

## A GLANCE AT EQUITY

The famous Chancellor of England who wrote of Utopia, the ideal commonwealth, has this to say of its people: "Yet this thing they chiefly reprove among other nations that innumerable books of law and expositions upon the same be not sufficient. But they think it against all right and justice that men should be bound to those laws, which either be in number more than be able to be read, or else blinder and darker than that any man can well understand them. . . . Else as touching the vulgar sort of the people which be both most in number and have most need to know their duties, were it not as good for them that no law were made at all, as when it is made to bring so blind an interpretation upon it that without great wit and long arguing no man can discern it."<sup>1</sup>

It is a far cry from an ideal commonwealth, either to our own or any that we expect. Yet these words of one of the greatest lawyers of England, written exactly four hundred years ago, are perhaps more interesting to our generation than they were to his.

If one should go into court when the judge was pronouncing his decision, he might find him expounding the principles that "equity delights to do justice and not by halves," and that "equity regards the substance rather than the form." He would be well pleased at such just sentiments.

If he goes now into the next room, he may hear another judge pronouncing judgment and expressly excluding these principles. He may that evening go into his library and, opening Hume, come upon his discussion of the English Court of High Commission. He will find him saying that the cause of the great feeling against it was its procedure, which was wholly opposed to principles of "justice and equity." Now, if a lawyer should come in upon him, he might point out that "justice" and "equity" were not at all the same things, that if the historian used the words as synonymous, he wrote, indeed, as an ordinary man would write but with great inaccuracy. The mystery is now complete.

By "justice," he has in his mind civil justice, that which according to a famous definition consists in "giving to every man his due"; he is taxed for the machinery which is supposed to pro-

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<sup>1</sup> Utopia, 163.

duce it; he believes he can appeal to it if in need; yet he has only a vague idea, if any, of what it is. The court is to him a sort of mysterious accouchment chamber where this justice, after vast labor pains of delay and ceremony and dispute, at last comes into being.

If he inquires he finds that this justice is not the same thing as equity, it is not the same thing as law, it is not the law of conscience, it is not the law of reason, nor of nature, nor of nations, it is not custom, it is not the law of God.

When Mary was told that by English law, her husband, William of Orange, would be excluded from all participation in her sovereignty, she said to him: "I did not know until yesterday that there was so great a difference between the law of England and the law of God."

What then shall we say to one who makes inquiry? Is it so that after a matter of two thousand years of western civilization, we have not developed a system for administering justice that is comprehended by the common man, scarcely even by the educated man? In a very large degree we must, indeed, say that it is true.

We can only say that while justice is not any one of these things alone, it may perhaps be anyone of them in a given case; that broadly speaking, it is a compound of all of them together. We shall be obliged to admit that the most learned men are constantly quarreling and disagreeing about it. If one believes that law is justice or ought to be, we shall have to say that law is something which lawyers, professors and philosophers cannot agree in defining.

Blackstone's definition of law, according to the idea of Bentham, no one now considers as more than a statement of one of its aspects. The late James C. Carter<sup>2</sup> makes a prolonged and serious effort to define law. He excludes one definition after another, even that exceedingly clear one that it is "That ordering of the affairs of men which is upheld by the popular will," and finally evolving his own definition, he says merely that: "Law is custom." To that definition, making it the beginning and end of the matter, he absolutely adheres.

But this definition really goes no more than half way. If law is custom, upon what does custom rest? It must rest upon some concept. It cannot be true that custom is something that just happens.

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<sup>2</sup>In a very recent book, "Law, Its Origin, Growth and Development."

We must end then, by telling our inquirer that we cannot resolve his difficulty by precise definition. We must admit frankly that in none of the activities of man has his progress been so laborious and slow as in the development of his notions of adequate civil justice and of methods to carry them into effect. But we can say that, tho' now slumbering and now grievously retarded, this development has been a progression toward a system of civil justice that tends all the time to become more simple and intelligible and to reach to higher ethical concepts.

