COMMON LAW RELIEF FROM PENALTIES:

WHEN DID IT ALL BEGIN?[1]

P G Turner[*]

1. Impositions are routinely made of contract parties who default. The judge-made common law imposes on such parties.

   (a) In a proper case, it imposes on them liability to be sued for an injunction to restrain further breach, and for specific performance.

   (b) It makes them liable to suffer a declaration that they have breached the contract, and are liable to pay another party damages for loss – and a declaration that the innocent party has terminated for default.

   Important as they are, I leave those impositions to one side for my purposes this evening.

2. Impositions are also routinely made of defaulting parties by the agreed terms of the contract itself. I shall focus solely on such impositions.

3. The agreed impositions made by the terms of contracts differ infinitely.

   (a) They can be modest: a liability to pay interest at a court rate, for example.

   They can be harsh: a very large sum may become payable, or a party might become liable to transfer some valuable company shares at a price well below their market value. Some impositions will differ in their harshness according to how events unfold. Following a party's default, an imposition can become penal *in effect* according to the seriousness of events

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[1] The following abbreviations are found in the notes below of archival sources:

BL: British Library.

C 6: National Archives, Public Records Office, Court of Chancery, Six Clerks' Office (Collins).

C 8: National Archives, Public Records Office, Court of Chancery, Six Clerks' Office (Mitford).

C 10: National Archives, Public Records Office, Court of Chancery, Six Clerks' Office (Whittington).

C 33: National Archives, Public Records Office, Court of Chancery, entry books of decrees and orders.

E 126: National Archives, Public Records Office, Exchequer, king's remembrancer, entry book of decrees.

KB 27: National Archives, Public Records Office, King's Bench plea rolls.

LI: Lincoln's Inn Library.

MT: Middle Temple Library.

References fuller than those provided in the notes below may be found in PG Turner, "*Lex Sequitur Equitatem:* Fusion and the Penalty Doctrine", in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (CUP 2019), ch 11,

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– such as a fall in market values, or a rise in interest rates. Or the events following default may prevent the imposition becoming harsh.

4. It is familiar law that some such impositions will be relieved by a court: those that are called "penalties".

5. Authorities decided in the last 17 years lay down some important principles as to the penalty doctrine that allows for such relief. I shall mention three.

6. The authorities lay down, first of all, that relief from a contractual penalty is grounded in "public policy", meaning the public policy of the court.

   (a) Lords Neuberger and Sumption said in *Cavendish Square Holdings v Makdessi*, decided by the UK Supreme Court, that the common law (unlike equity) "relieved the contract-breaker of the consequences [of default] not because the objective [of the agreed imposition for default] could be secured in another way but because the objective was contrary to public policy and should not therefore be given effect at all".[2]

   (b) And, in *Paciocco v Australia and New Zealand Banking Group Ltd* , decided by the High Court of Australia, Gageler J and Keane J in their respective concurring judgments took "public policy" to found the objection to a penalty clause.[3]

7. Secondly, the authorities of the last 17 years also lay down that "unconscionability" is a touchstone of intervention from contractual penalties.

   (a) In *Ringrow Pty Ltd v BP Australia Pty Ltd*,[4] a unanimous bench of the High Court of Australia said that "the propounded penalty must be 'extravagant and unconscionable in amount'" if a stipulation is to be relieved.[5]

   (b) In the *Cavendish* case,[6] Lord PSC Neuberger and Lord Sumption JSC said that where a stipulation is attached as a penalty, "the essential question [is] whether the clause impugned [is] 'unconscionable' or 'extravagant'".[7]

8. At the same time, these authorities lay down a third proposition: contracting parties must be afforded freedom to decide what contractual relations they shall have with one another, including relations that are to apply when one of them defaults.

9. These three principles are stated in similar terms in appellate decisions of the courts of Hong Kong, New Zealand and Singapore decided in this century, as well as in Australian

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[2] *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, [7]; see also Lord Hodge JSC at [243], [250].

[3] *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, [142], [155]-[156] (Gageler J), [253] (Keane J).

[4] [2005] HCA 71; (2005) 224 CLR 656.

[5] *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 [11], [21], [27], [32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ), following *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, 86-87 (Lord Dunedin) as interpreted by Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 193-94.

[6] [2016] UKSC 67; [2016] AC 1172.

[7] *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, [22]; also at [31].

and UK decisions. There is a respectable argument that these are basic principles of relief against penalties today.

10. That being the case, I wish to talk to you about something seemingly irrelevant. My question this evening is: When did relief from penalties at common law begin? Leeming JA recently apologized for raising the topic of *where* the doctrine begins – in law courts or equity courts – as "thoroughly arid":[8] in other words, it says little to a modern lawyer.

11. But I shall suggest that legal history on *when* relief from penalties at common law began is an eloquent commentator on the modern law.

12. Before taking you to the significant eras of English legal history for the topic, I shall say a little about the penal bond.

13. Then I shall approach the historical material in three steps.

14. First, by going to the later seventeenth century – the Restoration era – because this is when the modern doctrine is said to have been founded. For example, in *Andrews v ANZ*, the High Court of Australia said that the willingness of equity and law each to relieve had changed in the late seventeenth century as a result of developments in the common law action of assumpsit at the time.[9]

15. Second, I shall take you to the medieval period, to see how far back in time common law relief from penalties goes.

16. Thirdly, from the medieval period I shall move forwards in time to see what happened in the development of common law relief – and to see what has not happened.

17. Is relief from penalties, as we understand it, a *recent* invention? We shall have to see.

The penal bond

18. The penal bond comes up often in the cases on our doctrine.

19. At a conservative estimate, there are hundreds of reported cases in England on relief from penalties for the period from 1660 to 1875, when the Judicature Act system commenced.

