

# Michigan Law Review

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Volume 81 | Issue 7

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1983

## Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case

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*British House of Lords*

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### Recommended Citation

Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571 (1983).

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# EQUITY, DUE PROCESS AND THE SEVENTH AMENDMENT: A COMMENTARY ON THE ZENITH CASE\*

Patrick Devlin\*\*

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## I. INTRODUCTION

The seventh amendment to the United States Constitution requires that “[i]n Suits at common law . . . the right of trial by jury shall be preserved.” What exactly is a suit at common law? When the amendment was enacted in 1791, there was no law that was com-

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It has long been established in American law that the “suit at common law,” the subject of the seventh amendment, refers to the common law of England as it was at the time of the amendment in 1791. In 1979, the author was commissioned by the law firm of Wilmer, Cutler & Pickering to make a study of the relevant provisions of English law in connection with litigation (now terminated, except for one case in which the possibility of discretionary Supreme Court review on other issues remains) involving the International Business Machines Corporation. A previous article in the *Columbia Law Review* describes the results of this study. See Devlin, *infra* note 10. The present article is a continuation of this study. It reexamines the legal position taken in the prior article in view of the decision in *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980). Both articles are based on material produced by Mr. David Yale, Fellow of the British Academy, Fellow of Christ's College and Reader in English Legal History at Cambridge University, and by Mr. Nicholas Le Poidevin of the English Bar. In addition, the themes developed in this second article have called for the consideration of a number of American authorities among which the author would not have dared to tread without the guidance of Lloyd N. Cutler, James S. Campbell, and Andrew N. Vollmer, of the above law firm.

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mon to all the states. In 1812 Supreme Court Justice Story, in a Circuit Court ruling, held that the common law alluded to was the common law of England, "the grand reservoir of all of our jurisprudence."<sup>1</sup> This means that when today an American judge has to decide whether in any set of proceedings trial by jury is constitutionally required, he has to ask himself whether in England in 1791 the case would have been tried at common law. That is the test: it has come to be called the historical test.<sup>2</sup>

In England in 1791 there were three courts — the King's Bench, the Common Pleas and the Exchequer — administering the common law; there were quite a number of other courts, including an Admiralty Court and an Ecclesiastical Court; above all there was the Court of Chancery administering equity. If each of these courts had had exclusive jurisdiction over certain subjects, there would have been comparatively little difficulty in distinguishing a suit at common law from a suit in equity or in admiralty or in any other branch of the law; it would have been done simply by an examination of the subject matter of the suit. Doubtless it could have been done simply in this way if the choice lay between the common law and, say, admiralty. But if the choice lay between common law and equity, it could not be done so simply. For equity created the greater part of its jurisdiction by abstractions from the common law. Suitors at common law who found its processes inequitable petitioned the Chancellor to intervene. At first, no doubt, he did so ad hoc and on the merits of the particular case. But by 1791 his interventions were governed by three main principles. These were first set out by John Mitford in 1780 in a celebrated treatise, and approved by Story in 1836.<sup>3</sup> The suitor had to show (a) that the common law gave him no right in a case in which "upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong"; (b) that, although the common law recognized the right, its powers were insufficient to afford a complete remedy; or (c) that the court

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1. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C. D. Mass. 1812) (No. 16,750) (Story, J.).

2. See, e.g., C. WRIGHT, *LAW OF FEDERAL COURTS* § 92, at 450-52 (3d ed. 1976).

3. J. MITFORD, *A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY* (2d ed. Dublin 1789) (1st ed. London 1780). The treatise was first published in 1780, when the author described it as "an attempt to methodize the subject." He made substantial alterations for the 1789 edition; I have used this as being nearest in time to 1791. The book was used extensively by bench and bar and ran into many editions. Mitford himself, as Lord Redesdale, became Lord Chancellor of Ireland, an important equity judge, in 1803. The treatise served as a major foundation for Justice Story's *Commentaries on Equity Jurisprudence* (1836), which was instrumental in bringing "equity into the mainstream of American law." G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 372 (1970).

was being made "an instrument of injustice."<sup>4</sup>

The obvious example of the first of these principles in action is the creation of the trust. The common law would not recognize the informality of the trust: a suit for breach of trust was not entertained at all in a court of common law; it belonged exclusively to equity. There was, however, no such clear distinction of subject matter in a case in which the common law recognized the right but could not give an adequate remedy, or in a case in which the common law court, because of its faulty process, found itself being used as an instrument of injustice.

Take as an example of the inadequate remedy a case of trespass in which an award of damages, the only remedy known to the common law, would not stop the repetition of the trespass. The plaintiff in the common-law suit could then petition the Chancellor to issue an injunction forbidding any further trespass under pain of imprisonment. Or it might be the defendant in a common-law suit who needed some procedural aid, such as discovery, unknown to the common law and which only the Chancellor could order.

In many, perhaps most, of these cases the Chancellor could have granted the relief sought without interfering with the trial of the main point by a jury at common law. Thus, he could have told the suitor whose complaint was that damages would be an inadequate remedy that he must first obtain the verdict of a jury on the question of liability. On occasions this is what the Chancellor did. But in general, he found, as we still find today, that most cases cannot be split between courts without the certainty of additional expense and the risk of injustice.<sup>5</sup> The latter arises because judges are not machines; two judges may on the same set of facts reach different conclusions; more frequently a judge and a jury may reach different conclusions.

So there was soon established in the Chancery a general principle against multiplicity of suits: "[T]he court will not put him to sue doubly."<sup>6</sup> Thus, in addition to exclusive equity, in which there was never any suit at common law at all, there arose what came to be called concurrent equity made up of suits at common law that, in

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4. J. MITFORD, *supra* note 3, at 102-03.

5. Consider the references to economy and fairness in the analogous situation of pendent jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

6. *Cf. Jesus College v. Bloom*, 3 Atk. 262, 263, 26 Eng. Rep. 953, 954 (Ch. 1745) (relying on "the maxim of preventing multiplicity of suits," the court dismissed plaintiff's bill, which stated only an action for damages).

effect, the Chancellor decided himself.<sup>7</sup> In so doing, he necessarily denied the suitor at common law his right to trial by jury. What was the effect on this situation of the seventh amendment? The key was found in the word "preserved." In 1791, the right to trial by jury in a suit at common law was subject to the power of the Chancellor to stay the suit. The seventh amendment did not extend that right; it preserved it. The right that it preserved was not unqualified but subject to the Chancellor's power to stay. Thus, the historical test involves an inquiry, not only into what suits would, in 1791, have been entertained at common law, *i.e.*, what were legal rights as opposed to rights that were exclusively equitable — a comparatively easy matter to determine — but also as to whether in 1791 the Chancellor would have allowed the suit to proceed at common law.

The question that arose in *In re Japanese Electronic Products* (the *Zenith* case)<sup>8</sup> was one that had arisen before and received different answers. It was whether in 1791 the Chancellor would have allowed a suit to proceed at common law in which the complexity of the subject matter was "so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules."<sup>9</sup> As well as receiving judicial consideration, this question has been discussed in a number of articles in learned journals. I had contributed to the discussion an article on the English law in 1791 in which, after reviewing the authorities, I expressed the conclusion that in 1791 the Chancellor had the power to stop the common-law trial of a complex suit and suggested that the seventh amendment could be construed so as to leave this power with the federal courts.<sup>10</sup> In *Zenith*, the Third Circuit unanimously rejected this and similar interpretations of the seventh amendment.<sup>11</sup> But the court, by a majority, announced the conclusion that trial by an uncomprehending jury would be contrary to the requirement of due process in the fifth amendment. This conclusion brought the fifth and seventh amendments into conflict which was to be resolved, the court held, by preferring the fifth amendment as

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7. I say "in effect" because in form what the Chancellor did was to stay the suit at common law and in its place provide the common-law plaintiff with an equitable remedy.

8. 631 F.2d 1069 (3d Cir. 1980) [hereinafter cited as *Zenith*].

9. 631 F.2d at 1088. This language of Seitz, C.J., who delivered the majority judgment, may well become definitive, for the judgment is powerful, clear and concise. When for the sake of brevity I refer below to a suit as being beyond the comprehension of a jury, or as "complex," the word now generally used, this is what I mean.

10. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980).

11. 631 F.2d at 1083.

carrying greater weight.<sup>12</sup>

I was greatly heartened by this result. I have long been an admirer of the jury system and have sought to explain and justify its workings and to detect the secret machinations, sappings and underminings against which Blackstone warned.<sup>13</sup> "No machinator," I had already written, "could devise a better way of sapping and undermining the jury than that of putting upon it tasks beyond its capacity to discharge satisfactorily."<sup>14</sup> I had been disturbed by what seemed to me, if I may put it without disrespect, either apathy in the face of injustice bound to be caused by an uncomprehending jury or obstinacy in clinging to the belief that what a trained judge could understand must be equally comprehensible to all other members of his community. There seemed to me to be something surprisingly obsolete about deciding upon the mode of trial, not as the Supreme Court had hinted in 1970 by reference to "the practical abilities and limitations of juries"<sup>15</sup> but by reference to a line reached in another country, albeit the country of the "reservoir," nearly two centuries before. The *Zenith* opinion breathed a new spirit. Not being a student of the American Constitution, I was unconcerned about whether the wind of change blew from within the seventh amendment itself or from the new quarter of the fifth. It was the result that mattered.

I was, however, intrigued by the nature of the wind. It was not at all the "due process" with which I was familiar. Indeed, the *Zenith* court's application of due process, had it been expressed much more than half a century ago, would then have been condemned as unintelligible. When in 1354 Parliament declared that "no man of whatever estate or condition shall be ousted of land or tenement or taken or imprisoned or deprived of his inheritance or put to death without being brought to answer by due process of law,"<sup>16</sup> it meant that it was illegal to do any of these things otherwise than in accordance with the processes which were actually prescribed. The same Parliament annulled the attainder of Roger Mortimer on the grounds that he had been put to death and disinherited without being formally accused and given an opportunity to defend himself. Magna Carta had 140 years earlier declared that no man should be disseised, etc., otherwise than by the law of the land. Coke equated

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12. 631 F.2d at 1083-86.

13. See 4 W. BLACKSTONE, COMMENTARIES \*349-50.

14. Devlin, *supra* note 10, at 64.

15. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

16. 28 Edw. 3, ch. 3 (1354).

due process with the law of the land: "unless it be by the lawful judgment, that is, verdict of his equals (that is, men of his own condition) or by the law of the land, that is, (to speak it once for all) by the due course and process of law."<sup>17</sup> Due process in this sense, although it is not, as is widely thought, mentioned expressly in the English Bill of Rights, has for centuries served as the Anglo-American charter of protection against the use of arbitrary power — the midnight knock, the commitment to the Tower "by special command of the King," and so forth.

It has been contended, contrary to Coke's assertion, that due process of law is a narrower term than the law of the land.<sup>18</sup> But it had never, until the development about fifty years ago of the American concept of procedural due process, been suggested that it was a more expansive term. Until that development, due process ensured that the American citizen would get what the law positively gave him, no more, no less. If the law gave him trial by jury, there was no principle he could invoke that would give him anything different. Today the American citizen can invoke the principle of procedural due process to obtain what the law ought to give him according to "those canons of decency and fairness which express the notions of justice of English-speaking peoples"<sup>19</sup> or "minimum standards of fair play."<sup>20</sup> This modern due process, as I shall call it to distinguish it from the traditional, is now the norm against which all legal procedures must be judged under the Constitution, for it embodies the fundamental fairness which ought to animate the law.

When I read more about modern due process, I was struck by its resemblance to equity. It was not as ample as equity, for equity was not concerned wholly or mainly with process. But within its more limited field, it was in the twentieth century doing for the whole body of modern law (in which equity and the common law are now fused) what equity had done for the common law from the fifteenth to the nineteenth centuries. I thought that it would be of some historic interest to examine and compare the two patterns; this is what composes the first subject of this Article. The result is to show that equity, when it was enforcing procedural fairness, and modern due process are essentially the same. Writing about 1644, Milton revealed in one of his minor sonnets his discontent with the achieve-

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17. 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 46 (1671).

18. See, e.g., JURROW, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975).

19. *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J.).

20. *Zenith*, 631 F.2d at 1093 (Gibbons, J., dissenting).

ments of the Protestant Reformation in driving out popery: "New Presbyter," he exclaimed, "is but Old Priest writ Large."<sup>21</sup> If the enlightenment which followed on the discovery of modern due process can be compared with the Reformation, it could be said that due process is but old equity writ large.

The second subject of the Article originates in a natural curiosity on my part to know at what point the *Zenith* court and I differed on a matter of English law. The answer is that we did not meet. We both accepted that the question under the seventh amendment related to the state of English law in 1791, and we both accepted that in pre-1791 law the English Chancellor had the power to stay a suit at common law and so to deny trial by jury. I therefore asked myself the question: "What principles controlling the exercise of the power had been settled by 1791?" The question that the *Zenith* court appears to have asked itself was: "In what cases or categories of cases was the power actually exercised in or before 1791?" The second question has been allowed to dominate the argument, and the search has been for precedents rather than for principles. Complexity in litigation is largely a modern phenomenon and precedents two centuries old have been hard to find. Certainly on the negative side there has been no case of complexity which the Chancellor refused to stay. On the positive side, three cases have been subjected to deep analysis, the first two perhaps deeper than a seventeenth-century reporter was prepared for. The first, in 1603, was an action of ejectment and the second, in 1674, was for trespass and trover. In the first, the Chancellor said that his court "was better able to judge than a jury of ploughmen" a case in which the conclusion would have "to be discerned by books and deeds."<sup>22</sup> In 1674, another Chancellor said that it would be "monstrous and absurd" for a common jury to try an issue which depended on the validity of Danish letters patent and the meaning of a treaty between England and Denmark.<sup>23</sup>

Neither of these cases laid down any rule or principle; neither created a category. The third case, *O'Connor v. Spaight*,<sup>24</sup> can be claimed to have done both, but it has yet to be given the prominence that it deserves. It was decided in 1804 and is therefore, strictly speaking, thirteen years out of time. But insofar as it laid down a

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21. J. MILTON, *Sonnet on the New Forcers of Conscience under the Long Parliament* (1644), in MILTON'S SONNETS (E. Honigmann ed. 1966).

22. *Clench v. Tomley*, Cary 23, 21 Eng. Rep. 13 (Ch. 1603).

23. *Blad v. Bamfield*, 3 Swanst. 604, 36 Eng. Rep. 992 (Ch. 1674). For further consideration of this and the preceding case, see text at notes 113-33 *infra*.

24. 1 Sch. & Lef. 305 (Ire. Ch. 1804). This case is fully examined in Part X *infra*.



principle, it was formulated as one of long standing. And insofar as it established a precedent, it was accepted by the *Zenith* court as pre-1791,<sup>25</sup> rightly in my view since, though perhaps the earliest in its category to be reported, it is plain that it was by no means the earliest to be decided. It was an action in ejectment for nonpayment of rent. The issue was whether or not the rent had in one way or another in fact been paid, and the complexity lay in the complicated monetary transactions between the parties. The tenant filed a bill for equitable relief which the Irish Chancellor, Lord Redesdale, granted. Since the Chancellor was none other than the ennobled John Mitford, it is not surprising that he proceeded from a rule or principle expressed as cogently as the statement in the *Zenith* case. Chief Judge Seitz said, "A suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner."<sup>26</sup> The Chancellor said, "[T]he account has become so complicated that a court of law would be incompetent to examine it upon a trial at *Nisi Prius*, with all necessary accuracy . . ."<sup>27</sup> A broader statement of principle had been made by Lord Redesdale the year before in *Bateman v. Willoe*<sup>28</sup> though, since in that case he allowed the demurrer, presumably it cannot rank as a precedent. He then expressed his readiness to interfere in cases "of which cognizance cannot be effectually taken at law."<sup>29</sup> In much the same words, the *Zenith* court denied jury trial "when a jury will not be able to perform its task of rational decisionmaking."<sup>30</sup> Other coincidences of language are noted below.<sup>31</sup>

So the principle that the *Zenith* court was sustaining was the same as that formed in equity 176 years earlier. But the court was interested not in principle but in precedent. It was looking for a precedent strong enough to constitute "an established basis of equitable jurisdiction" in the territory of the common law.<sup>32</sup> *O'Connor v. Spaight*, the *Zenith* court held, set a precedent for complicated accounts, but for no other sort of complexity. It was an action for an equitable accounting and did not embrace by analogy "complex antitrust and antidumping suits."<sup>33</sup>

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25. 631 F.2d at 1080 n.11.

26. 631 F.2d at 1079.

27. 1 Sch. & Lef. at 309.

28. 1 Sch. & Lef. 201 (Ire. Ch. 1803).

29. 1 Sch. & Lef. at 205.

30. 631 F.2d at 1086.

31. See notes 137 & 138 *infra* and accompanying text.

32. 631 F.2d at 1083.

33. 631 F.2d at 1080.

What is the common law and how, as it exists at any point in time, is it to be ascertained? In this second part of the Article, answers are sought to some seemingly theoretical questions. The *Zenith* opinion suggests that the law should not include "a deduction of the likely reaction of the English chancellor to a hypothetical complex suit filed at law in 1791."<sup>34</sup> But how else is the common law to be ascertained? It does not take the form of a code with annual supplements that can be read off by a computer as of 10 December 1791. The common law is always in the making. It is in the womb as well as in the precedents. It exists as much in the word that is about to be spoken as in the recorded utterance. The law on any point is the correct answer to the client's question about what will be the likely reaction of the judges who ultimately decide his case. Undoubtedly the practitioner should look first at the precedents. If he finds an exact precedent, it takes him a long way toward the answer. But it is not conclusive. The precedent may be so far out of line that it is unlikely to be followed. Conversely, where there is no exact precedent, a satisfactory answer may proceed from declarations of principle that might be found only in *obiter dicta* or the opinions of the great jurists. That there is no binding precedent does not mean that there is no law.

The fact is that English legal history, as reconstructed in American courts for the interpretation of the seventh amendment, gives an incomplete picture of eighteenth-century equity. For a long time before and after 1791, equity was much more than a set of categories; it was also a creative force. When independence was declared in 1776, the American judiciary took over not only the corpus of equitable doctrine by then established, but also equity's potential for development. What happened in 1791 to destroy the potential? The historical test assumes that equity as an ongoing power with the capacity, which due process has today, of extending its reformative influence was, as it were, to be treated after 1791 as beheaded and left a spiritless trunk. Exactly how and when this restrictive construction of the seventh amendment came to be formulated is a question that I ask but have not the learning to answer.

Would the answer matter? Is it perhaps in the end a question only of interpreting "a suit at common law"? If an American judge, supported by traditional authority, says that on the true interpretation of these words in their place in the seventh amendment the line is to be drawn by the precedents and not by the principles, even if

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34. 631 F.2d at 1083.

that means truncating equity, who am I to say that he is wrong? It was in this way that the *Zenith* court approached the problem. It did not reject the livelier view of English legal history submitted to it. It said that it was

aware of no federal court decision that employs history in this manner.

. . .

