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COURTS OF LAW AND EQUITY—WHY THEY
EXIST AND WHY THEY DIFFER

BY WARREN B. KITTLE*

I

IT has always been puzzling to the beginner and difficult for him to understand how two apparent systems of law, differing materially in their conceptions of human rights and in their modes of procedure, should grow up at one and the same time in the same country or state. The ordinary person is apt to think that all law is based upon natural right, which all rational men feel and acknowledge in a greater or less degree, and is the same in all countries and in all courts, and they find it very hard to understand why, in English jurisprudence, there are courts of law and courts of equity, with a difference in the laws which they administer. These differences may seem stranger still when we remember that the courts of law and equity derived all their powers from the same source, and came into existence about the same time. All power and authority exercised by the courts was derived from the king. This was literally so in early times, and is still true in theory.¹

II

It is by reason of the different direction taken by the courts of law in the course of time from the rule of right as administered by the king in council and through his chancellor, that there grew up a difference between the two courts. The common-law courts ceased to expand after a certain period of development was reached, and, refusing to recognize certain rights, of course had no machinery with which to enforce such rights. And herein lies the reason for the differences between courts of law and courts of equity—the refusal of the law courts to expand—to

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¹See Lord Hobart in *Martin v. Marshall & Key*, Hobart 86 (ed. 1641); *Idem.* 154, 155 (Am. ed. 1829).

recognize that society, institutions, peoples, all grow. Courts of equity, on the other hand, developed the law as the state of society developed, and as man became enlightened through study and experience. Again, because of the lack of adequate process for the enforcement of certain claims and rights newly developed in society, courts of law, while not denying the right as an abstract proposition, could give no relief, so that a multitude of new rights began to be recognized and developed, for which there was no remedy provided by the law courts. And simultaneously with the development of these new rights, men began to devise new wrongs, and new and ingenious defenses, with which the law courts were unable, because of the narrowness of their rules, to cope. Equity alone furnished a remedy.²

It was not a usurpation on the part of the court of chancery for the purpose of acquiring and exercising power, but a beneficial interposition to correct gross injustice, and to redress aggravated and intolerable grievances that a remedy was devised to meet new cases and new conditions.

III

In the modern and real sense English law and equity, begins with the Norman kings. They found England without a compact and stable government, without a general and universal system of law for the whole country, but with a multitude of different laws in the different shires or counties, derived from divers sources, as certain customs of the primitive Britons, of the Picts, Saxons and Danes, certain Roman laws, and those of Normandy, and a multitude of special customs.³ Nor were there any national courts. There were certain communal courts, county courts, courts Baron and Manor courts, each exercising a precarious jurisdiction.⁴ Says an eminent authority, "There was every element of confusion and perplexity in the theory and administration of the law itself, in the variety of the systems which were contending for the mastery, and in the inefficiency of the courts in which they were applied. English law had grown up out of Teutonic customs, into which Roman tradition had been slowly filtering

²See, EATON, EQUITY 8, 11-18.

³1 BL. COM. 63 *et seq.*; 1 ODGERS, COM. LAW OF ENG. 49; BRUNNER, SOURCES OF THE LAWS OF ENGLAND.

⁴1 HOLDSWORTH, HISTORY ENG. LAW, ch. 1; 1 SELECT ESSAYS ANGLO-AMER. LEG. HIST. 113.

through the Dark Ages. Feudal law still bore traces of its double origin in the system of the Teutonic *comitatus* and in the Roman *beneficium*. Forest law, which governed the vast extent of the king's domain, was bound by neither Norman forms nor by English tradition, but was framed absolutely by the king's will. Canon law had developed out of customs and precedents which had served to regulate the first Christian communities, and which had been largely formed out of the civil law of Rome. There was a multitude of local customs which varied in every hundred and in every manor, and which were preserved by the jealousy that prevailed between one village and another, the strong sense of local life and jurisdiction, and the strict adherence to immemorial traditions."⁵

