September 1935

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

Robert L. Severns

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol13/iss4/1

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
NINETEENTH CENTURY EQUITY
A STUDY IN LAW REFORM
ROGER L. SEVERNS

PART II

MATUREITY AND REFORM

"What, then, is equity? Answer:—Whatever has ever been done by a court of equity." —JEREMY BENTHAM.

EQUITY was spoken of as a system before the nineteenth century opened. The work of Nottingham in the seventeenth and of Hardwicke in the eighteenth centuries went far to establish two facts. First, it was now possible to prophesy with reasonable accuracy what would be the outcome in most chancery cases. Cases were being decided with reference to known and established rules. Second, equity bore a fairly definite relation to the common law, and was a supplemental, if extraordinary, jurisdiction.

Common law and equity crossed swords many times. The bitterest duel was also the last. The victory won for the equitable jurisdiction in Coke's time established the independence of the Court of Chancery in the administration of equity, and in so doing established the equitable jurisdiction as an independent system. But the victory was in one respect costly. By the very fact of the independence of its court, equity ceased to be a rival of the common law. The territory ceded to equity was the right and power in a proper case to relieve against the

1 Professor of Law at Chicago-Kent College of Law.
effect of a common law judgment. But only in a proper case. Only upon grounds of equity, by now familiar, where common law processes could not accomplish the result, might the Chancellor employ his extraordinary powers. Thus the champions of equity forged its limitations. As Maitland has said, the equitable jurisdiction is supplemental, presupposing the existence of the common law at every stage. The Court of Chancery might have become merely another court of original and competing jurisdiction, along with the three great common law courts. But since it claimed and used extraordinary powers, its scope became limited by its "reason to be."

With the establishment of the important principle that only where legal remedies do not exist or are inadequate may equity act, the period of maturity begins. The principle is almost as old as the Court of Chancery and was the basis of decision in the fifteenth century, but it was not fully understood and applied as a rule of equity until much later. Conflict between the Chancellor and the common law judges ceased before the seventeenth century was past, but with the end of the conflict came also an end of the rivalry between the two systems.

Four phases or periods in the development of equity may be traced. As has been emphasized, the origin and basis of the jurisdiction was the prerogative power of the Crown—the power to override when necessary the rigid rules which develop when law becomes a system. Thus, at first, equity was merely the exercise of the prerogative attribute of the kingship, through various agencies. Crown and Council, itinerant justices, Chancellor and Council, even the common law judges, took a hand in its administration.

Thus also, at first, equity was merely the flexibility of royal justice. The time came when chancery could create

---

4 12 CHICAGO-KENT REVIEW 99.
6 12 CHICAGO-KENT REVIEW 89.
no new writs, and settled rules of procedure and pleading had been developed in the King's courts. Equity then broke apart from the common law, because the element of flexibility was ruled out when the law became a system. Thereafter, equity was the dispensation of a special justice, outside of, and sometimes in derogation of, the common law.

The cause of this transition is fairly plain. The common law meant merely the royal justice of the King's court. The common law so long as it retained a great measure of flexibility was the object of criticism for two reasons. In the first place, no certainty could exist where there was so much flexibility; and, in the second place, a new writ was new law. Law was the King's law and new law an exercise of the prerogative. Carried to its conclusion, the power to make new law is tyranny when exercised. Constitutional ideas of the supremacy of law were evolving. The King himself might be suffered to exercise his prerogative to override old law, but the exercise of this power by his agents was another matter.

Criticism drove flexibility out of the common law practice of the King's court, the criticism springing from the desire for certainty and the fear of oppression. Thus, for a time, equity became the executive order of the King in Council, given only in extraordinary and unusual cases. How this executive authority came to be exercised by the Chancellor, and at last by the Court of Chancery, has already been described.7

The second phase of the development of equity began with the establishment of the Court of Chancery as an institution independent of the council. This was the period of the ecclesiastical chancellors. As has been said, the equity of this period was similar to the older administrative or purely prerogative equity, but there was a difference. The common law was in the hands of professional judges, and the Chancellor was beginning to regard himself as a judicial officer. Thus equity became

7 12 Chicago-Kent Review 91-98.
less the mere expression of executive commands and
more and more the pronouncement of judicial delibera-
tion.

