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HISTORICAL NATURE OF EQUITY JURISPRUDENCE

HOWARD L. OLECK†

THE function of Equity is the correction of the (civil or common) law where it is deficient by reason of its universality (*i.e.*: its tendency to establish rules without exceptions).¹ In this broad, general sense, Equity is the body of principles which provide and govern exceptions to the law. But that is not all that Equity is.

"The English word 'law' means law and nothing else; but the corresponding terms in Continental languages are ambiguous. . . . *Recht, droit,* and *diritto* all have . . . [a] double signification. . . . [In] England the term 'equity,' means either natural justice or that particular branch of English law which was developed and applied by the Court of Chancery. Continental speech conceals the difference between law and right, whereas English speech conceals the connection between them."²

The legal term "equity" is generally acknowledged to be impossible to define completely. Almost everyone who has attempted to compose a definition of this word has ended by capitulating to the general view that the term has too many shades of meaning to be described definitively in one, or even several sentences.³ The fact that the word is much used in popular speech is also a complicating factor. A typical college dictionary defines the popular meaning of the word as follows: "Equity: (ek-wi-ti), n., 1., justice; impartiality; just regard to any right or claims; 2., the administration of law according to its spirit and not merely according to its letter. . . ." Or: "Equity (ek-wi-ti), n; pl. ties (-tiz). (OF. *equite*, fr. L. *aequitas*, fr. *aequus*, even, equal.) 1. State or quality of being equal or fair; fairness in dealing. 2. That which is equitable or fair. 3. Law. (a) The system of law which originated in the extraordinary justice formerly administered by the king's chancellor and was later developed into a body of rules supplementary to or aiding the common and statute law. The term has come to designate the formal system of legal and procedural rules and doctrines according to which justice is administered within certain limits of jurisdiction. (b) An equitable claim or right. 4. Hence, any body of legal doctrines and rules

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1. ARISTOTLE, *ETHICS*, V, xiv; CICERO, *DE ORATORE*, I, § 57; JUSTINIAN, *PANDECTS*, 50.17.85; BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE*, I, iv, § 5 (1569); GROTIUS, *DE AEQUITATE*, c. 1, § 2 (1689) ("*Haec Aequitas suggerit, etsi jure deficiamus.*") ; 5 PUFFENDORF, *LAW OF NATURE* c. 12, § 21 (Oldfather's transl. 1934); 1 STORY, *EQUITY JURISPRUDENCE* 3 (14th ed. 1918).

2. SALMOND, *JURISPRUDENCE* 9 (7th ed. 1924).

3. *Id.* c. 1, 2.

4. WINSTON, *DICTIONARY* 329 (College ed. 1943).

similarly developed to enlarge, supplement, or override a system of law which has become too narrow and rigid in its scope. 5. Colloq. The amount or value of a property or properties above the total of liens or charges."⁵

For purely introductory purposes, the following two principal meanings in law are offered as preliminary sketch definitions, neither of which is to be taken as a definitive description: First, equity is that portion of the law which was developed by the English and American courts of Chancery to remedy defects in the common law. Second, and more important, it is that portion of the law which has been, or may be, enunciated for the purpose of meliorating any harsh or otherwise undesirable effects resulting from the strict application of any particular rule of law. The latter function is performed, also, by the legislative authority, but that is too slow and cumbersome a method ever to be likely to displace equity courts entirely. The very interpretation of statutes themselves formerly was a matter unquestionably within the province of equity. Today, though the doctrine of literal construction of statutes now is the rule, justice, reason and common sense (what might be termed "moral equity") remain the basis for construing statutes.⁶ The superior adaptability of courts, as compared with legislatures, in establishing rules to deal with many problems of procedure, as well as of substance, as they arise, is patent in most situations.⁷

The description of equity as that law which was administered by the old English courts of Chancery, of course, is hardly a definition. Yet, that is the customary introductory description of equity.⁸ The net effect of such an introduction is to suggest that it is necessary to know what the law administered by English Chancery courts was, in order to understand what equity is. And that, in fact, is precisely what is intended to be made apparent by such an introduction. It is intended that such a definition be suggestive rather than precise and invite inquiry rather than answer it.⁹ However, equity long antedates the court of Chancery in England.¹⁰ And English Chancery is but a preliminary to consider-

5. WEBSTER'S NEW COLLEGIATE DICTIONARY 279 (2d ed. 1949).

6. McCaffrey, *Equity of the Statute, Ancient and Modern*, 119 N. Y. L. J. 2242, 2262, 2282, Col. 1 (Editorial, June 15, 16, 17, 1948). See also 47 MICH. L. REV. 1230 (1949); and Baker, *Legislating Judicially: Should the Power of Judicial Review be Curbed?*, 35 A. B. A. J. 555 (1949).

7. Cummings, *The Functioning of Judicial Machinery*, 33 J. AM. JUD. SOC. 175 (1950); Baker, *Legislating Judicially: Should the Power of Judicial Review be Curbed?*, 35 A. B. A. J. 555 (1949); and Lenhoff, *Extra-legislational Progress of Law—the Place of the Judiciary in the Shaping of New Law*, 28 NEB. L. REV. 542 (1949).

8. MAITLAND, *EQUITY*, 1, 2 (2d ed. 1936).

9. BISPHAM, *EQUITY* § 1 (11th ed. 1934).

10. 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 395 *et seq.* (6th ed. 1938).

ation of the United States courts of Chancery, which exercised and exercise powers like those of English and British Empire Chancery courts.¹¹

Before touching upon the history of English equity, which explains much of the true nature of equity today, it is desirable to sketch the general purpose of equity in its universal moral sense. In this sense the principal function of equity is to make more just the actual effect of the application of any rule of law, not excluding even the pre-existing rules of equity itself. Viewed in this light equity is, or should be, a living, changing thing, forever adapting itself to new conditions; in its ultimate sense it is a supreme law, acting upon and modifying codes, statutes, and case law. The avoidance of the freezing of law into inflexible rules is one of its chief purposes.¹²

At first impression, such a body of law seems dangerous, in that it lacks the certainty which law must provide. Law never should become a vague, unpredictable matter of judicial whim.¹³ Equity as a universal moral principle supplies the required certainty by basing its decisions on principles, rather than on rules which have the defect of undesirable rigidity. As long as these principles are sound, equity is sound. Such principles must be universal, always, and beyond any dispute as to their validity. And the chief principle upon which equity is founded, clearly, is the principle that justice must be done, despite the seeming finality of any rule of law, if that rule actually works an injustice.¹⁴ The same general idea is conveyed by various other terms and phrases, such as "conscience," and "bona fides," "the law of nature," "right and justice," "good morals," and so on.¹⁵ Vague and apparently unpredictable as this idea may seem, it is the real basis of equity. From the principles of equity there has been developed, over a period of centuries, a structure of equity rules which have the certainty and predictability without which no law is practicable; and of this, more will be said later.