IV

It was the firm policy of the Norman kings to concentrate all power within themselves, to overthrow the existing judicial system, and this they proceeded to do in different ways as opportunity afforded, with almost universal success. That the king can do no wrong, and that he is the fountain of all justice, of all dignity and honor, are familiar maxims to this day.⁶ It is always well to remember that the king, in early times, was the source of all power and authority, both legislative, executive and judicial, and the sovereign lord of all the land—he was the state. All his subjects were under his rule, and had taken an oath of fealty to him, “to bear faith and loyalty of life and limb, of body and chattels and earthly honor.”⁷ All lands were held mediately or immediately of the king, and every tenant took a similar oath of fealty to his lord or immediate land owner, and thus the whole kingdom was bound together by a continuous line of oaths leading from the most remote grantee up to the king.⁸

At first the legislative, executive and judicial functions were not considered as separate and distinct departments of government. These were of gradual development, and the king, at first, exercised all three of these functions himself. It was left for Montesquieu to discover and emphasize these elements of gov-

⁵Alice Stopford Green, “Centralization of Norman Justice under Henry II,”

1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 113.

⁶1 BL. COM. 242, 246, 271.

⁷1 POLL. & MAITL., HISTORY OF ENGLISH LAW, 2 ed., 299; 1 STUBBS, CONST. HIST. 289, 366.

⁸1 TAYLOR, ORIGIN & GROWTH ENG. CONST. 238-9.

ernment in the English Constitution in 1748.⁹ The numerous charters, grants and concessions made by the different kings show that they were considered as possessing all the rights and the people few or none—that the people acquired all their rights *from* the king, which, by continued pressure and exaction were finally forced from him in the “great charter” and other documents acknowledging the “rights” of the people. This notion prevailed especially among the early Norman kings. Says Stubbs, “The king is accordingly both the chosen head of the nation and the lord paramount of the whole land; he is the source of justice and the ultimate resource in appeal for such equity as he is pleased to dispense; the supreme judge of his own necessities and the methods taken to supply them. He is in fact despotic, for there is no force that can constitutionally control him, or force him to observe conditions to which, for his own security or for the regular dispatch of business, he may have been pleased to pledge himself.”¹⁰

In taking possession of England the Norman conquerors retained the Anglo-Saxon witan or council, which met upon summons, four times a year, but which did not receive the name of “parliament” until the reign of Edward I,¹¹ and did not assume to legislate independently of the king until the reign of the Tudors. The Anglo-Saxon kings legislated by and with the *advice* of the great council, and this was continued by the Norman kings. Through feudalizing processes the national assembly gradually became the king’s court of feudal vassals whose right to exercise power was made to depend practically upon the king’s pleasure, and while the powers of the council were practically reduced to a mere shadow, the royal authority became the central and dominant force in the constitution.

V

In order to discharge the vast and intricate duties which the growth of the royal powers thus concentrated around the person of the king, it became necessary for the crown to organize out of the main body of the great council a smaller body, or a special council, composed of the king’s immediate officers and advisors,

⁹See MONTESQUIEU, *SPIRIT OF THE LAWS*, Bk. 11, ch. 4.

¹⁰1 STUBBS, *CONST. HIST.*, ch. 11, §118.

¹¹1 TAYLOR, *ORIGIN & GROWTH ENG. CONST.* 239; 1 SPENCE, *EQ. JUR.* 328.

which could be specially charged with the work of administration. This select council consisted of the king's favorites and great officers, among whom were the chancellor, the treasurer, and the grand justiciary.¹² These bodies by which the king surrounded himself did not legislate in any true sense, but only *advised* the king, and the king made the laws with the advice of his council. The statute was the king's act, and not the act of any parliament. The reading of any British statute today will show this to have been the rule.¹³

This select council became known as the *curia regis*, and in modern times, corresponds very nearly to the privy council, although their functions are now vastly different.¹⁴

