Nineteenth Century Equity - A Study in Law Reform - Part I

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A STORY familiar to law students relates that a long time ago, when the common law of England was enforced through a system of writs, it became too rigid and inflexible; thus, there were subjects of the King who could not get relief in the common law courts, since there was often no writ to fit the facts of their cases. These subjects hastened to petition the King to give them justice.

This paper was begun as an inquiry into causes and influences which produced the vigorous reforms in English Chancery practice in the nineteenth century. To isolate the nineteenth century for purposes of studying and revealing the causes of reform or of change in the procedure of the equity courts is impracticable. Reform was necessitated by the failure of the existing system of practice and procedure to meet the social and economic conditions of the time. Further, this existing system itself was produced by a continuous process of change through which the original material of which equity was composed was molded to meet the demands of the day. The first part of this study, therefore, will deal with matters leading up to the nineteenth century and the basis upon which equity and the practice of the courts at that time rested, and the second will deal entirely with the events of the nineteenth century.

No attempt is made here to express new ideas concerning the basis of the equitable jurisdiction. Most matters concerning this subject have been thoroughly investigated, so as to leave little room for controversy. An attempt is made, however, in a small space, to pass in review certain events and facts which serve to explain the situation as it existed in the late eighteenth and early nineteenth centuries, a situation which in turn serves to explain many things that took place with respect to chancery practice during the years that followed.
and received satisfying results. So effective was this method of securing one’s rights, the story goes, that the volume of the King’s correspondence became too great, and he was forced to refer the petitions to the Chancellor with directions that he look into the matters and see what could be done; and with this function of the Chancellor as a sort of “Keeper of the King’s Conscience” began Equity and the High Court of Chancery.³

Now, there are some elements of truth in this story, but the effect of the story is to distort these elements, and to present the King, the Chancellor, the Court, and Equity in an altogether too favorable light. The student who has met with examples of real or fancied injustice in his first cases is impressed with the idea that Equity is some sort of Philosopher’s Stone by which injustice is whisked into justice by the simple method of preparing a form of petition lately called a “bill.” The fact that most modern bills in equity contain a statement that “your orator further represents that he is without a remedy in the premises except in a court of equity,” ⁴ and that this statement is founded upon the historical development of a principle of equity, fosters this conclusion.

However, when the evidence is in, the investigator must come to the conclusion that no body of law has been so cordially despised and no court has been so vigorously hated as the system called Equity and the tribunal known as the High Court of Chancery. In England there was war between the common law judges and the Chancellor, resulting from real or supposed encroachment of the latter. It has been said that in the United States, Pennsylvania had difficulty in establishing a court with chancery powers, since her Quaker population were not admirers of such courts.⁵ Equity has been a great force for good in the law—of this there can be no doubt, but its growth

⁴ The so-called clause of jurisdiction.
NINETEENTH CENTURY EQUITY

and development has not always been accompanied by popular acclaim.

Some sort of definition of equity is necessary in order to discuss the origin of the equitable jurisdiction. But here a real difficulty presents itself. Maitland has said, "Equity is that body of rules which is administered only by courts which are known as courts of equity." A definition of a thing in terms of itself is not a good definition, but no better seems possible. Equity has developed as a system separate and distinct from that of the common law, and, as it is sometimes said, "in the very teeth of the common law." The non-professional observer, looking at both systems together, is struck by the extraordinary powers of a court of equity; and perhaps the distinction can be thus explained.

The familiar procedure in the common law courts has been to award relief by way of a judgment which is satisfied by the payment of money as damages. With a few exceptions, as in the case of mandamus and the other extraordinary remedies, a money judgment was the only relief that could be given to a suitor at law. Not so in equity. Today in those jurisdictions where the distinction between common law and equity still exists, an equity court may do many things besides award the payment of a sum of money to the successful party. In an equity court, the judge, who is called the chancellor, may decree that a contract between two parties be specifically performed. So, if A and B agree, the one to sell and the other to buy a certain tract of land, and A changes his mind, the chancellor may compel him to execute a conveyance and to accept the selling price as payment. This could not be done except in a court with equitable powers; only money damages for breach of contract could be recovered by B if he sued at law. Another familiar example of these extraordinary powers of the chancellor is the awarding of an injunction which is an order restraining the defendant from doing some particular act, or compelling, as in the case of a mandatory injunction, the performance of some duty.
There are many cases where the mere payment of money by the defendant to the complainant will not do substantial justice between them. In the case of the contract to sell land before referred to, it is clear that the payment of a sum of money as damages by A to B will not serve to put B in possession of the land, or to give him the equivalent of the thing he bargained for. Since a court of common law has no power to compel A to execute a conveyance of his land to B, it is natural for B to ask the aid of a chancellor. Equity, therefore, is a system of rules for the exercise of extraordinary powers designed to afford relief where adequate relief cannot be given at law. This is the sense in which we understand equity today.