In all this long history of development there is no more significant thing in modern times, than the English Judicature Act and the abolition it carried of all distinction in form between law and equity. And the next great step must be in the future, the absolute wiping out of all distinction between law and equity in name and principle as well as in form and procedure. The time will surely come when there will be no such thing as the vast anomaly of this distinction as it has existed and in great part exists now. It will take generations to accomplish it, the amending in some respects of constitutions, before they can be, as they in fact ought to be, one and the same thing; but that it will come is as certain as that we have emerged from compurgation and trial by battle or from the extreme temper of reaction which held fast to rules shockingly unjust, based upon feudal theories and necessities, the reason for which had long since passed away. With this fulfillment, it is certain that our system of jurisprudence must approach immeasurably nearer its ideal of a rational, effective and harmonious whole.

Only that prophecy can be of interest that is based upon the past. To look forward we must look back. It may not be an exaggeration to say that the development of equitable jurisprudence is the most significant thing in all our judicial history. For it discloses in a manner far more impressive than the growth of the common law, the onward, persistent march toward a system of real justice, "complete and not by halves," a march that keeps pace with the growth of enlightened opinion and higher moral standards.

It is a strange picture that unfolds as we look back. We see a system that has existed in no other land than England, among no other peoples, a system administering different principles, not as in the Roman law, in the same tribunal, but in separate and distinct ones. We see the law courts contesting vigorously the

growth of the equitable jurisdiction, the judges resisting all innovation, insistent upon precedent, attempting to thwart and impede the action of the Chancery and the King. There pass before us the varying fortunes of the civil law, now held in high esteem, now so contemned that its Professor is forbidden to teach it in Oxford. We see the early Chancellors, Churchmen all of them, not lawyers, adopting sometime precepts of the Roman law in the exercise of their extraordinary jurisdiction; the law judges under Richard II forbade it to be quoted in their courts. We see the judges fomenting agitation in the commons against the Chancery and the commons bitterly complaining to the King. The judges charge the Chancellor with attempts to subvert the whole law of England, with the practice of substituting conscience for definite rule. They thwart the great Statute of Edward III providing for writs in similar cases to be issued out of the Chancery in all respects like the ones of ancient precedent. By claiming and exercising the right to decide upon the validity of these new writs when issued, they emasculated a statute which might have led to such a development of the common law that Chancery would have ceased to exist—they argued and intrigued, they spun out refinement upon refinement.

In the reign of Edward IV in 1483, the Chancellor issued an injunction to restrain the plaintiff from proceeding to judgment after verdict, in the Court of Kings Bench. But the Chief Justice said that they would not suffer it, that none the less the plaintiff might proceed. They would give him judgment and if he were imprisoned in the Fleet for violation of the injunction, they would grant a habeas corpus and discharge him.

Before many years were to pass, Wolsey as Chancellor of England was to find his use of the injunction constituting one of the articles of impeachment against him.

Nearly a hundred and fifty years afterward, the contest breaks out into what now is to be an issue of supreme historical importance, in which are set against each other two of the great lawyers of all time, Coke and Bacon. To their difference of opinion was added personal feeling in a high degree. The jealousy of Coke at Bacon's rise and power could scarcely work otherwise than to accentuate the spirit of opposition, the temper of defiance, with which all his life he had looked upon the encroaching jurisdiction of the Chancellor. One who held the common law throughout his career in supreme veneration, who called it indeed, "the perfection of reason," would be inclined to exert every power in

him to resist the doctrine put forward, that the Chancellor might enjoin the enforcement of a judgment at law. The doctrine must have seemed no less hateful to the judges as an assault upon the dignity and authority of the whole common law system than as the exercise of a power under a principle which, if expanded, might result in its entire overthrow. The case was referred to the law officers who, under the leadership of Bacon, sustained the Chancellor and he in turn was upheld by the King.

James I indeed had little inclination to act otherwise. He was no friend of the law courts, and found early occasion to rebuke the judges, summoning them before him and saying "that of late the courts of common law are grown so vast and transcendant as they did both meddle with the king's prerogative and had encroached upon all other courts of justice."<sup>3</sup>

The charges were not all on one side. But scarcely could the King act otherwise than in defence of his Chancellor, for in doing so he was defending his own authority.

