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Some Aspects of Fifteenth Century Chancery

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SOME ASPECTS OF FIFTEENTH-CENTURY CHANCERY

I

IT is now more than thirty years since Justice Holmes in a brilliant and daring essay[1] set on foot an inquiry[2] which has revealed the remote beginnings of English equity. Equity and common law originated in one and the same procedure and existed for a long time, not only side by side, but quite undifferentiated from each other. Their origin is to be found in the system of royal justice which the genius of Henry II converted into the common law; but this royal justice was in the beginning as much outside of, or even antagonistic to, the ordinary judicial system of the Anglo-Norman state as was ever the later equity of the Chancellor. There was no equity as a separate body of law; for the king's justices felt themselves able to dispense such equity as justice require. In fact to speak of law and equity is to import into the twelfth and thirteenth centuries a modern distinction which is absent. Just as Bracton was inclined to see in the King's Bench and Council but one court, so he regarded equity as an active, mitigating principle working in and through the administration of royal justice. The manner in which equity in this sense disappeared from the common law is become common knowledge. The jealousy of parliament, which may be but the reflection of the attitude of the community at large, the realization that the power to make new writs is a power to make new law, forced the writs into a closed cycle, and put an end to the free development of the common law. Without doubt the judges, who seem to become more conservative as ecclesiastics sit more rarely on the bench, furthered this restrictive movement. At all events the law became so rigid and inflexible, its practitioners were so absorbed in nice questions of form

[1] "Early English Equity," 1 L. QUART. REV. 162; SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, II, 705.

[2] Through the work of Maitland, and more recently of Mr. Bolland this new field has been explored. Dr. Hazeltine has well summarized the results of the earlier work: "The Early History of English Equity," ESSAYS IN LEGAL HISTORY (ed. Vinogradoff), 261. A very careful treatment of the whole subject is given by George Burton Adams, "The Origin of English Equity," 16 COL. L. REV. 87.

and pleading, that there was no longer room for equity. This has become the situation early in the fourteenth century; as a result a new field for the royal prerogative is found and equity is administered in the council from which in the next century the Court of Chancery breaks off.

If this view be correct, equity antedates the appearance of chancery as a court by more than two hundred years. It has not been accepted without challenge and the question of the continuity of equity has been raised.[3] Into this question I do not propose to enter; for I am concerned primarily with the evolution of equitable doctrines through chancery in the fifteenth century. The lines upon which modern equity has developed were determined in this crucial period. For good or ill equity is outside the common law, even antagonistic to it. It becomes in a very real sense a rival system, as contemporary testimony bears witness. "For these two lawes," complains an aggrieved sergeant,[4] "one being contrarye to the other cannot stande together but one must be as voyde. Wherefore it must needs followe, that, if this lawe be maintayned in chauncery by a subpoena, the common lawe which is contrarie to that, must needs be as voyde and of none effect." Although it has become the fashion[5] to discount the opposition between equity and law, this very opposition was an important factor in the fifteenth century. One should notice further that the shaping of equity is in the hands of ecclesiastics who knew little of the common law but a good deal of another system; their interference with the law is indirect, but more marked in that they act through an independent court.[6] For the future there will be two distinct bodies of doctrine which clash with each other. Thus

[3] See Holdsworth in 26 YALE L. J. 1, and the reply of Professor Adams, 26 YALE L. J. 550. As Professor Adams has pointed out, there is no necessary disagreement in the two positions. It should be noticed, however, that the term, "equity," is commonly used in the courts of law in the sense of analogy (BROOKE, ABR., Parliament, 13, 19 *ff.*), whereas in St. German's treatment equity excepts from the law on grounds supplied by reason and conscience. See Vinogradoff in 24 L. QUART. REV. 379. Though upon the institutional side there seems to be no break in the continuous development of equity, the use of the words, "reason" and "conscience," indicates the reception of new doctrines through which the older equity is quite transformed.

[4] "A Replication of a Serjaunte . . . ," HARGRAVE, TRACTS, 323, 325.

[5] *E. g.* MAITLAND, EQUITY, 17 *ff.* But *cf.* Hohfeld, "The Relations between Equity and Law," 11 MICH. L. REV. 537; "The Conflict of Equity and Law," 26 YALE L. J. 767. Professor Hohfeld's argument appears to me to be unanswerable.

[6] Holdsworth, "The Early History of Equity," 13 MICH. L. REV. 294.

English equity becomes a radically different thing from what it would have been had it remained a part of the common law.

Fifteenth-century chancery presents a number of interesting problems. One of the first relates to the organization of the Court of Chancery itself. Many cases that seem to begin in chancery are in fact heard and determined in the council. Hence an attempt must be made to differentiate the two jurisdictions and to determine when and how chancery became an independent court. We know further that the Chancellor sometimes consulted judges and even apprentices of the law. Was this a normal or abnormal procedure, or, what is more important, does it indicate that chancery borrowed from the common law or at least followed the analogy of legal doctrines? Again the rivalry between the two courts which culminated in the struggle between Coke and Lord Ellesmere is exhibited plainly in the fifteenth century. How far did the fear of an encroaching, competing court influence and stimulate the growth of the common law itself? Finally we may ask the most important question of all: In what kinds of cases did the Chancellor grant relief, and what was the basis of the doctrines he developed? Contrary to a somewhat general notion, I venture to suggest that most of these questions have not been finally solved, and, though I make no pretense of possessing the talisman, I propose to examine the material out of which the final solution may perhaps be worked.

II

As the common practice has been to place great reliance upon the Year Books it will be well to take notice of them first. For the collection of the cases, most of which are very familiar, I have relied upon the abridgments. The oldest abridgment[7] notices but four cases, one under the title "Conscience" and three under "Sub pena." Fitzherbert[8] has some twenty-three, or as you please to count, twenty-four entries, all under the title, "Sub pena." Brooke's "Abridgment" has the most complete collection and is further distinguished by a more discriminating classification.[9] His

[7] STATHAM'S ABRIDGMENT, *Epitome Annalium Librorum Tempore Henrici Sexti*, was published *circa* 1495.

[8] Fitzherbert has all of Statham's cases; in at least one instance he appears to have copied Statham verbatim: FITZ. ABR., Sub pena, 23; STATHAM, ABR., Conscience, 1.

[9] In addition to the titles quoted, notes concerning chancery and equity will be

most extensive title, "Feffementes al uses,"[10] unfortunately throws little light on equity; the most interesting cases will be found under "Conscience & Sub pena & Iniunctions."

The weakness of this line of authority is revealed by a cursory examination. It represents in the main an extremely brief period, the short reign of Edward IV; perhaps this is explained by the fact that the appearance of a chancery case in the Year Book is largely fortuitous. Moreover a goodly number of these reports are inaptly described as cases. They are mere incidental references to chancery in an action at common law, as, for example, the remark[11] of Moyle, J., in a writ of *Quare Impedit*, or Littleton's casual statement,[12] "*Jeo veia un foits un Subpœna port par tiel.*" Again an equity case is rehearsed in an action of debt,[13] or there is a necessary reference to chancery because an injunction has "arrested" judgment in trespass in the King's Bench.[14] If to these be added the extra-judicial expositions of "conscience" by the judges and an occasional reporter's note, fully half the cases are accounted for. The remaining half do purport to be real proceedings in chancery, but they are cases in which the Chancellor sought the advice of the judges, sergeants and even apprentices, usually in the Exchequer Chamber. Now from this the inference has been drawn that the Chancellor constantly resorted to the advice of the judges before deciding a doubtful case. I do not think the evidence of the Year Books is of great value upon this point; for the mere fact that a number of cases of consultation is reported is quite without significance. It is precisely those cases in which a common-law judge did assist that the reporter will take down in his notebook. The apprentice is a regular attendant of the common-law courts; that is an important part of his education. He does not attend hearings in chancery, and his opportunity to report an equity case is chiefly through the arguments before the judges. It is certainly worthy of note that the decrees in chancery,[15]

found under Actio sur le cas; Barre; Courts; Iudges, Iustices et lour power; Iudgementes; Iurisdiction; Parliament; *etc.*

[10] Probably the collection of cases under this title was occasioned by the passage of the Statute of Uses.