The proper exercise of his powers and the extraordinary relief which the chancellor can give, both serve to indicate to the observer who is unfamiliar with the history of equitable jurisdiction, that equity is a system which, upon principles of fairness and justice, serves to right wrongs and to remedy as by magic all defects in the law. However well the system may now function, the fact remains that during various periods of the development of the law equity has been looked upon with suspicion and distrust, sometimes because of the exercise of the powers referred to, sometimes because of a failure to exercise these same powers, and during the nineteenth century because of a failure to exercise the powers with reasonable dispatch.

It is clear to the student of legal history, that in the beginning of any system of law, the adjective law cannot be distinguished from the substantive. Therefore, it does not seem strange that a discussion of the origin of equity should begin with a discussion of procedure.

The years following the Norman Conquest saw the beginnings of a central court system around which the common law was to develop. As the common law courts branched off from the Curia Regis, they acquired a system of law of their own, distinct from the local custom
enforced by the local courts. This system of law was to become the common law of England, and only portions of the older customary law were to survive. Maitland has said in *A Sketch of English Legal History* that one of the great contributions the reign of Henry II made to the law was the bringing of the law of the King’s court to the people, and so laying the foundation for the system of the common law. How this was accomplished in part through the medium of the Itinerant Justices is a familiar story.

It is probable that these Itinerant Justices were merely an adaptation of an older system to a new purpose. There is some evidence to indicate that the special emissaries sent out by the Conqueror and by Henry I were the ancestors of the Itinerant Justices. But it is clear that the Itinerant Justice of the reign of Henry II was a judge in the true sense.

Bracton says that the powers of the Itinerant Justices varied widely, depending on the terms of their commissions. It is possible to observe the developing of a class of these justices whose powers were very broad. This class, known as the Justices of the Eyre, during the thirteenth and early fourteenth centuries came to occupy a position of great importance with respect to the growing judicial system. The class became obsolete before the fourteenth century had passed, but during its existence its members exercised a wider jurisdiction than ever was permitted to their successors, the Justices of the Assize. It is with these Justices of the Eyre that a procedure begins of which account must be taken.

The researches of William Craddock Bolland in the records of the Eyres have served to make clear many things about the manner in which these courts were conducted. The ordinary and usual way of commencing an action was by writ. Most of the cases of the Eyre of Kent of 1313-1314 indicate the commencing of actions in

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this way. But this was not the only way a suit might be begun. It appears that not infrequently very poor persons sought the aid of the justice by preparing a document called a "bill." The discovery of these "Bills in Eyre" and their striking similarity to the early petitions to the Chancellor and to the Council, have been the subject of much discussion.  

These bills range in date from Edward I to Edward III, and are chiefly found in the Eyre of Shropshire of 1292, the Eyre of Staffordshire of 1293, the Eyre of Kent of 1313-1314, and the Eyre of Derbyshire of 1331. The form and substance of them are interesting. They are written for the most part in Anglo-French on small pieces of parchment. They often begin, A les Justices nostrre Seygnur le Roy (erranz a Staffor), or sometimes simply Sire. The language indicates that they were drawn by persons unfamiliar with the language of the courts of that time, probably by professional letter writers, certainly not lawyers. An extraordinary lack of knowledge of law French is shown.

There appears to have been no set form that such a bill was required to follow, nor were they limited to any class or classes of cases. Bolland notes that in the bills he has examined are complaints of debt, detinue, trespass, and among others, acts are alleged which would be crimes today. Some bills conclude with the words "for God's sake" (pur deu). Others conclude pur deu e pur vos almes, pur vostre charite, or pur lamour Jesu Criste, e pur lalme la Reygne. The following is a typical bill, dated 20 Edward I, translated:

Dear Sir, I cry mercy of you who are put in the place of our lord the King to do right to poor and to rich. I, John Feyrewyn make my complaint to God and to you, Sir Justice, that Richard the carpenter, that is a clerk of the bailiff of Shrewsbury, detaineth from me six marks which I paid him upon receiving from him an undertaking in writing wherein he bound himself to find

me in board and lodging in return for the money he had from me; and he keepeth not what was agreed between us, but as soon as he had gotten hold of the money he abandoned me and constrained my person and gave me a scrap of bread as though I had been but a pauper begging my bread for God's sake, and I was nigh to dying of hunger through him. And for all this I cry you mercy, dear Sir, and pray, for God's sake, that you will see that I get my money back before you leave this town, or else never shall I have it back again, for I tell you that the rich folk all back each other up to keep the poor folk in this town from getting their rights. As soon, my lord, as I get my money I will go to the Holy Land, and there I will pray for the King of England and for you especially, Sir John of Berewick; for I tell you that I have not a halfpenny to spend on a pleader; and so for this, dear Sir, be gracious unto me that I may get my money back.

