

1891

The Rise and Progress of the Court of Equity

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Thesis

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The Rise and Progress
of
The Court of Equity.

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by

Howell Charles Williams
Cornell University School of Law.

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1891.

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Table of Contents.

1. Introduction. -----	pages 1. - 2.
2. Equity in the Roman Law-----	' 3- 8.
3. Equity in Early English Law-----	' 9. - 11.
4. The Office of the Chancellor-----	' 12-14.
5. Causes that led to the Establishment of the Extraordinary Jurisdiction of of the Court of Chancery-----	' 15-17.
6. Opposition from the Commons-----	' 18-20.
7. Extension of Chancellor's Jurisdic- tion---; Introduction of Subpeona---	' 20-22.
8. Statute of Uses-----	' 22-24.
9. The Great Chancellors----Lord Bacon's Orders. -----	' 24-28.
10. Abuses in the Chancery-----	' 28-30.
11. Scope of Equity-----	' 30-32.
12. Reforms in the System-----	' 32-34.
13. Conclusion-----	' 34-37.

The Rise and Progress of the Court of Equity.

Introduction.

To a student of the comparative jurisprudence of the different nations whose civilizations have left a marked imprint upon the world's history, there is one fact that stands out most prominently and which must needs attract the attention of every thinker----- that ^{at} one time or another in the legal development of every nation there has occurred ^{the} more or less sweeping change in its laws, either as to substance or ^{or} procedure; that the system which formerly existed has proved inadequate to meet the changing need of society and that a modification of that system has been accordingly instituted, and although its growth has been for a long time hampered by a slavish ^{sent}

devotion to precedent, yet in time the new system has reached a position which has placed it upon a par with that which had gone before. We see an illustration of this fact in the *λόγοι Σωλῶνος* of ancient Greece and in the *edicta praetoria* of imperial Rome but nowhere does it receive a ^{re} ~~more~~ striking exemplification than in the laws of our own England---in the rise, growth and progress of that system of jurisprudence known as Equity.

In this paper, the exposition of the subject must be confined to limits which custom dictates in productions of the kind; detail must give place to generalization, and amplification to brevity in order to at once keep within the scope of the subject and to have a finished and complete whole. With this aim in view the treatment of the subject is now taken up.

Equity in the Roman Law: -

The origin of Equity Jurisprudence, historically speaking, in the English Law is shrouded in obscurity. It is impossible to fix the precise date at which that system had its birth, but this much we know that the Equity administered by the early English Chancellors was very like and was probably borrowed from the *aequitas* of the Roman praetors. The first authentic account that we have of the application of equity principles was by the ecclesiastical courts during the Anglo-Saxon rule in England, probably about the reign of King Edgar. The ecclesiastics were very devoted to the Roman Law, and to that source it is necessary to turn in order to a complete understanding of the early system as it prevailed in England.

The Roman law of actions during its formative period was extremely arbitrary and technical. The suitor was forced to exercise absolute accuracy in complying with the established phrases in which his cause of action was set forth and any mistake, even the most trifling, was fatal to his suit. Gradually these actions, which were very like the old English common law actions, fell into disuse and were replaced by the formulary system of procedure. The magistrates who played the most important part in the development of the Roman law were the praetors. The legislative work which they performed was done chiefly by means of the edicts which they issued upon entering their office, and which contained the policy which they were to pursue during their term. These edicts in time formed a large part of the law.

The jurisdiction of the praetors, which was exercised by means of formulas, was called their 'ordinary' jurisdiction. In the latter part of the republic there arose another jurisdiction called the 'extraordinary'. It was in the exercise of this latter jurisdiction that the praetor cast themselves aloof from technicalities and applied remedies which were not provided for in any existing form of action, and equitable notions and ideas could thus be applied and so incorporated into the law. It is in the exercise by the praetors of this freedom in granting relief that the prototype of the English Chancery procedure can be seen. The ordinary jurisdiction of the praetors was abolished by the Emperor Diocletian A. D. 294, and from that time on the extraordinary jurisdiction was the only kind in vogue.