[11] Y.B. 6 EDW. IV, 10. 2 (*ad fin.*). See also Y. B. 21 EDW. IV, 22. 6.

[12] Y. B. 7 EDW. IV, 18. 16.

[13] Y. B. 37 HEN. VI, 13. 3.

[14] Y. B. 22 EDW. IV, 37. 21.

[15] Of the decrees which I have been able to examine, the great majority is made by the Chancellor alone.

so far as they are at present available, do not bear out the notion of frequent consultation. Further, many of the cases in the Exchequer Chamber concern uses; this is not without significance. Whatever his general attitude, the common lawyer realized that in protecting the use the Chancellor was doing a work of vast importance. Indeed, it is not improbable that one reason why the common law failed to give any legal effect to the use was that to do so would rob that device of much of its efficacy. If the statement [16] of Frowyk, C. J., be correct, in the time of Henry V the greater part of the land of England was in feoffment to uses; judges and attorneys, like other men, were vitally interested in the protection of the use. Again, as Spence [17] has pointed out, once the use is recognized, there is no occasion to depart from regular legal rules; and, as the Chancellor sought to direct the use by analogy to rules governing the devolution of the legal estate, the presence of the judges was necessary and important. But the Year Books do not explain why or how the Chancellor came to enforce uses, nor do they give much evidence of his theory and practice.

With regard to the cases as a whole, two observations may be made. The judges often base their advice, not upon the law, but upon their own ideas of "conscience." In an interesting argument, which unfortunately is reported only in an abridgment,[18] Prisot, C. J., pressed very strongly a legal analogy; he was interrupted by Fortescue,[19] C. J., who said, "*Nous sumus a arguer la consciens icy et nemy la ley. . . .*" This is an important admission in that it recognizes "conscience" as a juristic principle which finds its proper application in chancery. But to accept such interpretations of "conscience" as appear in the remarks of the judges is to approach the doctrines of equity from the wrong direction. In the second place, the reports come from hostile, or at all events, prejudiced

[16] Y. B. 15 HEN. VII, 13. 1. In the Year Book the name is spelled Frowike. It is doubtful whether he was Chief Justice at this time. *Cf.* FOSS, JUDGES, *sub nom.*, Frowyk. The statement quoted is repeated by COKE, CO. LITT. 272 *a*.

[17] 1 EQ. JUR. 384.

[18] FITZ. ABR., Sub pena, 23.

[19] Perhaps Fortescue's aspirations to the chancellorship, which he later asserted he had held, gave him a peculiar tenderness for "conscience." The derivation he suggests for the word ("*consciens dicitur a con et scio, quasi simul scire cum deo, scilicet de sauer la volunte de dieu cy procheine come reason puit*") seems to indicate a familarity with scholastic philosophy. *Cf.* DIALOGUS DE FUNDAMENTIS LEGUM ANGLIE, f. vii, *verso*.

witnesses. It was a constant complaint of the common lawyer that the Chancellor did not acquaint himself sufficiently with the common law; indeed Coke [20] singles out Sir Robert Parning for especial praise for that he "knowing that he that knew not the common law could never well judge in equity . . . did usually sit in the Court of Common Pleas . . . and heard matters in law there debated." But this practice of the earlier chancellors, admirable as it may have been,[21] was not followed by the ecclesiastical chancellors of the fifteenth century. In consequence it is not surprising that judges and sergeants took such opportunity as a common hearing in the Exchequer Chamber afforded to express themselves vigorously on what should be the principles and practice of the Court of Chancery, so much so as sometimes to draw a sharp reproof.[22] Hence it is necessary to read their statements in the light of their prejudices.

I do not wish to belittle the Year-Book reports of chancery cases; merely do I desire to emphasize their limitations. They preserve the only extant accounts of what the Chancellor is supposed to have said and some of his remarks are very interesting. It would be a real loss did we not have a generalization [23] of the "cases of conscience" from the mouth of the Chancellor; nor can one overlook the vividly reported debates, the sudden outburst of Cardinal Morton [24] who justified a subpœna by saying, "*Nullus recedat a Curia Cancellariae sine remedio*," and Bishop Stillington's maxim,[25] "*Deus est procurator fatuorum.*"[26] These and many more are of great value, as is likewise the evidence of the pressure exerted by chancery upon the common law.[27] Thus if they be

[20] 4 INST. Cap. viii, 79. Parning was, in Coke's words, "Chief Justice of England," before he was made Chancellor.

[21] It excited such violent admiration in Lord Campbell that he supposes Parning to have "laid the foundation-stone of that temple of justice, afterwards reared to such fair proportions by an Ellesmere, a Nottingham, and a Hardwicke." LIVES OF THE CHANCELLORS, (3 ed.), I, 246.

[22] An attorney who sought to parade his views was halted by the abrupt statement, "*ne parlez puis de l'autorite de cest court.*" Y. B. 27 HEN. VIII, 14. 6 (*ad fin.*).

[23] Y. B. 7 HEN. VII, 10. 2.

[24] Y. B. 4 HEN. VII, 4. 8.

[25] Y. B. 8 EDW. IV, 4. 11.

[26] The Y. B. reads, "futurorum," an obvious mistake. See 24 L. QUART. REV. 373, 380.

[27] *E. g.*, Fairfax, J., in Y. B. 21 EDW. IV, 22. 6. Note the surprising assertion that the King's Bench may issue an injunction. A clearer statement appears in BROOKE, ABR., Conscience, 21.

properly utilized and brought into relation with other material, no misapprehension will result; but to rely upon them for adequate evidence of the jurisdiction of chancery is to invite error. And yet this is precisely what has often been done. Out of a mass of books West's "Symboleography" may be instanced as typical. His analysis of "causes remediable in Chancery,"[28] is based largely upon these very cases, supplemented by references to the "Diversity of Courts" and "Doctor and Student." The latter treatise is indeed of unique importance, but it has often been misinterpreted. Even a more striking example is that of Coke, whose account of chancery[29] is not merely colored by his native bias, but is subject to the same limitations in the matter of authority. Thus the tradition became established, and it has endured to our own time. Now the vice of this method of approach is not only that it ignores the material out of which a study of chancery should be made, but it persists in envisaging equitable doctrines through the medium of common law. In part this is responsible for the widespread impression that the chancellors decided cases without regard to principle or precedent, and gave free play to whim and caprice. It has led also to a somewhat contemptuous view[30] of the Court of Chancery and to an utterly inadequate conception of the extent of its jurisdiction. We are thus treated to a picture of chancery painted by the common lawyer, — a picture that is not simply imperfect, but in many particulars untrue.