The *curia regis*, which during the Norman period drew to itself the whole center of administration and finance, has given birth not only to every court of law or equity in which justice is administered in the king's name, but also to the entire administrative machinery of the constitution.¹⁵ It may be regarded as the parent stem from which the courts of law and equity have sprung. Petitions were constantly addressed to the king in council for relief in various matters, and this council exercised jurisdiction in matters both civil and criminal. The old county courts and manor courts were dominated by the great men of the kingdom, and the poor were thus often denied redress in these courts. From such oppression they appealed to the king in council by a petition, called a bill, in which their grievances were set forth. This was the origin of a bill in Parliament, and is retained in courts of equity.¹⁶ After the great council or parliament became, in after years, the supreme legislative authority of the kingdom, it still retained many of its former judicial functions, and today the highest court in the British Empire is the House of Lords. The administration of justice continued nearly on the same footing for eight reigns, extending over more than two centuries.¹⁷

As the business of the special council, or *curia regis*, increased it became necessary to assign certain duties to certain persons or

¹²1 TAYLOR, ORIGIN & GROWTH ENG. CONST. 242; 1 SPENCE, EQ. JUR., 239.

¹³MORRIS, HIST. OF THE DEVELOPMENT OF THE LAW 272-287; 1 STUBBS, CONST. HIST. 400.

¹⁴1 SPENCE, EQ. JUR. 239; 1 TAYLOR, ORIGIN & GROWTH OF ENG. CONST. 232.

¹⁵5 FREEMAN, NORMAN CONQUEST 285.

¹⁶1 STORY, EQUITY JURISPRUDENCE, §48; DIGBY, HISTORY OF REAL PROPERTY, 5 ed., 321.

¹⁷1 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 3.

a group of persons constituting the special council, and thus was formulated the Exchequer, which is the oldest court, whose business originally pertained only to the revenue, but which, through legal fictions, drew to it a civil jurisdiction; then there was established the King's Bench, which was the highest court in the kingdom, with both civil and criminal jurisdiction, original and appellate. Afterwards there was established the court of Common Pleas for the trial of causes between subject and subject, which was known as the common bench. Originally all these courts followed the person of the king wherever he might be, and we find one of the passages in Magna Carta providing that, "common pleas shall not follow our court, but shall be holden in some certain place."¹⁸ This provision led to the fixing of the common pleas at Westminster, which broke up the unity of the *curia*. But it was not until the end of the reign of Henry III that the general staff permanently divided into three distinct courts, each exclusively devoted to the hearing of a different class of causes.—the Exchequer to the hearing of cases touching the king's revenue, the Common Pleas to the hearing of private suits of subjects, and the King's Bench to the hearing of all other suits that might fall under the general head of *placita coram rege*.¹⁹

VI

When the Norman kings first began to administer justice there was no law common to all England. After the establishment of the king's courts, the king's council and the courts began to formulate certain rules which became common in all the courts, and this was the germ of the common law. These rules were based on certain ancient customs and laws which were modified to suit the times. But the judges were at liberty to adopt any rule that seemed just and right in the case before them, and had they been men of greater statesmanship, of broader and more enlightened views, the common law would have been far more perfect and acceptable than it turned out to be under the narrow course adopted by the judges. The court of King's Bench and the court of Common Pleas, which consisted of several judges, were busy through a course of years in formulating rules and adopting customs

¹⁸MAGNA CARTA, Art. 17.

¹⁹1 TAYLOR, ORIGIN & GROWTH OF ENGLISH CONST. 249.

which they termed the common law, and as most actions concerned real estate in early times, these rules and customs followed the feudal laws in all their strictness. From selfish motives the barons and great land owners clung to the harsh feudal laws and customs, which were advantageous to them, and of course influenced their retainers and tenants to do likewise, and in this way the common-law courts gained great favor with the ordinary citizens, who were taught to believe that any variation from these feudal laws was a violation of their ancient rights. That these laws could be unjust, seems not to have been considered by them.