The jurisdiction was settled, never again to be successfully challenged, and with the decision of the controversy it is sometimes said that the contest between the two jurisdictions came to end.

But this cannot be said to be true. The permanency of equity, its place, its function as a system, vital, potential, with large powers of growth, was indeed finally assured. There were to continue as there had been in the past two kinds of jurisprudence, proceeding upon different principles, in different tribunals, with far different methods. But what perhaps gave stability to this distinction and may have contributed more largely than anything in the past to the development of the equitable jurisdiction, was the practice now beginning of reporting the decisions of the Chancery Court.

From this time there must have seemed a greater likelihood than ever before of deference to precedent, the development and establishing of fixed and settled rules, out of the absence of which complaints of suitors and many of the assaults of the judges and lawyers had sprung.

And now begins, in definite form, the development of what seems to be a supreme paradox. Equity found Justice a prisoner in the camp of Precedent and it set her free. It found only one door into the temple, which Customs alone could enter and it opened another portal beside it.

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<sup>3</sup>Hallam, *Eng. Const.*, 199.

Born in protest of precedent, proceeding in defiance of it, it now embraces it. It comes back to the house it had left. It adopts what seemed to be the rude ceremonies and unholy ministrations of the ritual from which it had fled. Precedent becomes its guide. Its rules are definitely formulated, its body of principles defined and settled until we find Sir Frederick Pollock observing ten years ago: "So completely has it forgotten its old claim to administer natural justice that a judge of the Chancery Division in England can now say 'this court is not a court of conscience'."

In periods almost exactly equal in time, about three hundred years from Edward II, when the Year Books began, until James I, and a like period from James I until the present time, the common law and the law of the Chancellor's Court had become as *lex scripta*, identical in character.

Here, then, is the picture of the age-long struggle, the struggle of two unlike forces to develop in harmony with each other; the effort at combination of elements which, out of their very nature it seems, must resist assimilation, the effort to fuse, out of absolute necessity, the authority of precedent, so that not only should there be law but that it should be known, and the more complete, the higher justice which the particulars of the case and the circumstances of the time seem to demand.

"The Court," said the Judge of the Chancery Division, "is not a court of conscience." But that, too, goes back two hundred years.

It had become so necessary for equity to attempt to free itself from the charge of arbitrary decisions that as early as 1676, Lord Nottingham, the Chancellor, sometimes called "The father of equity" on account of his great exposition and development of its principles, pointed out<sup>4</sup> that the court did not proceed according to conscience "naturalis et interna" but by conscience "civilis et politica." Whatever effect this distinction was to have in the future the fact is that in the beginning and for long before that time it had been quite otherwise. It is plain that there has been much confusion about it in the minds of the various writers.

Spence, writing of the reign of James I, says: "But generally during this reign *as well as before*, equity and conscience as rules of decision were referred to principles deducible from the Roman jurisprudence, the sanction of which was occasionally directly

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<sup>4</sup> *Cook v. Fountain*, 3 Swanst. 600.

adverted to independently of the private conscience of the judge. Nothing is recorded as having been delivered judicially from the bench which can warrant the supposition that the private opinion or conscience of the judge, or what is perhaps equivalent, his whim or caprice, independent of principle and precedent, was a legitimate ground of decision."<sup>6</sup>

If by this is meant that Equity developed upon a regard for precedent originally, or entirely upon the basis of the Roman law, the statement cannot be true and is refuted by his former statement that the Chancellors "took for their guide the principles of general jurisprudence and looked only to the attainment of what they considered to be substantial justice."<sup>6</sup>

"Equity," says Holland, "springs from old rules becoming too narrow, or out of harmony with advancing civilization, hence the introduction of some high functionary of a more perfect body of rules discoverable in his judicial conscience."<sup>7</sup>

The history of Equity discloses a long course of criticism and defiance, proceeding on the one side from the judges, on the other from the Chancellor and the supporters of his jurisdiction. It is said that the Chancery unsettles the law and for long in the beginning it certainly did so. The great Selden makes his historic scoff at equity as "a roguish thing", "according to the Chancellor's conscience." "It is all one," he said, "as if they should make the standard of measure the Chancellor's foot, according as it is long or short, so is equity." And Selden was a contemporary of Lord Nottingham and spoke toward the end of the century in the beginning of which, it has been said, the contest between law and equity practically ended.