The nature of equity, administratively, is due primarily to its development, historically, in England and the United States.¹⁶ Its nature as an ideal juristic theory is much older and more universal. The two

11. WALSH, EQUITY c. 1 (1930).

12. GROTIUS, DE AEQUITATE c. 1, § 2 (1689); SALMOND, JURISPRUDENCE 180 (7th ed. 1924).

13. LAWRENCE, EQUITY JURISPRUDENCE c. 1 (1929).

14. MAINE, ANCIENT LAW 50 (1912).

15. 1 POMEROY, EQUITY JURISPRUDENCE § 2 (5th ed. 1942); and Roelker, *Meaning of "Aequitas", "Aequus", and "Aequae" in the Code of Canon Law*, 6 JURIST 239 (1946). For an excellent exposition of the nature of "Natural Law" see Schmidt, *An Approach to the Natural Law*, 19 FORD. L. REV. 1 (1950).

16. Glenn & Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753 (1945).

phases of equity have not developed *pari-passu*. Nevertheless, the two phases should not be divorced from each other. They are two sides of the same coin. A study of one is barren without consideration, at the same time, of the other, and a study of either must begin with history.

ANCIENT HISTORY OF EQUITY

The oldest code of laws thus far discovered is the celebrated Code of Hammurabi, discovered at Susa in Mesopotamia in 1902.¹⁷ The block of black diorite on which the code is inscribed undoubtedly was carried off from Babylon by a conquering Elamite king, and set up in Susa as a trophy. The entire inscription, containing over 2,600 lines of text, has been translated.¹⁸ Hammurabi, a king of Babylonia, reigned some time in the period 2400-2200 B.C.

The Code of Hammurabi represents a highly advanced and fairly complex level of civilization. Babylonia actually was an amalgam, and the heir of preceding nations which had flourished in the same area for a long period before the ascendancy of Babylon. Sumerian, Akkadian, Chaldean, Babylonian, Hebrew, Assyrian, Median and Persian cultures all were phases of one long-continued civilization. Thus the code compiled by Hammurabi represents the product of civilized experience then already covering a period of almost 3000 years preceding.¹⁹

While based on the primitive concept of the *jus talionis*—"an eye for an eye, and a tooth for a tooth"—Hammurabi's code evidences the summation of various grades of culture. Thus, the ordeal by water undoubtedly originated in an era earlier than that in which were developed minute provisions governing property rights and inheritance.²⁰ Formal lawsuits and procedures were quite well developed in Hammurabi's day, and most of his code represents an accumulation of rules, quite explicit and rigid in their application. Typical of these rules and provisions are the following excerpts: Rule 25—"If a fire breaks out in the house of a man, and some one who has gone thither to put it out raises his eyes to the goods of the master of the house, that man shall be thrown into the fire." And, Rule 167—"If a man has married a woman, if she has borne him children, if that woman has gone to her fate; if afterwards he has taken another wife, who has borne him children, and if afterwards the father has gone to his fate; the children shall

17. Scheil, *Memoires de la Delegation en Perse* (4) in *TEXTES ELAMITES SEMITIQUES* (1902). The discovery actually occurred in Dec.-Jan., 1901-2.

18. WINCKLER, *DER ALTE ORIENT* (1902), and JOHNS, *THE OLDEST CODE OF LAWS IN THE WORLD* (1903).

19. *1 HISTORIAN'S HISTORY OF THE WORLD* c. 7 (Williams) (1907).

20. JASTROW, *THE RELIGION OF BABYLONIA AND ASSYRIA* (1898); Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 *YALE L. J.* 951 (1942).

not divide the property according to their mothers; they shall take the marriage portion of their mother; their father's property they shall share in equal parts." Laws relating to commercial relations were numerous, and show the existence of a highly developed system of commerce.

The first suggestion of a legal concept faintly resembling modern equity also appears in Hammurabi's code. While resembling modern "law" provisions, rather than modern "equity" provisions, these ancient rules suggest a groping toward a righteousness which is more than arbitrary statute law. Rule 42—"If anyone has taken a field to cultivate, and has not made grain to grow in the fields, he shall be charged with not having done his duty in the field; he shall give grain equal to that yielded by the neighboring field." And, Rule 48—"If a man has a debt and a storm has devastated his field and carried off the harvest, or if the grain has not grown on account of a lack of water, in that year he shall give no grain to the creditor; he shall soak his tablet [in water; *i.e.*, alter it], and shall pay no interest for that year." This is somewhat analogous to modern equitable relief.

The most remarkable evidence of the antiquity of the concept of equity, however, is not found in the Code of Hammurabi itself. It is found in various Sumerian-Assyrio-Chaldean tablets setting forth the law as it existed a little later than the period of Hammurabi. One maxim which is equity, without question, is found in various records of trials which were held in Nineveh, Assyria and Chaldea. It is startlingly similar to the modern "maxims of equity."

"He who listeneth not to his conscience, the judge will not listen to his right."²¹

Equally pertinent is the fact that an appellate jurisdiction existed in those ancient days, and that the final judge of appeals was the king.²² Here is the very original of the pattern which was to reappear almost 4000 years later in England, and was to be acclaimed as a novel product of English culture. The English kings and their chancellors, who established the equity courts (Chancery) which we know today, seem to have followed what now appears to be an almost inevitable pattern of legal development. The appeal to the king is a recurring characteristic of equity.²³

The law and lore of the Assyrio-Babylonian culture were introduced to the west through the Hebrews. Led by the venerable Abraham,

21. 1 HISTORIAN'S HISTORY OF THE WORLD 495 (Williams) (1907); and MENANT, DE COUVERTES ASSYRIENNES; LA BIBLIOTHEQUE DU PALAIS DE NINIVE (1880).

22. *Ibid.*

23. Palmer, *The Ancient Roots of the Law: We Cannot Escape the Past*, 35 A. B. A. J. 633 (1949).

the Hebrews came from Ur of the Chaldeans to what was then the crossroads of the ancient world, Palestine. (circa 2000-1800 B.C.)²⁴ There, in intimate contact with the second great civilization of antiquity, Egypt, the Hebrews elaborated the laws of their former home into the monolithic body of law now known as the Mosaic Code, destined to be the basis of much of the law of all the nations of the western world.²⁵ Closely resembling the codes of the Mesopotamian nations, the Mosaic Code far surpassed them in its scope and detail. Moral principles introduced by the Hebrews, distilled from their extraordinary religious genius, lent to their code a strong feeling of morality, equity in its broad sense. In fact the very term "equity" appears in the Old Testament: "To receive the instruction of wisdom, justice, and judgment, and equity. . . ."²⁶ While this may be due to its English rendition in the King James Bible, the concept, in whatever terms, is biblical. Once again, also, the right of appeal to the king appears. The story of the judgment of Solomon is known to every schoolboy.