As decisions were made by the common-law courts, the judges began to regard them as precedents, binding in future cases under like circumstances, and thus the law began to harden and become stereotyped, and to become written laws and a written system. This was hurtful to a rightful and advantageous development of the common law. Thus, as new facts arose and new situations presented themselves it was often found that there was no rule of law applicable to the state of facts presented, and the courts would grant no relief. Then, at times, there was an element of enmity between the king and the people, who began to chafe under their Norman rulers, and as the judges, under the special influence of the situation, sometimes sympathized with the people, they held fast to the narrow rules of law which had grown up under primitive conditions, and thus denied a remedy in the law courts to the injury of the citizen, which should have been granted when new and different circumstances arose. The common-law courts relied too much on precedent. The law should have grown as the wants of the people grew; but the fact is undeniable that the law was always behind the growing wants of the people. Many cases arose in which all men of sense admitted that there should be a remedy provided, but which the narrow-minded judges denied. It is true that the chancery issued all writs commencing a suit in the common-law courts, (which is another evidence of the origin of all the courts) which defined a remedy and gave the court jurisdiction to try the cause, but the judges of the common-law courts passed upon the legality of the writ, and refused to entertain jurisdiction, if, in the opinion of the judges, the law gave no remedy. This conduct effectually stunted and crippled the growth of the common law. We have instances of this narrowness for centuries, and a fair example, is the refusal

of Lord Holt to admit the negotiability of promissory notes until the Statute of Anne compelled him to do so.²⁰ Then again, the remedies which the law courts gave were often wholly inadequate. They were as bad as no remedy at all. The law courts knew no remedies except to recover specific property in certain instances, to recover a debt, which was considered in many ways as property, and to recover damages measured in money. There were no *preventative* remedies. The property had to be withheld, the debt due, or the act committed causing damages, before the law would take cognizance. They acted only after the fact.

VII

To remedy evident wrongs for which no relief was afforded by the law courts, the aggrieved party petitioned the king in council, who often granted relief in person, and who, as the business increased, delegated these duties to certain of his council, and finally to the chancellor, who acted with the council, and ultimately by himself. As time went on the business of the chancellor grew and increased and in the reign of Edward III the chancellor ceased to follow the court as one of the royal retinue, and his tribunal began to acquire a more distinct and substantive character. From the twenty-second year of that reign, in which all petitions of grace and favor were recognized as his province, his separate and independent equitable jurisdiction began to grow in power and importance. The equitable jurisdiction of the chancellor thus became one of the three great agencies which have adapted the old unelastic code of customary law to the expanding wants of progressing society, and for a long period of time the right of the chancellor to act was not questioned.²¹

At first the chancellor entertained jurisdiction in all sorts of cases, both civil and criminal, and whether for torts or for violation of contracts.²² For instance, for many years the law courts did not recognize any obligation arising from what we now term a "simple contract," but these were enforced only in a court of equity.²³ Afterwards upon the development of the action of as-

²⁰ 3 & 4 ANNE, c. 9; *Brown v. Harraden*, 4 T. R. 151; *Clarke v. Martin*, 2 Raym. Id. 777; *Story v. Atkins*, Id. 1430; *Trier v. Bridgman*, 2 East 359.

²¹ TAYLOR, *ORIGIN & GROWTH OF THE ENG. CONST.* 250; 1 HOLDSWORTH, *HIST. ENG. LAW* 198; DIGBY, *HIST. REAL PROP.*, 5 ed., 322.

²² 1 HOLDSWORTH, *HIST. ENG. LAW* 235; 1 SPENCE, *EQ. JUR.* 685 *et seq.*

²³ 2 STREET, *FOUNDATIONS OF LEGAL LIABILITY* 35.

sumpsit courts of law recognized these obligations, but this was in the fifteenth century. The reason for the assumption by the chancellor to act in all cases in early times was, that the law courts were dominated by persons who denied justice to the common people, and often a suitor was expelled from the law courts by threats and menaces during those turbulent times. Even the judges were not free from corrupt practices, and this occasioned many prosecutions to be instituted against them.²⁴ In fact, justice was not freely and evenly administered; hence an appeal to the king or his chancellor was necessary.²⁵ After the law courts began to administer justice more evenly, and without regard to persons, the chancellor ceased to take cognizance of cases in which the law courts afforded ample remedy.²⁶ It was not, however, until the law courts began to administer justice in a more fixed and certain manner that the equity courts adopted the rule that they would not take jurisdiction where there is a complete, adequate and plain remedy at law.