We choose not to pioneer in this use of history. If developments since 1791 have so changed the character of a suit at law to make trial of particular suits to a jury unjust, then perhaps the historically recognized boundary between law and equity should not govern the extent of the seventh amendment right. If so, then deviations from this approach to the seventh amendment should be based on the current policies and the present circumstances of the federal courts. We see no persuasive reason for incorporating into the seventh amendment the policies and probable actions of the English chancellor of 1791.<sup>35</sup>

If the argument in this Article is sound, there is no fundamental distinction between the policies of the English chancellor of 1791 and the current policies of the federal courts as exemplified in the *Zenith* opinion. The policy of both requires the recognition of the practical limitations of juries, the former because demanded by equity and the latter because demanded by due process. Its construction of the fifth amendment gives the *Zenith* court the choice not to pioneer. The validity of its choice depends upon whether its resolution of the conflict between the fifth and seventh amendments is correct. If it is correct, the matter in this Article is of academic interest only. A solution that reconciles two major provisions of the Bill of Rights must be academically preferable to one that has to resolve their antagonism, but that is all. But if it is incorrect,<sup>36</sup> there is an urgent practical need for a readjustment of the "historically recognized boundary." In either event, it is perhaps unlikely that a constitutional issue of such magnitude, impinging as it does on the right to trial by jury, will be finally settled by the Supreme Court without all the territory being explored. Pioneering will not in this larger context prove to be time ill spent.

The second subject with all its ramifications covers a lot of ground. For most of the time that I was considering it, I accepted the *Zenith* court's application of the traditional construction of the

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35. 631 F.2d at 1083.

36. Time must be allowed for American constitutional lawyers to evaluate the *Zenith* opinion on this point. For comment to date, see Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); Luneburg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981); Comment, *Non-Jury Trial of Civil Litigation: Justifying a Complexity Exception to the Seventh Amendment*, 15 U. RICH. L. REV. 897, 916 (1981).

historical test as properly resulting in the conclusion that complex cases could be decided by judges if they involved an account, but must be decided by jurors if they did not.<sup>37</sup> But I found myself increasingly reluctant to believe that the determination of the mode of trial, which matters so much in modern litigation, should be made on such a narrow ground and in the light of history rather than of reason. Before I had finished with the second subject I had resolved that I would not lay down my pen until I had satisfied myself that on this point history was adamant. I have now satisfied myself to the contrary. I think that the *Zenith* court's conclusion on this point was wrong. This is the third subject.

In treating the second subject I have distinguished between two questions:

- (1) What principles controlling the exercise of the power had been settled by 1791?
- (2) In what cases or categories of cases was the power actually exercised in or before 1791?

I have submitted that it is the first question which ought to be asked and answered; I have pointed out that the result of asking and answering the second question is the truncation of equity, treating it as if it were in 1791 a lifeless system which had lost its power of development.

I treat the third subject somewhat differently. I assume that the response I have just given to the second subject is wrong and that it is the second question which, if not truly the right question, is now so well established as such in American jurisprudence as to be beyond challenge. On this assumption it becomes necessary to define the category with which *O'Connor v. Spaight* is to be identified. Undoubtedly complexity is an essential feature of that category. Is it also an essential feature that the relief sought should be an order for an account? To answer this question, one must first consider how in the development of equity categories were formed.

Concurrent equity consists, as I have said, of abstractions from the common law. A petitioner had to show good ground for the Chancellor's intervention. If his petition was novel, there might be a heavy burden for him to discharge. But if he discharged it, he would blaze a trail that others with cases of the same type could follow. This was the way in which a category was created. What identified

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37. In a previous article, I had focused on principles of, rather than precedents for, equitable intervention in complex cases. See Devlin, *supra* note 10, at 72. Since I found ample evidence that the Chancellor would have intervened in complex cases based on pre-1791 principles, I had no occasion to decide conclusively whether the pre-1791 precedents for intervention extended beyond cases involving an account.

the category was the *equity* in the case, *i.e.*, the ground on which the Chancellor first took jurisdiction.<sup>38</sup> This would be the precedent that established the category and its rationale would show what the *equity* was.

The seventh amendment, I am now assuming, put an end to interventions that did not fall within one of the existing categories. The *Zenith* court, when deciding that the case before it did not so fall, did not give adequate consideration to the category identified in the rationale of *O'Connor v. Spaight*. The *Zenith* court referred to *O'Connor v. Spaight* only by naming it in a footnote as one of a number of "suits seeking relief in the form of an accounting between the parties."<sup>39</sup> Instead of looking for the *equity* in the case, the court looked only at its outward form. It did not ask the essential question whether the *equity* in the case was complexity in general or complexity in combination with account. When *O'Connor v. Spaight* is examined in the usual way in which a rationale is ascertained, it will be found that complexity in general is the essence of it. But the *Zenith* court, without examining the rationale, took it that complexity was relevant only in cases in which an accounting was ordered.<sup>40</sup> In my submission this approach is, as a matter of English law, wrong. If the day after *O'Connor v. Spaight* was decided, an unsympathetic Chancellor had been required to rule on a second case differing only in that the liability was for damages in tort, he would have been bound by the doctrine of precedent to overrule the demurrer and take the case into Chancery. In the third subject I seek to make good this proposition, elaborating on what I mean by the "equity" in the case.

These are the three subjects of the Article. Since in my treatment of them they are bound to overlap, I have not divided the Article into parts corresponding exactly with the subjects. But in what follows it will be found that Parts II to V are concerned mainly with the first subject, a comparison of equity and modern due process; that Parts VI to VIII are concerned with the second subject, whether "suits at common law" should be defined according to the principles of equity existing in 1791 rather than according to precedents; and that Parts IX to XI address the third question, whether a Chancellor

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38. When using the word "equity" in the sense of a ground for intervention, rather than as a principle or set of categories this Article italicizes it.

39. 631 F.2d at 1080 n.11.

40. 631 F.2d at 1080 ("We are aware of no case . . . in which a chancellor ordered an accounting in a suit involving nothing more than liability for money damages in trespass or tort.").

in 1791 would have taken a case into equity on the ground of complexity in general.

## II. EQUITY AS DUE PROCESS<sup>41</sup>

Every legal process is framed in the minds of its designers as a rule to be followed to a just decision. From its birth and increasingly with age it is beset, as all rules are, by two dangers. The first is the danger of enshrinement — the object of the rule recedes into the shrine so far behind the text that it can no longer be discerned; the text is venerated. The second is the danger of obsolescence — the object, or perhaps only its image, changes; what was seen as just in the harsh light of *laissez faire* is perceived to be unjust in the softer light of social equality. So the legal system, like any other system, needs to be supervised by a reforming agent.

In the United States today that agency is in part the constitutional rule of due process and is supplied by the courts themselves, as the interpreters of the Constitution. In England, where modern due process is unknown, the reforming agent in the civil law is the Lord Chancellor. He acts legislatively and not judicially. With the aid of a permanent body, the Law Commission, and of *ad hoc* committees which he sets up to consider various topics, he keeps the civil law under review. Reforming legislation may be introduced by him in the House of Lords, where it is quietly debated and, unless there is a spark of political interest in it, it attracts no opposition and little attention in the Commons. In England in the late eighteenth century, at the time when the United States was beginning to shape its own system out of English law, the reforming agent, outside Parliament, was still the Lord Chancellor. He was no longer acting with all the

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41. In this Part I am comparing equity with the modern due process involved in American law. It is worth noting that in England equity had been foremost in enforcing due process in the old sense. It is uncertain when the "right to be heard," as applied by Parliament to Roger Mortimer, *see* text following note 16 *supra*, was enforced as a rule in every legal proceeding. It seems probable that the Chancellor was enforcing it before the King's Bench had perfected its chief instrument, *viz.* the prerogative writ of certiorari or mandamus. There is dictum by the Chancellor as early as 1469: "By the law of nature, it is requisite that the parties be present, or that they be absent by contumacy, that is, where they are warned and make default." Y.B. Trin. 9 Edw. 4, f. 14, pl. 9 (1469). Intervention by the King's Bench is not recorded until much later. In 1615 the King's Bench granted a mandamus to restore to office James Bagg, removed for alleged offensive conduct, because it appeared from the return to the writ that he had not been heard in answer to the charge, *Bagg's Case*, 1 Rolle. 224; 81 Eng. Rep. 448 (K.B. 1615). In 1720 this case was described as "the MAGNA CHARTA of all cases of this nature," *The King v. Hutchinson*, Mayor of Carlisle, 8 Mod. \*99, \*101, 88 Eng. Rep. 77, 80 (K.B. 1722) (in argument). In this sphere the Chancellor would not usually interfere with the King's Bench which "has a great latitude and discretion in cases of that kind," *Lord Montague v. Dudman*, 2 Ves. Sen. 396, 397, 28 Eng. Rep. 253, 254 (Ch. 1751).

freedom of the mediaeval chancellors who were tilling virgin soil.<sup>42</sup> Precedents were now circumscribing his powers. Parliament was growing in importance; some grievances had to be left to it.<sup>43</sup> But the Chancellor was still doing much by direct intervention in the name of equity. Thus American due process and English eighteenth-century equity arose out of the same need: the perpetual need to keep the law as it is administered daily in the courts (which makes justice according to law) in touch with the law as it ought to be. The law as it is daily administered runs on rails and runs straight until the line is switched; the law as it ought to be is fluid, flowing in the course of social justice, which changes as society changes. Modern due process and old equity (in its procedural reforms) were called into being to satisfy the same need, and they satisfy it in the same way. The keynote of modern due process is fairness. Fairness is equity. What is fair is equitable and what is inequitable is unfair.<sup>44</sup>

Due process, the Supreme Court said recently in *Lassiter v. Department of Social Services*,<sup>45</sup> "has never been, and perhaps can never be, precisely defined. . . . [T]he phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." The great historian Maitland found the same difficulty with "Equity."<sup>46</sup> Both concepts are to be understood only by examining their works. Both analyze the process, so as to see not just whether it complies with the law, but whether it complies with the law as it ought to be. Until 1875 in England and 1938 in America what was meant by the law was the common law. Equity then was not concerned in its analysis to see whether the process conformed with the common law — that was left to the judges of the common law — but to see whether the application of the common law conformed with equitable principles. I

42. The evolution of precedential constraints is discussed further in notes 148-54 *infra* and accompanying text.

43. In *Earl of Bath v. Sherwin*, Gilb. 2, 2, 25 Eng. Rep. 2, 2 (Ch. 1707), Lord Chancellor Cowper said, "And if this Case was a Grievance in the Law, 'twas proper for another Jurisdiction, viz. in Parliament, especially since Parliaments are so frequent; so that it would be a Piece of Arrogance in him, to take upon him the Reformation of the Law, tho' it needed it." But the Chancellor was then speaking at first instance. When the case reached the House of Lords, he was emboldened by his peers to commit the "Piece of Arrogance." See *Earl of Bath v. Sherwin*, 1 Bro. P.C. 266, 2 Eng. Rep. 253 (H.L. 1709) (granting an injunction previously denied).

44. This is not to imply that procedural fairness had no influence on the common-law judges. The implication would not be just. Certainly they were concerned with securing a fair trial. We shall see later, for example, how they dealt with the problem of partial juries in such a manner as to render equitable interference almost unnecessary. We know too of their use of the prerogative writs to secure due process in inferior courts. Cf. note 41 *supra*. But they could not break the forms which they had themselves created and which the chancellors overrode.

45. 452 U.S. 18, 24 (1981).

46. See Devlin, *supra* note 10, at 45.

shall consider later to what extent by the end of the eighteenth century these principles were settled. But in the beginning they were as opaque and lofty as fundamental fairness is today. They were the ecclesiastical lawyers' rendering of the Roman *Aequitas* which means, Pomeroy says, the "*arbitrium boni viri*, which may be freely translated as the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle."<sup>47</sup> This may be compared with Frankfurter's "canons of decency and fairness."<sup>48</sup>

An excellent example of modern due process at work is in the conversion of the simple opportunity to be heard, such as should have been given to Roger Mortimer in 1354,<sup>49</sup> into the *meaningful* opportunity to be heard, such as should have been given to Abby Gail Lassiter in 1978. The supreme objective of due process is to ensure that what is produced at the end of the process is the accurate and just decision: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process . . . ."<sup>50</sup> In the adversary process there are bound to be cases in which the accurate and just decision will not be produced without the aid of counsel on both sides. So due process may require that counsel should be provided for an indigent litigant. A number of decisions of the Supreme Court, of which the *Lassiter* case is one of the most recent, have considered this requirement in differing circumstances.<sup>51</sup> In *Little v. Streater*,<sup>52</sup> decided on the same day as the *Lassiter* case, an indigent litigant could not afford to pay for a blood test in a paternity suit. The court decided that the importance of the test was such that without it the defendant lacked "a meaningful opportunity to be heard."<sup>53</sup> Another example is the requirement, imposed by the Supreme Court though not to be found in the relevant statutes, that welfare authorities hold a hearing before terminating benefits.<sup>54</sup>

These are some examples of due process concepts. The other examples I shall give — because they are especially relevant to my

47. 1 J. POMEROY, EQUITY JURISPRUDENCE 35 (1st ed. 1881). Extracts now and hereafter are taken from the first edition, but are not much changed in subsequent editions.

48. See note 19 *supra* and accompanying text.

49. See text following note 16 *supra*.

50. Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

51. *E.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973), involved a right to counsel at probation revocation hearings. The Court ruled that the possible revocation of probation was not a sufficient threat to liberty to justify a *per se* right to appointed counsel; instead, the right depends on the complexity of the case.

52. 452 U.S. 1 (1981).

53. 452 U.S. at 16 (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).

54. Goldberg v. Kelly, 397 U.S. 254 (1970).



theme — are of due process concepts as applied to jury trial. There can be no fair trial by a partial or incompetent jury. *Irvin v. Dowd*<sup>55</sup> is an example of partiality. The Supreme Court applied the due process clause of the fourteenth amendment to a case of “widespread and inflammatory publicity” and held that the state court had improperly denied a change of venue. Likewise, in *Jordan v. Massachusetts*<sup>56</sup> the Supreme Court said that “due process implies a tribunal . . . mentally competent to afford a hearing.” The Second Circuit has stated as a well-settled rule that “clear evidence of a juror’s incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict.”<sup>57</sup> These authorities cover incompetence generally. The novelty, such as it was, in the *Zenith* judgment lay in the application or extension of this principle to incompetence arising in a particular case because of its complexity. In *Lassiter*, one of the reasons the court gave for requiring counsel in parental status termination proceedings was that “[e]xpert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented.”<sup>58</sup> If due process entitles a litigant to counsel who comprehend his case, it must surely confer a like entitlement to a comprehending jury.

The reader is likely to be more familiar with due process and its works in the twentieth century than he will be with equity in the eighteenth. The former is part of the necessary equipment of a constitutional lawyer; the latter is now only legal history. I must therefore deal more elaborately with the workings of eighteenth-century equity, and I think that the neatest way of familiarizing the reader with them is to take him through the ten heads under which Mitford describes the jurisdiction of a court of equity and to illustrate with examples.

The first three heads are general. Equity intervenes in the first place where the common law gives a right but fails to afford a complete remedy; in the second place, “where the courts of ordinary jurisdiction,” *i.e.*, the courts of common law, “are made instruments of injustice”<sup>59</sup>; and in the third place, where the common law gives no right, but where upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong.

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55. 366 U.S. 717 (1961).

56. 225 U.S. 167, 176 (1912).

57. *United States v. Dioguardi*, 492 F.2d 70, 78 (2d Cir.) (verdict upheld where evidence of incompetence not clear), *cert. denied*, 419 U.S. 829 (1974).

58. 452 U.S. at 30; *see also* note 51 *supra*.

59. J. MITFORD, *supra* note 3, at 103.

Most of the examples given under these heads are concerned with the substance of the law whereas here we are concerned with procedure, though the line between them is often thin. Mitford puts under the first head the example of the lost bond; it could equally well be treated as a defect in common-law procedure. At common law the plaintiff must produce the bond or other instrument on which he sues; if he cannot produce it, he fails. By the seventeenth century the rule was being relaxed "in great and notorious extremities": If a man's house was set on fire and the deed perished with all his other goods, Coke was prepared to relax the rule on the rather precarious legal ground that "affliction be not added to affliction."<sup>60</sup> This degree of rigidity was inequitable; today we might say that it was also deprivation of property otherwise than by due process. From an early date equity intervened; the Chancellor, if satisfied by affidavit that there had been a deed and that the loss was accidental, would enjoin the defendant against taking the point that the deed had not been produced. Thus arose the principle of proof by secondary evidence which was eventually admitted into the common law.<sup>61</sup>

Since in the eyes of the common law the document itself was all that mattered, it was natural that when the document was produced duly signed and sealed the law should be unreceptive to pleas of mistake or fraud; something as decisive as *non est factum* had to be established. Equity thought otherwise and thus there arose the great equitable remedies of cancellation and delivery up, of rectification and reformation. Mitford puts these under the second head. He writes: "Sometimes a party, by fraud, or accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which must necessarily make the court an instrument of injustice; and it is therefore against conscience that he should use the advantage." Mitford's third head of equity jurisdiction, the one concerned with the enforcement of rights unknown to the common law, embraces the whole field of trust law.

The remaining seven heads are all more specific. Mitford distinguished them from the first three by saying that in these three the court of equity "assumed a power of decision," while in the seven the "courts of equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction to"<sup>62</sup> take seven specific tabulated actions. So he is treating the seven as

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60. *Doctor Leyfield's Case*, 10 Co. Rep. 88a, 92b, 77 Eng. Rep. 1057, 1066 (K.B. 1611).

61. *See Read v. Brookman*, 3 T.R. 151, 100 Eng. Rep. 504 (K.B. 1789).

62. J. MITFORD, *supra* note 3, at 116.

branches of auxiliary equity and for the most part they offer procedural rather than substantive help.

The fourth head is to remove "impediments to the fair decision of a question" and is further described as equity acting "as ancillary to the administration of justice in other courts."<sup>63</sup> The case which Mitford took to exemplify this related to the action of ejectment. Ejectment of course is concerned with possession, not with ownership, but the action had become a convenient way of trying title to land. If, however, the defendant had let the land, he could at common law evade the issue of title by denying that he was in possession. To enable the real question to be decided, equity would allow a bill by the claimant to the land for an order that the lessor should not set up the lease to defeat the ejectment. The question of title could thus be settled. *Leighton v. Leighton*<sup>64</sup> offers an example of the same device. In this case the plaintiff claimed from the defendant as a purchaser from the defendant's father. After the father's death, the defendant took possession, claiming under an old entail which, if proved, would have disentitled the father to convey the fee to the plaintiff. The plaintiff obtained a decree in Chancery directing an ejectment to try the "mere right": The defendant was to rely solely on the entail and not on any trust-term, mortgage or lease.

There is not now such scope for removing "impediments to the fair decision" as there was in eighteenth-century England. The technicalities that barnacled the old forms of action, such as ejectment, have long since disappeared. But the removal of such impediments as may remain and the idea of an ancillary to the administration of justice are as valid today as they were when equity was doing the work that due process does now.

Interim relief is very much the creation of equity since, to be effective, it usually needs the equitable weapon of the injunction. If there were no process for preserving land and chattels pending the trial of a dispute, a plaintiff might be unjustly deprived of his property. The common law in some forms of action provided a remedy. So in the action of ejectment the plaintiff could in certain cases obtain a writ of estrepement to prevent the party in possession from committing waste. But it was left to equity to provide a general interim remedy where the common law did not give a specific one. This is Mitford's fifth head.

In this field, the equity principle has in England continued its

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63. *Id.* at 121.