During the period of the ecclesiastics, the equity of the
Court of Chancery was the substitute for the element of
flexibility so characteristic of early royal justice, and for
the external prerogative equity—which supplied flexi-
bility when law first became a system. Although by the
middle of this period there was little resemblance be-
tween the judicial determinations of the Chancellor and
the executive orders of the King in Council, criticism and
protest were directed at the court and its chief officer.
The Chancellor was said to be encroaching upon the field
of common law, and he was warned off. The judicial
powers of the office, it was charged, were used to ad-
advance the political influence of the incumbent. More
ominous, though, was the criticism of the uncertainty
with which equity was administered—a criticism which
was natural but no more natural than that equity was
uncertain.

At this stage equity could not have been other than
what it was. The sureness and method of scientific in-
quiry do not often precede the executive order, the pur-
pose of which is to give immediate relief in a particular
situation. Further, equity was no part of the now
established system of the common law. The principle of
flexibility had been outlawed. Rules and principles es-
established by precedent had become the order of the day.
If the basis of his power and the purpose to be served by
its exercise are considered, it does not seem strange that
the Chancellor did not feel himself bound by rules or
precedent and did not formulate either.

But this situation could not continue. The desire for
certainty and definiteness is a natural one. So long as
comparatively few cases came to the Chancellor’s atten-
tion, no complaint was made of decisions which were in-
fluenced by the view he took of the individual merits of
the controversies. Commerce and industry brought about
a great increase in litigation in the Chancellor’s court,
and thus certainty in decision became a real necessity.
It was necessary to be able to forecast with reasonable accuracy the probable outcome in a chancery case.

Several causes, then, co-operated to produce the third phase in the development of equity. Selden had said, "Equity is a roguish thing, . . ." and criticized its uncertainty. The Chancellor was being forced to walk carefully because of the charge of usurpation made by the judges of the common law. Then, too, the Chancellor had come to regard himself as a judge, and the judicial process adopted was leading toward systemization. It should be mentioned also that the growing volume of litigation could hardly have any other effect than to create a need for established rules. The Court of Chancery, always undermanned, could scarcely continue to function unless the increased amount of litigation could be handled in a systematic way. And, the Chancellor would have been more than human if he had not tended to do in one situation as he had done many times before in similar situations.

As has already been pointed out in the first part of this study, reaction set in and equity became as definite and certain as the common law itself. Both a reaction against uncertainty in the common law and a reaction against uncertainty in the administration of equity have now been noticed. The first produced a situation which made inevitable the establishment of a supplemental jurisdiction. The second forced the reduction of that supplemental jurisdiction to a system of rules and principles. Thus equity entered upon the third phase or period in its development. It remains to observe how certainty was accomplished and its effect.

The third phase of equity begins with the opening of the seventeenth century and the chancellorship of Ellesmere. Ellesmere realized to some degree the need for reform in the administration of equity and took some steps to correct its faults. Further improvement was made during the chancellorship of Bacon when rules

---

regulating the practice of the court were formulated. However, equity reached maturity only when the effects of the work of Nottingham, Hardwicke, and perhaps Eldon were felt. Heneage Finch, Earl of Nottingham, has been called the "Father of Equity," and in many respects the title was justly earned. As Lord Keeper in 1673 and Lord Chancellor in 1675, he brought to the office not only experience as an equity lawyer and intellectual ability of a high order, but personal integrity as well. Concerning his accomplishments, Lord Campbell said:

Justly regarding jurisprudence as a science which rests on general principles, and as illustrated and defined by the writings and rules of former jurists, he bore in mind that without a familiarity with these it was impossible that his own decisions should be consistent, systematic, and sound. He had peculiar difficulties to struggle with—that Equity, which he was to administer, had sprung up originally in England, more from a desire to get at what was thought the justice of a particular case between litigating parties, than to lay down methodical rules—that many of his predecessors had been men not educated in the profession of the law, and incapable of apprehending legal distinctions—that their judgments had been generally allowed to fall into oblivion as more likely to mislead than to guide—and that no attempt had been made to classify or to systematize those which had been preserved. He had the sagacity to discover that Equity might be moulded into a noble code, supplying the deficiencies of the old feudal doctrines, and adapted to the altering necessities of a people whose commerce and wealth were so rapidly increasing.

Unquestionably his experience and training in the principles and method of the common law shaped his administration of equity. Equity received a great impetus toward definiteness through his efforts.

Nottingham set the course of equity directly toward organization and system, but Hardwicke is generally given credit for bringing certainty and system in equity

9 Ibid., p. 50.
11 Ibid., 248.
to their full maturity. From the time of Hardwicke, equity, like the common law, was thought of in terms of leading cases. Through his decisions, such as that in Penn v. Lord Baltimore\(^1\) and Earl of Chesterfield v. Janssen,\(^2\) many of the principles governing the exercise of equitable powers were stated in terms of rules upon which his successors simply elaborated. Hardwicke became Chancellor in 1736; and, by the time of his resignation of the Great Seal in 1756, equity had definitely become a system of jurisprudence distinct from, and supplemental to, the common law.