The *Ius civile*, the law of early Rome, was characterized by strict formality. It was extremely inflexible and many times failed to give relief where right and justice demanded it. If, for instance, a set of facts and circumstances differed in the least from those to which the existing remedies were applicable, no relief could be obtained. In order to remedy this defect the praetors introduced a class of actions enlarged in the scope of their operations, and from time to time invented entirely new actions to meet the wants of suitors. In doing this the praetors drew largely from the *Ius gentium*, the principles of which were understood to have a universal sanction, and also from the *lex naturae*, which was founded upon ideas and precepts of morality. The rules which were thus derived were termed *aequitas* (from *aequum*)

because they were supposed to be impartial in their operation, applying to all alike.

Whenever the praetor perceived that a strict adherence to the ius civile would do a moral wrong he would shape his edict according to the particular notion of morality that he might have. Gradually the cases in which he interfered increased in number and thus a set of principles was adopted into the law which constituted equity. It did not, as in the English system, form a separate department of the law but it was engrafted into the jurisprudence of the Romans of which it ever afterwards remained the most prominent feature. Toward the middle of the Empire the meaning of the word "aequitas" became enlarged and then it came to correspond with the conceptions of right, justice and conscience with which

our understanding of the term is always associated.

Having taken a brief survey of the system as it existed in the Roman law we are prepared to consider the subject in its more modern and interesting development in the law of England.

Equity in the Early English Law:--

The Anglo-Saxon kings, with the assistance or perhaps through the medium of their councils, exercised a kind of equitable jurisdiction for mitigating the rigor of *the* positive law laid down in the codes, when the strict execution thereof in a particular case would have worked injustice. At first all persons below the rank of optimates were denied the right to relief, but ultimately the right of appeal from all the inferior tribunals to the

King's Court became fully established.

The administration of justice in England was originally intrusted to the aula regis, ~~for~~ the great court or council of the King, as the Supreme Court of Judicature which, in early times, undoubtly ^{ad} administered equal justice according to the rules both of law and Equity as the case might require. When that court was dissolved and its principal jurisdiction distributed among various courts, the ⁶Common Pleas, King's Bench and Exchequer, each received a certain portion and the Court of Chancery also shared in the distribution. But, at that time, a court of equity as contra-distinguished from a court of law does not seem to have ~~subsisted~~ subsisted in the original plan of partition. Fleta, Glanvil, Brecton, the earliest writers of the common law, make no mention of the equitable juris-

diction of the Court of Chancery, which fact is a strong point in favor of the theory that if there was any equitable cognizance taken of particular cases it did not come through any particular court known as the Court of Chancery, but directly from the king, either in person or through his Chancellor, it being one of the King's prerogatives to administer justice in his realm. It was the maxim of the law that the King was the fountain of all justice and therefore application was made to him and his council by means of petitions granted not as a matter of right but as a matter of grace and favor.

As perhaps it has already been intimated, the common law courts were not at any time sufficient for the needs of the country, and the existence of civil rights which they were incompetent to protect was, even in the infancy

of the present courts, fully recognized. An action ^{at} common law was commenced by the original writ, which was extremely technical in character and ill-adapted to the different causes of action which the changing relations of personal status created. Accordingly, the Statute of Westminster II. was passed ⁱⁿ whereby authority was given to the Chancellor to frame new writs, *inconsimili casu*, as the case required. ^{-the} Nevertheless, cases constantly arose to which these new writs were inapplicable. The words of the Statute ¹ were ~~to be framed~~ give no power to make a completely new departure; writs were to be framed to fit cases similar to but not identical with cases falling within existing ¹⁰¹ writs. Thus the evil ² was far from being completely remedied. The judicial powers, however, which the Chancellor and his assistants, who were chiefly

ecclesiastics, acquired in formulating these writs were the roots from which the Chancellor's equitable jurisdiction grew, for the petitions craving their aid were continually referred to the Chancellor for him to consider and answer, until in time the reference became so much a matter of course that parties endorsed their petitions over of their own motion, and the Chancellor's power to grant relief in the nature of that granted by the King's Council and Parliament became so firmly established, that it became the custom to address petitions directly to him.

