LANDMARK CASES IN EQUITY

Landmark Cases in Equity continues the series of essay collections which began with *Landmark Cases in the Law of Restitution* (2006) and continued with *Landmark Cases in the Law of Contract* (2008) and *Landmark Cases in the Law of Tort* (2010). It contains essays on a series of landmark cases in the development of equitable doctrine running from the seventeenth century to recent times.

The range, breadth and social importance of equitable principles, as these affect commercial, domestic and even political matters, are well known. By focusing on the historical development of these principles, the essays in this collection help us to understand those principles better, and provide insights into the processes of legal change through judicial innovation. Themes addressed in the essays include the nature of the courts' equitable jurisdiction, the development of property rights in equity, constraints on the powers of settlors to create express trusts, the duties of trustees and other fiduciaries, remedies for breach of these duties, and the evolution of constructive and resulting trusts.

Landmark Cases in Equity

Edited by

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Preface

Readers of our previous volumes of *Landmark Cases* essays—on the law of restitution, contract and tort—will notice something different about *Landmark Cases in Equity*. It is twice the length of its predecessors. This expansion is not meant to suggest that equity is somehow more important than the other topics, or that there are twice as many landmark cases in equity as there are in restitution, contract or tort. The reason is rather that we were fortunate enough to obtain funding from the Society of Legal Scholars to hold a significantly larger event than the workshops out of which the earlier volumes were born: a two-day conference at the Faculty of Laws, University College London, at which earlier versions of the essays in this volume were presented to a large audience of equity scholars, legal historians, judges, legal practitioners and students. We are most grateful to the Society of Legal Scholars, and also to Richard Hart of Hart Publishing, for their financial support, without which staging the event would not have been possible. We are also grateful to Lisa Penfold, the UCL Faculty of Laws events manager, for her expert professional assistance in making the occasion a rewarding experience for all who attended.

Although it is longer than its predecessors, readers of our earlier volumes will recognise many features of *Landmark Cases in Equity*. The authors were given a free choice of topic and methodological approach, and a wide range of equitable doctrines is investigated in this volume. Some authors have chosen to examine their cases within the framework of their contemporary settings, others to take a longer view and to consider the impact which their cases have had on the thinking of subsequent generations. Some have focused their attention on purely doctrinal developments, while others have looked at the social, economic or political background to their case. A variety of topics is addressed, including the nature of the courts' equitable jurisdiction (*The Earl of Oxford's Case*; *Penn v Lord Baltimore*; *Re Earl of Sefton*), the development (or non-development) of property rights in equity (*Burgess v Wheate*; *Tulk v Moxhay*; *Ramsden v Dyson*; *National Provincial Bank Ltd v Ainsworth*), constraints on the powers of settlors to create charitable trusts (*Morice v Bishop of Durham*; *National Anti-Vivisection Soc v IRC*), the duties of trustees and other fiduciaries (*North-West Transportation Co Ltd v Beatty*; *Regal (Hastings) Ltd v Gulliver*; *Boardman v Phipps*), remedies for breach of trust and breach of fiduciary duty (*Re Hallett's Estate*; *Nocton v Lord Ashburton*; *Paragon Finance plc v DB Thakerar & Co (a firm)*), and the evolution of constructive and resulting trusts (*Coke v Fountaine*; *Lord Grey v Lady Grey*;

Gissing v Gissing). Recurring themes include a concern with classification, the dominance of particular individuals in the development of equitable principles, equity's relevance to political questions (both domestically and abroad), and the interpenetration of equity and common law.

Since this is likely to be the last of the *Landmark Cases* series that we edit together, we should like to take this opportunity to express our thanks to all of the authors of essays in the volumes on restitution, contract, tort and equity. We hope that these volumes show that the study of individual cases, as pioneered by the late Brian Simpson, is a flourishing and fruitful form of academic literature. There is much to be gained from reassessing what we know about the cases by which we habitually orientate ourselves.

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The Earl of Oxford's Case (1615)

DAVID IBBETSON*

A. INTRODUCTION

IT IS THE fate of cases, over time, to be classified and pigeon-holed to the extent that their original sense, or senses, are eroded out of view. The *Earl of Oxford's Case*[1] is no exception to this. It appears in White and Tudor's *Leading Cases in Equity*[2] as the principal case dealing with relations between Chancery and the Common Law, reflecting the very sharp focus on this issue in the reported judgment; and recent legal historians have placed it firmly in the context of the dispute over jurisdiction between Sir Edward Coke and Thomas Egerton, Lord Ellesmere.[3] This was, undoubtedly, one of the issues in the case. As with most Equity cases in the

* I am grateful to Steven Churches, David Hoyle, Richard Hoyle, Neil Jones, Colin Lizieri, Mike Macnair, Richard Nolan and Graham Virgo for assistance and comments; they bear no responsibility for errors or misinterpretations that remain. Particular thanks are due to the Master, Fellows and Scholars of Magdalene College, Cambridge, for permission to consult and quote from their archives.

Unless otherwise stated, manuscript references are to sources in The National Archives, London. Other conventional abbreviations used are: MCC—Magdalene College Cambridge; HLS—Harvard Law School; BL—British Library; CUL—Cambridge University Library; HMC—Historical Manuscripts Commission. Many of the archival documents are transcribed and translated by Nina Green at <http://www.oxford-shakespeare.com/documents.html>. When referring to State Papers I have added references to the volume and page of the relevant calendars: Letters and Papers Foreign and Domestic, Henry VIII ('L & P'), Calendar of State Papers, Domestic, Elizabeth ('CSPD'). The dating of the documents by the editors of the calendars is very unreliable. Spelling has been modernised throughout.

[1] (1615) Chan Rep 1, 21 ER 485. The very brief report at Tot 126, 28 ER 143 sub nom *Comes Oxon' v Neeth*, is of no value.

[2] EP Hewitt and JB Richardson (eds), *White and Tudor's Leading Cases in Equity*, 9th edn (London, Sweet & Maxwell, 1928) 1.615.

[3] JP Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1941) 36 *Illinois Law Review* 127; JH Baker, 'The Common Lawyers and the Chancery: 1616' (1969) 4 *Irish Jurist* 368; LA Knafla, *Law and Politics in Jacobean England* (Cambridge, CUP, 1977) 171–73; M Fortier, *The Culture of Equity in Early Modern England* (Aldershot, Ashgate, 2005) 76–81 (cf 'Coke, Ellesmere, and James I' (1998) 51 *Renaissance Quarterly* 1255). See too CW Brooks, *Law Politics and Society in Early Modern England* (Cambridge, CUP, 2008) 142–52.

period, it existed in relation to an actual or a potential decision at Common Law, in this case the decision of the Court of King's Bench in the *Magdalen College Case*, *Warren v Smith*.[4] The *Magdalen College Case* had held for one party in the complex of litigation, Magdalene College Cambridge, acting through its Master Barnaby Goche and its Bursar John Smith, while the *Earl of Oxford's Case* in Chancery found for the other party, Henry, the Earl of Oxford. It was unavoidable, therefore, that the issue of the proper relationship between Common Law and Equity should have been raised. Moreover, alongside the *Magdalen College Case* and the *Earl of Oxford's Case* there was a reported habeas corpus action, *Googe and Smith's Case*,[5] in which the King's Bench was asked to rule on the legitimacy of imprisonment by order of the Chancery when there had already been a judgment at Common Law. But careful reading of the records suggests that it was only one issue in the case, and a relatively minor one at that. Ellesmere's speech, as reported, was directed at this point alone; but there is some room for doubt whether it was ever actually delivered, and it should not be allowed to mask the broader issues in the litigation.

It is as well to sketch in this background at the start.[6] The question whether Chancery had a power to act after judgment had been given at Common Law had been rumbling since the early years of the sixteenth century.[7] The matter had been formally discussed by the Common Law judges in *Finch v Throckmorton* in 1597,[8] and had there been resolved against Chancery intervention. Egerton, then Lord Keeper and not yet created Lord Ellesmere and elevated to the office of Lord Chancellor, may for the time being have accepted this. However, a contemporary poem to him by the poet Samuel Daniel, whose patron Egerton was, portrays him as holding the balance between the excessive rigour of the law and the rule of unbridled conscience;[9] and it may be that this reflects Egerton's own perception of his role. In any event, from the beginning of the reign of James I he began to award injunctions against the enforcement of Common Law judgments, to the disapproval of the Common Law judges. Thomas Fleming, Chief Justice of the King's Bench from 1607, oversaw the use of legal means against these Chancery injunctions: habeas corpus applications to release those imprisoned by the Chancery for refusing to obey such

[4] (1615) 1 Rolle 151, 81 ER 394; 11 Co Rep 66, 77 ER 1235; Cro Jac 364, 79 ER 312.
[5] (1615) 1 Rolle 278, 81 ER 487.
[6] Dawson (n 3); Baker (n 3); Knafla (n 3) 155–81.
[7] JH Baker, *Oxford History of the Laws of England, VI* (Oxford, OUP, 2003) 173–79.
[8] *Finch v Throckmorton* (1597) BL MS Harl 6686 f 222v (Coke's MS report), 118 S[elden] S[ociety] 441; Coke, *Third Institute*, 124; *Fourth Institute*, 86. Dawson (n 3) 134–35.
[9] S Daniel, *A panegyrike congratulatorie deliuered to the Kings most excellent Maiestie at Burleigh Harrington in Rutlandshire* (1603), sig C, 'To Sir Tho: Egerton Knight, Lord Keeper of the Great Seale of England'. For Daniel and his relation to Egerton, see J Pitcher, 'Samuel Daniel's Gift of Books to Lord Chancellor Egerton' (2005) 17 *Medieval and Renaissance Drama in England* 216.

injunctions, and threats of indictments under the Statute of Praemunire (1402) for acting contrary to Common Law judgments. The situation was exacerbated when Fleming was succeeded by Coke in 1613. In *Glanville v Courtney* (1614–15)[10] the friction between the two courts—and between the two men—came to a head with the Chancery re-imprisoning a man who had been released on habeas corpus by the King's Bench; and an attempt to resolve the problem in Parliament came to nothing. At this point the *Earl of Oxford's Case* arose, its report focusing on the legitimacy of the Chancery decree. The whole question was then referred to the Privy Council, and in June 1616 the King himself gave a speech in the Star Chamber affirming the legitimacy of Chancery intervention.[11]

Yet behind the litigation were the parties, the facts and the eventual result. Neither the college nor the Earl of Oxford would have been particularly interested in the legal niceties or the fight between the Chief Justice and the Lord Chancellor; they simply wanted to win. We can reconstruct the facts behind the dispute in some detail, and in doing so we may cast some doubt on the story which has been told by biographers and by historians of Magdalene College and the University of Cambridge, who have not always appreciated the significance of the legal devices which were used or the subtleties of the parties' tactics in the litigation and in their attempts to get the conflict resolved in their own interests.