64. 1 P. Wms. 671, 24 Eng. Rep. 563 (Ch. 1720).

development even after fusion. The rule used to apply only to such property as was the subject matter of the dispute. Until 1975 a defendant, threatened with a substantial claim, might deprive the plaintiff of a remedy by removing all his assets out of the jurisdiction; this can now be prevented by the "*Mareva* injunction."<sup>65</sup>

While the fifth head deals with the preservation of property, the sixth deals with the interim injunction generally. Mitford states the principle in a sentence that expresses the foundation of the modern practice: "A court of equity will prevent the assertion of a doubtful right in a manner productive of irreparable injury."<sup>66</sup> In the eighteenth century the power was used not only to prevent waste but also to protect *pendente lite* copyright and patents.

Mitford's seventh head of equity is illustrated by the situation in *Aldridge v. Mesner*<sup>67</sup> — one as familiar around 1800 as it is today. In this case a horse was bought at an auction, the auctioneer was paid the price and then the horse was returned to the seller as unsound. What was the auctioneer to do with the money? At common law he could only wait until he was sued by the buyer or seller or both, and they could not all be parties in the same action; the only exception to this was the case of a bailee who held property with the agreement of two or more claimants. Equity introduced the bill of interpleader.

Mitford's eighth head covers the efforts of equity to put an end to vexatious litigation at common law. These efforts succeeded in 1709 when the House of Lords took the unusual course of reversing the decree of the Lord Chancellor. In *Earl of Bath v. Sherwin*,<sup>68</sup> the respondent and his predecessors in title tried and failed on five occasions — in 1694, 1696, twice in 1700 and once again in 1703 — to dispossess the Earl of Bath, the issue in each case being the same, *viz.*

65. So called after the name of the case in which this form of interim injunction was first approved by the Court of Appeal, *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*, [1980] 1 All E.R. 213, [1975] 2 Lloyd's L.R. 509 (C.A.). At first the relief was granted only when the defendant was a foreigner, but in 1980 this restriction was removed. See *Prince Abdul Rahman v. Abu-Taha*, [1980] 1 W.L.R. 1268, 1273, [1980] 3 All E.R. 409, 412 (C.A.). At about the same time it was decided that the interim injunction could be strengthened by an order for discovery of documents designed to ascertain what assets within the jurisdiction the defendant had, see *Bankers Trust Co. v. Shapira* [1980], 1 W.L.R. 1274, [1980] 3 All E.R. 353 (C.A.). All of these developments occurred within five years — a flash of equity back in its old form. Or, if you prefer, a touch of modern due process applied in the English manner, *i.e.*, by virtue of statutory authority to do what is "just or convenient," Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 5, ch. 49, § 45(1). *Mareva* injunctions have recently received explicit legislative approval. See Supreme Court Act, 1981, ch. 54, § 37(3).

66. J. MITFORD, *supra* note 3, at 123.

67. 6 Ves. Jun. 416, 31 Eng. Rep. 1122 (Ch. 1801).

68. 1 Bro. P.C. 266, 2 Eng. Rep. 253 (H.L. 1709).

whether the second Duke of Albemarle, through whom Lord Bath claimed, was the lawful son and heir of the first Duke. The respondent was able to do this because ejectment was an action in trespass, so that it was always possible to allege a new trespass on which to ground a new suit. In 1703 the Earl exhibited a bill in Chancery praying that all questions touching the legitimacy of the second Duke "be quieted and extinguished"<sup>69</sup> and asking for perpetual injunction staying all further proceedings at law. For the respondent it was argued "that the matter in question was purely a matter of fact, triable by jury"<sup>70</sup> and that, so long as he paid his own and his adversary's costs, a plaintiff was within his rights in suing repeatedly. The House of Lords, reversing Lord Chancellor Cowper, held otherwise. This decisive intervention may, as quite often happened, have encouraged the common-law courts to provide a common-law remedy. Usually it took some time for the encouragement to make itself felt. But by the end of the century, *i.e.*, after Mitford's second edition, the common-law judges were refusing to allow a second action if the second ejectment was in substance brought in by the same title.<sup>71</sup>

Equity's attitude to vexatious litigation was part and parcel of its ardent desire to discourage multiplicity of actions. This desire (which was expressed in dicta covering the 100 years before 1791)<sup>72</sup> was the force behind the Chancellor's drive to encourage joinder of actions, a topic that Mitford includes under the eighth head. At common law joinder was very restricted. For example, if the lord of the manor disturbed the right of common of the tenantry, each tenant would have to sue separately; there was no form of representative action. Equity introduced one in the form of a bill of peace. It was kept as a procedural remedy only and did not take the matter of dispute away from the common law. Mitford says: "Indeed in most cases it is held that the plaintiff ought to establish his right by a determination of a court of law in his favour before he files his bill in

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69. 1 Bro. P.C. at 268, 2 Eng. Rep. at 254.

70. 1 Bro. P.C. at 270, 2 Eng. Rep. at 255.

71. *See, e.g.*, Keene v. Angel, 6 T.R. 740, 101 Eng. Rep. 802 (K.B. 1796); *see also* Leighton v. Leighton, 2 Bro. P.C. 217, 2 Eng. Rep. 256 (H.L. 1720).

72. *See, e.g.*, Bouverie v. Prentice, 1 Bro. C.C. \*200, \*200, 28 Eng. Rep. 1082, 1083 (Ch. 1783) ("to put an end to suits and litigation"); Mayor of York v. Pilkington, 1 Akt. 282, 284, 26 Eng. Rep. 180, 181 (Ch. 1737) ("because a great number of actions may be brought"); Cowper v. Clerk, 3 P. Wms. 155, 156, 24 Eng. Rep. 1010, 1011 (Ch. 1732) ("to prevent a multiplicity of suits") (footnote omitted); Baker v. Rogers, Sel Cas. t. King 74, 74, 25 Eng. Rep. 230, 230 (Ch. 1729) ("to prevent expense and multiplicity of suits") (in argument); Disney v. Robertson, Bunb. 41, 41, 145 Eng. Rep. 588, 588 (Ex. 1719) ("to prevent a multiplicity of suits"); Ewelme Hospital v. Andover, 1 Vern. 265, 23 Eng. Rep. 460 (Ch. 1684); *see also* Fitten v. Lord Macclesfield, 1 Vern. 287, 292, 23 Eng. Rep. 474, 476 (Ch. 1684) ("to prevent multiplicity of trials").

equity.”<sup>73</sup>

Under the ninth head Mitford deals with the bill of discovery as an aid to the process in other courts. It is unnecessary to elaborate on this, which is generally regarded as equity's most potent gift to legal procedure. It is, however, worth recalling a little known case in the House of Lords in 1821<sup>74</sup> in which both Lord Redesdale and Lord Eldon asserted the power of the Court of Chancery to order a defendant to permit the plaintiff to enter his premises for the purpose of inspection. This case was exhumed in 1974 and won for a pioneering plaintiff, emboldened perhaps by the success of the *Mareva* injunction, what is now known as an “*Anton Piller* order.”<sup>75</sup> The order is obtainable on an *ex parte* application if the plaintiff can make out a strong *prima facie* likelihood of the destruction or removal of incriminating evidence.

Finally, Mitford deals with bills to perpetuate testimony. It was a defect in the common law procedure that it admitted no evidence except *viva voce* at the trial. The Chancery procedure was of course to record evidence in depositions. Depositions could be unsatisfactory, as the Chancellors readily acknowledged when they framed issues of fact for findings by a jury after oral examination and cross-examination. On the other hand, injustice might be done if a witness was unavailable for the trial. So the Chancellors would entertain a bill to perpetuate testimony. The bill had to allege either that the facts could not be immediately investigated in a court of law or that before they could be investigated a witness was likely to die or leave the country. The case of the Duke of Dorset illustrates the application of the rule. The defendant claimed the right to fish on the Duke's preserves and threatened to sue when all the Duke's witnesses should be dead. The Duke brought a bill in Chancery for a Commission to examine his witnesses to establish his sole right to fish. The defendant demurred. If he had demurred on the ground (which he said was the fact) that he had done more than threaten and had actually fished, the demurrer would have been good, for the plaintiff could then have brought an action in trespass at common law, and, the court said, “the party having a remedy at law, the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been

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73. J. MITFORD, *supra* note 3, at 128.

74. *East India Co. v. Kynaston*, 3 Bli. (O.S.) 153, 4 Eng. Rep. 561 (Ch. 1821).

75. *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55.

found the most effectual method for discovering of the truth."<sup>76</sup> But since he had not pleaded this, the demurrer was overruled and the depositions taken. As was said in *Marsden v. Bound*, "by the strict rules of the common law, no depositions of witnesses taken *de bene esse*, or before issue joined, can be read or given in evidence."<sup>77</sup> The way around this was to apply to the Chancellor to enjoin the defendant from opposing the reading of the depositions.

This concludes Mitford's survey. We tend to think of equity chiefly as constituted by its great creations, such as the law of trusts, and its potent remedies, such as the injunction and the reformation or rectification of contracts. These certainly were the most important areas of equity jurisdiction. In matters of exclusive equity, such as trusts, the common-law courts were not being robbed; these were fresh fields colonized by equity. In concurrent equity the jurisdiction was shared. In auxiliary equity the common-law jurisdiction was left basically intact, equity intervening only to order specific improvements, sometimes merely by prohibiting a purely obstructive defense, always "acting as ancillary," as Mitford puts it.<sup>78</sup> Equity was not aggressive and greedy: She did not come as a conqueror to annex; she filled the empty quarters of the law. Wherever it could be shown that there was already an adequate remedy at law, a demurrer was allowed: Mitford is constantly stressing this. Although at the beginning of the seventeenth century Lord Ellesmere won the battle with Chief Justice Coke which gave the Chancellor what Maitland called "the upper hand,"<sup>79</sup> the great Bacon, then Lord Keeper, said that if "all causes that were triable naturally by the common law, and by jury, should be made examinable, and determinable in Chancery per testes," it would be "to confound jurisdictions, and to make the common law, and all the course of it needless, and a handmaid to the Chancery, and to take such causes as it pleaseth them to leave . . . ."<sup>80</sup>

Likewise, in the exercise of its jurisdiction equity hesitated to pass from the auxiliary over to the concurrent. The distinction between concurrent and auxiliary jurisdiction is that in the former

76. *Duke of Dorset v. Serjeant Girdler Prec.*, Ch. \*531, \*531-32, 24 Eng. Rep. 238, 238 (1720).

77. 1 Vern. 331, 331, 23 Eng. Rep. 502, 502 (Ch. 1685).

78. J. MITFORD, *supra* note 3, at 12. For an explanation of exclusive, concurrent, and auxiliary equity, see Devlin, *supra* note 10, at 53-56.

79. F. MAITLAND, *EQUITY* 9 (1909).

80. *Mannerling v. Dennis*, Hob. 353, 80 Eng. Rep. 349 (K.B. 1617) (with Hobart, C.J.) (allowing a demurrer for want of equity).

equity "assumes a power of decision"<sup>81</sup> and takes over the whole case; it will do this only when it considers that the common-law process is basically unsuitable and so, even with help, unusable. The common-law method of taking an account, for example, could not be improved by equitable aids; it had to be superseded. Then there was the consideration that, once a party had gone to the Chancellor for help, it might be cheaper and more effective to settle the whole thing in Chancery, so avoiding multiplicity of proceedings. This was a powerful consideration in cases where discovery was sought. Then also there was the natural reluctance to loosen a grip. Mitford writes:

The courts of equity having gone the length of complicated cases of account, of partition, and of assignment of dower, seem by degrees to have been considered as having on these subjects a concurrent jurisdiction with the courts of common law in cases where no difficulty would have attended the proceeding in those courts.<sup>82</sup>

Due process has no court of its own. It acts by improvement of the law. So it is to be compared in the main with auxiliary equity which acted in the same manner. Consider then the achievements of equity, as displayed by Mitford, in the field of due process and the clogs on justice that it removed: It saved the man who lost his documents by introducing the principle of secondary evidence; it prevented a defendant from being harassed by abuse of process; it ensured that the time necessarily taken in the trial process could not be used to deprive the plaintiff of the fruits of victory; it stopped purely obstructive defenses; it devised interpleader and permitted joinder; it preserved vital evidence. Above all, it forged the weapons of discovery and of the injunction and lent them to the common law. None of these was imposed on the law. They could be said almost to be dovetailed into it. At any rate they fitted so well that in England most of them were formally adopted by the common-law judges (though discovery and the injunction only by statute) before the general fusion in 1875.

The spirit of equity did not suddenly perish in 1791. It continued in England into the nineteenth century to do its beneficent work, though with diminished force as it came up against systematization,<sup>83</sup> which is the natural consequence of growth, and ultimately fossilization, which is the terminal disease of growth. In its own field

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81. J. MITFORD, *supra* note 3, at 103.

82. *Id.* at 111. As to concurrent jurisdiction in the action of account, see also *Weymouth v. Boyer*, 1 Ves. Jun. 416, 420, 30 Eng. Rep. 414, 416 (Ch. 1792); J. MITFORD, *supra* note 3, at 120-21; note 248 *infra* and accompanying text.

83. Systematization follows the natural tendency of lawyers, even when in pursuit of



it produced in 1791 the device of restraint on anticipation,<sup>84</sup> in 1848 the device of the covenant the burden of which runs with the land,<sup>85</sup> and then in the 1860's the invention of the floating charge. An example of action in aid of the common law is the equitable doctrine of contribution enunciated in the year of Mitford's second edition in *Dering v. Earl of Winchelsea*.<sup>86</sup>

Sir Edward Dering, the plaintiff, had a brother who, as a collector of Customs, had to furnish the Crown with a fidelity bond for £12,000 with 3 sureties, who were to be Sir Edward, Lord Winchelsea and another. This was effected by the brother giving three separate bonds of £4,000, a different one of the sureties joining with him on each bond. The object of the separation was to limit the liability of each surety to £4000; had there been only one bond for £12,000 each surety would have been liable for the full amount. The brother defaulted to the extent of £3883 which the Crown recovered from Sir Edward. He considered that the other two sureties should each refund him a third of what he had lost. If there had been only one bond, the common law would have given him a remedy by implying a contractual obligation on the other parties to the contract, but since there were three separate bonds there was no privity of contract. Sir Edward brought a bill on the equity side of the Exchequer claiming contribution from the other two sureties. The relief was granted by Chief Baron Eyre who said:

[C]ontribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, . . . the reason given in the books is, that in *equali jure* the law requires equality; one shall not bear the burden in ease of the rest, and the law is grounded in great equity.<sup>87</sup>

The application of equity was new; the plaintiff was refused his costs partly because of "the equity he asks being doubtful."<sup>88</sup> The doctrine was in due course admitted into the common law.

### III. EQUITY, DUE PROCESS AND THE JURY

I have described<sup>89</sup> how modern due process has acted to secure an impartial and competent jury. Two or three centuries earlier eq-

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equity, to fit their case into a precedent, rather than to break new ground. See Devlin, *supra* note 10, at 72.

84. See *id.* at 101.

85. *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

86. 1 Cox 318, 29 Eng. Rep. 1184 (Ch. 1787).

87. 1 Cox at 321, 29 Eng. Rep. at 1185.

88. 1 Cox at 323, 29 Eng. Rep. at 1186.

89. See notes 55-58 *supra* and accompanying text.

uity was acting in the same sort of way to achieve the same sort of objectives. Of course the common law was not impotent to protect itself against the partiality of jurors. There was the challenge, the change of venue and, until its obsolescence in the fifteenth century, the writ of attaint. But these weapons were not always strong enough to prevent bribery, intimidation, and interference generally, and when they were not, equity intervened. For example, a bill was allowed to change the venue of a trial at law in which Sir William Tyrringham was the defendant on the ground that Sir William was so powerful that right could not be had against him in his own county of Buckingham.<sup>90</sup> But by the eighteenth century it had come to be thought that the common law remedies for partiality were adequate. This is in effect what Lord Keeper Wright said in 1702 when he refused to order a new trial sought on the ground that freeholders in Suffolk had said that they would not find against a countryman.<sup>91</sup>

Equity was concerned with the competence of the jury as well as with its impartiality. The order for a new trial was the way in which equity intervened to negate the decisions of juries which revealed a failure to understand the facts or to apply correctly the law. It was also the way in which equity cured other defects of process that had appeared at the trial, such as the taking of a party by surprise,<sup>92</sup> or granted relief in the case of such misfortunes as the belated discovery of fresh evidence.<sup>93</sup> Before granting relief in the latter case, the Chancellor required proof that the evidence could not with due diligence have been made available, and this is the foundation of the present rule in English law.

The judgment of Lord Chief Justice Mansfield in 1757 in *Bright v. Eynon*<sup>94</sup> is most instructive about the way in which the erring jury was being handled in the eighteenth century. In the opinion of the court the jury had drawn the wrong conclusion from admitted facts. This might have been due, the Chief Justice thought, to prejudice imbibed from pretrial discussion, or "[t]he cause may be intricate; the examination may be so long as to distract and confound their

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90. The date is uncertain; the case is cited in *Earl of Kildare v. Eustace*, 1 Vern. 437, 439, 23 Eng. Rep. 571, 571 (Ch. 1686).

91. *Tovey v. Young*, Prec. Ch. 193, 24 Eng. Rep. 93 (1702).

92. *Hennell v. Kelland*, 1 Eq. Cas. Abr. 377, 21 Eng. Rep. 1114 (Ch. 1676), cited in Prec. Ch. 193, 24 Eng. Rep. 93 (1702); *Coddrington v. Webb*, 2 Vern 240 (Ch. 1691).

93. See *Curtis v. Smallridge*, Free. Ch. 177, 22 Eng. Rep. 1143 (1664) (new trial not granted where failure to introduce evidence was because of defendant's negligence, rather than fresh discovery of evidence).

94. 1 Burr. \*390, 97 Eng. Rep. 365 (K.B. 1757).

attention,"<sup>95</sup> or they might mistakenly have drawn the wrong legal consequences. The common-law court had occasionally granted a new trial but, said the Chief Justice, the relief "was holden to a degree of strictness, so intolerable, that it drove the parties into a court of Equity."<sup>96</sup>

The grant of a new trial at common law in this and subsequent cases must have diminished the need for equitable intervention but did not put an end to it. The proceedings in *Bright v. Eynon* were upon the customary motion that judgment be entered in accordance with the verdict.<sup>97</sup> After judgment had been entered there was no jurisdiction at common law to grant a new trial, whereas equity was still prepared to intervene. So we find Lord Redesdale saying in 1803 that a bill for a new trial, though "watched by equity with extreme jealousy," would be successful where a party had made no defense "because it was impossible for him to do it effectually at law" as in the case of complicated accounts, or where a party had obtained some "unconscientious advantage at law."<sup>98</sup>

Equity interfered with arbitrations in the same way as it did with jury trials, *i.e.*, to secure due process in the modern sense. Like jurors, arbitrators could be prejudiced and incompetent. Moreover, since they operated without direct judicial supervision, they could infringe elementary rules such as the duty to hear both sides. Such rules are the principles of natural justice, which is closely akin to due process. Equity in the sixteenth century assumed judicial control over arbitrations; this jurisdiction, now regulated by statute,<sup>99</sup> has

95. 1 Burr. at \*393, 97 Eng. Rep. at 366.

96. 1 Burr. at \*394, 97 Eng. Rep. at 367.