Since the time of More, with one exception, the office of Chancellor was held by common law lawyers. Under their supervision, the reaction against uncertainty in the principles of equity developed until the jurisdiction reached its maturity. Thus, under Hardwicke, equity approached the point at which rule and precedent governed decision—the point which the common law, for obvious reasons, reached many years before.

From Hardwicke to Eldon, many of the principles of modern equity were established. Law and equity were separate systems existing side by side, each with its independent sphere. The phrase that the remedy at common law must be inadequate in order to invoke the powers of the Court of Chancery became practically an apothegm, since certain causes of action were thought of as distinctly equitable without further inquiry.

The period of certainty and of rule in the administration of equity lasted until near the middle of the nineteenth century, when the period of reform began. It needs not a great deal of explanation to show that the abuses and defects which led to the sweeping reforms of the nineteenth century were partly the result of the trend toward certainty.

The discussion thus far has been concerned more with generalizations as to substantive equity, than with the procedure through which equitable principles were administered. It is in the equity procedure, however, that

\(^{13}\) 2 Ves. Sen. 125, 28 Eng. Rep. 82 (1750).
the effects of certainty and definiteness are most obvious. During the period of the ecclesiastical Chancellors, procedure in equity was simple and swift. As has already been suggested it was influenced by the summary procedure utilized in certain instances in the ecclesiastical courts. The chancellor was petitioned by the plaintiff who set forth his grievances in his informal bill. The defendant was summoned, and the Chancellor examined him under oath; any other parties deemed necessary might be summoned and examined. After the Chancellor had sufficiently informed himself of the facts, he made whatever order was necessary to do justice between the parties. This procedure was the logical outgrowth of the idea that each case was to be decided according to what should be done in that particular situation. There was no necessity of written records. The justice dispensed was the extraordinary justice of the King given as a matter of grace and not of right, to be granted or withheld as the sovereign chose in any later similar case.

Likewise the system of pleading had little in common with the technical special pleading of the common law or the over-elaborate system of equity pleading of the nineteenth century. The plaintiff's petition or bill was an informal document stating all the facts and circumstances of his case. The answer of the defendant was just as informal. The purpose and effect of these pleadings was not, as it was at common law, to arrive at a specific issue, but to get the whole case before the Chancellor. This led to a difference in the method of disposition of cases from that employed at common law. The Chancellor, as became a dispenser of extraordinary justice, considered the whole case in all its circumstances and did not confine his attention to specific issues.

Before comparing this simple and common sense procedure and pleading with the elaborate system of the late eighteenth and early nineteenth centuries, some account must be taken of the organization of the Court of Chancery. The Chancellor was assisted during the middle

14 12 CHICAGO-KENT REVIEW 97.
15 Holdsworth, History of English Law, IX, 338.
ages by a body of clerks who originally had general supervision over the issuance of writs. These clerks were later styled Masters in Chancery. Holdsworth says that their duties became specialized with the growing jurisdiction of the court. The primary function of the Masters was to serve as assistants to the Chancellor and to hear and report parts of cases referred to them.\textsuperscript{16}

Another official of the court, and one who gradually acquired true judicial functions, was the Master of the Rolls. This functionary appears to have had supervision over the Chancery Rolls and to have been originally a clerk. As the Masters' duties increased, a large share of these fell to the Master of the Rolls who began to exercise a limited jurisdiction and to assume judicial duties.\textsuperscript{17}

In addition to these officers, a group of officials known as the Six Clerks originally kept the records of the court and acted as solicitors for the parties to litigation. These positions were fee offices, and long after the Six Clerks ceased actually to represent litigants they received handsome fees for unnecessary copies of proceedings furnished to their theoretical clients. The Six Clerks were in turn assisted by the Sixty Clerks who were paid a portion of the fees received from litigants.

It is obvious that with only two judicial officers, the court was too grossly understaffed to handle any great volume of litigation. There were many complaints in the sixteenth and seventeenth centuries of the delays which this inadequacy occasioned. Also, abuses developed among the other officers of the court which made litigation highly expensive. A wave of protest against the court and its abuses broke out, and its abolition was threatened during the time of the Commonwealth.\textsuperscript{18} This outburst was merely a prelude to the storm which broke around the court in the nineteenth century. The judicial staff continued to be inadequate, and litigation there continued costly until public opinion forced reform.