This chapter will examine in turn the land transactions which constitute the factual background to the litigation, the litigation itself and its contextual significance, and lastly the issue for which the *Earl of Oxford's Case* has, for better or worse, become famous.

B. THE LAND TRANSACTIONS

Travel north by punt from the centre of Cambridge, and within a few minutes you reach Magdalene College. There, on a modern building, is a gargoyle of a sixteenth-century Genoese moneylender, Benedict Spinola. Spinola is vilified in college tradition as the man who in 1575 cheated the college out of a potentially very valuable plot of land in London, began to build on it, and in a few years sold it on to the Earl of Oxford at a great profit. It is these transactions that we must examine carefully.

The land which was to be the subject of the dispute was originally the property of the Priory of Holy Trinity, Christchurch. It had been surrendered to the Crown in 1532 as a result of unpaid debts, and had been granted

[10] *Glanville v Courtney* 2 Bulst 301, 80 ER 1139; Cro Jac 343, 79 ER 294; 1 Rolle 111, 81 ER 365; 1 Rolle 219, 81 ER 444; Moo 838, 72 ER 839; 118 SS 440.

[11] JP Sommerville (ed), *King James VI and I: Political Writings* (Cambridge, CUP, 1995) 204, esp at 215.

to Thomas, Lord Audley in 1534.[12] Audley died in 1544, and it came to the newly-founded Magdalene College under his will, together with the rectory of the church of St Catherine Cree.[13] Just outside the city walls, the land was known as the 'Great' or 'Convent' (or 'Covent') garden, and was approximately seven acres in extent. It lay between Bishopsgate to the west and Aldgate to the east, and was bounded to the south by Houndsditch and to the north by Hog Lane, later known as Petticoat Lane.[14] For the time being it was little more than low-grade land, leased to one Thomas Casye at a rent of £9 per year;[15] the Chancery litigation of the early seventeenth century was to describe it as having been a laystall, or rubbish tip, for the city of London.[16]

Almost immediately the land and rectory were leased for 50 years to Laurence Owen, a gunfounder whose property was contiguous to the college's land, at a rent of £20 per year.[17] According to the report of the commissioners enquiring into the affairs of the University in 1546, the rent was divided into two parts, £11 for the rectory and £9 for the land.[18] This was a significant part of the college's total annual income of £44.9s.6d.[19] There was nothing unlawful in the college's making a lease for 50 years, but Audley's executors clearly thought that it was unwise. Exercising the power to make statutes for the college granted to them under Audley's will, they therefore took steps to provide that the college might in future make leases for at the most 10 years.[20] They were, however, very slow, and it was not until 1555 that the statutes were in fact given to the college.[21] Already, in 1547, the then Master Richard Carr and the fellows had made a lease of the reversion of the land for a further 21 years, from 1595 to 1616, to one Richard Noke, point-maker of Cambridge, at the same rent of £20 per year.[22]

[12] *Victoria County History, London*, vol 1, 471.

[13] PCC will dated 19 April 1544, proved 18 Feb 1545: PROB 11/31 f 3.

[14] P Cunich and R Hyam, 'Lost Inheritance: the College's City of London Property at Aldgate' (1991–92) 36 *Magdalene College Magazine and Record (New Series)* 42, 43–44.

[15] PROB 11/31 f 3, at f 5.

[16] C 78/291 no 18 m 2.

[17] Lease referred to in C66/1128 m 6.

[18] E 315/440 f 33v. To the same effect, *Earl of Oxford's Case* 1 Chan Rep 1, 21 ER 485 erroneously printed as £40 and £9 (for variants between print and manuscript reports of the case, see below text after n 167); the same figure is given in SP 1/196 f 73 (L & P 19.2 477). The statement in SP 12/103 f 11 (CSPD 1547-80 493) that the division was £12.10s for the rectory and £7.10s for the land is inaccurate, but suggests that in reality it might have been treated as a lump sum payment of £20.

[19] E 315/440 ff 32–33v; P Cunich, D Hoyle, E Duffy and R Hyam, *A History of Magdalene College Cambridge, 1428–1988* (Cambridge, CUP, 1994) 47.

[20] SP 12/103 f 3 (CSPD 1547–80 493); SP 15/39 f 141 (CSPD Addenda 1580–1625 520); SP 1/196 f 73 (L & P 19.2 477).

[21] Cunich *et al* (n 19) 55.

[22] SP 12/103 f 11 (CSPD 1547–80 493); date from patent making grant to Spinola. For Noke, who had been irregularly appointed university stationer some years previously, see D McKitterick, *History of Cambridge University Press*, vol 1 (Cambridge, CUP, 1992) 46–47.

Magdalene was not at all a wealthy college, 'by far the poorest of the colleges in Cambridge' at this time.[23] By the early 1570s, under the mastership of Roger Kelke, matters had become so bad that tradesmen were refusing to deal with the college, and only provided necessaries on the credit of the President, William Bulkeley.[24] It was in this context that it turned to its land in London to see if it was possible to increase the revenue from it. Contact was made between Kelke and Benedict Spinola, a Genoese merchant, moneylender to the Queen and one of the wealthiest men in London,[25] who was by then renting part of the Covent garden.[26] The proposal was that the land should be conveyed in fee farm to Spinola at a rent of £15 per year (perhaps originally £30), substantially more than what the college was then receiving.[27] Not all the Fellows were in favour of this, and one, John Bell, petitioned Lord Burghley to intervene to prevent the transfer.[28] But Bell's voice was clearly unable to prevail in the college, since in December 1574 it moved to grant the land to Spinola, together with the rectory.

This was not altogether simple. Leaving aside the limitation of leases to 10 years in the college's own statutes,[29] any grant to Spinola would come up against a parliamentary statute of 1571 which, inter alia, rendered void any feoffment or lease for more than 21 years or three lives made by a college to any person or persons, bodies politic or corporate.[30] In an attempt to get round this restriction, the college and Spinola undertook some rather complex manoeuvres: instead of conveying the property directly to Spinola, it was agreed to use the Queen as an intermediary. The essence of

[23] Cunich *et al* (n 19) 47.

[24] *Ibid*, 75–76, quoting SP 12/127 f 28 (dated 12 December 1578).

[25] For Spinola, see GD Ramsay, 'The Undoing of the Italian Mercantile Colony in Sixteenth Century London' in NB Harte and KG Ponting (eds), *Textile History and Economic History* (Manchester, Manchester University Press, 1973) 22, 41–43.

[26] Spinola's name appears on a list of those renting land at this time (clearly as sub-tenants from the college: SP 12/288 f 63 (CSPD 1601–03 313) (undated)). See too SP 1/196 f 73 (L & P 19.2, 477), where John Bell, a fellow of the college, refers to 'one Benedict Spinola, having obtained part of the said former term in parcel of the said gardens'. The editors' dating of this document to 1544 is impossible, since Bell could not have held his fellowship until c1570 (JA Venn, *Alumni Cantabrigienses* (Cambridge, CUP, 1922), sub nom).

[27] SP 12/288 f 63 (CSPD 1601–03 313) refers to 'one of the college tenants so that he may have the gardens only, in fee farm, will presently pay to the college by year' £30; but the first use of the word 'college' is interlined as an addition, so it may well be that this refers to Spinola, who was the college's sub-tenant. If so, it suggests that he might originally have been offering to pay the larger sum to the college.

[28] SP 1/196 f 73 (L & P 19.2 477).

[29] Above, n 20.

[30] Stat 13 Eliz c 10 s 2 (*Statutes of the Realm*, 4 544). For the statute and the colleges' response, see S Bendall, C Brooke and P Collinson, *History of Emmanuel College, Cambridge* (Woodbridge, Boydell Press, 1999) 129–31. The Queen was not above ignoring the statute: in 1579 she granted Merton College's manor of Malden to the Earl of Arundel for 2,000 years at a rent of £40 per year: GH Martin and JRL Highfield, *History of Merton College, Oxford* (Oxford, OUP, 1997) 169.

the agreement was encapsulated in the five provisions of an indenture of 10 December 1574:[31]

a) the college covenanted to grant to the Queen the rectory and the Covent garden, receiving £25 per year for the rectory and £15 per year for the garden;
b) in exchange, Spinola covenanted to obtain from the Queen the rectory and the garden, provided that the college had duly made the conveyance to her;
c) provided all this occurred, the college undertook to use its best endeavours to obtain parliamentary confirmation of the grant of the garden to Spinola;
d) Spinola covenanted to convey the rectory to the college's nominee, free of any incumbrances imposed on it by him; and
e) Spinola covenanted to make a further deed to the college giving a right to distrain for unpaid rent, with a backstop right of re-entry should the rent be still unpaid after a year.

In pursuance of this agreement, three days later the college by separate indentures granted the garden and the rectory to the Queen, at rents of £15 per year and £25 per year respectively, with a proviso that if she did not convey them to Spinola by 1 April 1575 the college's grants to her would be void and the college would have a right of re-entry. The indentures were duly acknowledged in the Chancery on 26 January 1575 by the college's attorneys: that of the land by Roland Broughton of the Inner Temple and that of the rectory by Thomas Walter of Gray's Inn.[32] Three days later, by separate letters patent under the great seal, the Queen granted the garden and the rectory to Spinola in fee.[33]

The traditional analysis of this transaction sees Spinola as the villain of the piece, laying his hands on valuable property for far less than its true value; Burghley is portrayed as Spinola's willing accomplice, serving his royal mistress by obtaining such favourable terms for the royal moneylender; and Kelke is treated as cravenly following Burghley's will however much this was to the disadvantage of the college.[34] There is, for sure, evidence to support this analysis. John Bell's petition to Burghley, cited above, points to Spinola as the moving force behind the transaction; a letter from Kelke to Burghley dated 26 January 1575 speaks of him and the fellows having 'satisfied your request

[31] MCC A/27/5.

