EPIEIKEIA, A DIALOGUE ON EQUITY IN THREE PARTS. By Edward Hake. Edited by D. E. C. Yale. New Haven: Yale University Press, 1953. Pp. xxix, 152. $2.50.

THIS late sixteenth century tract, previously unpublished, reflects the confusion and difficulties of Elizabethan lawyers in explaining English equity, as administered principally by the Chancery. The tract does not add significantly to material already available but it faithfully reflects attitudes of the day and certainly deserves modern publication.

Hake, the author, was a minor literary figure as well as a lawyer. In neither phase of his activities did he make a great impression on his own time. He was a member of Gray's Inn and presumably practiced for a time before the central courts in London. However, much of his time and energy went into local government in the town of Windsor. He served as mayor, was elected a member of Parliament from Windsor in 1588, and served as steward of New Windsor in the 1590's. In the manuscript Chancery Bills and Answers at the Record Office, there are pleadings in a Chancery action brought by Hake in January, 1592, seeking to be confirmed in the office of steward of New Windsor to which the Queen had recently appointed him.[1] His rival claimant, defendant in the proceeding, charged that Hake was a "troublesome fellowe" and the denials and countercharges of Hake suggest how deeply involved he was in the factional strife of a small community. He maintained his connections with prominent judges and lawyers, however, and, as indicated by the present tract, he read fairly widely and reflected much on the baffling problems of Chancery Equity.

Hake was only one of many at the time who sought some rational explanation of the evident fact that the remedies of the Chancery were indispensable to English society and to the functioning of the common law itself. The Chancery was a very busy court. All the practicing common lawyers appeared before it constantly. At all times they had to take account of Chancery doctrines and of the threat of Chancery intervention in common law litigation. There were, beside the Chancery, various satellite equity courts that applied similar doctrines, especially the Court of Requests whose apologist, Sir Julius Caesar, befriended Hake and tried to help him publish the present tract. When Hake's manuscript was being written, the common lawyers had forged the means for bringing the satellite courts under control and were probably considering further measures against them. But the Chancery was a redoubt much harder to reduce, fortified as it was by nearly 300 years of adverse possession.

Among sixteenth century discussions of equity the best known and most influential was *Doctor and Student,* by St. Germain, which had been first published in 1523 and had gone through numerous editions before Hake wrote. It dealt of course with many specific problems in the relations between common law and Chancery equity, though in the main the approach was broadly philo-

1. Eliz. H 19/57.

sophical and one of its virtues was the access it gave to continental speculation. Hake borrows much from St. Germain, both with and without acknowledgment. He also relies heavily on Plowden's discussion of the equitable interpretation of statutes, already published in an extensive note in Plowden's Reports. West's *Symboleography,* published in 1590, had much to say about equity in general and something about specific applications of equity through Chancery remedies. Crompton's *Authority and Jurisdiction of Courts,* published in 1593, treated the same subjects more briefly. Thomas Ashe, a contemporary of Hake's in Gray's Inn, wrote a book (not published until 1609) which employed the same title (*Epieikeia*) as Hake's, but which was mainly concerned with "equitable" interpretation of statutes by common law courts. There are in addition various other manuscripts dating from these years that discuss the relations between the "equity" of the common law courts and the equity of the Chancellor. Some were published later and some deserve their present state of obscurity. But all reflect the trouble in many minds, the difficulty of explaining the English solutions, and the search for a general theory that might tie diverse phenomena together.

Hake's treatise is cast in the form of a dialogue between Hake and two other persons named Eliott and Lovelace. Simulated dialogue was of course a favorite form of expository writing at the time. In skillful hands, like those of St. Germain, it served to bring out and emphasize basic points of conflict on seriously debated questions. Hake's treatment makes Eliott and Lovelace not much more than amiable stooges, whose objections are soon bowled over and whose questions are mostly feeders for Hake. A considerable amount of filler is used to maintain the form of a conversation. The illusion is aided further by occasional wanderings in the discussion, as in Hake's ten-page argument in Dialogue I that judges should be learned. In view of his discursiveness on this subject, it is disappointing that Hake is so brief in his next contention that judges should be "couragious and stowte" in resisting commands of the Queen to violate the law. He returns to this general issue later in a brief treatment of a related problem—the stays of litigation at the Queen's command which were commonly called protections. Hake starts with some bold quotations from Magna Charta, but then rather weakly concludes that stays not authorized by law must be explained by "the absolute power of the Prince" which he (Hake) did not propose to dispute "at this tyme or at any other tyme."[2] In short, Hake touches on some great issues. Though most of his discussion is bland and somewhat diffuse, he could not avoid skating up to the hardest kind of questions, which lay embedded in the center of his subject.