Endorsement
The defendant admitteth the agreement and breach; and the parties come to an agreement by leave of the court.8

The procedure for trial of a case begun by bill appears not to have differed widely from that followed where the action was begun by writ. The bills were delivered to the sheriff. The complainant was then required to find two pledges that he would duly prosecute his suit. If he was too poor to have friends wealthy enough to be his pledges, he might take an oath which would serve the purpose. After all this, the sheriff would summon the defendant to appear, and it seems that the same steps were taken to compel appearance as in cases begun by writ. When the defendant did appear he might answer in several ways. One of the most usual is Placitavit quod non est culpabilis negat toturn et ponit se super patriam, (i.e. put himself upon a jury). Sometimes, Dicit quod nihil contra pacem fecit. Very often the parties came to an agreement, for the bills are endorsed, Cognoscit et concordati sunt. And sometimes the plaintiff would

8 30 Selden Society, Select Bills In Eyre, 6.
drop his suit, in which case the endorsement is *Retraxit per licentiam*, or *Licentia recedendi*.

There are several very significant things to notice about this procedure by bill. Almost all of the bills in the volume entitled Select Bills in Eyre, edited by Mr. Bolland, ask relief on behalf of poor persons who, it may be assumed, have no other way of securing justice. The Chancery charged a fee for a writ, but there is nothing to indicate that any fee was charged where the action was begun by bill. It is to be noted also that these bills are addressed to the Justices of the Eyre, not to the King or to the Council.

The circumstances attending the bringing of these bills or petitions and the poverty alleged by almost all of the complainants seem to suggest that there must have been some obstacle in the way of the prosecution of the action by writ. This assumption is strengthened by the fact that examples of prosecution of suits by bill are few compared to the number of cases begun by writ. The bill must have been the exception, not the rule. The following case from the Eyre of Kent of 1313-1314 serves to illustrate the kind of Justice that was administered:

A complainant brings a bill of account. The wife of the defendant comes into court and tells the Judge that her husband is paralysed and can neither come to the court nor speak, and she asks that the proceedings may be stopped. Then says Hervey of Staunton to the plaintiff: "If so it be as this woman has told us, let the plaint drop, and you will have your money paid. If you persist in going on, and we find that this woman is telling us the truth, it shall cost you dear."^9

If there was an obstacle in the way of the prosecution of these suits, why did they not fail? Why did the Justices of the Eyre permit poor persons to avoid the necessity of purchasing a writ? The answer to these questions is found in the jurisdiction of the Justices. The Justices of the Eyre were commissioned by the King to hear all

^9 27 Selden Society, Eyre of Kent, II, xxix.
pleas and more than that, to do justice in the King's name between subject and subject. When they acted thus, they acted as the King himself might act, and as his direct representatives. Now, the powers exercised by the judges at Westminster were also delegated powers, but they were exercised through strict forms. These delegated powers found their expression in the writs. The extraordinary powers of the Justices of the Eyre are the residuary powers of the King. Mr. Bolland says:

Now to what does all this point? Surely to the immemorial belief that inherent in the King are the right and the power to remedy all wrongs independently of common law and statute law and even in the teeth of these; the right and the power, in fact, to do as he likes, whatever hard law and still harder practice may dictate; and the hope and the trust that, his own personal interests being in no way concerned, he will right the wrong and see that justice is done. And the Justices of Eyre were in a very special sense impersonations of the King who had received from the King not only authority to hold all pleas, but, further than that, authority to hearken to and to give amends for any complaint that should be brought by any against any other. I think that there can be no doubt that these bills are the very beginning of the equitable jurisdiction.\textsuperscript{10}

To sum up the conclusions that may be drawn from this procedure by bill, it may be said that the administration of a very special justice is indicated. The complainants or petitioners were almost all very poor persons. The appeals in the bills were direct to the Justices themselves. No form was necessary and no strict procedure had to be followed. The difference from proceedings on writs is significant. It may be said that all that was necessary was to state sufficient facts to show a reason for granting relief. Indeed it appears that if a bill did not state sufficient facts, permission was granted by the Justices to amend viva voce, a procedure which would not have been tolerated at Westminster. All of these things

\textsuperscript{10}27 Selden Society, Eyre of Kent, II, xxviii—xxix.
indicate that a very special power was exercised by the judges *erranz*. The nature of the bills themselves points to the conclusion that the petitioners considered the Justices as put in the place of the King himself. To quote again from Mr. Bolland:

All that the King could do to right wrong his Justices in Eyre could do; they, no more than he, were held back by law if equity demanded a remedy which law would not give. His Justices of the Bench might go as far as law would let them but no further . . . . In Eyre alone was access to the King's plenary power possible to them, . . . .

As the system of the common law developed around the developing court system, then, it tended to crystallize into set forms. For practical reasons litigants who present themselves before the central courts must seek their remedies according to the prescribed forms. The functioning of the court system itself will not permit a departure. But over and above forms, procedure, and rules of court—at least at this stage—is the King himself. He had the power to look beyond the form to the substance and may lend his power in aid of a person wronged to see that the wrong does not go without a remedy. This power he allows his Justices of the Eyre to exercise, since they are his special representatives commissioned by his hand. For a time, outside of the Council, the exercise of this power or part of the Royal prerogative is limited to the Eyres.

