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EMMANUEL COLLEGE V EVANS (1626) AND THE HISTORY OF MORTGAGES

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ABSTRACT. *For more than two and half centuries, the case of* Emmanuel College v Evans *(1626) has been understood as a leading case for the origin of the principal doctrine of mortgage law: the equity of redemption. A closer inspection shows that it has nothing to do with the equity of redemption. This article examines* Emmanuel College *to see what it was actually about and where this leaves the history of mortgages in equity. In so doing, the article demonstrates the status of* Emmanuel College *as a leading case to be invalid, and exposes a serious flaw in the methodology of much historiography on mortgages and of early-modern equity more generally. The article also shows how a leading case can obtain its position when it does not stand for its purported proposition. And it provides a nearly unique window into the nature of the Chancery court record and development of equity thanks to a serendipitous documentary survival.*

KEYWORDS: *Mortgages; equity of redemption; leading case; Court of Chancery; history; equity.*

I. INTRODUCTION

Blackstone considered rules relating to trusts and mortgages the "twin pillars of substantive equity".[1] The core of the second pillar is the principal doctrine of mortgage law: the equity of redemption. According to the equity of redemption, a mortgagor is the true owner

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[1] D.E.C. Yale, "Introduction: An Essay on Mortgages and Trusts and Allied Topics in Equity," in *Lord Nottingham's Chancery Cases*, vol. 2 (79 Selden Society 1961), 8 (citing W. Blackstone, *Commentaries on the Laws of England*, vol. III (London 1768), 436–37).

of mortgaged property irrespective of a mortgage's legal forms. The consequences of this doctrine are myriad. Despite many developments in mortgages and associated doctrines over the centuries, the equity of redemption remains the foundation of mortgage law.

The origins of the equity of redemption have for centuries been linked with *Emmanuel College v Evans*,[2] a case in the Court of Chancery in the mid-1620s. Different scholars have taken *Emmanuel College* to be the first case where late redemption of a mortgage was available as a matter of course, or even the first case evincing the fully fledged equity of redemption.[3] Regardless of the particular view of the case, essentially all agree that it is relevant to the origins of this doctrine. Unfortunately, this is not correct.

As this article shows, *Emmanuel College v Evans* has almost nothing to do with the equity of redemption. Mortgage redemption was not at issue in the case. Only through a decontextualised reference to one line in the case report did a link with the equity of redemption become established. The case was actually about the superiority of a certain type of equitable title over a certain type of legal title. This article therefore explores what *Emmanuel College* was really about and its association with the equity of redemption. In so doing it achieves three things. First, it exemplifies how a case can become a leading case on a point to which it has at best a tangential relation. Second, it exposes a methodological flaw in the historiography of early equity, and demonstrates that the history of *Emmanuel College* and the origins of the equity of redemption must be revised. Third, it sheds special light on the nature of early Chancery records, and the development of the court as a doctrinal institution, through an examination of a nearly unique archival survival: the notes of Lord Keeper Coventry who decreed the case.

II. Emmanuel College v Evans in the literature:

Though the final decree in *Emmanuel College v Evans* was made in 1626,[4] it was not until a report of the case was printed in a collection called *Reports in Chancery* in 1693 that it became known to the world.[5] This report is what the historiography has linked with the equity of redemption.

[2] (1626) 1 Chan. Rep. 18; 21 E.R. 494.

[3] While later law would distinguish the equity of redemption (the mortgagor's equitable estate in the land) and the equitable right to redeem (the mortgagor's right to redeem late), no such distinction could exist until the equity of redemption had formed fully into an estate. Thus no such distinction existed in the early seventeenth century. Indeed, the primary characteristic of what would become the equity of redemption was at first the right to redeem late. Cf. Burns, note 21 below, at 47.

[4] See note 85 below.

[5] 1 Chan. Rep. 18; 21 E.R. 494. A nearly indecipherable reference to *Emmanuel College* had previously appeared in *Tothill* in 1649; see note 28 below.

A. Lex Vadiorum

One might expect to find reference to a leading case on the equity of redemption in a 1706 treatise called *Lex Vadiorum*, *The Law of Mortgages*.[6] Although a quarter of *Lex Vadiorum* appears under the heading "Of the Equity of Redemption", it makes no mention of *Emmanuel College v Evans*. The author, Samuel Carter, was certainly familiar with *Reports in Chancery* where the report of *Emmanuel College* appears. He cited other cases from *Reports in Chancery* in *Lex Vadiorum* numerous times,[7] and two of his earlier treatises were published by the same bookseller who published *Reports in Chancery*.[8] But *Emmanuel College* never appears in any of the three editions of *Lex Vadiorum*.[9] It seems that this was because the link between the case and the equity of redemption had not yet been established.

B. Viner's Abridgment

The link between *Emmanuel College* and the equity of redemption appears to have begun in 1742 with Mr. Charles Viner's monumental *Abridgment of Law and Equity*.[10] Professor Sir John Baker has called this work "the greatest of all the abridgements", so significant that "it remains one of the first recourses for lawyers searching into pre-1800 law."[11] In twenty-three volumes Viner surveyed virtually the entire corpus of existing rules of law and equity appearing in print, providing references to cases organised into topical headings in alphabetical order with subheadings lettered A–Z. *Emmanuel College v Evans* appears in the volume including the letter "M", under the general heading "Mortgage". It appears under subheadings "C" and "R" thus:

> (C) Dispute between Mortgagor and Mortgagee:
>
> [several cases numbered 1–3 here]
>
> 4. Lease by way of Mortgage; if the *Money be paid tho' after the Day* 'tis void in Equity against a Purchasor, or a Charity. Chan. Rep. 18 I Car. I. Emanuel College v. Evans.[12]

[6] S. Carter, *Lex Vadiorum, the Law of Mortgages* (London 1706).
[7] Ibid., at pp. 4, 17, 18, 150, 169, 172, 173.
[8] The bookseller was John Walthoe. S. Carter, *Lex Custumaria, or, A Treatise of Copy-Hold Estates in Respect of the Lord, Copy-Holder* (London 1696); S. Carter, *Treatise Concerning Trespasses Vi et Armis* (London 1704).
[9] The second and third editions retained the same title and were published in London in 1728 and 1737 respectively.
[10] C. Viner, *General Abridgement of Law and Equity*, vol. 15, 1st ed. (London 1742); 2nd ed. (London 1793).
[11] J.H. Baker, *Introduction to English Legal History*, 4th ed. (London 2002), 186.
[12] Viner, note 10 above at p. 440 (emphasis original).

And:

> (R) Redemption. In what cases:
>
> 1. Money secured on a mortgage *Lease*, tho' *not paid at the day*, but *after*, yet the lease ought to be void in Equity, as well as on a legal Payment it would have been *void* in Law. Chan. R. 20 I Car. I. Emanuel College v. Evans.[13]

The references remained identical in the second edition in 1793.

The second reference probably accounts for the link between *Emmanuel College* and the equity of redemption. There, Viner lists the case first to explain "in what cases" "redemption" of a mortgage is available. The entry then says that late redemption is as effective in equity as timely redemption is in law, which is the essence of the equity of redemption: equity permits late redemption. Thus Viner associates the case both with the equity of redemption, and with the origin of the doctrine, by listing it first. The prominence of Viner's abridgment appears to explain how *Emmanuel College* subsequently became considered one of the leading cases for the equity of redemption; authors picked up the idea that they found there and repeated it.

