

## DISCUSSION

COMPLEX CASES AND JURY TRIALS:  
A REPLY TO PROFESSOR ARNOLD \*

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In his Article published in this issue,<sup>1</sup> Professor Morris S. Arnold concludes that there is “no good historical foundation for the argument that plaintiffs may be denied the right to a jury trial because their cases are complex.”<sup>2</sup> In Professor Arnold’s opinion, to interpret the seventh amendment as permitting extraordinarily complex cases to be withheld from juries is to adopt a position “at odds with the current of American legal thought in the late eighteenth century” and “without general support in the English authorities of that age.”<sup>3</sup>

We submit that Professor Arnold’s conclusions rest upon an incomplete examination of the historical evidence. Part I of our Reply shows that the framers of the seventh amendment intended to incorporate into the amendment the distinction between suits at common law and proceedings in equity as that distinction was made in England in 1791. As Lord Devlin recently has shown,<sup>4</sup> the

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\* *The research contained in this Reply was originally undertaken by the authors on behalf of the International Business Machines Corporation, a client of the law firm of which Mr. Campbell is a partner and a party or amicus in several pending cases that raise the issue of the right to a jury trial in complex civil litigation. [The Editors].*

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<sup>1</sup> Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980).

<sup>2</sup> *Id.* 848.

<sup>3</sup> *Id.* 830 (footnote omitted).

<sup>4</sup> See Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980).

practice in England at that time was for chancellors to make sure that complex cases were tried as proceedings in equity, without a jury, and not as suits at common law, with a jury. Part II re-examines one of the early decisions relied on by Lord Devlin, *Towneley v. Clench*.<sup>5</sup> We demonstrate that, contrary to Professor Arnold's view, *Clench* is good authority for the proposition that the chancellor would prohibit trial at law of issues beyond the understanding of a jury.

### I. THE SEVENTH AMENDMENT AND THE TRADITIONAL ENGLISH BOUNDARY BETWEEN LAW AND EQUITY

Throughout our history, American courts have followed the admonition of Mr. Justice Story that "it is the common law of England, the grand reservoir of all our jurisprudence"<sup>6</sup> to which the seventh amendment refers when it requires that "[i]n Suits at common law . . . the right of trial by jury shall be preserved . . . ." <sup>7</sup> Professor Arnold suggests a different approach. He urges that the "special affection" with which Americans regarded the jury in 1791 creates an "aura" that should permeate any interpretation of the seventh-amendment right to jury trial.<sup>8</sup> That "aura" makes the English historical allocation of cases between law and equity quite secondary to an assertedly different American experience—much more pro-jury and anti-equity—embodied in the seventh amendment.<sup>9</sup>

There are two flaws, one minor and one major, in Professor Arnold's suggested revision of seventh-amendment historical analysis. First, a more balanced review of American historical evidence shows that although eighteenth-century Americans did indeed

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<sup>5</sup> Cary 23, 21 Eng. Rep. 13 (Ch. 1603). Although the English Reports reprint is headed "*Clench v. Tomley*," documents in the Public Record Office in London show that the defendant's name was Clench and the plaintiff's name was Towneley, rather than the reported "Tomley." The corrected spelling shall be followed here.

<sup>6</sup> *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

<sup>7</sup> U.S. CONST. amend. VII. See, e.g., *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."); *Ex parte Peterson*, 253 U.S. 300, 309 n.1 (1920) (Brandeis, J.) ("The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute").

<sup>8</sup> Arnold, *supra* note 1, at 831.

<sup>9</sup> *Id.* 831-32.

treasure the civil jury, they also recognized the need for and legitimacy of equity. Second, and more to the point, however, it is the intent of the framers of the seventh amendment, as reflected in the language and legislative history of the amendment itself, that ultimately must determine the historical scope of the constitutional right to jury trial in civil cases—not some general “affection” or “aura” inferred from colonial practice or rhetoric. When we look at the amendment itself, and understand the process through which it came to be adopted, we see that the constitutional boundary between law and equity established by the seventh amendment is the same as the distinction drawn in England at that time.

### A. *American Attitudes Toward Law and Equity*

A special affection for the jury does not necessarily imply a special dislike of equity (or admiralty). One might wish to have both (or all three), each in its proper place. Many eighteenth-century American lawyers voiced strong support for equity law and practice as necessary components of a legal system.<sup>10</sup> Several colonies—including, notably, New York and Virginia—modelled their legal systems closely after that of England and thus had separate chancery courts.<sup>11</sup> Other colonies, such as New Hampshire, otherwise not following the English plan, nevertheless at times retained separate courts of equity.<sup>12</sup>

The colonies of Pennsylvania and Massachusetts did not maintain separate courts with general equity jurisdiction.<sup>13</sup> Professor Arnold urges that the experience of these two colonies somehow demonstrates early America's special affection for juries and cor-

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<sup>10</sup> See I THE LAW PRACTICE OF ALEXANDER HAMILTON 178-79 (J. Goebel ed. 1964) (“Except as lawyers . . . were drawn into political controversies over Chancery, the provincial bar was fully aware of the importance of the equity jurisdiction as a supplement to the common law and of its indispensability for the vindication of the rights and claims of clients.” (footnote omitted)).

<sup>11</sup> See THE FEDERALIST No. 83, at 524-25 (A. Hamilton) (B. Wright ed. 1961); Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 PERSPECTIVES IN AMERICAN HISTORY 257, 262-64 (D. Fleming & B. Bailyn eds. 1971). In New York, for example, a supplement to the Duke's laws in 1665 provided that bills in equity should proceed “by way of Bill and delivering in Answers upon Oath and by the Examination of witnesses, in like manner as is used in the Court of Chancery in England.” L. FRIEDMAN, A HISTORY OF AMERICAN LAW 47 (1973) (emphasis supplied).

<sup>12</sup> In New Hampshire, equitable jurisdiction was vested in the governor and council prior to 1699. See L. FRIEDMAN, *supra* note 11, at 47.

<sup>13</sup> See Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U. L. REV. 269, 271-72 (1951); Katz, *supra* note 11, at 266-72.

responding loathing of equity.<sup>14</sup> A careful examination of the Massachusetts and Pennsylvania experiences, however, demonstrates that the absence of separate equity courts in these colonies was the result of factors more subtle than an all-consuming desire for jury trials.