It is interesting to speculate upon what our laws would be like today, if the Hebrews had not preserved their progenitor codes from the destruction that befell Assyria and Babylon. The brutal harshness of the laws of the Medes and the Persians, the conquerors who overthrew Assyrio-Babylonia, is proverbial. The very language of the ancient empires vanished almost 3000 years ago. Not until the middle of the eighteenth century was a start made on deciphering the records of Assyria and Babylon.²⁷

Later, with the addition of the New Testament, the Bible became the very basis of all western civilization and law.²⁸ Its nature is too well known to need any description here. Suffice it to say that equity is its very essence. Hebrew law, softened by Christianity and made orderly by Roman practicality, was to become the law of the western world.²⁹

Meanwhile, Egypt, only a little younger than the eastern empires, rose to majestic stature in many ways, but not in the field of law.³⁰ The funereal religion of Egypt and the dominance of its priests kept back the development of law. The law was in the hands of the priesthood, and the Pharaoh was too remote from the people to be available for appeals.³¹

24. GENESIS XI, xxxi.

25. OLD TESTAMENT; EXODUS; LEVITICUS, NUMBERS, DEUTERONOMY.

26. PROVERBS I, iii.

27. RAWLINSON, HISTORY OF ASSYRIA (1889); WINCKLER, GESCHICHTE BABYLONIENS UND ASSYRIENS (1892).

28. SALMOND, JURISPRUDENCE 24 (7th ed. 1924).

29. *Ibid.*

30. See HERODOTUS, HISTORY (Beloe's transl. 1806).

31. WILKINSON, POPULAR ACCOUNT OF THE ANCIENT EGYPTIANS (1854); CHAMPOLLION, L'EGYPT SOUS LES PHAROONS (1814).

Ancient Greece, the source of so much of our present culture, had surprisingly little to contribute to the development of law or equity.³² The first written laws of Athens were the laws of Draco, distinguished only by their severity. Draconian law became almost an epithet, and these laws were said to have been written not in ink, but in blood.³³ About 600 B.C., the laws of Draco were entirely revised by Solon, who also constituted the first real courts of justice in Greece. These courts were constituted from among the citizens of Athens, and the panels of judges were enrolled by lot, thus giving even the poorest citizen a chance for judicial office, in most democratic fashion.³⁴ But Solon's laws were so drawn as to keep control of the chief offices in the rich men's hands. "Furthermore because his laws were written somewhat obscurely, and might be diversely taken and interpreted, this did give a great deal more authority and power to the judges. For, considering all their controversies could not be ended, and judged by express law: they were driven of necessity always to run to the judges and debated their matters before them. Insomuch as the judges by this means came to be somewhat above the law; for they did even expound it as they would themselves."³⁵ Here, perhaps, is the first instance in Greek jurisprudence of interpretation of rules of law, which can be said to resemble equity.³⁶ Aristotle (384-322 B.C.) did point out that too general rules of law might work actual injustice, and suggested that meliorative interpretation was desirable in many cases.³⁷ Unfortunately, the Greek courts already were becoming instruments of political advantage rather than seats of justice. Moreover, Aristotle's chief interest was natural science rather than law.³⁸ By about 400 B.C., in the time of Aristophanes, the Greek courts had degenerated entirely into the merest sounding boards for the display of forensic talent, and had become so corrupt as to warrant little further consideration.³⁹ Elements of Greek jurisprudence are discernible in later Roman law, but the Romans were not greatly indebted to Hellenic culture in this particular respect.

32. But see Russell, *Greek Legal History—A Note*, 6 CATH. U. SEMINAR 77 (1948); and 1 TAYLOR, LAWS OF PLATO 624 (1934).

33. See THIRLWALL, THE HISTORY OF GREECE (1855).

34. See BURY, A HISTORY OF GREECE TO THE DEATH OF ALEXANDER THE GREAT (1927).

35. See PLUTARCH, LIVES OF ILLUSTRIOUS MEN (Langhorne's transl. 1823).

36. See also: GROTE, A HISTORY OF GREECE (Solon the Law-giver) (1907).

37. Chroust, *Aristotle's Conception of "Equity" (EPIEIKEIA)*, 18 NOTRE DAME LAW 119 (1942).

38. 4 HISTORIAN'S HISTORY OF THE WORLD, 260 *et seq.* (1907).

39. See Aristophanes' Plays; THIRLWALL, HISTORY OF GREECE (1855). See also STONE, PROVINCE AND FUNCTION OF LAW c. 8, § 2 (1950).

It is quite probable that the real source of Roman civilization was Etruria. This theory, now widely accepted, would explain logically much about Rome that otherwise is inexplicable.⁴⁰ The Etruscans were an Asiatic people, and thus, probably brought with them to Italy the laws of the Mesopotamian nations. Unfortunately, the Romans destroyed or defaced Etruscan monuments, (which are found even under the earliest ruins of the city of Rome), and the mysterious Etruscan language still baffles the efforts of all philologists.⁴¹ Etruscan civilization was highly developed before its destruction by a series of barbarian assaults, of which the Roman attack was the last, and the fatal one. Then Rome was a semi-barbaric city-state, not even noticed by the outer world until the time of Aristotle (340 B.C.). Rome absorbed the Etruscan culture which, together with the contacts and influence of Phoenicia, and later of Carthage and Greece, undoubtedly transmitted to Roman law many of the principles of law originated by the Asiatic nations. The Romans, despite their characteristic brutality, possessed great gifts of orderliness and logic, and were destined to fashion out of diverse elements the first truly balanced system of jurisprudence. In this body of law, equity (*aequitas*) was to have a leading part.⁴² It should be noted, in passing, that Roman orderliness later led to Roman bureaucracy.⁴³

The first noteworthy body of Roman law was a code, subject to all the defects of this inelastic form of jurisprudence. This was the Code of the Twelve Tables of the Decemviri, established in 451 B.C.⁴⁴ The excessively harsh provisions of the Twelve Tables, modified somewhat with the passage of time, remained the basis of Roman law for a long period. By the time of the century before Christ it had become somewhat confused in its efforts to strike a balance between individual liberty and the safeguarding of material interests.⁴⁵ The Romans were complete materialists. Moreover, even more than in other nations, most of the inhabitants of Rome were slaves. All law was written primarily for the benefit of the relatively small number of Romans who were citizens and property (including slave) owners.

Legal proceedings under the Twelve Tables were highly formalized and were carried on by means of a very few forms or writs, prescribed

40. WELLS, *THE OUTLINE OF HISTORY* 382 (1921).

41. *Ibid.* See also LIDDELL, *A HISTORY OF ROME* (1893).

42. See LIVY, *HISTORY OF ROME*.

43. Schiller, *Bureaucracy and the Roman Law*, 7 *CATH. U. SEMINAR* 26 (1949).

44. KOCOUREK AND WIGMORE, *SOURCES OF ANCIENT AND PRIMITIVE LAWS* (1915); and HERTZBERG, *GESCHICHTE DER ROMER IN ALTERTHUM* (1879).

