Opening Dialogue

The scene is an undergraduate law class at the beginning of term.

Teacher: I wanted to talk about dialogues. Could one of you tell me something about the dialogue as a literary device?

Richard: Why don't you tell us – you're the teacher, after all!

Esther: Are we going to have a dialogue about dialogues?

Teacher: Yes to both of you. The dialogue form – questions and answers exchanged in a conversation – can be a good way to understand the nuances of an argument. So rather than merely present the course material, I thought we might start with a dialogue to introduce the subject and the themes.

Esther: This sounds like a fad. Have you been told you have to try to be "innovative"?[1]

Teacher: It's the opposite of innovative, actually. In the 15th century, Fortescue's *De Laudibus Legum Angliae* – roughly translated as "In Praise of the Laws of England" – took the form of a dialogue between a young exiled English prince and his lord chancellor, and there were many other examples.[2] The rediscovery and publication of Plato's dialogues[3] and the seemingly open-ended inquiry they permitted led to that form being used in many works in the early 16th century,[4] including by Erasmus,[5] Thomas More[6] and Christopher St German,

1 Cf the well-aimed criticism of modern university management, which treats "innovation [as] more important than doing something well": Interview with Barbara McDonald, *Gazette of Law and Journalism*, 26 March 2023.

2 See P Goodrich, "Introduction: The Great Dialogue" in P Goodrich (ed), *A Cultural History of Law: In the Early Modern Age* (Bloomsbury, 2019) 1 at 14-15 for numerous examples and on the "crucial role" played by the literary form of dialogue in the early history of law. The form declined in popularity, although the modern "FAQ page" has some similarities, and see L Katz, "A Teoh FAQ" (1998) *AIAL Forum* No 16, 1.

3 Notably, by Marsilio Ficino in 1484; for most of the mediaeval period, only the Timaeus, Phaedo, Meno, and part of the Parmenides were available in Latin: see J Hankins, *Plato in the Italian Renaissance* (EJ Brill, 1991).

4 For the use of the form in the early 1530s in England, see "'Where the word of a king is': Dialogues Printed by Thomas Berthelet, 1530-1532" in JC Warner, *Henry VIII's Divorce: Literature and the Politics of the Printing Press* (Boydell Press, 1998) 27-46. For its use by Italian humanists such as Petrarch, Bruni, Poggi and Valla so as to permit interlocutors the freedom to expound their opinions, see G Remer, *Humanism and the Rhetoric of Toleration* (Penn State UP, 1996) 85-87.

5 D Erasmus, *Colloquia* (Basel, 1524).

6 T More, *Utopia* (London, 1516).

whose *Doctor and Student* may have been published precisely 500 years ago.[7] It was a sophisticated account of law and equity within the English legal system, and enormously influential.[8] I thought it might appeal to you – partly because of the anniversary, and partly because the student of law explains to the doctor how the English legal system worked.

Esther: Sometimes I have thought that the teacher learns as much from students' explanations in class as the students learn themselves.

Richard: What do you mean may have been published *precisely* 500 years ago? Either it was or it wasn't.

Teacher: We know that it was published at least 495 years ago, because copies of a 1528 edition exist today. There are also some suggestions in lists published a couple of centuries ago that there had been a 1523 edition, but we can't be sure.[9]

Richard: Why would a doctor be having a conversation about law?

Esther: I read about Doctors' Commons in *David Copperfield*.[10] By the 1520s Henry VIII had been married to Catherine of Aragon for many years without a male heir. Papal authority was, to say the least, becoming decidedly unfashionable in England – was the book an explanation by a student of common law to a civilian doctor of laws?

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7 T Plucknett and J Barton (eds), *St German's Doctor and Student* (Selden Society, 1974) vol 91 (*Doctor and Student*). For the date of publication, see below.

8 Translated into English in 1530 and 1531, republished six times in the 16th century, nine times in the 17th century and six times in the 18th century. "It is St German, as much as any single individual, who is responsible for the fact that today we have courts of equity rather than of conscience": Barton, introduction to Plucknett and Barton, above, xlvii.