Plainly, colonial Massachusetts was not opposed in principle to courts of equity. Indeed, as Professor Katz has concluded, "there was a recurrent desire among New Englanders for the establishment of equity courts."<sup>15</sup> Thus, the legislature of the colony of Massachusetts (called the "General Court") tried repeatedly in the late seventeenth century either to create a separate court of chancery or to authorize the Massachusetts Superior Court to act as a court of equity. On each occasion, the General Court was overruled by the Crown.<sup>16</sup> Because of these royal vetoes, no further attempt was made to create a separate court of equity in Massachusetts after 1693. Instead, surrogate equity procedures soon developed in both the county courts and in the General Court.<sup>17</sup>

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<sup>14</sup> Arnold, *supra* note 1, at 836, 837-38. Professor Arnold also finds special significance in the fact that equity courts in colonial America often referred specific questions of fact to juries for decision. *Id.* 836-37. But, as discussed by Lord Devlin, this practice was common in England as well. See Devlin, *supra* note 4, at 60-62. Its use in America, therefore, cannot be taken as evidence of some break with English practice.

Professor Arnold also notes Thomas Jefferson's support for routine use of juries in equitable proceedings, Arnold, *supra* note 1, at 836, but he fails to point out that Virginia rejected Jefferson's innovation in 1783 after experimenting with it for a six-year period. See An act to amend the acts for establishing the high court of chancery and general court, Ch. XXVI, § III, 11 Va. Laws 342 (1783) (W. Hening ed. 1821) (repealing Ch. XV, § XXVI, 9 *id.* 389 (1777)). Nor does Professor Arnold mention that the First Federal Congress considered and rejected, in enacting the Judiciary Act of 1789, a proposal that jury trials be required in equity actions in the new circuit courts. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 78-79 (1924).

<sup>15</sup> Katz, *supra* note 11, at 264.

<sup>16</sup> See Katz, *supra* note 11, at 265; Woodruff, *Chancery in Massachusetts*, 5 L.Q. REV. 370, 373-75 (1889), reprinted in 9 B.U. L. REV. 168, 171-73 (1929). Massachusetts's desire for equity jurisdiction apparently continued well into the eighteenth century. See Katz, *supra* note 11, at 265; *Equity Jurisdiction—Further Discussion of History in Massachusetts and Maine*, MASS. L.Q., Oct., 1947, at 49, 55 (editor's note).

<sup>17</sup> Indeed, Massachusetts's refusal to entrust certain matters to juries for resolution, despite the repeated royal vetoes of separate courts of equity, attests to the general recognition among citizens of the Massachusetts Colony that juries properly have only limited functions. Thus, it appears that from the beginning of the Colony there was no right to jury trial of factual issues in certain types of cases. These included divorce cases, see *Parker v. Simpson*, 180 Mass. 334, 351, 62 N.E. 401, 407 (1902), cases involving paupers, see *Inhabitants of Shirley v. Inhabitants of Lunenburg*, 11 Mass. 379, 385 (1814), cases involving the militia, see *Mountfort v. Hall*, 1 Mass. 443, 452 (1805), probate cases, see *Parker v. Simpson*, and cases in which only a very small amount of money was at stake, see *id.* These causes were heard either in the county courts, see L. FRIEDMAN,

Nor does the dispute over equity courts in Pennsylvania illustrate an overwhelming preference for juries in civil trials. From the evidence now available, it appears that in the seventeenth century Pennsylvania had a dual system of equity—both at the local level and through the governor and council—that functioned without juries.<sup>18</sup> But in the eighteenth century the antiproprietary party attempted to establish local control over equity courts by transferring all equity jurisdiction to the county courts from the high court in Philadelphia.<sup>19</sup> After some thirty-five years of debate over this issue of who should dispense equity, a stalemate was reached and general equity jurisdiction was abolished in 1736.<sup>20</sup>

In sum, a balanced study of colonial legal practice belies the generality of Professor Arnold's conclusion that eighteenth-century Americans were opposed to equity because of their "high regard for the jury."<sup>21</sup> Professor Katz has offered a more careful assessment:

Equity law was accepted by all concerned [in colonial America]—the dispute was over the constitution of the courts that dispensed equity. The Crown and the proprietors insisted upon a narrow, prerogative authority for chancery courts, while most colonists were equally insistent upon the need for legislative consent. . . . Finally, *the*

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*supra* note 11, at 48 (the county courts of Massachusetts were made into probate courts, with judges exercising the "full power and authority [of ecclesiastical officials] . . . in England"), or in courts of general sessions of the peace, *see* *Inhabitants of Shirley v. Inhabitants of Lunenburg*.

In addition, cases involving forms of equitable relief not otherwise available in the Massachusetts courts could be brought by petition to the General Court. *See* Woodruff, *supra* note 16, 5 L.Q. Rev. at 372, 9 B.U. L. Rev. at 170. Often such cases would be referred to magistrates for decision. *See, e.g., In re Roxbury Schoole* (General Court, 1st Sess., May 27, 1669), in 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY, Pt. II, at 434 (N. Shurtleff ed. 1854).

In light of the variety of cases in which juries never were used in the Massachusetts Colony, it is not surprising that in 1787 a Massachusetts Federalist observed that "out of three or four hundred actions at a court not more than ten are decided by jury." One of the Middling-Interest, *Some Objections to the New Constitution considered*, Mass. Centinel, Nov. 28, 1787. Indeed, although this eighteenth-century writer despaired of trying to set forth a federal requirement governing jury trial in civil cases ("for there is no one point in which the states more differ than in this"), he admitted that "there is one circumstance in which [the states] all agree, viz. in deciding some cases of property without any jury at all." *Id.* In response, an antifederalist, also apparently from Massachusetts, did not take issue with "One of the Middling-Interest's" views concerning the disuse of civil juries. Rather, he took issue with the Federalist's reasoning that "because we will not have a jury when we do not want them, we shall not when we do." One of the Common People, *Boston Gazette*, Dec. 3, 1787.

<sup>18</sup> Katz, *supra* note 11, at 266.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* 270.

<sup>21</sup> Arnold, *supra* note 1, at 833.

*controversies had pretty well ceased by 1750, when the generally recognized need for equity as part of the Anglo-American legal system had resulted either in viable chancery courts or in alternative devices in the existing common law system. Political criticism of chancery courts had lost even its rhetorical usefulness.*<sup>22</sup>

The notion that the American colonists had a "special affection" for juries and a corresponding dislike for equity is not a reliable basis for locating the seventh-amendment boundary between law and equity.