20. Until sometime in the 19th century, the majority of cases concerning relief from penalties concerned penalties in bonds. Until then, the penal bond was the commonest form of writing used to embody contractual agreement.

21. The form of the bond, and its operation, therefore merit recalling.

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[8] M Leeming, "Penalty Clauses and Restraints of Trade – Storm-warnings, statutes and style", 7th Judicial Seminar on Commercial Litigation, 24 February 2022, p. 8 (to be published in the *Australian Bar Review*).

[9] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 525, [51]-[61].

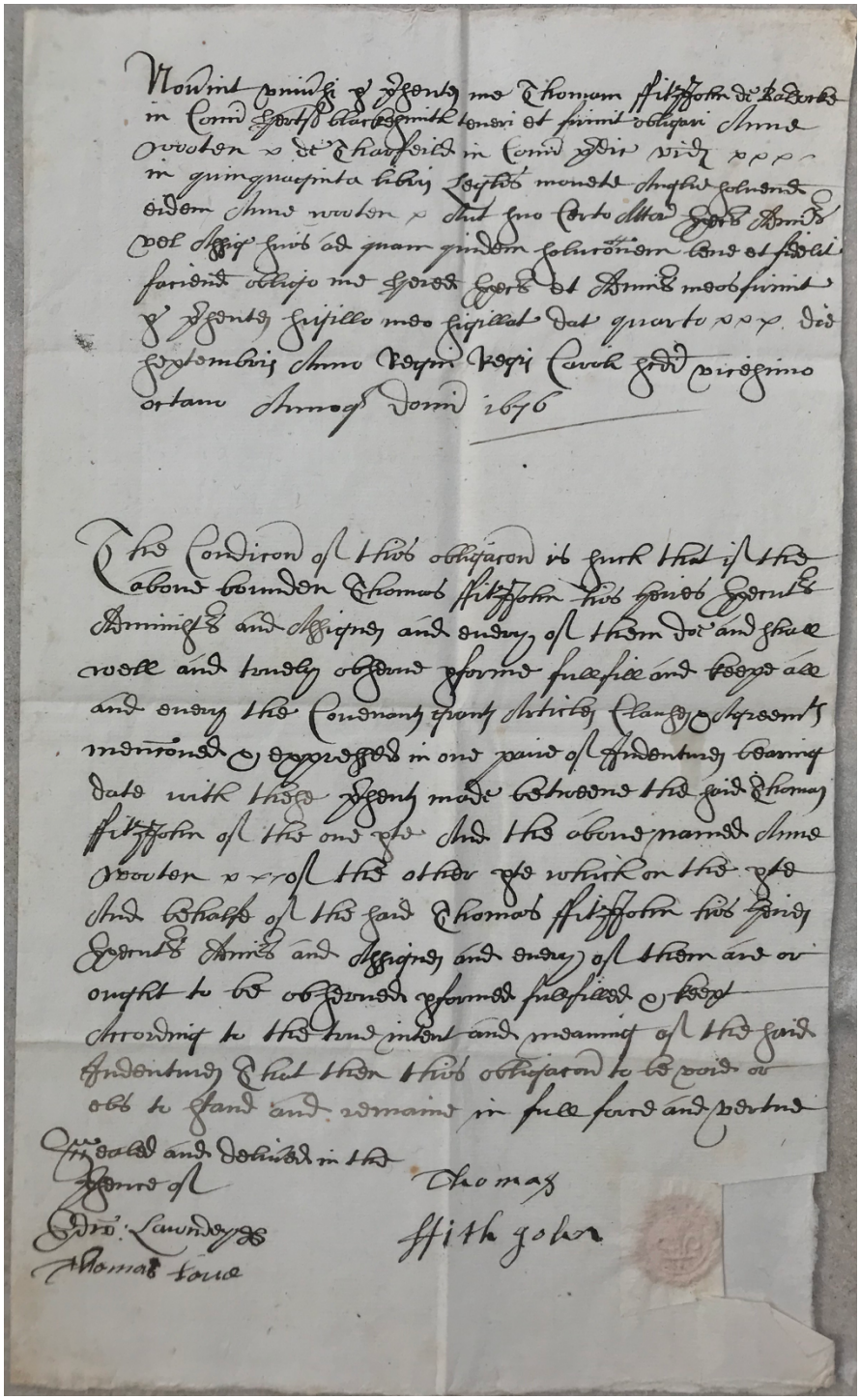

Fig. 1: penal bond executed 1676 (author's collection and image).

22. Figure 1 is an image of a typical penal bond executed in 1676. Penal bonds were described variously, according to their purpose. Bonds of this type were described as penal bonds conditioned for the performance of covenants or articles.

23. You will see, first, that the writing is in two parts. The upper part of the bond contains the 'penalty' or 'obligation': a sum which is expressed to be immediately payable in lawful currency of the realm. It is written in Latin.

24. The lower part, set nearer the left margin, contains the ‘condition’. This is written in English: it needed to be, since it was this part of the instrument which a person had to comprehend in order to know how to perform his or her bargain. In the condition, you may be able to decipher the words:

> The condition of this obligation is such that if the above bounden Thomas Fitzjohn his heirs, executors, administrators and assigns and every of them do and shall well and truly observe, perform, fulfil and keep all and every the covenants, grants, articles, charges and agreements mentioned and expressed in one pair of indentures bearing date with these presents,

that “then this obligation [is] to be void or else to stand and remain in full force and virtue”.

25. A second example, dating from 1719, bears the same structure and the same general features. This example has been stamped and bears a red wax seal.