C. More Early Treatment

After Viner, many authors, including some of the great treatise writers of the nineteenth century, continued to link *Emmanuel College* to the equity of redemption. For instance, in 1821, Coote's *Treatise on the Law of Mortgages*, called *Emmanuel College* the earliest case "in which the doctrine [of the equity of redemption] seems fully admitted".[14] And in 1878, in his *Treatise on the Law of Mortgages of Real Property*, the American writer Mr. Leonard Jones cited the case for the proposition that "the right of the mortgagor to redeem after forfeiture seems to have been a recognised right in the reign of Charles I."[15] Numerous other writers, such as Mr. George Spence in his influential *Equitable Jurisdiction of the Court of Chancery*, repeated similar ideas.[16]

In the early twentieth century, two United States Supreme Court Justices cited the case in like manner. In 1920, Mr. Harlan F. Stone cited *Emmanuel College* in an article in the Columbia Law Review written while he was dean of Columbia Law School to support the proposition: "It was only with the invention of the bill to redeem in 1625 that the relationship [between mortgagor, mortgagee, and

[13] Ibid., at p. 461 (emphasis original).
[14] R.H. Coote, *Treatise on the Law of Mortgage*, 1st ed. (London 1821), 20.
[15] L.A. Jones, *Treatise on the Law of Mortgages of Real Property*, vol. I (Boston 1878), 5.
[16] G. Spence, *Equitable Jurisdiction of the Court of Chancery*, vol. I (London 1846), 603; see also, W. Cruise, *Digest of the Laws of England Respecting Real Property*, vol. II (London 1804), 85.

property] became the subject of equitable cognizance."[17] Later, when Stone was an associate Justice of the Supreme Court, he joined an opinion by Chief Justice Charles Evans Hughes in which the latter cited *Emmanuel College* in a string citation explaining how the courts of equity had rendered the common law of mortgage forfeiture irrelevant through the equity of redemption.[18]

D. Richard Turner's The Equity of Redemption

Though little different from its predecessors, in 1931, Mr. Richard Turner wrote the modern view of *Emmanuel College v Evans*. His book, *The Equity of Redemption*,[19] explores history of the doctrine exclusively from printed reports, tracing it from its origins to its developed form.[20] No one else has examined the equity of redemption, particularly its origins, in the same level of detail. Turner's view has consequently been little scrutinised or challenged, and it continues to represent the received wisdom.[21]

Turner takes *Emmanuel College* to represent the key turning point in the history of the equity of redemption. In his view, before the case, if a mortgagor had failed to redeem on time, he or she might come to Chancery to seek relief from forfeiture of the land, but an explanation of circumstances sufficient to excuse the forfeiture was necessary to obtain relief. Supposedly in *Emmanuel College* and thereafter the circumstances of forfeiture were irrelevant and relief was available of course; litigants had a *right* to come to Chancery and obtain relief from forfeitures regardless of the reason.

Turner did not accept this view merely on the authority of earlier authors; he provided his own rationale for it. Turner put forward several arguments, two of which deserve mention here. First, he adduced evidence against the existence of the equity of redemption in 1624, the year prior to *Emmanuel College* (or so Turner incorrectly believed[22]). A bankruptcy statute passed in 1624 empowered bankruptcy commissioners to redeem bankrupts' mortgages "at a day to come" with "no mention being made of any redemption after the day".[23] Turner took the lack of reference to late redemption as evidence that the equity

[17] H.F. Stone, "The 'Equitable Mortgage' in New York" (1920) 20 Columbia L. Rev. 519, at 520.
[18] *Home Building & Loan Association v Blaisdell* (1934) 290 U.S. 398, 447 n. 18.
[19] R.W. Turner, *The Equity of Redemption* (Cambridge 1931).
[20] Ibid., at p. lxv.
[21] Recent courts and scholars continue to cite Turner, see e.g., *Cukurova Finance Int'l Ltd. v Alfa Telecom Turkey Ltd.* [2013] UKPC 20 at [18]; F. Burns, "Clogs on the Equity of Redemption", in J. Glister & P. Ridge (eds.), *Fault Lines in Equity* (Oxford 2012), 45 at pp. 47–48, 50–51, 56; A.R. Berman, "Once a Mortgage, Always a Mortgage – The Use (and Misuse of) Mezzanine Loans and Preferred Equity Investments, (2005) 11 Stanford Journal of Law Business & Finance 76, at p. 86–87; N. Bamforth, "Lord MacNaughten's Puzzle: The Mortgage of Real Property in English Law" (1996) 49 Current Legal Problems 207, 215–16; Yale, note 1 above at pp. 32–33.
[22] See note 85 below.
[23] Turner, note 19 above at p. 28 (citing 21 Jac. I, c. 19 s. 13 [Turner meant to cite s. 12]).

of redemption did not yet exist. But this argument assumes too much. It presupposes that the drafters of the statute would have known of the Chancery doctrine, would have chosen to empower bankruptcy commissioners to avail themselves of it, and would have made some reference to it in the statute's language. Without support for such assumptions, Turner's argument is at best weak.

Turner's second argument was that *Emmanuel College* "is the first [case that fails] to mention the circumstances [of mortgage forfeiture] as a reason for the relief in a report of considerable length, and from this time onwards no special circumstances seem to have been required."[24] In other words, *Emmanuel College* was a relatively long report, but contains no mention of the circumstances of forfeiture, thus it can be taken as a case in which late redemption was claimed as of right.[25]

But a serious methodological flaw renders this argument unsound. As mentioned above, Turner based his work solely on printed reports.[26] He thus assumed that the reports effectively represent the Chancery's activity at the time, rendering silence in the report as equivalent to silence in the court itself. Unfortunately, the reports of this period fail to represent the activity of the Court of Chancery sufficiently to support such an inference. The collection *Reports in Chancery*, in which *Emmanuel College* appeared, was published in 1693 and was only the fourth collection of Chancery reports ever to be printed.[27] *Reports in Chancery* was a slim volume including cases across a 40-year period; it therefore represented only a tiny sample of Chancery activity. Its three predecessors were no larger. And much of their content could not even fairly be called reports, consisting as they do of nothing more than a case name, a topic, and a reference to the court record.[28] The printed reports from this period thus fail to represent the activity of the court; and silence in the reports is therefore not equivalent to silence in the court. The insufficiency of printed reports has been noted previously in other work, particularly Dr. Neil Jones's work on trusts.[29]

[24] Ibid.

[25] Turner is more cautious than to claim that *Emmanuel College* acted as precedent to establish the new right; he claimed only that it is the first case where the equity of redemption seems to operate. And though his argument apparently establishes a precise date for the doctrine in 1625, the year he thought *Emmanuel College* came down, he backtracks from such precision, putting the date in a fifteen-year range from 1615 to 1630. Turner, note 19 above at pp. 30, 27.

[26] See note 20 above.

[27] The three prior collections of Chancery reports were: Tothill; 21 E.R. 105, first printed 1649, reprinted 1671; Cary; 21 E.R. 1, first printed 1650, reprinted 1665; Choyce Cases; 21 E.R. 66, first printed 1652.

[28] See, e.g., a 'report' of the decree by Lord Keeper Williams, eventually waived by the parties for rehearing, in *Emmanuel College v Evans* itself: Tothill 3; 21 E.R. 105, containing *in toto*: "Magister Coll Emanueli contra Ewens concerning an advowson which passed but by general words decreed in equity, in Hil. 21 Jac. li. A. fo. 572." On early Chancery reports generally see M. Macnair, "The Nature and Function of the Early Chancery Reports" in *Law Reporting in Britain* (London 1995).

[29] See, e.g., N.G. Jones, "Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham" (2010) 31 Journal of Legal History 273–298; N.G. Jones, "The Use Upon a Use in Equity Revisited" (2002) 33 Cambrian Law Review 67–80; N.G. Jones, "Tyrrel's Case (1557) and the Use

The conclusion which Turner draws from *Emmanuel College* is therefore invalid. Indeed, as will be seen, Turner misunderstood *Emmanuel College* and its significance much more seriously than even this demonstrates.

E. Post-Turner Treatment

In the eighty years since Turner wrote, the traditional understanding of *Emmanuel College* has remained undisturbed. Mr. David Yale is the only later scholar to have written in any depth about the history of mortgages and the equity of redemption.[30] But Mr. Yale was concerned with the period under Lord Nottingham (LK 1673–75, LC 1675–83), well after *Emmanuel College*, when the equity of redemption was fully established. He therefore did not have occasion to probe Turner's view of the origins of the doctrine.[31]

Several other important scholars have therefore reiterated Turner's view of *Emmanuel College*. Dr. Albert Kiralfy, in his edition of Professor Potter's *Historical Introduction to English Law*, cited the *Emmanuel College* as an example of the Chancery's recognition of the "*right* of the borrower to redeem the land on repayment of the loan after the day for repayment".[32] Professor Brian Simpson also put forward the received wisdom in his *History of the Land Law*, saying: "By the time of *Emmanuel College v Evans* (1625) the requirement of special hardship has been dropped, and the Chancery has come to give relief against forfeiture of the land as a matter of course."[33] Professor Sir John Baker cited the case to support the claim that "in the early seventeenth century it became an established doctrine that in equity the mortgagor was the true owner of the land."[34] In 2009, *The Oxford International Encyclopedia of Legal History* continued to discuss *Emmanuel College* under "Mortgage" as related to the turning point at which "the mortgagor did not aver hardship, but instead sought 'the usual clemency.'"[35] The case even found its way into a 2011 opinion of a United States District Court.[36] And in 2012, both a textbook on English land law and a collection of essays on equity cited the case for the standard propositions.[37]

Upon a Use" (1993) 13 Journal of Legal History 75–93; see also J. H. Baker, "The Use Upon a Use in Equity 1559–1625" (1977) 93 L.Q.R. 33.