### B. *The Legislative History of the Seventh Amendment*

In order to determine the historical meaning of the seventh amendment, one obviously must look beyond general sentiment to the specific events leading up to the drafting and adoption of the seventh amendment. For it is only through a review of such events that one can hope to give more precise meaning to the framers' preservation of the jury trial right "[i]n Suits at common law." Remarkably, Professor Arnold fails to consider any of this legislative history.

If the citizens of the newly formed United States had wished to make some radical break with traditional English distinctions between equity and law, one would have expected them to do so in the wholly new constitutions enacted by several states immediately following the Revolution. But none of the civil jury trial provisions in the constitutions or declarations of rights adopted by ten of the original fourteen states<sup>23</sup> went so far as to require that *all* civil cases be tried before a jury.<sup>24</sup> Indeed, insofar as these pro-

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<sup>22</sup> Katz, *supra* note 11, at 282-83 (emphasis supplied); accord, L. FRIEDMAN, *supra* note 11, at 48 ("[T]he American Revolution did not abolish courts of chancery. Chancery merely passed to new masters."); 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 10, at 179 ("The public animadversions [to equity] in the form of assembly resolves stemmed primarily from a deep-seated resentment that the Crown had excluded the legislature from erecting any but courts for small causes." (footnote omitted)).

<sup>23</sup> Vermont, the fourteenth state, declared its independence from New York and adopted its own constitution in 1777. It was admitted to the Union in 1791, after it ratified the Constitution.

<sup>24</sup> See 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235 (1971) (Virginia); *id.* 260 (New Jersey); *id.* 265 (Pennsylvania); *id.* 278 (Delaware); *id.* 280 (Maryland); *id.* 287 (North Carolina); *id.* 298-99 (Georgia); *id.* 324 (Vermont); *id.* 342 (Massachusetts); *id.* 378 (New Hampshire).

visions differed, it was in their specification of cases to which the requirement of a jury did not extend.<sup>25</sup>

The seventh amendment itself arose out of antifederalist attempts to defeat ratification of the Constitution at the various state ratifying conventions.<sup>26</sup> During the debates at these conventions, those opposing the new Constitution repeatedly expressed their fear that, absent some specific constitutional provision to the contrary, the new federal Congress could eliminate all jury trials in civil cases in the federal courts.<sup>27</sup> Once again, however, just as no state constitution had ensured jury trials in all civil cases, the antifederalists did not want every civil case to be tried as of right to a jury. Those supporting ratification, on the other hand, did not want the total elimination of civil juries. Rather, while apparently agreeing that some civil cases should be tried to the jury, the federalists argued that the matter of which cases required jury trial could prudently be left to Congress to decide,<sup>28</sup> and that in any event, the jury was not appropriate for all civil cases.<sup>29</sup>

Seven proposed amendments to the federal Constitution concerning the civil jury emerged from the state ratification debates. Pennsylvania (a minority of the convention), Virginia, and North Carolina suggested that the right should extend to "controversies respecting property" and "suits between man and man."<sup>30</sup> A

<sup>25</sup> Compare VIRGINIA DECLARATION OF RIGHTS OF 1776 art. 11, reprinted in 1 B. SCHWARTZ, *supra* note 24, at 235 ("That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is preferable to any other, and ought to be held sacred.") with MASSACHUSETTS DECLARATION OF RIGHTS OF 1780 art. XV, reprinted in 1 B. SCHWARTZ, *supra* note 24, at 342 ("In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury . . .").

<sup>26</sup> At the Constitutional Convention a proposal to include a provision guaranteeing a right to jury trial in certain civil cases was rejected because it was believed "not possible to discriminate equity cases from those in which juries are proper," and because state provisions were considered adequate. 1 B. SCHWARTZ, *supra* note 24, at 438 (quoting remarks of Mr. Gorham).

<sup>27</sup> See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836) (remarks of James Monroe at the Virginia ratification convention).

<sup>28</sup> See, e.g., 2 B. SCHWARTZ, *supra* note 24, at 639-40 (remarks of James Wilson at the Pennsylvania convention); *id.* 691 (remarks of Christopher Gore at the Massachusetts convention); *id.* 778 (remarks of Gov. Edmund Randolph at the Virginia convention).

<sup>29</sup> See, e.g., THE FEDERALIST No. 83, *supra* note 11, at 527-28; 2 B. SCHWARTZ, *supra* note 24, at 639 (remarks of James Wilson at the Pennsylvania convention).

<sup>30</sup> See 2 B. SCHWARTZ, *supra* note 24, at 658, 841, 967 (Pennsylvania, Virginia, and North Carolina, respectively).

minority of the Maryland convention would have restricted the right to "actions on debts or contracts, and in all other controversies respecting property."<sup>31</sup> Massachusetts and New Hampshire recommended a provision securing, in diversity cases, the right to a jury trial of issues of fact "arising in actions at common law."<sup>32</sup> Finally, New York recommended an amendment stating: "That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate."<sup>33</sup>

These were the proposals before James Madison when he undertook to draft the Bill of Rights during the First Federal Congress. Madison, of course, was a federalist, a co-author with Alexander Hamilton and John Jay of the *Federalist Papers*.<sup>34</sup> He steadfastly had resisted any attempt to add amendments to the Constitution before its adoption, and as a delegate to the Virginia Ratifying Convention he specifically opposed inclusion of a civil-jury-trial provision.<sup>35</sup>

In the proposed amendments that Madison submitted to Congress, he included a provision that: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."<sup>36</sup> This proposal is readily traceable to the state conventions' proposals from which Madison drew. The reference to suits "between man and man" plainly came from the proposals of the Pennsylvania minority,

<sup>31</sup> *Id.* 732.

<sup>32</sup> *Id.* 713 (Massachusetts) (emphasis supplied); *id.* 761 (New Hampshire).

<sup>33</sup> *Id.* 913 (emphasis supplied).

The Livingston notes of the debate over the proposed civil-jury-trial amendment at the New York ratifying convention show the Federalists (Hamilton and Jay) anxious that the amendment not compel the use of juries in equity and admiralty. The antifederalist proponents of the amendment (Yates and Jones) met this concern by suggesting that the jury-trial right be available according to the common law as in the English Court of Exchequer, which exercised both an equitable and a legal jurisdiction. See *id.* 897; Devlin, *supra* note 4, at 51 n.22.