[32] MCC A/27/6; A/27/7. It is not clear why separate attorneys should have been used. In the recognisance relating to the rectory, Walter is expressly vouched for by Broughton.

[33] C 66/1128 m 6, m 13 *Calendar of Patent Rolls 1572–75*, nos 2841, 2851.

[34] EK Purnell, *Magdalene College* (London, Robinson, 1904) 65–77, vi ('fraud, at which the highest in the land connived'); Cunich *et al* (n 19) 77–79; V Morgan, *A History of the University of Cambridge, II, 1546–1750* (Cambridge, CUP, 2004) 175–76; D Pearson, *Edward de Vere (1550–1604)* (Aldershot, Ashgate, 2005) 46–47.

touching Mr Spinola with all diligence and dutiful obedience accordingly, though not without evil report of some evil disposed persons';[35] and there is no doubt that Kelke, like many others in Cambridge and elsewhere in England, had sought Burghley's assistance in getting preferment. None the less, there is real room for doubt whether things were quite so underhand.

It is abundantly clear from Kelke's letter to Burghley that the latter had been putting pressure on the college in some way and for some reason, but it does not follow that his purpose was to despoil the college to the advantage of Spinola. The principal content of the letter was the reform of the college's statutes, requesting that Burghley should first cause them to be sealed by the Queen with the great seal before 'sending them home', so that they should have as much authority as the founder's statutes, which had themselves been made under the great seal. The number of fellowships was a matter for the statutes—it had been fixed at six in the reformed statutes of 1565[36]—and although there are no accurate lists of Fellows at this time, it is known that there was a speedy turnover and not infrequent vacancies.[37] It would be little wonder that this was a matter of concern when the statutes were being amended, and that pressure might be put on the college to raise its income in order to support its statutory number of Fellows. Such an interpretation is consistent with an undated document commenting on changes which might be made to the college's statutes, which ends apparently inconsequentially with a reference to the sum of £20, 'which yearly shall grow by the grant in fee farm to Mr Benedict Spinola', which would provide an income of £6.13s.4d for each of two Fellows to be appointed, with the balance of £6.13s.4d to remain for the general purposes of the college.[38]

Further evidence points against Burghley's close involvement in the transaction between Spinola and the college. On 21 January 1575, one Thomas Wattes wrote to him to say that following Burghley's instructions he had approached the Solicitor-General, Thomas Bromley, who had told him that Mr Hurleston of the Inner Temple was acquainted with the details of the college's conveyance to Spinola; we know from other sources that Hurleston acted as Spinola's lawyer.[39] Wattes then passed on to Burghley the details which he had obtained from Hurleston.[40] If Burghley was

[35] SP 12/103 f 14 (CSPD 1547–80 494).
[36] Cunich *et al* (n 19) 55.
[37] *Ibid*, 69.
[38] SP 1/244 f 238, 239v (L & P Addenda 1.2 558). There is no apparent warrant for the editors' attribution of this document to 1544.
[39] REQ 2/178/60/2, Spinola's answer to a petition in the Court of Requests from Julio Borgarucci in 1580, signed by Hurleston as his counsel. For this action, see below, n 61. Bromley himself had acted for Spinola in a Chancery case: *Pype v Spinola* (after 1558) C3/143/81.
[40] SP 12/103 f 11 (CSPD 1547–80 493), dated 21 January 1575. It may be no coincidence that the College's attorney and the draftsman of the indenture of 10 December between the college and Spinola was another Inner Templar, Rowland Broughton.

attempting to discover exactly what the college was doing as late as this, it is highly unlikely that he was collaborating with Spinola in a plot to further the latter's interests at the expense of the college. A more plausible reading of the evidence is that Burghley had been alerted to the concerns whether the transaction was in the college's interests by the petition of John Bell and a further one to the same effect, dated 8 January 1575, from Thomas Barber, one of Audley's executors,[41] and that he was taking steps to discover exactly what it was that the college was doing.

The nub of the matter, surely, is that by the time of Kelke's mastership, Magdalene was abjectly poor. In the absence of another benefactor—a hoped-for benefaction from the Duke of Norfolk in 1564 had never materialised, and the first major gift since the college's foundation, a donation from Sir Christopher Wray, was not to arrive until 1589[42]—if the college was to survive it had no obvious alternative but to increase the income from its existing assets; and the only exploitable asset which it had was its Aldgate property.[43] The real problem was not that the college was being hoodwinked by an Italian moneylender, blind to the potential value of the land which was said by Bell to be then producing a rental income (by subleases, evidently) of over £60 per year and which would be expected to produce double that when the leases ended and it finally returned into the hands of the college.[44] It was that the leases granted in the 1540s still had more than 40 years left to run.

It seems clear that Spinola was intending to break the existing leases of the land and rectory. Exactly how this was to occur is not clear. It may be that he was going to buy out the existing lessees, it may be that he was going to bully them out, it may be that he was going to use a combination of these. It is possible, even, that he had a legal right to do this because of the peculiarity of the grant to him via the Queen: the contemporary law books suggest that a grant of land in fee by the Crown without express reservations of any lesser rights would normally pass a full, unencumbered title to the grantee.[45] In any event, it is known that at about this time he was harrying John Casye (the successor of Richard Casye, who was farming the Aldgate land in 1544) with threats to dispossess him,[46] and in a

[41] SP 12/103 f 3 (CSPD 1547–80 493).

[42] Cunich *et al* (n 19) 76, 88–90.

[43] Its other main asset was a rentcharge of £20 per year on the manor of Purleigh, Essex; but this had been fixed by Parliament in 1543 and was not able to be changed: *ibid*, 43–44.

[44] SP 12/288 f 63 (CSPD 1601–03 313), probably dating from this time, lists 22 tenants paying a total of £39.17s.8d to Casye for lands in half of the Great Garden and a further nine paying £16.15s.6d to one Gibson for lands in the other half of the Great Garden, with Gibson receiving also £13 for the parsonage.

[45] Brooke *Abridgement*, *Patentes*, 3, 39. This would not mean that the sub-lessees were without remedy, but it would only have been a remedy in damages; Spinola would still have been able to get control of the land in order to develop it.

[46] SP 12/146 f 213 (CSPD 1547–80 701).

memorandum to Burghley in 1577, Richard Howland, Kelke's successor as Master of Magdalene, stated that, 'as Mr Spinola can better certify you', the leases were by then utterly void.[47] It is only the destruction of the lease that explains the otherwise incomprehensible transaction relating to the rectory: the transfer from the college to the Crown and from the Crown to Spinola, with a condition that Spinola should reconvey it to the college or its nominee. The whole purpose of this, according to Lord Ellesmere in the later litigation, was that the college should have the rectory free of the lease.[48]

To assess the transactions of 1574/75, and Spinola's behaviour, we should begin with the grant of the rectory. Pulling the pieces together, before the college parted with it, it was receiving a rent of £11 per year, and according to the rental of c1574 its tenant had sub-leased it for £13 per year.[49] The actual income from it was probably little in excess of the £25 per year which Spinola had agreed to pay for it: Howland's memorandum to Burghley in 1577 says that the college was trying to find someone else to whom it could be assigned, but the only person who was willing to take it at a rate the same as or greater than Spinola was currently paying was of dubious financial credit,[50] and when a lease of it was made in 1578 the agreed rent was £28 per year.[51] In effect, Spinola was guaranteeing the college something like the full commercial rent until a better lessee should have been found, and taking upon himself the responsibility of breaking the existing lease. Small wonder that when the rectory was leased to Ralph Parys of Dullingham, near Cambridge, in 1578, Spinola is described—by the college—as having been acting as its 'trustee'.[52]

The land, though, was a different matter. It was later to be said in Chancery that it was Spinola's intention to turn the waste ground into garden plots and to build houses on these, and that he cleared and fenced the land, creating 50 plots which he leased out to individuals who built houses on them and himself building a house on part of the land which he retained.[53] When he attempted to sell it on to his countryman Julio Borgarucci in 1579, it was said that its rental value by then was £180 per year, its capital value something in excess of £2,000;[54] and when it was in fact sold later that year the purchase price was £2,500. Spinola had obvi-

[47] HMC 13 *Salisbury*, no 509.
[48] C 78/291 no 18 m 3, m 5.
[49] SP 12/288 f 63 (CSPD 1601–03 313).
[50] HMC 13 *Salisbury* no 509.
[51] MCC A/27/10.
[52] MCC A/27/10, college's annotation; Purnell (n 34) 72–73.
[53] C 78/291 no 18. Although this was an ex parte statement, taken to be true simply because it was formally unchallenged, there is no reason to doubt its fundamental veracity; if anything, it would have been in the petitioners' interest to have downplayed the extent of Spinola's development.
[54] REQ 2/178/60/1. The figures may not be wholly accurate, since they appear in Borgarucci's ex parte petition in the Court of Requests; but he would have had no reason to

ously made a very substantial profit. We do, however, have to be careful not to exaggerate this, since we do not know how much he had had to pay out to break the pre-existing leases or to develop the land, nor what his liabilities were to his own lessees against which he was to guarantee the Earl of Oxford.[55]

That Spinola should have made a profit is hardly a cause for surprise: he was a shrewd businessman with a very large amount of capital which could be invested in the improvement of the land. The real question is how far the college had made a bad bargain. Taking together the transactions relating to the land and the rectory, as was clearly the parties' intention, the college was in effect conveying its freehold reversion in the land to Spinola in exchange for an immediate doubling of its rentcharge from £20 to £40.[56] The calculation of the value of freehold reversions is fraught with difficulty even today;[57] still less was it a science in the sixteenth century. However, making a number of assumptions which would have looked reasonable in 1575, and ignoring completely the college's impecuniosity (and hence the risk that it would have to sell at an inopportune moment), the capital value of the freehold reversion on the land would have been little more than £200.[58] If anything, even this is an exaggeration of the value on sixteenth-century approaches, for reversionary interests tended then to be

misrepresent them significantly. Spinola's reply is at REQ 2/178/60/2. See Pearson (n 34) 47 (erroneously stating that the rental value was £1,900 per year).

[55] C 54/1080 no 6.

[56] In fact this underestimates the college's gain, since the income from the rectory would increase if the value of the rectory increased as the college could call for its retransfer to it at any time; it was only the charge on the land that was fixed.

[57] For the calculation and its difficulties, see *Earl Cadogan v Sportelli* [2007] 1 EGLR 253. I am grateful to Professor Colin Lizieri for explaining the theory behind the valuation of reversionary interests; errors in its application are mine alone.

