subpoena

see item 227; *Hungerford v. Goreing*, 2 Vern. 38 (1687); item 951, *Hodson v. Earl of Warrington*, 3 P.W. 35 (1729); item 1167, *Angell v. Draper*, 1 Vern. 399 (1686); item 1288, [Anon.], 2 Ca. Ch. 4 (1679); item 1645, *Bishop v. Bishop*, 1 Ch. Rep. 142, 144 (1639); item 1718, *Shalmer v. Evesham*, 2 Ch. Rep. 29 (1689); item 1762, *Trethervy v. Hoblin*, 2 Ch. Rep. 172 (1764); item 2014, *Duncalf v. Blake*, 1 Atk. 52 (1737).

93. Item 1476, [Anon.], *Freeman* 93 (1685).

94. Item 1210 (*see supra* note 23), *Hide v. Petit*, 1 Ca. Ch. 187 (1670), *Freeman* 133.

95. Item 1776, *Whitlock v. Marriot*, 2 Ch. Rep. 386 (1685).

96. Item 872, [Anon.], 2 P.W. 406 (1726).

97. Item 1688, *Meynel v. Cooper*, 1 Ch. Rep. 217 (1661). *See also* item 2016, *Ex parte Kerney*, 1 Atk. 54 (1744).

98. Item 1689, *Meynel v. Cooper*, 1 Ch. Rep. 217 (1661).

99. Item 101, *Childrens v. Saxby*, 1 Vern. 207 (1683). The Lord Keeper thought it an idle practice in the Court to put a thief to his oath to accuse himself; for he that has stolen will not stick to forswear it; . . . therefore *in odium spoliatoris* [to the disadvantage of the wrongdoer] the oath of the party injured should be a good charge upon him that has done the wrong.

might alien his land “and prevent the justice of the court.”¹⁰⁰ The court stoutly declared that a judgment creditor “is not to be Chancellor” and affect the rights of other creditors.¹⁰¹

The Lord Chancellor vigorously made clear that he “much disliked these doings” when a mountebank sought to gain from exhibition as a curiosity of a monstrous birth (having two heads, four arms, and four legs) both before and after the death of the creature. Plaintiff, its mother, was to receive during its life one-eighth of the profits from showing it. It lived but a month, and the defendant embalmed the body and kept it. Plaintiff sued to be relieved of her agreement and an accounting of the profits from exhibition. The Lord Chancellor, after expressing his distaste, “decreed the prayer of the bill and full costs, and that the def. should bury the body within a week.”¹⁰²

With equal disgust the Lord Chancellor rejected the complaint of a man who had deserted a woman by whom he had had a child. He had given her a bond for £500 to pay her £50 and maintain the child. He offered to pay the £50 and sought to enjoin the bond “alleging, as the truth was, that the lady had been taken in bed with another man before. L.C. refused the injunction, saying this should not be a court to examine such matters. ‘Iniquity, sais the editor, takes away equity.’”¹⁰³ The Lord Chancellor was equally outspoken in another case where the plaintiff had seduced his wife’s sister and had several children by her. He gave her some bonds as a provision for her and the children, and afterwards gave her a weekly allowance. When she brought suit on one of the bonds, he sought relief in equity, alleging that the bonds were void for lack of consideration

100. Item 146, [Anon.], 1 Vern. 318 (1685). A writ of *ne exeat regno* (let him not leave the kingdom) prohibiting a party from leaving the country “may be granted even in a case of private concernment, if there is danger of subterfuge from the justice of the nation.” Item 1399, Sir Robert Henly v. —, 2 Ca. Ch. 245 (1678). For other cases on *ne exeat*, see item 1021, Ex parte Bruncker, 3 P.W. 312 (1734); item 1189, Read v. Read, 1 Ca. Ch. 115 (1668); item 1895, Le Clea v. Trot, Pr. Ch. 230 (1704).

101. A creditor by judgment was paid by the executor out of the personal estate, whereby there is failure of assets for other creditors. L.C. They shall have the benefit of his judgment against the land, for tho’ the judgment creditor may proceed at law against either real or personal estate; yet he is not to be Chancellor to prevent payment of the debts, when he is not prejudiced by it.