<sup>34</sup> Indeed, because the *Federalist Papers* were meant to be the official Federalist interpretation of the Constitution, it is apparent that Madison and others must have shared the view expressed in *The Federalist* No. 83 that "to extend the jurisdiction of courts of law to matters of equity will . . . tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode." THE FEDERALIST No. 83, *supra* note 11, at 528 (A. Hamilton). Insofar as Hamilton's views concerning the civil jury were "idiosyncratic," therefore, see Arnold, *supra* note 1, at 832, the "idiosyncrasy" was shared with Madison, the drafter of the seventh amendment, and with those for whom the *Federalist Papers* spoke.

<sup>35</sup> See Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 686-87 n.115 (1973).

<sup>36</sup> 1 ANNALS OF CONG. 453 (Gales & Seaton eds. 1789).



North Carolina, and Madison's home state of Virginia.<sup>37</sup> The reference to "suits at common law" came from the New York, Massachusetts, and New Hampshire proposals.<sup>38</sup> Madison's proposed right to jury trial in civil cases was referred to a select committee of eleven Congressmen, which deleted the Virginia reference to suits "between man and man." The reference to suits at common law, however, was maintained.<sup>39</sup>

After the committee had reported out what was to become the seventh amendment, and less than a month before Congress adopted it, Jefferson wrote to Madison from Paris to comment on the draft that Madison had forwarded to him. He liked Madison's draft "as far as it goes; but I should have been for going further."<sup>40</sup> Specifically, Jefferson suggested in lieu of Madison's proposal: "*All facts put in issue before any judicature shall be tried by jury except* 1. in cases of admiralty jurisdiction wherein a foreigner shall be interested, 2. in cases cognisable before a court martial . . . , and 3. in impeachments allowed by the constitution."<sup>41</sup> Madison and the Congress did not adopt Jefferson's suggestion or any others like it, and the benchmark for application of the seventh amendment remained the traditional line between suits at common law and proceedings in equity.<sup>42</sup>

Two conclusions emerge from the legislative history of the seventh amendment. The first, of course, is that the amendment was born as an attempt to meet the concerns of a substantial number of Americans that juries be used in some civil cases. The second conclusion derived from the legislative history of the seventh amendment is that the amendment did not abandon, but instead carefully maintained, the traditional English distinction between suits at common law appropriate for jury resolution and proceedings in equity requiring resolution by a judge.<sup>43</sup>

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<sup>37</sup> See text accompanying note 30 *supra*.

<sup>38</sup> See text accompanying notes 32 & 33 *supra*.

<sup>39</sup> See 2 B. SCHWARTZ, *supra* note 24, at 1117; Wolfram, *supra* note 35, at 729.

<sup>40</sup> Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), reprinted in 2 B. SCHWARTZ, *supra* note 24, at 1140, 1143.

<sup>41</sup> *Id.* (emphasis supplied).

<sup>42</sup> The version of the seventh amendment reported to the Congress by the committee went unchanged through the House, the Senate, and the ratifying state legislatures, save for the addition of a dollar-value limitation. See Wolfram, *supra* note 35, at 729-30.

<sup>43</sup> Federal practice immediately following ratification of the seventh amendment confirms that it was English practice to which Americans turned to define the bounds of federal equity on this side of the Atlantic. Thus, the Supreme Court

## II. COMPLEXITY AS A GROUND FOR THE DECISION IN *Towneley v. Clench*

Following his treatment of the American background of the seventh amendment, Professor Arnold refers to Lord Devlin's recent work demonstrating that chancellors of the eighteenth century exercised jurisdiction over unusually complex cases.<sup>44</sup> Professor Arnold concludes to the contrary that there is no "evidence of an eighteenth-century American or English belief that complexity was a ground for the exercise of equitable jurisdiction."<sup>45</sup> To sustain his conclusion, Professor Arnold analyzes only two of the cases cited by Lord Devlin: *Towneley v. Clench*<sup>46</sup> and *Blad v. Bamfield*.<sup>47</sup> The focus of Professor Arnold's attack, however, is on *Clench*.<sup>48</sup>

Before reexamining *Clench*, however, it should be emphasized that the evidence for an equitable jurisdiction based on complexity is not to be found solely or even principally in *Clench* and *Blad*. Lord Devlin cites a range of authorities, many of them closer in time to the adoption of the seventh amendment than *Clench* or

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rule of August, 1792, provided that the outlines of the federal courts' equity practice should be taken from the practices of King's Bench and English Chancery. See 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 580 (J. Goebel ed. 1971).

<sup>44</sup> Devlin, *supra* note 4. Lord Devlin, whom Mr. Le Poidevin assisted in his endeavor, first published his research as a private monograph. P. Devlin, Note on the Suit at Common Law in England at the Time of the Seventh Amendment (1791) (Dec., 1979) (copy on file with the *University of Pennsylvania Law Review*).

<sup>45</sup> Arnold, *supra* note 1, at 848. While maintaining throughout his article that there is no evidence to show that equity *ever* took jurisdiction on grounds of complexity, Professor Arnold ultimately hedges his conclusion by stating that even if one were to concede the existence of such a jurisdiction, no evidence exists to show that it was *exclusive*. *Id.* 848. Granting that much, however, concedes the argument. If equity had concurrent jurisdiction of complex cases, thus giving the chancellor the discretion to bring them into the court of chancery, and if the chancellor in fact exercised that discretion to take jurisdiction over a particular case, then the litigation became a proceeding in equity and, being no longer a "suit at common law," was removed from the scope of the seventh amendment. As the Supreme Court held in *Shields v. Thomas*, 59 U.S. (18 How.) 253, 262 (1855), the seventh amendment, correctly interpreted, embraces neither the "exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law" (emphasis supplied).

<sup>46</sup> Cary 23, 21 Eng. Rep. 13 (Ch. 1603). See note 5 *supra*.

<sup>47</sup> 3 Swan. 604 (App.), 36 Eng. Rep. 992 (Ch. 1674). The case is more fully reported in 1 LORD NOTTINGHAM'S CHANCERY CASES 7-8, 106-08 (D. Yale ed.) (Selden Society Vol. 73, 1957).

<sup>48</sup> As for *Blad v. Bamfield*, Professor Arnold admits that there the Chancellor stopped a common-law action and decided the case himself because a jury was unsuited to decide it and admits that the decision supports the view that complexity was a reason for withholding a case from a jury. Arnold, *supra* note 1, at 846.

*Blad*, and reference should be made to his work rather than to this discussion for a full review of the evidence.