97. The rule in the Common Pleas was that the successful party could not enter judgment until the expiration of four days of the following term. So the loser had until then, but no longer, to move for a new trial. *See* *Birt v. Barlow*, 1 Doug. 171, 99 Eng. Rep. 113 (K.B. 1779); W. TIDD, *THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS* 903-04, 912 (9th ed. 1828).

98. *Bateman v. Willoe*, 1 Sch. & Lef. 201, 205-06 (Ire. Ch. 1803).

99. The first was An Act for Determining Differences by Arbitration, 1698, 9 & 10 W. & M., ch. 15, which is considered in the next paragraph. In England the first comprehensive statute was the Arbitration Act, 1889, 52 & 53 Vict., ch. 49, followed by Acts in 1934, 1950 and 1979. *See* Arbitration Act, 1934, 24 & 25 Geo. 5, ch. 14; Arbitration Act, 1950, 14 Geo. 6, ch. 27; Arbitration Act, 1979, ch. 42.

In America, a federal statute, first passed in 1925, permits courts to confirm an arbitration award, if "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." 9 U.S.C. § 9 (1976). *See generally* 9 U.S.C. §§ 1-208 (1976). The statute also sets forth grounds on which federal courts may vacate an arbitration award. Some are:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to

become very important. According to Lord Nottingham,<sup>100</sup> the Chancery asserted a general jurisdiction to support awards by decreeing performance of them and by enjoining actions at law in breach of them.<sup>101</sup> He himself, as Chancellor in *Smith v. Coriton* in 1675,<sup>102</sup> framed a more precise jurisdiction covering two categories. The first consisted of awards where the submission had been made by order of the court; such awards, Nottingham said, "are always examinable, for a court of conscience will never confirm an award against conscience." The second category he describes as consisting of "awards upon voluntary submission by bond." To secure performance of an award, the practice at this time was for the parties to exchange bonds for a certain sum, the bond to come into effect only if the signatory failed to honor an award made against him. If the bond turned out to be insufficient, the successful party could come to equity, Nottingham said, "to have the rest executed *in specie*."<sup>103</sup> To the contrary effect, equity would set aside an award "where there is apparent corruption or partiality" or "injustice in not hearing the parties."<sup>104</sup> In *Brown v. Brown*,<sup>105</sup> the Lord Keeper said that an award could also be set aside for "a manifest error in the body." This was the commencement of a jurisdiction that was to play an important part in arbitration law, the setting aside of an award for an error of law on the face of it.

Many of the arbitrations which equity was supervising in this way must have been in matters of common law, for arbitration has always been favored by commercial men. In 1698 the jurisdiction assumed by equity was formulated by statute and extended to the courts of common law. The statute recites:

Whereas it has been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the deter-

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the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers . . . .

9 U.S.C. § 10(a)-(d) (1976). Federal courts may modify or correct an award if "there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a) (1976). States have similar statutes. See, e.g., N.Y. CIV. PRAC. LAW §§ 7510-11 (McKinney 1980).

100. PROLEGOMENA OF CHANCERY AND EQUITY, reprinted in LORD NOTTINGHAM'S TWO TREATISES 306 (D. Yale ed. Cambridge University Press 1965).

101. See *Reignolds v. Latham*, Cary 106, 21 Eng. Rep. 56 (Ch. 1578).

102. 1 LORD NOTTINGHAM'S CHANCERY CASES 196 (D. Yale ed., 73 Publications of the Selden Society, 1957) [hereinafter cited as NOTTINGHAM].

103. NOTTINGHAM, *supra* note 102, at 196.

104. *Id.*; see, e.g., *Knipe v. Blackwell*, NOTTINGHAM, *supra* note 102, at 269 (1675), *Bateman v. Tidcomb*, NOTTINGHAM, at 347 (1676); *Brown v. Brown*, 1 Vern. 156, 2 Ch. Cas. 140, 22 Eng. Rep. 885 (1683); *Earl v. Stocker*, 2 Vern. 250, 23 Eng. Rep. 763 (Ch. 1691).

105. 1 Vern 156, 2 Ch. Cas. 140, 22 Eng. Rep. 885 (1683).

mining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission; now for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters; be it enacted [etc.]

The Act allows the parties to agree that their submission "should be made a Rule of any of His Majesty's Courts of Record, which the parties shall choose." This enabled the court selected to issue process for the enforcement of the award; that court was also empowered to set aside an award "procured by corruption or undue means."<sup>106</sup>

The new procedure was not universally adopted. Parties continued to rely on purely equitable remedies and on equity itself to expand the reach of due process accordingly. In *Burton v. Knight*,<sup>107</sup> the submission was to three arbitrators or any two of them. Two of them excluded the third from their meetings and allowed the defendant to be present. The Lord Keeper set aside the award as "partial and unfair." In *Morgan v. Mather*,<sup>108</sup> one of the Lords Commissioner set out the grounds for setting aside an award. Two were lack of jurisdiction and admitted mistake, and the third "corruption, or that they have proceeded contrary to the principles of natural justice . . . as if without reason they will not hear a witness." In *Walker v. Frobisher*,<sup>109</sup> the arbitrator, "a most respectable man," took evidence in the absence of one of the parties and after he had declared the hearing to be closed. He swore that the evidence had no effect on his award and Lord Chancellor Eldon believed him, but nevertheless set aside the award. If these decisions had been given under the Act, they would doubtless have been the same. Equity had already settled the principles, and the Act, as noted above, referred to "undue means" and later to "undue practice," which are the same thing as undue process. In *Paschal v. Terry*,<sup>110</sup> counsel successfully moved the King's Bench to set aside an award made by an umpire without hearing the plaintiff on the ground that it was "contrary to natural Justice, to make an Award without giving Notice to the Parties to attend."

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106. An Act for Determining Differences by Arbitration, 1698, 9 & 10 W. & M., ch. 15.

107. 2 Vern. 513, 23 Eng. Rep. 929 (Ch. 1705).

108. 2 Ves. Jun. 15, 18, 30 Eng. Rep. 500, 502 (Ch. 1792) (opinion of Lord Commissioner Wilson).

109. 6 Ves. Jun. 69, 31 Eng. Rep. 943 (Ch. 1801).

110. Kel. W. \*132, \*132-33, 25 Eng. Rep. 530, 530 (K.B. 1733).

## IV. EQUITY AND COMPLEXITY

To return to the jury, I think it to be beyond doubt that an eighteenth-century Chancellor who was satisfied *after* the verdict that the jury had failed to comprehend the issues would set aside the verdict and grant relief. But would a Chancellor have acted in anticipation? Would he have gone as far as due process has now gone in the *Zenith* decision and prohibited trial by jury as soon as he perceived, to use the words of the *Zenith* court, complexity "so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules"?<sup>111</sup> Did a Chancellor in fact ever do so? If so, how do the words he used compare with the *Zenith* formula? I shall try to answer these three questions in their order.

First, would the Chancellor have acted in anticipation? There is no difference in kind between the factors that cause a judge to grant an injunction after judgment and those that cause him to act in anticipation. There is a difference in degree. After judgment the judge bases himself on what he knows to have happened; before judgment he has to base himself on what he thinks may happen.<sup>112</sup> So in the latter case the evidence must be stronger, but that is all. There is nothing in the history of equitable intervention to suggest that a Chancellor who was ready to act after the event would have thought it out of the question to act before, or, to be specific, that a Chancellor who would set aside a verdict by a jury shown to be incompetent would permit trial by one which would probably prove to be incompetent.

There are indeed in that history two cases which suggest that the Chancellor would have had little hesitation in acting beforehand. In *Clench v. Tomley*,<sup>113</sup> an action in 1603 for possession of land, Lord Chancellor Egerton<sup>114</sup> said that he would not leave to a jury a case in

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111. 631 F.2d at 1088.

112. See, e.g., *ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp.*, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978), *aff'd. sub nom. Memorex Corp. v. International Bus. Machs. Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981) (trial judge, after questioning jurors unable to reach a decision, entered directed verdict for IBM and, because of the complexity of the case, prospectively struck jury demand in the event of a retrial).

113. Cary 23, 21 Eng. Rep. 13 (Ch. 1603). The authenticity and effect of *Clench* has also been discussed in Devlin, *supra* note 10, at 74-76; Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 840-46 (1980); Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965, 974-85 (1980); Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980).

114. Sir Thomas Egerton, Lord Keeper, was created Lord Ellesmere, Lord Chancellor, in 1603, 21 Eng. Rep. vii, and is often known by his later title.

which the conclusion would have "to be discerned by books and deeds." Such a case would very probably have been beyond the understanding of a jury; it is unlikely that in 1603 all jurors could read, let alone exercise discernment on legal documents. In an action for trespass, *Blad v. Bamfield*,<sup>115</sup> in 1694, Lord Chancellor Nottingham said that it would be "monstrous and absurd" that a common jury should try whether the English had a right to trade in Iceland. The *Zenith* court examined both cases carefully, not in order to see whether the Chancellor was *claiming* the power to deny trial by jury in a complex case, but in order to see whether he actually exercised that power in such a manner as to establish a basis of equity jurisdiction in cases of complexity. The court considered that neither case sufficiently established such a basis.<sup>116</sup>

As to *Clench*, the Chief Judge agreed that "the chancellor seems to have enjoined the trial because he considered an issue inappropriate for jury determination."<sup>117</sup> But he thought it to be doubtful whether the report of the case was complete and correct and held that "a single decision of dubious authority"<sup>118</sup> was not enough.

As to *Blad*, he noted that the Chancellor granted the injunction (and thus denied jury trial), and continued:

Contrary to appellants' assertion, the rationale for equitable relief in this case was not that the chancellor found the issue particularly unsuitable for a jury. It was that issues of international relations were not proper matters for determination in a trial at common law, either by a judge or a jury.<sup>119</sup>

A search for "the rationale for equitable relief" cannot be undertaken without an examination of the facts of the case. Bamfield was a Briton who traded in Iceland, which was then under the Danish Crown. Blad held a patent from the King of Denmark which gave him a monopoly of all import and export trade with power to license and to seize the goods of any infringer. A short war between England and Denmark was concluded in July 1667 by the Treaty of Breda,<sup>120</sup> which, so Bamfield contended, recognized a general right

115. 3 Swanst. 604, 607, 36 Eng. Rep. 992, 993 (Ch. 1674). A fuller report of *Blad* appears in NOTTINGHAM, *supra* note 102, at 106-08.

116. 631 F.2d at 1081-83.

117. 631 F.2d at 1082.

118. 631 F.2d at 1083. "Dubious authority" refers to the text and not to the judge, although Chief Judge Seitz states that the decision "may be an aberration." In W. JONES, THE ELIZABETHAN COURT OF CHANCERY (1967), Egerton is the outstanding figure and is described as dominating the Elizabethan Chancery. *Id.* at 50. There were many criticisms of his character, "[h]owever, it was admitted that Egerton was a good hearer of causes." *Id.* at 93 n.2.

119. 631 F.2d at 1082.

120. The original of the treaty is in Latin printed in Consolidated Treaty Series, Vol. 10 p.

to trade. Nevertheless, in 1668 Blad seized in Iceland the goods of Bamfield for trading without a license. In 1673 Blad came to England and Bamfield took the opportunity of bringing an action against him at common law in trespass and trover in respect of his seizure of the goods. Blad went to the Privy Council asking the Council to stay the common-law proceedings on the ground that they involved a question of state. Lord Chancellor Nottingham, who was at the Council, "stood up and said this was not a question of state, but of private injury." It would be "no injury to the Dane to let the suit go on, for whatever was law in Denmark would be law in England in this case . . . . And if the Dane wanted his authentic proofs, I offered him, upon a bill exhibited before me, to grant him an injunction till the commission returned."<sup>121</sup> Doubtless this offer was made because of the difficulty which would confront Blad in trying to prove in a court of common law that what he had done in Iceland was according to Danish law.

In Chancery Blad proved the letters patent and that the seizure was in accordance with them. Bamfield did not question this. But he contended that Blad, having now "had all the benefit of this Court which he could reasonably expect"<sup>122</sup> should present the patent as his defense to the trespass action at law. His reply, Bamfield said, would be that the patent was illegal and contrary to the articles of peace. This reply did not impress Lord Nottingham. Holding that the articles were "understood on both sides, with exception to the laws and customs of each kingdom," he decided the case himself forthwith in favor of Blad. Thus he assumed jurisdiction over a common-law claim for trespass and trover. How did he justify that? The judgment gives three possible grounds for equity jurisdiction and out of one of them there must emerge the rationale in the case.

The first ground of jurisdiction is that "it relates to a trespass done upon the high sea" and that the Chancery "may send for any cause out of the Admiralty to determine it here . . . ."<sup>123</sup> But the Chancellor does not push this to a conclusion. The case was not in the Admiralty, so he did not in fact send for it. There could be no reason for sending for it unless it fell under his second ground which

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289, the relevant provision being (p. 291) the last sentence of Article 1. *See also*, 1 G. CHALMERS, A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS 73, 74 (1790) (English translation). In 1670 there was a final and comprehensive treaty which by Article XLI preserved all former leagues and treaties. *Id.* at 96. One or the other or both of these constitute "the articles of peace" referred to in the report of the case.

121. NOTTINGHAM, *supra* note 102, at 7-8 (P.C. 1673).

122. 3 Swanst. at 605, 36 Eng. Rep. at 992, NOTTINGHAM, *supra* note 102, at 107.

123. 3 Swanst. at 605, 36 Eng. Rep. at 992, NOTTINGHAM, *supra* note 102, at 107.



is that "it had relation to articles of peace, all leagues and safe conducts being anciently enrolled in this court."<sup>124</sup> This means that if in the course of an action for trespass it becomes material to determine the effect of a document enrolled in Chancery, the Chancellor can deny trial by jury. There is not, I think, any other instance of a claim for equitable jurisdiction as wide and vague as this. Here again Lord Nottingham did not elaborate. He diverted to the observation that "if it had been known at Board that this would have been the main part of their case, doubtless the Council would not have suffered it to depend in Westminster Hall."<sup>125</sup> But he went on to say that in truth the plea failed for the reason which I have given above. Lord Nottingham's manner of speech has, I think with great respect, misled the House of Lords in the recent case of *Buttes Gas & Oil Co. v. Hammer*<sup>126</sup> into saying that *Blad v. Bamfield* was "a decision clearly on justiciability, and not merely on defense." Lord Wilberforce is there describing what Lord Nottingham ought perhaps logically to have said and decided once he had concluded that the case was after all "a case of state," but not what he actually said and decided. He heard evidence and gave judgment. When a judge begins the operative part of his judgment by saying "never was any cause more properly before the Court,"<sup>127</sup> it is hardly possible to say that he was deciding that it was not justiciable.

So we must look to the third ground where indeed Lord Nottingham himself gives the reason for his decision. "Wherefore the whole state of the case appearing now before me, as much as ever it can do in any other place, I thought fit to put an end to it, and decreed that the Plaintiff should have a perpetual injunction to stay the Defendant's suit at law . . ." <sup>128</sup> The submission by Bamfield with which Lord Nottingham had to deal was that, equity having exhausted its auxiliary jurisdiction, the case should go back to the common-law court for the trial. If he was rejecting the submission on the ground that equity was not acting solely as an auxiliary but by virtue of a concurrent jurisdiction of its own, either an admiralty jurisdiction or as the custodian of leagues and safe conducts, surely he would have said so. All that he thinks it necessary to say is that he had heard all that there was to hear. He was giving an early instance of the rule against multiplicity of actions which was to be developed further by

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124. 3 Swanst. at 606, 36 Eng. Rep. at 992, NOTTINGHAM, *supra* note 102, at 107.

125. 3 Swanst. at 606, 36 Eng. Rep. at 992, NOTTINGHAM, *supra* note 102, at 107-08.

126. [1981] 3 W.L.R. 787, 805 (H.L.).

127. 3 Swanst. at 605, 36 Eng. Rep. at 992, NOTTINGHAM, *supra* note 102, at 107.

128. 3 Swanst. at 607, 36 Eng. Rep. at 993, NOTTINGHAM, *supra* note 102, at 108.

Lord Hardwick: "So in bills for *injunctions*, the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here";<sup>129</sup> "this court will not put him to sue doubly . . . ."<sup>130</sup>

This narrow rationale is broadened by a very powerful dictum that the issue was not in any event suitable for trial by jury. Why not? Chief Judge Seitz says it was because it was an issue of international relations and so not a proper matter for determination in a trial at common law. This suggests that there was a special category of issues which the Chancellor would rescue from trial by jury because they concerned international relations. It sounds plausible only because we are now familiar with the idea that issues on international relations are not justiciable at all. If they were justiciable, no one would have suggested in 1674, any more than they would now, that they could not be determined as satisfactorily by a common-law judge as by an equity judge. But of course in 1674 they could not be determined at common law by a judge alone. What created unsuitability was the participation of the jury.

If *Blad v. Bamfield* had gone back to the court of common law, a jury, with the aid of a direction from the judge, would have had to decide the same questions as the Chancellor had decided. Were the acts of seizure all within the scope and authority of the letters patent? If so, were the letters patent invalidated by a treaty which gave a general right to trade? If the judge had directed the jury in accordance with Lord Nottingham's view, they would have had to have decided whether there was an understanding that the treaty accepted the laws and customs of Denmark. It is impossible not to perceive the difficulty of obtaining a satisfactory verdict on issues of this sort in which intricacies of fact and law are intermingled, whether they arise in international relations or in any other sphere. This, *inter alia*, is what is meant by complexity. One indicator of complexity, Chief Judge Seitz wrote, is "the conceptual difficulties in the legal issues and the factual predicates to these issues . . . ."<sup>131</sup>

Lord Nottingham's dictum on complexity is close to the heart of *Blad v. Bamfield*. True, he put an end to the case by deciding it himself. But would he have decided it himself if the issues had been cognizable by the jury? It is arguable that the dictum ought to be treated as part of the rationale. Whatever the rationale, one cannot

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129. *Jesus College v. Bloom*, 3 Atk. 262, 263, 26 Eng. Rep. 953, 954 (Ch. 1745).

130. *Bishop v. Church*, 2 Ves. Sen. 100, 106, 28 Eng. Rep. 66, 70 (Ch. 1750).

131. 631 F.2d at 1088.

get away from the fact that a Chancellor with the enormous authority of Lord Nottingham was saying that to send the issue for trial by common jury would be "monstrous and absurd."<sup>132</sup> He would not have put it that way if he knew that he had no power to stop trial by jury of a complex issue. In *Clench's* case, even if the report is too incomplete to establish a rationale, there is no reason to believe that the Chancellor was being misinterpreted when he said that the case would be beyond the understanding of "a jury of ploughmen."<sup>133</sup> Chief Judge Seitz observed that the Chancellor "proved in his later clash with Chief Justice Coke that he held relatively expansive views on the authority of a chancellor to intervene into legal matters."<sup>134</sup> But it was the Chancellor who was victorious in the clash.<sup>135</sup>

It must be remembered that equity (whether this be to its credit or not), though it respected the jury, had not the reverence for it which one finds in the American judicial system. For equity, trial by jury was a value, but not an incomparable value; it had to be weighed in the scales against other values. One of these, which equity found weighty, was the avoidance of a multiplicity of actions. There were many cases in which equity, not confining itself to giving aid to the common-law process, assumed the power of decision, as Mitford puts it; this was for the sake of cheapness and efficiency. For this motive alone equity was constantly denying trial by what would doubtless have been a competent jury; it would not be squeamish about denying trial by an incompetent one.