\textsuperscript{16} Ibid., I, 418.
\textsuperscript{17} Ibid., I, 419.
\textsuperscript{18} Ibid., I, 430.
The increase in judicial business which brought about specialization in the duties of the Masters, and accompanied and to some degree made necessary the reduction of equity to a system, was attended also by changes in procedure and pleading. The desire for certainty led to elaboration of the common-sense system of practice previously outlined. This elaboration, carried to absurd extremes, brought the period of maturity to a close and created a situation which led to the period of reform.

A picture of what equity and its administration had become during the last half of the eighteenth century and the early part of the nineteenth may be drawn from many sources. Perhaps the classic treatise of the period on equity pleading is that of John Mitford, afterwards Lord Redesdale. The title of this book, the first edition of which was issued in 1782, is significant—"A Treatise on the Pleadings in Suits In The Court of Chancery, By English Bill." A glance at its contents indicates that the informal pleadings allowed by the ecclesiastical chancellors had been replaced by lengthy documents which formed part of a technical system.

Bills in equity, the petitions of the poor suitors in former times, were classified into three groups—Original Bills, Bills Not Original, and Bills in the Nature of Original Bills. Original Bills were further classified as Bills praying relief, and Bills not praying relief. Bills Not Original included Supplemental Bills, Bills of Revivor, and Bills of Revivor and Supplement. In addition to these, Mitford described eight sorts of Bills in the Nature of Original Bills.\(^1\)

During this period, pleadings had been given technical names and equity had borrowed some things from the system of pleading at common law. In reply to the plaintiff's bill, the defendant, depending upon the character of the defense he intended to make, might file a disclaimer, demurrer, plea, or answer. If the plaintiff or complainant, as he was called in equity, filed a replication, the

pleadings were usually at an end save for possible amendments. Equity pleading never became as elaborate as special pleading at common law. The more informal manner of getting the whole controversy before the court in one mass, rather than step by step as at common law, was still adhered to. But equity pleading did become formal, and Mitford’s book breathes system and detail in formal outline.

Order and system are undoubtedly necessary in the handling of matters with dispatch, but chaos results when system becomes an end in itself, instead of a means to an end. In equity, the desire for certainty became a passion for system, and chaos was the result. John Wesley wrote in 1745:

I called on the Solicitor I had employed in the suit lately commenced against me in Chancery, and here I first saw that foul monster a Chancery Bill. A scroll it was of 42 pages in large folio to tell a story which needed not to have taken up 40 lines, and stuffed with such stupid senseless improbable lies, many of them, too, quite foreign to the question, as I believe would have cost the compiler his life in any Heathen Court either of Greece or Rome, and this is equity in a Christian country.

Jeremy Bentham, in The Rationale of Judicial Evidence, drew the following picture:

In the written instrument, the bill, by which the suit commences, the plaintiff, not upon oath, enjoying a complete license for mendacity, tells whatever story suggests itself to his professional fabricator as best adapted to whatever may be the purpose. In this bill (the length, and by that means the expense, of which, is whatever he is pleased to make it,) he possesses an engine of destruction, by the use of which, the stock of plunderable matter at the command of the defendant being given (not exceeding a certain quantity,;) the victim may be consigned to certain ruin. To this purpose, it is not necessary that, from the beginning to the end, the bill should contain a single syllable of truth: and (that the license given to him in this respect may be the more complete and uncon contradicted) besides that he is freed from all

---

apprehension on the score of punishment, he is not, even in this comparatively unimpressive mode, subjected to any such check as that of cross-examination.\textsuperscript{21}

Prolixity and over-elaboration in pleading were not the only ills to which equity was heir. A résumé of its procedure indicates that certainty had been over-indulged and system had become an end in itself. Holdsworth sketched the equity procedure from the report of the Chancery Commissioners of 1850: The suit began with the filing of the plaintiff’s bill, a lengthy document containing numerous interrogatories and engrossed on parchment. Being summoned, the defendant could file a demurrer, plea or answer to the bill. The answer set out the defense and also replied to the plaintiff’s interrogatories. Unless the defendant lived within twenty miles of London, a special commission was necessary to take the interrogatories. This procedure was both expensive and slow.