[30] Yale, note 1 above.

[31] See ibid., at 32–33.

[32] A.K.R. Kiralfy, *Potter's Historical Introduction to English Law*, 4th ed. (London 1958), 621. (emphasis original).

[33] A.W.B. Simpson, *History of the Land Law*, 2nd ed. (Oxford 1986), 244.

[34] Baker, note 11 above at p. 313.

[35] C. McNall, "Mortgage; English Common Law" in *Oxford International Encyclopedia of Legal History*, vol. 4., ed. Stanley N. Katz (Oxford 2009), 189.

[36] *U.S. v. Porath*, (2011) 764 F. Supp. 2d 883, at 890 (E.D. Mich.).

[37] B. McFarlane, N. Hopkins, S. Nield, *Land Law: Texts, Cases, and Materials* (Oxford 2012), 1062 n. 42; Burns, note 21 above, at p. 48 n. 16.

III. Emmanuel College v Evans in actuality

Despite the widespread view of *Emmanuel College v Evans* as a leading case on the equity of redemption, it was no such thing. This section explains what *Emmanuel College* was actually about.

A. The Property

Emmanuel College v Evans centred on North Cadbury, Somerset. This rural area of Somerset is probably best known for the large hill near the adjacent village of South Cadbury called "Cadbury Castle", long reputed the site of Camelot, the court of King Arthur.[38] The most noteworthy aspects of North Cadbury today are the stunning manor house and the beautiful parish church of St Michael the Archangel. The church was built in the fifteenth century[39] and the manor house between 1586 and 1592 by Mr. (later Sir) Francis Hastings in the midst of the events leading to *Emmanuel College*.[40] Both the manor and the church were at the heart of *Emmanuel College*. Specifically at issue in the case was the advowson of North Cadbury, the right to nominate the rector of the parish church, which right began as appendant to the manor and required litigation to settle whether it had been severed to be held in gross.[41]

Today advowsons are generally disregarded as a form of property, but in the sixteenth and seventeenth century they could have significant value. Because the rector of a parish obtained rights to tithes (paid as a type of tax), plus the right to control property owned by the parish itself, the ability to nominate the rector was an important form of patronage. Furthermore, the rector's religious disposition had obvious ability to influence the local population in an era when the Reformation was on-going and religious matters were of universal concern. Advowsons also mattered particularly to the colleges of England's two universities as they represented certain paths to place their own members into good livings – a major concern in an era in which the colleges effectively remained seminaries.

[38] See L. Alcock, *Cadbury Castle, Somerset: The Early Medieval Archaeology* (Cardiff 1995), Preface, 5–6. Figures of relevance to *Emmanuel College* also knew the legend: in 1583, Francis Hastings reported to his brother, the third earl of Huntingdon, as part of a land survey that the site was reputed to be Camelot. C. Cross, ed., *The Letters of Sir Francis Hastings 1574–1609* (Frome: Somerset Record Society vol. LXIX, 1969), 29.

[39] Victoria County History, Somerset, draft of 'North Cadbury Religious History, http://www.victoriacountyhistory.ac.uk/sites/default/files/work-in-progress/north_cadbury_religious_history.pdf [accessed 2 December 2013] p. 9.

[40] Victoria County History, Somerset, draft of 'North Cadbury Manors and Estates', http://www.victoriacountyhistory.ac.uk/sites/default/files/work-in-progress/north_cadbury_manors_and_estates.pdf [accessed 2 December 2013] p. 5.

[41] C 3/342/8 document 4. See generally, "Advowzen" in John Cowell, *The Interpreter*, 2nd ed. (London 1637).

B. The Mortgage and Gift of the Advowson

North Cadbury formed part of the significant patrimony of the Hastings family, who were the earls of Huntingdon. Henry, third earl of Huntingdon (b. ca. 1536, d. 1595), was beset by financial difficulty throughout his life and constantly sought to raise money through various means.[42] One such means was a series of mortgages of North Cadbury, which he mortgaged at least six times.[43] The Earl successfully redeemed the first five mortgages, but the sixth was more complicated and would lead to much litigation.

The Earl made the sixth mortgage by deed dated 20 March 1583, granting the manors and appurtenances of North Cadbury, Kilmersdon, and Walton, all in Somerset, and the hundreds of Kilmersdon, Babington, and Wellow, also in Somerset, to a London merchant, Ambrose Smyth, for a term of 500 years.[44] The mortgage could be redeemed by the Earl indemnifying Smyth for acting as his surety, and by repaying a total of £300 to Smyth in annual instalments of £50. Upon redemption, the lease for 500 years would become automatically void. If the Earl failed to redeem, the 500-year lease would be permanently confirmed to Smyth. The last payment was due in May 1589.

While North Cadbury was still mortgaged, the Earl made a grant of the advowson to the newly founded Emmanuel College, Cambridge. By indenture bearing date 19 January 1586, the Earl granted four advowsons, including North Cadbury, to Sir Walter Mildmay and Francis Hastings to his own use for life, remainder to the College.[45] (Sir Walter was the founder of Emmanuel College and Mr. Hastings was the Earl's younger brother, co-donor to the College, and a type of viceroy for the Earl's financial interests.[46]) By the Statute of Uses 1536,[47] the use that the Earl granted to himself for life was executed, thus re-vesting a life estate in the advowson directly in himself and vesting a remainder in the College. Put straightforwardly, the Earl gave the advowson to the College after a life estate in himself.

Or at least that is what he intended to do. As will be seen below, the crux of *Emmanuel College* was that the Earl's gift failed at law. Because North Cadbury was mortgaged at the time of the gift, the Earl technically had no greater estate than a reversion after the 500-year lease.

[42] See, C. Cross, *The Puritan Earl* (London 1966), 108–11.
[43] Ibid., at pp. 324–27.
[44] HAD 2777.
[45] ECA Box 8.A3, A4. The other advowsons were Aller, Somerset; Loughborough, Leicestershire; and Puddletown, Dorset.
[46] L.L. Ford, "Mildmay, Sir Walter (1520/21–1589)", *Oxford Dictionary of National Biography* (Oxford 2004); online edn, Jan 2008 [http://www.oxforddnb.com/view/article/18696, accessed 2 December 2013]; Cross, note 42 above at pp. 41, 106–08.
[47] 27 Hen. VIII c. 10.

He thus had no capacity at law to give the advowson to the College before the year 2083. Had the mortgage been successfully redeemed according to the ordinary course, thus avoiding the 500-year lease, his gift would have been ratified post hoc. But as will also be seen below, that is not what occurred.

C. The Disposition of the Manor and Initial Litigation

1. The Case of Earl of Huntingdon v Freke

Three months after making his gift to Emmanuel College, i.e. on 20 April 1586, the Earl sold all his interest in North Cadbury to his brother Francis Hastings.[48] North Cadbury was still mortgaged at the time. As long as the mortgage were properly redeemed, the 500-year lease would become void, Hastings would wind up with the fee simple of North Cadbury and the Earl's life estate in the advowson, plus the College would have its remainder in the advowson. But the redemption did not proceed smoothly, and it took Chancery litigation to settle the matter. The case of the redemption of North Cadbury was a Chancery case called *Earl of Huntingdon v Freke* that came to a decree in 1591.[49]

The reason for the suit was a technical forfeiture of the mortgage. How the forfeiture came about was a complicated story, but the essence is this.[50] In the midst of the Earl's financial dealings with the mortgagee, Ambrose Smyth and his family,[51] he gave them some money with instructions about what to do with it. But they kept it instead. The Earl decided to consider the money payment in lieu of the final three annual payments of £50 still due on the mortgage. But the total that they had kept was only £139 13s 4d: £10 6s 8d short of the £150 total due. The earl offered to pay the difference, but the Smyths refused to accept; furthermore they refused to agree that the £139 13s 4d counted towards the mortgage payments. As the common law maintained what was essentially a perfect-tender rule for performance of such conditions,[52] the entire mortgage was therefore forfeit at law.