### A. *The Course of the Proceedings in Towneley v. Clench*

Of all the authorities cited by Lord Devlin, it is *Towneley v. Clench*<sup>49</sup> that Professor Arnold treats most fully. In that case, Lord Keeper Ellesmere reportedly retained equitable jurisdiction over a case because the outcome was "to be discerned by books and deeds, of which the Court was better able to judge than a jury of ploughmen."<sup>50</sup> Lord Devlin cautions against giving *Clench* "more solemn scrutiny than its slender form invites,"<sup>51</sup> but explains that it is "clear authority for the proposition that the Chancellor would prohibit the trial at common law of any issue which from its nature he thought to be beyond the understanding of a jury."<sup>52</sup> Professor Arnold, drawing conclusions from the court records rather than from the report of the Chancellor's reasoning, doubts whether Ellesmere ever made the reported statement and concludes that "the obvious basis for jurisdiction was the superior process available in equity."<sup>53</sup> He adds: "[T]he facts [of the case] seem remarkably simple."<sup>54</sup>

In fact, the record material is wholly consistent with the report, and Professor Arnold's account omits an important fact derived from the records. It is necessary first to summarize the course of the proceedings. Towneley's bill,<sup>55</sup> dated January 24, 1601, tells a

<sup>49</sup> Cary 23, 21 Eng. Rep. 13 (Ch. 1603).

<sup>50</sup> *Id.*

Professor Arnold questions the accuracy of the report by commenting upon "the relatively unscientific and imprecise character of early reports," Arnold, *supra* note 1, at 841 (although he later, and rather oddly, defers to what he reads as the reporter's criticism of Ellesmere, *id.* 845). This treats the report in a rather cavalier fashion. The reporters were unofficial in the sense that they were not paid out of government funds, but that is still true; and although the report is old, and some old reports are unreliable, there are excellent reports dating back to the end of the thirteenth century. If the report's brevity suggests treating it with caution, yet the reference to "a jury of ploughmen" is characteristic of Ellesmere, and carries its own stamp of authenticity. In comparing the report with the material in the Public Record Office, it should be borne in mind that the primary function of the latter was to record what the court had done and not why it had done it. The report, however, was prepared for lawyers, more interested in legal reasoning than in the facts of the particular case. Report and record should therefore be read together.

<sup>51</sup> Devlin, *supra* note 4, at 75.

<sup>52</sup> *Id.*

<sup>53</sup> Arnold, *supra* note 1, at 844.

<sup>54</sup> *Id.*

<sup>55</sup> Bill preferred by Francis Towneley, *Towneley v. Clench* (sworn Jan. 24, 1600 [*i.e.*, 1601]), Public Record Office, London [hereinafter cited as P.R.O.]

straightforward story. Francis Vaughan was seised of various lands (all freehold, according to Towneley) and died on July 21, 1600, leaving them by will to Towneley in tail male.<sup>56</sup> Towneley entered the property and possessed himself of the title deeds, but while they were being removed to safe-keeping an assistant of Clench, Bedolph, took them by force and brought them to Clench.

Clench also claims the property, the bill continues, and has entered into part of the lands devised to Towneley, a house called "The George," making a lease of it to one Barsey, who has begun an action in the King's Bench (*sic*) to establish his title.<sup>57</sup> Barsey is pressing the action intending to get a verdict before Towneley can recover back his title deeds.

Towneley explains that he understands Clench is claiming through his wife Mary Clench, and that Mary believes she is heir to Francis Vaughan, being the granddaughter of Francis's brother Anthony. Towneley meets her claim with the assertion that Anthony was a bastard son of Sir Hugh Vaughan.<sup>58</sup>

Towneley does not specify what equitable relief he seeks but he does give reasons for invoking the court's jurisdiction. One is that the witnesses to prove Anthony a bastard are mostly living in Guernsey and Jersey and other distant places, so that they cannot be brought to England "to be deposed viua voce [*sic*]"<sup>59</sup> without great expense and trouble. It is not obvious whether he wants the court to take their evidence on commission or to act without it. The other reason is that because Towneley has only just become entitled to the lands, he does not know the dates or contents of the title deeds, so that he cannot obtain them at common law (in an action of detinue) and without them will be disinherited. It is

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C2/Eliz/T3/60. A copy of Mr. Le Poidevin's verbatim transcription from the document in the Public Record Office is on file with the *University of Pennsylvania Law Review*.

<sup>56</sup> An estate in tail male is one type of an estate tail. Under an estate in tail, the lands descend from the grantee to the heirs of his body, *i.e.*, his lineal descendants. The estate in tail male limits the descent to males. See C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 40 (1962).

<sup>57</sup> Clench's entry and lease probably was made purely for the purpose of enabling Barsey to sue. It was usual by this time, where freehold title was in question, for the claimant to make an artificial lease to a friend because the action available to leaseholders, that of ejectment, was simpler than those specifically designed for freeholders. See Alden's Case, 5 Co. Rep. 105a, 105b, 77 Eng. Rep. 217, 218 (C.P. 1601).

<sup>58</sup> Mary makes clear in her answer that she is not in fact claiming as heir to Francis, but as heir to Anthony who she says was legitimate. Answer of Mary Clench, Towneley v. Clench (sworn Apr. 29, 1601), P.R.O. C2/Eliz/T3/60.

<sup>59</sup> Bill preferred by Francis Towneley, *supra* note 55.

easy to infer what Towneley wanted: under those disabilities he would have had great difficulty in defending Barsey's King's Bench proceedings so that his immediate need was to enjoin Barsey's action. Accordingly, on May 7, 1601, his counsel Francis Bacon<sup>60</sup> outlined to the court the contents of the bill (mentioning the loss of the documents, though not the absence of witnesses) and asserted that Towneley and those from whom he claimed had been in possession for forty years and more.<sup>61</sup> An injunction was thereupon awarded against the common-law proceedings.

By that time Clench and his wife had already sworn their answers to the bill.<sup>62</sup> They maintained that originally Sir Hugh Vaughan was seised of the land and died in August 1536, leaving three lawful sons, George, Anthony and Francis, born in that order.<sup>63</sup> (Francis is the Francis Vaughan from whom Towneley claims.) Subject to a gift of certain lands to his wife Blanche for life, Sir Hugh, by will dated July 16, 1533, left his lands to George in tail male, thereafter in default of male issue to Francis in tail male, thereafter in default of male issue to Anthony in tail male, followed by further remainders. It is evident that if that will was effective, Mary Clench could not be entitled to the lands as Anthony's heir, if only because she was not his heir male. Clench therefore asserts that the will was void, an allegation in which, as will be seen, there was certainly some substance. According to Clench, on Sir Hugh's death intestate, the lands descended to George, the eldest son and heir, who later died without issue; Anthony then became entitled, as second son and George's heir, though Francis managed to interpose himself and entered into possession of the property. Towneley claims as Francis's devisee but, Clench's answer continues, Anthony's title descended to Anthony's son Hugh (grandson of Sir Hugh) and then to Hugh's daughter Mary, now Clench's wife.