Item 1490, Goree v. Marsh, Freeman 113 (1690). The same thought occurs in a fourteenth century record. A thief who had stolen a cow escaped while being taken to jail and was decapitated when he resisted and could not otherwise be recaptured. The court ordered “that the man who had decapitated the prisoner should be arrested. He would be arraigned for the killing because he had made himself judge (*pur ceo qil se fist mesme iuge*). But if the facts were found to be as described above, he would be acquitted.” THE EYRE OF NORTHAMPTONSHIRE, 3-4 EDWARD III, A.D. 1329-1330, VOLUME I, 97 THE PUBLICATIONS OF THE SELDEN SOCIETY 199, 207, 213 (D. Sutherland ed. 1983).

102. Item 1335, Herring v. Walround, 2 Ca. Ch. 110 (1682).

103. Item 1296, Bodly v. —, 2 Ca. Ch. 15 (1679). Relief was likewise denied against a bond to pay £400 to a “kept woman,” but the decision would have been otherwise had it been proved “that the def. was a common strumpet, and used to draw in young gentlemen.” Item 207, Whaley v. Norton, 1 Vern. 483 (1687). See also *supra* note 45.

or were satisfied by the weekly allowance. The Lord Chancellor said: "I can do no more ag[ains]t the bail than decree principal, interest, and good costs; let these therefore to be paid, or the bill to be dism[isse]d and it is pity I can do no more."¹⁰⁴

In a case where *A*, *B*, *C*, and *D* were trustees, *A* brought a bill to remove *D* as trustee. *B* and *C* answer that they are not willing to serve with *D*, but he insists on continuing. The Lord Chancellor emphatically declared: "I like not that a man should be ambitious of a trust, when he can get nothing but trouble for it." The Lord Chancellor then discharged *D*.¹⁰⁵ Another rule derived from ethical principle is attributed to a famous Lord Chancellor:

Before L[or]d Nottingham's time it was held that where lands were devised to be sold for the payment of debts and legacies, they should be paid *pari passu*: but he held the debts should be preferred, for he said he would not make a man sin in his grave, and such has been the course since.¹⁰⁶

Justice, rather than technical legality, is always uppermost in governing the action of a court of equity.¹⁰⁷ Equitable relief is inherently discretionary.¹⁰⁸ If the equities are not strongly in favor of a party invoking equitable relief, the court of equity may decline to intervene, and decide to leave the party to the party's remedy at law. This doctrine is expressed in the familiar maxims "he who seeks equity must do equity" and that a litigant must come into a court of equity "with clean hands." A certain degree of arbitrariness and imprecision is inevitable, as the outcome of each case depends upon the impact which the circumstances of the case make upon the conscience of the chancellor.¹⁰⁹

104. Item 1850, *Spicer v. Hayward*, Pr. Ch. 114 (1700).

105. Item 1350, *Uvedale v. Ettrick*, 2 Ca. Ch. 130, 131 (1682). Jefferson adds the reporter's note that "a trust being a creature of equity, equity will not only modify and regulate the execution of trusts, but also direct, limit and controul [sic], the actions of the trustees." *Id.*

106. Item 1975, *Brunsdon v. Stratton*, Pr. Ch. 575 (1721). Regarding the importance of Lord Nottingham as "Father of Modern Equity," see 6 W. HOLDSWORTH, *supra* note 31, at 541-48.

107. Technicalities often were disregarded in equity. Thus when a warrant had been issued by the Chancellor directing that a person who had failed to pay money as ordered by the Court "stand committed for his contempt" the delinquent debtor surrendered on a Sunday to the Warden of the Fleet, and then contended that he should be discharged on the ground that his arrest on Sunday was void. The Lord Chancellor rejected this argument, citing a comment by Chief Justice Holt that the Lord's day "should not be a sanctuary for malefactors." Item 2017, *Ex parte Whitchurch*, 1 Atk. 55 (1749).

108. For a discussion of equitable discretion, see item 945, *Cowper v. Cowper*, 2 P.W. 720, 753 (1734).

109. See *supra* notes 7-9. On one occasion the Lord Chancellor explicitly emphasized that "I know not on what reasons [a case cited by counsel] was decreed, but I am to decree according to my own conscience, and every case stands on it's own bottom." Item 243, *Earl of Rivers v. Earl of Danby*, 2 Vern. 72 (1688). A plaintiff, seeking favor from the court, may be subjected to conditions which cannot be imposed on a defendant. Item 39, *Micoe v. Powell*, 1 Vern. 37 (1682); item 157, *Hale v. Thomas*, 1 Vern. 345 (1685).