45. BOUCHE-LE CLERCQ, *MANUEL DES INSTITUTIONES ROMAINES* (1886).

for various types of actions, which were submitted to a magistrate.⁴⁶ If and when the highly technical forms of pleading were approved by the magistrate, he sent the parties to a "Judex," who listened to the testimony and handed down a judgment, much as a jury might do. Then the magistrate reviewed the finding of the Judex and affirmed or revised it.⁴⁷ A magistrate bore the official title of "Praetor."⁴⁸ This method of procedure was the praetors' "ordinary" jurisdiction. In addition, the praetors had an "extraordinary" jurisdiction to hear and decide, without the employment of a Judex. In the extraordinary jurisdiction, a praetor decided a suit, including questions of law and of fact, himself, without the technical restraints of forms or writs.⁴⁹ This was equity jurisdiction and procedure, quite comparable with modern practice. The "extraordinary" jurisdiction modified the harsh results of the application of the stiff rules of "ordinary" jurisdiction.

Later, the functions of the praetors expanded greatly. They not only determined suits, but also set forth law applicable to hypothetical situations, first by greatly increasing the number of forms, or writs, and then as a routine practice, apart from any forms.⁵⁰ About 300 A.D., the employment of the Judex was abandoned, and the judges themselves handled all matters, much as equity courts do today. Prior to this change, the "ordinary" and "extraordinary" technique of the courts was equivalent to the early, separate, British and American "common law" and "chancery" courts. The merger of both into one court, which occurred in Rome, was emulated later in Britain and in most of the states of the United States. It is significant that much of the higher development of Roman law took place in the Eastern Empire, early in the Christian Era.

The old civil code of Rome was supplanted, during this process, by an amalgam of laws which the Romans termed the "natural law." By this they meant a combination of the *Jus Gentium* (Law of Nations), and the *Lex Naturae* (Law of Nature). This combination was called *Aequitas* (Equity). The Law of Nations meant those laws which were found to exist in the codes or rules of all nations. The Law of Nature meant those laws which were universally recognized. The two were much alike, and eventually merged. But Roman so-called natural law should be distinguished from natural law as we know it today.⁵¹

46. GAIUS, 4. 61-3. See also note 44, *supra*.

47. 1 POMEROY, EQUITY JURISPRUDENCE c. 1 (5th ed. 1942).

48. LIDDELL, HISTORY OF ROME (1893).

49. 1 POMEROY, *op. cit. supra* note 47, at 5 *et seq.*

50. RADIN, ROMAN LAW (1927).

51. *Ibid.* See also 1 POMEROY, *op. cit. supra* note 47, at 5 *et seq.* For a good exposition of modern Natural Law, see Schmidt, *An Approach to the Natural Law*, 19 *FORD. L. REV.* 1 (1950).

Gradually, the Roman judges abandoned the rules of the old civil code as they found them to conflict with these principles of universal law. At the same time new remedies thus made necessary were provided, as forms of action, or defenses. In time, repeated usage developed real certainty, and a new body of law existed. This was Equity. Under the influence of Christianity, equity became the dominant, pervasive law.⁵² In 438 A. D., the Emperor Theodosius, (the younger), ordered the compilation of a new code embodying these developments. About a century later a recompilation was made, under the Emperor Justinian.⁵³ These later were to form the basis of Canon Law.⁵⁴ They usually were referred to as the (Roman) "Civil Law."

The development of equity in Britain was destined to parallel closely its evolution in Rome, with certain important differences. Because of the willingness of Roman judges to change what needed changing, Roman Equity developed within the existing court structure. The English judges were to resist any changes in their forms of action, and thus, were to make necessary the establishment of a separate system of courts and of jurisprudence.⁵⁵

The barbarian destruction of Rome left the Church as the principal, and practically sole, repository of learning in the western world, throughout the medieval period. From the time of the Emperor Constantine, the Bishops served as the chief arbiters of their respective dioceses, and Charlemagne even included this arrangement in his constitution.⁵⁶ As the ecclesiastical jurisprudence naturally tended to deal with persons (in personam), rather than property (in rem), the Roman *aequitas* was particularly apt for the purpose, and the equity of Rome was preserved and improved. Moreover, the range of church authority spread over all of Europe, exercising a strong civilizing influence, and leaving the impress of Roman law and equity on the new legal systems of the European nations. This is most obvious in the development of French law, and in the pre-code laws of the Germans, whose first contact with civilization was obtained through the Romans. Its effect on English Law was profound. From the English Law, of course, developed American law and equity.⁵⁷

52. 1 POMEROY, *op. cit. supra* note 47, at 5 *et seq.*

53. JUSTINIAN, *INSTITUTES* (Elements and Principles), *PANDECTS* (Digests and Opinions), *NEW CODE* (Imperial Constitutions), *NOVELS* (Supplemental New Constitutions). See Pringsheim, *Character of Justinian's Legislation*, 56 L. Q. REV. 229 (1940).

54. 1 BL. COMM. *81.

55. 1 POMEROY, *EQUITY JURISPRUDENCE* 12 (5th ed. 1942).

56. 1 LAWRENCE, *EQUITY JURISPRUDENCE* 42 (1929). See also STONE, *PROVINCE AND FUNCTION OF LAW* c. 8, § 24 (1950).

57. Coleman-Norton, *Why Study Roman Law?*, 2 J. LEGAL EDUC. 473 (1950).

ENGLISH HISTORY OF EQUITY

Before the Norman conquest (1066 A. D.) the law of England was almost entirely rude "customary usage" administered by the courts of the hundred and the shire, while the only law comparable with equity was the arbitrament of the king and his council.⁵⁸ After the conquest the same system prevailed under the local manor courts and county courts, as to "customary" law, while appellate, special, or "equitable relief" was available only from the king and his council. The king was the source of all justice, having the power, whenever it was necessary and proper, to do whatever was required by right and justice.⁵⁹ In addition, there existed a separate and distinct court for the benefit of members of the nobility, called the Curia Regis.⁶⁰

Meanwhile, in 1120 A. D. the study of Roman Law was begun at the University of Bologna, in Italy, thence to be extended throughout western Europe. Lanfranc, William the Conqueror's Prime Minister, apparently was an Italian Professor of Law.⁶¹ In 1143, Theobald, Archbishop of Canterbury, who had learned Roman law at Bologna, brought to England a great scholar of Roman law, Vacarius, who established this study at the University of Oxford in 1149.⁶² "Bracton's celebrated work, *De Legibus et Consuetudinibus Angliae* [Concerning the Laws and Customs of the English], written between A. D. 1256 and 1259, and which is an epitome or systematic institute of the common law as it then existed, exhibits in the plainest manner the results of the judicial labor and scientific study which had preceded it.⁶³ A considerable portion of its doctrines, and even of the terms in which its rules are stated, is taken directly from standard treatises of the day upon Roman jurisprudence.⁶⁴ In the language of an eminent writer,⁶⁵ 'As Roman legal matter obtained reception, although the written sources of the Roman law were not at all received as having a legislative authority, Bracton properly included such Roman legal matter among the *leges et consuetudines Angliae*.'"⁶⁶ When one recalls that the first Chancellors of the

58. WALSH, EQUITY c. 1 (1930). See Adams, *Origin of English Equity*, 16 COL. L. REV. 87 (1916); and TREVELYAN, HISTORY OF ENGLAND 91-3, 133 (1937).