[48] SRO A\CFO/1; HAD 2778; CP 25/2/206/28 Eliz I Trin/5; Cross note 42 above at p. 314.
[49] C 78/72/19; C 33/81 f. 439v; C 33/82 f. 446v; see also C 33/81 f. 161v; C 24/218 box 1/7.
[50] The following is based on C 78/72/19.
[51] The original mortgagee, Ambrose Smyth, died before redemption. His son and executor, Francis, inherited the mortgage. The Earl carried on the same financial relationship with Francis that he had with Ambrose. But Francis died shortly after his father, and the combined Smyth estate went to Francis's widow Elizabeth. She soon married Mr. (later Sir) Thomas Freke, and he controlled the estate by the time that it came to litigation in *Earl of Huntingdon v Freke*, which accounts for the name of the lead defendant in the case. See C 24/218 box 1/7.
[52] A.W.B. Simpson, "The Penal Bond with Conditional Defeasance" (1966) 82 L.Q.R. 392, at 404; E.G. Henderson, "Relief from Bonds in the English Chancery: Mid-Sixteenth Century," (1974) 18 American Journal of Legal History 298, at 300-01; A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford 1975), 93.

The Earl and Francis Hastings sued in Chancery to redeem, stressing that the Earl had effectively pre-paid the mortgage payments when the Smyths kept his money, and stressing that the Earl had offered to pay the outstanding £10 6s 8d.[53] In other words, they requested forfeiture relief on the theory that the breach of the condition of redemption was de minimis. The court issued a decree in their favour, permitting late redemption.[54] Though the court's reasoning in the decree is not fully clear, the specifics of what was ordered mirrored the Earl's requests perfectly. That fact plus the overall tenor of the decree indicate that the de minimis nature of the breach drove the outcome. Nothing in the case suggests that late redemption was available as of right.

2. The Trust of the Manor of North Cadbury

Although redemption of the mortgage normally would have resulted in avoidance of the 500-year lease and unified title to North Cadbury in fee simple absolute in Francis Hastings, that did not occur in this case. Hastings intentionally arranged for a different title structure. He kept the lease for 500 years in being by having it conveyed to a trustee to his use; the trustee was Mathewe Ewens, Baron of the Exchequer, and former Hastings family lawyer.[55] At law, Hastings therefore personally held only the reversion of North Cadbury after the 500-year lease, while his trustee held the present estate of the 500-year lease for his benefit.

Keeping a redeemed-mortgage lease, a "satisfied term", in trust became a common way of holding title in the early-modern period because of its effect in defending the title from encumbrances.[56] The basic logic of using such a structure was something like this. In an era before land registration, verifying whether title was clear was always a problem. If land were held in trust, it disabled the owner from encumbering the title at law – only the trustees who technically held the legal title could legally encumber it. A buyer could thus take title from the trustees in confidence that the seller had been legally incapable of encumbering the title during the trust. Because a mortgaged lease was effectively held in trust during the mortgage, it was the oldest-available encumbrance-free title. Keeping the redeemed-mortgage lease "on foot" (as contemporary parlance had it) and held in trust would therefore establish the best encumbrance-free title available. This is what Hastings did with North Cadbury.

[53] *Earl of Huntingdon v Freke*, C 78/72/19, membrane 39, line 102-membrane 40, line 15.
[54] Ibid., at membrane 41, lines 30–68.
[55] C 78/113/24 lines 22–28.
[56] For further discussion see Yale, note 1 above at pp. *150–60*.

3. *The Case of* Haskett v Hastings

Conventional though Hastings's trust arrangement for North Cadbury was, it led to litigation both in *Emmanuel College v Evans* and a case called *Haskett v Hastings*. Both cases involved similar issues. The fundamental problem was the split in beneficial and legal ownership of North Cadbury.

In *Haskett* the split came to the fore when Hastings sold and leased several parcels of North Cadbury.[57] Because he held only the reversion at law, Hastings personally could grant only estates out of this reversion, i.e. possessory estates beginning in the year 2083. His trustee, Baron Ewens, had to grant estates out of 500-year lease to begin before that. But Hastings made deeds of his grants personally. His error caused no problems initially; the purchasers took possession and were unmolested. This was because the only person with standing to challenge their possession was Baron Ewens, who as Hastings's good friend and trustee would never have done such a thing. But then two things changed. First, Hastings sold North Cadbury to Baron Ewens.[58] Again, this was not a problem because Ewens understood the legitimacy of Hastings's grants. Second, and more problematically, Baron Ewens died within two years, leaving North Cadbury to his widow Frances for life, then to his eldest brother Alexander, according to his will.[59]

Frances and Alexander Ewens, who were not close to Hastings, sought to maximise their interest in North Cadbury by invalidating his grants.[60] They had standing to try because when Baron Ewens had bought North Cadbury he had continued the same holding structure as Hastings, simply changing the trustees of the 500-year lease.[61] Baron Ewens also preserved the trust in his will. Thus the 500-year lease out of which the estates should have been granted had continued to exist and had now come to Frances and Alexander Ewens as beneficiaries of the trust according to which it was held. They correctly believed that at law Hastings never had power to grant estates personally out of the 500-year lease; their trustees thus retained legal title to his grants.

Hastings's purchasers fought back in Chancery in 1600, suing a variety of people and arguing that as the beneficial owner of North Cadbury, Hastings had had power in equity to grant their estates.[62] Most of the defendants, including Hastings himself, entirely agreed

[57] C 78/113/24 lines 44–52.
[58] Ibid., at lines 31–32; Cross, note 42 above at p. 43.
[59] PROB 11/91 f. 246; C 142/257/62 lines 16–17. Later difficulty about Baron Ewens's devise of North Cadbury would lead to litigation in Court of Wards that required resolution by both chief justices with the chief baron. *Ewens's Case* (1611) Ley 34, 80 E.R. 610.
[60] C 78/113/24 lines 39–42.
[61] Ibid., at lines 33–36.
[62] C 78/113/24; C 33/97 f. 324v, C 33/98 f. 350; C 33/99 f. 244, C 33/100 f. 206; C 33/99 f. 381v, C 33/100 f. 358v.

with their position.[63] Frances Ewens argued that she was ignorant of the trust, and thinking that Hastings had no capacity to make the grants, she consequently believed that she was entitled to the estates as part of her jointure.[64] Alexander Ewens vaguely "denie[d] that he gave out that he would avoid the said plaintiffs' estate[,] but that he promised they should be well dealt with."[65] This was as much opposition as the purchasers faced. The Chancery decreed in the purchasers' favour, acknowledging that Hastings had equitable title to North Cadbury when he made the conveyances; thus they were good in equity if not at law. The court therefore ordered the Ewenses and their trustees to make grants of legal title to the purchasers to confirm their estates in law.

D. Emmanuel College v Evans*: the litigation*

After *Haskett v Hastings*, North Cadbury remained in the hands of the Ewens family, passing at the death of Alexander Ewens in 1620 to his son and heir, Mathewe Ewens (nephew and namesake of Baron Ewens). All the while, title remained held in a trust of the same 500-year lease by which the Earl of Huntingdon had mortgaged North Cadbury to Ambrose Smyth in 1583, and which he had sued to redeem in *Earl of Huntingdon v Freke*.