[58] The reversion is calculated as $MVO/(1+d)^t$, where MVO is the current market value, d the 'deferment rate', and t the number of years until the reversion; the deferment rate is defined as RRFR + RP—RG, where RRFR is the 'real risk free rate' (ie the risk-free rate of interest), RP the 'risk premium' (ie the risk that the property might have to be sold at an inopportune time), and RG the rate of growth (ie the real growth in value). In making the calculation I have made the following assumptions:

- MVO = £1200, calculated as 20 times the rental value obtained from SP 12/288 f 63 (CSPD 1601–03 313) (a factor of 20 is that normally used in calculating the relation between capital and rental at this time, though it is probably a slight overestimate); this is broadly in line with the estimate of John Bell in SP 1/196 f 73 (L & P 19.2 477).
- RRFR = 6% (from G Clark, 'The Cost of Capital and Medieval Agricultural Technique,' (1988) 26 *Explorations in Economic History* 265, 273, Table 3 (treating the nominal rate as the real rate, as would have been normal at this time: see Clark, *ibid*, 268).
- RP = 0 (see text).
- RG = 1.71 (based on the estimate of John Bell that the rental income from the land would have doubled by the time the leases had ended).
- t = 41 (the number of years remaining under the leases).

Applying these assumptions, the value of the reversion is estimated at £214.

undervalued.[59] Set against this is the value to the college of the increase in the rentcharge by £20 per year. This can be approximately capitalised by multiplying by 20, producing a value of £400. There is therefore no solid justification for the criticism of Spinola or those members of college who supported the sale. Of course, with hindsight, it would soon have been evident that the increase in the value of the land was far greater and far more rapid than would have been predicted; but that was only because of the sale to Spinola, followed by his breaking of the existing leases and investing in the development of the land; and we cannot take hindsight into account in evaluating the transaction.

After 1579 Spinola drops out of the picture. As noted above, the sale to Borgarucci did not take place, and instead agreement was made with the Earl of Oxford that the land would be sold to three of his servants (presumably acting as nominees for the Earl) for £2,500, payable by instalments,[60] with Borgarucci seemingly to receive a commission of £100.[61] It is easy to conjecture why the land was not put into Oxford's own name: apart from the fact that his personal finances were in a disastrous state, he had a few days previously challenged Sir Philip Sidney to a duel and might reasonably have feared for his life.[62] In the event, this transaction ran into difficulties too. According to Spinola's account, the first instalment of £500 was paid but not the balance, and as a result the sale may in theory have been avoided,[63] though Oxford's nominees none the less granted leases over parts of the land.[64]

By this stage the precise whereabouts of title to the land was thoroughly confused.[65] In the early summer of 1580 steps were taken to clear it up. On 14 June, Oxford's nominees made an indenture conveying the land to

[59] I am grateful to Professor Richard Hoyle for this information.

[60] The indenture, dated 27 August 1579, is referred to in the later indenture to Oxford, C 54/1080 no 6. Spinola had had many previous dealings with Oxford; in particular, while Oxford was travelling in Continental Europe after 1575 Spinola had been a channel for communication—and more importantly cash—between him and his father-in-law, Lord Burghley.

[61] This was to be the subject of a claim by Borgarucci in the Court of Requests in 1580: REQ 2/178/60. The outcome of this is not known (the entry book of the Court of Requests for this year does not survive), but it is likely that the claim came to nought as a result of Spinola's death. An endorsement on the petition shows that process issued against Spinola on 15 June 1580, within a few weeks he had fallen ill and was making his will (PROB 11/62 f 294, dated 6 July 1580), and he was buried in St Gabriel Fenchurch on 15 August 1580 (so recorded in Parish Register).

[62] Pearson (n 34) especially ch 3; AH Nelson, *Monstrous Adversary: The Life of Edward de Vere, 17th Earl of Oxford* (Liverpool, Liverpool University Press, 2003) 195–200.

[63] REQ 2/178/60/2.

[64] C 54/1080 no 5.

[65] In 1608 an inquisition post mortem on the death of Oxford derived title from the servants, while the special verdict in the *Magdalen College Case* derived it from Spinola: C142/305/103; KB 27/1426 m 288.

Oxford himself,[66] and one day later Spinola did the same.[67] The first of these preserved the rights of the two men to whom leases had been made, presumably with Oxford's consent, but in the second Spinola covenanted to save Oxford harmless against claims which might in the future be made by anyone tracing their rights through him. As well, it seems that there may have been doubts whether the college might not still have had rights, presumably on the basis that the conveyance of 1574/75 was of questionable validity. It had clearly been seen in 1574 that there might be difficulties—hence the term in the indenture between the college and Spinola that the college would seek parliamentary confirmation of the grant—and in 1576 a statute had been passed ratifying grants which had been made to or by the Queen.[68] However, there may still have been questions; justifiably so, since in the event the King's Bench was to hold in the *Magdalen College Case* that this statute had not made this grant good.[69] If there was uncertainty, this might have been brought to the surface through the Lincoln's Inn reading of Lent 1582 on the effects of the 1576 statute on grants by the Queen's letters patent, by Thomas Egerton.[70] Very shortly after this, no doubt to strengthen Oxford's position, Roland Broughton, the draftsman of that conveyance and the college's attorney, himself made a fine of all the lands to Oxford in consideration of £200.[71] It is not clear why the fine should have been made by Broughton rather than the college, but since a fine was conclusive against third parties after five years[72] it may simply have been a matter of convenience for Broughton to have done it, though it is perhaps more likely that it was an attempt to avoid the effects of the 1571 statute by making it appear that the grant was not in law made by the college.[73] In any event, the intended effect must have been that the college's potential rights were being bought out for £200.

This in effect marks the end of the property transactions giving rise to the *Earl of Oxford's Case*. Oxford was to convey the land away in 1591 for the benefit of his second wife, Elizabeth Trentham, part of a complex marriage settlement, but an inquisition post mortem taken after his death

[66] C 54/1080 no 5.
[67] C 54/1080 no 6.
[68] Stat 18 Eliz c 2 (*Statutes of the Realm* 4 608).
[69] Below, 15–18.
[70] CUL MS Dd 11.87 f 152, BL MS Harl 5265 ff 136–37; BL MS Harg 207 ff 58, 64, 65v. The surviving notes on the reading do not reveal this point to have been dealt with specifically, though it did deal with the requirement that grants to the Queen required good consideration: below, text at n 105.
[71] CP 25/2/170/2949 no 5.
[72] Stat 4 Hen VII c 4; Co Litt 262. For the operation of fines, which had changed little in its fundamentals since the twelfth century, see GJ Turner, *Calendar of the Feet of Fines relating to the County of Huntingdon* (Cambridge, CUP, 1913) cxxiv–cli. A contemporary description of the practice of making fines is Thomas Powell, *The Attourneys Academy* (London, B Fisher, 1623) 125–29.
[73] See below, text at n 108.

in 1604 shows that he died seised of the land, which therefore descended to his heir.[74] It was against the heir that the college was to take action in an attempt to recover the property.

C. THE LITIGATION

Oxford died on 24 June 1604. An inquisition post mortem on his Essex lands, taken in the September of that year, makes no mention of the London property, but since it was out of the county we should not necessarily expect it to do so.[75] There is no doubt, though, that it was still in the hands of the Oxford family, and at Michaelmas 1606 Barnaby Goche,[76] now Master of Magdalene, accepted the rent of £15 from one of the tenants of the Covent Garden, Edward Hamond, giving him an unsealed receipt to this effect.[77] However, the college soon began to move to question the position. On 5 February 1607, Goche, acting on behalf of the college, formally ejected Sir Francis Castillion, the lessee of one of the houses on the land, and made a lease for six years to John Smith, the Bursar of the college. This was not a pure fiction—the document making the lease was presented in evidence in the King's Bench in the *Magdalen College Case*—but there is no doubt that the lease was made with a view to an action of ejectment being subsequently brought.[78] Castillion re-entered immediately and continued to occupy the land,[79] but nothing further happened for a while. Matters seem to have been brought to a head when the next year's payment fell due to the college: at Michaelmas 1607, Castillion was once again ejected, but this time the college remained in possession.[80] The intention was no doubt to precipitate an action of ejectment at Common Law, but the new Earl was still a minor in wardship, and he—or more likely his representatives—brought suit in the Court of Wards against the college for its intrusion into the land.

The case was first heard in June 1608, when the plantiff's claim and the defendants' defence were brought before the court.[81] The court, however, at first declined jurisdiction. The inquisition of 1604 had made no reference

[74] C 142/305/103.

[75] C 142/286/165. HE Bell, *Court of Wards and Liveries* (Cambridge, CUP, 1953) 69–76, esp at 73–74, citing *Lord Winsor's Case* (1611) Ley 31, 80 ER 608.

[76] For Goche, see A Thrush and JP Ferris (eds), *History of Parliament, House of Commons 1604–1629*, vol 4 (Cambridge, CUP, 2010) 405, sub nom Barnaby Gooch. I adopt the spelling used by Goche himself.

[77] The receipt, transcribed in full in KB 27/1426 m 288, does not say on whose behalf Hamond was acting. Except where noted otherwise, the information which follows in this paragraph is derived from the special verdict in *Warren v Smith*, the *Magdalene College Case*, KB 27/1426 m 288, substantially reproduced in 11 Co Rep 66, 67–68; 77 ER 1235, 1236–39.

[78] WARD 9/530 f 337, describing this as an entry for trial of the title.

[79] *Ibid*.

[80] *Ibid*.

[81] WARD 9/530 f 185.

to lands outside Essex, and in the absence of an inquisition post mortem to the effect that the former Earl had died seised of these lands there could be no issue touching the wardship. It was therefore ordered that a further inquisition be taken as a matter of urgency, and that the parties should agree on the names of 'indifferent commissioners' to do this. John Smith, the college's Bursar, was subsequently to complain that the college had not had any part in the appointment of the commissioners and had not been able to bring witnesses before them;[82] but be that as it may, the inquisition was duly made on 17 August 1608.[83] Three findings of the inquisition are pertinent: first, that the Earl had died seised of the Covent Garden in fee; secondly, that the lands were worth £5 per year; and, thirdly, that the commissioners did not know who had been receiving the profits since the death of the former Earl. The first of these was something which the college had wanted to question before the inquisition was made, on the basis that the land had been conveyed away in 1591;[84] though it is not clear why it should have mattered to the college specifically that it was the alienees rather than the Earl who were seised. The second point, that the land was worth only £5 per year, causes more of an eyebrow to be raised, given that it was already said to have been worth more than £2,000 in 1580 and even then producing rents of £180 per year. The explanation seems to be that the Earl's sub-leases, or at least many of them, had been made in exchange for capital payments and only a nominal peppercorn rent.[85] This too perhaps explains the third point: if the rents really were that minimal, it is understandable that there might have been doubt as to who—if anybody—had received them.