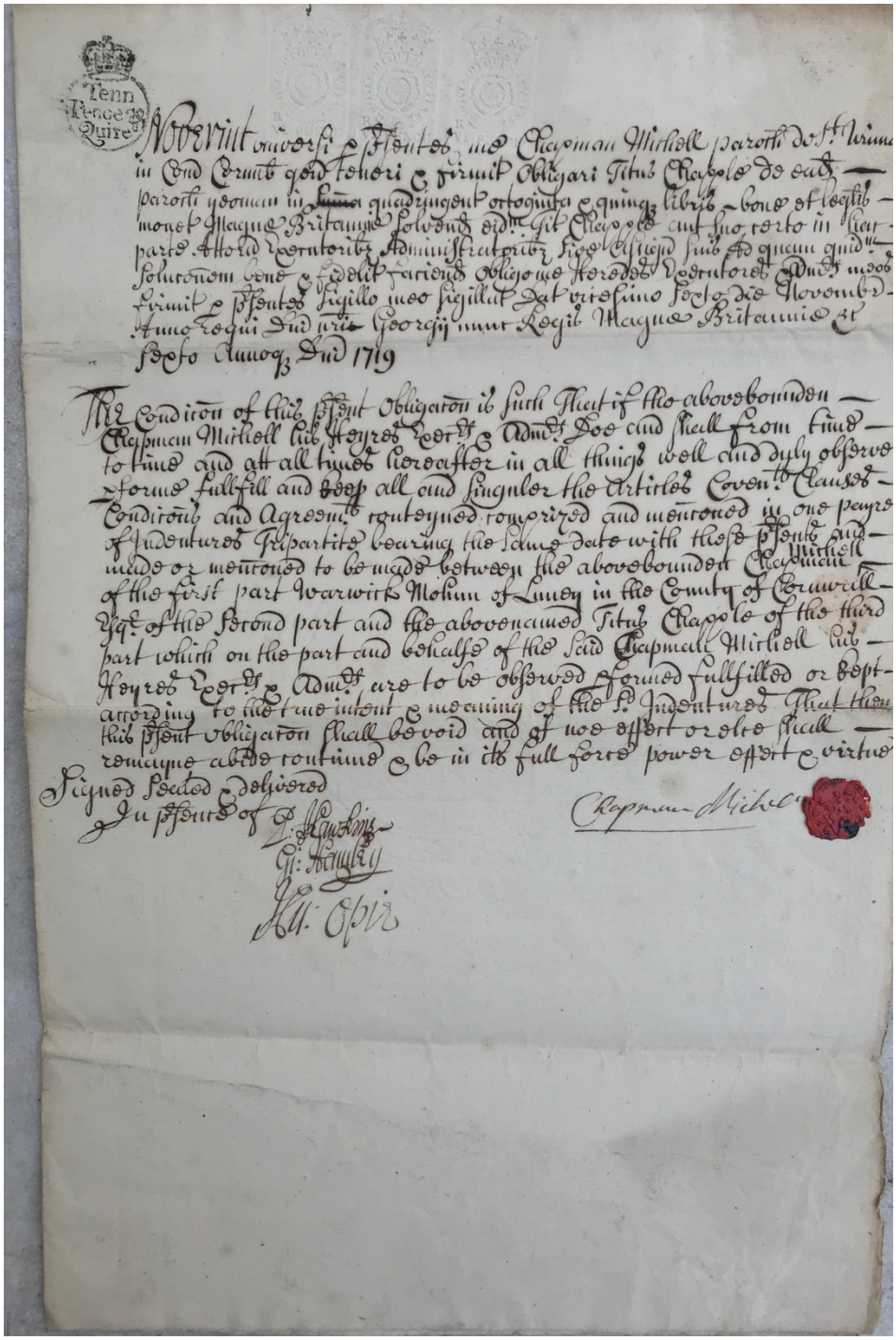

Fig. 2: Penal bond executed 1719 (author's collection and image).