As for the advowson, on the eve of litigation in 1622, Emmanuel College, as far as it was concerned, had held it for close to 30 years. It believed that its interest had vested in possession when the Earl had died in 1595, terminating the life estate he had reserved.[66] But the College's title to the advowson had never been tested because it had never had opportunity to make use of its putative rights as patron. Ever since 1593, when Francis Hastings, as owner of the Earl's life estate, had presented Robert Sibthorpe MA to North Cadbury, there had been no vacancies in the parish.[67]

1. The dispute

In July 1622, Robert Sibthorpe died.[68] Upon this vacancy, the College looked to exercise its right of presentation for the first time by presenting one of its fellows, Daniel Cockerell BD.[69] But Mathewe Ewens, the current beneficial owner of North Cadbury, had other ideas. He believed that the advowson was still appendant to the manor, giving

[63] C 78/113/24 lines 44–52.
[64] Ibid., at lines 83–87.
[65] Ibid., at lines 82–83.
[66] C 3/342/8 document 4, lines 14–15.
[67] See ibid., at lines 12–13.
[68] Ibid., at line 17; C 3/342/8 document 3, lines 38–39, 69; C 3/398/14, line 31; C 33/143 f. 806.
[69] C 3/342/8, lines 72–73, 109; C 3/342/8 document 4, lines 18–19.

him right of presentation. So at the same time that the College presented Mr. Cockerell, Mathewe Ewens made a rival presentation of John Seward MA.[70] The competing presentations caused the Bishop of Bath and Wells to forebear instituting either presentee.[71]

The College's response to this impasse was to sue in Chancery, initiating the case of *Emmanuel College v Evans*. The name of the defendant is widely known as "Evans" rather than "Ewens" because the editor of the report of the case in *Reports in Chancery* misrendered the name. In the Chancery record, the defendant's name always appears as Ewens. Other defendants were the trustees of the 500-year lease, namely Sir Robert Phillips and Sir George Horsey, and their candidate for North Cadbury, John Seward.[72]

The defendants initiated their own suit to try title at common law to the advowson under the writ of *quare impedit* in the Court of Common Pleas.[73] The trustees of the 500-year lease brought the action arguing that legal title to the advowson was in the lease that they held. As commonly occurred when actions at law and in Chancery conflicted, the Chancery stayed the *quare impedit*, and it had little significance thereafter.[74]

The dispute in *Emmanuel College v Evans* essentially came down to this. The defendants argued that they had legal title to the advowson as parcel of the unexpired 500-year lease held in trust for Mathewe Ewens. They argued that the College had only a reversionary interest in the advowson after the expiration of the lease (in the year 2083) because the reversion was "in truth all the estate which his Lordship then had power to grant or convey to the said College"[75] when he made his gift. The College maintained that the Earl had intended to give them the remainder of the advowson immediately after a life estate in himself, and legal technicalities should not be permitted to stand in the way of his charitable intent.[76] It was, in many ways, a classic law versus equity dispute: the defendants argued a fairly straightforward legal position about title and power to grant estates; the College argued for substance over form, appealing to intuitive right of who really ought to get the advowson.

[70] C 3/342/8 document 4, lines 20–21; C 33/143 f. 806.
[71] C 33/143 f. 806.
[72] C 3/342/8 document 4.
[73] C 33/143 f. 806; see "Quare Impedit" in Cowell, above note 41.
[74] C 33/144 f. 1374. The *quare impedit* nevertheless technically continued. In the final decree of *Emmanuel College*, the defendants were ordered to confess the action on behalf of the College to strengthen the College's title. When they came to do so, a question arose in the Common Pleas as to whether the case had been properly continued, the action having been filed nearly four years previously. A report survives of that question. *Phillips v Emanuel College* (1627) Littleton 3-4, 124 E.R. 107-08.
[75] C 3/398/14, line 86, cf. line 81; cf. C 33/342/8 document 3, lines 87–90.
[76] C 3/342/8 document 4.

The litigation of the case was long and slow. One decree was given just over a year after the bill was exhibited, in February 1624, by John Williams, Bishop of Lincoln and Lord Keeper at the time.[77] In it he recognised the right of the College to the advowson, but ordered a peculiar compromise, or "middle course" as he called it,[78] by which Mathewe Ewens would present to North Cadbury at this vacancy only and then convey all his interest to the College. But the point of allowing Ewens this single presentation was so that he could present his son who was not yet old enough to be presented.[79] To deal with this, the decree provided that the College's aforementioned presentee, Daniel Cockerell, could act as a type of curate until Ewens's son came of age. But Cockerell left for another parish before Ewens's son came of age, forcing Williams to revise his decree.[80] The revised decree worsened the College's position, effectively granting the advowson to Ewens for three years with ability to present his son for a further four.[81]

The College was unsurprisingly dissatisfied with this outcome, but surprisingly, so was Mathewe Ewens. When Bishop Williams was replaced as Lord Keeper in 1625, both sides therefore waived his decree.[82] That Ewens would do so is all the more surprising in light of the identity of Williams's replacement as Lord Keeper: Sir Thomas Coventry, who had been the College's own counsel in the case.[83] Though Coventry initially displayed reluctance to re-hear the matter,[84] he eventually issued the decree normally associated with *Emmanuel College v Evans*.

2. The decree

Three and a half years after the bill was exhibited, on 19 May 1626, Coventry issued the final decree in *Emmanuel College v Evans*.[85] The decree survives in four sources. One is the widely known report of the case found in *Reports in Chancery* first published in 1693.[86] It is not a report in the classic sense of being notes of a court observer, but is

[77] C 33/145 f. 527v; C 33/146 f. 685. This decree is mentioned briefly in Tothill, note 28 above.
[78] C 33/143 f. 806; C 33/144 f. 847.
[79] C 33/147 f. 1047; C 33/148 f. 1086v is only a cross reference.
[80] Ibid.
[81] Ibid.
[82] See C 33/149 f. 980; C 33/150 f. 801; see also note 84 below.
[83] Coventry is named as the College's counsel as "Mr. Attorney General" at a hearing of 17 June 1625, C 33/146 f. 1047.
[84] On 24 November 1625, Coventry "ordered that Counsel on both sides shall be heard touching the premises sometime the next term"; C 33/149 f. 97; C 33/150 f. 121v. The following 21 February 1626, the defendants joined in the College's request for a rehearing, but Coventry refused to set a date for it unless he had both side's request in writing; C 33/149 f. 501v; C 33/150 f. 594. Even when he finally issued a new decree, Coventry remained reluctant. See note 115 below.
[85] C 33/149 f. 980; C 33/150 f. 801.
[86] (1626) 1 Chan. Rep. 18; 21 E.R. 494.

rather a lightly redacted version of the next source.[87] That next source is the official record of the Court of Chancery in the entry books of decrees and orders, otherwise known as the Register.[88] The Register was the court's own record of its daily action in particular cases, in a sense like the common-law plea rolls, but significantly more informative. Another source is an exemplification of a full decree of the sort normally found in the Chancery decree rolls, but kept by Emmanuel College and apparently never enrolled.[89] The last source is a most unusual one: notes, seemingly handwritten by Lord Keeper Coventry himself, of his opinion in the case.[90] Each of these sources (with the exception of Emmanuel College's unenrolled decree, which has no unique content) is next considered both to show what *Emmanuel College v Evans* really stands for, and for insight thereby provided into the nature of Chancery sources.

3. Coventry's notes

Coventry's notes are a logically structured opinion of *Emmanuel College*, setting out why the College was entitled to the advowson. They are the clearest expression of the case and they show what doctrinal significance of *Emmanuel College* really has.

The notes begin with a two-point prima-facie case for why the College had the better equity. They then consider a series of "objections" (explicitly so termed), and provide answers as to why the objections fail to rebut the prima-facie case.

The first prong of the College's prima-facie case was "the stance of the lease for 500 years".[91] Coventry noted that it was merely a mortgage, which he considered an expedient in a financial transaction rather than a real estate that ought to carry the advowson. The second prong was the Earl's intent regarding the advowson. Coventry wrote: "I think [the Earl] did not so much think of the Lease[,] nor that the Advowson was out of himself"[92] when he made his gift, because, as Coventry gently put it, the Earl was "as noble as could be But not

[87] Turner misunderstood this when he wrote *The Equity of Redemption*. Yale, note 1 above at p. 32 n. 6.
[88] C 33/149 f. 980; C 33/150 f. 801.
[89] ECA Box 8.C2.
[90] CUL MS Dd.3.87.14. I am grateful to Professor David Ibbetson for calling this manuscript to my attention. It has been suggested that "[t]he manuscript may perhaps be Williams's autograph": J.H. Baker, *Catalogue of English Legal Manuscripts in Cambridge University Library* (Woodbridge 1996), 25. Internal evidence nevertheless shows that it must be Coventry's, not Williams's; see note 115 below. Numerous corrections throughout the manuscript tend to suggest that it is not a copy as a copy presumably would be cleaner. The possibility cannot be eliminated, however, that the notes are not from Coventry's own pen. Someone who heard Coventry's decree delivered orally, and who wrote in the first person as though he or she were Coventry could be the author. Irrespective of who exactly wrote them, the notes appear contemporary with the decree and contain Coventry's reasoning.
[91] CUL MS Dd.3.87.14 at p. 1 lines 28-p. 2 line 1. The word "stance" is uncertain.
[92] Ibid., at p. 2 lines 14–15.

greatly provident in his estate".[93] Furthermore, Coventry noted that it would have been "absurd for the Earl to have reserved an estate to himself for life if he had taken knowledge that the Advowson for 500 years had been gone from him by force of the lease".[94] Coventry therefore concluded: "it is without question that the intention of the Earl was the College should have the Advowson after his life & not expect till after 500 years".[95]

The defendants' first objection to the prima-facie case, which Coventry described as "shrewd",[96] was a doctrinal argument about the relationship of law and equity:

> Here is a lease out that is good in Law; and this lease shall not be avoided by one that comes not in as a purchaser for valuable consideration. And the College is no purchaser nor comes in upon valuable considerations etc. And so shall not be relieved against this lease which is a good lease in law.[97]

In other words, a legal estate is not avoided in equity except by a purchaser for valuable consideration; since the College claimed title by a gift rather than a purchase, the defendants' legal estate should prevail.