Once the inquisition had been taken, the new Earl's claim in the Court of Wards could proceed. On 19 October it was argued by Attorney-General Henry Hobart, the Recorder of London Henry Montagu and Lawrence Hyde on the part of the Earl; and Serjeant Augustine Nicholls and John Manningham[86] on the part of the college, where it was said that the college was seeking to traverse the inquisition, ie to have it overturned. In the light of this the case was adjourned, the college to retain possession of the land provided it gave a bond to keep the house in repair and to account for mesne profits should it eventually lose the action.[87] In time, the college

[82] WARD 9/530 f 253.
[83] C142/305/103.
[84] WARD 9/530 f 253; above, text at n 74.
[85] This was said to be the case with the land in question in the Court of Wards, which Castillion was holding at a peppercorn rent (WARD 9/530 f 337), and in the later Chancery proceedings it was stated that the Earl of Oxford had made leases for great sums of money which he had taken as fines (C 78/291 no 18).
[86] Manningham was a former student of Magdalene, and it is tempting to guess that it was he who had seen the possibility of reversing the effects of the 1575 transaction.
[87] WARD 9/530 f 271v, amended f 337, continued f 436v.

formulated its traverse, and in February 1609 the case re-emerged, this time with the college as plaintiff.[88] It proceeded slowly. By the end of May the parties had agreed that there need be no examination of witnesses,[89] but it took another year for the court to resolve, after receiving advice from the judges, that the right should be decided at Common Law on a special verdict agreeing all the relevant facts.[90]

Pursuant to this, Sir Francis Castillion re-entered the land. On 20 December 1610 he made a formal lease for two years to one John Warren, and on 23 December Warren was ejected by John Smith, the college's Bursar and lessee.[91] All was set now for the bringing of an action of ejectment, by this time the normal method of trying title to land.[92] The action was brought in the Hilary Term of 1611, and pleaded to issue in the Easter Term of that year.[93] The jury found a lengthy special verdict detailing the circumstances set out above and focusing on the legality of the grant of 1574/75; since it refers also to the Acts of Parliament of 1571 and 1576, we may well suspect that the verdict was in truth an agreed statement of facts and issues produced by the parties' lawyers, on the basis of the issues previously identified in the Court of Wards.

The case was argued several times between Hilary Term 1613 and Hilary Term 1615.[94] No conclusion was reached. At first it seems that Fleming CJ was inclined to uphold the grant and find against the college,[95] but Coke, who had succeeded him as Chief Justice of the King's Bench in October 1613, seems from the start to have favoured the college's case.[96] Perhaps because of this, while the argument in the King's Bench was still depending, an attempt was made on the part of the Earl to protect his position by presenting a bill in Parliament to confirm the grant of 1574/75, but this was

[88] WARD 9/530 f 504v. SP 15/39 f 141 (CSPD Addenda 1580–1625 520) looks to be a draft of the college's grounds for the traverse, but the document is badly mutilated so we cannot be sure.

[89] WARD 9/531 f 108.

[90] WARD 9/532 f 109 (16 May 1610). It was later said that there was a further decree made in Trinity Term 1610 which formulated the special verdict to be found (C 78/291 no 18, m 4); I have not been able to discover this. For the use of the judges in making decisions in the Court of Wards, see Bell (n 75) 98–100.

[91] KB 27/1426 m 288.

[92] JH Baker, *Introduction to English Legal History*, 4th edn (London, Butterworths, 2002) 301–03.

[93] KB 27/1426 m 288.

[94] According to the report in 1 Rolle 151 it was argued in Easter and Michaelmas Terms 1613 and Hilary Term 1614. There are manuscript reports from Hilary 1613 (HLS MS 109 f 23, CUL MS Ii 5.26 f 38v) and Michaelmas 1613 (HLS 109 ff 25, 27) and also Hilary Term 1615 (HLS 109 f 27v).

[95] HLS 109 f 23.

[96] HLS 109 f 27v.

abortive.[97] The issues were finally brought to a head in the Court of King's Bench in the Easter Term of 1615 and judgment given for the college.[98]

The arguments in the King's Bench in the *Magdalen College Case* need not be analysed in detail. All the reports show that they were structured in the same way, with four principal points.

Most important was that the initial grant from the college to the Queen was avoided by the statute of 1571. It had already been resolved by the judges that the statute did apply to grants of this type,[99] and the arguments on both sides were effectively a reprise of those which had arisen earlier. They revolved largely around the question whether the statute bound the Queen, an aspect of the larger and constitutionally more interesting question of when statutes bound the Crown and when they did not. On its proper construction, however, the 1571 statute disabled the college (and other ecclesiastical corporations) from making grants rather than disabling others from receiving property, so the question of the applicability of the statute to the Queen did not directly arise. This point was made by Coke CJ in Hilary Term 1615,[100] and unanimously so held by the court giving judgment the following term.[101]

Given this, it had to be decided whether the grant to the Queen had been subsequently validated. The first possibility was that this had been done by a later statute. An act of 1572,[102] excluding from the operation of the 1571 Act grants of houses (with less than 10 acres of land appurtenant to them) in cities, boroughs and suburbs, was at first relied upon, but this was eventually abandoned on the grounds that it had not been expressly referred to in the special verdict of the jury.[103] Alternatively, it might have been affected by the statute of 1576.[104] This rendered good grants which had been made to the Queen on good consideration,[105] but on the facts of

[97] *Commons Journals*, 13 May 1614. A draft of the bill is in BL MS Harl 6806 art 78, transcribed (somewhat inaccurately) in Purnell (n 34) 76–77.

[98] (1615) 1 Rolle 151, 81 ER 394; 11 Co Rep 67, 77 ER 1235; Cro Jac 364, 79 ER 312.

[99] *The Case of Ecclesiastical Persons* (1601) 5 Co Rep 14, 77 ER 69. The point is referred to in the reading of Lewis Prowd in Lincoln's Inn in 1606, noting that his original opinion had been that such grants were good since they could not be supposed to have been fraudulent (CUL MS Dd 5.50 f 38v at 39v); the fifth volume of *Coke's Reports*, containing this case, had been published in 1605.

[100] HLS 109 f 27v at f 28 (not in the brief report of the argument that term in 1 Rolle 151, 163; 81 ER 394, 402–03). It had been conceded by the Earl's counsel from the start that if this was the proper construction of the statute then the conveyance would have been void: HLS 109 f 23, *per* Hyde.

[101] 1 Rolle 151, 163; 81 ER 394, 402–03.

[102] Stat 14 Eliz c 11 s 5 (*Statutes of the Realm* 4 601).

[103] HLS 109 f 27v at f 28, *per* Mountague KS. The argument had formerly been put forward strongly by Hobart A-G (1 Rolle 151, 158; HLS 109 f 25 at f 25v) and Hyde (HLS 109 f 23, CUL MS Ii 5.26 f 38v).

[104] Stat 18 Eliz c 2 (*Statutes of the Realm* 4 608).

[105] More accurately, the statute read 'for any sum or sums of Money or other Considerations'; it was argued in the Exchequer Chamber that this had a wider meaning than the consideration

this case the college was to receive no consideration from the Queen, since her conveyance to Spinola was to take effect before the annual rent next fell due.[106] Consequently the initial grant to the Queen was void. The second part of the statute validated grants made by the Queen, but it was said by Croke J that the statute served only to give effect to voidable grants, not those which were absolutely void;[107] and since the 1571 act was quite clear that the grant by the college was void and this had not been cured by the first part of the 1576 act, it followed that the grant by the Queen to Spinola was also ineffective.

A second possibility was that the fine levied by Rowland Broughton in 1582[108] was conclusive against the college. The normal rule was that a fine was effective even against third parties after five years had elapsed from the proclamation of the fine in the Common Pleas.[109] However, the court held that the 1571 statute was sufficiently broadly worded to catch fines, even those levied by third parties: it referred to grants 'made had done or suffered', and the non-claim constituted a 'sufferance'.[110] Were the law otherwise, it was said by Haughton J, the 1571 statute would have been a dead letter, since any college could allow a stranger to enter onto its land and levy a fine, and then sit back for five years until the transferee's title had fully ripened. We may suspect that this may have been exactly what the college had attempted to do.

Lastly, it was argued that Goche's receipt of the rent from Hamond in 1606 precluded the college from making its claim. But there was nothing formally to suggest that he was acting with the authority of the college, and the receipt was not under seal (presumably the college's seal[111] is meant), and the court was therefore clearly of the opinion that the college was not barred by this either. Indeed, according to Dodderidge J, Haughton J had thought the point so obvious that it was not even worth arguing.[112]

Throughout, the reasoning of both counsel and judges is markedly formalist. Although an abundance of case law was cited, it was in effect largely an exercise in statutory interpretation; and as such it has to be said that the analysis was impeccable. Thomas Egerton, Lord Ellesmere, was

that would have been sufficient to raise a use, and that the requirement was therefore satisfied since the grant from the college to the Queen had recited that it was made 'for divers considerations ... thereunto moving' the Master and fellows: HLS 1081 f 48v, 52v.

[106] 1 Rolle 151, 169; 81 ER 394, 407. In his reading on the statute in 1582, Egerton had examined the question of what constituted value: BL MS Harg 207 f 58, BL MS Harl 5265 f 136v.

[107] 1 Rolle 151, 170–71; 81 ER 394, 408.

[108] Above, n 71.

[109] Above, n 72.

[110] 1 Rolle 151, 171; 81 ER 394, 408–09.

[111] Somewhat piquantly, this had been a gift to the college from none other than Benedict Spinola.