After a sufficient answer was filed, a motion was made by the plaintiff for the production of documents in the defendant’s possession. This order was also the occasion of considerable expense. It often happened that the answer of the defendant made it necessary for the plaintiff to amend his bill, in order either to traverse the facts stated in the answer, or to introduce new facts. Further answers were then called for; and the case could then either be heard on these answers, or the plaintiff could put in a formal replication denying the answers. The pleadings being thus at an end, the next step was to lay them before counsel to advise on the evidence, and to prepare interrogatories for the examination of witnesses. On these interrogatories the witnesses were examined in private, none of the parties nor their agents being present. As the interrogatories were framed by counsel without knowing what witnesses would be forthcoming, or what answers they would give, it was necessary to frame questions to meet many possible contingencies. It is obvious that, in these circumstances, no effective cross-examination was possible, so that it was seldom resorted to. It was necessary to issue a special

\textsuperscript{21} The Works of Jeremy Bentham (edited by John Bowring, Edinburgh: William Tait, 1848), VI, 482.
commission to take the evidence of witnesses in the country—a process which was at once expensive and slow. When all the evidence had been taken it was published; and the parties could get copies on the payment of fees. The case was then ripe for hearing; but it could be delayed by motions to suppress depositions, or to issue another commission to take further evidence. When the case was set down for hearing, there were often further delays, by reason of objections taken on account of the misjoinder of a party, or nonjoinder of necessary parties, or the death of a party, or the emerging of new facts. This was the occasion of bills of revivor or supplement, which often meant that the same tedious course of procedure must be started anew. Even if all these defects were cured, it was often still not possible for the court to pronounce a final judgment unless it was a judgment dismissing the bill. It was often necessary to send the case to a master to take accounts or make inquiries. Again, if at the hearing a question of law arose, a special case might be sent to a court of law, or the court might require a plaintiff to test his legal right by bringing an action at law. Moreover, if on the depositions the court could not come to a clear conclusion as to the facts, it might direct that an issue should be tried by a jury in a court of common law.

In addition to this cumbersome procedure, the steps involving an appeal or rehearing might delay still further the final settlement of the controversy. This endless delay, coupled with exorbitant fees charged at every stage, and corruption and graft among the lesser officials of the court, created a situation which could not endure. Perhaps these evils could have been corrected from within the court itself had it not been for the excessive conservatism of its judges.

The most conservative of judges was Lord Eldon, who became Chancellor in 1801. Although a great and gifted judge, Eldon’s efforts were stripped of much of their possible benefit by his extreme deliberation. Deliberation before opinion becomes any court, but caution became Eldon’s vice. He took cases under advisement and retained them for years. In his opinions, also, he too

22 Holdsworth, History of English Law, IX, 340-341.
often doubted the soundness of his own conclusions. Had he been less industrious and intellectually capable, this uncertainty might have been proper. Since his qualities as a judge of equity entitled him to rank with Nottingham and Hardwicke, it was unfortunate that his sense of caution hampered the exercise of those qualities. The arrears and delays of the court became so serious during his chancellorship that public sentiment was aroused.

It was during the chancellorship of Eldon that the ills of equity attracted the attention of Jeremy Bentham. Bentham was born in 1748, the son of a wealthy middle-class attorney, who educated him for the bar in the fond hope that he would some day be Lord Chancellor. However, Bentham had little liking for the practice of his profession and no desire to occupy the wool-sack. After his father's death he became what his gifts best fitted him to be—a legal philosopher and reformer. Dicey wrote of him:

Bentham, like Voltaire, ultimately owed much of his authority to the many years for which he was able to press his doctrines upon the world. Iteration and reiteration are a great force; when employed by a teacher of genius they may become an irresistible power. For well nigh sixty years, that is to say to two generations, Bentham preached the necessity, and explained the principles, of law reform. He began his career as an unknown youth whose ideas were scouted by men of the world as dangerous paradoxes: he ended it as a revered teacher who numbered among his disciples lawyers and statesmen of eminence, and had won over to his leading ideas the most sensible and influential of English reformers.

The whole field of law interested Bentham and he pried into every nook and cranny of it to find material and examples for his reform doctrines. Sarcasm was his weapon and he used it with effect. He wrote, "Infirmity is the general lot of human nature; but it is in the practice

---

23 See his opinion in Morice v. The Bishop of Durham, 10 Ves. 521, 32 Eng. Rep. 947 (1805). "I do not hesitate to say I entertain doubt..."

of the law only that a man may be sure to gain by it. Designed or undesigned, it is upon the head of the unlearned that the transgressions of the man of learning are avenged."\textsuperscript{25}

In *The Rationale of Judicial Evidence*, first published in 1827, he wrote of the practice of equity as he saw it then. For special attack he selected two of the most vulnerable points in the system—the mode of taking evidence\textsuperscript{26} and the distinction between equity and common law.\textsuperscript{27} On the contribution of equity to the cause of jurisprudence, he made this remark, "Chaos is the grand rampart of chicane: and for the organization of chaos, the services of equity have been beyond price."\textsuperscript{28}