The only satisfactory evidence of the actual proceedings in chancery is to be found in a series of documents preserved in the Public Record Office and known as the Early Chancery Proceedings.[31] This collection contains petitions addressed to the chancellors from the time of Richard II to the early years of Henry VIII. It is estimated that there are some three hundred thousand; the mere number is bewildering, and it is only since the record office has begun to prepare careful calendars[32] that anyone will have the

[28] SYMBOLEOGRAPHY OF THE CHAUNCERY (ed. 1618), § 18.

[29] 4 INST. Cap. viii.

[30] *E. g.*, REEVES, HIST. OF ENG. LAW, (2 ed.), III, 384: "Its jurisdiction did not comprehend a great extent and the exercise of it was feeble and imperfect . . ."

[31] Hereafter cited: E. C. P. The petitions are divided into bundles. There is no standard method of citation; for convenience I have adopted the method of indicating the number of the bundle in Roman numerals and the number of the petition in Arabic numerals. Thus, X:10 means Bundle ten, petition ten.

[32] The calendars are more useful to a pedigree hunter than a legal historian; for,

hardihood to attack so huge a mass of material. A portion, unfortunately very small, of the petitions has been published. When the Calendars of Chancery for the reign of Elizabeth were printed the commissioners published a number of specimen petitions drawn from the earlier series. It is impossible to tell upon what principle of selection they proceeded, nor how far the petitions there presented are representative of the whole body. In 1896 the Selden Society carried on the work, abandoned half a century earlier, with the "Select Cases in Chancery," [33] edited by Mr. W. P. Baildon. Elsewhere other specimens[34] will be found, but although much good work has been done, the fact remains that less than one per cent of the petitions is as yet published.

The standard collections have rendered the form of the petition [35] so familiar as to require no comment, but one of its defects as evidence must be noticed. So far as its extraordinary jurisdiction is concerned, chancery [36] was not a court of record in the fifteenth

though names of parties and places are always given in detail, the reader is often left to guess the nature of the suit.

[33] In this collection all the petitions in Bundle III are printed, and in addition a number of select petitions. Mr. Baildon has prepared the first scholarly edition of the Chancery Proceedings.

[34] ARCHAEOLOGIA, 59 (Part. I) 1; 60 (Part II) 353, collected by C. Trice Martin, Esq.; THE ANTIQUARY, IV, 185; V, 38, collected by S. R. Bird, Esq. In OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, IV, 172, I have brought together petitions to illustrate the treatment of contract in chancery. If other printed specimens exist I am not familiar with them.

[35] The statement of the case is frequently so informal and in language so uncouth or obscure that it seems clear that many petitioners were without professional advice. This marked characteristic of the chancery petitions was found to have a counterpart in the Bills in Eyre, recently discovered by Mr. Bolland, and published in 30 S. S. In the first enthusiasm of discovery, it was assumed [*e. g.*, Pollock, "Transformation of Equity," ESSAYS IN LEGAL HISTORY (ed. Vinogradoff), 291], that in the bills the ancestor of the petition was at last found. This assumption has not stood the test of careful analysis, and the better opinion seems to be that the petition in chancery developed from the petition to the council. Holdsworth, 26 YALE L. J. 14; Adams, 16 COL. L. REV. 87, 98; Powicke, 30 ENG. HIST. REV. 330, 332; BALDWIN, KING'S COUNCIL, 283, note 1.

[36] There was a common-law side to the Court of Chancery of which a familiar account is given by COKE, 4 INST. Cap. viii, 79. For the most part the proceedings were begun by common-law process, and it is generally agreed that in the exercise of this jurisdiction the Chancellor followed the law and could not advert to matters of conscience. Since Pike published the case of Hals *v.* Hyncley, 1 L. QUART. REV. 443, it has been known that these proceedings sometimes began by bill, and that the defendant was brought into court by subpœna. Hence one must always be on one's guard; for a petition in the Early Chancery Proceedings may involve a case on the common-law side of the court.

century. The decrees were not enrolled,[37] and the only record which we have of them is in the chance case when the decree was indorsed upon the bill itself. The absence of records gives color to the complaint of the common lawyer and it is doubtless true that the ecclesiastical chancellors did not feel themselves hampered by the lack of a previous decision. Still the fact that so many bills have been preserved indicates that they were kept for some purpose, and we know that in some cases the chancellors did consult the old bills for guidance.[38] However if a bill be unindorsed it is impossible to say that relief was granted in that particular case, and as the great majority of the bills are without indorsement, the limitations of the printed collections are apparent. This difficulty can be overcome only through an intensive study of the Early Chancery Proceedings. I wish to point out some lines along which it may be profitably pursued.

III

Perhaps no situation is better calculated to reveal the antithetical attitudes of equity and the common law than the simple one which arises when an obligor has satisfied his obligation, but has taken no acquittance.[39] If the obligee brings an action of debt, the obligor cannot wage his law against the sealed instrument nor plead payment, and hence he is without defense. The law's failure to protect the foolish person who is so stupid as not to protect himself is justified by the theorist very easily.

"It is ordained," says the Student in the Dialogue,[40] "by the Law to avoyd a great inconvenience that else might happen to come to many people; that is to say, that every man by a Nude parol, and by a bare Averrement should avoid an Obligation. Wherefore to avoid that inconvenience, the Law hath ordained, that as the defendant is charged by a sufficient writing, that so he must be discharged by sufficient writ-

[37] The decree rolls begin in 26 HEN. VIII, the decree and order books in 36 HEN. VIII. Some specimens will be found in MONRO, ACTA CANCELLARIAE, 328 *ff.*

[38] In Y. B. 22 EDW. IV, 6. 18, the Chancellor is reported to have said that it was the common course to grant relief in certain cases, "*car nous trovoms recorde en le chancery de tiels.*" I believe this must refer to the indorsements on the petitions. *Cf.* an interesting decree, E. C. P. XXIX, 13; OXFORD STUDIES, IV, 216.

[39] Variations will be found in OXFORD STUDIES, IV, 85–97.

[40] DOCTOR AND STUDENT, Dial. I, chap. 12. A similar argument is made by the sergeant, HARGRAVE, TRACTS, 323, 324.

ing, or by some other thing of as high authority as the Obligation is. And though it may follow there upon, that in some particular case a man by occasion of that generall Maxime may be compelled to pay the money againe that he payd before: Yet neverthelesse, no default can be thereof assigned in the Law."