Thereby, it would seem, plainly appears the continual feeling of distrust, jealousy and opposition, that lasted for generations. Indeed, great lawyers, a vast body of students and followers, bred to absolute veneration of the common law, could find only in it, as in great measure it was, the bulwark of English freedom and instrument of social development, the exposition of the national temper and spirit, reaching ever to higher levels and a more perfect standard of excellence.

In Blackstone's mind the common law spoke with as much authority as if it, too, had said "Thou shalt have no other gods before me."

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<sup>6</sup> Spence, 2, 414.

<sup>6</sup> I. 375.

<sup>7</sup> Jurisprudence, page 67.

Writing his treatise in 1765 in volumes comprising more than a thousand pages, he finds room only for a scant eight pages for a discussion of equity.

Sir Frederick Pollock, a great champion of the common law, remarks that at the time when Blackstone wrote, modern equity was in its infancy, yet only just thirty years later we find Swift saying of the Chancellor's Court: "It is sufficient to remark that it has directly or indirectly claimed cognizance of almost every other matter that respects property, so as to become the most important tribunal in England."<sup>8</sup>

There can be no better illustration than Blackstone of the temper and attitude of the great common law magistrates. He is above all a champion and defender of the common law. But another, with a sense of humor at least not profound, is able to say of equity that it is "the most magnificent and practically useful monument that man has ever in any country raised in his character of a jurisprudential animal."<sup>9</sup>

Blackstone insists that the common law enforces the principles of equity in its own judgments. He goes so far as to be unwilling to admit even the defects which equity has supplied. "It is said that it is the business of the court of equity in England to abate the rigor of the common law. But no such power is contended for."<sup>10</sup> A statement so surprising invites examination.

As early as 1349, under Edward II, the Chancellor was holding court alone. Under Richard II, we find the Chancery certainly established as a separate court with a difference in procedure settled on forms substantially characterizing those of modern times. Under Edward IV, its jurisdiction for some purposes had been so far conceded that we find "all the judges affirming that the Chancery was the King's court." It had already assumed a large jurisdiction. But it was precisely in those cases in which the court assumed to act in contradiction to that of the law courts and in remedy of their defects that we find the judges quarreling and protesting. And from this time on, when the court had become under Edward IV set up as a separate court, "the judges continued to dispute the Chancellor's authority to interfere with the jurisdiction of the common law courts."<sup>11</sup>

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<sup>8</sup> Swift's Digest, Vol. II.

<sup>9</sup> London Jurist, July, 1846.

<sup>10</sup> Comm., Vol. 2, page 419.

<sup>11</sup> Spence on Equity, I, page 349.

Nearly three hundred years before Blackstone makes this statement that it was not contended that it was the function of equity to abate the rigor of the common law, Bacon had said in his *History of Henry VII* that under his Parliament, 1487, among "divers excellent laws ordained" and among the courts there were "the Chancery, the Pretorian power for mitigating the rigor of the common law in case of extremity by the conscience of a good man." So also Lambard, who writes in the time of Elizabeth, says of the rise of equity: "The king did commit to his Chancellor together with the charge of the great seal his own regal, absolute and extraordinary pre-eminence of jurisdiction in civil causes as well for the amendment as for the supply of the common law."

It is sometimes said that the development of English equity jurisprudence is an accident. Bispham in his sketch of its origin speaks of it so, and Swift says that "a court by mere accident grew out of the necessity of the existing state of things and by degrees assumed and established a jurisdiction of great extent and importance."<sup>12</sup>

This, perhaps, is true and not true. The form may have been accidental but the rise of equity can no more be said to be an accident than the whole progress of civilization can be said to be one.

The error of those who see equity rising only from a mere custom, that of appeal to the parental authority of the king and the granting of special relief upon such petition by him, or by him and his council as a matter of course, is pointed out by Sir Henry Maine in his work on "Ancient Law." The growth of equity, as also in similar if more laborious and tardy manner of law, is the growth of moral progress.