As yet it is only to his Justices of the Eyre that the King has lent so much of his *persona* as will enable them to do abstract justice in the failure of, or in spite of, common law and statute law. Hereafter the same power will accrue to the King's Justices sitting at Westminster, and later yet will be withdrawn from these to become the special and characteristic appanage of the Court of Chancery and the warrant for its equitable jurisdiction.12

11 30 Selden Society, Select Bills in Eyre, xvi—xxvii.
12 W. C. Bolland in 27 Selden Society, Eyre of Kent, II, xxi.
It is obvious that in the thirteenth and fourteenth centuries no distinction can be drawn between common law and equity. But it is possible to observe the exercise of a power to give relief because good conscience demands it, whatever may be the dictates of strict law. The end of law is justice, but it is an end which is never reached. Here is an effort in aid of the law to reach that end. No attempt is made to trace any institutional evolution from the Justices of the Eyre to the Court of Chancery. It is believed that there was no such continuity of development. What seems indisputable is that the powers of both rest upon the same basis.¹³

The development of the rules of equity has been the contribution to the law of the High Court of Chancery. Maitland says that in the time of Edward I, three great common law courts had come into existence, the King's Bench, the Common Bench or Court of Common Pleas, and the Exchequer. At this time the business of these courts was becoming distinct. One court was more than a court, it was a treasury department. What today would be called the Civil Service was transacted by the Exchequer and one other great office, the Chancery. At the head of the Chancery was the Chancellor, at this period an ecclesiastic, a sort of secretary of state to the King, who at this time had no exclusive judicial functions.

Two influences, however, were at work drawing him close to the administration of justice. As the common law came to be enforced through writs, it became the function of the Chancery to draw up and issue these writs. Justice was purchased from the Chancery at a price. This was not a judicial function, but it served to bring the Chancellor in close contact with the law. Most of these writs were "writs of course" which had been formulated before, but there existed in the Chancery a certain limited power to create new writs derived from a clause of the Statute of Westminster II. Thus it some-

times became the duty of the Chancellor to consider whether, upon a certain set of facts, a new writ ought not to issue.

But there was another influence which turned the attention of the Chancellor to matters of law. Like the Bills in Eyre before discussed, there was another manner in which the power of the King to do justice was sought. Disappointed suitors in the central courts at Westminster, deprived of a remedy by the growing strictness of the common law, began to address the King in petitions, seeking thus to invoke his aid in their troubles. Maitland says that by the end of the thirteenth century the number of petitions had become very large and the work of reading them was onerous. In practice much of this fell upon the Chancellor.

It is to be remembered that the Chancellor was, as well as the King's prime minister, a member of the Council. As the number of petitions grew and the Chancellor came more and more to deal directly with them, the petitions gradually ceased to be addressed to the King. In the thirteenth century petitioners usually addressed the Chancellor and the Council or either of them. At this point some account must be taken of the subject-matter of the petitions.

The judicial functions of the Chancellor and the Council in this period may be divided roughly into two classes. There appears to have developed a law side and an equity side to the powers exercised. Some of the petitions crave the exercise of the royal power to relieve against the inelasticity of the common law, while others ask relief against the King as well as from him. The latter petitions call for the exercise of common law jurisdiction. Because the King cannot be sued, persons injured by his officers must adopt the medium of petitions to secure justice. This law side of the jurisdiction does not last very long so far as the Chancellor is concerned.

14 F. W. Maitland, Equity, Also The Forms of Action At Common Law, p. 3.
The most important of the judicial functions of the Chancellor and the Council fall in the field of equity, the power to give relief where the common law as administered by the King's courts had proved inadequate. Most of the early petitions seem to have originated in the fact that the defendant was so rich or so powerful that he could not be brought into court in the usual way. The phrase "he is of too great a maintenance" is often found in these bills. The early equity jurisprudence appears to have consisted of cases where, although there might have been a remedy at law, yet because the petitioner was poor and the defendant was rich and powerful, the legal remedy was not satisfactory. Sometimes it appeared that the defendant had prevented service of the writ upon him, or had bought up the jury, or had the sheriff under his thumb. At any rate, many of these early cases look like criminal or quasi criminal cases. Following is an example of an early petition dating somewhere between 1443 and 1450:

To The most reverent father in God, The Archbishop of Canterbury, Chancellor Of England,