The Chancellor took no such beatific view of the law; he did regard the "nude parol," and he did not hesitate to order the cancellation of an obligation.[41] However the order to cancel an obligation may not produce the desired result; for if the obligee refuses to produce his obligation in chancery the action at law can proceed. Although there was some fluctuation of opinion among the judges as to the effect of a decree of cancellation, it was settled in the reign of Henry VI,[42] if not earlier, that the decree of itself could have no effect upon the instrument: its operation was confined to the person of the defendant and did not extend beyond him. It was thus that the theory that equity acts *in personam* was fastened upon the Court of Chancery, but it speedily found a method of turning this limitation to advantage. An injunction is but an order to the person; the common lawyer was precluded by his own decisions from viewing it in any other light. Hence the Chancellor could well maintain that an injunction against prosecuting an action at law was merely an order to the defendant and

[41] An extreme case arises when the instrument chances to be a statute merchant; for that is matter of record and if the Chancellor may tamper with it, what records of the law are safe? In Y. B. 22 EDW. IV, 6. 18, such a case was put before the judges in the Exchequer Chamber. A recognizor in a statute merchant had paid the money but failed to take a release; the recognizee proceeded to sue out execution. If he were brought into chancery he would admit payment; ought a subpœna to be granted? Fairfax declared that it would be against all reason to grant a subpœna and thus by the testimony of two witnesses to upset matter of record. (There is no significance in the number, two. Commonly a much larger number were heard in chancery; and *cf.* Y. B. 16 EDW. IV, 9. 10, *ad fin.*). The recognizor ought to have protected himself; "*moi semble qu'est sa folie.*" The Chancellor replied that to grant a subpœna where an obligation was paid was common practice in chancery and he went on to compare the relief given against the heir of a feoffee to uses. This particular illustration roused the ire of Hussey, Chief Justice of the King's Bench; if descent or a statute merchant might be impugned by the testimony of two witnesses, all legal records would be endangered. But Hussey would place any sealed instrument in the same category, and he concluded grandly, "*Jeo die ceo pur ley et issint est le ley.*" The Chancellor, according to the reporter, conceded the exception of the statute merchant. But see the decree in 10 S. S. 140, where a statute merchant is ordered canceled by the advice of the judges.

[42] Y. B. 37 HEN. VI, 13. 3.

not an interference with a court of common law. The judges took with ill relish this neat counter move, which was the more exasperating, in that they had no process wherewith to retaliate;[43] and directly the injunction was used with effect the seeds of a long and bitter struggle were sown. The following petition, hitherto unpublished, presents through its indorsement more detailed evidence of the procedure of chancery than any other that I have seen. As it bears directly upon this question discussed so bitterly in the Year Books, the reproduction of the *ipsissima verba* seems warranted.

To the most reverent ffader in god & his good & gracioux lord tharchebysshopp of Caunterbury & Chaunceler of Inglond.[44]

In humble wyse shewith unto your good lordshipp Thomas Iden of Stoke in the Countie of Kent Esquier, that, where he was bounde by his Obligacion to oon Edward Wode, late Citezen & Grocer of London, in the some of xvij li. vj s. viij d., sithen whiche tyme of makyng of the seyd Obligacion the seyd Edward Wode in his lif Resceyved xiiij li. by thandes (*sic*) of dyvers Sufficyent & Credybyll personez; And the seyd Thomas Iden & the seid other personez by whoos handes the seyd xiiij li. was payde, of great trust & Confydence and by cause the seyd somez of money were payed at dyvers dayes and tymes, the seyd Obligacion was left & sufferd to remayne in the handes & kepyng of the seyd Edward Wode in his lif; And after the decease of the seyd Edward Wode the seyd Obligacion came to thandes (*sic*) of Angneis, late wyf of the

[43] Punitive damages were awarded where an injunction was dissolved, Y. B. 21 Edw. IV, 78, 20, but such a method would not be available if chancery retained jurisdiction. In Y. B. 22 Edw. IV, 37, 21, the judges urged a plaintiff to proceed to judgment in defiance of an injunction and assured him that if he were imprisoned in the Fleet by the Chancellor, they would release him by *habeas corpus*. But the plaintiff would not be persuaded.

[44] E. C. P. CCCXXVI, 49. Two other indorsed petitions involving injunctions against actions at law may be of interest. In E. C. P. LIX, 242, an obligor, the petitioner, alleges that the obligee, defendant, altered an obligation so as to make it read 40 *s.* instead of 20 *s.* and brought an action of debt upon it by attorney. The obligor pleaded "nat his deed," but the obligee "hath caused a panell to be retorned of soche persones of his affynyte which woll here no evydence for the part of your seid Orator. . . ." A subpœna was sought. In his answer, E. C. P. LIX, 243, the defendant denied every allegation in the petition, but the decree, indorsed on the petition, shows that an injunction was granted staying the action at law until the matter could be heard in chancery. This case was in 19 Edw. IV. Another petition, E. C. P. LX, 84 (22 Edw. IV), prays for relief against suit on a bond of one hundred pounds, given to secure a debt of half that amount. The defendant, it is alleged, by divers devices made it impossible for the petitioner to pay the debt. An injunction, in terms similar to those in the principal case, was granted.

seyd Edward Wode, pretendyng to be executrice of the testament of the seyd Edward Wode, whiche Angneis hath taken to husbonde oon Thomas Denys; And howe be it the seyd Thomas Iden hath be redy to paye to the seyd Agneis iij li. vj s. viij d. residue of the seyd xvij li. vi s. viij d. and to have delyverie of the seyd Obligacion, that to doo the seyd Agneis hath alwey refused; yet that nat withstandyng, the seyd Thomas Denys and Agneis hys wyf as executrice of the testament of the seyd Edward, of their Covetyse mynde & yevyll dyspocycion have Comensed and (*sic*) accion of Debt ayenst your seyd Supplyaunt upon the seyd Obligacion afore the kynges Justices of his Comon Benche, entendyng by the same to recover the seyd xvij li. vj s. viij d. ayenst all ryght and good conscience, wherof your seyd Supplyaunt hath no remedy by the Comon lawe of this lande: It may therefore please your good and gracieux lordshipp, the premissez tenderly to consydre & to graunt a writt of Sub pena to be dyrectyd to the seyd Thomas Denys and Agneis his wyf commaundyng them by the same to appere be fore the kyng our souverayne lord in his Chauncery at a Certeyn day & under a certeyn payn by your good lordshipp to be lymytted there to answere to the premissez; And that it may please your good lordshipp to commaunde & streytly to engoyne the seyd Thomas Denys and Agneis that they procede no fferther in their seyd accion unto the tyme the premissez and all Circumstauncez therof be dewly examyned and determyned as shall accord with reason & good conscience, And your seyd supplyaunt shall dayly pray to god for preservacion of your good lordshipp.

PLEGII DE PROSEQUENDO:[45]
Johannes Smyth, *de* London, Gent'.
Henricus Horn, *de eadem*, yoman.

INDORSED: *Coram Rege in Cancellaria sua die lunae xxvj die Octobris Anno Henrici* vij xxij°.

Memorandum quod termino[46] *Michaelis videlicet vicesimo octavo die Octobris Anno regni regis Henrici septimi vicesimo secundo iniunctum fuit per dominum Cancellarium Angliae et Curiam Cancellariae Bartholomeo*

[45] At the end of many petitions there appear the names of the persons who stand as pledges for the petitioner. This was probably an ancient practice, *cf.* BROOKE, ABR., Conscience, 24, but by Stat. 15 HEN. VI, c. 4, it was provided that no writ of subpœna should issue until the petitioner had found sureties to satisfy the defendant for his damages in case the allegations made in the petition were untrue. This soon became a mere form, for the pledges were given fictitious names, the draftsman using colors or fish according to his fancy, until at length John Doe and Richard Roe appear. MARTIN, ARCHAEOLOGIA, 60 (Part II), 354–55.

[46] The reference to Michælmas term is puzzling. It may be that I have misread the manuscript. Chancery did not keep terms; the court was always open. BROOKE, ABR., Iurisdiction, 74; 1 Spence, EQ. JUR. 383.

Prous attornato infrascriptorum Thome Denys et Agnetis sub pena viginti librarum de terris et catallis ipsius Thome Denys levenda quod nec ijdem Thomas et Agnes nec aliquis alius eorum nomine aut per eorum mandatum, auctoritatem seu instanciam, in aliquo placito siue querela materiam infracontentam aliquo modo tangentem coram Justiciis dicti domini Regis de Banco communi seu alibi ulterius persequantur, quousque materia in infrascripta peticione contenta coram dicto domino Rege in Cancellaria sua praedicta pendens indecisa plenarie fuerit descussa et determinata vel aliter a dicto domino Cancellario et Curia habuerint licenciam.