These characteristic peculiarities of equity are illustrated in cases from the Equity Commonplace Book. Thus Jefferson records that “chancery will not execute it’s own decrees by bill, without examining the justice thereof, much less those of another court.”¹¹⁰ The rule is elaborated in another case in these terms:

When a decree is capable of being executed by the ordinary process of the court, process shall go without attending to the inequity of the decree, because it is not the act of the present judge, and so his conscience is not concerned. But where the ordinary process cannot execute the decree, but it is become necessary to bring an original bill, and to obtain a second decree, the judge must make it his own act, and therefore will enter on the merits.¹¹¹

Equity seeks to do complete justice.

It is not always true that where a man has a title at law he shall pursue his legal remedy and not have a decree in chancery. For where there is just occasion to come into this court, and the court is by that means possessed of the cause and the right fully examined here, it will not after that send the pl. to law. This court never decreed a suit where it might decree a remedy.¹¹²

Hence, “where a matter remediable at law is complicated with other matters proper in equity, this court will determine the whole matter.”¹¹³

On the other hand, parties were often left to pursue whatever remedies were available to them at law. In one such case, a lessee for years, with covenants to repair, assigned the lease by way of mortgage for money borrowed. The tenements being out of repair, the lessor brought a bill against the mortgagee to discover whether the lease had not been assigned to him so as to compel him to repair. The court concluded, although “it was the m[ortga]gee’s folly to take the whole lease and thereby subject himself to pay the rent and repair tho’ he could not have possession,” that “as he is only a m[ortga]gee and has not had possession we will not help the pl. to a discovery, but let him recover at law as well as he can.”¹¹⁴ Similarly, if dealings between merchants have ceased for a long time “and there has been a seeming acquiescence” with respect to the state of their mutual accounts, “we will leave them to the law.”¹¹⁵

Another striking illustration of relegating a party to his legal remedies is denial of specific performance in case of inequitable contracts, where

110. Item 317, *Baker v. Childs*, 2 Vern. 226 (1691).

111. Item 1752, *Lawrence v. Berney*, 2 Ch. Rep. 127 (1677).

112. Item 180, *Earl of Kildare v. Sir Morrice Eustace*, 1 Vern. 428, 437, 438 (1686). Similarly, after completion of discovery proceedings in equity, “we will not send them to law.” Item 354, *Christ-College in Cambridge v. Widrington*, 2 Vern. 282 (1692). *See also* item 1056, *Humphreys v. Humphreys*, 3 P.W. 395, 397 (1735).

113. Item 1458, *Graves v. White, Freeman* 57, 64 (1680).

114. Item 347, *Pilkington v. Shaller*, 2 Vern. 374 (1700).

115. Item 348, *Sherman v. Sherman*, 2 Vern. 276 (1692).

that remedy would otherwise have been available. Thus on a bill for specific performance of articles to purchase,¹¹⁶ the Lord Chancellor

declared he was not bound to assist contracts which were harsh and unequitable, or are attended with such circumstances as would be a hardship on the def. That this case was proper for a jury who might mitigate or moderate damages according to circumstances; whereas this court could take no advantage of such circumstances, but must decree executio[n], or dismiss the bill. And therefore the bill was dismissed, tho' without costs.¹¹⁷

Where a party claiming title to land or a sole right to a fishery is out of possession, and thus able to vindicate his right at law, the equitable remedy of perpetuating testimony of witnesses in support of his claim will be denied, and the claimant relegated to his action at law. The reasons for this rule were explained in a case where the claimant to a sole right of fishery was in possession and the bill to perpetuate testimony was upheld. For "if a man is in possession and is only threatened with disturbances, he can bring no action at law, and has no remedy but by bill to perpetuate his testimony." Where an action at law is available it is preferable, since the depositions of witnesses to perpetuate their testimony are not made public until after their death, and they are thus in a position to commit "the gravest perjury and go unpunished; besides, the party having his remedy at law, the other should not be deprived of an opportunity of confronting & publicly examining the witnesses which has always been found the most effectual method for discovering truth."¹¹⁸

CONCLUSION

From the foregoing survey of certain aspects of Jefferson's Equity Commonplace Book, it seems clear that in his own research he faithfully practiced the method which he admonished law students to follow, of seeking out "the pith of the case" and of "never using two words where

116. Specific performance ordinarily would be granted where the subject of the contract of purchase was land or unique chattels.