9 No copy of the 1523 edition is known to survive, but the reference appears immediately before the entry for the extant 1528 publication in Herbert's edition of *Typographical Antiquities* (John Murray, London 1785) vol I, 330. Earlier scholars treated 1523 as the date of first publication (see for example John Rastell's entry in the *Dictionary of National Biography*, H Graham, "The Rastells and the Printed English Law Book of the Renaissance" 47 *Law Librarians Journal* 6 at 11 (1954); W Holdsworth, *A History of English Law* (3rd ed, Methuen & Co, 1945) vol V, 267; and S Thorne, "St Germain's *Doctor and Student*" 10 *The Library* (4th series) 421 (1930)), but the weight of modern authority aligns with E Devereux, *Bibliography of John Rastell* (McGill-Queen's Press, 1999) 149 who said that it "seems to me to be a ghost", in part because the year "mdxxviii" on Rastell's colophon could easily be misread as "mdxxiii", and in part because of the upsurge in demand shortly after 1528 including the 1530 English "translation". The title page of the latter states that "though this Dyaloge in many places agreyth with the Dyaloge that was lately drawen in Laten bytwxte a Doctoure and a Student of the same groundes yet it can not be taken as a tranlacion out of that Dyaloge" (because it omitted parts of the 1528 volume and contained new material).

10 See G Squibb, *Doctors' Commons* (Clarendon Press, 1977) for a history of Doctors' Commons, and an endorsement of Dickens' statement (*David Copperfield* ch xxiii) that they formed "a cosey, dosey, old-fashioned, time-forgotten, sleepy-headed little family-party": at 36.

Teacher: Yes. And St German also wrote *A Little Treatise concerning Writs of Subpoena* in around 1532 on chancery procedure,[11] and probably also another work complaining of the chancery under Wolsey.[12]

Richard: It's all too easy to say something from the distant past is "sophisticated". Can you try to explain why that is so?

Teacher: As you are going to find in the course, it's constantly necessary to get into the details, so let me give you an example. In order to explain the relations between common law and equity, St German wrote that where a debtor borrowed money on a sealed bond, but failed to have the bond cancelled when it was repaid, the bondholder could still sue at law on the debt, and it was no answer that he had paid. But chancery would give a remedy. St German went on to explain why. Common law procedure did not permit a debtor to deny a sealed debt, which in general worked conveniently, but could be abused by a dishonest creditor if the debtor had in fact paid. You have to bear in mind that the defendant could not give evidence at a common law trial, but could be compelled to do so in a chancery suit.[13]

Richard: I thought equity was based on exceptions to strict common law rules.

Teacher: That's not wrong, but it's too simplistic to think of equity, whether in the 16th or 21st century, as a series of exceptions. The different approach, originally influenced by very different procedure, was a key distinction. St German contrasts the mode of adjudication at common law, where the law judges according to allegations and proofs,[14] with chancery, where "the very trouthe yn conscience is to be serchede".[15] This is very similar to the point famously made by Lord Stowell in *The Juliana*[16] – that ill-fated voyage taking convicts to Hobart – not to mention by the High Court in *Jenyns v Public Curator (Qld)*,[17] which is fundamental to the Australian legal system in the 21st century;[18] have you heard of it?

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11 J Guy (ed), *Christopher St German on Chancery and Statute* (Selden Society, 1985) Supp Series vol 6 (*A Little Treatise*).

12 *The Replication of a Serjeant at the Laws of England*, reproduced in Guy, above. For St German's complete works, see ch 3 of the same work; they included dialogues on theological topics discussed at 36-43.

13 "Behind this argument concerning evidence … one discerns the common law trial where the defendant could not give evidence and the chancery suit where he was compelled to do so. … It may be that in such problems there is to be found the beginnings of recognition that the court of chancery was possessed of a separate body of jurisprudence, not merely a separate arsenal of procedural weapons": DEC Yale, "St German's *Little Treatise concerning Writs of Subpoena*" (1975) 10 *Irish Jurist* (ns) 328 at 330.

14 *Doctor and Student*, 117 ("*ubi lex iudicat secondum allegata et probata*"); *A Little Treatise*, 121.

15 *A Little Treatise*, 121.

16 (1822) 2 Dods 504 at 522; 165 ER 1560 at 1567.

17 (1953) 90 CLR 113 at 119.

18 See for example *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [122]-[123] and *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 at [39] and [57].