To the allegations raised in the answers, Towneley filed a replication that acknowledges that Sir Hugh was seised of the lands

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<sup>60</sup> Bacon was called to the bar in 1582 and became Solicitor General in 1607, Attorney General in 1613, Lord Keeper in 1617, and Lord Chancellor in 1618. See his entry in 1 *DICTIONARY OF NATIONAL BIOGRAPHY* 800-44 (1908) (reissue).

<sup>61</sup> *P.R.O.* C33/99, fol. 462v (May 7, 1601); *id.* C33/100, fol. 450.

<sup>62</sup> Answer of Thomas Clench, *Towneley v. Clench* (sworn Feb. 7, 1601), *P.R.O.* C2/Eliz/T3/60 (copy of verbatim transcription on file with the *University of Pennsylvania Law Review*); Answer of Mary Clench, *supra* note 58.

<sup>63</sup> Eventually, the court would find Anthony a bastard, partly on evidence that Anthony was born before George and Francis. See note 70 & accompanying text *infra*.

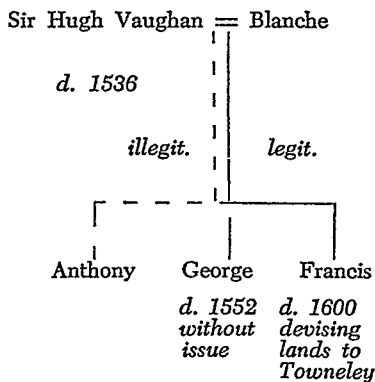
and goes on to state that on his death the lands descended to George, on whose death without issue they properly descended to Francis rather than to Anthony. Dealing with Clench's assertion that Anthony was the second legitimate son of Sir Hugh, Towneley repeats that he was a bastard.<sup>64</sup> On that summary of the pleadings (in which one allegation, to be mentioned shortly, has been deliberately omitted), the only issue between the parties seems to have been whether Anthony was legitimate.<sup>65</sup>

On May 17, 1602, after Towneley had secured an injunction against the King's Bench proceedings, Clench obtained an order *nisi* that since the principal question between the parties was one of bastardy, a typical jury question, it should be tried at law.<sup>66</sup> That would have been accomplished simply by dissolving the injunction. But on June 14, 1602, it was ordered that the matter should remain in chancery and go to a hearing there.<sup>67</sup> The grounds for the court's order were, first, that Towneley "dothe not wholly insist vpon the said point of Basterdy but vpon some other

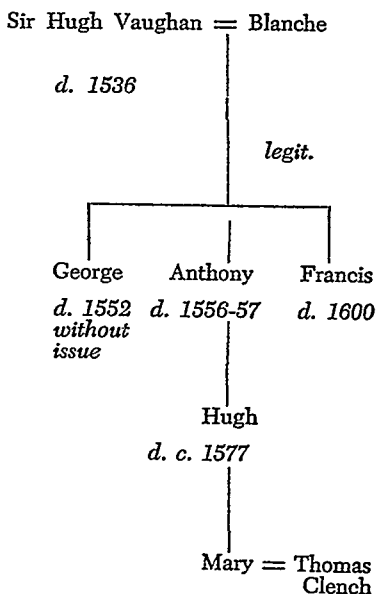
<sup>64</sup> Replication of Francis Towneley, *Towneley v. Clench* (n.d.), P.R.O. C2/Eliz/T3/60 (copy of verbatim transcription on file with the *University of Pennsylvania Law Review*).

<sup>65</sup> The opposing contentions are clearly expressed in pedigrees.

Towneley's, as set out in his bill and replication, were as follows:



Clench's, as set out in his answer, were as follows:



<sup>66</sup> P.R.O. C33/102, fol. 584 (May 17, 1602).

<sup>67</sup> *Id.* C33/102, fol. 674v (June 14, 1602).

question";<sup>68</sup> second, that Towneley and his predecessor had had possession for about 50 years;<sup>69</sup> and third, that by Clench's own admission Bedolph had taken the title deeds with which Towneley would have defended his title at common law and "contemptuously" refused to bring them into court. The next and last significant step in the case was the final decree, made on May 31, 1603. This recites that the court found as a fact that Anthony had been a bastard and decrees possession in favour of Towneley.<sup>70</sup> But for our purposes, it is the decision of June 14, 1602 to retain the case in equity rather than to let it go to the courts of law that is plainly the crucial one.

### B. *Towneley's Need For Discovery and Depositions*

Professor Arnold suggests that equitable jurisdiction rested not on the complexity of the case but on a two-fold inadequacy in common-law procedure: the absence of a power to compel the production of documents and the absence of a power to compel the appearance of witnesses.<sup>71</sup> This reasoning fails to distinguish between grounds for accepting equity jurisdiction in the first place and grounds for refusing to let a jury decide the question of title once the court has accepted jurisdiction of the dispute.

Consider first the documents that Bedolph had seized. That an opponent had documents relevant to an action at law was certainly a good reason for a party to come into equity asking for their production. Commonly, as in this case, he needed in addi-

<sup>68</sup> *Id.*

<sup>69</sup> Though lengthy possession would not in itself suffice to keep an ejectment case from a jury, it may reinforce other reasons because a judge is more apt to appreciate that lengthy possession is some evidence of rightful possession.

<sup>70</sup> The final decree was made with Ellesmere's personal authority. *P.R.O.* C33/103, fol. 681 (May 31, 1603). (The records state that "the original is signed with the hand of the Lord Keeper." *Id.* C33/104, fol. 722v (May 31, 1603) (translated from Latin original)). It is, as Professor Arnold accurately states, Arnold, *supra* note 1, at 842, a decree for quiet possession in Towneley's favour "until better matter shalbe shewed in this Court to the contrary." *P.R.O.* C33/103, fol. 681. It is based on a finding of fact that Anthony was born a bastard of Sir Hugh and Blanche before their marriage. That finding derived from the following evidence: 1) on Sir Hugh's death George was found to be his son and heir by inquisition post mortem; 2) by several manorial court rolls of presentments made in the time of Queen Mary, Francis was found to be the brother and heir of George, although Anthony was still alive; 3) by a book recording the education of Sir Hugh's children and by the depositions of many witnesses it appeared Anthony was many years older than George; and 4) that by Sir Hugh's will the lands were entailed to George, then Francis, and lastly Anthony suggested that Anthony was illegitimate. Additional grounds for the decree were that Francis had been in possession for close to 50 years and that Towneley's title-deeds had been taken from him by Bedolph and handed to Clench.