Besecheth mekely youre pore bedeman, John Bushop, that where he late was in his house at Hamell of the Rice in the Counte of Suth’ the xij day of Marche laste passed in godis pees and the kinge’s, ther came John Wayte, Richard Neuport and John Neuport with xij [?] other personas in theire company, arayed in maner of werre, and in full ryoutis wyse in forcible maner there and thenne entred the house of youre seid besecher aboute myddenygth, and him lyinge in his bedde toke, seesed, and emprisoned, and his purse with xxvs. of money therin and the keyes of his cofres fro him toke, and the same cofres openyd, and xxviij [?] li. of his money, ij standinge cuppes of siluer gilte, vij flatte peces of siluer, ij masers, vj girdels and a baselard harneysed with siluer of the godes and catalles of William Poleyn, of the value of xl li. ther beinge in the kepinge of youre seid besecher, and v peces of kerseys and the stuffe of household of youre seid besecher, to the value of xxx li., ther founde, toke
and bere away, and fro him thens the same nigth to Sydingworth ledde, and in horrible streyt prison kepte hi the space of ij days; and fro thens him caried to a place called Spereshotis Place in the same shire [?], and him there in full streite grevous prison in stokkes kepte stille bi the space of v dayss; and other fulle grete wronges to him dud ayenste the pees of the kinge oure souereigne lord to the . . . destruccion of the body of youre seid besecher, whiche is not of power to sue his remedye bi the commune lawe, and importable loste of his godes, but yf more soner remedye be hadde for him in this behalfe: Plese it youre gracious lordshippe to graunte seueralle writtes to be directe to the seid John Wayte, Richard Neuport and John Neuport, com-maundinge theim to appere afore you at a certein day by you to be lemyt, to be examined of these premisses, and to doo and receyue that gode feyth and consciens wille in this behalfe, and that they more ouer by youre discretion be compelled to fynde sufficiaunt surete to kepe the kynges pees ayenst youre seid besecher and ayenst alle the kinges liege peple; at the reuerens of god and in the wey of charite.

Plegii de prosequendo \{ Willelmus Poleyn, \\
\{ Johannes Grene.\^{15}

As has been said, there is at first no distinction between the judicial functions of the Chancellor and those of the Council. The phrase *Curia Cancellariae* is in use in the fourteenth century, but Professor Dicey points out that there is no reason to suppose that persons summoned in the fourteenth and early fifteenth centuries came before a separate court of Chancery. However, by the end of the fifteenth century, equity matters were going directly to the Chancellor for decision. The reasons for applying to the Chancellor or to the Council, as has been said, were two: first, because of inelasticity, the common law procedure was incapable of dealing with certain cases; second, the peculiar situation of the parties was such, in some instances, that the cases could not otherwise be dealt with (i.e. where the King was a party). As

\^{15} 10 Selden Society, Select Cases in Chancery, 134-135.
to this inelasticity of the common law, Professor Dicey says: "Whenever, in fact, either from defect of legal authority to give judgment or from want of the might necessary to carry their decisions into effect, the law courts were likely to prove inefficient, then the Council stepped in, by summoning before it defendants and accusers." It appears, then, as in the cases before the Justices of the Eyre, that the Chancellor and the Council administered an extraordinary justice, which was derived from that reserve of authority in the King himself.

Before discussing the steps by which the Chancellor as a judicial officer becomes separated from the Council, it is necessary to consider the procedure by which relief was granted. The litigation was begun by presenting the petition, or bill, as it will be called hereafter, to the Chancellor. These bills were in French down to the time of Henry V, after this in English. As was before noted, the earliest petitions or bills were addressed to the King, later to the Chancellor and Council. The alleged wrong was then set forth, and it was necessary that it be such as to require the Chancellor to act outside his purely administrative powers. The bills do not always ask a specific remedy, which was sometimes left to the discretion of the tribunal.

After the bill was presented, the Chancellor proceeded to require the presence of the defendant by writ, and it is clear that the writ used was the writ sub poena, a personal writ. When the defendant appeared, he was examined under oath, after which, whatever relief seemed proper was given. This was the ancestor of our modern chancery proceedings.

It is impossible to trace the exact steps by which the Chancellor came to sit apart from the Council as a judge. Certainly it is clear that for a time after a court of chancery had begun there was no clear distinction between

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its jurisdiction and that of the Council. Professor Dicey in his essay on the Privy Council says:

As the Law Courts had branched off from the Curia Regis, so the Chancery began to separate from the Council. The exact steps, by which the process of separation was carried out, cannot be known. But it may readily be supposed that the pressure of other business, and a distaste to the niceties of legal discussion, made the Council glad to first refer matters of law to the Chancellor, and next to leave them entirely to his decision. Whatever the steps of the change, a great alteration took place, and before the death of Edward III the Chancellor decided matters of equity on his own authority, and gave assistance to those hindered by violence from obtaining aid through the regular course of law. The date of his establishment as a Judge of Equity is approximately marked by a proclamation of Edward III, which referred matters of grace to the Chancellor’s decision. Though, from about this date, the Chancellor exercised an independent jurisdiction, the Council’s power suffered no diminution. Both the Council and the Chancellor aided those whom Common Law was unable to protect. Both the Chancellor and the Council enforced obligations binding in conscience though not in law. Attacks made on the power of the Chancellor are attacks on the authority of the Council and the Council in Chancery can hardly be distinguished from the Chancellor’s own Court.\(^{17}\)

It is not until the end of the fifteenth century that purely equity matters go to the Chancellor alone. Looking at the earlier bills it is seen that most of them alleged that because of violence, the petitioner was not able to get his remedy at law. But it will be seen that as time goes on, these matters are referred to the Council and the Chancellor does not trouble himself with them. Thus, a principle of equity is established that endures to the present day, namely, that a court of equity will not take jurisdiction for the purpose of enforcing the criminal law. Why this came about is not clear. It is possible that a statute, 3 Henry VII, c. 1, was largely the cause,

\(^{17}\) Dicey, The Privy Council, pp. 16-17.
since it provided that certain offenses—maintenance, embracery, misdemeanors in sheriffs, taking of money by jurors, riots, unlawful assemblies, and others—should go to the Council. It is probable also that the Chancellor felt that these matters were better dealt with by an administrative tribunal. Whatever the reason may have been, the Chancellor ceased to concern himself with matters of violence and turned his attention to the remedying of defects in the purely civil side of the common law. The Council continued to deal with matters of violence, and later, when they were dealt with by “The Lords of the Council Sitting in the Star Chamber,” there came from the judgments of that court a contribution to the criminal law.