26. A third example dates to 1777 and was printed by a stationer. It too is stamped.

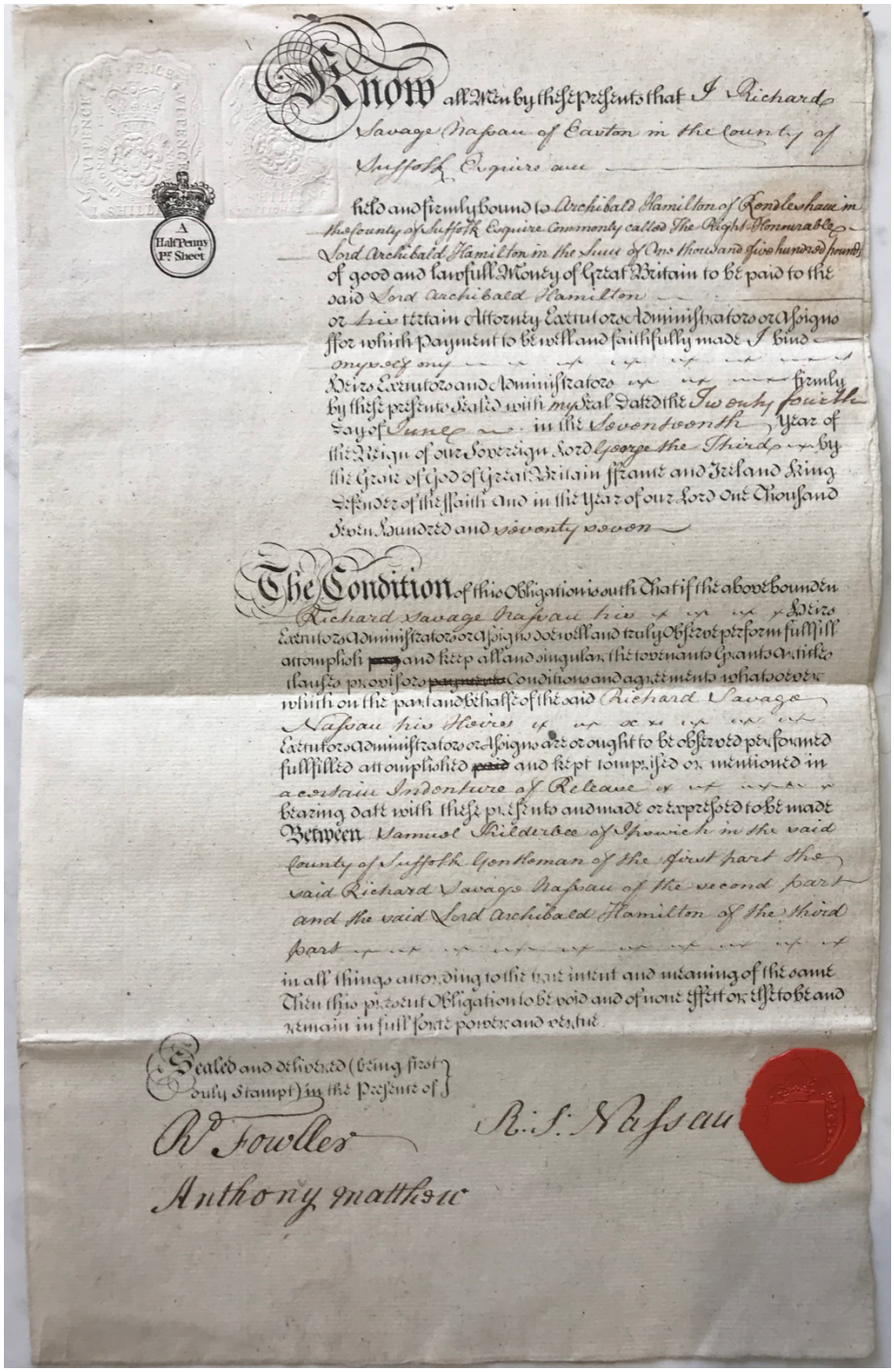

Fig. 3: Penal bond executed 1777 (author's collection and image).

27. From the span of years of these bonds – 1676 to 1777 – it will be apparent that the form of penal bonds was in many respects unchanged for a long period. But the form of these bonds was in fact remarkably steady for hundreds of years.

(a) The layout of the text reflects the operation of the bond: an operation which Simpson described as 'topsy turvy'.[10]

(b) Classically the penalty enforced in an action of debt. The upper part of the bond immediately makes the obligor – the person who grants the penalty – a debtor to the obligee in the sum of the penalty.

(c) The lower part of the bond contains the potential answer or plea which the debtor needs to successfully defend an action of debt for the penalty. If the obligor proves that the condition was fulfilled (e.g. by the obligor observing and performing the articles in a contemporaneous instrument), then the penalty shall be void and of none effect such that the action for debt fails.

28. The penalty was normally a sum in gross, a type of arbitrary sum.

(a) It was in gross, and arbitrary: its amount was independent of proof of loss the obligee in fact suffered.

(b) Indeed, its amount was independent of proof that the obligee suffered a loss at all.

29. The penalty's character is clearest in common money bonds. In the case of money bonds – that is, bonds in which the condition required the obligor to pay money – the penalty was typically in a sum double the amount of the sum the parties really intended the obligor to pay.

30. The strictness and potential harshness of penal bonds form the background to the whole of the English law of contract for the 500 or so years in which penal bonds were popularly in use as contractual instruments. The literal enforcement of the penalties in bonds was a notorious activity of the common law courts.

The Restoration

31. We are told by cases and writers of recent years that,[11] before the Restoration, relief from penalties was given only in courts of equity – principally, the Court of Chancery – and only in cases of extremity. A plaintiff in Chancery had to have suffered particular harshness before the court would grant relief from a penalty. When a plaintiff succeeded, the relief given by the Chancery was typically a stay of common law process and an inquiry into what loss a counterparty had suffered.

32. We also learn from these cases and writers that the basis of relief changed in the Restoration. Relief was put on a modern footing. No longer was proof of extremity required

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[10] AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 LQR 392, 411.

[11] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 189, 191, 195, 197, 201-03, 212; *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 525, [53], [55]-[63]; *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, [4]-[10], [15], [17], [32], [41], [42], [87]; *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525, [115], [122]-[126], [248]; PS Atiyah, *An Introduction to the Law of Contract*, 5th edn (Oxford: Clarendon, 1995), 298; J Getzler, 'Patterns of Fusion', in P Birks (ed), *The Classification of Obligations* (Oxford: Clarendon, 1997), 185; J Oldham, *The Mansfield Manuscripts* (London: University of North Carolina Press, 1992), 352 n 2; Parliament of New South Wales, *Report of the Law Reform Commission on the Application of Imperial Acts*, LRC 4 (Sydney: Government printer, 1967), 50-51.

to persuade the Chancellor to relieve from a penalty. A liberal doctrine of relief was adopted instead.

33. The influential account on this and most points on which I shall touch this evening was that of Professor Brian Simpson in an article on the penal bond published in the *Law Quarterly Review* in 1966. Simpson here followed the research of his friend David Yale,[12] who worked on Lord Nottingham's MSS. Simpson located the development early in the Restoration in which relief from the penalty of a bond was granted upon no more than the payment of compensation by the defaulting obligor.[13] Gone, it seems, was the need for extremity.

34. Such was the liberality of the period that, before long, the common law courts themselves adopted Chancery practice. Australian, English and Singaporean decisions all now maintain that the common law ingested Chancery principles and procedures somewhere between 1669 and the century's end.[14]

35. Separately, Parliament intervened. The Parliament made two enactments enabling common law courts to relieve from penalties.