VIII

But it still remained necessary for the court of chancery to afford relief in many instances simply because the law courts had narrowed the law and denied a remedy.²⁷ And here we must observe that the chancellor acted with the same power and authority as the common-law judges, deriving his powers from the king, the source of authority from which the common-law judges derived their powers. It is strange that the common-law judges, whose appointment and discharge depended wholly on the will of the king, and who admitted the source of their authority was the king, should ever deny the authority of the chancellor who derived his powers from the same source, and whose office was as ancient as that of any common-law court.²⁸ In matters of law, the king legislated, and by his authority delegated to the courts, the courts legislated, not indeed, in the form of a statute, but in declaring what was and what was not law; and this process, under the guise

²⁴ See 3 BL. COM. 408; 2 HOLDSWORTH, HIST. ENG. LAW 183, 240 *et seq.*; 1 FOSS, MEMORIES OF WESTMINSTER HALL 5.

²⁵ 1 SPENCE, EQ. JUR. 686-8; DIGBY, HIST. REAL PROPERTY, 5 ed., 325.

²⁶ 1 SPENCE, EQ. JUR. 689.

²⁷ See DIGBY, HIST. REAL PROPERTY, 5 ed., 324.

²⁸ See DIGBY, HIST. REAL PROPERTY, 5 ed., 321 *et seq.*; *Martin v. Marshall & Key*, Hobart 63; 2 COM. DIG.

of judicial decisions, goes on to this day.²⁹ When the chancellor declared a certain rule to be the law, he had as much authority to do so as any common-law judge to declare a rule or custom to be the law. The sources of their power were one and the same, namely, the king. As stated, the powers of the court of chancery and its right to act was not questioned until many years after the Norman conquest. Indeed, this court was in great favor with the people. It was not until there arose a conflict between the king and his barons and other subjects that the powers exercised by the chancellor were questioned, which usually resulted in an appeal to the king and a decision in favor of the chancery. The chancellor was usually an ecclesiastic, learned in the civil and canon laws, and consequently borrowed many rules from these sources, which he embodied in, and so enriched, the equity jurisdiction. There was also at times great enmity between the English nation and the Pope of Rome, because of certain tribute exacted by the church, and this for a while caused a conflict between the people, who for that reason hated everything Roman, and consequently the chancellor.

The last of these controversies between the common-law courts and the court of chancery was between Lord Coke and Chancellor Ellsmere, in which Coke was ignominiously defeated.³⁰ From this time on the powers exercised by the chancellor have never been seriously questioned. But Coke, while a great expounder of the common law, was blinded and bigoted in his devotion to that law, and did as much as lay in his power to retard its growth. He regarded it as the perfection of human reason, and says, "if all the reason that is dispersed into so many heads, were united into one, yet he could not make such a law as the law of England is."³¹ Every unbiased man knows this eulogy on the common law to be nothing less than fulsome flattery. The ultimate adoption of

²⁹SALMOND, JURISPRUDENCE, §50; HOLLAND, JURISPRUDENCE, 12 ed., 66, 77; BLACK, LAW OF JUDICIAL PROCEEDINGS 6, 7; 1 ODGERS, THE COMMON LAW OF ENG. 88. In the Middle Ages legislation was not the primary business of parliament, and the rule that the king cannot legislate without parliament was established only by decree. Early statutes, therefore, are of a mixed character, containing both legislative and administrative provisions. Law making, in the early period, was not yet regarded as a distinct branch of sovereign power, external to the judicial authorities. POLLOCK, FIRST BOOK OF JURISPRUDENCE, 2 ed., 345-46.