When at last the Chancellor comes to sit apart from the Council, there follows a very interesting and important period in the development of equity. It has been elsewhere observed that the early Chancellors were almost invariably ecclesiastics, usually Bishops. Therefore, it is natural to expect that Roman Law and Canon Law will have an influence on equity. Whether this influence was great or little, has been the subject of much controversy. The early procedure of the Court of Chancery may have been largely copied from the summary procedure of the ecclesiastical courts used for the suppression of heresy. But it is to be doubted whether the Canon Law had much influence upon substantive equity for two reasons. First, it will have been noticed that when the Chancellor and the Council acted, it was in aid of, and not outside of, the common law. The early Chancellors often asked the assistance of the lawyers who were practicing before them, and these lawyers were common law lawyers, for there was then no “Chancery Bar.” Second, it does not appear that the Chancellor felt himself bound by either precedent or settled principles. Phrases are to be found in the reports today which are suggestive of the maxims of the Corpus Juris Canonici, and no doubt the ecclesiastical Chancellors
were familiar with them, but it is believed that these were merely the borrowing of phraseology rather than the borrowing of substantive principles.\(^8\)

The period of the ecclesiastical Chancellors is a period in which the court and equity are subjected to the severest criticism both at the beginning and at the end of the period. In the fourteenth century, when the Chancellor and the Council entertained petitions in which the petitioners were poor, while the defendants were rich and powerful, they were granting relief in all manner of cases. The excuse for coming to the Chancellor was not that the cases presented questions which were not cognizable in the common law courts, but was rather that, by the use of corruption or violence, the wealthy were able to escape the jurisdiction of the law courts. Criticism of this growing power of the Chancellor and the Council cannot be looked for from the rank and file of the population during this period. Therefore, the criticism comes from the ruling class, those who were "of too great a maintenance." In other words, the bitterest criticism comes from the very defendants before the Chancellor. But from another source come the rumblings of discontent. If litigants are able to get relief from the Chancellor in cases where according to the common law a remedy exists, it is natural to expect that the common law judges themselves will resent the supposed intrusion into their particular province. Accordingly a violent storm of protest breaks out which echoes in Parliament, the result of which is the placing of a further limitation upon equity and the power of the Chancellor. Maitland in his discussion of the origin of equity says:

In this period one of the commonest of all reasons that complainants will give for coming to the Chancery is that they are poor while their adversaries are rich and influential—too rich, too influential to be left to the clumsy processes of the old courts and the verdicts of juries. However, this sort of thing can not

\(^8\) See F. W. Maitland, Equity, Also the Forms of Action at Common Law, pp. 8-9.
NINETEENTH CENTURY EQUITY

well be permitted. The law courts will not have it and parliament will not have it. Complaints against this extraordinary justice grow loud in the fourteenth century. In history and in principle it is closely connected with another kind of extraordinary justice which is yet more objectionable, the extraordinary justice that is done in criminal cases by the king's council. Parliament at one time would gladly be rid of both—of both the Council's interference in criminal matters, and the Chancellor's interference with civil matters. And so the Chancellor is warned off the field of common law—he is not to hear cases which might go to the ordinary courts, he is not to make himself a judge of torts and contracts, of property in lands and goods.\(^{19}\)

Thus from the fifteenth century onward, the equity administered by the Chancellor is strictly the equity which is in aid of, and supplementary to, the common law. That there was at this time a real threat to the system of the common law there can be no doubt. If this intervention by the Chancellor had been permitted to go unchecked, it is possible a system of administrative law would have superseded the common law. The agitation against equity at this time was similar to that of a yet later period, although with a better foundation.

From what has been said it will be apparent that the principles of substantive equity and the functions of the Chancellor as a judge arise side by side. Nevertheless, after the establishment of his judicial powers, the Chancellor became equity. It has already been observed that the Chancellor did not consider himself bound by any sort of fixed principles, and as Bishop succeeded Bishop in possession of the Great Seal, there was no tendency, as in the common law courts, to feel bound by precedent. The decree rolls begin in 1534-1535, the reports in 1557, and it is not until 1660 that complete records of proceedings before the court of Chancery are available. Now, this is proof that the lawyers who practiced before the court did not feel the need of citing previous decisions

\(^{19}\) Ibid., p. 6.
to the Chancellor. For the Chancellor was no more bound to follow precedent than he was bound to follow the dictates of the canon law in deciding disputes between English laymen. Therefore, it can be said that during this period decisions were rendered in equity cases upon principles of justice and conscience. Indeed, the phrase "court of conscience" is a phrase often met with at this time.