As to what he termed the absurdity of the distinction between law and equity, Bentham was especially vituperative, as the following excerpt amply shows:

In every country where there are bad laws, there will be equity in this sense: in no country except England is there any such thing as equity, in the sense of another and distinct body of law. In no other country are there two sorts of law—a sort of law called equity, a sort of law called law, in a continual state of conflict with one another. It is not the word that is the grievance: it is the two sets of judges pulling different ways, and, between them, tearing to pieces the property of the suitors: it is the oscitancy of the legislator, sitting mute and drivelling, while under his nose two sets of servants, both saying to him—"Lord, Lord!" are ordering and disordering the concerns of his household, laying about between them and pillaging according to as many repugnant sets of rules, never preannounced, and (as completely as they could be made and kept) to all but learned eyes inscrutable. It is the mountebank imposture of a particular set of dealers, pretending to possess a monopoly of that almost everywhere too-dear priced commodity, which, if honestly sought for, would be found everywhere or nowhere. This is your only shop for equity! None to be had anywhere else for any price!

Equity! applied to what we feel of the practice of the courts

\textsuperscript{25} Works of Jeremy Bentham, VI, 484.
\textsuperscript{26} Ibid., VI, 482.
\textsuperscript{27} Ibid., VII, 288-305.
\textsuperscript{28} Ibid., VII, 300.
to which it has given a name, it is a term of derision, a cruel mockery.

Equity! in what class of ideal beings is it to be found? Is she like justice, a sort of goddess, and would you see her likeness? Look for it among Jefferies’s and Kirk’s lambs. Is it a remedy? It sweetens like sugar of lead; it lubricates and soothes like oil of vitriol, or butter of antimony.29

It can scarcely be said that Bentham was vox clamantis in deserto, for, by the time of the publication of the Rationale, others were taking up the cause against the court. In 1828, Joseph Parkes, a solicitor, published a history of the Court of Chancery.30 In the Preface to this work he said that “The English Court of Chancery at the present moment possesses ‘effects of the Suitors’ amounting to Forty Millions sterling, at the same time that it holds in abeyance the right to other personal and real estates of much greater and unknown value.” The abuses of the Court of Chancery seemed to him to be one of the greatest grievances of the times. In the same Preface, he noted that Lord Lyndhurst had succeeded Eldon and was pledged to early and effective reform.

Parkes’s book was published at the time when the abuses in the Court of Chancery were at their very height and before any definite steps had been taken toward reform. It is therefore interesting and valuable as a contemporary picture. The principal grievances against the court were, first, the intolerable delay in the proceedings and, second, the prohibitive cost of litigation; the latter, a result both of delay and of the system of fee offices and its consequent corruption and graft.

The dilatory character of justice administered in the name of equity was due in part, no doubt, to the inadequacy of the judicial staff of the court. However, much of the blame must be placed on the reaction toward certainty which had progressed far beyond the correction of previous evils. This reaction seems responsible for engrafting upon equity practice the elaborate system

29 Ibid., VII, 302.
of pleading and the detailed rules of procedure which utterly defeated the purpose of equity—relief against the inadequacies of the common law. Lord Lyndhurst himself, successor to Eldon as Lord Chancellor, said, "There is no doubt that parties only come to the Court of Chancery when dire necessity compels them to do so."

Several excerpts are quoted by Parkes which indicate that the press had begun to take up the cause of reform and to call attention to the abuses in the equity court. The following is an example:

_Gladwin v. Bonner_—The Lord Chancellor expressed his sincere wish, if possible, to remove this unfortunate Family out of the atmosphere of the Court of Chancery, where they had been contesting their rights ever since his Lordship was a school-boy; and Mr. Thomas Bonner's Great Grandfather was plaintiff in the Cause reported in 1 Vesey, by which he was entirely ruined, &c. He would consider the case, and give his final judgment in a few days!31

The arrears in the court during this time evidently reached staggering proportions, for Parkes is authority for the statement that in the year 1825 there were pending and undisposed of before Lord Eldon and the Vice Chancellor, 1,577 cases, exclusive of motions and judgments.32 It is amusing, also, to read in the Appendix to his book that the Court of Chancery on the Island of Montserrat in the West Indies, several times had been presented by the grand jury of the Island as a nuisance!33

The literary efforts at reform in the Court of Chancery reached a high point in 1853 with the publication of Dickens' _Bleak House_. Always a reformer at heart, Dickens drew a true picture of the Court of Chancery during the first half of the nineteenth century. The book is a description of the financial and moral ruin of persons so unfortunate as to be born into litigation in that court. The effect of its delays and corruption upon litigants is the main theme, which has for its motivation the case of Jarndyce and Jarndyce.