Memorandum quod termino sancti Michaelis videlicet vicesimo octavo die Octobris anno Henrici vij xxij° dies data est partibus infrascriptis ad producendos testes ad probandum materiam infracontentam hucinde usque cras sancti Martini tunc proxime sequentis cum[47] *expressita renunciacione ulterioris termini dilacione ex assensu parcium.*

Memorandum quod termino sancti Michœlis videlicet decimo septimo die Novembris anno Henrici vij xxij° iniunctum fuit per reverendissimum in Christo patrem Willelmum Cantuariensem Archiepiscopum Cancellarium Angliae Thome Iden quod ipse adducet vel adduci faciat coram domino Rege in Cancellaria sua infra novem dies post dictum decimum septimum diem Novembris proxime et immediate sequentem omnimodas scripturas et litteras acquietancie solucionem cuiusdam summae infrascripta peticione contentae concernentes [vel quod][48] *sinautem*[49] *Thomas Denys et Agnes a dicta curia [quiate] dimittantur.*

Memorandum quod termino sancti Michaelis videlicet vicesimo nono Novembris Anno Henrici vij xxij° ordinatum et decretum fuit per venerabilem in Christo patrem Willelmum Cantuariensem Archiepiscopum Cancellarium Angliae et Curiam Cancellariae quod si infrascriptus Thomas Iden rationabilem finem cum infrascriptis specificatis Thoma Denys et Agnete uxore eius de et pro solucione cuiusdam summae infrascriptae infra Octavas sancti Hillarij tunc proxime sequentis minime fecerit, quod tunc praedicti Thomas Denys et Agneis ab omnibus et singulis deductis et allegatis in infrascripta peticione penitus absolvantur et a dicta curia superinde totaliter dimittantur quieti sine die et ulterius quod Iniuncio [. . .][50] *per eundem dominum Cancellarium Bartholemeo Prous attornato ipsorum Thome Denys et Agnetis ut praenotatur*[51] *facta, relaxata est ac idem Bartholemeus dicta summa xx li ea consideracione quietus et exoneratus existit.*[52]

[47] The passage "*cum . . . dilacione*" is very obscure. This portion of the decree is almost illegible and hence the reading is conjectural.

[48] Words in brackets are struck out.

[49] "*si non autem*"?

[50] An erasure; probably "*facta*" was written twice and the first subsequently erased.

[51] A conjectural reading.

[52] "*exsistit*"?

Through the decree this case can be followed from the first step to the conclusion. On the 26th of October the complainant presents his petition, praying for a subpœna and an injunction. Probably the subpœna was granted at once and two days later an injunction was issued, directed to the attorney of the defendants; in its somewhat clumsy phrase it is designed to restrain not only the attorney, but the defendants or anyone acting in their behalf, from proceeding further with the legal action until the matter be heard in chancery. The subsequent orders show that it was effective. Whether the defendants had already appeared cannot be determined; it was a common practice to grant an injunction upon the presentation of the petition. Indeed it was charged in the articles of impeachment of Wolsey that he granted injunctions without a bill. The fact that the attorney is mentioned in the order, although he is not mentioned in the petition, seems to indicate that the defendants had put in an appearance, perhaps by attorney.[53] The absence of a written answer is inconclusive. On the day on which the injunction is issued a time is set for the hearing, namely the "morrow of St. Martin" (November 12), when both parties are ordered to produce their witnesses. At this hearing the complainant was evidently unable to establish his case by oral evidence and on the 17th of November a further order is made requiring him to bring into chancery such written evidence [54] as he may have of the payment alleged in the petition. Twelve days later comes the final decree, in conditional form. Unless the complainant will make a final settlement (*rationabilem finem*) with the defendants, presumably by paying the residue of the sum due, the defendants will be dismissed *sine die*, and the injunction will be dissolved.[55] This indicates very nicely the flexibility of chancery procedure and at the same time shows the careful investigation of all the facts of the case. By successive orders the Chancellor is able to retain jurisdiction of the matter involved until final settlement; it is noteworthy that, once having taken jurisdiction, he disposes

[53] Appearance by attorney was a not uncommon practice. See 10 S. S. 1, 14 *ff.*

[54] The words, "*omnimodas scripturas et litteras acquietanciae*" may refer to a sealed release, *etc.*, but I do not so interpret them.

[55] If the change from subjunctive to indicative in the final sentence of the decree is significant, it would mean that the injunction is dissolved in any case. But the decrees rarely exhibit a nice discrimination in moods, and the indicative after *quod* is not unusual.

of all the questions and does not remit the parties to further action at law. The final decree, unlike a judgment at law which must necessarily follow the writ upon which it is predicated, may assume any form requisite to meet the exigencies of the particular case.

One phrase invites comment. The decree is made "*per . . . Cancellarium et Curiam Cancellariae.*" This form, which is very common, might lead to the inference that the decree was made, not by the Chancellor alone, but by the Court of Chancery, implying perhaps the presence of other officials, judges or councillors, as a part of the court. I believe, however, that the words indicate nothing more than that the decree of the Chancellor is the decree of the court; for the same form is preserved in general use down to the time of Charles II,[56] when there can be no question of the existence of chancery as a distinct tribunal. Further, as the council and the judges are mentioned in many decrees the absence of any mention in this case seems to be conclusive. In fact the decrees not only reveal in detail the procedure of chancery, but offer the best material out of which the two problems of the consultation of the judges and the relation of chancery to the council[57] may be solved.

IV

In retrospect at least, the two most important doctrines evolved in chancery relate to contract and uses. With reference to the first I may be brief as I have attempted to examine it in detail elsewhere.[58] The Chancellor gave relief in a very heterogeneous class of cases, but I am here concerned primarily with the simple case of parol contract, in which chancery gave a remedy nearly one hundred years before Assumpsit had been evolved out of Trespass on the Case. Appeal is made to equity not simply because the litigant seeks a better remedy than is afforded by common law; for while specific performance is granted early in the fifteenth century it is by no means the only relief sought. Chancery gave damages as well. What is most significant, however, is

[56] 1 SPENCE, EQ. JUR. 389.

[57] The relation of chancery to the council has been very carefully studied by Professor Baldwin in KING'S COUNCIL, chap. x. It may be doubted whether the decrees will throw much new light upon this question.

[58] "The History of Contract in Early English Equity," OXFORD STUDIES, VOL. IV.

that no distinction is drawn between misfeasance and nonfeasance; the Chancellor seems to have proceeded upon a purely contractual theory. Unlike the common lawyer he did not approach contract through tort. Perhaps the most striking feature of these contracts, or as the petitioners prefer to call them "bargains" and "accords," is their formless character, and indeed it was their very informality which put them without the pale of common law. The community, however, cannot await with patience the slow evolution of a legal system whose staple analogy is the technical relation of lord and tenant. Feudalism as a practical system had ceased to be of importance long before the law which was bottomed upon it had adapted itself to a new environment. The fifteenth century saw a rapid expansion of commercial enterprises and the necessity of some recognition of fluid and formless agreements became pressing. In addition the host of "bargains" between people of humble station, who from ignorance or lack of means failed to observe the technique of legal forms, cried out for attention. What more natural than that the Chancellor, who assimilated the *lex mercatoria* to the law of nature,[59] and whose court was always open to the poor, should step into the breach, and enforce promises upon the principles of reason and conscience? The extent of his activity is too evident to be dismissed casually, and no study of the development of contract is complete which fails to give due weight to the influence of chancery.