I pass to the second question: did the Chancellor in fact ever act to prevent trial by an uncomprehending jury? I think he did. I need not recur to *Clench* and *Blad*; all that can be said about those cases has now been said. The clearest case, and one of unimpeachable authority, is *O'Connor v. Spaight*.<sup>136</sup> I shall in the next paragraph quote Lord Redesdale's dictum and I shall later examine the dictum in its setting.

My third question called for a comparison between the words devised under due process for the denial of trial by an uncomprehending jury and those used by equity. The *Zenith* court denied jury trial "when a jury will not be able to perform its task of rational decisionmaking . . ."<sup>137</sup> Lord Redesdale denied jury trial in a case

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132. See note 23 *supra* and accompanying text.

133. See note 22 *supra* and accompanying text.

134. 631 F.2d at 1083.

135. See note 79 *supra* and accompanying text.

136. 1 Sch. & Lef. 305 (Ire. Ch. 1804).

137. 631 F.2d at 1086.

that "has become so complicated that a Court of Law would be incompetent to examine it upon a trial . . ." <sup>138</sup> The language of the *Zenith* court can now be seen as a precise and limited application of the broader language used in the Irish Court of Chancery 176 years earlier. If Lord Redesdale had been asked whether his words covered a case of such complexity that a jury could not perform its task of rational decisionmaking, he would undoubtedly have said that they did, for he followed them up immediately with the example of a complicated account. If the *Zenith* court had been asked whether a jury that could not perform its task of rational decisionmaking could be regarded as a competent jury, it would surely have said that it could not.

This leads us into the heart of the mystery which I must endeavour to elucidate. If on this point there is no conflict between equity and due process, where lies the conflict between the seventh and fifth amendments? If, as is universally agreed, what was protected by the seventh amendment was the right to trial by jury in England in 1791; if, which is indisputable, the right to trial by jury in England in 1791 was subject to equity; and if, as is the theme of this Article, equity and due process are, for the purposes with which we are here concerned, the same, how has it come to pass that in 1980 due process has to be called in to silence the seventh amendment's demand for trial by a body incapable of arriving at a rational decision?

## V. EQUITY AND FUNDAMENTAL FAIRNESS

When I embark on the task of elucidation I move on to another theme and before doing that I must make sure that I have completed all that I have to say about the sameness of due process and equity as a principle of judicial activity. I have shown that they originated out of the same social need and fulfilled the same reformatory function. I have compared their workings and it emerges from this comparison that the differences are superficial. History never repeats itself exactly. The conditions which in the Middle Ages called for reformatory and remedial action are not the same as conditions today; hence the action produced is not just the same. Three differences, none of them fundamental, may be noted.

The first is that equity put itself above the law. The Chancellor in the name of the King threatened to imprison anyone who exercised his legal rights. Today this would be considered to be intolerable tyranny. But in medieval England the King was the fount of

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138. 1 Sch. & Lef. at 309 (Ire. Ch. 1804).

justice and the common law was rudimentary. The Chancellors were acting like the praetors in Rome who granted a remedy in a situation in which the *ius civile* provided none.<sup>139</sup> On the whole, though the common lawyers fought the idea right up to the time of James I, it was thought fitting that the King should grant petitions, theoretically only in special cases, relaxing the grip of the law. Essentially, this was an exercise of the dispensing power which, used outside the system of equity, led to the Glorious Revolution of 1688. So theoretically, and whatever the motive, equity was tyrannical and at war with the rule of law. This must have given equity a bad name with the Pilgrim Fathers, which perhaps in America it has not completely lived down.

Due process, on the other hand, derives from the Constitution. Due process does not cancel the law but molds it. Nevertheless, for all practical purposes, it is doing the same job. Whether it acts through the Constitution or the Chancellor, it holds, as Maitland put it, "the upper hand."<sup>140</sup> The fact that the upper hand in each case derives its strength from a different source of power accounts also for the second superficial difference — a difference in terminology. In the practice of equity conscience was the keyword; in due process it is fairness. Equity declares it to be unconscientious or unconscionable to take advantage of the imperfections of the law; due process relies on the fundamental fairness at the core of the law to rectify its surface imperfections.<sup>141</sup>

Finally, there is the fact that the imperfections to be remedied today are slighter than the imperfections of the past and consequently call for more sophisticated treatment. The enemies which equity overcame seem to us now to be injustices so monstrous that we marvel that the common law could have harbored them; the undue processes which today we correct would have seemed to our ancestors to be minor irregularities. I have exemplified these already in the distinction between simple and meaningful opportunity to be heard.<sup>142</sup> Until the 1730's the defendant in the ordinary criminal

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139. The parallel with the praetor was drawn by Chief Baron Gilbert, a respected writer, in his *Lex Praetoria*, part of his *HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY* (1758). It was, in the following year, noted by Lord Hardwicke in his letter to Lord Kames, *see* note 153 *infra* and accompanying text.

140. *See* Devlin, *supra* note 10, at 50 (quoting F. MAITLAND, *supra* note 79, at 9-10).

141. There is no antagonism. Today the various characterizations are used interchangeably or may be accumulated for emphasis. A judge is reported as saying that it would be "unjust, unfair, unconscionable, and inequitable" for the plaintiff to have more than he had awarded him. *London Times*, July 31, 1981, at 5.

142. *See* notes 49-54 *supra* and accompanying text.

trial was not allowed counsel;<sup>143</sup> and in civil suits it is hardly more than a generation ago that statutory legal aid superseded the process *in forma pauperis*. Before that, aid for the indigent, unless in the extreme that called for charity, would have been considered subversive of the social order, penalizing thrift and encouraging idleness. So you will not find in equity any doctrine as refined as that laid down in the important due process decision of *Mathews v. Eldridge*.<sup>144</sup> Due process is now more often concerned with striking a balance than, as equity was, with initiating a new conception. So due process does not require the State to invariably provide counsel for the indigent; there are factors to be balanced. The *Eldridge* case "propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."<sup>145</sup>

## VI. THE DARK AGES: 1791-1830

The mystery of which I spoke<sup>146</sup> has its origin in the dark ages between 1791 and 1830. In *Parsons v. Bedford*<sup>147</sup> in 1830 the "historical test" which is applied today was settled in essentials. In the composition of this test equity, as a dynamic force, a principle of judicial activity, is not an ingredient. If it were there, there would be no room now for due process. It is the vacuum created by the elimination of equity as a principle of judicial activity that due process is now being called upon to fill. How did this elimination occur? Research into this period of American legal history has not as yet enabled us to find the answer; this is why I call the period the dark ages. There may be lying undiscovered cases like *Turney's Executor v. Young* which shows a court of equity in 1814 in Tennessee granting an injunction against the execution of a common-law judgment on the ground that "a fair trial was not had."<sup>148</sup> This offers a glimpse of equity working in the same way as it was in England and in Ireland under Lord Redesdale. But it is only a rift in the clouds and the period as a whole is still obscure.

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143. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 124 (1983).

144. 424 U.S. 319 (1976).

145. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (summarizing *Eldridge*).

146. *I.e.*, the source of the perceived conflict between the fifth and seventh amendments.

147. 28 U.S. (3 Pet.) 433 (1830).

148. 2 Tenn. (2 Overt.) 265, 266 (1814).

I have written of equity as a dynamic force or a principle of judicial activity on the one hand and on the other as a system. What exactly do I mean? Equity originated as a principle of judicial activity. In England from the fourteenth to the nineteenth century it was a dynamic force changing the application of the law in the way in which due process is doing today in the United States. During these centuries it proliferated into the set of principles which Mitford "methodized." It was a creative principle and as it proliferated it created a body of law and established a jurisdiction. In its primary meaning it is a creative principle, in its other meaning it is the jurisdiction or system which it has itself created.

As the system matured, the force of the creative spirit diminished. There is an admirable discussion of this in Pomeroy,<sup>149</sup> from which I draw many of the following observations. In the beginning every equitable doctrine or rule was of necessity an innovation. The ecclesiastical Chancellors had nothing to guide them except "the dictates of natural right, or morality, or conscience."<sup>150</sup> But the application of a principle, however general in its terms, to any set of facts which is not entirely unique is bound to suggest a rule and so to give birth to a precedent. Precedents multiply and, as Pomeroy puts it, "from the universal conservative tendency of courts to be controlled by what has been already decided,"<sup>151</sup> a system of doctrines is developed and assumes a comprehensive shape. As late as 1670,<sup>152</sup> however, it was being queried whether precedents could properly be used for ascertaining "a universal truth," to which Lord Keeper Bridgeman replied that precedents were very necessary and useful. Lord Hardwicke in 1759 in his celebrated letter to Lord Kames, wrote that "[s]ome general rules there ought to be, for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Praetor [Chancellor] must not be so absolutely and invariably bound by them, as the judges are by the rules of common law."<sup>153</sup> Sixty years later Lord Eldon, as is to be expected, put it more tightly: The "doctrines of this Court ought to be as well settled and made as uniform

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149. 1 J. POMEROY, *supra* note 47, at 35.

150. *Id.* at 37.

151. *Id.* at 40.

152. Fry v. Porter, 1 Rep. 300, 307, 86 Eng. Rep. 898, 902 (Ch. 1670).

153. 1 J. POMEROY, *supra* note 47, at 50; Letter from the Earl of Hardwicke to Lord Kames (June 30, 1759), reprinted in 1 A. TYTLER, LORD WOODHOUSELEE, MEMOIRS OF THE LIFE AND WRITINGS OF THE HONOURABLE HENRY HOME OF KAMES 237-44 (1807); see also 5 J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 167 (1846).

*almost* as those of the common law . . . ."<sup>154</sup> A statement of principles by Lord Redesdale, made in 1802, comes between the two in stress:

There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, *and may thus illustrate or enlarge the operation of those principles*; but the principles are as fixed and certain as the principles on which the courts of common law proceed.<sup>155</sup>

Lord Redesdale's dictum may be thought to represent the view that prevailed at least until the middle of the century. It formed the basis of Dr. Pomeroy's text, which is so clear and precise that it is worth quoting in its own right:

The true function of precedents is that of illustrating principles; they are examples of the manner and extent to which principles have been applied; they are the landmarks by which the court determines the course and direction in which principles have been carried. But with all this guiding, limiting, and restraining efficacy of prior decisions, the chancellor always has had, and always must have a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers. He can extend those doctrines to new relations, and shape his remedies to new circumstances if the relations and circumstances, come within the principles of equity, where a court of law in analogous cases would be powerless to give any relief.<sup>156</sup>

I have given examples of the Chancellor continuing well into the nineteenth century to extend doctrines and shape remedies.<sup>157</sup>

In *Parsons v. Bedford*<sup>158</sup> the line was drawn between suits in which legal rights were to be ascertained and determined and suits recognized only in equity and admiralty. An admiralty suit is distinguishable by its nature from a suit at common law; there is no difficulty about that. A suit that is recognized *only* in equity is likewise

154. *Gee v. Pritchard*, 2 Swanst. 402, 414, 36 Eng. Rep. 670, 674 (Ch. 1818) (emphasis added).

155. *Bond v. Hopkins*, 1 Sch. & Lef. 413, 428-29 (Ire. Ch. 1802) (emphasis added). In this case Lord Redesdale considered the extent to which courts of equity should give effect to the statute of limitations. The passage which immediately follows that cited in the text is also worth citing for the general principle.

Nothing is better established in courts of equity, (and it was established long before this act) than that where a title exists at law and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that where a title exists in conscience though there be none at law, relief should also, though in a different mode, be given in equity.

156. J. POMEROY, *supra* note 47, at 49.

157. See notes 84-88 *supra* and accompanying text.

158. 28 U.S. (3 Pet.) 433, 446 (1830).



distinguishable; there is no difficulty about the distinction between exclusive equity and the common law. But what about concurrent equity? What about the suits in which legal rights had to be ascertained and determined but in which equitable remedies or equitable aid were sought and which the Chancellor retained within his jurisdiction so as to avoid multiplicity of actions? As the years went by the test was broadened and the line softened. The *Zenith* court described it as follows: "Usually, courts have categorized suits among law, equity, and admiralty on the basis of the presence of a subject matter or a remedy peculiarly associated with one of the three jurisdictional categories."<sup>159</sup> The American courts now look for features — later in the *Zenith* judgment they are referred to as "indicia"<sup>160</sup> — indicating a family resemblance but, hard or soft, the line is plotted according to the positions taken up in 1791. It is as if two opposing armies, fighting in a city such as Jerusalem or Berlin, had suddenly declared an armistice and thereafter the boundary was drawn on the line which actually separated the armies at the moment of the ceasefire. What bases had equity actually established in the territory of the common law by 1791? Applying this test, the *Zenith* court was unable to "conclude that complexity alone ever was an established basis of equitable jurisdiction."<sup>161</sup>

## VII. THE TRANSFER OF JURISDICTION

When in 1776 the colonies that were soon to become the United States renounced their allegiance to King George III and declared their independence of Britain, they did not thereby proclaim anarchy. The executive, legislative, and judicial organs of each state continued to function notwithstanding that sovereignty had passed from the Crown to the People. The judges in the courts of law, equity and admiralty in each state continued to exercise their powers though no longer in the name of the King. They accepted the corpus of the law as it then existed but continued in the manner of an English judge to "make" or "declare" new law — equity, as we have seen, doing so more liberally than the common law — when they deemed it to be necessary, treating this as a proper exercise of judicial power. They did not, any more than their separated brethren across the Atlantic, treat the precedents which made up the body of law as bases of jurisdiction beyond which they could not move. They looked for the

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159. 631 F.2d at 1078.

160. 631 F.2d at 1079.

161. 631 F.2d at 1083.

principle in the precedent and from it derived their power to make new law. So the question for an equity judge who had to decide whether or not he would intervene in a suit at common law was not "Do the cases show that a judge has actually intervened?" but "Do the principles authorize a judge to intervene?" To this question, if it is put in the case of an equity judge faced with the possibility of trial by an uncomprehending jury, there could, on the principles to be derived from the pre-1791 authorities, be only an affirmative answer. But this is not the question which the American courts now ask themselves. When they examine the English authorities they look only for signs of an actual intervention and, if they find it, they treat its effect as circumscribed by the facts of the case. They do not distill from it the rationale of the case and treat that as a source of power. I shall illustrate this later by an examination of *O'Connor v. Spaight*.<sup>162</sup>

The transfer of sovereignty or jurisdiction is a transfer of power. It is not a transfer of the results to date of the exercise of the power with the power itself left behind. The acceptance of the results to date is not the object of the transfer but rather a natural consequence of it. To refuse them would create a vacuum; and the new holder of power, though he may wish for change, does not wish to question the legitimacy of the power with which he is now himself endowed. To be sure, acceptance of the results to date does not mean that the new authority will continue to exercise the power so as to produce similar results in the future. The transfer creates a new situation. The *Zenith* court, on its way to the haven of the fifth amendment, paused long enough to glance at this situation. If there were to be deviations, they said, from the old approach they should be based on current policies and present circumstances: "[W]e see no persuasive reason for incorporating into the seventh amendment the policies and probable actions of the English chancellor of 1791."<sup>163</sup> With respect, this is to confuse policy with power. An incoming administration takes over all the powers of the outgoing but only those of its policies which it approves. So when a jurisdiction changes hands, there is transferred the whole of the past as it is recorded in precedents and the whole of the principles on which the jurisdiction is founded. But the new hands do not undertake to apply the principles in the same way as they were applied in the past, nor are they

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162. See notes 204-08 *infra* and accompanying text.

163. 631 F.2d at 1083.

concerned with the “probable actions” of the old hands whom they have replaced.

Principle is liquid and precedent is frozen. If control over the flow of principle changes, the shapes of the precedents yet to be formed will be different from what they would have been. Let us look at the principle of “effectuality” which, I have suggested,<sup>164</sup> was one of the principles which in or about 1791 controlled the power to deny jury trial. It was a principle not yet channelled; it might flow on in a narrow or in a broad stream. At its narrowest it would be no wider than the later *Zenith* formulation with which I compared it, *i.e.*, ineffectual to perform the task of rational decisionmaking — in other words, ineffectual to do justice. But effectuality and efficiency are not very far apart in sound or in meaning and it is easy to call a mode of trial inefficient when you are comparing it with another that is speedier and cheaper and, as you might say, more effective; or, as you could end up by saying, more convenient. This is what happened in England. The broadening began almost at once in the chain of cases started by *O'Connor v. Spaight*, which had to do with bills asking for an account in equity: “[T]hough an action might be maintained, yet, if it appears, it would not be tried without great difficulty, and the verdict could not from the nature of the case be equally satisfactory with the proceedings under a decree, an account shall be decreed.”<sup>165</sup> This was how it was put as early as 1807. But the broadening did not proceed evenly. In 1827 there is a dictum by the influential Chief Baron Alexander: “[I]t must be such an account as cannot possibly be taken justly and fairly in a Court of law.”<sup>166</sup> But by the middle of the century the full width of the stream was recognized by Lord Chancellor Cottenham.<sup>167</sup> He began by saying that the ground for the application was that “justice cannot be done, or not so effectually done, by a trial of the action as by an account taken before the Master.” Then he went on to say that

although the practical difficulty experienced in proceeding at law does form an important consideration in the exercise of the *discretion* of this Court . . . [t]he jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of purely legal right, or to enforce justice in cases in which

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164. See note 138 *supra* and accompanying text.

165. *Carlisle v. Wilson*, 13 Ves. Jun. 276, 280, 33 Eng. Rep. 297 (Ch. 1807) (Erskin, Lord Chancellor).

166. *Frietas v. Dos Santos* 1 Y. & J. 573, 576, 148 Eng. Rep. 800, 801 (Ex. 1827). Alexander sat in the Exchequer and had a high reputation as an equity judge; per Master of the Rolls Romilly in *Grenville-Murray v. Earl of Clarendon*, 9 L.R. 8 Eq. 18 (M.R. 1869).

167. *North-Eastern Railway Co. v. Martin*, 2 Ph. 758, 41 Eng. Rep. 1136 (Ch. 1848).

Courts of law cannot afford it; but the jurisdiction is concurrent with that of the Courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of parties.<sup>168</sup>

This was the doctrine which came to be, as it were, officially formulated in 1875 when the dividing line was set at "not capable of being conveniently tried before a jury."<sup>169</sup>

Blackstone would not have approved. One of his most famous passages is a warning against the temptations of "convenience":

And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet, let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation, are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.<sup>170</sup>

Story, in nineteenth-century America, would likewise have disapproved, as he disapproved in general of the encroachments of equity on the grounds of mere convenience. The basis of equitable jurisdiction, he held firmly, was the inability of a court of law to furnish a plain, complete and adequate remedy.<sup>171</sup> Even without the seventh amendment it is most unlikely that the American courts, once freed from a strict adherence to English precedent, would have preferred the test of inconvenience to that of injustice; they might, however, have accepted the test of Chief Baron Alexander, as quoted above — "cannot possibly be taken justly and fairly in a court of law."

### VIII. THE TRADITIONAL CONSTRUCTION

I have been looking at the anatomy of a transfer of jurisdiction and separating the transfer of power or authority from the transfer of the body of law up till then created. Another way of putting it is to say that in 1776 what was taken over was not just a body of law but the existing legal system as a going concern: the common law not only as it had by then been declared but with all that was within it

168. 2 Ph. at 761, 41 Eng. Rep. at 1138.