Esther: A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

Teacher: Just so. Equity is rather more than exceptions to common law rules.

Esther: But I didn't know that the voyage of *The Juliana* had anything to do with Australia.

Teacher: The ship sailed from Portsmouth to Hobart, delivered its cargo of convicts,[19] then sailed back via Sydney, Batavia, Singapore and Calcutta, taking on board and delivering cargo each time, and then returned to England, only to sink in the Thames estuary. The plaintiff was one of two survivors, but was forced to sue in order to be paid, because the articles he had signed provided that he was not entitled to wages until the ship had arrived in London.

Richard: But isn't that just a case of equity relieving against a contractual promise that is perceived to operate too harshly?

Teacher: In fact the main argument was whether a statute which aimed at preventing seamen deserting in the West Indies, which had been held at common law to prevent a claim for wages in the face of such a promise in the articles, prevented the application of a well-established equitable intervention in promises contained in bonds where the ship had earned freight.[20] Lord Stowell's decision illustrates all three main components of the legal system.

Richard: But doesn't "equity" come from Aristotle? Isn't equity *defined* as "a correction of law where it is defective owing to its universality"?

Teacher: It is quite true that that is how Aristotle defined ἐπιείκεια,[21] and it's quite true that that is how St German referred to equity: "in some cases it is necessary to leue the wordis of the lawe & to folowe that reason and Justyce requyreth & to that intent equytie is ordeyned that is to say to tempre and myttygate the rygoure of the lawe".[22] But, as Esther has said, equity extends to more than tempering and mitigating the rigour of the law, although that is an important aspect of it.

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19 Described as "a most troublesome, a most disgusting and a most dangerous cargo": (1822) 2 Dods 504 at 523-524; 165 ER 1560 at 1567.

20 *Appleby v Dods* (1807) 8 East 300; 103 ER 356, a decision of Lord Ellenborough LCJ, nonsuiting a plaintiff based on 37 Geo III c 73, a statute levelled against desertion on West Indies voyages, where a trade had developed whereby merchant vessels recruited mariners from other merchant vessels, leaving the latter stranded: R Merkin, *Marine Insurance: A Legal History* (Edward Elgar Publishing, 2021) vol II, 95. See further section 7.6 below.

21 *Nichomachean Ethics*, 5:10; see WD Ross, *The Works of Aristotle Translated into English* (London, 1913) 1137b.

22 *Doctor and Student* 97 ("*Ita quod in aliquibus casubus est necessarium pretermissis verbis legis sequi: id quod petit iustitie ratio et ad hoc ordinatur equitas que etiam dicitur Epikaya scilicet obtemperare legis rigorem*"). Indeed, St German's 1528 Latin text transliterates Aristotle's ἐπιείκεια.

Esther: Sometimes courts decide binary issues, like whether the defendant has breached a duty of care or a contractual promise or whether a publication is defamatory. And sometimes, when deciding to set aside a contract which was entered into for undue influence, or whether to make an order for family provision to a relative of the deceased, they exercise a discretion based on all the evidence in the case.

Richard: But the same courts administering both common law and equity, and family provision legislation for that matter, according to the same procedural rules make those decisions.

Teacher: That is right, but it can be helpful in difficult cases – especially where a contestable question of law arises – to look at the common law or equitable ancestry.

Richard: What about statute? When courts are asked to set aside contracts for statutory unconscionability or to make orders for family provision, they are exercising powers conferred by statute.

Teacher: But statute very often draws on judge-made law. How is a court to exercise the discretion to set aside a contract conferred by the Australian Consumer Law? The statute is less than explicit, and it is natural to regard the discretion as informed by comparable situations in equity. When the question is whether a defendant has breached a duty of care under s 5B of the civil liability legislation, it is also natural to look back to the earlier judge-made law, although of course the statute has altered it somewhat. And when statute confers a new power, like the power to make an order for family provision, that too is informed by approaches developed at judge-made law.

Esther: But if common law and equity co-exist, now after the Judicature legislation has been enacted, they are administered by the same courts. Why should they be kept separate?