117. Item 1993, *Sir Harry Hick v. Phillips*, Pr. Ch. 575 (1721). On the other hand, "where an agreement is to save the honor and preserve the peace of a family and is a reasonable agreement, a court of equity will be glad to lay hold of any just ground to carry it into executio[n]." Item 2002, *Stapilton v. Stapilton*, 1 Atk. 2, 5, 11 (1739). The agreement upheld in *Stapilton* was designed by Philip, the father of two sons Henry and Philip, to divide his property between them, to avoid controversy regarding the legitimacy of Henry and to provide for both sons equitably. Plaintiff was the son of Henry and at first claimed the whole estate, but after Henry had been found illegitimate, claimed his share under the agreement. Defendant was the younger son Philip.

118. Item 1981, *Duke of Dorset v. Girdler*, Pr. Ch. 532 (1720). For further discussion of rules regarding bills to perpetuate testimony, based upon the same case, see items 1982 and 1983. Blackstone similarly praised the common law system of public examination of witnesses *viva voce* as a preferable method of establishing the truth. 3 W. BLACKSTONE, *supra* note 31, at 373-74.

one will do." His treatment of every case was indeed "condensed into the narrowest compass possible which will admit of presenting distinctly the principles of the case."¹¹⁹ His notebook plainly manifests his powers of acute legal analysis. Careful comparison of different reports of the same case (and different cases relating to the same subject matter) is evidenced by his supplemental annotations and queries exhibiting his own reflections on the topic under consideration.

How effectively Jefferson concentrated upon the controlling issues of the cases which he analyzed, and condensed his account of them "into the narrowest compass possible" by eliminating colorful but legally unimportant details, can be interestingly demonstrated by reviewing some of the omitted passages from judicial decisions which he summarized in the Equity Commonplace Book. In a case where relief was granted against a bond given for money won at gaming, Jefferson tells us only that "the parties were very poor, and [there was] some little suspicion that the def. had not played fairly." Freeman's report informs us that the plaintiff was a distiller of strong spirits and the defendant was a tapster; that the game they were playing was known as "all-fours;" that the defendant was laying out the cards, and the knave of clubs turned up several times together. In the court's opinion it was "an unreasonable Sum for such Persons to [venture] at play."¹²⁰

The report in *Atkyns* of the decision to admit evidence not given under the sanction of a Christian oath covers thirty pages of copious discussion, almost resembling a Supreme Court opinion dealing with the First Amendment. We learn also that the ceremony which generates for the Gentou plaintiff the obligation to testify truthfully is to touch the foot or hand of a Brahmin priest.¹²¹

Jefferson's laconic account of *Pool v. Sacheverel*¹²² omits many colorful details. The case involved the estate left by one Sacheverel, whose daughter by his first wife was married to plaintiff Pool. The question before the court was whether the defendant, who had been Sacheverel's maid servant, was his wife. She had given birth to a bastard by him but claimed that before the birth of a second child she had been married to Sacheverel at the Fleet prison, the parties to the marriage having used the names Robert Marshall and Ann How, spinster. Edward Pool, plaintiff's father, inserted an advertisement in a newspaper reciting the entry in the Register of the Fleet, and further stating: "Whoever shall discover and legally prove that the said two Persons were then married, and before and at the time of the Marriage were really called and known by those respective names, shall have a Reward for such Discovery (on legal Proof of the same) of 100 l. over and above all legal Charges, to be paid by *Edward Pool*."

119. See *supra* note 1.

120. See *supra* note 75. The report does not state the amount of the wager, except that it was under £100.

121. 1 Atk. at 21; see *supra* note 79.

122. See *supra* note 87.

A motion that Pool be committed was put over by the Master of the Rolls for hearing before the Lord Chancellor "as being a Matter of great Moment, concerning, on one Side, the Liberty of the Subject, and on the other, the Preservation of Evidence from Subordination and Corruption."¹²³ After prolonged deliberation and with great solemnity, Lord Chancellor Parker (who apparently was acquainted with Mr. Pool and acknowledged the probity of his character, but nevertheless felt bound to commit him,¹²⁴ pronounced judgment: "This tends to the Suborning of Witnesses, is very dangerous, and not only greatly Criminal, but is a Contempt of the Court, being a Means of preventing Justice in a Cause now depending . . .; and as the Court may so in Justice it ought, to punish this Proceeding."¹²⁵

The chancellor pointed out that

This Advertisement will come to all Persons, to Rogues as well as honest Men, and it is a strange Way of arguing to say, that offering a Reward to one Witness is criminal, but that offering it to more than one is not so: Surely it is more criminal, as it may corrupt more.¹²⁶

He asserted that:

It is a Reproach to the Justice of the Nation, and an insufferable Thing, to make a publick Offer in Print to procure Evidence, and is tantamount to saying, that such Persons as will come in and swear, or procure others to swear such a Thing, shall have 100 *l.* Reward; and this in a Cause now depending here.