It seems a very desirable thing to have disputes decided upon principles of what is just and right between the parties. With such principles as the basis for decision there is no need for settled forms and rules of law. Such was this early theory of equity, and certainly a theory consistent with the root of the Chancellor's judicial power, the residuum of justice in the King over and above all forms and rules. Yet, it was this very theory that brought the Court of Chancery to grief. However much the failure of the theory to work in practice is to be regretted, it must be admitted that, men being as they are, such failure was inevitable.

Wolsey, deposed in 1529, is the last of the great ecclesiastical Chancellors, although the period of the Court of Chancery as a court of conscience really extends from 1461 to 1603. For a time in between these dates, so long as a Chancellor free enough from political entanglements to give his attention to the business of the court occupies the woolsack, equity functions quite well. But complaints are continually voiced all through the period that the court is sadly in arrears on its judicial business.

An examination of the court at the time Wolsey left it indicates that many cases were before it which had been pending for a long time. This state of affairs is not entirely chargeable to neglect on the part of its chief officer. Until 1813 there were only two judicial officers in the court, the Lord Chancellor and the Master of the Rolls. Considering the volume of litigation which came to Chancery it is small wonder that the court did not keep up. Wolsey was succeeded by Sir Thomas More, who
was able to clear the docket in the short space of time he was entrusted with the Great Seal. With quite justifiable pride he caused the fact that there were no cases undecided pending before him to be entered on the record. If More's biographers are to be believed, this was an accomplishment attained by no previous and few succeeding Chancellors.20

However, it was not the arrears of the court that caused the greatest criticism during the period of the ecclesiastics. Rather, it was the character of the justice that was meted out in the Chancellor's decisions. The idea of leaving the decision of cases to the conscience of the judge, unhampered by rule or precedent, is satisfactory so long as that judge's ideas of justice correspond to those of the majority of litigants. But men's consciences vary. Therefore, as the consciences of the Chancellors varied, so did equity. When a Chancellor used his office as a vehicle through which to wield political power, his conscience was apt to play little part in the decisions he rendered.

The function of the lawyer, in part, is to forecast judicial decision. That this was impossible, or became so, is readily apparent where decisions depended to a large extent upon the whim of the equity judge. It is not strange, therefore, that the administration of equity under the ecclesiastical Chancellors should have been regarded as very unsatisfactory. Persons contemplating proceedings in the Court of Chancery could never be sure that they had a reasonable chance of succeeding. Equity was a sort of black magic which sometimes worked and sometimes did not. It can be understood why John Selden (1584-1654), should say of equity:

1. Equity in Law is ye same yt ye spirit is in Religion, whatever one pleases to make it. Some times they Goe according to conscience some time according to Law some time according to ye Rule of ye Court.

2. Equity is a Roguish thing, for Law we have a measure know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity. Tis all one as if they should make ye Standard for ye measure wee call a foot, to be ye Chancellors foot; what an uncertain measure would this be; One Chancellor ha's a long foot another A short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience.  

With this situation existing with respect to equity, a reaction is to be looked for. Although the reaction takes place, it is not complete until Hardwicke is Chancellor in 1736. If equity is uncertain, the reaction will be toward certainty, and this is what occurred. It really begins with Ellesmere, when the feud between the common law judges and the Chancellor breaks out for the last time. Since the threat to equity in the time of Ellesmere presents the final stage in the struggle between the Chancery and the law courts, it seems best to consider this struggle before tracing the steps toward certainty. In one sense the struggle and its outcome are part of the reaction referred to, and have influenced the equitable jurisdiction to the present time.

Ellesmere became Lord Chancellor in 1596, and some time before this date the old complaint of the exorbitant and aggressive authority of the Court of Chancery dating back to the days when the Chancellor and the Council relieved against “too great a maintenance” is heard again. This time, however, there is less reason for the complaint than before. The common law judges had always looked upon equity as a threat to their powers and a threat to the existence of the common law. It is easy to see why this was so, but the fact remains that, in the time of Ellesmere, if the relationship between both systems had been clearly understood by the judges and the Chancellor, there could have been no conflict. Since the jurisdiction of the Court of Chancery was limited to

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those cases in which there was no remedy at law, the
distinction between the two seems plain. But this was
not the view taken by Lord Coke or by many of the
judges who preceded him. They could see in the growing
equitable jurisdiction nothing but an encroachment upon
their particular field.

In the edition of *The Table Talk of John Selden* edited
by Samuel Harvey Reynolds in 1892, the editor, in a
note, quotes from a letter which serves to show clearly
and amusingly the turn the controversy had taken in
1616.