<sup>71</sup> Arnold, *supra* note 1, at 844.

tion a temporary injunction against the proceedings at law while he obtained his equitable remedy. But once the documents were produced, there was no reason why the action should not proceed to trial by a jury; and in fact equitable suits for discovery only in aid of proceedings at law were common.<sup>72</sup> Towneley's complaint that the absence of his title-deeds disabled him from defending the action of ejectment would have justified equitable intervention, but it would not ordinarily have resulted in a permanent withdrawal of the case from a jury.

Professor Arnold also suggests that in fact the title-deeds never were produced,<sup>73</sup> but if that is right it does not strengthen his argument; if Ellesmere felt able to issue a decree in the absence of the title-deeds, there would have been no difficulty in a jury's similarly rendering a verdict. If it be objected that the decree was on the face of it subject to review ("until better matter shalbe shewed"), the same would have been true of a jury verdict, since for technical reasons the loser in an ejectment was at this time always (and inconveniently) able to begin a fresh action and to try his luck with another jury.<sup>74</sup>

Similar reasoning applies to the other ground of equitable jurisdiction relied on by Professor Arnold—the supposed absence of a common-law power to compel the attendance of witnesses. Although the common-law courts did have such a power, it would not have reached to the Channel Islands;<sup>75</sup> and, of course, one can well see that in Towneley's case, as his bill alleges, it would have been very troublesome and costly to fetch witnesses over from Guernsey and Jersey. The Court of Chancery could issue a commission to examine witnesses overseas, and perhaps depositions were taken in that way.<sup>76</sup> But again, this ground of equitable intervention would

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<sup>72</sup> See, e.g., *Throckmorton v. Griffin*, Tot. 18, 21 Eng. Rep. 110 (Ch. 1595) (establishing a right of common); see generally J. MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL 52 (2d ed. London 1787).

<sup>73</sup> Arnold, *supra* note 1, at 844. It may in fact be that the title-deeds seized by Bedolph had been brought into court by the time of the final decree, as the decree makes provision for the distribution of certain unspecified "evidences." P.R.O. C33/103, fol. 681 (May 31, 1603).

<sup>74</sup> Coke refers obliquely to this rule in *Ferrer v. Arden*, 6 Co. Rep. 7a, 9a, 77 Eng. Rep. 263, 266 (C.P. 1599). See also 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 16-17 (2d ed. 1937).

<sup>75</sup> 1 W. HOLDSWORTH, *supra* note 74, at 520-21 (6th ed. 1938); see A. EAGLESTON, THE CHANNEL ISLANDS UNDER TUDOR GOVERNMENT, 1485-1642, at 30 (1949).

<sup>76</sup> The decree in *Clench* mentions depositions but it is not clear which witnesses were deposed.



not have justified excluding a jury once the depositions had been taken. It would have been perfectly possible to permit a trial at law and to order the depositions to be used in its course.<sup>77</sup>

### C. *The Complex "Other Question"*

Professor Arnold thus fails to explain why the court refused to allow the question of title to go to a jury in 1602 or why it affirmed that decision by making a decree itself in 1603. Nothing would have been simpler than dissolving the injunction and allowing Barsey's ejectment action to go to trial. The three reasons given in 1602 for not taking that course have already been set out.<sup>78</sup> The length in time of Francis Vaughan's possession is one. The absence of the title-deeds is another; but that cannot still have been operative in 1603 given that the Lord Keeper felt able to issue a decree. The third is that Towneley was insisting on "some other question" besides the dispute about Anthony's legitimacy. Although this question is not specified in the record of the refusal of a trial at law, a perusal of Clench's answer and Towneley's replication shows that a point had arisen which could have resolved the whole case in Towneley's favour independently of Anthony's legitimacy. It is the only other point which could have done so and must be the other question referred to by the court in 1602. Moreover, the matter raised by Towneley, which is the important fact overlooked by Professor Arnold's account, is a point of considerable complexity and sufficiently explains Ellesmere's description of the case as unsuited to the consideration of a jury of ploughmen.

The point was this. Sir Hugh Vaughan's will gave the lands in tail male first to George, then to Francis, and finally to Anthony. As mentioned above,<sup>79</sup> if the will was valid, Clench's claim failed irrespective of Anthony's legitimacy, because Mary Clench could not be Anthony's heir male. In his answer,<sup>80</sup> therefore, Clench asserted that the will was invalid because Sir Hugh had died before the enactment of the Statutes of Wills.<sup>81</sup> Towneley's other point was that the will might be valid.<sup>82</sup> This other point makes it neces-

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<sup>77</sup> See, e.g., *Exton v. Turner*, 2 Cas. Ch. 80, 22 Eng. Rep. 856 (1681) (witnesses were aged and liable to die before the trial could be held).

<sup>78</sup> See notes 67-70 *supra* and accompanying text.

<sup>79</sup> See notes 62-65 *supra* and accompanying text.

<sup>80</sup> Answer of Thomas Clench, *supra* note 62.

<sup>81</sup> Statute of Wills, 1540, 32 Hen. 8, c. 1; Statute of Wills, 1542, 34 & 35 Hen. 8, c. 5.

<sup>82</sup> See Replication of Francis Towneley, *supra* note 64.

sary to explain the background to those Statutes, passed in 1540 and 1542, and the Statute of Uses, passed in 1535.<sup>83</sup>

Under the law as it stood both before and immediately after the Statute of Uses, land could not be devised at common law. If a person died seised of land, it automatically devolved on his heir and any testamentary attempt to alter that process was in general simply ineffective. However, would-be testators were able to give themselves what was in effect, though not technically, a power of devise by means of a use, which corresponds to the modern trust.

The use was employed whenever it was desired to separate legal entitlement from beneficial enjoyment, as, for example, where land was to be given for the benefit of an infant. The donor would convey the land to the trustee (the "feoffee to uses") who held it and administered it on the infant's behalf ("to the use of" the infant). In the eyes of the common law, the feoffee to uses was the absolute owner, but the Court of Chancery would enforce his duties to the beneficiary.