But Coventry felt that equitable title was not so limited and wrote: "I shall never doubt but to relieve a charitable work against a Deed of this nature being but a mortgage".[98] Coventry stressed both the worthiness of the College's "estate of Charity & Devotion"[99] and the weakness of the redeemed mortgage. He explained that redemption renders a mortgage lease impotent in equity, even though redemption might be late. Redemption of the mortgage in this case meant that "thereby the lease although good in law yet is it void in equity".[100] Thus the College's equitable claim was sufficient to overcome the defendants' type of legal title.

Coventry's reference to mortgage redemption immediately above was the only reference to mortgage redemption in the opinion. All that it said was: where a mortgage had been redeemed late – but had in fact been redeemed – such redemption was as effective in equity as timely redemption was in law. It said absolutely nothing about when late redemption was available. It therefore cannot be taken as an instance of redemption of course or the equity of redemption. This is all the more

[93] Ibid., at lines 3–5.
[94] Ibid., at lines 17–20.
[95] Ibid., at lines 24- p. 3 line 1.
[96] Ibid., at p. 3 line 2.
[97] Ibid., at lines 2–9.
[98] Ibid., at lines 22–25.
[99] Ibid., at p. 3 lines 19–20.
[100] Ibid., at p. 4 lines 17–18.

true because the court had specifically ordered late redemption of this mortgage – not as a matter of course – in *Earl of Huntingdon v Freke*.

The defendants' second objection to the College's *prima-facie* case was an attempt to establish better equitable title than the College: "So here being a lease in law & upon good & valuable consideration your equity will not hold against a purchaser[.] For where a purchaser hath Law & a valuable consideration I will set such a purchaser before a Charitable use only & without consideration."[101] That is to say a purchaser for valuable consideration who also has legal title has a superior equity to a charitable act. Though not stated in this quote (but evident in the rest of the opinion), an additional element of the defendants' claim was that the purchaser lacked notice of problems with the title. With the additional element, what the defendants were really arguing was (to use a helpful but anachronistic concept) that "equity's darling" – a purchaser for valuable consideration without notice – who also has legal title, has better equity than those claiming under a charitable act.

Coventry seems to have accepted the defendants' doctrinal position that equity's darling defeats a charitable act. Especially given that the defendants were doctrinally correct according to later development of equity,[102] it therefore appears that the superiority of equity's darling was established even now. The only question for Coventry was whether the defendants in fact qualified as equity's darling.

The defendants' claim to be equity's darling depended on their status as successors in interest to Francis Hastings and Baron Ewens. The question was thus whether one or both of these men had been equity's darling. In other words, did either man purchase North Cadbury for valuable consideration thinking that he was also getting the advowson in fee simple. Because both men unquestionably gave valuable consideration, the question came down to whether either man thought that he was buying the advowson in fee simple.

Coventry wrote that whether Hastings was equity's darling "hath most troubled my thoughts",[103] and he consequently spent a long time considering the relevant facts. Coventry noted that the indenture of bargain and sale of North Cadbury lacked reference to the advowson, but the fine (another method of effecting the conveyance) for the same transaction included it.[104] Coventry nevertheless reasoned away the disparity and found no reason to believe that Hastings thought that

[101] Ibid., at lines 25-p. 5 line 3.
[102] See, *e.g.*, J.J. Powell, *Treatise on the Law of Mortgages*, vol. I, 3rd ed. (London 1791), 381; Yale, note 1 above at pp. *160–63*.
[103] CUL MS Dd.3.87.14 at p. 5 lines 4–6.
[104] SRO A\CFO/1; CP 25/2/206/28 Eliz I Trin/5.

he was buying more than the Earl's life estate in the advowson on this evidence.

Coventry also considered that Hastings had sealed a deed reflecting that the advowson remained appendant to North Cadbury after the Earl's death. But Hastings sealed this deed only in his capacity as trustee of the 500-year lease for the Ewens family from 1600 to 1608. Coventry therefore wrote: "That doth not much move me because persons trusted many Times seal Deeds & never read them. And I have sometimes Done so myself where I am but trusted".[105]

The defendants also used evidence that Hastings had schemed to replace Robert Sibthorpe as rector of North Cadbury after the Earl's death to argue that Hastings believed that he continued to hold the advowson. How else, they reasoned, could Hastings get his preferred candidate, one "Crane",[106] into the rectory unless he had bought an estate in the advowson that continued after the Earl's death? But Coventry thought that Hastings might have hoped to get the College to nominate Crane. He wrote it would have been "a small matter to the College to give that favour to Sir Francis seeing [that the vacancy] came not by Act in law or death of the Incumbent But by Sir Francis's endeavour to have the other resign".[107]

Coventry also rejected direct testimony about Hastings's state of mind. In Coventry's view, the witness who testified that Hastings had believed that he had bought the fee simple of the advowson could not support his testimony "concerning the intent of another man which no man knoweth but God".[108] Better evidence on the question came from the College which presented "3 witnesses that Sir Francis in the life of the Earl expressly Declared that he was to have the Advowson for the life of the Earl, which stands with the Fine & Indenture, and that after the Earl's Death the Advowson was to go to the College."[109] Coventry therefore concluded: "all which makes not Sir Francis a Clear purchaser And if Sir Francis be no Clear purchaser then the equity [of the College] remains good against [the defendants]."[110]

The next question was whether Baron Ewens was equity's darling. This was simpler and Coventry dealt with it more quickly. After noting the worthy and learned character of Baron Ewens,[111] Coventry expressed scepticism that such a legally learned man would leave out all

[105] CUL MS Dd.3.87.14 at p. 6 lines 5–8.
[106] Presumably this was Thomas Crane MA who became rector of South Cadbury in 1587. SRO D\D\Vc/73, D\D/breg/17, D\D/breg/31; CUL MS Dd.3.87.14 at p. 5 lines 7–16.
[107] CUL MS Dd.3.87.14 at p. 6 lines 9–22.
[108] Ibid., at lines 24–32.
[109] Ibid., at p. 5 lines 27-p. 6 line 1.
[110] Ibid., at p. 7 lines 1–4.
[111] Ibid., at lines 5–9.

reference to the advowson in his purchase documents if he thought that he were getting it.[112] Coventry also noted that "no act nor word proved that Baron Ewens had an eye to this Advowson."[113] And as "the Baron was so much privy to the Earl's estate that if it had been meant that he should have the Advowson some word or Act of his would have been produced or some mention made of it in the Deed."[114]

Coventry therefore finally concluded that he had "no reason to move me to think that Sir Francis or Ewens are Clear purchasers of the lease, & therefore cannot take away the equity which upon the beginning of the Case was settled in the College."[115] Thus the defendants were not able to object successfully to the College's prima-facie case for the advowson; the defendants' legal title in the redeemed mortgage was inadequate to defeat the College's equitable claim based on the Earl's charitable intent, and the defendants' attempts to claim superior equity failed on the facts.

At no point was late redemption of a mortgage at issue in *Emmanuel College*. Coventry noted that the mortgage related to this case had been redeemed late, but he did so only to explain that late redemption was effective in equity just as timely redemption was effective in law. This said nothing about the availability of late redemption. Indeed, as has already been explained, it took an entirely different case, *Earl of Huntingdon v Freke* to obtain the late redemption mentioned here. And in *Freke* late redemption was granted on the rationale that the breach of the condition had been *de minimis*. Thus neither *Emmanuel College v Evans* nor *Earl of Huntingdon v Freke* stand for a right to late redemption or the origin of the equity of redemption.