    (a) An Act of 1697,[15] 'An Act for the Better Prevention of Frivolous and Vexatious Suits', empowered common law courts to stay an action of debt brought to enforce the penalty of a bond conditioned for the performance of covenants. The statutory procedure emulated the stays and enquiries that the Chancery employed in such matters.

    (b) Then, in 1705,[16] came Lord Somers' Act: a famous piece of law reform of its age. Regarding penalties, the Act provided (section 12) *inter alia* that payment of the sum truly due after the day it fell due was a plea in bar in an action of debt for the penalty of a bond. That, too, reflected what could be achieved with the relief available in Chancery.

36. The recent decisions take today's penalty doctrine to flow from there – with, of course, much elaboration in case law along the way.

37. Can one go back further, to find earlier origins of relief from penalties – particularly relief in common law courts?

38. Investigation has revealed three pieces of evidence of earlier practices of common law courts in relieving from penalties.

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[12] DEC Yale, 'Introduction', in DEC Yale (ed), *Lord Nottingham's Chancery Cases Volume II* (London: Selden Society, 1961) (79 SS), 15-16, 20.

[13] AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 LQR 392, 418.

[14] See reference in note 12 above. Also *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [77].

[15] 8 & 9 Wm III c. 11 s. 8.

[16] 4 & 5 Anne c. 3.

Medieval relief

39. The first predates the rise of the penal bond in popularity, around the time of the Black Death in 1349.

40. *Umfraville v Lonstede*[17] was a case in the Court of Common Pleas in 1308/09. Umfraville sued in debt to recover the penalty of a bond. The bond was conditioned for delivery of a written instrument by Lonstede to Umfraville at a day certain.

41. Lonstede tendered the writing at the wrong place, thus forfeiting the penalty. Later again he tendered the writing to Umfraville in court.

42. Umfraville's loss, there court noted, was trivial.

43. But the penalty had been forfeited nonetheless. Umfraville's counsel submitted that the court should enter judgment for the plaintiff creditor.

44. This prompted an outburst from Bereford J. He said it were well that the obligee receive the writing, and that 'this is not, properly speaking, a debt; it is a penalty; and with what equity (look you!) can you demand this penalty?'[18]

45. The result was that the court refused to enter judgment – precluding the court enforcement of the penalty.

46. Two things are apparent from this evidence:

    (a) one, the court resorted to a dispensary power located – not in, but outside, the common law;

    (b) two, this was a kind of substantive 'equity' which had nothing to do with courts of equity.

Tudor practice

47. The next evidence is connected to a case almost 300 years later.[19]

48. The context of this case is a rule about the effect of payment of a sum due under a bond, being an instrument under seal. Provided the bond carried its seal, the creditor could sue for sum payable on the bond. Unless a debtor who paid the sum due on a bond it delivered up and cancelled, the debtor could be sued again so long as it carried the seal.

49. In this anonymous case, a 'foolish fellow' had granted two simple bonds (not penal bonds) for the one debt without obtaining surrender of the first bond when he entered into the second bond.

50. The case was in the Common Pleas, one member of which at this time Walmsley J, whom historians know as a grumpy judge. Walmsley J said it lay outside the Common Pleas' authority to redress the man's folly.

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[17] (1309/9) YB 2 & 3 Edw. II; 19 SS 58 (CP).

[18] *Umfraville v Lonstede* (1308/9) 19 SS 58, 59.

[19] *Anon* (1596/7) BL MS Add 25199 f 2.

51. The case, as reported, does not present to our point. But an unpublished MS report of the case – held in the British Library – contains a reporter's note, which says (referring to the judges of the Common Pleas):

> Their course here is for the most part that if the defendant will at the first appearance confess the debt or the greater part and tender the rest with costs and forbearance according to 10 in the 100, the Justices will moderate the matter. But if he denies the debt, or does not come until after judgment or verdict, then they will rarely meddle with it, but let the law run.[20]

52. The evidence is intriguing. It provides a glimpse into unwritten judicial practice of a habit suited to relieving from penalties.

Restoration practice

53. A third piece of evidence dates from the Restoration itself.

54. *King v Atkyns*[21] was a case in King's Bench in 1670. I mention the case because of a reported comment of counsel in the case. This was another an action of debt for the penalty of a bond. Counsel commented to the bench that the action should be stayed and an issue directed *quantum damnificatus* – to ascertain the obligee's true loss. Simpson took this as evidence that the common law courts were – following equitable practice – relieving from penalties at the time.[22]

55. This evidence must, however, be discounted. It is apparent from reports of the case other than the report to which Simpson referred – printed reports but also MS reports – that the King's Bench rejected counsel's position. The court said that the obligor 'had best *consent* to go to issue upon *quantum damnificatus*, and save a chancery suit'.[23]

No generalised common law doctrine in early modern period

56. What appears from these three pieces of evidence when they are taken together?

57. First, each relates to a practice possessing a distinct source.

    (a) The practice in *Umfraville v Lonstede* came from outside the common law, in some substantive notion of 'equity' – specifically non-Chancery equity.

    (b) The Tudor practice reported together with the anonymous Tudor practice again locates its reason *outside* the common law. But, in contrast to the medieval example, its source

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[20] Ibid; translation of Charles Grey, 'The Boundaries of the Equitable Function' (1976) 20 AJLH 192, 214-15 n 61.

[21] (1670) KB 27/1906 m 1372; 1 Sid 442; MT MS 2C 366; also 2 Keb 529 pl 33, 597 pl 22, 609 pl 43, 642 pl 72, 739 pl 39, 746 pl 58; 1 Vent 35, 78; MT MS 2C 411.