On Tuesday, one Bertram, an aged gentleman, killed Sir John
Tyndall, a master of the Chancery, with a pistol charged with
three bullets, pretending he had wronged him in the report of
a cause, to his utter undoing, as indeed he was not held for
integerrimus. . . . Mine author, Ned Wymarke, cited Sir Wil-
liam Walter for saying that the fellow mistook his mark, and
should have shot hailshot at the whole court, which indeed grows
great, and engrosses all manner of cases, and breeds general
complaint for a decree passed there this term, subscribed by all
the king’s learned counsel, whereby that court may receive and
call in question what judgments soever pass at the common law,
whereby the jurisdiction of that court is enlarged out of measure,
and so suits may become as it were immortal. This success is
come of my Lord Coke and some of the judges oppugning the
Chancery so weakly and unreasonably that, instead of overthrow-
ing that exhorbitant authority, they have more established and
confirmed it.

The final stage in the controversy came about in this
way. A certain action was begun in the King’s Bench
before Lork Coke. A judgment was recovered by the
plaintiffs, apparently because the material witnesses for
the defense were entertained at an inn by agents of the
plaintiffs and prevented from appearing before the court.
After the entering of this judgment, the defendants filed
a bill in equity praying that the Chancellor issue an
injunction restraining the plaintiffs at law from seeking
to enforce their judgment. Ellesmere, having in mind that the three great grounds for equitable relief were fraud, accident, and breach of trust, issued the injunction as prayed for. This was enough for Coke. He immediately seized the opportunity to declare that those who had sought relief in the Court of Chancery were guilty of a violation of the Statute of Praemunire, since they called into question a judgment of the King's Court. The fact that the statute had reference to the papal courts did not deter Coke. The grand jury having refused to indict, the controversy came at last to be referred to the King. James I, unquestionably acting upon the advice of Bacon, Coke's mortal enemy, decided the question in favor of Ellesmere. Of course, this controversy had a political aspect. James intended to appear supreme over all his judges and would have used the Court of Chancery as a tool for that purpose had this been possible. However, the effect generally was salutary. Two or three things are to be noticed about this controversy and its result. The Court of Chancery had never felt that it had the power to exercise appellate jurisdiction over the law courts. The injunction which Ellesmere issued was not directed to the common law Court of King's Bench. It was directed simply to the parties to the action and was issued upon grounds which unquestionably gave the court jurisdiction. The Court of Chancery was not tarred with the stick that tarred Coke's sacred King's Bench. That court all through its history had issued writs of mandamus, procedendo, and prohibition directed to the judges of other courts. The Chancellor had never felt that it lay in his power to direct the decision of courts of common law jurisdiction. In the instant case, no relief was possible at law, since the common law courts could do nothing except enter judgment upon the testimony which was produced at the trial. Matters of fraud and the relief from its consequences were without a doubt matters of equitable jurisdiction. Viewed in this light, it is very clear that equity was functioning again in aid of and supplementary to the common law. Mait-
land has stated that equity was never a self-sufficient system, at every point it presupposed the existence of the common law. To quote him:

We ought to think of Equity as supplementary law, a sort of appendix to our code, or a sort of gloss written around our code, an appendix, a gloss which used to be administered by courts especially designed for that purpose.\(^2\)

The result of the controversy was the establishment of the independence of the Court of Chancery. And its right to act by injunction in this manner has never since been seriously questioned.

Ellesmere, as Chancellor, was faced with other difficulties possibly not so immediately dangerous as Lord Coke. He recognized that there were defects in a system which was based on no firmer foundation than the conscience of the Chancellor. Criticism such as that of Selden spurred those who had to do with the practice in the Court of Chancery. As a result, a new idea crept into their minds—the idea that somehow, after all, there were certain basic principles of equitable jurisdiction upon which the right of litigants to relief was based. One of these had already been noted, the absence of inadequacy of the relief at law. It is not the purpose of this paper to discuss these principles, such as fraud, accident, mistake, or to show how the use, the trust and the mortgage have become exclusively creatures of equity.

From the time of Ellesmere to the Chancellorship of Eldon the trend was exactly opposite to that which Selden criticized. If equity was uncertain and unsure during the administration of the ecclesiastical Chancellors, it was fast becoming both certain and sure under the guidance of the common law lawyers who succeed them.

Heneage Finch, Lord Nottingham, became Lord Chancellor in 1673. Often called the father of English Equity,

\(^2\) Maitland, Equity, p. 18.
he probably did more to settle the jurisdiction of his court than any other Chancellor. Nottingham deliberately set out to reduce equity to a system of rules established by precedent. The records of the court and the reports of cases decided are proof of this fact. It can be seen how, more and more, the practice of the court is becoming settled and the lines of its jurisdiction clearly defined.

What Nottingham left undone was largely completed under Hardwicke, who began his Chancellorship in 1736. From More to Eldon, the Great Seal was almost continuously in the hands of great lawyers, and the result was that by the time of Eldon the equitable jurisdiction had become so fixed, so certain, that lawyers could say, "There is nothing new in equity."

What starts as a boon often ends as a boomerang. So with equity. Its story is a continuous chain of action and reaction. Perhaps the final episode was written in the nineteenth century, when once again criticism upon criticism was heaped upon the system and the court that administered it. The results of that criticism were far more drastic than anything so far discussed, and it will easily be seen how the things which brought about the criticism were but the result of the trend toward certainty just described.23

23 The second part of this article will follow in a later number of this volume.