Where the device was to be employed as a substitute for a power to devise, the would-be testator conveyed his lands to one or more feoffees, who might be expected to outlive him, to hold to the testator's own use. The legal title to the land remained in the feoffees both before and after the testator's death, but his will could effectively dispose of the beneficial interest as he wished. This device, however, was disliked by the king for a quite collateral reason: because the testator did not die seised of the land, his estate evaded certain feudal dues that were payable to the king when a landowner died seised.

To prevent this result, the Statute of Uses was passed. It did not prohibit the creation of uses, but it provided that they should be "executed," that is, a legal title to the lands equivalent to the beneficial interest became vested in the beneficiary. Thus the feoffees to uses dropped out of the picture altogether.

The Statute came into force on May 1, 1536,<sup>84</sup> and at first was assumed to have succeeded in the intended abolition of the employment of the use as a substitute for a power of devise. On a conveyance from a grantor to the feoffee to uses with the grantor retaining the use of the property, it was assumed that by force of the Statute the legal fee simple would never leave the grantor, the would-be testator: the feoffee was to hold to the use of the grantor

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<sup>83</sup> Statute of Uses, 1535, 27 Hen. 8, c. 10. The following explanation is necessarily somewhat simplified. For a fuller treatment see R. MCGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 155-67 (4th ed. 1975).

<sup>84</sup> Statute of Uses, 1535, 27 Hen. 8, c. 10, § 11.

and that use was executed. Because the grantor would die still seised, his heir would take at common law and have to pay the feudal dues. The abolition of the effective power of devise was extremely unpopular and a few years later the Statutes of Wills were passed, giving testators a qualified power of devise effective at law but preserving the king's right to the feudal dues.

In the course of the sixteenth century, however, it was realized that the Statute of Uses could be evaded<sup>85</sup> if, for example, the testator conveyed lands to his feoffee to his own use subject to a power to appoint further uses by will. By force of the Statute, the testator received back a qualified legal fee that was determined on his exercise by will of the power of appointment. Thus the beneficiaries of his will received such interests as he appointed, interests which took effect at law and not merely (as before the Statute) in equity.<sup>86</sup> Testators were thereby enabled to exercise a general power of devise, in place of the qualified power conferred by the Statutes of Wills.

The bearing all this has on Clench's claim against Towneley is made clear in the answers and replication. Sir Hugh Vaughan made his will on July 16, 1533, before the Statute of Uses, but he died in August, 1536, a few months after the Statute had come into force. Clench asserts that the will was void because Sir Hugh died after that Statute and before the first Statute of Wills took effect in 1540.<sup>87</sup> He also adds a denial that Sir Hugh's lands were held in use. Towneley, in his replication, controverts this last allegation: in 1532-33, Sir Hugh conveyed his lands away to his own use, no doubt as a preparatory step in making his will. Thereafter he made his will, then the Statute of Uses supervened, whereupon Sir Hugh became seised again, and subsequently died.<sup>88</sup>

Up to this point Towneley's version of events does not prove Sir Hugh's will valid because Towneley does not set out the terms of the conveyance of 1532-33. Nevertheless, Towneley quite clearly leaves open for himself the possibility that the will was valid, pre-

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<sup>85</sup> The Statute gave rise to numerous difficulties of interpretation. Shortly before *Clench*, Francis Bacon, one of Towneley's counsel, had described it as "a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort, that it is hard to say which bark will sink, and which will get to the haven; that is to say, what assurances [*i.e.*, dispositions of land] will stand good, and what will not." F. BACON, *Reading on the Statute of Uses*, in *LAW TRACTS* 299, 299 (London 1737) (text of reading at Gray's Inn in 1600).

<sup>86</sup> See *Co. Litt.* 111b; see generally Megarry, *The Statute of Uses and the Power to Devise*, 7 *CAMBRIDGE L.J.* 354 (1941).

<sup>87</sup> Answer of Thomas Clench, *supra* note 62.

<sup>88</sup> Replication of Francis Towneley, *supra* note 64.

sumably on the footing that it constituted an appointment under a power which might have been reserved on the conveyance. Towneley states that when Sir Hugh died, George took as son and heir at law in fee simple *or else* as tenant in tail under the will.<sup>89</sup> Then he adds an allegation that, if true, would show that Sir Hugh's will had all along been regarded as quite possibly valid: in 1591-92 Francis Vaughan suffered a common recovery.<sup>90</sup> This was a species of collusive litigation that had the effect of enlarging an interest in tail into a fee simple. It was a useful step for Francis to take if and only if it was possible that he had a fee tail rather than a fee simple, that is, if it was possible that he had taken under Sir Hugh's will rather than as heir at law. Moreover, alleging the common recovery disposed of the remaining difficulty in Towneley's way. Proving the validity of Sir Hugh's will would eliminate Mary Clench's claim but of itself would not give Towneley a title, because there is nothing to suggest that he was Francis's heir male so as to enable him to take under the entail. But the common recovery, by giving Francis a fee simple, entitled Francis to dispose of it by will, thereby allowing Towneley to claim as Francis's devisee.

It should be said that Sir Hugh's will would almost certainly have been regarded as invalid upon his death in 1536, because the devices for avoiding the effect of the Statute of Uses had not then been invented. But they were in use by the end of the sixteenth century; and it is plain that in retrospect the invalidity of the will was regarded as dubious. The fact that Francis Vaughan went to the trouble of suffering a common recovery is proof enough of that.

In his replication, therefore, Towneley specifically reserves the point that Sir Hugh's will was effective and binding.<sup>91</sup> That on its own would have sufficed to defeat Clench, whether or not Anthony Vaughan was a bastard. It is the only point that fits the court's reference in 1602 to the "other question" on which the plaintiff was insisting.<sup>92</sup>

It is also a point that thoroughly justifies the court's refusal to dissolve the injunction and allow a trial at law on the grounds given in Cary's report. A jury of ploughmen, in order to decide the general question of title in the ejectment proceedings, would have needed instruction in the method of disposing of land by will before the Statute of Uses, the effect of that Statute, the special significance

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See text accompanying notes 67-70 *supra*.

of a death between 1535 and 1540, and the possible ways in which a will might take effect despite the Statute. If this exposition has been lengthy and tedious, it would equally have taxed the mind of a seventeenth-century juror.