[22] AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 LQR 392, 418-19, mentioning '*R v Atkyns*' [sic]. The plaintiff was Thomas King, surety for Thomas Atkyns on a penal bond granted to the excise officers to the use of the sovereign.

[23] MT MS 2C 366. The parties were already in Chancery: (T 1668) C 10/127/3; subsequent proceedings (M 1671-H 1672) C 8/219/21. No decree or order in the proceeding has been found.

is in the procedural practices of a common law court rather than a substantive notion of equity.

(c) The practice in *King v Atkyns*, truly understood, is no more than the practice of a court willing – as courts constantly do now – to make consent orders which might or might not represent the orders that the court would make if a matter be contentious.

58. Secondly, the items of evidence that I have so far discussed are evidence of *practice*, as distinct from doctrine. Of course, an isolated judicial practice can develop into a general judicial practice. And judicial practice can become doctrine and thus common law.

59. But that was not the result of these practices. Each practice of was different, was narrow, and arose spontaneously. The last of them – of making consent orders – shows nothing at all about laws as to relief from penalties as such. The Tudor practice related to debts as such, including penalties. Unlike the medieval practice, it did not concern penalties alone.

60. It can be accepted that these – and perhaps other – practices must have arisen from time to time. One must also accept that such practices could fall from use when their judicial makers died or the practice itself ceased to be needed or justified.

61. The transience of any such "equitable" practices of the Common Pleas, in particular, must be accepted also. Keyling CJ was chief justice of the King's Bench in the early the Restoration, from 1665-71, when the King's Bench, the Common Pleas and the Chancery all sat near one another at Westminster. He said in one case:

> 'You know the old character of the three courts in Westminster Hall, viz. Common Pleas is all law and no equity; the Chancery, all equity and no law; and this court both law and equity.'[24]

He knew nothing of such earlier "equitable" practices in the Common Pleas.

62. The practice which is claimed as the root of the modern common law doctrine is different again.

(a) In Australia, modern doctrine says that a penal stipulation is unenforceable to the extent it is penal.

(b) In England and in Singapore, modern doctrine says that a penalty is void.

Neither of those results – nor the explanations given for them – continues the earlier common law practices which I have been discussing so far.

No common law doctrine of relief at all in Restoration

63. I should like now to return to our starting point, in the Restoration, to enquire how a common law doctrine of relief became established then or thereafter.

64. Modern doctrine assigns the root of the modern *common law* doctrine of relief from penalties to the Restoration mainly because Simpson's study placed it there. To say that

[24] [*Vanbergh v Sterne*] (1669) MT MS 2C 301, 302.

the shape of the modern conception of common law relief from penalties is Simpson's conception is only a minor exaggeration.

65. Simpson had two pieces of evidence.

66. The first piece I have already discussed: that was the submission of counsel rejected by the court in *King v Atkyns*. To that evidence one must give no weight.

67. Simpson's second piece of evidence was a passage from a notebook made by Lord Nottingham (L.K. 1673-75; L.C. 1675-82), his *Prolegomena of Chancery and Equity*. I have already mentioned David Yale in connection with Simpson. Yale edited Nottingham's MS and saw it published with Cambridge University Press in 1965, the year before Simpson's famous paper was published in the *Law Quarterly Review*.

68. In the notebook, Nottingham referred to a practice which seems to have obtained in King's Bench. According to this, in an action of debt on a bond, the court would stay the proceeding if the defendant brought into court and tendered the sum truly due plus interest and costs.[25]

69. Simpson seized on this. Together with counsel's remark in *King v Atkyns*, Simpson considered this to prove that in the Restoration era, common law courts ingested the medicine of equity and began to relieve from penalties under new powers of their own.

70. But manuscript study, and fuller study of printed reports, now shows otherwise. The practice to which Nottingham referred was not based on a doctrine of relief from penalties as such. The development was much more important: it was the then novel practice of accepting payment into court.[26]

71. That practice seems to have existed in the Civil War period but to have died, like the old king. But, like the sovereign himself, it was restored after the Republican period. The practice was as general as was manageable in accordance with common law theory of the time

    (a) iit applied to all liquidated claims, being all debts, rents and so on;[27]

    (b) it could be employed to obtain relief from penalties;

    (c) but it was not as such *concerned with* penalties.

72. More telling is the positive evidence of there being no such common law doctrine at the time.

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[25] H Finch (Lord Nottingham), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'*, ed. by D.E.C. Yale (CUP, 1965), 203.

[26] See "*Lex Sequitur Equitatem:* Fusion and the Penalty Doctrine", in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (CUP 2019), 257-61.

[27] *Vanbergh v Sterne* Chancery (H 1667) C 6 179/52 (bill and answer), C 33/230 ff 333-34 (injunction); (M 1669) KB 27/1912/1 m 336; 2 Keb 553 pl 39; 2 Keb 555 pl 46 (*sub nom Stern v Vanburgh*); 1 Vent 41 (*sub nom Anon*); LI Mis 500, 55 (*sub nom Vanberge v Sterne*); BL MS Landsowne 1064, 170 (s.n.); MT MS 2c 301 (s.n.).

(a) There are any number of actions of debt to recover a penalty in common law courts after 1669.

(b) Indeed, the cases of debt for a penalty in a common law court are huge in number after 1700, too; and these include cases in which the plaintiff sued for the penalty and obtained judgment for it.

(c) There are cases in which the plaintiff also obtained execution, and in which relief had to be obtained afterwards in the Chancery.

73. To illustrate the point vividly, consider the practice in the Court of Exchequer. That court at the time was a court of both common law and equity. It operated law and equity 'sides'.

(a) In the equity side, equitable relief was granted on principles and under procedures largely the same as those employed in the Court of Chancery.