The office of the Chancellor was a very ancient one. He performed various functions, being Secretary to the King and Keeper of his Seal. By virtue of the latter position he was the head of the office in which the same

Kings charters were enrolled and from which the original writs were issued. All petitions to Parliament and the Council passed through this office and the records concerning them were there enrolled. The Chancellor was present at all the Kings Councils and nothing was done without his advice. He was the keeper of the King's conscience, being almost always an ecclesiastic. It does not appear that he regularly held any court of his own prior to the reign of Edward II. According to Fleta recognizances and contracts were enrolled in the Chancery and by the Statute of Merchants (13 Edw. I.) the power of taking recognizance was expressly reserved to the Chancellor. Here we see the beginning of the Chancellor's separate jurisdiction. By this time the Chancellor began

to be regarded as a judicial person. Whenever a commission was appointed to hear petitions the Chancellor was invariably named, since by his connection with the administration of the law and his position as the head of the ecclesiastical court he was supposed to have a knowledge of what "Conscience," "Justice," and "right" demanded.

Writers upon the subject have generally assigned the following causes as those which most contributed to the establishment of the extraordinary jurisdiction of the Court of Chancery:---

(1.) The attitude of the common law judges to the binding authority of precedents.

(2.) The rules concerning real property and many concerning the personal status and relation of subjects were of feudal origin, and the dogmas of feudalism being

opposed to the doctrines of the Roman law, they could not be enforced by the same tribunal.

(3.) The peculiar feeling of the English people during the reigns of Edward III. and Richard II. toward the government of Rome had a great influence upon the Court of Equity because the common law judges interdicted the principles of the Roman law from the common law courts, and thus drove them into the Court of Equity.

(4.) The inadequacy of the common law remedies in furnishing relief adapted to the rights and duties of litigants, All these causes had a greater or less influence upon equity in formative stage.

We have seen that the earliest general reference of petitions to the Chancellor was brought about by virtue of an ordinance passed in the eighth year of the reign of

Edward I., which provided that all petitions were to pass through the Chancellor's hands before being presented to the King and his Council. The Chancellor, however, had as yet only the powers of a referee and no exclusive jurisdiction in respect to these petitions. During the reign of Edward II., the Chancellor began to sit regularly for judicial business. During the reign of Edward III. the Chancery as a Court for hearing causes became fully established and was fixed at Westminster. In the 22nd. year of the reign of Edward III. the famous writ to the Sheriff of London was issued reciting, "that he, the King, was much occupied with matters of State, and his own business, and directing that all matters proper to be brought before him, whether relating to the Common Law, or to the special grace of the King, should be brought, the

matters touching the Common Law before the Lord Chancellor (the Archbishop of Canterbury elect) to be disposed of by him, and the matters touching the grant of the King's grace before the Chancellor, or the keeper of the Privy Seal, and that they or one of them should transmit to the King the petitions which they could not dispose of without consulting him, together with their or his opinion thereof, so that on reading it and without it being necessary to make any suit to the King, he might indicate his will in the matter to the Chancellor or keeper of the Privy Seal, and that thenceforth no other business of the kind should be brought before the King himself. "

Beside the matters referred to the Court had jurisdiction over the issuing of scire facias upon recognizances and

to annul the King's Charters wrongly granted, petitions of right and traverses of office, and actions by and against the officers of the Court. Lord King, Mr. Justice Blackstone and Mr. Wooddeson say that the Court of Equity took its position among the Courts of the kingdom as a separate and independant court with the Chancellor at its head probably about the latter part of the reign of Edward III., and they referred to the above mentioned proclamation. Some authors, notably Lord Coke and Sir Francis Bacon are authorities for saying that it was a mere temporary measure, but this view is not borne out by the decided weight of authority.