Of uses I speak with great hesitation as I have never made any effort to collect the cases from the Early Chancery Proceedings. I am confident, however, that there are hosts of such cases from the persistency with which they obtruded themselves upon my attention when I was searching for other matters. The poverty of the material relating to uses in the bills published by the Record Commissioners, of which Spence[60] complained, is entirely accidental; unfortunately the nature of the "Select Cases in Chancery" made it impossible to supply this deficiency. Doubtless the *cestui que use* first appealed to the council,[61] but by the time of Henry V petitions to the Chancellor are very common,[62] in 1450 the use is

[59] Y. B. 13 EDW. IV, 9. 5; *cf.* OXFORD STUDIES, VOL. IV, 131 *ff.*

[60] 1 EQ. JUR. 447.

[61] There was a case of a use before the council as late as Henry V. BALDWIN, KING'S COUNCIL, 278.

[62] The earliest decree in the printed collections is in 24 HEN. VI; 2 Cal. Ch. xxii.

recognized as a vendible interest.[63] It seems probable that the development of the use of land can be traced step by step through the petitions, and it is highly desirable that the evolution of the most important institution of chancery should be studied in the best sources.

But the use of land is no isolated phenomenon in chancery. There are numerous cases of uses of chattels and trusts of money. As an illustration of the latter the following petition deserves notice.

To the ryght reverent and wirchipfull lord the Archbysshopp of Canturbury and Chaunceller of Englond.[64]

Besecheth mekely your poure and continuall Bedeman, Nicholas Lyghtfote, that where oon John Lyghtfote his fader toke tokepe uppon trust to oon Robert Oke xx li. in money tobe delyvered to the forsaid Nicholas whenne he were att full age and whenne the said Robert were required, the said Nicholas divers tymes and oft hath required after the deth of his ffader hath required [65] the forsaid Robert tomake delyverie to him of the said xx li. after the will and entent of his fader, whech todo the said Robbert utterly hath refused and yit refuses to the grete hurte and hynderyng of poure Suppliant, Consideryng ryght gracious lord that your poure bedeman hath no remedy atte commone lawe: Pleas hit your ryght gracious lordshipp to consider thies premisses and there uppon of your good grace to graunt to your poure Suppliant a writt sub pena direct to the said Robert gyfyng hym in charge to appere before yow in the Chauncerie att a certayn day under a certayn payne as good faith and conscience requiren, and that for the luf of almyghty god and in the way of charite.[66]

A single unindorsed petition is entitled to little weight, and I should not venture to print this one except that I believe it to be typical of a large class,[67] of which representatives may be found throughout the fifteenth century. If the real intent of the parties was that the specific twenty pounds be delivered to the petitioner, there would be a true trust in the modern sense. But it may be

[63] E. C. P. XIX, 59; OXFORD STUDIES, VOL. IV, 199.

[64] E. C. P. XVI, 627. The date cannot be fixed with certainty. It may be as early as 8 HEN. IV; it is not later than 35 HEN. VI.

[65] The repetition of the words "hath required" is quite characteristic of the careless phrasing of many petitions.

[66] The "pledges to prosecute" are omitted.

[67] E. C. P. XVI, 628 is a case precisely similar. In examining the Chancery Proceedings I noticed many cases of this type but unfortunately did not transcribe more than one.

doubted whether the ecclesiastical chancellors demanded in all cases the existence of a specific trust *res;* the money is delivered in confidence, and if confidence raises a binding obligation,[68] it may be satisfied by the delivery of an equivalent twenty pounds. At the same time this transaction may be viewed as a contract, and as equity readily recognized the right of the beneficiary to sue on the contract the remedy sought here could be supported on that theory. Confessedly the subject needs further investigation; it may be that a careful study of the petitions involving trusts of chattels and money would throw new light upon the development of the trust idea in chancery.[69]

V

"Three things are to be judged in court of Conscience: Covin, Accident and breach of Confidence." So runs the antique rhyme, attributed to Sir Thomas More, which has often been quoted as a summary of the extraordinary jurisdiction of chancery. Fraud (covin) and accident must be passed by, copiously as they might be illustrated from the petitions; I merely wish to notice one or two further cases in which "conscience" may be involved. The first is suggestive of a familiar problem in Quasi-Contract. In a peculiarly artless petition [70] one John Trerise recounts his plaint. He chanced to be in London with his friend John Gotholhan when the latter borrowed forty shillings of a certain Henry Mederose.

"The whiche Henry," continues the complainant, "asked the said John Gotholhan ho shuld be his suerte for the said xl s. and he answered and seid . . . 'there nedith no suerte for this money betwene you and me, for we be of olde aqueyntaunce and knowledge;' and so they were agreed. And for asmuche that your said suppliaunte thenne seid to the said Henry these words, 'I trow ye dare not dowt of youre payment at the said day by cause of youre olde aqueyntaunce,' the said Henry hath taken a pleynt of dette withynne the said Citee ayenste your said suppliaunte supposyng that he undirtoke for the said xl s. And by force

[68] As to the effect of "confidence," see Vinogradoff in 24 L. QUART. REV. 373, 381.

[69] There is danger in focusing attention too severely upon any one institution. The protection of the use proceeded *pari passu* with the enforcement of parol contract. There seems to be an interaction of principles between contract and use, and the doctrine of "conscience" is involved in both. But I do not venture to advance a definite theory without a further study of the Chancery Proceedings.

[70] E. C. P. XLV, 292. Date uncertain, probably 1443.

of the whiche he hath paid the said xl s. to the said Henry ayenste all reson and conscience."

The complainant did not attempt to recover the money from the creditor but instead "certified the said John Gotholhan of the premisses;" the debtor refused to pay and "for asmuche that there was never any contracte [71] betwene youre said suppliaunte and the said John Gotholhan upon the said xl s. wheruppon youre said suppliaunte myght have an accion by the course of the comyn lawe ayenste the said John Gotholhan," the complainant was left without remedy except in chancery. He therefore prayed for a subpœna to the debtor, requiring him "to answere to the premisses and to be coarted to pay and contente the said xl s. to youre said suppliaunte as *reson and conscience requireth.*" It would be dangerous to draw definite conclusions from a single bill, but it suggests a problem which might well be explored by searching for analogous cases. One may hazard the guess that relief was granted. The debt is discharged by the forced contribution of the complainant. Why should he not have relief against the person who in reason and conscience should have discharged it? In fact the situation is not very different from that in which the plaintiff has under constraint discharged the defendant's obligation. The obligation of the debtor, in the absence of an express undertaking, to discharge his surety had its origin in equity and was imported into the law by Lord Mansfield. It is true that this complainant was not a surety nor even a co-obligor of the defendant; but it is recognized today that if the plaintiff discharge the defendant's obligation to prevent the sale of his (plaintiff's) property, the defendant must respond;[72] and this is clearly an equitable principle. The courts have taken the view that the seizure of the property must be a lawful seizure, which would distinguish the principal case where the action of debt was without foundation. Still it has been argued with great force that an unlawful seizure may be fully as coercive as a lawful one, and that a remedy should be given against the obligor;[73] so here the complainant is no volunteer, but

[71] The only "contract" which would give a remedy at law would be a deed. Y. B. 44 Edw. III, 21. 3; Holmes, Common Law, 264.