(b) The law side took the form of the Exchequer of Pleas, as was called. Much like the King's Bench and the Common Pleas, the Exchequer of Pleas heard common law actions at the assizes. Added to that were statutory powers of the court as the court of revenues, and inherent powers of the court as a revenue court – powers which flowed and ebbed through the centuries.

74. As Justice Leeming observes in his writings, in its makeup the Court of Exchequer thus formed a sort of model for the Supreme Court of New South Wales from 1824 until 1972[28] and is comprehensible to lawyers familiar with a court of concurrent legal and equitable jurisdiction in the pattern established by the English Judicature Acts of 1873-75.

75. The MS records of the Court of Exchequer in the late seventeenth century reveal a significant type of case. This was a case in which a debtor who was liable to be sued in debt for a penalty brought a bill in the equity side of the Exchequer to commence a proceeding. They might do this before they had been sued for the debt by the creditor, or after the creditor had brought an action.

76. Now, the Barons sitting in the Exchequer in equity lacked the power to determine common law rights. The Court of Chancery also lacked such a power until Sir John Rolt's Act was enacted in 1862.[29] But the Exchequer had common law jurisdiction elsewhere, in the Exchequer of Pleas.

77. What the Barons in equity would do was to direct that the obligor and obligee commence an action of debt for the penalty in the Pleas side of the court at the next assizes. At the same time, the Barons would reserve the equity of the matter.

78. Bound by those orders, the parties would then commence and pursue an action at law, where the plaintiff would procure a verdict, and perhaps also judgment. All that happened in the law side of the court.

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[28] M Leeming, "Fusion – Fission – Fusion: Pre-Judicature Equity Jurisdiction in New South Wales, 1824-1972", in JC Goldberg, HE Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (CUP 2019), 123-24.

[29] *Chancery Regulation Act 1862* (UK), 25 & 26 Vict. c. 42.

79. Then the debtor – the plaintiff in the Exchequer sitting in equity – could return to the Exchequer in Equity, where the equities would now be considered with the benefit of at least a verdict obtained at law.

80. According to how quickly the common law plaintiff in debt sued for the penalty in the law side of the court, the matter might arrive back in the equity side of the Exchequer at any of several stages. The matter might come back:

    (a) immediately after the jury's verdict;[30]

    (b) or after judgment;[31]

    (c) or, sometimes, once execution had been taken out of a judgment upon a verdict.[32]

81. Entries showing the use of this practice in the Exchequer are to be found in the court's manuscript records into the late 1690s (where my searches so far have ended).

82. Similar movements between the other common law courts and the Chancery are seen at the same time, and through the eighteenth century. To mention an example, one might take the case of *Martin v Hardy*.[33] The obligee of a bond sued for the penalty in an action of debt in the Court of King's Bench.

83. The trial took place at nisi prius before no less a personage than Lord Mansfield C.J. Lord Mansfield's knowledge of equity, and his proclivity to bring as much equity into the common law as possible, are well known – to some, such as Lord Kenyon, notorious.

84. The outcome of the trial? The obligee recovered a verdict and judgment for the penalty. The penalty was valid, enforceable and – to that point – enforced in a common law court.

85. It was only in the Chancery that the obligor could claim relief – and the better-known proceeding is a Chancery proceeding in which the obligor did just that: the case of *Hardy v Martin*, in Chancery in 1783.

86. The whole point of the procedural sequences in the Exchequer and Chancery courts was:

    (a) to ascertain the obligor's and obligee's common law rights, and

    (b) to separately ascertain an equity of the obligor.

87. Suppose, however, that the common law of the king's courts had known a doctrine that penalties are unenforceable or void.

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[30] *Stinton v Deynes* (E 1683) E 126/14 f 53r-d.

[31] *Snowe v Wayne* (E 1688) E 126/15 f 181r.

[32] *Blackthorne v Banister* (M 1684) E 126/14 f 221r-d; *Tobias v Barthrop* (T 1685) E 126/14 f 276r-d; *Buggin v Grace* (H 1690) E 126/15 f 305 r-d.

[33] (1781) 1 Mansf MSS 352 (an action brought in breach of the plaintiff's common injunction: see, in Chancery, *Hardy v Martin* (E 1783) C 33/457 f 412d, C 33/459 ff 478r-479d.

(a) It would not have been necessary for parties to shuttle back and forth between law and equity sides – or law courts and equity courts – to have the enforcement of the penalty finally adjudicated.

(b) Indeed, it is unthinkable that counsel and client would have suffered these processes had they been unnecessary. They would have become intolerable, and have been stopped, at the earliest opportunity.

88. The evidence is explained, however, by:

(a) the fact that penalties were valid and enforceable, subject only to equitable and statutory relief; and

(b) the fact that – leaving statute and equity aside – the common law courts possessed *no* doctrine of relief from penalties in the later seventeenth century, when common law relief from penalties is supposed to have begun.

Later starting dates?

89. If a common law doctrine against penalties had not taken root by 1700 or even by Lord Mansfield's day, did it take root later? Recent cases venture two possible later starting dates.

90. The first is 1801 or thereabouts. The leading case of *Astley v Weldon*[34] was decided by the Court of Common Pleas in that year. The Chief Justice of the court at the time was Lord Eldon – another common law judge who knew some equity.

91. Immediately one can see why this case might be taken as evidence of common law relief from penalties being entertained in 1801, and in that sense recognised as valid:

(a) the Common Pleas possessed no equitable jurisdiction of the kind possessed by the Court of Exchequer at the time, or by the Chancery; and

(b) no one involved in the case showed any doubt that the court had power to grant that relief if the circumstances required it;

(c) relief, indeed, was granted.