169. *Clark v. Cookson*, 2 Ch. D. 746, 748 (1876) (interpreting Rule 26 under order XXXVI of the Rules of Court embodied in Supreme Court of Judicature Act, 1875, 38 & 39 Vict., ch. 77, amending Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66; see also *Devlin*, *supra* note 10, at 96.

170. 4 W. BLACKSTONE, COMMENTARIES \*350 (emphasis in original).

171. See J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 649-50 (1835) (criticizing dictum in *Calmady v. Calmady*, 2 Ves. Jun. 567a, 569, 30 Eng. Rep. 780, 781 (Ch. 1795) (*Loughborough, L.C.*), that in cases of partition "the jurisdiction of this Court obtained upon a principle of *convenience*" (emphasis added)).

and which in accordance with its own processes would in due time be revealed — equity with its potential as well as with what it had actually accomplished. How then does it come about that equity in relation to the jury,<sup>172</sup> has lost its potential? The answer must lie in the terms of the seventh amendment. Without that amendment there can be nothing to prevent the transfer taking effect in the ordinary way in relation to trial by jury as much as to any other part of the system.

“In Suits at common law, . . . the right of trial by jury shall be preserved.”<sup>173</sup> The text is deceptively simple. It implies that in 1791 the right to trial by jury in every suit at common law was secure and needed only to be preserved. This may well be how it appeared to the framers of the amendment, even to the lawyers among them. By 1791 fifteen years had elapsed since the Declaration of Independence, and since, it may be guessed, anyone in the states had paid much attention to the activities of a Lord Chancellor. Even before that, his activities would not have been followed as closely in Virginia and Massachusetts as they were in Lincoln’s Inn. Nevertheless, the fact was, as every lawyer sufficiently erudite would know, that a plaintiff who embarked on a suit at common law had no guarantee that it would end up with the issue being decided by a jury. There could be a suit properly brought at common law upon a legal claim and seeking only a legal remedy, such as an action of ejectment, and yet in which the Chancellor would intervene and decide the matter himself; or in which, if a judgment had already been obtained, he would prohibit its enforcement.

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172. In relation to the law and practice generally, equity in America retained, as in England, its potential for development. For example, in 1954 the Supreme Court held for the first time that racial discrimination in public education violated the fourteenth amendment of the Constitution. *Brown v. Board of Education*, 347 U.S. 483 (1954). It asked for reargument on the nature of the relief it should provide to redress the constitutional violation and concluded in *Brown II*:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

349 U.S. 294, 300 (1955) (footnotes omitted). Likewise, the judgment in *Atlas Roofing v. Occupational Safety & Health Review Commn.*, 430 U.S. 442 (1977), makes it clear that there was no “freezing.” See, e.g., *Murphy v. Kerr*, 5 F.2d 908 (8th Cir. 1925) (applying the doctrine in *Tulk v. Moxhay*); *Lidderdale’s Executors v. Executor of Robinson*, 25 U.S. (12 Wheat.) 594 (1827) (establishing the equitable doctrine of contribution among obligors without deeming it necessary to say that *Dering v. Earl of Winchelsea* had established it as a basis of equitable jurisdiction in England in 1787). The *Tulk* and *Dering* cases are discussed at notes 85-88 *supra* and accompanying text.

173. U.S. CONST. amend. VII.

“Preserved” is not the same as “guaranteed.”<sup>174</sup> If the seventh amendment were to be interpreted as guaranteeing the right to trial by jury in every suit that could properly be entertained at common law, the power of concurrent equity would be totally destroyed. The Chancellor got his way by prohibiting the litigant from pursuing his rights at common law and offering him, if he was entitled to it, equitable relief instead. Thus every intervention by equity into a suit at common law could end up by denying the litigant his right to trial by jury. It was not the object of the amendment to put an end to all such interventions and so to deprive equity altogether of its power over the common law. To preserve trial by jury as it existed in 1791 is therefore to preserve it subject to the intervention of equity as it was in 1791. This has never been disputed. It leaves room, however, for two interpretations. One, the narrower of the two, the one that was adopted in *Zenith* as the traditional construction, is that it was subject to those interventions which equity had by 1791 actually made effective; there must be no further encroachments. This freezes the position reached in 1791 and deprives equity of its potential.

The other interpretation is that trial by jury was subject to any intervention by equity which was in accordance with the principles which by 1791 had been established. Under this broader interpretation there would be no arbitrary intervention, but equity would be allowed to continue with its work in cases in which trial by jury could not provide an adequate remedy or could result in a court of law being used as an instrument of injustice. This broader interpretation leaves the court with a residual discretion to intervene if the task that is being put upon a jury is beyond its practical abilities and limitations — in other words, a discretion to intervene if that is the only way to get a fair trial. It is not a fanciful interpretation since it accords with the *Ross* footnote, acknowledging the “practical abilities and limitations of juries.”<sup>175</sup> It is hardly possible, as the *Zenith* court seems to accept,<sup>176</sup> to read that footnote as consistent with the traditional construction of the seventh amendment. Moreover, if the traditional construction is adopted, no one has as yet suggested any way, except by recourse to the fifth amendment, whereby under the Constitution a fair trial can be secured in cases that a jury cannot understand.

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174. See *Atlas Roofing Co. v. Occupational Safety & Health Review Commn.*, 430 U.S. 442, 459 (1977) (White, J.).

175. See note 15 *supra* and accompanying text.

176. 631 F.2d at 1079-80.

The advantages of the traditional construction are palpable. It erects a barrier against further encroachment that might diminish a unique and valuable institution. It is a construction which would doubtless have been applauded by much American sentiment in 1791, which would think equity not so much an emollient as an undemocratic exercise of judicial power, and of trial by jury as a sacred inheritance.<sup>177</sup> But as a barrier it is held firm only by its historical roots. It is not as if trial by jury had been designed to fit the suit at common law; the meeting between the two was brought about by historical accident and not by legal science. Likewise, although the barrier has not been maintained inflexibly in position, the changes that have been made were not to satisfy changing social and economic conditions; they were movements, impelled by the force of analogy, in the old historical groove. They have diminished the field of equity and made the area covered by trial by jury much larger than it was in 1791. On the one hand (rightly, since a constitution should not be inflexible), the seventh amendment has not been restricted to the suit at common law as it was in 1791. It covers now new and analogous causes of action.<sup>178</sup> On the other hand, the merger of common law and equity has greatly reduced the influence of equity since the equitable remedies, such as injunction and discovery, are now available at common law. Thus an action for treble damages under the antitrust laws, as in the *Zenith* case, is by analogy a suit at common law, while the need for discovery, which before 1938 would in a complex case have driven the plaintiff to equity, can now be satisfied at common law.

What are the legal merits of the alternative and broader interpretation? As an English lawyer I have no qualifications for comparing them with those of the traditional construction. What I am competent to do is to comment upon the applicability to the English authorities of the historical test which the traditional construction imposes. As I have already suggested, the historical test seems to me not to be founded upon a true understanding of the nature of equity in 1791. Equity was then a set of principles and not a group of categories. The categorization which the traditional construction demands forces equity into a straitjacket that was unknown in 1791.<sup>179</sup>

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177. "[I]n suits between man and man, the ancient trial by Jury is preferable to any other, and ought to be held sacred." Virginia Declaration of Rights on June 12, 1776, art. 11, reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235 (1971).

178. See, e.g., *Curtis v. Loether*, 415 U.S. 189 (1974) (right to jury for Title VIII fair housing claim); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (trademark statutes); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959) (antitrust statutes).

179. Categorization is still rejected. In discussing the principles that should guide a trial court when deciding whether to enjoin a proceeding in a foreign court, Lord Scarman recently

In the eighteenth century, no Chancellor was deterred from intervening because the case before him did not fall into a category. He did not look, as the *Zenith* court did in applying the traditional construction, for "indicia"; he did not try to characterize the suit as legal or equitable;<sup>180</sup> he looked only to see whether or not there was an *equity* in the case. If he found it, he would not require it to be categorized any more than an American judge today, asked to apply the fifth amendment, would inquire what category of undue process was being alleged.

In the preceding paragraph I put *equity* into italics to indicate that there is yet a third meaning for this amorphous word. Used without an article, definite or indefinite, equity, as I have said,<sup>181</sup> could mean either a principle of judicial activity or the system of law which the exercise of that principle created. The third meaning, which to avoid confusion I shall continue to italicize, is to describe the element in a suit which attracted the attention of the Chancellor as bringing it within one of the principles on which he intervened. It was in this sense that the word was used in the demurrer. A defendant to a bill in Chancery who wished, as it were, to object to the jurisdiction, did so by means of a demurrer to the bill "for want of *equity*." If the Chancellor disallowed the demurrer, that finished the *right* to trial by jury; the litigant might get a jury, but it would be at the discretion of the Chancellor, and it would be only an advisory jury. In the succeeding paragraphs I shall give some examples of *equities* which will show also the irrelevance of the nature or character of the suit.

In *Cole v. Greene*,<sup>182</sup> Greene, the tenant, had a lease for years of a brewhouse in London. He or his subtenant, Forth, "prostrated" the brewhouse and erected dwelling-houses, thus improving the rental value from £120 to £200. Cole sued for waste in the Court of Hustings, praying for forfeiture of the lease and treble damages; Greene pleaded no waste. At the trial before the Deputy Recorder, the jury found waste and gave as single damages £200, trebled to £600. Greene moved the Recorder in arrest of judgment and succeeded on a pleading point. There was a new trial at which the jury were directed by the Recorder — evidently on the ground of the "meliora-

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rejected the argument that a court could exercise its jurisdiction in only two established classes and said that "the width and flexibility of equity are not to be undermined by categorization . . . . [T]he way in which the judges have expressed themselves from 1821 onwards amply supports the view . . . that the injunction can be granted . . . where it is appropriate to avoid injustice." *Castanho v. Brown & Root (U.K.) Ltd.*, 1981 A.C. 557, 573 (1980).

180. See 631 F.2d at 1078.

181. See text following note 148 *supra*.

182. 1 Lev. \*309, 83 Eng. Rep. 422 (K.B. 1670).



tion" or improvement to the property — to find no waste.<sup>183</sup> Cole obtained a writ of error which came before Judges Commissioners, Chief Justice Vaughan, Chief Baron Hale and other justices. They reversed the Recorder and gave judgment for Cole on the first verdict "for the place wasted and treble damages." Greene obtained a writ of error to the House of Lords, but the only error he alleged there was procedural, *i.e.*, to the composition of the jury.

Meanwhile, Forth, the subtenant, had preferred a bill in Chancery for relief on the ground of melioration. He was granted the common injunction, staying execution of the judgment. In Chancery Lord Keeper Bridgeman, "in regard there had been one verdict for the plaintiff, and another for the defendant," directed an issue "whether waste or not" out to the King's Bench Bar.<sup>184</sup> Hale, who as Chief Baron had been one of the Commissioners, was now Chief Justice of the King's Bench. Grumbling about the proceedings — "now they go into Chancery, and we must try the cause over again, and the same point"<sup>185</sup> — he held it to be waste, "and the jury gave their verdict accordingly, and 100 marks single damages, which trebled, amounted to £200 which the Chancery compelled Cole to take."<sup>186</sup>

What was the *equity* in the case and what in the end was the relief given? It must have been seen as a strong *equity* to have procured the interference of the Chancery after the affirmation of the judgment "in Parliament" — as Chief Justice Hale put it — and at the risk of trouble with the King's Bench.<sup>187</sup> It is easier to say what the *equity* was not. It was not the melioration pleaded in the bill. At first sight it would seem to be an unconscientious landlord who would try to forfeit a lease because the tenant had improved the property. But suppose a landlord did not want his property improved: Was equity going to force the improvement on him? "If you pull down a malt-mill, and build a corn-mill, that is waste," said

183. See *Greene v. Cole*, 2 Wms. Saund. 251, 258 n.11, 85 Eng. Rep. 1037, 1046 n.11 (K.B. 1672).

184. 1 Lev. at \*311, 83 Eng. Rep. at 423.

185. *Cole v. Forth*, 1 Mod. 94, 86 Eng. Rep. 759 (K.B. 1672).

186. 1 Lev. at \*311, 83 Eng. Rep. at 423.

187. The proceedings in the King's Bench are reported as *Cole v. Forth*. See note 185 *supra*. Hale prefaced his grumbling with the declaration, "By protestation I try this cause," and read the statute 4 Hen. 4, ch. 23 (1402), which enacted that after judgment in the King's Bench "the parties and their heirs shall be thereof in peace until the judgment be undone by writ of error or attain." 1 Mod. at 94, 86 Eng. Rep. at 759 (emphasis in original). The common lawyers still resented their defeat by Ellesmere, see F. MAITLAND, *EQUITY* 5 (1909); notes 79-80 *supra* and accompanying text, and "the heats . . . betwixt Lord Coke and Lord Ellesmere" had been stirred again in *King v. Standish*, 1 Mod. 59, 86 Eng. Rep. 730 (K.B. 1670), which was "[a]n action upon the Statute of Praemunire for impeaching in the Chancery a judgment given in the King's Bench."

Hale.<sup>188</sup> In equity as well as in law an owner may choose between malt and corn. And so, as Hale said again, "if it be waste at *law*, it is so in *equity*."<sup>189</sup> Anyway, if melioration had been the *equity*, the Lord Keeper would have decided in Chancery whether or not he would grant relief and would not have directed an issue to the King's Bench.

Was it then the *equity* indicated by the Lord Keeper — inconsistent verdicts? But the inconsistency arose simply because the Deputy Recorder took one view of the law, directing his jury that waste was waste whether meliorative or not, and the Recorder himself took the other view. The third verdict must also depend on what direction was given. It would be given by Chief Justice Hale, who had already, as Chief Baron, supported the Chief Justice of the Common Pleas and the other justices in affirming the Deputy Recorder. Bridgeman was himself a noted common lawyer, who had in his time been Chief Justice of the Common Pleas, and the common law was plain. He could hardly have directed an issue merely for the purpose of having the common law restated.

Yet there is surely something inequitable about a judgment that not only forfeits the improver's lease and makes him pay damages, but goes on to treble the damages by way of penalty. The tenant was in effect being fined £400 for increasing the rents by £80 a year. Was this the real injustice which the Lord Keeper perceived? All we can say with confidence is that in the end it was what he relieved against. By the verdict of the third party the £400 was conveniently eliminated and the Chancery "compelled" the landlord to take the lesser sum. Obviously the threat was that, if he did not take it, the injunction would be continued so that the landlord would lose the forfeiture which the judgment gave him.

This shows that for an *equity* it was enough that the Chancellor had a serious fear that, if he did not intervene, injustice would result. I offer as further illustrations of this two decisions of Lord Eldon, given in 1801 and 1802, the first being *Pulteney v. Warren*.<sup>190</sup> The plaintiff was the owner of several houses in Sackville Street, Piccadilly, and had granted leases to a number of tenants, including the defendant Dr. Warren. In 1790 he gave them all notice to quit and in the following year brought an ejectment against one of them, Lady Cavan.<sup>191</sup> He succeeded in the King's Bench, obtaining judg-

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188. 1 Mod. at 95, 86 Eng. Rep. at 759.

189. 1 Mod. at 94, 86 Eng. Rep. at 759 (emphasis in original).

190. 6 Ves. Jun. 73, 31 Eng. Rep. 944 (Ch. 1801).

191. The action was originally brought against Spottiswood, an under-tenant of Lady Cavan, who, however, was allowed to defend the action.

ment on May 24, 1794, but she sued out a writ of error returnable in the House of Lords. The plaintiff then brought ejectment against Dr. Warren and other tenants, claiming against them *inter alia* an account of mesne profits. They all applied for a stay of the actions pending the decision in the Cavan case and the King's Bench granted the stay. On May 7, 1795, the House of Lords affirmed the judgment against Lady Cavan. Lady Cavan, Dr. Warren and the other tenants then filed bills in Chancery and it was not until June 17, 1797, that the plaintiff moved the King's Bench for leave to enter up judgment against Dr. Warren. Five days later Dr. Warren died, and so, following the rule *actio personalis moritur cum persona*, the claim for mesne profits was barred. Nevertheless, the Chancellor intervened to order an account of the mesne profits. What was the equity? Lord Eldon said:

The ground, therefore, upon which this case is decided, is, that the *res gestae* shew, that Dr. Warren has amalgamated and mixed himself with the other tenants. The equity as to all of them arises from their joint act, operating to prevent the Plaintiff from having that redress at law, which in all moral probability he would have had, if this Court had not interfered; and which in all moral justice he ought to have had.<sup>192</sup>

The second decision of Lord Eldon is *Kemp v. Pryor*.<sup>193</sup> On the face of it it was a simple case of breach of contract for the sale of goods. The buyer had taken delivery and exported the goods to New York without examining them. When the goods were examined in New York by his agent they were found to be deficient in quantity and quality and the agent had to sell them at a loss. The buyer believed that he had been swindled and that inferior goods had been substituted. Threatened by the seller with an action at common law for the price, he paid the money under protest and brought a bill in which he alleged fraud and asked for an account of the loss made on the sale in New York. His difficulty at common law, if he was sued for the price, was, as his counsel said, that he was not "in possession of any evidence, by which he could defend himself."<sup>194</sup> He asked for discovery, which the defendant was willing to give, and also for a commission to examine witnesses in New York, but the defendant opposed any further relief.

What then was the *equity*? The Chancellor, who said "there is a considerable risk of doing injustice, if I should allow this demurrer,"<sup>195</sup> was clearly anxious to help. He suggested a couple of possi-

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192. 6 Ves. Jun. at 92-93, 31 Eng. Rep. at 954.

193. 7 Ves. Jun. 237, 32 Eng. Rep. 96 (Ch. 1802).

194. 7 Ves. Jun. at 238, 32 Eng. Rep. at 97.

195. 7 Ves. Jun. at 239, 32 Eng. Rep. at 97.

ble *equities*. The first was that since the buyer was not able to return the goods from New York in the way in which he could have done if they had been examined in England, it could be argued that he was authorized to sell them for the benefit of the defendant and to obtain damages for the difference. The second was a much wider sort of *equity*. If fraud was proved, the Chancellor said,

I am not sure a person taking the articles under these circumstances has not a right to say in Equity, he is entangled<sup>196</sup> in so much of difficulty, as to the point of rescinding the contract by re-delivery, that the articles ought not to be considered sold for any other purpose than this; that he may have an issue, if necessary; or, that the quantum of damages may be settled by a Court of Equity; being incapable of being accurately settled but by an account of the sales, which the vendor made it necessary to have abroad, and of the produce.<sup>197</sup>

On this the Chancellor overruled the demurrer. But then, being Lord Eldon, he had misgivings and directed further argument. The difficulty he then felt was the fact that the plaintiff had paid the money. "The obvious mode would have been a bill for an injunction; instead of taking a step, which renders it almost impossible to give him relief upon any bill."<sup>198</sup> So the Chancellor decided in the end that the demurrer would lie. But it seems that if the buyer had asked for an injunction instead of paying the money he would have established his *equity*.