The growing power of the Court of Chancery did not proceed altogether without opposition. From the time of the reign of Richard II. and for more than a century

thereafter continual complaints were made by the Commons of the interference of the Chancellor in matters cognizable in the Common Law Courts. These remonstrances are a clear indication of the growing importance of the Chancery and they point conclusively to the fact that it was steadily usurping ^{the} place formerly occupied by the Council and by Parliament itself. In spite of this opposition the House of Lords continually sent petitions to the Chancery to be dealt with there, and in the struggle between the Commons and the Chancery, the King invariably sided with the latter. Having the royal authority back of it, it is not surprising that the attacks of the Commons were effectually resisted and instead of curtailing the Chancellor's powers they seemed to have produced the

the opposite effect. These attacks continued during the reigns of Henry VI. and Edward IV.

The jurisdiction of the Court, at first rather meagre, had now been so extended as to embrace a wide field of remedies covering the various property and individual rights. It extended to forgery, duress, discovery, contracts, specific performance, injunction, mortgages and uses and many other cases which a Court of law would not recognise. It was in connection with the operation of uses that the Court of Chancery obtained the greatest extension of its jurisdiction. The work of the Chancery in connection with uses became from the end of the reign of Henry VI. so common a part of its jurisdiction that by the middle of the next century the idea had already gained ground that the Chancellor's equitable jurisdiction had

been originally constructed for the purpose of protect-
 ing them. Uses were introduced into England by the
 clergy from the Roman Law for the purpose of avoiding
 the Statute of Mortmain. By the reign of Edward III.
 feoffments to uses were well known and attempts were made
 to enforce them in the Common Law Courts, ~~By~~ the aid of
 conditions in favor of the intended beneficiary and by
 a series of statutes in relation to fraudulent feoffments
 These failing, uses were driven into the Chancery in all
 cases, and there they were protected by the characteristic
 remedy of a subpoena and decree binding the person. Here
 the protection afforded to cestuis que use was soon ex-
 tended beyond that accorded to ordinary rights in
 personam.

To John de Waltham, Bishop of Salisbury, Master of the

Rolls during the reign of Richard II., and afterwards Keeper of the Seal is usually ascribed the invention of ~~the~~ the subpoena. This was a judicial process issuing out of the Court of Chancery, commanding the defendant to appear and submit to an examination concerning the subject matter in controversy. It was through the medium of this writ that the jurisdiction of the Chancery was, in later years so largely extended.

During the reign of Henry the Eighthth an event occurred which was destined to work a severe blow to the now widespread jurisdiction of the Court of Chancery--- the passage of the celebrated Statute of Uses (27 Henry VIII.) The immediate effect of the Statute^s was to convert such uses as it operated upon, into legal estates and to import into the Common law the varied^{the} interests commencing in in

futuro, and upon matter subsequent which ^{been} had previously
 created by way of use only, and also to introduce new
 methods of the conveyance of the legal estate, characteriz-
 ed by the same secrecy as had attended the transfer of
 the use. Uses passed into the jurisdiction of the ordi-
 nary courts and thus a great portion of the earlier
 business of the Court of Chancery was swept away. But the
 strict construction put upon the Statute by the courts
 enabled Chancery to retain jurisdiction over many trusts
 which the Chancellor had originally protected, Trusts
 in chattel interests were outside of the Statute and over
 these also Chancery retained control. The Statute instead
 of checking conveyances to uses really stimulated their
 growth and what were uses before the Statute were after-
 wards denominated "trusts." These trusts, in after years,

constituted a very large share of ^{the} jurisdiction of the Court of Chancery.

The history of the Court of Chancery from the reign of Henry VIII. down to the Commonwealth is made up largely of the work of the famous Chancellors who played such a prominent part in the development of the system. Down to 1529 the Chancellors had been for the most part men unacquainted with the Common law. Now we have a line of Chancellors who were expert lawyers as well as ecclesiastics. The first of these is Wolsey, who was at the same time Prime Minister under Henry Eighth. It was he who first claimed the prerogative of interfering with the execution and judgment of a common law court. Wolsey was succeeded by Sir Thomas More, who followed out the practice of granting injunctions to stay actions at law which

inequitable. At this time, says Lord Campbell, (Vol. II. p. 87)

"the business of the Court of Chancery had so much increased that to dispose of it satisfactorily required a judge regularly trained to the profession of the law and willing to devote to it all his energy and industry.