59. *Ibid.*

60. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 40 (6th ed. 1938).

61. Wigmore, *Lanfranc, The Prime Minister of William the Conqueror: Was He once an Italian Professor of Law?*, 58 L. Q. REV. 61 (1942).

62. POMEROY, *op. cit. supra* note 55, at 18.

63. Blume, *Bracton and His Time*, 2 WYO. L. J. 43 (1948); Reinhardt, *The Status of the Crown in the Time of Bracton*, 17 TEMP. L. Q. 242 (1943).

64. POUND, *A Comparison of Systems of Law*, 10 PITTS. L. REV. 271 (1948).

65. GUTERBOCK, BRACTON AND HIS RELATIONS TO THE ROMAN LAW 62 (Coxe transl. 1866).

66. 1 POMEROY, *op. cit. supra* note 55, at 19. See also Forbes, *European Law—Some Early Stages*, 60 JURID. REV. 31 (1948).

king were churchmen, and that this situation continued for a long time, it is hardly surprising that Roman and ecclesiastical law and equity had so profound an effect on English law.⁶⁷

King Henry the Second (1154-1189), whose wife was the romantically celebrated Eleanor of Aquitaine, appointed as his Chancellor the distinguished churchman, and his bosom companion, Thomas à Becket. Peter of Blois, Henry's biographer, wrote of this friendship that they were "*cor unum et animam*" (of one heart and of one mind). Becket had studied Roman law at Bologna, having been sent there by Archbishop Theobald of Canterbury, and also at Auxerre, in Burgundy, another leading school of the civil law. He also had served as Theobald's personal emissary to Rome, and was steeped in Roman law.⁶⁸ His magnificence and power as Henry's Chancellor were second only to those of Henry himself. Under his direction the first national court administering a single body of law for all of England was established. A series of forms of action, or writs, directed toward jury verdicts rather than trial by battle or oath helpers, was established. Most of these writs pertained to rights in land, and to crimes, as Henry was engaged in consolidating the royal power and cutting down the power of the earls and barons.⁶⁹ This court sat regularly at Westminster, and often at the Exchequer, and maintained a number of travelling judges. These "judges in eyre" spread the domination of the king's court, and reduced the authority of the local courts. Glanvil, Henry's Chief Justice, developed the writs, particularly the writ of assize, relating to property.⁷⁰

It was ironic that Thomas à Becket, raised to the primacy of the English church when Theobald died in 1161, should thereupon abandon his worldly ways and become Henry's deadly foe in the struggle which ensued between church and state. His death at the hands of some of Henry's overzealous retainers is a well-known bit of historical drama. But, before that, in 1164, under the pressure of the king, and apparently of the Pope himself, he had signed the famous Constitutions of Clarendon, which later were rejected by the Pope but remained effective in England.⁷¹ The most important points of the Constitutions of Clarendon were as follows: Disputes concerning advowsons (the right to present to a bishop a person fit to be appointed to a benefice)⁷² and presenta-

67. 1 BL. COMM. *81 *et seq.* See also Holdsworth, *The Relation of English Law to International Law*, 26 MINN. L. REV. 141 (1942).

68. FITZSTEPHEN, *LIFE OF BECKET (Vita Sancti Thomae)* (12th Cent.). Quoted in 18 HISTORIAN'S HISTORY OF THE WORLD 297 (1907).

69. NORGATE, *ENGLAND UNDER THE ANGEVIN KINGS* (1887).

70. 3 BL. COMM. *184.

71. MACFARLANE AND THOMSON, *THE COMPREHENSIVE HISTORY OF ENGLAND* (1856).

72. BLACK, *LAW DICTIONARY* 69 (3d ed. 1933).

tions were to be tried in the king's court; criminous clerks were to be tried in the king's court; and appeals were to be allowed from the ecclesiastical courts to the king.⁷³ The Constitutions formed the groundwork of the later supreme authority of the king's courts, replacing the until-then dominant ecclesiastical courts, as well as the manor courts.⁷⁴ Thereupon the Curia Regis and its law became the court and the common law of the nation. But it should be understood that this development of the "common law" was a special gift from the king, which only he could grant, or withhold.⁷⁵ An individual was entitled to redress from the local court, if it had an appropriate writ for his case; he only might beg the intercession of the king's court in special circumstances, or if the local court could not, or would not aid him.⁷⁶

The Chancellor, secretary to the king, and "keeper of the king's conscience," soon took over from the king the burden of administering the king's justice. Later, after a sufficient number of cases had arisen and had been decided in this manner, writs were issued by the chancellor's court in any case based on similar facts. These writs in turn were to become formalized and later still, a new set of special "equity" rules was to become necessary, to relieve the rigidity of the first set of chancellor's writs. These first writs of the chancellor, together with the pre-existing writs, became the routine forms of legal redress, for what we now call "common law." The later series of remedial rules were the ones which became "equity."⁷⁷ It was not until later, however, that the court of "Chancery" reached full stature, and became the "Court of Equity" which enunciated these latter, remedial rules of "equity."

In the eleventh and twelfth centuries any remedy beyond the limited power of a local court could be had only by the king's assistance. This was obtained by applying to the king's chancellor, addressing, through him, a petition to the king. The Chancery then would issue an "original writ," which gave authority to the king's court (a branch of the Curia Regis) to hear and determine the matter.⁷⁸ This latter court had powers which combined the characteristics now separately labeled "common law" and "equitable." These gradually solidified into a limited group applicable to a certain number of well-defined types of cases.⁷⁹

73. 18 HISTORIAN'S HISTORY OF THE WORLD 267 (1907).

74. STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND (5th ed. 1891).

75. Adams, *The Origin of English Equity*, 16 COL. L. REV. 87 (1916).

76. Adams, *Continuity of English Equity*, 26 YALE L. J. 550 (1917). Also, WALSH, EQUITY 4 (1930).

77. McCLENTOCK, EQUITY 4 (2d ed. 1948).

78. COOK, CASES ON EQUITY 2 (4th ed. 1948).

79. *Ibid.*

The writs available for this group of case types were the "common law writs." To the King's Court were added, in turn, the court of the Exchequer, the court of Common Pleas, and the court of the King's Bench,—all common law courts, and all approachable for special relief only on the authority of a writ issued by the Chancery.⁸⁰

The freezing of the common law writs into a rigid system made it impossible for many petitioners to obtain writs appropriate to their peculiar problems. Without appropriate writs, they could obtain no adequate redress from the common law courts. Of necessity, therefore, their problems were again addressed to the Chancellor, the King's secretary and keeper of the king's seal, usually a bishop, and usually familiar with the *aequitas* of Roman law.⁸¹ By the time of Richard the Second (1377-1399) the chancellor's office had developed a court to deal with such problems. This was the Court of Chancery (*Curia Cancellariae*).⁸² The need for it originated in the tendency of the common law courts to become firmly settled into a policy of confining their jurisdiction to cases which fitted their customary writs (*brevia de cursu*, or writs of course). Even when, in the reign of Edward the First (1272-1307), Chancery was empowered to issue new writs (*breve magistralis*, and writs *in consimili casu*) to deal with new situations, it met resistance from the common law courts which could, and often did, throw out the writ as unlawful.⁸³ Then the chancellor, as the repository of the king's legal authority and power, employed that power directly, as a supplement to the already existing common law (writ-issuing) side of his authority. This new, special exercise of judicial power was the meliorative (equitable) side, employed to effect justice where the "law" side could not or would not do so.⁸⁴

It is apparent that the Curia Regis, and the common law, easily could have maintained flexibility and liberality by accepting the new writs issued by the Chancery. Had the common law courts accepted these necessary innovations, instead of becoming bemused by form and precedent, there would have been no need for the creation of a special, competing court and system of law.⁸⁵ Instead, the common law became a narrow, formalistic system, confined to the method of granting relief by the award of damages after an injury had been suffered. Other, preventive or special relief was not available from the common law courts. The only exception to this state of affairs was found in the

80. GLENN AND REDDEN, *CASES ON EQUITY* 8 (1946).

81. MATTLAND, *EQUITY* 2 (2d ed. 1936).

82. *Ibid.*

83. *Id.* at 2 *et seq.*

84. 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 401 *et seq.* (6th ed. 1938).

85. Note, *Interpretations of English Medieval History*, 207 *L.T.* 367 (1949).

willingness of the common law to accept suits for the recovery of land. And this is especially strange when it is remembered that the old manor courts usually had granted specific relief rather than damages.⁸⁶

Political tensions and rivalries had important, though often unpredictable, effects on the development of law, then as now. Henry the Third (1216-1272), a weak king, often at odds with his earls and barons, was forced to sign away some of his powers at a parliament held at Oxford in 1258. In order to weaken the chancellor, of whose powers they were jealous, the lords, led by the Earl of Leicester (Simon de Montfort, the younger), had inserted in the Provisions of Oxford the rule that the chancellor could not establish new writs except with the consent of the council and the king.⁸⁷ The effect of this rule was the practical cessation of the creation of new writs, which were only of academic interest to the council and the king. Thus, the lords, seeking to weaken the chancellor, actually laid the basis for the magnification of chancery. If the chancellor could not create a new writ with which to send a petitioner to the common law courts, he could do something better,—he could keep the petitioner's entire matter within his own chancery. Nor did the later provisions for writs *in consimili casu* (similar cases), provided in the Statute of Westminster Second⁸⁸ by the alternately just and vicious Edward the First, prove of much effect.⁸⁹ The common law courts were adamant in rejecting the novel writs of chancery.

Typical of the attitude of the common law courts was their rejection of cases involving uses in land, which became commonplace in the reign of Edward the Second (1307-1327).⁹⁰ Uses, and the trusts which succeeded them, and the vast field of jurisprudence allied with them, thus were taken over by equity by default.⁹¹ In addition, the common law courts could render only a judgment for the plaintiff or a judgment for the defendant, without any special modifications or provisions desirable for the particular situation involved. Obviously, this took no account of special assistance beyond the general relief, which often was needed. Equity could and did provide for such special assistance, as its decree could be so drawn as to suit the particular situation.⁹²

Typical of the classes of cases taken over by chancery, because its

86. WALSH, HISTORY OF ENGLISH AND AMERICAN LAW § 77 (1923).

87. HUME, THE HISTORY OF ENGLAND (1890). See also KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY (1890).

88. 13 Edw. I., c. 24 (1285).

89. CAMPBELL, LIVES OF THE LORD CHANCELLORS (Mallory ed. 1876).

90. THOMAS, Note on the Origin of Uses and Trusts, 3 SOUTHWESTERN L. J. 162 (1949).

91. 1 POMEROY, EQUITY JURISPRUDENCE § 38 (5th ed. 1942).

92. BISPHAM, PRINCIPLES OF EQUITY 7 (11th ed. 1934).

extraordinary jurisdiction could effect substantial justice, and the common law could give only damages, in general, were the following: Uses and trusts (already mentioned); assault and trespass, when the power, or local influence, or violence of the tort-feasor made the common law remedies futile; specific performance of contracts; injunctive restraint of nuisances; relief from fraud; relief from mistake; and others of similar tenor.⁹³ On the other hand, equity could not interfere when the common law courts could offer an adequate remedy. A bill which attempted to have equity so interfere was "demurrable for want of equity."⁹⁴

Necessarily, the chancellor, and then equity, could not effect substantial justice without by-passing precedent when a situation demanded special treatment. This necessity, and the chancellors' placing of justice above form, elicited ironic comment from the opponents of the new technique. An interesting, though somewhat unfair comment, typical of this critical attitude, much quoted even today, is that made by John Selden (1584-1654). "Equity in Law is the same thing that the spirit is in Religion, what every one pleases to make it. Some times they go according to conscience . . . some time according to the Rule [i.e.: ruling law] of the court. Equity is a Roguish thing, for Law we have a measure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the Standard for the measure we call a foot, to be the Chancellors Foot; what an uncertain measure would this be; One Chancellor has a long foot another a short foot a third an indifferent foot; 'tis the same thing in the Chancellors Conscience."⁹⁵ But oppose to this the following remarks of Sir Joseph Jekyll in *Cowper v. Earl Cowper*:⁹⁶ ". . . the discretion which is exercised here, is to be governed by the rules of law and equity, which are not to oppose, but each, in turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or over-turn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with."⁹⁷ Selden spoke of the discretion of

93. *Id.* at 9.

94. MAITLAND, *EQUITY 2 et seq.* (2d ed. 1936); and 1 STORY, *EQUITY JURISPRUDENCE* §§ 20-8 (14th ed. 1918).

95. SELDEN, *TABLE TALK* 43 (Pollock ed. 1927).

96. 2 P. Wms. 752, 24 Eng. Rep. 930 (1734).