Teacher: It's a fair point, to which we will come much later in the course.[23] But for now, just suppose there are two bodies of law applicable to the same subject matter, as undoubtedly was the case in England for centuries. It was necessary to have some rules to resolve what happens when they conflict. As it happens, St German also provides an account of the operation of a 1403 statute which purported to prevent judgments given in the King's courts from being examined in Chancery.[24] Although we cannot be sure today even how to spell his

23 See Chapter 7 below.

24 4 Henry IV c 23. Of this, St German wrote (with modernised spelling):

> Doctor: There is a statute, 4 Henry IV c 23, which provides that judgment given in the King's courts shall not be examined in Chancery, Parliament or elsewhere, by which statute it appears that if any judgment be given in the King's courts against an equity, or against any matter of conscience whatsoever, there can be had no remedy, for there can be no remedy without an examination, and the statute prohibits examination. What is thine opinion?

name,[25] we can be sure that the idea of statute regulating the interaction between common law and equity was familiar and controversial half a millennium ago. The same statute was relied on by Coke in his submission in the *Earl of Oxford's* case,[26] and King James' decree in the Star Chamber confirmed the Chancellor's power to issue common injunctions, accepting Ellesmere's argument that the statute and others like it did not apply to proceedings in chancery and that, even if it did, what was examined was the parties' conduct, not the common law judgment.[27] This was the direct ancestor to the Judicature provisions.[28]

Esther: So the Judicature legislation can be traced back some 600 years?

Teacher: Yes. Lawyers in earlier centuries were highly likely to encounter equity through St German,[29] just as you may have first encountered equity through Dickens' *Bleak House*, in which coincidentally your namesakes are characters. Although you can read *Doctor and Student* as a polemic tending to diminish the authority of papal courts and enhance the authority of parliament,[30] St German's work contains an account within the same legal system of the separate bodies of common law and equity, and how they relate to one another, and how statute regulates them, which directly links to the Judicature reforms.

Richard: So this book in which we appear is about common law and equity?

Teacher: Don't forget statute!

Student: If judgments given in the King's courts should be examined in the Chancery or before the King's Council or in any other place, the plaintiffs or claimants should seldom come to the purpose of their suit, nor should the law end.

25 In the Middle Temple records, he is described as "St German" in 1502, "St Jermyn" in 1504, 1090 and 1015, and "St Germayn" in 1511: see J Guy (ed), *Christopher St German on Chancery and Statute* (Selden Society, 1985) Supp Series vol 6, 11-12. St German's writings were published anonymously during his lifetime, and his *Little Treatise* was first only published in 1787.

26 (1615) 1 Ch Rep 1; 21 ER 485. See D Ibbetson, "*The Earl of Oxford's case*" in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 1.

27 See *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485, and see *Ramsay Health Care Australia Pty Ltd v Compton* (2017) 261 CLR 132; [2017] HCA 28 at [100] ("In *The Earl of Oxford's Case*, the Lord Chancellor's submission which prevailed included the statement that the Chancery jurisdiction could be exercised whenever a common law judgment was 'obtained by Oppression, Wrong and a hard Conscience'. The Chancellors were not precluded from exercising their 'corrective' jurisdiction in any particular case; the governing principle was one of 'conscience'").

28 Notably, s 25(11) of the *Judicature Act 1873* (UK) and the *Law Reform (Law and Equity) Act 1972* (NSW).

29 Nathaniel Cole's "Prescription for Educating a Barrister" of 14 August 1736 lists *Doctor and Student* published two centuries before as the third work for an aspiring student to read, after Hale and Fortescue, but before *Fleta* and Bracton and Coke; it is reproduced in D Lemmings, *Professors of the Law* (Oxford UP, 2000) 341-342. Baumer stated that *Doctor and Student* functioned as "the basic handbook for law students up to the time of Blackstone": F Baumer, "Christopher St German: The Political Philosophy of a Tudor Lawyer" 42 *American Hist Rev* 631 (1937).

30 As does Sir John Baker: J Baker, *The Oxford History of the Laws of England* (Oxford UP, 2003) vol VI 1483-1558, 502.

Richard: So this book, in which Esther and I are characters, is about the interaction in the legal system between common law, equity and statute?

Teacher: Yes. That interaction is the most interesting part. It's the main way in which questions of law are argued before courts, and decided by courts.

Esther: It might be more interesting than I expected.

Teacher: It's far too soon to say.