92. According to Lord Neuberger and Lord Sumption in the *Cavendish* case, *Astley v Weldon* marks a turning point in the common law doctrine of relief from penalties.

(a) Until 1801, they accept, courts of equity had been active in relieving from penalties.

(b) However, after 1801 the common law courts were solely responsible for the development of a common law doctrine of relief from penalties from the date of this case onwards.

93. A similar note was struck by the High Court of Australia in the *Andrews* case.[35] A unanimous court there said that a fusion of law and equity had taken place by 1829. In

[34] (1801) 2 Bos & P 346 (Lord Eldon CJ, Heath, Rooke and Chambre JJ).

[35] *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 205, [56].

that year, the King's Bench decided another leading case, *Kemble v Farren*.[36] Tindal CJ said that the law courts had "in modern times, endeavoured to relieve [from penalties], by directing juries to assess the real damages sustained by the breach of the agreement".[37]

94. On the other hand, there are the statements of Lord Bramwell – a man adored the economics of David Ricardo in the same measure as he disdained equity. Bramwell made a notable series of statements starting in 1859 and continuing until after the new Judicature Act system commenced in November 1875.

    (a) *Betts v Burch*[38] was a case in the Exchequer in 1859. Bramwell, then one of the Barons, said in the case that:

        (i) to his mind the judges in common law proceedings had proceeded to relieve from penalties without being clear as to the source of their power to grant relief; and

        (ii) that the true and only source of relief was statute: in particular, the procedural powers granted by the 1697 Act.

        (iii) More than that, Bramwell said that under those statutes the common law courts were empowered to apply equitable principles.

        (iv) Thus, there was no *common law doctrine* against penalties, in his view – the judge-made common law allowed for the strict enforcement of penalties in contracts;

        (v) there was only equitable relief, granted by courts of equity or by the common law courts exercising statutory powers which picked up equitable principles.[39]

95. He repeated this understanding in Exchequer in a case of 1872 – with the agreement of Channell and Pigott BB – and again after the Judicature Act system commenced in a case of 1876.

96. Bramwell's understanding is borne out by the evidence, and was accepted over decades.

    (a) Lord Halsbury and Lord FitzGerald accepted it in a leading House of Lords decision on appeal from Scotland, *Lord Elphinstone v Monkland Iron and Coal Co*;[40]

    (b) Bramwell's understanding forms the basis of the House of Lords' decision in *Watts, Watts & Co Ltd v Mitsui and Co Ltd*[41] in 1917 – around three years after the House of Lords decided the best-known case of all, the *Dunlop* decision.

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[36] (1829) 6 Bing 141.

[37] *Kemble v Farren* (1829) 6 Bing 141, 148.

[38] (1859) 4 H & N 506, 511.

[39] See also *Preston v Dania* (1872) LR 8 Ex 19, 20-21 (Bramwell B, with whom Channell and Pigott BB agreed); *Re Newman; Ex p. Capper* (1876) 4 Ch D 724, 733-34 (Bramwell JA).

[40] (1886) 11 App Cas 332, 346, 348.

[41] [1917] AC 227, 235 (Lord Finlay LC, with whom Lord Parker of Waddington concurred), 246 (Lord Sumner).

97. In Australia, a different theory was taken up by Mason and Wilson JJ in the *AMEV-UDC* case in the High Court of Australia in 1986. They considered that a common law doctrine nevertheless developed as a result of the Judicature Act system.

98. From what I have said, it is apparent that it did not, in England. Nor does the evidence of law and practice in Australia support their Honours' theory.

Our dogmas

99. How do the three principles that I mentioned at the outset – as principles basic to the penalty doctrine today – stand in view of the history of the beginnings of common law relief from penalties – a history of something which never really began?

100. The first of those is the supposed grounding of relief from penalties in public policy.

(a) The public policy grounding of relief from penalties today must be understood as a recent invention. Public policy only begins to be mentioned in English cases on and off from as late as the 1960s.

(b) How much assistance is derived from ground relief from penalties today on public policy is debatable. There are respectable arguments to be made on both sides.

(c) But on any view, there was no public policy at common law against penalties – until recently, at best. Penalties at law were both valid and enforceable – and were sued on and enforced, including to execution.

101. The second basic principle of the penalty doctrine today, which I mentioned at the outset, is unconscionability. The historical material that I have discussed does not address a criterion of unconscionability in express terms.

(a) It does not as such show, for instance, whether relief from a penalty in Australia today properly requires the party who claims relief to prove that the stipulation is unconscionable.

(b) But one can report that, if unconscionability is requisite of relief, then there are hundreds of reported cases on relief from penalties dating from the seventeenth century onwards in which the requirement has been neither satisfied, nor pleaded nor even mentioned. If proof of unconscionability is now a requisite of relief from a penalty, then that too is a recent invention.

102. On the third principle – that parties should be relatively free to agree impositions for default which each shall be entitled to of the other – the old law and the current law appear to be at one.

103. Perhaps this will surprise: in cases decided since the middle of the 1990s, judges have spoken as though they have found or recovered a lost policy of judicial restraint that allows contract parties to agree the impositions that a defaulting party should suffer, confident that those impositions will be enforced in a court.

104. The historical evidence on which I have touched this evening is far more dramatic. What it illustrates is no mere policy of judicial restraint.

(a) It illustrates the wholesale disinterest of the common law in parties' agreements to inflict and accept contractual penalties at the hands of one another.

(b) The common law simply did not care for the complaints of defaulting parties about penal impositions thrown on them with their agreement.

That is radically different to the notion, now prevailing in Australia, the UK and New Zealand, that a policy of judicial restraint will only be exercised upon proof of legitimate commercial interests.

105. Thank you.

18 May 2022 (corrections 23 May 2022)