97. *Id.* at 753, 24 Eng. Rep. at 942.

the chancellor, but this discretion is vested in the court of chancery, not in the chancellor, and that is a very different matter. Being vested in the court, the rules of equity, applied and re-applied in similar cases, settled into definite, predictable law. Then the Chancellor's Foot became of standard size.⁹⁸

In 1515, in the reign of Henry the Eighth, Cardinal Wolsey served as the last great ecclesiastic to hold the title of Chancellor.⁹⁹ Thereafter, with one exception in Charles the First's reign (1625-1649), the chancellors were not churchmen.¹⁰⁰ Some ideas originated and developed by equity began to be crystallized into statutory form. For example, the Statute of 13 Elizabeth, the first statute governing fraudulent conveyances (1570), was based on chancery experience.¹⁰¹ Reports of cases began to be published and settled rules of procedure were developed. Sir Edward Coke, (1552-1634), great English common law jurist, brought the issue of common law vis-a-vis equity to final decision, against the celebrated Lord Ellesmere, and went down to final defeat.¹⁰² This contest arose when the chancellor, acting through equity's "in personam" authority, enjoined individuals who had won common law judgments, from enforcing those judgments when their literal enforcement would work actual injustice. This was deemed an affront by the common law judges, and Coke declared that such injunctions were unlawful under the Statutes of Praemunire (enacted to weaken the Papal courts), because they sought to override the judgments of the King's Courts.¹⁰³ Francis Bacon, Viscount St. Albans, then Lord Chancellor, advised James the First against Coke's view, which advice suited King James' desire to appear to be supreme over all the courts and judges.¹⁰⁴ He ruled in favor of equity, which thereafter never again was seriously challenged as a system of law. Incidentally, Bacon thereby won the undying hatred of Coke, who later was instrumental in Bacon's disgrace and trial on charges of bribery and corruption.¹⁰⁵ In any event, from that time forward, chancery was at least equal in standing with the law courts. More, it could prevent the employment of the law courts in certain cases, while the law courts could not prevent the employment of equity courts. A fortunate succession of capable chancellors developed equity, in succeeding years,—among them such famous

98. See also: STAFFORD, *HANDEGOK OF EQUITY* c. 7 (1934).

99. CAVENDISH, *THE LIFE OF CARDINAL WOLSEY* (1852).

100. CAMPBELL, *LIVES OF THE LORD CHANCELLORS* (Mallory ed. 1876).

101. OLECK, *CREDITOR'S RIGHTS AND REMEDIES* 24 (1949).

102. KNIGHT, *A HISTORY OF ENGLAND* (1868).

103. MATTLAND, *EQUITY 2 et seq.* (2d ed. 1936).

104. AITKEN, *COURT AND CHARACTER OF JAMES THE FIRST* (1891).

105. SPEDDING, *THE WORKS OF FRANCIS BACON* (1864).

jurists as Sir Thomas More, Lord Nottingham, Lord Guilford, Lord Somers, Cowper, Harcourt, King, Talbot, Hardwicke, Northington, Camden, Thurlow, Loughborough, Eldon, Grant, St. Leonards, Westbury, Selborne and Jessel.¹⁰⁶

The procedure in equity was begun, as has been mentioned hereinabove, by a petition. In addition, the plaintiff set forth his cause in a "bill." Then the chancellor would issue a "subpoena," in the king's name, to summon the opposing party, who could demur, enter a plea, or file an "answer." The plaintiff also could, if he desired, file a "replication" to the answer. But, despite the filing of a replication, if the answer met the bill squarely it was conclusive, unless a witness and corroborating facts, or two witnesses, opposed the statements in the replication.¹⁰⁷ Then, employing the customary rules of evidence, the hearing was conducted by an "examiner," using the method of interrogatories and cross-interrogatories, and examining each witness separately and privately. Then followed "the passing of publication," or an opportunity for the parties to inspect the depositions thus gathered.¹⁰⁸ Of course, today, in England and in the United States, oral examination by a court or examiner is customary, instead of interrogatories. A jury may be employed to hear specific issues of fact, but its verdict is merely advisory and is not binding on the examiner.

The Supreme Court of Judicature Act, in 1873, abolished the system of two distinct sets of courts in England. Instead of the old separate Chancery, King's (or Queen's) Bench, Common Pleas, Exchequer, Court of Probate, Court of Divorce, and Court of Admiralty, a new High Court of Justice was established, having five divisions, and with a Court of Appeals above it. Later, another, higher court of last resort was added,—the House of Lords.¹⁰⁹ The divisions were similar to the old separate courts, but became parts of a single, unified system.¹¹⁰ In these courts, in addition to their other functions, each court is required to grant the same relief, in case of an equitable claim or defense, as would have been granted by the old Court of Chancery. Thus, the principles of equity now thoroughly permeate all English courts and law.

EQUITY IN THE UNITED STATES

The American colonies naturally adopted English law and procedure. Some of the colonists brought with them, too, a hostility to the royal

106. CAMPBELL, *LIVES OF THE LORD CHANCELLORS* (Mallory ed. 1876).

107. BISPHAM, *PRINCIPLES OF EQUITY* 12 (11th ed. 1934).

108. *Id.* at 13.

109. Statute of 39 and 40 Vict., c. 59 (1876).

110. MATTLAND, *LECTURES ON EQUITY* 2 (2d ed. 1936). See also: Statute of 38 and 39 Vict., c. 77 (1875).

power and its chief functionary, the chancellor. They had unhappy memories of the chancery and Star Chamber proceedings, which were closely associated in their minds with the equity courts of England.¹¹¹ In some of the colonies, particularly those which were established on the proprietary pattern of control by royal governors, the governors stood in the same relationship to the colony courts as did the king to the English courts.¹¹² There, the governor, or a chancellor of the governor, wielded the equity power.¹¹³ In other colonies, principally in New England, governed by legislative assemblies, usually the equity authority was placed in the colony courts without too much concern over the fact that these courts also wielded common law power. After the Revolutionary War separate equity courts patterned after the English High Court of Chancery were provided for in the constitutions of several states. Delaware, Maryland, New Jersey, New York, and South Carolina had such provisions.¹¹⁴ In Massachusetts and Pennsylvania the contest for the equity power was not resolved until later.¹¹⁵ Thus, in New Hampshire and Pennsylvania the courts had little equity power until almost the middle of the nineteenth century, and in Maine and Massachusetts not until the 1870's.¹¹⁶

The need for certainty of law, and the distrust of authority in a pioneer society, probably had much to do with the relative unimportance of equity in the United States in the nineteenth century.¹¹⁷ Its development was slow, and in some areas practically non-existent for a long time, nor was it highly regarded even in the legal profession generally. As a result the common law courts took over some of equity's functions.¹¹⁸ Yet this very neglect may have been a blessing in disguise, as it postponed the establishment of American equity principles, in many cases, until the American courts and jurists had become more mature.¹¹⁹ The Federal Constitution did provide for equity power for the federal courts, by the method of granting to the federal courts jurisdiction at law and in equity.¹²⁰ In 1811, Story, as a Justice of the Supreme Court, began to exert his gifted influence on federal equity.