[112] 1 Rolle 151, 172; 81 ER 394, 409.

later to observe that the court had overturned an understanding of the law which had continued for many years,[113] but this fails to do justice either to the length of the arguments or to the care with which they were crafted. What is noteworthy is this very formalism. Nowhere was it ever suggested that it might have been remotely relevant that Spinola, the Earls of Oxford and their tenants had spent a great deal of money developing the land, and that the college might have been attempting to make a wholly unjustified windfall profit.

The Earl of Oxford—still a minor—was no doubt understandably aggrieved by the decision. Apparently immediately he brought a writ of error to remove the case to the Exchequer Chamber.[114] No less speedily, he went to Chancery, this time joining as co-plaintiff one Thomas Wood, another tenant who had been dispossessed by the college and whose land had been leased to John Smith, the bursar.[115] The first entry of the case in the Chancery Decree Books is on 26 June 1615, a matter of weeks after the decision of the King's Bench.[116] The Earl's bill has not been discovered in the Chancery records, but its gist may be reconstructed from the decree roll, checked against the report of the *Earl of Oxford's Case* in the Chancery Reports and the proceedings noted in the Chancery decree books and the Masters' report. After giving the facts at length, it picked out the following points: since the grant by the college in 1574/75, Spinola, the late Earl of Oxford and his tenants had expended a very considerable sum of money—£10,000 it was said—on the development of the land; the Earl and his tenants had given penal bonds for quiet possession to those to whom they had made leases, which bonds would be forfeit if the college was able to reclaim the property; those who had purchased leases had relied on the fact that the land had originally been granted to Spinola by the Queen's letters patent, the strongest guarantee of a good title; and that the purpose of the grant had been to improve to the greatest extent possible the college's financial position, a purpose which had been fulfilled:[117]

> It being her Majesty's Intent, That the college should be advanced greatly in Profit, by having the Rectory to them and their Successors discharged of the Lease

[113] C 78/291 no 17, m 7.

[114] Noted in the margin of KB 27/1426 m 288 as having been received on 12 May 1615. There are reports of arguments in the Exchequer Chamber in HLS 1081 f 48v and HLS 2068 f 1. Coke's report of the decision of the King's Bench was already in print, and was expressly addressed by Serjeant Moore: HLS 1081 f 48v at ff 51, 52v. Process on the writ of error was subsequently discontinued.

[115] MCC A/27/14, dated 20 December 1607.

[116] C 33/128 f 1234; the entry in the decree rolls gives 9 June as the date of the petition (C 78/291 no 18). At 1 Chan Rep 1, 3; 21 ER 485, 485 it is said that the bill in Chancery was preferred before the judgment of the King's Bench had been entered on the roll.

[117] 1 Chan Rep 1, 1–2; 21 ER 485, 485, the first paragraph significantly corrected by comparison with the manuscripts. The gain to the college is marked with a cross in the margin of the decree roll.

> for Years … And that Spinola and his heirs should have only the garden paying £15 per annum being the uttermost rent …
>
> Note; the college is hereby advanced £1700 more than they should have been if the former Lease had continued, which is not yet expired.

The petition would have raised matters which the college might have wished to dispute: the amount of money spent on the development of the land, the amount at risk from penal bonds, whether the college had made any profit and, if so, how much. The defendants Goche and Smith, though, refused to answer, but instead demurred to the bill and entered a plea which in effect restated the Common Law finding that the grant of 1574/75 was void. The basis for the demurrer, again reconstructed from the decree roll, was—significantly—not that the claim had already been adjudged at Common Law, but rather that the matters raised by the petitioners were appropriate to be determined at Common Law and not in Chancery, together with a denial that the erection of a 'colony' of buildings could affect the Common-Law rights of the owner of the land.[118] The matter was immediately referred to two of the Masters in Chancery, and in the light of their report that the demurrer was insufficient, dated the following day,[119] it was ordered that the defendants should answer the substance of the petition.[120] They refused to do so on the grounds that the matter was not within the jurisdiction of the Chancery, Smith saying that he was acting on the advice of Goche and Goche saying that he was acting on the advice of his counsel, and on 21 October 1615 the two men were committed to the Fleet prison for contempt.[121] One can only speculate as to the conversation at dinner in Magdalene when the news arrived that the Master and Bursar had been sent to gaol. Three weeks later the Chancery turned the screw tighter, requiring an answer to have been made within one week on pain of

[118] C78/291 no 18 m 3: '[T]he matters in the said bill contained were aptly determinable and to be determined by the common laws of this realm and not in this honourable court, neither did the same contain sufficient cause to draw into examination and question in this court matter of title and the validity and invalidity of estates derived from the said college which if they were ineffectual in law to debar the said college as of the complainants own showing they appeared to be as the defendant alleged then were not the same by colony of buildings upon any other persons loud and unjust pretence of recompense of the same things which was not warrantable by law of any sort to take away the right of the college neither were such unreasonable estates tending to the disherison of the said college and not warranted by law to be questioned in equity.'

[119] C38/22 (unfoliated). The report was based on three grounds: that the college had received full consideration for the land; that a large amount of money had been spent on the development of it; and that at the time of the original grant it was generally thought that a conveyance via the Queen would take the grant outside the statutory restrictions.

[120] C 33/128 f 1259v.

[121] C 33/130 f 39 (deleted), 53.

forfeiting £200.[122] Meanwhile, the two men had brought a writ of habeas corpus to the King's Bench.

The intransigence of Goche and Smith and the bringing of habeas corpus brought into focus the whole question of the relationship between Common Law and Chancery, and it is for this that the case has become a landmark in the eyes of posterity. This context will be examined in due course,[123] but it was, of course, only peripherally relevant to the parties, for whom the real question was—as it always had been—whether the college could recover back the land which it had conveyed away in 1574/75.

The spotlight was only briefly on the habeas corpus case.[124] The King's Bench was divided over the question whether the Chancery suit could be said to have been brought in respect of the same cause of action as the *Magdalen College Case* at Common Law, for the co-plaintiffs with the Earl were different in the two cases, and hence presumptively the actions were being brought for different plots of land in the Covent Garden.[125] Dodderidge J was inclined to overlook this, since the reality of the situation was that both the Common-Law and Chancery claims were concerned with the underlying freehold of the Earl of Oxford. Coke CJ, however, stressed the technical point, and the court ordered that the Earl's bill and the associated documentation in the Chancery suit be brought into the King's Bench so that it could be verified whether or not the actions were being brought for the same matter.[126] When the bill was produced the court seems to have leaned in favour of the applicants, but in the event, the Chancery backed off. On 30 November, Lord Ellesmere ordered that Goche and Smith be released from the Fleet, but should be required to give sureties that they would attend the Chancery every day until given leave to depart.[127] Their attendance in the Chancery was duly noted every sitting day of the court in Hilary Term 1616, at the end of which their sureties were released, though Goche and Smith were again required to attend day to day in the Easter Term.[128]

After two weeks of formal attendance, it seems that argument in the case was heard on 2 May.[129] Again, Lord Ellesmere LC demonstrated a marked

[122] C 33/129 f 134v. It is to this point that the reported *Earl of Oxford's Case* probably belongs: below n 170.

[123] Below, 27–32.

[124] For the growth of habeas corpus at this time, see P Halliday, *Habeas Corpus* (Cambridge, Mass, Belknap, 2010).

[125] *Googe and Smith's Case* (1615) 1 Rolle 277, 81 ER 487; 3 Bulst 115, 81 ER 98; HLS 109 f 102v.

[126] It is worthy of note that Coke was generally unsympathetic to habeas corpus actions aiming to overrule Chancery orders to imprison: Halliday (n 124) 91.

[127] C 33/130 f 232v, noted at 1 Rolle 277, 278; 81 ER 487, 487.

[128] C 33/130 f 462.

[129] C 33/129 f 728. The first half of the entry is deleted (and marked as vacated), but the continuation at f 728v is not; the parallel entry in C 33/130 f 620 says merely that the defendants appeared. Though it may not have been relevant as part of the legal record, there is no good reason to reject the factual accuracy of the deleted entry.

reluctance to rush to judgment. The bill contained 'divers matters of great equity … meet to be received in this court',[130] and nothing in it brought into question the proceedings in the Court of Wards or in the King's Bench. The implication of this was that the defendants' demurrer was not well-founded, and Ellesmere said that he would proceed to give judgment to that effect in one week's time unless Goche had by then waived the demurrer and answered to the bill.

Ellesmere's judgment was given on 6 May 1616.[131] Right to the end he was urging the defendants to waive their demurrer and answer the points made in the petition, but Goche refused to do so despite the advice of his counsel that he should. Instead he insisted on the finality of the judgment at Common Law, making reference to the Statutes of Praemunire[132] and referring to a recent case in Chancery on the application of the 1571 statute. Goche, a Doctor of Laws, was by this time making the arguments himself—his counsel is recorded as having agreed that the arguments were irrelevant and having said that he had tried to convince Goche of this—but Ellesmere none the less dealt with them carefully. Judgment was therefore decreed for the plaintiffs, the defendants having been taken to have confessed by their demurrer all the facts alleged in the petition, and an injunction was issued that the Earl and his tenants have quiet enjoyment of the lands and that all suits at Common Law be stayed.

This, one might have thought, would be the end of the matter, but Goche did not give up. Towards the end of 1616 the case took another turn. At Michaelmas, one Thomas Mosse, no doubt acting as the Earl's representative, arrived with witnesses at Magdalene to tender the £15 annual rent and the arrears which had accrued over the previous nine years. They said that they had waited in the college hall from 3.00 in the afternoon until sunset, but nobody from the college would come to accept the money from them. A further petition was brought, this time requiring the college to accept the rent, and on the college's refusal to do so it was ordered that the money be paid into court and that depositions be taken from witnesses to the tender which could be used in any future proceedings, protecting the Earl from the risk that the witnesses might have died in the meantime.[133] Still Goche remained intransigent, refusing to accept the rent as it fell due, and thereby creating the impression that the Earl's title was not secure so that he could not deal with it freely. In 1619 he petitioned the King for confirmation of the decree of 1616.[134] James referred the matter to Francis Bacon, now

[130] C 33/129 f 728 (deleted).
[131] C 78/291 no 17. Curiously, the decree book makes no mention of this, noting simply the defendants' routine appearance: C 33/130 f 626.
[132] Below, text at n 186.
[133] C 33/132 ff 342v, 600v.
[134] Details from C 78/291 no 17.