³⁰2 WHITE & TUDOR, LEADING CASES IN EQUITY, 4 Am. ed., 1298; 2 *Id.*, (6 Eng. ed.), 652; 10 R. C. L. 257; 1 SPENCE, EQ. JUR. 673-75; 1 CAMPBELL, LIVES OF THE CHIEF JUSTICES, (Am. ed. 1873), 289; 2 CAMPBELL, LIVES OF LORD CHANCELLORS, (Am. ed. 1873), 338, 364, 386 *et seq.*

³¹COKE LIT. 97b, 1 THOMAS' COKE 1.

equitable principles both by the law courts, and by legislation, has been such, that there is very little of the common law left, as it was in Coke's day, which shows that it never was "the perfection of human reason," but the reverse.

IX

Thus, side by side with the common law, there grew up a system of equity law much more elastic, penetrating, and far better adapted to the growing wants of the people than the unelastic and unbending common law, and which was founded upon a far higher ethical and moral plain, and more pregnant with sound reason and common sense than many rules of the common law.³² The fact that such a system grew and flourished, is an evidence of the inefficiency of the common law, which failed to satisfy the public needs. This law, which has never ceased to grow and expand by the light of reason and sound morals, has triumphed over the common law, for it has been enacted in conservative England, and many of our states, that "where the rules of equity and the common law conflict, the rules of equity shall prevail."³³ However, long before this legislation, enlightened jurists in the mother country adopted a host of the equity rules in the courts of law, and Lord Mansfield so expanded the law by the adoption of equity principles and the customs of merchants, that he imbued it with a freshness and vigor partaking of his own glowing and masculine intellect.

We mention a few of the many cases in which the common law gave no relief. No common-law writ, for example, existed by which a defective instrument could be reformed, a fraudulent conveyance set aside, a mistake or accident effectually relieved against, or a beneficial interest in property enforced against the holder of the legal title. Nor did the common law give a remedy by which a contract for the sale of real estate could be specifically enforced; nor did it furnish any remedy for the prevention of a wrong, as by injunction; and where the facts of the case lay wholly within the knowledge of the plaintiff and defendant, there could be no relief, because the common law forbade either of the parties to

³²DIGBY, *HIST. REAL PROPERTY*, 5 ed., 324.

³³36 and 37 VICTORIA, ch. 66, §§24, 25; 10 R. C. L. 262; *Bettman v. Harness*, 42 W. Va. 439; *BISPHAM, PRINCIPLES OF EQUITY*, 9 ed., §11; *EATON, EQUITY* 3; 1 *POMEROY, EQUITY JURISPRUDENCE*, § 40.

any action to testify on the trial, and the rule was the same as to any one having a legal interest in the suit.³⁴

X

Some of the many examples where the law and equity courts differ in their treatment of the same subject-matter are the following:

1. The legal rule was that a sealed instrument could be discharged only by another instrument of as high a character, or else by a surrender of it so that the creditor could make *profert* of the instrument in an action at law. But equity regarded the seal as a mere form, and the debt as a real fact, and its payment as a satisfaction. It therefore relieved the debtor who had thus paid by restraining the action at law brought on the instrument. Equity disregarded the seal and looked into the real relations of the parties and rejected the rule that a seal can be discharged only by an act of equal degree. These equitable doctrines have long since been transferred into the law of this country.

2. Again, by the old common law a creditor could not maintain an action upon a lost instrument, because he could not make *profert* of it. If he lost the instrument he lost his debt by the rules of law. But equity disregarded this form, and gave relief by enforcing the demand. Later this equitable rule has been adopted by the law courts, although in some states equity alone can give relief.³⁵

3. Courts of equity took a different view of the rights of the parties in respect to forfeitures and penalties. For example, a bond for the payment of one hundred dollars is executed payable in sixty days, with condition to pay three hundred dollars in case the principal is not paid on the date specified. The ancient common law rigidly exacted the penalty in such case, if the money was not paid on the day it was due. But from the earliest times

³⁴1 GREENLEAF, EVIDENCE, 15 ed., §327-9; CHAMBERLAYNE'S BEST, EVIDENCE, 3 ed., 154; 1 STARKIE, EVIDENCE, 7 ed., 104.