The holder of the Great Seal could no longer satisfy the public by occasionally stealing a few hours from his political occupations to dispose of bills and petitions."

Lord Ellesmere, Sir Thomas More's successor, may be said to have been the first Chancellor to establish equity upon the basis that its jurisdiction was to be found in and guided by the cases already decided and the principles already to be derived therefrom. He also added many new doctrines to equity and gave relief in many new cases

In the great case of the Earl of Oxford (Leading Cases, W. and T. p. 644.) Lord Ellesmere claimed power to determine new cases on new principles, even against the law, and to legislate on individual rights. 'The Chancellor is by his place under his Majesty to supply that power (of Parliament), until it may be had in all matters of meum and tuum between party and party and the cause where there is a chancery, he said, is for that men's actions are so divers and infinite that it is impossible to make any general law which may apply meet every particular act and not fail in some circumstances.' It was during his Chancellorship that the great struggle between the Chancellors and the common law judges over the power of the former to issue injunctions and stay

executions at common law was finally terminated in a victory for Chancery.

Lord Bacon, the next Chancellor, is chiefly memorable as the author of Bacon's Orders, --- certain rules and regulations which he carried into effect for the purpose of systematizing and settling the Chancery procedure.

Bacon did much toward remedying certain abuses that had grown up in the Chancery especially in doing away with unnecessary delays and the charging of exorbitant fees.

Lord Coventry also issued some Orders, which were afterwards embodied in Lord Clarendon's, upon the subject of interrogatories and the examination of witnesses. As a result of the work of the Chancellors the Court could interfere in the execution of a judgment obtained in a

common law court. But it did not stop here. Chancery interfered, not only where judgment had been obtained by fraud or by the defendant's accidental default, but in some instances where a right deliberately granted and secured by the common law was being enforced by unexceptional means. The creation of rights in equity in opposition to rights at law, - as the right to redeem a forfeited mortgage, dates from this period.

Reference has already been made to the abuses which existed in the Chancery practice and procedure. The machinery of the court was very slow to start, the business had increased to an alarming extent, so that the Court was greatly in arrears, enormous fees were charged by the various masters, clerks and other functionaries, all of these things called for a reform. During the Protector-

ate of Cromwell an attempted reform was projected but it failed. The work of the reformers was, however, not entirely futile. The disorders of the Chancery were made public and their causes investigated. The restoration of the Stuarts ended, for a time, any further attempt.

The system of equity had by this time reached an extraordinary stage of development. Trusts had been extended, new methods of encumbering real property were devised, and the introduction of a new kind of property in the nature of transferrable stocks had taken place. All these things tended to broaden the scope of the Chancery.

During the Stuart dynasty, the right of appeal from the Chancellor to the House of Lords was established for the first time. The Chancellorship was held successively by

such men as Lords Nottingham, ~~Lord~~ Hardwicke, Somers, Thurlow and Eldon, who impressed their marked individuality upon the system of Equity and did much to improve its procedure.

We have now reached a period in our study where it will be interesting to consider the various subjects which are cognisable in the Court of Chancery. During the formative period, the jurisdiction of Equity was confined to such subjects ~~to such subjects~~ as assaults, trespasses, and various outrages of a kindred nature. It has since greatly expanded so that now it may be said to embrace the following subjects:----- Trusts, Administration, Married Women's property, Guardianship of infants, Mortgages, Fraud, Mistake, Accident, Penalties, Sureties, Specific

Performance, Injunctions, Discovery, Compromises, and some others. Equitable doctrines have thoroughly permeated the whole legal system, and have greatly abated the rigor of the old common law. The rivalry between the two systems has resulted in a marked improvement both in Equity and in Law. Many legal remedies are administered in Equity and equitable rights are frequently recognized by the law Courts. In the language of Sallust, the Roman historian, "Neither is sufficient in itself; the one needs aid from the other."