[72] *Cf.* England *v.* Marsden L. R. 1 C. P. 529 (1866); Edmunds *v.* Wallingford, 14 Q. B. D. 811 (1885). These cases were brought to my attention by Prof. Edgar N. Durfee.

[73] Keener, Quasi-Contracts, 395; Woodward, Quasi-Contracts, § 250.

one who has been compelled to satisfy another's debt by duress of legal action. A decision in his favor would not be difficult to support upon principle.

The other matter relates to sorcery and witchcraft. A defendant, so it is charged,[74] "*par divers artez erroneous et countre la foy Catholic, cestassavoir socery*," has succeeded in withdrawing all the water from the petitioner's pond, to the great damage of his beasts pastured in the meadow adjoining. He brought an action of trespass and after failure therein concluded that loss of water by sorcery was "*une mater de conscience.*" Another complainant[75] prays that the defendant may be restrained under oath from using "the craftys of enchauntement, wycchecraft & sorcerye" whereby "he brake his legge and [his] foul was hert." It is said that the "comyn lawe may nouzt helpe." Had the complainant but waited another hundred years he would have found a sympathetic audience in the common-law jury.[76] Perhaps the most interesting aspect of these petitions lies in the light which they throw upon the relation between chancery and the ecclesiastical court. It is the Court Christian which appears to be the proper forum[77] for pleas of sorcery and its twin, heresy, and if chancery was usurping jurisdiction in this matter it was against that court. If usurpation there was, it seems not to have been resented. Cases which have been collected by Mr. Trice Martin[78] show that the churchmen were constantly applying to the Chancellor for aid in suppressing witchcraft and sorcery or for relief when they were threatened with actions because of too vigorous treatment of witches. So when one of that kidney, *nomine* Tanglost, made "and ordeyned ij ymages of wax . . . to distrow" the Bishop of St. Davids and, dissatisfied with her own poor handiwork did "send for another woman which . . . cowde and hadd more connyng and experiens . . . and made the iij^{d} ymage," the Bishop, finding that an examination before "iiij Doctours of Devynyte" followed by spiritual "corrections" had no effect upon so hardened a sinner, appealed to chancery for a subpœna.[79] However trivial or frivolous these

[74] E. C. P. XII, 168. Another petition relating to sorcery is E. C. P. XII, 210.

[75] 1 Cal. Ch. xxiv.

[76] Thayer, "Trial by Jury of Things Supernatural," LEGAL ESSAYS, 325.

[77] HALE, CRIMINAL PRECEDENTS, *passim.*

[78] MARTIN, ARCHAEOLOGIA, 60 (Part II), 353.

[79] E. C. P. CCLXVII, 41; MARTIN, ARCHAEOLOGIA, 60 (Part II), 374.

petitions may seem, they are too numerous to be ignored. Whether or no the suppression of "nygromancy" be ordained by "conscience," it gives another indication of the large place occupied by the Court of Chancery [80] in the life of the century.

VI

The cases in which the doctrine of conscience had its peculiar application do not by any means exhaust the jurisdiction of chancery. By its methods of procedure and speed of decision the court was so definitely filling a popular need that suitors do not scruple to resort to subterfuges to gain access to chancery. Less exactness of pleading was required than by the law, and even if a bill were "misconceived" the complainant was not out of court; if he had any case at all he was permitted to amend orally, and the defendant was required to answer.[81] Thus it is that the Chancellor says that his decision proceeds "*secundum conscientiam et non secundum allegata*," [82] by which the context shows him to mean that the truth is to be discovered by any means within his power. While the common law, through its reliance upon the witness function of the jury, would not compel, nay would not permit, the defendant to testify, the Chancellor found one of his most important weapons in the examination of the defendant under oath.[83] How successful this procedure was, is evidenced by the fact that the petitions uniformly pray for such examination, often adding that the defendant has already made material admissions which it is desired to get into evidence. If we remember that the court is governed by no set terms, but is always open, its more conspicuous virtues are manifest.

Situations too complicated for the common law were easily amenable to the procedural devices of equity. Familiar examples are found in the bill of account or bill of peace [84] of which there

[80] Cases involving sorcery came before the council; chancery did not have an exclusive jurisdiction in this matter.

[81] Y. B. 16 Edw. IV. 9. 9. *Cf.* remark of the Chancellor in Y. B. 9 Edw. IV, 41. 26: "*En cest court il n'est requisite que le bille soit tout en certain solonque le solemnity del comon ley, car icy il n'est forsque petition.*"

[82] Y. B. 9. Edw. IV, 14. 9.

[83] As illustrative of this procedure, see 1 Cal. Ch. xxxi; 2 Cal. Ch. xvii; Oxford Studies, IV, 147.

[84] *E. g.*, E. C. P. CCCXXVI, 37 (the defendant is bringing three actions of debt in different courts upon the same obligation).

are numerous specimens in the Chancery Proceedings. It was likewise with the administration of estates. Some of the circumstances which may have induced the Chancellor to act are set forth in an interesting petition.[85] A widow was made sole executrix by the last will of her late husband. He was, according to her statement, "a manne of great countenaunce and putte hym selve to grete costys and charges," so much so that she feared that his "goodys woll not stretche for to pay his dettys and perfourme his last will." Hence she feared to undertake administration, yet if she did not she might "lose all suche goodys as were bequest unto her." Neither her friends nor her learned counsel could advice her what to do; in the meantime two actions of debt had been brought against her as executrix, and "how so ever she aunswere to the same as yet by the cours of the comyn lawe she must nedys entricke her self and put her in iubardie of losse of all her movable goodys." It was no baseless fear to which she thus gave expression; for the position of the executor or administrator at common law was extremely precarious. A little negligence or a slight mistake in pleading and the liability of the testator or intestate became the personal liability of the representative.[86] Naturally this was so; for the common law, with its attention always focused upon actions between plaintiffs and defendants, did not consider the estate as a whole. Inasmuch as the common-law judges had in one way or another limited the field of action of the ecclesiastical courts,[87] there was an insistent demand for some tribunal competent to deal with the settlement of the personal estate. Thus the ecclesiastic regained in chancery what he had lost as a churchman; and in a later period the system of rules governing the rights and liabilities of the personal representative were elaborated in chancery. Equity profited at the expense of both common law and Court Christian.

It is not simply the cases in which the inherent defects of common-law procedure are manifest, with which we are here concerned. While it is accepted as a fundamental rule that no successful appeal can be made to the Chancellor unless the petitioner is without remedy at law, this does but raise the further question, what con-

[85] E. C. P. XLV, 132.

[86] HOLDSWORTH, HIST. ENG. LAW, III, 462–63.