And though conceding Pool's honesty, the Lord Chancellor continued: "Yet the Justice of the Court, nay the Justice of the Nation being concerned in so publick a Case, I cannot dismiss the Party . . . but in Justice, and for Example's Sake, he must stand committed."¹²⁷

In addition to displaying Jefferson's skill in penetrating to the heart of a case, and stating its holding concisely and precisely, the Equity Common-place Book demonstrates that the body of doctrine recorded by Jefferson accurately mirrors the development of equity jurisprudence as expounded by eminent legal historians and authoritative treatises. Jefferson was obviously a well qualified equity practitioner. Early in his legislative career he drafted a bill establishing a separate court of equity in republican Virginia,¹²⁸

123. 1 P.W. at 676. Echoes of this conflict are bandied about today under the rubric "free speech *versus* fair trial."

124. *Id.* at 678.

125. *Id.* at 677.

126. *Id.*

127. *Id.* at 678.

128. Bill for Establishing a High Court of Chancery (Nov. 25, 1776), 1 THE PAPERS OF THOMAS JEFFERSON 610-20 (J. Boyd ed. 1950).

and from his scholarly preceptor George Wythe,¹²⁹ renowned for many years of service as chancellor,¹³⁰ he could not fail to have absorbed a solid understanding of equitable principles. Having, in the familiar preamble of the Declaration of Independence, proclaimed America's allegiance to "the Laws of Nature and of Nature's God," he had no difficulty in comprehending and promoting the infusion of moral precepts and natural justice which equity contributed to the Anglo-American legal system.

129. The first printed Virginia law report was Wythe's *Decisions of Cases in Virginia, by the High Court of Chancery, with Remarks upon Decrees by the Court of Appeals, reversing some of those Decisions*, published in 1795. A second edition, by B.B. Minor, appeared in 1852. See E. DUMBAULD, *supra* note 1, at 75 & n.3, 95 n.93, 120 n.261. Wythe was a diligent classical scholar, and his "engaging pedantry" is displayed in his judicial opinions. "Greek and Latin maxims, long dead names from old mythologies, allusions to figures of history and literature, snatches of scientific truths, and algebraic equations, follow each other across the pages of his decisions." 2 D. MAYS, EDMUND PENDLETON 292 (1952). It was said of him that "he could hardly refrain from giving a line of Horace the force of an act of Assembly." *Id.* Wythe held the first American law professorship and the second (after Blackstone) in any English-speaking country. The post was established in 1779 during Jefferson's governorship. C. WARREN, A HISTORY OF THE AMERICAN BAR 343-45 (1913).

130. For a recent brief biography of Wythe, see A. DILL, GEORGE WYTHE, TEACHER OF LIBERTY (1979). After an illustrious career at the bar and in public service (including his signature on the Declaration of Independence at the head of the Virginia delegation and election as speaker of the Virginia House of Delegates) Wythe became one of three judges of the Court of Chancery in 1778. From 1789 he was sole chancellor of Virginia until in 1802 additional chancery courts were erected in Williamsburg and Staunton. Wythe remained as chancellor of the Richmond court until his death on June 8, 1806. He died of arsenic poison administered by his sister Anne's grandson, whom he had treated with great kindness and who was then living with Wythe in the yellow wooden house at the southeast corner of Grace and Fifth streets in Richmond. Wythe never directly accused George Sweeney of the crime, but added a codicil to his will disinheriting the youth. Sweeney was acquitted of the murder largely because under Virginia law at that time the testimony of a black woman servant was not admissible against a white defendant. *Id.* at 79-82; see also J. BOYD, THE MURDER OF GEORGE WYTHE 22, 42-43, 45-46 (1949) (privately printed for the Philobiblon Club). Minor's edition of Wythe's *Decisions*, (*supra* note 129), contains a *Memoir of the Author* (pp. xi-x1), including his will and three codicils.