The reform movement which started during the Common Wealth, but which, on account of the Restoration, never came to a head, finally culminated in two measures which will forever mark the progress of the Court of Chancery;

In the year 1854 a statute was passed in Parliament entitled the "Common Law Procedure Act" by which power was given to the common law courts to entertain defences by plea, on equitable grounds, thereby giving the party an opportunity of showing his equity without first applying to the Chancellor; and if he failed so to do, he could not afterwards obtain relief from the Court of Chancery by injunction unless the Common Law Court refused to take cognizance of his equity.

On August 5th, 1873, an Act of Parliament was passed under the title of the "Supreme Court of Judicature Act" whereby the constitution of the Courts of England was radically changed. By this act which took effect November 2nd, 1874, it was provided that the Court of Chancery ,

Queen's Bench, Common Pleas, High Court of Admiralty, Court of Probate, Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, should be united and consolidated and should constitute one Supreme Court of Judicature to consist of two divisions under the names of 'Her Majesty's High Court of Justice' + 'Her Majesty's High Court of Appeal.'

Thus the principles of Equity have been made to prevade the whole mass of English jurisprudence. The two Tribunals so long opposed are now united under one head, sitting in the same place and presided over by the same Judges. They have become the co-ordinate parts of one great legal system, which is based upon the broadest principles of human action, ---a bulwark of strength to the nation and a model of perfection to the whole civilized

world.

In concluding the subject of this paper we cannot do better than to quote the words of that illustrious expounder of modern equitable principles, Mr. Pomeroy, who in his admirable work on Equity Jurisprudence, in speaking of the development of that system has said:--- "As the expensive tendencies of the Common Law are thus confined within certain limits, and as its power to administer justice and to grant the variety of remedies needed in the manifold relations of society is incomplete, the English and American system of Equity is preserved and maintained to supply the want and to render the national jurisprudence, as a whole, adequate to the social needs. It is so constructed upon comprehensive and fruitful principles that it possesses an inherent capacity of

expansion so as to keep abreast of each succeeding generation and age. It consists of those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, was either unable or inadequate, in the regular course of its development, to establish, enforce, and confer, and which is therefore either tacitly omitted or openly rejected.

On account of the somewhat arbitrary and harsh nature of the common law in its primitive stage, these doctrines and rules of equity were intentionally and consciously based upon the precepts of morality by the early Chancellors, who borrowed the jurial principles of the moral code and openly incorporated them into their judicial legislation.

This origin gave to the system, which we call equity, a

distinctive character which it has ever since preserved. Its great underlying principles, which are the constant sources, the never-failing roots of its particular rules are unquestionably principles of right, justice, and morality so far as the same can become the elements of a positive human jurisprudence; and these principles being once incorporated into the system, and being essentially unlimited, have communicated their own vitality and power of adaptation to the entire branch of the national jurisprudence of which they are, so to speak, the sub-structure. It follows that the department which we call equity is, as a whole, more just and moral in its creation of rights and duties than the correlative department which we call the 'law'. It does not follow, however, that the equity

so described is absolutely identical with natural justice or morality. On the contrary, a considerable portion of its rules are confessedly based upon expediency or policy rather than upon any notions of abstract right. "

Finis est.

A u t h o r i t i e s.

1. Muirhead's Roman Law.
2. Maine's Ancient Law.
3. Spence's Equitable Jurisdiction. (Vols. I. & 2.)
4. Bispham's Principles of Equity.
5. Pomeroy's Equity Jurisprudence.
6. Campbell's Lives of the Chancellors.
7. Kerly's History of Equity.
8. Snell's Equity.
9. Adams' Equity.
10. Story's Equity.
11. Leading Cases in Equity.
12. Fonblanque's Equity.
13. Lectures on Equity. (Prof. Hutchins.)