The real difficulty was that Hake, like others among his contemporaries, was afflicted with a fatal indecision. The common lawyers had become familiar with "equity," conceived as a principle of interpretation and usable by common law courts. Indeed, Hake devotes one of his three dialogues to this equity which is "within" the common law—directing decisions according to spirit rather than

2. P. 75.

letter, searching out true intent, and fulfilling without contradicting the law's real purposes. This was the emphasis in Aristotle's famous definition of *epieikeia*, on which Hake relies not only for his title but for a whole branch of his argument.[3] When equity of this type happened to be associated with the "law of nature which is reason" or the law of God, the coincidence was fortunate, but its function was still to search out the "soul and spirit" of the law itself. Such a version of equity could not really explain the central facts that were spread over the English landscape: a set of Chancery remedies that operated in direct contradiction to specific rules of the common law, to their policies and purposes, and to their "soul and spirit." Equity viewed merely as a principle of interpretation could not explain an equity that depended solely on the Chancellor's own conscience, nor could it explain how the Chancellor's equity could take account of circumstances that were "withowte or beside the case" and that indeed "the lawmaker" would not have been willing to consider even if he had foreseen them.[4] Hake tries to make it appear throughout that the Chancellor's equity and the common lawyer's equity were essentially the same, but any practitioner who had appeared before the two sets of courts knew well they were profoundly different. On this key issue Hake's discussion can only be described as evasive. His conclusion that there is no real contradiction between Chancery and common law because Chancery acts "ad personam and not ad rem" is a transparent evasion, although it has acquired a kind of tawdry respectability through later centuries of repetition.

The lawyers of the late sixteenth century were confronted with the grim alternatives either of conceding that "the law of nature which is reason" had an unlimited mandate to rewrite the inherited common law or of attributing the innovations of the Chancery to the political authority of the Crown. They were unwilling to do either, though certainly the attribution to a political source was to become very common within two decades. Hake does concede at one point that the authority of the Chancery depended on the "absolute power of the Prince."[5] But then he adds that "much mighte be sayde of this matter, and even nowe while I have bine speaking unto yow many things have come to my remembraunce, but I must forebeare them all."[6] How true it was that much might be said of this matter. Some fifty years later a revolution was fought over this matter and then for another 300 years much more has been said concerning it. Yet the innovations of the Chancery could surely not have occurred without the overmastering power of the Crown or without a political theory that justified, indeed demanded, the intervention of political authority to realize "equity," "conscience," and "the law of God." It is surprising to find in the interesting preface to this volume by Professor Samuel Thorne a sharp denial of the suggestion that the Chancellor historically acted "for the Prince, was keeper of the king's conscience, and that the Chancery, in consequence, de-

3. P. 7.
4. Pp. 122, 126.
5. P. 140.
6. *Ibid.*

pended solely upon the prerogative and was a prerogative court—the court of the king's absolute power."[7] Perhaps the crucial word in this passage is "solely." It was precisely to avoid the "sole" dependence on royal power that Hake and other diligent authors wrote their treatises. The problem was to find a frame of ideas that had some authority other than that supplied by the Queen's militia and the trained bands. In this search it cannot be said that Hake was any more successful than other contemporary writers. His account of the common lawyers' "equity" is good, since it rests on the recorded experience of those first class minds which had been working over the common lawyers' heritage for centuries. His account of the Chancellor's equity is sketchy and uninformative, and on the crucial issues evasive and unconvincing.

The great disappointment of Hake's treatise is referred to by the editor in his introduction. Hake is almost entirely silent on subjects that would be most helpful to us now—the developing doctrines and the specific solutions of the late Elizabethan Chancery. The court was very active, its records were (and are) in excellent and most usable condition. Hake himself must have seen the Chancellor's equity at work in very concrete ways. Yet he tells us nothing, just as the contemporary reports of Chancery cases tell us almost nothing of what the Chancellor was really doing, and why.

On all the charges that can be levelled against Hake, one can readily excuse him. It was hard for anyone basking in the slanting Indian summer sun of the last years of Elizabeth to raise the dangerous question of her Chancellor's authority. It was much harder for a lawyer to undertake a strictly lawyer's job on the Chancery, to organize and classify and correlate the manifold, dispersed activities of the sixteenth century Chancery. This did not mean that the remedies employed by the Chancellor had been directly transported to England from some Elysian fields or that the Chancellor considered himself the agent of an omnipresent law of nature. The Chancellor's work was firmly rooted in robust common sense, and to an amazing extent it enlisted the good sense and the consciences of English laymen—solid citizens, stable and sober men, not visionaries at all. But to organize the results of common sense into a body of intelligible doctrine was too great a task for Hake, the mayor and steward of Windsor, minor satirist and poet. He can hardly be blamed for postponing work that was to take 200 years.

The preface to the present edition, by Professor Thorne, is, as one would expect, wise and well-informed. The general editor of the series published for the Yale Law Library by the Yale University Press reveals his complete familiarity with the legal literature of the period. There is also an Introduction of seventeen pages by the editor, D. E. C. Yale, and this adds to the interest and value of the edition. The work of publication is carefully done. It will preserve a minor but interesting and very representative sample of Elizabethan lawyers' thought.

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7. P. viii.

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