Lord Chancellor, the two Chief Justices, Montagu of the King's Bench and Hobart of the Common Pleas, and the Chief Baron, Tanfield, requiring them to certify their opinions in the matter.[135]

The case was yet again argued by counsel, though unfortunately no report of this has been discovered. It was only now, after more than 10 years in the courts, that the substance of the Earl's case was subjected to judicial consideration. The basis of his position, as expressed in the original Chancery petition, was in effect that the college should be estopped from reclaiming the land, at least without paying compensation for the improvements:[136] those holding it had spent a good deal of money on the improvements and had put far more at risk through the giving of penal bonds, all of which they had done in good faith and in the apparently reasonable belief that the Queen's letters patent had given an irrefrangible title; and the college had in no sense been cheated by the transaction or even taken advantage of, but on the contrary had made a considerable profit out of it. The Lord Chancellor, Chief Justices and Chief Baron largely accepted this. Whatever the true interpretation of the statute of 1576, ever since it had been enacted the view of lawyers had been that grants made by letters patent were good in law; as a consequence, very large sums of money had been expended by individuals in the belief that their estates were good, and no fault could be imputed to them for having been mistaken in this belief. In sum, it was not appropriate to dispossess bona fide purchasers who had remained in possession for many decades.[137] On receipt of this certification, the King instructed Lord Chancellor Bacon to affirm Ellesmere's earlier decree, saying that it was properly part of the King's function 'to take care and provide that the rigour of the law might be so tempered with equity as that his majesty's subiects might not by colour of law be pressed with any hard and avoidable extremities.'[138] John Manningham, still counsel for Goche and the college, argued that in refusing the rent they were not in any way impugning Ellesmere's decree, but Bacon rejected this since the refusal could not be interpreted in any other way than as implying that they still had a claim over the land.[139] In the light of this, a final decree was made requiring the college to accept the rent as it fell due and give acquittance under

[135] Montagu and Hobart had argued the Earl's case as counsel, but it would be wrong to conclude from that that they must have been biased in favour of him when sitting in a judicial capacity.

[136] It is clear from the college's demurrer (above, n 118) that the Earl would have been satisfied with this. The situation would therefore have been exactly the same as in Roman law if a *vindicatio* had been brought and the defendant raised an *exceptio doli*.

[137] Summarised in C 78/291 no 17.

[138] *Ibid*, m 8.

[139] C 33/314 f 921v.

seal for it and ordering that no further litigation over the original decree be permitted.[140] An injunction to this effect was served on the college.[141]

Goche then turned to Parliament, having been elected as MP for Cambridge University in 1621.[142] He first attempted to proceed by way of petition, but it was resolved that he should instead proceed by bill.[143] Although as yet the only issue was whether Goche should be allowed to speak since the matter might have been thought to be his own cause, Sir Edward Coke's recorded remarks show that the point of substance might still have been a matter in dispute:[144]

> It is a great grievance that the parliament shall say, be it enacted that all such Leases shall be void, and the Chancellor, be it decreed that it shall be good; for it was done in Magdalen College Case, whereof Gouch spoke. The writ of error after that one judge had argued for the judgment was discontinued. The chancellor that made the decree held a lease from a college upon the same title. This particular involves a general; it toucheth every man in his inheritance.

The bill to avoid the Chancery decree against the college was duly presented, justified on the grounds that the Chancery should not decide matters of inheritance,[145] but lack of time meant that it was not fully debated or enacted. Re-elected to the 1624 Parliament, Goche again introduced a bill to overturn the decree, at the same time as the Earl of Oxford introduced a bill into the House of Lords to confirm it.[146] Although Oxford's bill made better progress, both bills stalled in committee and neither was enacted. This, finally, put an end to the matter, at least for a while: on several occasions since the college has investigated the re-opening of the question.[147]

D. THE ISSUES IN THE LITIGATION

It is impossible to capture in any simple way what this complex of litigation was 'really' about. For Goche and the college, no doubt, it was seen as a

[140] C 78/291 no 17, m 8.
[141] MCC A/27/16.
[142] Thrush and Ferris (n 76) 408. He had unsuccessfully stood for election in 1614: *ibid*, 407.
[143] W Notestein *et al*, *Commons Debates 1621* (New Haven, Conn, Yale University Press, 1935) vol 3, 158; vol 4, 299; vol 5, 139, 366. For procedure by petition, appropriate to the redress of a private grievance, see Coke, *Fourth Institute*, 10–11. The 1621 parliamentary proceedings are concisely described in Thrush and Ferris (n 76), 408.
[144] Notestein *et al* (n 143) vol 5, 139. For all his rhetoric, it is noteworthy that in 1613 Coke himself had intended to buy the lease of the manor of Cressingham, Norfolk, which had been conveyed to the Queen by the Dean and Chapter of Norwich: JP Collier (ed), *The Egerton Papers* (London, Camden Society, 1840) 462; I owe this reference to Dr Steven Churches.
[145] Notestein *et al* (n 143) vol 3, 197; noted also vol 2, 353; vol 4, 317.
[146] For the 1624 proceedings, Thrush and Ferris (n 76) 412.
[147] Cunich *et al* (n 19) 82–83.

matter of attempting to recover valuable land out of which they believed that they had been in some sense cheated in the 1570s. For the Earl of Oxford, no doubt, it was seen as a matter of retaining valuable land which he had always thought to be his, and where he was at risk of losing many thousands of pounds if his tenants were evicted from property which they had developed at considerable expense and in the belief that their rights were well-grounded. Both sides surely thought they were right, both were willing to exploit the potentials of the English legal and political system to press their own claims, and probably both were frustrated by the ability and willingness of the other side to do so.

For the historian, the most important feature is the jurisdictional plurality which characterised the early-modern legal system: the dispute was located in turn before the Court of Wards, the King's Bench, the Exchequer Chamber, the Chancery, the Chief Justices and Chief Baron acting on commission from the King, and finally in Parliament. In such a world, finality was a goal which could hardly be achieved where both parties were tenacious and determined to succeed. As well, we cannot help pausing in an attempt to understand how Parliament in 1571 might have legislated to outlaw transactions whereby colleges parted with their lands for lengthy terms of years or in perpetuity, only for the Queen to be used as an instrument to avoid the statute, with Parliament then unable effectively to deal with the problems created thereby.

For the lawyers, the issue at the heart of the dispute was the inviolability of Common-Law property rights. This was the basis of Goche's and Smith's demurrer in the Chancery—that the determination of property rights was a matter purely for the Common Law and not for the emergent equity of the Court of Chancery—and it lay behind Goche's bill in the 1621 Parliament, that the Chancery should not meddle in matters of inheritance.[148] This whole issue of the inviolability of property rights was a dominant theme in the political discourse of the reign of James I, intimately connected with arguments about the protection of individual liberty.[149] Its principal focus was the legitimacy or illegitimacy of extra-parliamentary taxation. It had been held by the Court of Exchequer in *Bates' Case* in 1606[150] that the King had a general power to levy taxes—in this case a levy on the importation of currants—for the public good. This decision, and the way in which it was being implemented, was a matter for sustained criticism in the Parliament of 1610: taxation at the will of the King was tantamount to the taking of

[148] Above, n 118, n 145.

[149] JP Sommerville, *Politics and Ideology in England, 1603–1640* (London, Longman, 1986) 145–63.

[150] *Bates' Case* (1606) Lane 22, 145 ER 267.

property without consent, something which was improper.[151] For William Hakewill, certainty was the hallmark of the Common Law;[152] the Common Law could be seen as the guarantor of the stability of property rights. Similar concerns lay behind the discussion of the Irish custom of tanistry, according to which land descended not according to some predetermined and certain rule, but to the kinsman who was deemed the most worthy. A statute of 1570[153] had made it possible for the current tanist to convert his interest into a Common Law estate by surrender to the Crown and regrant, but tanistry had not itself been abolished. In the early seventeenth century a move was made to do this, led by Sir John Davies, the Attorney-General in Ireland.[154] One aspect of this attack on tanistry was the argument that it was a custom which should not be admitted as valid by the Common Law. It did not satisfy the basic minimal criterion of reasonableness, argued Davies in the Irish King's Bench.[155] If the line of descent was not certain, the occupant for the time being would have no incentive to develop or improve the land; it encouraged crime, since men could have no confidence that their wives or children would be provided for after their death; and it went against the maxim of the Common Law that there could be no abeyance of the freehold. In sum, 'A commonwealth cannot survive without certain ownership of land.'[156] The *Case of Tanistry* might not at first have been familiar to lawyers in England, but the publication of Davies's report of it in 1615, in a volume dedicated to Ellesmere, would have ensured its entry into the legal consciousness.

That established property rights should be afforded strong protection by the law is no doubt something on which Magdalene and the Earl of Oxford would have agreed. The difference between them was that the college was arguing that property rights were to be identified solely by reference to the Common Law, whereas the Earl was placing greater weight on the fact that he and his tenants had been in occupation of the land for several decades and had in good faith spent a great deal of money in the development of it. This was the truly contested territory in the case, and the decision in favour of the Earl reflected two important points. First was that Common Law

[151] See, eg, the speech of Thomas Hedley in the debate over impositions in 1610: ER Foster (ed), *Proceedings in Parliament 1610* (New Haven, Conn, Yale University Press, 1966) 188–89; Sommerville (n 149) 153–54.

[152] W Hakewill *The Libertie of the Subject: Against the Pretended Power of Impositions. Maintained by an Argument in Parliament Anno 7o Jacobi Regis* (London, 1641) 10: 'That the Common-Law of England (as also all other wise Laws in the World) delight in certainty, and abandon incertainty, as the mother of all debate and confusion, than which nothing is more odious in Law.'

[153] Stat 12 Eliz c 4.

[154] HS Pawlisch, *Sir John Davies and the Conquest of Ireland* (Cambridge, CUP, 1985) 55–81.

[155] *Case of Tanistry* (1608) Dav 28, 80 ER 516.

[156] *Ibid*, 33–34; 522–23.

did not have a monopoly over the determination of rights of real property, second that—in modern terms—the Court of Chancery had the power to manipulate property rights based on the working of what we would see as a broad principle of estoppel.