4. The record

In the vast majority of Chancery cases from this period, the record is the only surviving source. Coventry's notes in *Emmanuel College v Evans* are a nearly unique survival of the actual reasoning of the head of the Court of Chancery from the period.[116] As such, the comparison

[112] Ibid., at lines 9–14.
[113] Ibid., at lines 18–19.
[114] Ibid., at lines 19–25.
[115] Ibid., at p. 8 lines 1–6. Though this entailed absolute victory for the College, in something of a *non sequitur*, Coventry immediately continued:

> Therefore I should have been glad my motion might have taken effect that all parties would have submitted to the Decree of my predecessor & I could have wished it still but since you have on both sides waived the Decree: For the right of the Case I have delivered my Opinion.

Ibid., at lines 6–10. Absolute victory for the College obviously differed from Williams's "middle course". One wonders if Coventry felt awkward decreeing the same position he had argued for his former client.
[116] One other opinion of Coventry's appears to have survived, equally mysteriously, from a case called *Lownes Case*. CUL MS Mm.6.69.17. The *Lownes Case* manuscript is in two different hands, the second of which is almost certainly the distinctive hand of one of the Registrars' clerks who frequently wrote in the Register A-books at the time. That, plus the fact that the manuscript has

between the notes and the record provides a special window in which to glimpse behind the record at its fundamental nature.

The record[117] is not the same as Coventry's notes. It certainly derives from Coventry's notes as indicated by a similarity of content too significant to be coincidence, but the record expresses some points differently, while both omitting and adding others. Overall the record is a poor imitation of Coventry's notes. While most of Coventry's ideas find their way into the record, they do so in a comparatively jumbled fashion. The logic and organisation are not nearly so clear. And the clarity of the structure of the prima-facie case and objections from Coventry's opinion disappears altogether. Though particularly with the benefit of Coventry's notes one can see how the record coheres, it does not independently present such a well-reasoned doctrinal consideration.

Inexplicably, not everything in Coventry's opinion is in the record. The biggest gap is Coventry's discussion of Hastings's scheme to replace Sibthorpe as rector of North Cadbury with Crane. While Coventry spent not inconsiderable space on the matter, no trace appears in the record. It is unclear why this is so.

Conversely, there is content in the record that is not in Coventry's notes, which ranges from the expected to the inexplicable. The prefatory language discussing the circumstances of the hearing predictably appears only in the record. And the specific set of orders of what the defendants had to do because the College won is not too surprisingly omitted from Coventry's notes.[118] But two other matters turn up uniquely in the record although one might expect to find them in Coventry's notes.

First, there is an entirely independent theory of the defendants' entitlement to the advowson. The defendants apparently argued that by presenting Sibthorpe to North Cadbury in 1593, Hastings had "usurped" title to the advowson, which had thereafter come down to Mathewe Ewens personally. This theory was rejected because "Sibthorpe was presented in the life time of the said Earl by the said Sir Francis according to the intents of his purchase", i.e. Hastings owned the Earl's life estate in the advowson when he presented Sibthorpe. Hence "the same was no usurpation". Coventry never mentions the usurpation theory. One can only speculate as to why he

almost no corrections, suggests it may be a copy. In what may be no more than a remarkable coincidence, *Lownes Case*, sub. nom. *Herbert contra Lowns*, is the very next case in *Reports in Chancery* after *Emmanuel College v Evans*. See 1 Chan. Rep. 22, 21 E.R. 495.

[117] C 33/149 f. 980; C 33/150 f. 801.

[118] The defendants were ordered to convey all their right in the advowson to the College and to make a presentation of the College's preferred candidate, which Sir Robert Rich, one of the Chancery masters, was to supervise.

does not: perhaps because it had been rejected at an earlier hearing in the case even before he became Lord Keeper.[119]

Second, where Coventry discussed the late redemption of the mortgage of North Cadbury in general terms, the record refers explicitly to *Earl of Huntingdon v Freke*. Both Coventry and the record ultimately make the same point – that the mortgage of North Cadbury had been successfully redeemed – though they do it in different ways. Coventry uses the classical style of legal learning, discussing doctrinal points unrelated to actual authorities. The record is more direct in that it discusses the specific case that had decided the point at issue. In that sense, this was the single point on which the record was more focussed than Coventry.

On a broader level, the disparity between the record and Coventry's opinion makes an important point about the nature of the Chancery record in the period: the record may fail to reflect fully the formalist doctrinal sophistication of the court. Whereas Coventry's notes clearly display a legal style of argumentation, consideration, and determination of the case, the record reflects something much less ordered. Coventry's reasoned progression through issues and arguments becomes a desultory series of points yielding an apparently sensible, but perhaps slightly haphazard, outcome in favour of the College. Quite how and why that result is reached becomes slightly masked in the record. Because enough residue of Coventry's logic remains in the record, some underlying doctrine can be reconstructed, but only to an extent, and it takes some work. The skill of the Registrars, or perhaps simply stylistic convention, thus may mask a doctrinal and logical sophistication of the court in the period when the record is our best guide to its activity.

5. The report

The report of *Emmanuel College v Evans*[120] in *Reports in Chancery* is mostly a verbatim extract from the record but with a few important redactions. Some redactions are insignificant deletions, but others show something about the development of the court in the nearly 70 years between the making of the decree and the publishing of the report. And one very important deletion helps explain how *Emmanuel College* could come to be misconstrued as related to the origins of the equity of redemption.

Aside from a minor error and a few paraphrases, the redactions were essentially four deletions. First, all references to Ambrose Smyth,

[119] See C 33/144 f. 1374; the A-book copy, which should be at C 33/143 f. 1251, is missing along with all folios 1248-66.
[120] 1 Chan. Rep. 18-21; 21 E.R. 494–95.

the mortgagee of North Cadbury, and the details of the Earl's dealings with him were deleted. This is mostly an excision of irrelevant detail as the reader of the report would be expected to know nothing else about the case; thus the identity of Ambrose Smyth and the details of the Earl's financial dealings with him had no context or significance. The report never refers to the identity of the mortgagee, but remains quite intelligible without such information.

Second, references to several other factual matters were also removed. Two were findings of fact related to Francis Hasting's status as equity's darling. In both instances, the report simply skips from the words in the record immediately preceding the finding to those following, and in both cases the report remains intelligible.[121] The logical conclusion is that the editor of *Reports in Chancery* was interested particularly in doctrinal content, and considered these factual matters to be irrelevant.

Third, a reference to "conscience" in the record's final conclusion was specifically excised. Where the record says "the plaintiffs have good right *in equity and conscience* to the said Advowson",[122] the report says "the plaintiffs have good right *in Equity* to the said Advowson".[123] That the editor would bother to delete the word "conscience" suggests some specific intent to de-emphasise "conscience" in favour of "equity". Presumably this reflects an increasing doctrinality and emphasis upon formalised "Equity" in the nearly 70 years between the drafting of the record in 1626 and the report in 1693. Indeed, the simple fact that reports were being printed at the latter time suggests the same thing. This tends to confirm the view that the Court of Chancery was at this time moving from being a court of "conscience" to one of "equity" as it became more doctrinal and methodologically similar to the law courts.[124]

[121] 1 Chan. Rep. 18 at 19; 21 E.R. 494 at 495. A blackline of the changes from the record to the report shows the specific changes:

> of purpose to convey the advowson to the said Sir Francis Hastings During the life of the Earl only ~~And it stands proved by the depositions of several witnesses that the said Sir Francis Hastings often affirmed that after the death of the said Earl the said College ought to have and present to the said advowson~~ And this Court conceived that the said Advowson being Leased not by special name…

1 Chan. Rep. 18 at 21; 21 E.R. 494 at 495:

> would not upon his second purchase have left the said Advowson out of the ~~conveyance~~ deed and fine if he had ~~conceived himself to be a clear purchaser of~~ thought he had purchased the said advowson~~,~~. ~~neither was there any convenient proof on the defendant Ewens's behalf that his said uncle or the said Sir Francis Hastings did particularly bargain for the said Advowson nor had any eye upon the advowson at the time of their purchase,~~ So as this Court is of opinion…

[122] 1 Chan. Rep. 18 at 21; 21 E.R. 494 at 495 (emphasis added).
[123] C 33/149 f. 980; C 33/150 f. 801 (emphasis added).
[124] See Baker, note 11 above at pp. 106–07.