[87] HOLDSWORTH, *op. cit.*, I, 398–99.

stitutes lack of remedy at law.[88] Common-law writs are ofttimes expensive luxuries and the person injured may be too poor to avail himself of the orthodox remedy. On the other hand his adversary may be very rich and powerful, and it will be hopeless to proceed in the ordinary courts. Thus we have one class of cases which come into chancery because of the inequality of the parties. There are many pathetic recitals in the bills, in which the complainants make much of their poverty or illness and the great fear in which they stand of the defendants. "Be the Comon lawe your seid Besecher getes no remedy, ffor ther der no Sheraff execute the Comon lawe agaynes thaym (defendants) in that parte." [89] No relief can be had against the defendant "because of his grete supportacion." [90] Such are but instances. Distrust of a jury, especially if it be impaneled in a local court, is repeatedly expressed. It is said to be "parcyall and not indifferent," [91] or is described, with unconscious irony, as a "favorable enquest." [92] Indeed, so far as one can reconstruct popular feeling, a jury, far from being regarded as a palladium of liberty, was an object of aversion. If it is not the jury itself which is at fault, it is probably some local official. One instance will suffice.[93] The complainant [94] brought an "assise of fressh force . . . before the Mayor and Sheriffs of York." One of the Sheriffs before whom "the seid plee honged ther to be determyned," by color of office, "broght ynne to the seid Court atte divers dayes of the seid plee divers extorconners, riotours and misdoers . . . in terrour of the persones empanelled in the seid assize . . . so that such personnes empanelled . . . drust (*sic*) not appere & some apperyng drust not sey troughthe ther ynne." If

[88] There is one surprising ground of inadequacy of legal remedy, namely wager of law in debt or detinue, whereby the defendant may deprive the complainant of his just debt or chattel. OXFORD STUDIES, VOL. IV, 99, 111, 187 (E. C. P. XI, 427 *a*, decree indorsed).

[89] E. C. P. XXVII, 5.

[90] E. C. P. XV, 30.

[91] E. C. P. CCVI, 51.

[92] E. C. P. XXVIII, 75.

[93] Further examples of this type of case are E. C. P. XIII, 109 (Mayor and sheriffs of Bristol will not give judgment for petitioner, pretending a *certiorari* has issued out of chancery); LXXVIII, 29 ("oon of the Bailiffes of the under Shireff of Kent" arrested petitioner without cause "surmittyng that he shulbe utlawed" and will not release him "in lesse than your seid besecher will gif hym xx s. for a bribe."); XLV, 117 (Petitioner says the court "will take no credence to his enformacion" because of the might of the defendant).

[94] E. C. P. XIII, 85 (24 HEN. VI).

then we combine the cases in which through inequality of parties a remedy fails with those in which misconduct of courts and officials is the ground of appeal, we have a class which numerically at least is very large. The matters which form the substance of complaint in these cases concern ordinary legal causes of action, such as disseisins, torts and breaches of contract.

The prevalence of violence and outrage, so vividly pictured in the Paston Letters, which was induced by the disordered state of the country disrupted by civil wars, led to many cases in chancery partaking of a criminal nature. The cases are closely connected with those just discussed, but the remedy which is sought is not compensation; rather is it the punishment of the offenders. Thus where the petitioner has been threatened and assaulted, he prays that the defendants be brought before the Chancellor and "be so chastised & punysshid that it be an ensample & drede to all other sich mysdoers . . . Consideryng that the commune puple of that Shire crieth uppon the grete extorcion of hem and her mayne & that their punysshement shall cause grete rest & pees yn that Shire." [95] It is in brief the complete breakdown of the system of criminal justice which occasioned the Chancellor's action.[96] Beyond question appears the imperative need in mediæval England for a great judge who had the prestige and power to suppress the outrages of offenders who were strong enough to put at naught the ordinary processes of the law. It is but natural that such an one should be found in the Chancellor, who possessed the confidence of the king and who was not easily influenced by threats or bribes. Certainly the petitions bear witness to the belief among all classes that in the Chancellor resided a general power to redress all wrongs if for any reason the person injured could not protect himself through the common law. When the court of Star Chamber was established, most of the cases which required punishment were transferred to that tribunal, but chancery continued to give reparation under the Tudors. This phase of the jurisdiction in turn ceased as crimes diminished in frequence, and the courts of law proved more successful in giving compensation for injuries.

[95] E. C. P. X, 41. *Cf.* E. C. P. V, 175 (Ravishment and abduction of petitioner's daughter); V, 191 (Defendant, who is "*le pluis graunde meffesour, enbraceur, maigntenour et commune barretor de tout le pays*," with others of his persuasion has put petitioner in terror of his life, *etc.*).

[96] Very likely the Chancellor acted in conjunction with the council.

In this brief review some of the more important of the Chancellor's activities have been noticed. The court draws its authority, in ultimate analysis, from the royal prerogative by which it is endowed with sufficient power to give relief in cases where the common law gave no remedy, whether by accident or design. But this is not all. The Chancellor did not scruple to interfere with that precious child of the law, the *franc tenement*, where the complainant was violently dispossessed of his land. Again, if common-law process were used fraudulently, or if the inequality of parties left the legal remedy of but theoretical value, a remedy was found in chancery. Through its superior process and procedure the court dealt easily with situations which baffled the common law, and by means of the injunction and specific performance, preventive and specific relief found a place in the English legal system. But novel and effective procedure was not chancery's sole contribution; for to a new substantive doctrine was due the recognition of the use and the enforcement of parol contract. Thus through the Early Chancery Proceedings is the wide-sweeping jurisdiction of the Court of Chancery revealed; we gain an insight into its influence and importance which will go far to correct the false impression created by the Year Books.

With Wolsey the great line of ecclesiastical chancellors came to an end. Their work was done; of its popularity there can be no question. Complaints of course there are and in the sixteenth century they become loud voiced. The subpœna is not to be found in the *Natura Brevium;* it is charged that it cannot be ordained by the law of the realm.[97] But these complaints proceed almost without exception from jealous practitioners of the common law who make grievance of the competition of chancery [98] and particularly of its interference with legal rights. Herein there lies a grave danger. Such is the political power of the Chancellor that, if his action be arbitrary and unrestrained, it may be utilized for purely political ends; it is not so much the Chancellor as the king who may deride the common law. Under such a government as England was fast developing this could not be tolerated. As Sir

[97] "Replication of a Serjaunte . . . ," HARGRAVE, TRACTS, 323, 327.

[98] In 1547 "divers studentes of the Common-Lawes" complain that by reason of the activity of chancery the common law is so hampered that the courts have scarcely any business. ACTS OF THE PRIVY COUNCIL (1547–50), 48–50; Maitland "English Law and the Renaissance," SELECT ESSAYS, I, 193, note 51.

Frederick Pollock [99] has well said, the Court of Chancery could not remain a "fountain of unlimited dispensations," but must become "as regular a court of jurisdiction as any other." The change begins with James I, but its fruition comes in another century. Through the common lawyers [100] who had custody of the great seal from the Restoration onwards, the equity of chancery becomes recognized as part of the law of the land. The foundation, however, was laid already; for the ecclesiastics of the fifteenth century had erected the groundwork upon which the structure of modern equity is reared.[101]

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[99] The Transformation of Equity, ESSAYS IN JURISPRUDENCE (ed. Vinogradoff), 293. *Cf.* his statement in 21 L. QUART. REV. 434, 435.

[100] MAITLAND, EQUITY, 10. *Cf.* Professor Roscoe Pound in 30 HARV. L. REV. 201, 216.

[101] The iteration of the words, "reason and conscience," in the petitions raises a difficult problem to which only incidental reference has been made. I hope in the near future to examine the relation of the doctrine of conscience to the development of contract in chancery. The whole subject has been placed on a new footing by Sir Paul Vinogradoff's remarkable study of the influence of scholastic philosophy upon English equity, "Reason and Conscience in Sixteenth-Century Jurisprudence," 24 L. QUART. REV. 373.