32 Ibid., p. 3.
33 Ibid., p. 597.
This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into another world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth, perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its weary length before the court, perennially hopeless.

Dickens' Lord Chancellor was probably Lyndhurst, who was pledged, as Parkes noted, to effective reform. Bleak House presented an unusually accurate sketch of the Court during the chancellorship of Lyndhurst, although several reforms had been made when the book was published. The following piece of descriptive writing gives the keynote of the book:

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation, Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of

hoary sinners, holds, this day, in the sight of heaven and earth....

"Mr. Tangle," says the Lord High Chancellor, latterly something restless under the eloquence of that learned gentleman.

"Mlud," says Mr. Tangle. Mr. Tangle knows more of Jarndyce and Jarndyce than anybody. He is famous for it—supposed never to have read anything else since he left school.

"Have you nearly concluded your argument?"

"Mlud, no—variety of points—feel it my duty submit—ludship," is the reply that slides out of Mr. Tangle.

"Several members of the bar are still to be heard, I believe?" says the Chancellor, with a slight smile.

Eighteen of Mr. Tangle's learned friends, each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a pianoforte, make eighteen bows, and drop into their eighteen places of obscurity.

"We will proceed with the hearing on Wednesday fortnight," says the Lord Chancellor. "For the question at issue is only a question of costs, a mere bud on the forest tree of the parent suit, and really will come to a settlement one of these days."36

The situation pictured by these various writers could not long continue. The Bench and Bar were too conservative to initiate any sweeping reforms; it remained for an aroused public opinion to start them. Probably the writings of Jeremy Bentham did not have an immediate influence on public opinion for they reached a limited audience; but they did bring to the more thoughtful and better educated persons a realization of the seriousness of the situation. Parkes's book called to the attention of lawyers abuses to which they were too close otherwise clearly to see. Bleak House reached the general reading public and so may have had wider influence than either Bentham or Parkes. It must be remembered, though, that some steps toward reform had already been taken when Bleak House appeared. The newspapers of the day kept the Court of Chancery before the public and so sustained the cause of reform.

36 Dickens, Bleak House, pp. 2, 6.
The abuses within the Court and its equity administration were too flagrant to endure. Whatever may have been the direct influences, reform was inevitable. Pressure was brought to bear from outside the legal profession, but the lawyers guided the course of reform.

In 1813 the first step was taken. A bill was passed in Parliament creating the office of Vice Chancellor to assist the Chancellor in his judicial duties. This bill was opposed for political reasons by that noted reformer, Sir Samuel Romilly, but was passed over his objections. The measure recognized the inadequacy of the judicial staff of the court but did not strike at the heart of the trouble; and, in spite of the Vice Chancellor, the arrears of the court reached their peak after the creation of the office.

In 1825, as a result of constant agitation in the House of Commons, a Chancery Commission was appointed to investigate abuses in the administration of equity. This Commission was headed by Lord Eldon, whose ultra-conservatism and personal pride foredoomed the efforts of the Commission to failure. The report glossed over the most obvious defects and merely recommended improvement in some particular phases of the practice. "The report of the Commission was an apology for all the abuses of the court." In 1831, jurisdiction in bankruptcy was taken from the Court of Chancery and placed in a separate court, thus relieving some of the pressure of judicial business; and in 1833 the Master of the Rolls was directed to sit continuously as a judge. His jurisdiction was extended and, as a result, some of the Chancellor's work was lightened. In 1842 two additional Vice Chancellors were appointed.

A rather significant reform in procedure was accomplished in 1843, when it was provided that any defendant might be examined as a witness on behalf of the plaintiff.