And finally, the reference to *Earl of Huntingdon v Freke* in the record was removed in the report with accidentally very significant consequences. Where the record refers to *Freke*, the report simply skips from the line preceding the reference to the one after it.[125] By omitting reference to *Freke*, and failing to include anything else to refer to the de-minimis-breach rationale of that case, the editor of the report created two misleading impressions: first, that the issue of the forfeiture of the mortgage of North Cadbury was actually determined in *Emmanuel College v Evans*; second, that there was no rationale adduced to justify relief from forfeiture. The report was left saying only this about late redemption: "and this Court conceived the said Lease being but a Security, and that Money paid, and though the Money not paid at the Day, but afterwards, the said Lease ought to be void in Equity, as well as on a legal Payment, it had been void in Law".[126] It was this line, in almost exactly these words, that Viner abstracted when he cited *Emmanuel College* as explaining "in what cases" mortgage redemption was available.

Emmanuel College v Evans arguably became a leading case only because the editor of the report chose to delete reference to *Freke*. The record makes clear that the late-redemption issue was determined in *Freke*, a separate case fully 35 years before *Emmanuel College*. There is no reason to cite *Emmanuel College* about late redemption when that issue was settled elsewhere. Only because the record's reference to late redemption was de-contextualised to remove mention of *Freke* could *Emmanuel College* therefore appear to be the first instance of an equity of redemption.

The question nevertheless arises whether *Earl of Huntingdon v Freke* should accede to the significance that *Emmanuel College v Evans* once had. *Freke*, after all, determined the mortgage-redemption issue thought to have been decided in *Emmanuel College*. The answer is nevertheless "no" for two reasons. First, as has already been explained,

[125] 1 Chan. Rep. 18 at 19; 21 E.R. 494 at 495. A blackline of the changes from the record to the report shows the specific changes:

> for that it had been absurd in the said grant to reserve unto himself an estate for life after 500 years~~. And it further appeared unto this court that a question growing in this Court after the purchase of the said Sir Francis between the said Earl and the executors of the said Ambrose Smith touching the said Lease of 500 years, And the matter coming to hearing in this court in the 33rd year of the late Queen Elizebeth It appeared that all the money which the said Smith had paid for the said Earl had been repaid to the said Smith, save only the said sum of 10li 6s 8d, which was decreed to be paid by the said Earl to the said Smith's executors and the Lease to be delivered up to the said Earl, or to be assigned to the said Earl or to such as he should appoint at the Earls charges as by the said decree now read appeareth and there upon~~ that the said lease was assigned by the said Earl to ~~the said~~ Mathewe ~~Ewens~~ Ewans the defendant' uncle, ~~who was afterwards one of the Barons of the Exchequer~~ in trust for the said Sir Francis Hastings.

[126] 1 Chan. Rep. 18, 20; 21 E.R. 495.

Freke stands only for the availability of relief in cases of de minimis breach of the condition of redemption. It therefore does not stand for the availability of forfeiture relief of right, or for a developed equity of redemption as *Emmanuel College* has been thought to do. Second, and perhaps more importantly, even if it did stand for relief as of right, this would not mean that it should be considered a leading case. As discussed above, the method that identified the *Emmanuel College* as significant is faulty. It either blindly follows a citation in Viner, or, as with Turner, relies too heavily on printed reports in analysing early-modern equity. Thus any transfer of significance first identified by those methods is similarly tainted. Any case so identified can be taken as no more than an isolated point in a broader, uncharted sea of Chancery activity. While such a case could be significant, it equally could not be; the method simply is not competent to assess its significance. *Freke* is therefore not "the new *Emmanuel College v Evans*".

IV. Conclusion

For over 250 years, *Emmanuel College v Evans* has been misunderstood. Ever since Charles Viner first cited it in 1742, it has been taken as a leading case on origins of the equity of redemption. According to Richard Turner, "the leading historian of the equity of redemption",[127] it is as close as it is possible to get to observing the origin of the doctrine; he thought it was the first case where the borrower could redeem late as a matter of course without explaining the forfeiture. But *Emmanuel College* has almost nothing to do with mortgage redemption, which was not at issue in the case; title to an advowson was. The redemption of the relevant mortgage had been adjudicated in an entirely different case, *Earl of Huntingdon v Freke*, 35 years earlier. It is only because the editor of the report of *Emmanuel College* happened to delete reference to *Freke* that *Emmanuel College* became associated with mortgage redemption. The historiography of *Emmanuel College v Evans* and its role in the development of the equity of redemption has therefore been mistaken.

Observing the error about *Emmanuel College* shows something both of what a leading case sometimes is, and of how it can obtain its position. If a case is thought to encapsulate a principle, it can become shorthand for it; the actual content of the case and the significance that it had in its original context falls away and the principle takes on a life of its own as a "precedent". That happened to *Emmanuel College*. A feature enabling that process was resort to "proof texting", citing a

[127] D. Sugarman & R. Warrington, "Land Law, Citizenship, and the Invention of 'Englishness': The Strange World of the Equity of Redemption," in John Brewer and Susan Staves (eds.), *Early Modern Conceptions of Property* (London 1996), 114.

single line a-contextually for a particular principle. (Anyone who has either taught undergraduate law students, or practised a form of law involving briefs, can attest to ubiquity of the phenomenon.) Here the proof text was the one line in the report about late mortgage redemption. That line was twice de-contextualised, first by removal of the reference to *Earl of Huntingdon v Freke* by the reporter, and then by Viner taking only that line for his digest. The authors who subsequently enshrined *Emmanuel College v Evans* in the historiography focused on this line, and a self-perpetuating legend was born.

What *Emmanuel College v Evans* actually stands for doctrinally is the weakness of a redeemed-mortgage lease, or "satisfied term", as a type of title in equity, especially compared with title derived from a charitable act. The respective claims to the advowson of North Cadbury came down to this: the defendants had legal title by a redeemed-mortgage lease, and the College had equitable title from the charitable act of the prior beneficial owner. The court found that legal title in the lease was inferior to equitable title based on the charitable act. Mortgage redemption was only tangentially relevant.

That *Emmanuel College v Evans* has been misinterpreted stems also from a methodological problem: over-reliance upon printed reports. The four small collections of Chancery cases in print by 1693 are an insufficient basis for understanding everything that the Chancery did up to that point. They are thus inadequate to ground the conclusions that have rested upon them. *Emmanuel College* represents this phenomenon in microcosm. From the name of the case – which should be *Emmanuel College v Ewens*, not Evans – to the fact that it did not decide a point of mortgage redemption, the record shows a different reality than the report. In the same way, the reports are far too incomplete and selective in what they portray to represent accurately the state of substantive equity in the period. Only by resort to the record, where the full activity of the court is represented, can the early history of equity be told. Just as with trusts, a broader survey of the Chancery record is therefore needed to understand the history of the equity of redemption and mortgages in equity.

Though the record may be the best source for substantive equity in the period, it may nevertheless not do justice to the formalist doctrinal sophistication of the court at the time. In the survival of Lord Keeper Coventry's notes of *Emmanuel College* is a nearly unique opportunity to compare the record to the reasoning of the Lord Keeper and see how it is reflected therein. In this case, the substance of the Lord Keeper's thinking did find its way into the record, but in a desultory form that tends to obscure the apparent rigour of the argumentation and consideration of the case. In Coventry's notes, a well-argued and well-considered case driven by doctrine appears. In the record,

a slightly jumbled set of points yields an apparently sensible outcome by a somewhat-uncertain logic. It therefore could be that proceedings in Chancery in this period were even more doctrinal and stylistically legal in their character than generally comes across in the record.[128] This should be born in mind where the record is used to understand early-modern equity.

In sum, we must change how we think of *Emmanuel College v Evans* and the historical methodology of early equity more broadly. *Emmanuel College* is not about the equity of redemption; it is about the relative strengths of certain legal and equitable titles. It has long been a disembodied leading case, standing distant from its underlying content. Investigating the record has corrected this misimpression, and the necessity of the record as a source for any investigations into early substantive equity has become evident. While the record may not be perfect as a source, in that it may fail to capture the full doctrinal sophistication of equity, it contains a great deal of unexplored material and should be used more. Only by resort to the record can the history of the equity of redemption and mortgages in equity – or any other topic in early-modern equity – be properly understood.

[128] This may at least be true under Lord Keepers who were lawyers, viz. *not* Bishop John Williams (LK 1621-25) or courtier Sir Christopher Hatton (LC 1587-91).