³⁵Read v. Brookman, 3 T. R. 151; see Campbell v. Myers, 72 W. Va. 428; Austin v. Galloway, 72 W. Va. 221; Kabler v. Spencer, 114 Va. 539, 77 S. E. 504; McLin v. Richmond, 114 Va. 244; Lyttle v. Cozad, 21 W. Va. 183; Hall v. Wilkinson, 35 W. Va. 167, 12 S. E. 1118; Clark v. Nickell, 73 W. Va. 69, 79 S. E. 1020.

The word "instrument" as here used means a sealed writing. As an unsealed "note" did not require "profert" to be made thereof, if lost, proof of the contents was sufficient. 1 MADDOX, CH. PRAC. 25; Walmsley v. Child, 1 Ves. Sr. 341, 345; Glynn v. Bank of England, 2 Ves. Sr. 38.

equity adopted the policy of relieving against penalties and forfeitures by treating the time of performance as immaterial, and a substantial conformity to the stipulations in the bond as sufficient. It gave the creditor what was justly and equitably due him, which usually consisted of the principal and interest, and compelled him to forego the surplus or penalty which he had exacted, and which the law permitted him to retain. Afterwards the law courts gave judgment for the penalty, but to be discharged by payment of the amount actually due; and sometimes not for the penalty, but only for the amount actually due.

4. As to *titles*, courts of equity took a different view from courts of law. By the common law all property was either real or personal, tangible or intangible. Title to real estate of the tangible character could pass only by livery of seisin, which generally meant an actual change of possession, and the law courts refused to recognize any other title. Thus, in a conveyance to A for the use of B, courts of law utterly denied any claim of title in B and refused to recognize that B had any right therein.³⁶ B could be sued at law for trespass in taking the rents and profits.³⁷ Equity, however, recognized B as the beneficial owner and held A to be a mere trustee for B and allowed him to reap the benefits of the property by restraining A from prosecuting any action at law against B. This recognized the principle of trusts, which in its many phases equity has always fostered.

In respect to tangible personal property equity supported a trust in respect thereto in like manner as in respect to real estate. But there was intangible personality called *choses in action*, which the common law held could not be transferred. Thus, at common law things in action, expectancies, possibilities and the like were not assignable.³⁸ But equity always recognized the right to transfer title to a *chose*, and protected the transferee for a valuable consideration. Afterwards, the law courts adopted the rules of equity in this respect, first, as to negotiable instruments, and afterwards as to non-negotiable instruments, and other evidences of debt.³⁹

³⁶BILLSON, EQUITY IN ITS RELATIONS TO COMMON LAW 167; DIGBY, HIST. LAW REAL PROPERTY, 5 ed., 320.

³⁷BILLSON, EQUITY IN ITS RELATIONS TO COMMON LAW 169.

³⁸COKE LIT. 266a; 2 BL. COM. 280.

³⁹See *Rowe v. Dawson*, 1 Ves. Sr. 331; *Master v. Miller*, 4 T. R. 320, 340, 341-2, 1 Eq. Cas. Abridged 44.

5. To say nothing of the vast difference in the mode of procedure between the two courts, of the fact that equity acted directly upon the person, while the law courts acted against the property of the defendant in most cases, there was an auxiliary jurisdiction exercised by the chancellor as to "suits for discovery" and "suits for perpetuation of testimony," or for taking testimony *de bene esse*, and divers other instances in which courts of equity proceeded differently than did the courts of law.

Every one knows that the federal government as well as many of the states of this union observe the distinction between courts of law and courts of equity, whether the law is administered by the same judge or by different tribunals, and the rules and practices of each court are kept separate and distinct. Under the "reformed procedure" or code practice, adopted by a great number of the states there has been a fusion of equity and law principles and all are administered by the same tribunal.