With hindsight, the first of these looks as if it could hardly have been controversial, and the speed with which the Masters in Chancery reported that Goche's demurrer was ill-founded[157] suggests that this is how they saw the matter too. However, it might not have been quite so clear-cut at the time. Sixteenth-century Chancellors had rather vacillated over the question of the extent to which they could or should interfere with property, commonly preferring to do so indirectly rather than directly,[158] and what we think of today as Chancery's property institutions were not yet established. Since 1536 the Statute of Uses had operated to convert most uses into legal estates, except where the feoffees had active duties to perform.[159] The passive trust, based on the use upon a use, was only just beginning to emerge, and the uncertainty which it introduced was a matter for criticism by Common Lawyers;[160] it was not until the time of Lord Nottingham later in the seventeenth century that it was to be truly established, and even then it was arguable that the beneficiary's interest was a purely personal right.[161] The equity of redemption was still in the process of gestation;[162] and equitable rights such as restrictive covenants were still centuries away. While for the modern lawyer the proprietary consequences of equitable rights are absolutely fundamental (though no longer centred on interests in real property), matters could have turned out very differently indeed. It is no exaggeration to say that had the *Earl of Oxford's Case* upheld Goche's demurrer, the subsequent history of the English law of property could have been unrecognisably different.

The second point, the operation of a broad principle of estoppel, is more technical. The Chancery decree roll shows that an idea of this sort was the basis of the Chancery judgment: Spinola, the Earl of Oxford and their tenants had expended very considerable sums on buildings; they had acted in

[157] A single day: above, n 119.

[158] E Henderson, 'Legal Rights to Land in the Early Chancery' (1982) 26 *American Journal of Legal History* 97.

[159] Such active uses did not compromise the dominance of the Common Law, since they were not concerned with the whereabouts of what we would today regard as beneficial ownership, only with how the undoubted holders of the fee simple should exercise their property rights.

[160] NG Jones, 'Trusts in England after the Statute of Uses: A View from the 16th Century' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae* (Berlin, Duncker & Humblot, 1998) 173. Baker (n 92) 309. See in particular the Reading of Henry Sherfield on the Statute of Wills (Lincoln's Inn, 1623), in JH Baker and SFC Milsom, *Sources of English Legal History* (2nd edn by Sir John Baker, Oxford, OUP, 2010) 149.

[161] M Macnair, 'The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries' in Helmholz and Zimmermann (eds) (n 160) 207.

[162] GJ Turner, *The Equity of Redemption* (Cambridge, CUP, 1931) 27–28, 37–38.

good faith throughout, and in the reasonable belief that they had good title; the college had not been overreached but had itself made a considerable profit.[163] The last of these points may have been particularly important, for it is marked with a cross in the margin of the decree roll. Estoppels had long been recognised as a matter of Common Law, but only where there had been a positive act or representation by the person estopped.[164] Here there had been no such positive conduct, and it was presumably for this reason that the issue was not raised in the Common Law proceedings in the *Magdalen College Case*. Indeed, the word 'estoppel' was nowhere used in the Chancery proceedings in the *Earl of Oxford's Case*, and the printed report of the case focuses on the issue of the relationship between Chancery and the Common Law courts rather than the substantive ground of the decree in Equity. Equitable estoppel, as a basis of proprietary claims, hardly existed in the eighteenth century—the section devoted to it in Viner's *Abridgment*[165] is exiguous, for example—and it was not until the middle of the nineteenth century that this aspect of the *Earl of Oxford's Case* was to be resurrected, as one of the foundational authorities for the formulation of the idea of estoppel by acquiescence in *Ramsden v Dyson*.[166] But this could not be expressed as the formal basis of the decision in the *Earl of Oxford's Case*, for as yet the conceptual vocabulary was not there to do so.

E. 'THE EARL OF OXFORD'S CASE'

The heading of the *Earl of Oxford's Case*[167] in the Chancery Reports reads: 'The Earl of Oxford's Case in Chancery. With the Lord Chancellor's Arguments, touching the Jurisdiction of the said Court. Mich. 13 Jac. I.' The most noteworthy thing about this is the date, Michaelmas Term 1615, for the Chancery record has no trace of any judgment being given in the case in that term. It was, it is true, a busy term, with the Chancery much concerned with the contumacy of Goche and Smith;[168] but the first

[163] C 78/291 no 18.

[164] See, eg, J Rastell, *Exposition of Certaine Difficult and Obscure Words, and Termes of the Lawes of this Realme* (Assignee of Charles Yetsweirt, decd, 1595), f 84 and Co Litt 352, both of which are expressed in terms of a person being estopped by his own acts or writings.

[165] Viner, *Abridgement*, *Estoppel*, F (a).

[166] *Ramsden v Dyson* (1866) LR 1 HL 129, 134. On this case, see the essay by N Piška in ch 9 of this volume.

[167] (1615) 1 Chan Rep 1, 21 ER 485. I have compared the printed text to a selection of manuscript versions (CUL MS Gg 2.31 f 211v, CUL MS Mm 1.43 p 466, BL MS Harl 1767 f 29v, BL MS Harl 4265 f 67, BL MS Harg 227 f 279v, BL MS Harg 249 f 148v, BL MS Harg 269 f 25v, BL MS Lansd 613 f 31v, BL MS Stowe 296 f 65). All are substantially similar; points where the manuscripts vary from the printed text in some significant way are noted where appropriate.

[168] C 33/130 ff 39, 53, 235, 232v.

substantive decree in the case was on 6 May 1616, approximately six months later.[169] The date therefore gives the context for the report: it is concerned solely with the propriety of imprisoning the defendants for their contempt in refusing to answer the Earl's bill.[170]

The way in which this issue is formulated reflects contemporary concerns. It need not have done so: Goche and Smith might have argued that it was their right to demur to the Earl's petition, taking the risk that the demurrer would be decided against them, and that consequently the Chancellor's requirement that they waive their demurrer and answer the petition was illegal. However, in 1615 the whole question whether the Chancery had a power to require a successful party to release a judgment at Common Law and to commit him to prison when he refused to do so was very much centre-stage. Matters had come to a head in Trinity Term, in *Glanvill's Case*.[171] Contrary to Ellesmere's insistence on the legitimacy of doing so, Coke had led the Common Law judges to the opposite conclusion and had ordered Glanvill's release on habeas corpus. At the legal heart of *Glanvill's Case*, and of *Apsley and Ruswell's Case*[172] at the same time, was whether a return to habeas corpus that the applicant was imprisoned by the order of the Chancery was good in itself, or whether the cause for which the imprisonment had been ordered had to be shown so that the King's Bench could evaluate its sufficiency.

Ellesmere's reasoning suggests that Goche and Smith were trying to place themselves within the Common-Law principle of *Glanvill's Case*, and his careful analysis looks to be directed at taking the case outside it.

The first point established by Ellesmere was that the Earl had a good claim in Equity or conscience.[173] In the absence of any answer by the defendants, it was said to be legitimate for the court to proceed on the basis of the facts alleged in the bill: *Gorringe v Taylor*.[174] This settled, the position in Equity could be considered on its merits. Here the Earl and his tenants had expended very considerable sums of money on the development of the land, and it was not conscionable for the defendants to insist on their strict legal rights without compensating the plaintiffs. Chancery

[169] Above, text at n 131.

[170] Above, text at n 124.

[171] *Glanvill's Case* 1 Rolle 111, 81 ER 365; 2 Bulst 301, 80 ER 1139; Moo 838, 72 ER 939; Cro Jac 343, 79 ER 294. This paragraph largely summarises JH Baker, 'The Common Lawyers and the Chancery: 1616' (1969) 4 *Irish Jurist* 368, 374–76.

[172] *Apsley and Ruswell's Case* 1 Rolle 192, 81 ER 424; 1 Rolle 218, 81 ER 443.

[173] 1 Chan Rep 1, 1–7; 21 ER 485, 485–86. For the role of conscience at this time, see D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Aldershot, Ashgate, 2010) esp at 157–58.

[174] *Gorringe v Taylor* (1596) C 33/91 f 424; 117 SS 210 no 235, 224 no 332 (not on this point). The reference to the case is omitted from the printed version.

authority was cited for this too: *Peterson v Parrys and Hickman*.[175] In that case land had been held by a husband and wife jointly; the husband made a lease, the lessee expended considerable sums in developing the land, and after the husband's death the wife initiated an action of ejectment to recover the land from the lessee. The Chancery refused to order a staying of the Common-Law action, but only on the basis that the lessee would be compensated in full for the value of the improvements. The situation in the *Earl of Oxford's Case* was exactly the same, said Lord Ellesmere: 'The Plaintiff in this Case only desires to be satisfied of the true Value of the new Building and Planting since the Conveyance, and convenient Allowance for the Purchase.'[176] This was sufficient to set down an independent basis for the Chancery action.

It should be noted that there is here a mismatch between the report of the case and the Chancery record. The report gives the reasons why the Earl's claim should succeed, but the record shows emphatically that this was not decided in Michaelmas Term 1615 but continued to be at issue until May 1616. We might strongly suspect that the report of the case does not represent Ellesmere's actual decision in 1615 but is a formalised version of his argument prepared for independent circulation. However, since it is this argument which is being examined, we may gloss over this mismatch.

Ellesmere's reasoning to justify the intervention was subtle. The first limb was to show that Chancery might legitimately intervene after a judgment at law, provided that the grounds of the judgment were not themselves questioned.[177] Hence it was possible to have recourse to Chancery where an action was brought at Common Law to enforce a bond, where it was asserted that the money due under the bond had already been paid (this not being a defence at Common Law). At this point (at the bottom of page 8 of the printed report) there is a small but important linguistic shift: instead of speaking of the intervention of *Chancery*, he moves to referring to the intervention of *Equity* after judgment at Common Law. The first example of this, relief against penal bonds, was indeed a case of Chancery involvement; but immediately thereafter the focus shifts to Common-Law intervention by the writ of *audita querela*, a remedy available to reverse the effect of a judgment at law on the basis of material extraneous to the initial claim,[178] described by Ellesmere as a 'Latin Bill in Equity'. Hence, there was room for Equity to neutralise the effect of Common-Law judgments, both through the Court of Chancery and in the Common Law courts themselves.

[175] *Peterson v Parrys and Hickman* (1597) C 33/93 f 125; 117 SS 263 no 248 (not on this point).

[176] 1 Chan Rep 1, 6; 21 ER 485, 486.

[177] 1 Chan Rep 1, 7–11; 21 ER 485, 486–87. The words 'And for the Judgment', marking the beginning of the section, form a header in the manuscripts.

[178] TFT Plucknett, *Legislation of Edward I* (Oxford, OUP, 1949) 145–46.