37 Holdsworth, History of English Law, I, 442.
40 Ibid., 443.
or any co-defendant. Heretofore, the only way of accomplishing this was through the unsatisfactory interrogatories in the bill.\textsuperscript{41}

The attention of Parliament was directed to the matter of appeals from the Master of the Rolls and Vice Chancellors, and in 1851, a court of intermediate appeal, consisting of two Lord Justices in Chancery and the Lord Chancellor, was created.\textsuperscript{42}

However, it was not until 1852 that the first truly important reforms were accomplished. The first matter attacked was the expense and abuses attending the system of fee offices. The appointment of Masters had been transferred to the Crown and the compensation fixed on a salary basis in 1833. In 1842 the Six Clerks had been abolished. But in 1852 the Masters were abolished and their functions taken over by judges sitting in chambers. Provision was made for appointment by the Master of the Rolls and Vice Chancellors of Chief Clerks, who were to be paid by salary. Thus the old abuses of special fees for office copies that no one ever needed were abolished.\textsuperscript{43}

Another important step was taken in 1852. It will be remembered that the only testimony of witnesses admissible, according to Chancery practice, was that taken before officers of the court upon previously framed interrogatories. This mode of taking testimony was abolished in 1852, and a plaintiff was empowered to give notice to the defendant that the evidence of the case should be taken either orally or upon affidavit. The act provided that the taking of evidence should be in the presence of the parties or their counsel and that the witnesses should be subject to cross examination and re-examination.\textsuperscript{44}

The year 1852 may fairly be taken as an epoch in the history of the old Court of Chancery. After 1852 it was a reformed Court. The Act of that year introduced many useful reforms. It abolished the practice of engrossing Bills on parchment and

\textsuperscript{41} Augustine Birrell, A Century of Law Reform, p. 187.
\textsuperscript{42} Holdsworth, History of English Law, I, 443.
\textsuperscript{43} Ibid., 444-445.
\textsuperscript{44} Birrell, A Century of Law Reform, p. 190.
substituted printed Bills, it at least endeavored to get rid of prolixity in pleadings, it simplified procedure in many ways too numerous to mention, and particularly as to objections for want of parties, and it took the first step towards the union of the jurisdictions by giving the Court of Chancery full power to determine any question of law which in the judgment of the Court it was necessary to decide previously to the decision of the equitable question at issue between the parties, and it declared it no longer lawful to the Court of Chancery to direct a case to be stated for the opinion of any Court of Common Law.\footnote{\textit{Ibid.}, p. 191.}

Even the Act of 1852 did not correct the defects to the extent necessary. Certainty and definiteness had run their course. The reaction toward reform had gathered momentum and was not to be stopped. The pendulum was swinging back toward simplification, and in some degree toward flexibility.

In 1873, Parliament determined to make a clean sweep of the entire court system. Accordingly, the first Judicature Act was passed in that year to be effective in 1875. By the terms of the Act the principal courts, including the Court of Chancery, were consolidated to form one Supreme Court of Judicature. This court was then divided into two parts, the High Court of Justice and the Court of Appeal. The jurisdiction formerly exercised by the Court of Chancery was thus vested in the High Court of Justice. Moreover, it was provided that the rules of law and equity should be administered concurrently in the High Court; and, subject to certain limitations, where equity and law were in conflict the rules of equity were to prevail.\footnote{Holdsworth, \textit{History of English Law}, I, 640.}

As a result of these changes in the judicial system and in the administration of the law, sweeping changes in procedure and pleading were inevitable. By court rules, the substitution of oral testimony for written evidence was accomplished. Equally important, a unified and simplified code of pleading and procedure for all divisions of the High Court became effective. Thus, at last,
the technical, over-elaborate system of pleading which Bentham ridiculed was abolished. 47

The spirit of the nineteenth century was the spirit of reform. Within its span the reaction toward certainty and definiteness in the administration of equity came to grief because system in equity became an end in itself, instead of a tool to promote the ends of justice. The result was a movement away from this over-mechanization, and equity entered its fourth phase, the period of reform. The accomplishments of the reform period may be briefly summarized. Through the reconstruction of the court system, the judicial staff became adequate to handle the volume of litigation. Fee offices were abolished, and some of the terrific costs of litigation were done away with. The system of pleading was simplified and became understandable. Procedure, unified in all branches of the High Court, became contributory to the ends of justice rather than to the ends of delay. Finally, equity and law became a united system, and what there was of flexibility remaining in the rules of equity returned again to supply that element in the common law.

In this course of action and reaction that has been the story of equity, it is to be observed that, although every movement was carried too far and necessitated the retracing of steps, from every phase something of permanent benefit has been retained. In the most recent phase, the period of reform, the ground gained under Nottingham and Hardwicke has not been lost. The rules of substantive equity remain much the same as when first established. In many respects they are broad enough to permit application to changing times and conditions of men. If equity is today a rather rigid system of rules, the flexing of those rules when necessary is in the hands of the legislature. Although it has swung from one extreme to another, even Jeremy Bentham admitted that "Equity judicature...was in effect contributory also in a very high degree to the direct ends of justice: to the prevention of misdecision, and of failure of justice." 48