I have already<sup>199</sup> referred to the cases in which a court of equity would stay execution of a common law judgment and where the *equity* was "an unconscientious advantage at law"<sup>200</sup> or simply "that the question had not been fairly tried."<sup>201</sup> *Cooke v. Betham*<sup>202</sup> also shows the Chancellor looking not for the category but for the *equity*. It was a suit at common law by a solicitor on a bill of costs and the defendants filed a bill in Chancery to restrain the action. The Chancellor said that it was impossible to try the case at law and that the only difficulty arose from the "plaintiffs not referring to a case establishing their equity on the ground of the long and complicated nature of the charge." He took time to look at the cases and on the

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196. Had Lord Eldon in mind the apothegm attributed to Mansfield: "The institution of Courts of Equity . . . is to prevent substantial justice from being entangled in the net of form"? It had been cited to him the year before by Mr. Alexander, the future Lord Chief Baron, in argument in *Pulteney v. Warren*, 6 Ves. Jun. at 78, 31 Eng. Rep. at 947.

197. 7 Ves. Jun. at 241, 32 Eng. Rep. at 98.

198. 7 Ves. Jun. at 250, 32 Eng. Rep. at 101-02.

199. See notes 92-98 *supra* and accompanying text.

200. *Bateman v. Willoe*, 1 Sch. & Lef. at 205-06.

201. *O'Mahony v. Dickson*, 2 Sch. & Lef. at 411.

202. 4 Jur. 957 (Ch. 1840).

following day, and without reference to authority, he said, "I have no doubt that justice cannot be done in this case in a court of law."<sup>203</sup>

*O'Connor v. Spaight*<sup>204</sup> is the case which introduced complexity by name into English law as an *equity*. It was a decision given in 1804 by the Irish Court of Chancery that might have passed unnoticed if the judge had not been Lord Redesdale, formerly John Mitford. What he said was canonized by the House of Lords in 1847.<sup>205</sup> It is the only *equity* out of those which I have mentioned which touches directly trial by jury. The others arose out of defects in the substance of the common law or in its procedure generally. These cases were taken into Chancery and so inevitably, though incidentally, the right to jury trial was lost, though to an extent the loss could be made good by the direction of an issue. But in a case of complexity, the *equity* was the incompetence or ineffectuality of the jury and so, where it was present, the case had to be tried by a judge alone. In a sense this was the beginning of the nonjury trial. When with the fusion of law and equity in 1875 it became necessary to find a formula for the nonjury case, the formula framed was derived from *O'Connor v. Spaight* and the authorities which followed it.

It is a measure of the divergence between English jurisprudence as it was and as it is now seen, by eyes blinkered by the traditional construction of the historical test, that in the *Zenith* opinion, *O'Connor v. Spaight* is mentioned only in a footnote as one of the "suits seeking relief in the form of an accounting between the parties." "The chancellor's jurisdiction over accounting actions," the opinion continues, "consisted of two general categories." The distinctive feature of the second category was "when the accounts between the parties were too numerous and complicated for a common-law jury to unravel."<sup>206</sup>

On this thesis complexity is important only insofar as historically it brought a suit into the category of the equitable account. By itself it is insignificant. Suppose that there is a case in which the facts "are too numerous and complicated for a common jury to unravel," but the relief sought is not an account but damages, single or treble; would not the same principle apply? This is a question which the traditional construction of the historical test makes it impermissible

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203. 4 Jur. at 957.

204. 1 Sch. & Lef. 305 (Ire. Ch. 1804).

205. See *Taff Vale Ry. v. Nixon*, 1 H.L. Cas. \*111, \*121, 9 Eng. Rep. 695, 699 (1847); *Foley v. Hill*, 2 H.L. Cas. \*28, \*38, 9 Eng. Rep. 1002, 1006 (1848).

206. 631 F.2d at 1080 & n.11.

to ask or answer.<sup>207</sup> Outside the boundaries of equitable accounting the jury must decide without unravelling. Such is traditionally the requirement of the seventh amendment. I hope that I would not be committing *lèse majesté* against the American Constitution if I were to say that such formality would strike a nonlawyer, and even a lawyer of another discipline, as quite unrealistic. It would have struck Lord Mansfield and Lord Eldon as an entanglement in the net of form.<sup>208</sup>

But the purpose I have in view does not require me to impugn the majesty of the Constitution. I have the more limited object of showing that the picture of equity at work as it emerges from the *Zenith* opinion — and as it would emerge from any opinion adopting the traditional construction — is foreign to English law and practice as it was in 1791. To make this good I shall look first at the practice of the equitable account, then at the leading case of *O'Connor v. Spaight*, and finally at equity's practice in the areas of dower and partition.

#### IX. ACCOUNTING IN EQUITY

What is it that distinguishes the claim for an account from the claim for a debt? In both cases, if the claim is successful, the result will be the same, namely, payment by the defendant of the amount he owes to the plaintiff. There are two reasons for the action of account. The first is that a plaintiff cannot sue for debt unless he knows the amount which he is owed. If, for example, he entrusts an agent with money to disburse, requiring him to return the balance, he cannot without an account know what the balance is. To succeed in this form of claim he must first show that there is a duty to account arising from a relationship between the parties such as principal and agent. Equity recognized the duty as existing in many cases in which the common law did not. This is the foundation of the equitable account. The other reason for the action of account is that it reduces a multiplicity of claims to a single one. Where there is a course of dealing between two parties, each transaction results in a debt due from one to the other. If there were no action of account, each party would have to make numerous separate claims for debt; the account strikes a balance which is a single debt.

Both the common law and equity entertained the claim for an

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207. See *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980).

208. See note 196 *supra*.

account, but the procedure for taking the account at common law was so cumbersome that actions at law for an account were, as Lord Chancellor Hardwicke noted in 1751, few.<sup>209</sup> The account had first to be sent to auditors. The procedure thereafter is described as follows by James Wilson, one of the first Justices of the United States Supreme Court:

If, upon any article in account, the auditors cannot agree; or, if agreeing, the parties are not satisfied; then, upon each point, so litigated, a separate and distinct issue may be taken, and that issue must be tried by a jury. In this manner, a hundred issues may be joined in the same cause, and tried separately by as many juries; but the general statement of the disputed accounts still remains before the auditors, and by them the general result from the whole must be formed and ascertained.<sup>210</sup>

Each issue, he might have added, had to be decided by the jury without hearing the evidence of the parties,<sup>211</sup> and without, unless an application for it was made in Chancery, the discovery of any documents. By contrast, the procedure in Chancery required the defendant to produce his account and vouch on oath for its accuracy; the disputed items could soon be identified and settled as speedily as they would be today.

During the eighteenth century, the bill in equity for an account became very common. There were three tributaries to the increasing flow. First there were many cases, such as agency, in which the common law did not recognize a duty to account. In such cases the right to have an account was the *equity* which gave the Chancellor jurisdiction. It was then immaterial whether the account itself was complex or simple. Second, the remedy of account was the equitable equivalent of the common-law remedy of damages. For breach of contract the common law awarded damages; for breach of trust equity required the trustee to account. Here again it was immaterial whether the account was complex or simple. Equity could, and occasionally did, give damages in the form of compensation, but its usual method of giving relief in money was by ordering an account and payment of the amount found due. Third, there were the cases in which complexity was the only *equity* in the case, giving the Chancellor jurisdiction in what would otherwise have been a straightforward suit at common law. In such cases the common law gave a remedy, but an inadequate one, and the inadequacy was the ground for the Chancellor's intervention. Here he had to be careful that he

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209. *Ex parte Bax*, 2 Ves. Sen. 387, 28 Eng. Rep. 248 (Ch. 1751).

210. J. WILSON, *Lectures on Law*, in 2 THE WORKS OF JAMES WILSON 492 (R. McCloskey ed. 1967).

211. *See* Devlin, *supra* note 10, at 58.

was not taking into Chancery what was essentially an action for debt with perhaps a claim for a setoff on the other side. He had to be on his guard against the litigant without an *equity* who was nevertheless anxious to qualify for equitable relief.<sup>212</sup>

What qualified a litigant for equitable relief in the form of an account was just the same as for any other form of equitable relief. It was the existence of an *equity*. The obvious *equity* was a duty to account of a kind which the common law did not recognize. But it might be any other sort of *equity* — an allegation of unconscientious dealing or simply an allegation that justice could not be done under the common-law procedure. The *equity* might appear in a common-law claim against a defendant for money such as rent or for damages. When the defendant filed a bill in Chancery he had to ask for equitable relief. If his case was that the plaintiff was not entitled to anything at all, he need not ask for more than an injunction to stay the action. But if he had to admit that the plaintiff was entitled to something, he must ask also for an account of what was due. A complex account was an *equity* no different from any other. It fell into the class of case in which a court of law could not give adequate relief. In such a case the *equity* would be the complexity and the relief the account. But if the *equity* was not the complexity, the relief would still be the account, however simple. Let us look again at *Kemp v. Pryor* and *Bateman v. Willoe*.

In *Kemp v. Pryor* there was at least a suspicion that the seller had cheated by supplying inferior goods, perhaps in the hope, which was fulfilled, that they would not be examined until they got to New York. Since the buyer had unwisely paid the price, his remedy could

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212. In G. BISPHAM, *PRINCIPLES OF EQUITY* (2d ed. 1878), Professor Bispham distinguishes in §§ 479 and 480, from which I give extracts below, between two classes of account. He was not especially concerned with complexity, so that there is nothing to correspond to the third class in this paragraph; otherwise, his division corresponds with the division between the first (section 480) and second (section 479) classes in the text:

479. The equitable remedy of Account is applied whenever it is required, as a matter of course, in all cases in which equitable titles are to be protected, and equitable rights enforced; and, also, in many instances where jurisdiction has been assumed by virtues of equitable remedies. . . . In all of the above instances the *account* plays, as it were, a subordinate part, and is used more effectually to work out equities which form the basis of the bill.

480. But there are other cases . . . in which the jurisdiction of courts of chancery is based solely upon the remedy of account, and in which without the necessity for this remedy the case would present no features to warrant the interposition of the chancellor. Bills filed in such cases are, in the true technical sense, bills for account, and in them the remedy itself invokes or gives rise to the jurisdiction, whereas in the instances already put, the jurisdiction, already attached, invokes or makes use of the remedy.

*Id.* at 525-26.

The cases of *Kemp v. Pryor*, *Bateman v. Willoe* and *O'Connor v. Spaight* are submitted as examples of cases in which the account played a subordinate part, simply being made use of as the remedy. See notes 213-217 *infra* and accompanying text; Part X *infra*.



only be in damages. His *equity* was the difficulty in these circumstances of getting relief at law. He asked for an account of the loss made on the resale. Obviously he was not asking for an account by the seller who could not possibly give one. Obviously too there was no complication in the account. The buyer had only to prove the resale prices — much more easily done of course by affidavit before a master than by witnesses heard on commission or brought from New York. The quotation I have given from Lord Eldon's observations<sup>213</sup> shows him as quite willing to have the quantum of damages settled in this way.

In *Bateman v. Willoe*, the common law defendant's grievances, which he tried unsuccessfully to turn into an *equity*, were based on two points that he had failed to plead in the common-law suit. The suit against him was brought by a solicitor on three bills of costs. His first point was that the solicitor had agreed to waive one of the bills and that to take a verdict on it after that was, as his counsel put it, "such an unconscientious proceeding as a Court of Equity would relieve against." His second point was that he ought to have been given a credit for £61 in another set of bills which had been settled by arbitration. He filed a bill asking for an account. Lord Redesdale said that both points could have been raised before a jury. So that was that. But the Chancellor went on to discourse — in a passage from which I shall later quote — on the circumstances in which "Equity does sometimes interfere." Obviously he saw nothing inappropriate in the nature of the relief sought. Had it been granted, it would simply have reduced the debt in the same way as in *Cole v. Green* equity simply reduced the damages.<sup>214</sup>

Is not this the essence of the matter? Where there was an *equity*, a bill could not be thrown out for want of equity; where a bill was not thrown out, there had to be offered a suitable remedy: where there was a money claim, the suitable remedy was the account. Jurisdiction attached because of the *equity*, not because of the account. In the same way today the due process clause attaches because of some unfairness in the process, not because of the nature of the relief available. But the *Zenith* opinion, following the traditional construction, makes the form of relief the deciding factor:

We are aware of no case, however, in which a chancellor ordered an accounting in a suit involving nothing more than liability for money damages in trespass or tort . . . Hence, the present lawsuit is most similar to actions in which an equitable accounting was unavailable.

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213. See text at note 197 *supra*.

214. See note 186 *supra* and accompanying text.

Appellants' analogy, therefore, fails.<sup>215</sup>

Mesne profits is simply the technical term for money damages in trespass and we have seen an accounting ordered for them in *Pulteney v. Warren*.<sup>216</sup> The *equity* was the unconscientiousness of taking advantage of a stay which the defendants themselves had sought. Certainly an unusual *equity*, but there are not many torts which can harbor an *equity* and for which an account would be a suitable remedy. For most torts, the common law gives an adequate remedy in the form of unliquidated damages which no account could quantify. The tort of deceit is the most likely to call for an account and indeed frequently obtained one; but there the presence of fraud gave the Chancellor a concurrent jurisdiction. But I find it hard to believe that, if in a case like *Kemp v. Pryor*, the claim had been for damages for conversion instead of for breach of contract, Lord Eldon would have said simply that an account was "unavailable." Consider the record. Equity enforced treble damages for the tort of waste. It gave general damages in the form of compensation for the torts of assault, false imprisonment and malicious prosecution.<sup>217</sup> It was ready to give, in the form of an account, special damages for breach of contract. Even if there were no precedent, is there any reason to think that it would not have given, in the form of an account, special damages for tort?

But the general answer to the passage in the *Zenith* opinion cited above is that it contains two misconceptions. The first is in the supposition that it mattered to equity whether the common-law suit in which it was intervening was in contract or in tort or in any other form of action. The second is in the supposition that there is or was some distinction of substance between a claim for special damages, whether in contract or in tort, and a claim for an account. As to the first, equity cut across the divisions of the common law; any rule against giving compensation for tort would have been out of place. We have seen equity giving compensation for the torts of trespass and waste;<sup>218</sup> it was willing to give compensation in lieu of damages for the torts of assault, false imprisonment and malicious prosecution. In 1684 a bill for discovery was objected to as being sought in order to bring an action in tort; Lord Keeper Guilford overruled the

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215. 631 F.2d at 1080-81.

216. See notes 190-92 *supra* and accompanying text.

217. See, e.g., *May v. Hook*, 1 Jac. & W. 663, 37 Eng. Rep. 521 (Ch. 1773); *Frowd v. Lawrence*, 1 Jac. & W. 655, 37 Eng. Rep. 518 (Ch. 1820).

218. See notes 182-92 *supra* and accompanying text (discussing *Pulteney v. Warren* and *Cole v. Greene*).

objection.<sup>219</sup> As to the second, it is not possible to settle any claim for special damages without an account, though if the claim is very simple, the account will be very simple too. The relief is the same; what the common law called special damages, equity called an account.

#### X. *O'CONNOR V. SPAIGHT*

It is time now to look at this leading case, to examine it in its setting among the other authorities, and above all to consider the rationale as expressed in the judgment. *O'Connor v. Spaight*, like *O'Mahony v. Dickson*,<sup>220</sup> which Lord Redesdale decided in the following year, was an action of ejectment brought by a landlord for nonpayment of rent. The issue was whether or not the rent had been paid, and it ought to have been short and simple. But it appears that in the Ireland of that time it was not the custom for the tenant to present himself on the quarter day with his money. To begin with, the rent was so much an acre and no one had ever measured exactly the acreage; or, if he had, someone else had measured it differently. Sometimes under-tenants would pay sums direct to the landlord; sometimes, if the landlord was running out of money, the tenant would put his name on a bill for him; sometimes the landlord would take a load of hay of uncertain value. In the later case Lord Redesdale thought that in the end there were not above three items in dispute and that these could have been dealt with by a jury. But in *O'Connor v. Spaight* the tenancy had run in this irregular manner for sixteen years without rent ever being paid as such. Lord Redesdale said:

The ground on which I think that this is a proper case for equity, is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *Nisi Prius*, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of account, the justice of the case cannot appear.<sup>221</sup>

There is no English case reported before 1791 which clearly and firmly established that a case involving a complex account was

219. See *East India Co. v. Evans*, 1 Vern. 305, 23 Eng. Rep. 486 (Ch. 1684). The Lord Keeper had already said that "in some cases, even for a trespass, a bill is proper enough in this court," *East India Co. v. Sandys*, 1 Vern. 127, 129, 23 Eng. Rep. 362, 363 (Ch. 1682).

220. 2 Sch. & Lef. 400 (Ire. Ch. 1805).

221. 1 Sch. & Lef. at 309.

within the equitable jurisdiction. *O'Connor v. Spaight*, which clearly does establish it, was not decided until 1804. Nevertheless, I think that the *Zenith* court was right to treat the law as settled by 1791. Lord Redesdale in his judgment in *O'Connor v. Spaight* makes it quite clear that he is not enunciating new law; he refers to "a principle on which courts of equity constantly act."<sup>222</sup> As John Mitford, when dealing in his 1787 treatise with cases in which "a court of equity will entertain jurisdiction of a suit though a remedy might perhaps be had in the courts of common law," he includes "matters of account" in that category. The ground, he says, is "the difficulty of proceeding to the full extent of justice in the courts of common law" in, *inter alia*, "long and intricate accounts."<sup>223</sup> Later he says:

The courts of equity having gone the length of assuming jurisdiction in a variety of complicated cases of account, of partition, and of assignment of dower, seem by degrees to have been considered as having on these subjects a concurrent jurisdiction with the courts of common law in cases where no difficulty would have attended the proceeding in those courts.<sup>224</sup>

Mr. Mitford does not refer to any decision in support of these propositions. Six years later in 1793, Lord Chancellor Loughborough was asked to order that a partner who had retired from the firm under a settlement whereby he took out his capital, should give an account of what he had taken, it being alleged that the settlement was void as against creditors. It was objected that the matter could be tried at law. The Chancellor agreed that the same rule would apply in equity as in law, but, he said, the question was whether any balance was due at the time of the dissolution and that could not be tried without an examination of the books, accounts and of the parties which could not be conveniently had at *nisi prius*.<sup>225</sup>

What was the rationale in *O'Connor v. Spaight*? It is the ration-

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222. *East India Co. v. Kynaston*, 3 Bli. (O.S.) 153, 4 Eng. Rep. 561 (Ch. 1821), referred to in text at note 74 *supra*, illustrates, first, how wrong it could be to suppose that, in an age when law reporting was unsystematic, the law was made up entirely of reported cases, and, second, the authority and reliability of Lord Redesdale's statements of principle and practice. This was the case in which the Chancery ordered a defendant to permit his premises to be inspected. In the House of Lords, after it had been admitted in argument, 3 Bli. (O.S.) at 161, 4 Eng. Rep. at 563, that "no instance can be found in which the Court of Chancery has ever heretofore assumed or exercised any such authority," Lord Redesdale mentioned a case directly in point in which he had been engaged as counsel 21 years before. "The memory of the case," the reporter noted, 3 Bli. (O.S.) at 168, 4 Eng. Rep. at 566, "had almost perished from the Profession," but Lord Redesdale's "kind condescension" enabled him to extract an account of it from the Register's Book and to formalize it in the reports as *Lonsdale v. Curwen*, 3 Bli. (O.S.) 168, 4 Eng. Rep. 566 (1799).