111. POUND, *SPIRIT OF THE COMMON LAW* 53 (1921).

112. GREGORIE, *RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA* (1950).

113. Wilson, *Courts of Chancery in America*, 18 AM. L. REV. 226 (1834).

114. BISPHEAM, *PRINCIPLES OF EQUITY* 19 (11th ed. 1934).

115. F. W. G., 31 MASS. L. Q. 56 (Oct. 1946); HOWE, 32 MASS. L. Q. 49 (Oct. 1947).

116. Woodruff, *Chancery in Massachusetts*, 5 L. Q. REV. 370 (1889).

117. See Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. OF PA. L. REV. 842 (1949).

118. SCOTT AND SIMPSON, *CASES ON JUDICIAL REMEDIES* 614 (2d ed. 1946).

119. STORY, *EQUITY JURISPRUDENCE* § 56 (14th ed. 1918).

120. U. S. CONST. Art. 3, § 2. See also Morse, *The Substantive Equity Historically Applied by the U. S. Courts*, 54 DICK. L. REV. 10 (1949).

The anomaly of two separate, competing systems of courts and of law was repugnant to the fresh and practical minds of the new nation. One who had begun proceedings in the wrong court was dismissed and put to the needless trouble and expense of beginning all over again.¹²¹ The obvious practicality of applying equity in common law matters to which it might well apply, and vice-versa, required a change in the old system, despite the resistance of established custom and a conservative profession. In 1846 New York, where Chancellor Kent had strongly influenced equity, took the first step when it abolished the Court of Chancery and established a Supreme Court having the powers of the old chancery jurisdiction as well as common law powers.¹²² Missouri followed in 1849, California in 1850, and Iowa, Kentucky and Minnesota in 1851.¹²³ The distinction between legal and equitable forms of action was abolished, and a general form of civil action was adopted.¹²⁴ The other states followed the lead of New York in revising their own system.¹²⁵ Today only five states still maintain nominally separate equity courts. They are Delaware, Maryland (in Baltimore), Mississippi, Tennessee, and Vermont.¹²⁶ New Jersey, which maintained a separate equity court until September, 1948, now also has established a unified Superior Court.¹²⁷ Separate administration of law and of equity within the same court is the method adopted by the states of Alabama, Florida, Maine, New Hampshire, Pennsylvania, Rhode Island, Virginia and West Virginia. Arkansas, Illinois, Iowa, Kentucky, and Oregon, though nominally code states, still require distinctive labelling (at law, or in equity) of proceedings in their courts. All the other states, as well as Alaska, the District of Columbia, Hawaii, and Puerto Rico, have adopted codes similar to the Field Code, (*i.e.* that of New York).¹²⁸ In 1938 the Supreme Court of the United States, and the District Courts, adopted new Federal Rules of Civil Procedure for all civil matters, wherein a single form of action is provided for all cases.¹²⁹

121. McReynolds, *Chancery Practice and Procedure*, 20 TENN. L. REV. 749 (1949).

122. N. Y. CONST. of 1846. See also Kharas, *A Century of Law—Equity Merger in New York*, 1 SYRACUSE L. REV. 186 (1949); and Note, *Law and Equity in New York—Still Unmerged*, 55 YALE L. J. 826 (1946).

123. CLARK, CODE PLEADING 21 (2d ed. 1947).

124. N. Y. CODE OF PROCEDURE § 69 (Field Code, 1848); Coe and Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L. Q. 238 (1942).

125. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 71-88 (1950).

126. CLARK, CODE PLEADING 47 (2d ed. 1947).

127. English, *New Jersey Re-organizes Its Judicial System*, 34 A. B. A. J. 11 (1948); Lewis, *Equity*, 4 RUTGERS L. REV. 274 (1949).

128. Ingersoll, *Police Courts in London*, 2 YALE L. J. 54 (1894), and CLARK, CODE PLEADING § 8 (2d ed. 1947).

129. FED. R. CIV. P. 35(a). 1 *et seq.* See also Cummings, *The Functioning of Judicial*

Under the code system which now prevails in most American jurisdictions, while the procedural distinction between legal and equitable actions has been changed, the inherent distinction between the two fields of law continues.¹³⁰ It is true that all actions are begun in the same way; the facts constituting the cause or the defense must be truly stated; fictions in pleadings no longer are employed; and legal and equitable actions are triable in the same courts. But there remains a difference in essence, between the two fields, which is as marked as the difference between actions *ex contractu* and those *ex delicto*, and cannot be dispelled by legislative fiat.¹³¹

All a plaintiff need do, now, is set forth in his complaint a clear statement of facts constituting his cause and a demand for the judgment which he claims. The inherent differences between law and equity, such as determine whether or not a trial by jury is a matter of right, and otherwise affect the interest of litigants, remain unchanged. Accordingly, one who seeks equitable relief still must present facts entitling him to that form of relief, or be dismissed. Nor will it suffice that he prove a cause of action sufficient at law. If it is insufficient in equity, the action may be sent to the law side of the court for trial, or may be dismissed.¹³² Equitable defenses, however, now can be entered in legal actions, without asking affirmative equitable relief.¹³³ Equitable counterclaims often are disposed of prior to the trial of law issues.¹³⁴

Summing up this discussion of the nature of equity from the historical viewpoint, it may well be said that equity is an historically inescapable necessity. Where it does not develop by adaptation, or transplantation, it must be improvised. Like the concept of God, if there was none, one would have to be invented as a matter of universal necessity. Different though its administrative manifestations may be in various places and under varying conditions, the concept of what is right and just is, in essence, always inevitable, if justice is not to become subordinate to form in the law.¹³⁵

Machinery, 33 J. AM. JUD. SOC. 175 (1950); Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CALIF. L. REV. 127 (1943); Note, 36 GEO. L. J. 666 (1948).

130. Fulop, *Law and Equity in Revised Judicial System*, 73 N. J. L. J. 25 (1949).

131. GODLEY, EQUITY 8 (2d ed. 1931); Fisher, *Wedding Law and Equity*, 40 ILL. L. REV. 326 (1946).

132. BACHRACH, CASES IN EQUITY 7 (1924).

133. *Id.* at 2.

134. GODLEY, EQUITY 10 (2d ed. 1931).

135. For a modern example of the continuing need for equity to resolve problems which are insoluble "at law," see Oleck, *Specific Performance of Builders' Contracts*, 125

There are some jurists, today, who seem to think it somewhat naive to emphasize the word "justice" in legal discussions. But justice still remains the essential purpose of all law. Equity, certainly in its historical moral sense, and hopefully in its administrative sense, is the principal technique thus far developed to make certain that law always will be readily adaptable for, and directed toward, the achievement of justice.

N. Y. L. J. 22, col. 1 (editorial Jan. 3, 1951); and Pound, *Progress of the Law—Equity*, 33 HARV. L. REV. 420, 432 (1920).