223. J. MITFORD, *supra* note 3, at 110.

224. *Id.* at 111.

225. *Anderson v. Maltby*, 4 Bro. C.C. 423, 29 Eng. Rep. 970 (Ch. 1793).

ale which makes the law. The common law is not composed of decisions but of statements of law in accordance with which decisions were made. It is not the result that is the law, but, the statement of how the result was reached. It is not permissible for the commentator to take the result, state how he would have reached it himself and declare the latter statement to be the law. This is not made permissible by the fact that the commentator's statement may be more economical, *i.e.*, reach the same decision by narrower reasoning. It is the reasoning adopted by the judge, not that preferred by the commentator, which makes the rationale or the *ratio decidendi* of the case. One must look therefore at what the judge said and read it in the circumstances in which it was uttered. I have already quoted the principle which Lord Redesdale enunciated. It was the principle on which courts of equity took cognizance of matters, which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law. Did Lord Redesdale intend to confine this principle to bills for an account? So narrow a reading would be inconsistent with what, as Mr. Mitford, he had written in 1787. There he treated the "long and intricate account" as an instance of an *equity* arising where the common law could not give an adequate remedy. The quotations which in the preceding paragraph I gave from his treatise all occur in the section in which he is treating generally an *equity* arising from the failure of the common law to provide an adequate remedy. It is, however, perhaps more significant that the narrow interpretation would be inconsistent with what Lord Redesdale had said judicially only the year before. In *Bateman v. Willoe*<sup>226</sup> he referred to cases "of which cognizance cannot be effectually taken at law" and gave the complicated account as an example of such a case.

In the case law which flowed from *O'Connor v. Spaight* the dictum was invariably treated as categorizing cases "of which cognizance cannot be effectually taken at law" and as exemplifying the category by reference to the complicated account. In the House of Lords in *Foley v. Hill* the Lord Chancellor said: "[T]he rule is, that where a case is so complicated, or where, from other circumstances, the remedy at law will not give an adequate relief, there the Court of Equity assumes jurisdiction."<sup>227</sup> He then cited the dictum in support

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226. 1 Sch. & Lef. 201, 205 (Ire. Ch. 1803).

227. 2 H.L. Cas. \*28, \*37, 9 Eng. Rep. 1002, 1006 (1848). Lord Campbell likewise distinguished between the general and the particular: "The time when the jurisdiction of equity attaches, is when, at law, there is not a satisfactory remedy or when, from the complexity of the accounts, it is not a fit case to be referred to a jury." 2 H.L. Cas. at \*45, 9 Eng. Rep. at 1009.

of this statement.

A dictum on the application of the principle to a case other than an account appears in 1842 in *Strickland v. Strickland*.<sup>228</sup> The plaintiff claimed that he, and not the defendant, was entitled to some of the Strickland estates. His title depended entirely on the legal validity of a will made in 1808. He attempted to justify his bill in Chancery by saying "that, if it were necessary for him to establish the validity of the devises at law, it would be more convenient to do so on the trial of an issue, than on the trial of an action." Master of the Rolls Langdale said: "In cases where . . . the facts are such, and of a nature so complicated, that complete and effectual relief can only be given here, this Court will afford its assistance . . . ." <sup>229</sup>

When, with the fusion of law and equity in 1875, it became necessary to define in the Rules of Court those cases which "could, without any consent of parties, be tried without a jury," this was done by Rule 26.<sup>230</sup> The purpose of the rule was explained in two dicta:

This rule was framed expressly to meet cases which would under the old system have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture of law and fact, or from great complexity, or otherwise, not capable of being conveniently tried before a jury.<sup>231</sup>

Similar language was used by Master of the Rolls Jessel in 1877:

The rule was intended to apply to that class of actions which a jury is not as a rule competent to deal with, either from their great complexity as regards facts, or from fact and law being so intermingled together that it would be difficult, if not impossible, to direct a jury by separating the law from the fact, or because the questions as regards the law are of such a delicate nature and require a knowledge of such refined law that they could not conveniently be presented to a jury.<sup>232</sup>

The *Zenith* opinion relies, surprisingly, on the first of these dicta as authority for the view that "complexity alone was not a grounds for relief in equity." The dictum, the court says, "identifies two separate prerequisites to a denial of a jury trial demand: trial of the matter in the court of chancery prior to the merger *and* complexity or other grounds for believing that a jury would be unsuitable." From this the court infers that "complexity alone was not a grounds for relief in equity."<sup>233</sup> This is a very literal reading, and the court

228. 6 Beav. 77, 49 Eng. Rep. 754 (Ch. 1842).

229. 6 Beav. at 79-80, 49 Eng. Rep. at 755.

230. Rule 26, Order XXXVI, Rules of Court (1875); see Devlin, *supra* note 10, at 95-96.

231. *Clark v. Cookson*, 2 Ch. D. 746, 747-48 (1876) (Hall, V.C.).

232. *Bordier v. Burrell*, 5 Ch. D. 512, 514 (1877).

233. 631 F.2d at 1081.

does not attempt to give it to the second of the two dicta although it is to the same effect as the first. The reading makes nonsense of the first dictum. If complexity were a prerequisite to a denial of jury trial, then a demurrer on the ground that the case was simple would always have succeeded. The better reading of the passage is surely to treat it as saying that the rule was framed to include cases which had been tried in the Chancery because of their complexity.

The *Zenith* court relies on two later cases as confirming its reading of the dictum. Neither case refers to the dictum. In *Garling v. Royds*,<sup>234</sup> the plaintiff asked for the cancellation and delivery up of promissory notes on the ground that his signature had been obtained by "fraud and misrepresentation." His case was that the notes were accompanied by an arrangement, "having regard to which they ought not to be sued upon until after certain things had been done . . . ."<sup>235</sup> Fraud is one of those matters over which common law and equity exercised a concurrent jurisdiction. There was therefore no prima facie right to trial by jury as there would have been if the claim had been of a purely legal nature. In cases of concurrent jurisdiction the Chancellor exercises a discretion, and Vice Chancellor Hall exercised it against a trial at common law. He agreed that it was the sort of case which would ordinarily be tried by a jury but in this case the intent of the parties would have to be ascertained from correspondence which was not inconsiderable in bulk and that was better done by a judge than by a jury. "Having regard to that ingredient . . . and to the general complexity of the case,"<sup>236</sup> he thought it best tried by a judge. The case seems to me to be neutral. It is not authority for the proposition that complexity by itself is an *equity*. Such a proposition has to be tested upon a suit that raises legal issues and asks for the remedy at law; in this case the suit was a hybrid. On the other hand, I find it difficult to see how the casual reference to complexity as an element in the exercise of the discretion can be regarded as authorizing the view that complexity was not a ground for relief in equity.

*Wedderburn v. Pickering*<sup>237</sup> is also a neutral case. It was a boundary dispute in which the plaintiff asked for an order for possession of the piece of land in dispute; this question turned upon the construction of certain deeds and the explanation afforded by plans and conveyances. There was also a claim for an injunction against the

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234. 25 W.R. 123 (Ch. 1876).

235. 25 W.R. at 124.

236. 25 W.R. at 124.

237. 13 Ch. D. 769, 772 (1879).

obstruction of a right of way. The judge exercised his discretion to refuse trial by jury, saying that it was "peculiarly a case which it is not convenient for a jury to try." The fact that the plaintiff was seeking an equitable remedy prevents the case from being used as an authority for the proposition that complexity alone is sufficient to justify the intervention of equity. But there is nothing in the judgment to suggest that if the complexity (a word not used in the judgment) had stood alone, the judge would have been compelled to order trial by jury. It would have been odd if there had been, since the judge was Master of the Rolls Jessel, the author of the second dictum quoted above.

If, which I do not myself think, the rationale as expressed by Lord Redesdale in *O'Connor v. Spaight* needs clarification, it seems to me that the authorities which follow it, especially the two dicta in 1875, make it crystal clear. The *Zenith* court considered that it applies only to complexity in account. One might as well say that it applies only to complexity in an account between landlord and tenant. It is as if it were to be said on the authority of *Cole v. Greene* that the Chancellor would intervene to grant relief from inconsistent verdicts, but only if they occur in a claim for treble damages for waste. Or as if it were to be said that when in *Kemp v. Pryor* Lord Eldon spoke of "entanglements" he meant only entanglements resulting in a claim for damages for breach of contract for the sale of goods examined in New York. Or indeed as if it were to be said that the decision of the *Zenith* court itself applies only to actions for treble damages under the antitrust and antidumping laws, leaving all other complex cases to be decided by a jury incapable of rational decisionmaking.

#### XI. ACCOUNT, PARTITION AND DOWER

Account was not the only form of action in which equity was ready to grant relief because of "the difficulty of proceeding to the full extent of justice in the courts of common law." In the passage from which this quotation is taken, Mitford grouped "complicated cases of account, of partition and of assignment of dower."<sup>238</sup> Both partition and dower were rights at common law. It will be instructive to consider what the complications were that allowed them into equity.

An estate entailed could be either in tail male, *i.e.*, only male issue inheriting, or in tail general. In the latter case, if there were no

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238. See text at note 224 *supra*.



male issue, a female heir would inherit. But if there were more than one female heir of the same degree, *e.g.*, three sisters, the eldest did not inherit the whole as an eldest brother would have done, but all the sisters inherited jointly as co-parceners. If any one of them wished to have a separate interest and the others would not agree, she could at common law obtain a writ of partition requiring the sheriff to attend with twelve men of the neighborhood and allot to each party her fair share. Co-ownership, *i.e.*, joint tenants and tenants in common, could also be created by devise, but such co-owners could not at common law obtain the writ; it was extended to them by statutes in 1539 and 1540. A widow had a right to a life interest in the third part of any lands of which her husband had been solely seised at any time during their marriage of an estate of inheritance that issue of hers could have inherited, whether she in fact had issue by him or not. She could call on the owner of the land, who might be either the heir or a purchaser from the husband, to assign her the third part. If he failed to do so, she could obtain a writ to the sheriff directing him to make the assignment.

In partition and dower the complications in the legal proceedings arose mainly from the need to have all the right parties before the court. It was not usually a simple case of one sister or joint tenant suing the others. It would be natural to treat litigation as a last resort, and when it came, a single interest might have developed in a way difficult to trace without discovery. The strictness of the common law is illustrated in *Beedle v. Clerke*,<sup>239</sup> where the plaintiff seeking partition was one of two joint tenants. He brought his action against the other and, because he believed that the other had granted an interest to a third party, joined the third party as a defendant. He was defeated by proof that the third party was only a tenant at will and had to start all over again. In dower the position of a widow was even more difficult; she had first to identify those of her husband's lands which were subject to dower.

If the plaintiff could get into Chancery, he or she would find the procedure far easier and more flexible. First, of course, there was the boon of discovery. Then the Chancellor would direct a commission, usually more efficient than the sheriff and his twelve. He would give effect to the commission's findings by ordering the necessary conveyance, an instrument that was more adaptable than a common law judgment; it could, for example, provide for easements. Equity would equalize a division into shares that were convenient but not

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239. Cro. Jac. 218, 79 Eng. Rep. 190 (K.B. 1609).

exact by ordering money compensation; this was preferable to the pedantry of the sheriff who in one case of dower chalked out one third of every room in the house.<sup>240</sup> Equity would allow, which the common law would not, for money spent on improvements. The decree in Chancery would bind remaindermen, which the common law judgment would not. In short, as in the case of the complicated account, the superiority of the equitable process drove out the legal.

That partition raised complications beyond solution at common law seems to have been accepted quite soon. Lord Nottingham in 1677 said that "it was never known that the aid of this Court was denied to any man who sought for a partition here."<sup>241</sup> "[T]he delays at common law," he said, "many times are such, it being in a real action (if the demandant happen to bring his writ against the persons that are not the tenants, &c) that he shall never attain the end of it . . . ."<sup>242</sup> Mitford in the passage cited was rather bold in putting dower on the same footing as partition as early as 1780 but his boldness turned out to be justified. It would hardly have been justified in 1735 when in *Moor v. Black*<sup>243</sup> the Chancellor carefully examined the impediments alleged to a trial at common law before overruling the demurrer. As late as 1793, in *Mundy v. Mundy*,<sup>244</sup> the demurrer was being fully argued. The bill did not particularize any impediments. Counsel for the plaintiff argued that a specific allegation would be immaterial "as it is manifest that the widow must meet with impediments at law."<sup>245</sup> He claimed that the court had "acquired a concurrent jurisdiction by having immemorially exercised it" and relied on Mitford. Counsel for the defendant pointed out that Mitford gave no authority for his statement. In support of the demurrer he argued:

There is no instance of such a bill for dower without stating, that there is some impediment at law, as terms outstanding, or that the deeds are in the hands of the Defendant. . . . It is clear in general, that a party cannot sue in equity for a legal right, unless some impediment at law is shewn, or it is a case of concurrent jurisdiction, as an account.<sup>246</sup>

The Chancellor accepted that at law there was "a degree of intricacy

240. *Abingdon's Case* (temp. Eliz.), cited in *argument* in *Howard v. Candish*, Palmer 264, 81 Eng. Rep. 1074 (K.B. 1622).

241. 2 LORD NOTTINGHAM'S CHANCERY CASES 566 (D. Yale ed., 79 Publications of the Selden Society, 1961-1962).

242. *Manaton v. Squire*, Free. Ch. 26, 22 Eng. Rep. 1036 (1677).

243. *Cas. t. Tal.* 126, 25 Eng. Rep. 699 (Ch. 1735).

244. 2 Ves. Jun. 122, 30 Eng. Rep. 554 (Ch. 1793).

245. 2 Ves. Jun. at 126, 30 Eng. Rep. at 556.

246. 2 Ves. Jun. at 123, 30 Eng. Rep. at 554.

and difficulty" which had had the effect of putting an end to writs of dower; in twelve years he remembered only two. "Upon the whole, under the authority quoted from a very correct and respectable treatise, and upon the answer, this demurrer ought to be over-ruled."<sup>247</sup>

In all this one can see the similarity between account, partition and dower and one can see why Mitford grouped them together. Out of the grouping there emerge two points of particular relevance to my argument. The first is that complexity had, as it were, a life of its own. It was not part and parcel of the equitable account any more than it was part and parcel of the suits in equity for partition or dower; it was the *equity* which brought each of the three suits into Chancery. The second point is the demonstration of how this *equity* could lead to concurrent jurisdiction.

There must have been a time in the beginning when a plaintiff seeking equity had in every case to establish just why a court of law could not give him an adequate remedy. He had to show what in his case the impediments were. When the same sort of impediments have been repeatedly shown in cases in the same category, *e.g.*, partition or dower, it is inevitable that, by the force of precedent if of nothing else, they will be taken as read. It is at this stage that equity assumes concurrent jurisdiction over the category. The plaintiff then need only mention dower or partition or whatever the category may be and the Chancellor forthwith exercises his discretion, usually on grounds of convenience, as to whether or not to intervene. This is what Mitford is saying in the passage cited and this is how it was summed up some time later by Master of the Rolls Langdale:

[T]here are, indeed, some particular cases of legal right, such as dower and partition, in which the Court has assumed a general jurisdiction, probably in consequence of the difficulties to which the Plaintiff would be subjected in seeking to obtain complete justice at law; but in other cases, the Plaintiff is to shew what the difficulties are, and how they impede him in a manner contrary to equity, and his bill ought to pray to be relieved from them.<sup>248</sup>

The fundamental principle was that the complications must be such as to create impediments to justice at common law substantial enough to show that the remedy there was unclear, incomplete or inadequate. In 1791 in a case of partition there was no need to plead the impediments in the bill because, there being concurrent jurisdiction, they were assumed to be there. In 1791 in a case of dower the same could be said on the authority of Mitford's "very correct and

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247. 2 Ves. Jun. at 128a, 30 Eng. Rep. at 557.

248. *Strickland v. Strickland*, 6 Beav. 77, 81, 49 Eng. Rep. 754, 755 (Ch. 1842).

respectable treatise," though there was no reported precedent for it until 1793. In 1791 the same could be said, again on the authority of Mitford, in the case of a complicated account, though there was no reported precedent for it until 1804. It sounds odd to say that there was no need to show complications in a complicated account, but in practice one can see from *O'Connor v. Spaight* what that meant. In that case Lord Redesdale, after a cursory examination, satisfied himself that there was more to it than a simple action for debt with a possible setoff. In any other cases of complexity the particular impediments must be pleaded and demonstrated, as we have seen happening in dower at least as late as 1735. The difference, however, is merely procedural.

In 1791 there was no distinction of substance between a complex account and any other sort of complexity. The *Zenith* case in so distinguishing elevates a matter of pleading into a matter of substance and thereby proposes an imaginary limit, unknown to English legal history, to equitable jurisdiction.

## XII. CONCLUSION

My conclusions are best expressed in the form of a Proposition, a Replication and a threefold Rebuttal.

**PROPOSITION.** Equity in 1776 consisted both of a principle of judicial activity in accordance with which new law was being made, and of the body of law which that activity was creating. An American judge had therefore the power not only of administering the existing body of equity law but also of creating new law in accordance with established principles, namely where the courts of common law could not provide a complete remedy or could be used as an instrument of injustice. An uncomprehending jury could frustrate a complete remedy and could be an instrument of injustice. It follows that an American judge had in 1776 the power of denying trial by an incompetent jury.

**REPLICATION.** The proposition is not disputed as a general proposition true in 1776, but its particular application to trial by jury is denied. Since 1791 jury trial has been governed by the seventh amendment. By declaring that in every suit at common law the right to trial by jury should be preserved, the amendment, on its true construction, extinguished in relation to trial by jury the ordinary judicial power of extending the law beyond the limits theretofore reached. By 1791 English law had reached the point where it denied

trial by an uncomprehending jury when the relief sought was in the form of an account, but not otherwise. This is the limit.

REBUTTAL. First, while it is admitted that the construction of the seventh amendment set out above is the traditional construction and supported by authority, it is not the true construction. It misconceives the nature of equity as it was in 1791, treating it as a closed system and ignoring its force as a principle of judicial activity. The true meaning of the amendment is that it was designed to give the authority of the Constitution to the unwritten equitable principle that a trial by jury should not be interfered with unless in particular cases it failed to provide an adequate remedy or became an instrument of injustice.

Second, if this is not the meaning which should have been given to the seventh amendment *ab initio*, it is the meaning which should now be given to it. The Constitution is not inert. Its liveliness was strikingly illustrated half a century ago when the traditional meaning of fifth amendment due process was changed so that it came to mean the same as eighteenth-century equity. What the English chancellor once did as "equity," the Supreme Court does now as "due process." Modern due process is not frozen in time; it is invoked today to strike down procedures and penalties that were hallmarks of the common-law process in 1791. It would be retrograde now to insist upon a construction of the seventh amendment which would result in one article of the Constitution demanding trial by a process which another article condemns as unfair.

Third, if the traditional construction is to be preferred, it is denied that in 1791 the law of England was limited as stated above. The law then was that a party to a suit at common law, whether in tort or in contract or upon a lease or howsoever, who could satisfy the Chancellor that because of the complexity of the suit a jury could not effectively take cognizance of it, had an *equity* which would justify the Chancellor in entertaining the bill, prohibiting further proceedings at common law and granting the common-law plaintiff the appropriate equitable relief, whether in the form of an account or otherwise. The *Zenith* court applied English law incorrectly.

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