The history of equity makes plain its progress from conscience to precedent, as before pointed out, and shows how at last it crystallizes in a system which may again fail to keep pace with the expansion of ideas of adequate justice. There can be, indeed, no effective precedent without permanency of record and for five hundred years equity developed without any such thing. It was in the beginning a system which did, in fact, proceed without settled rules except so far as it sometimes applied the principles of the civil law, and Blackstone points out that in early times, its decisions were, more than anything else, in the nature of awards.

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<sup>12</sup> Vol. 2, page 14.

The first grant of awards by the king and his council in the exercise of a jurisdiction out of which equity has grown was not in cases where the common law could not furnish a remedy but where from the violence of the times and the power of suitors, the courts were powerless to act, the whole ordinary machinery of justice broken down.

The poor indeed were almost out of the pale of the protection of the law. The Commons in the reign of Richard II complain of the oppression of the king's courts as so great that justice could not be done. And this, with varying changes of light and shade, is a picture that continues for hundreds of years of English history, amid the recurring convulsions of society and the fluctuations of freedom and security. The helplessness of the ordinary courts under Henry I which caused the first petition to the king is strikingly before us at the close of the Fifteenth Century. Green draws a vivid picture of social England during that time. The Paston letters "lift for us," he says, "a corner of the veil that hides the social state of England in the fifteenth century. We see houses sacked, judges over-awed, or driven from the bench, peaceful men hewn down by assassins or plundered by armed bands, elections controlled by brute force, parliaments degraded into camps of armed retainers."<sup>13</sup>

In the court of the Star Chamber, sometimes referred to as in its beginning a court of "criminal equity," we see the same attempt in matters of public offenses to supplement the helpless machinery of the courts that was made in civil matters. It arose in the same way. "The King in his council had always asserted a right in the last resort to enforce justice and peace by dealing with offenders too strong to be dealt with by his ordinary courts. Henry systematized this occasional jurisdiction by appointing in 1486 a committee of his council as regular court called the court of Star Chamber." And this court in its inception, before it lent itself, by its practice of proceeding without a jury and by the examination of defendants upon interrogatories without the presence of accusers, to the designs of oppression, was a court which Bacon could call "one of the sagest and noblest institutions of this Kingdom."

There was no thought that the king and his Parliament or great council in originally granting the petition of suitors because of failure of the law courts to proceed was exercising other than ordinary jurisdiction. The Chancellor had always a large ordi-

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<sup>13</sup> Green's "England."

nary jurisdiction. It was at a later time and for far different reasons that the extraordinary jurisdiction of the king and the great council, afterward the Privy or Select Council which grew out of it, and afterwards the Chancellor, arose.

Nor did in the beginning this exercise by the king of his residual authority seem to occasion any opposition. But it was at first exercised by the king and the Great Council.

With the increasing exercise by the Chancellor of his authority in addition to and above the law, the growth of the equity jurisprudence becomes inseparably connected with the growth of the English constitution. For the common law was the bulwark of English freedom. The principles of the English constitution are as much a part of it as the oldest custom, and the growth of the English constitution is the history of a long struggle between people and prerogative. The development of equity takes on in some part a political aspect. Many of the protests of the common law courts against the Chancellor's exercise of power may have come, as well as from other reasons, from the alarm at the exercise of this power as exhibiting an increase of the prerogative of the crown. And as the law becomes more and more *lex scripta*, its precedents more firmly established, the greater the alarm must be at any prerogative whatever that might assume to over-ride it.

Through these troubled waters of politics, then, must the more just and enlightened principles of the equity jurisdiction pass before the rude dealings of the courts could be amended. And even to contemporaries their dealings were rude. The jurists of the continent in the time of Hale thought the common law a barbarous code and in the language of Pomeroy "it was a barbarous code."<sup>14</sup>

The nature and details of the efforts of the common law courts to resist the growing power of the Chancellor, how far and in what cases they were connected with politics, how far and wherein there may have been in them the deep human elements of jealousy and pride, the picturesque aspects of the contest, in a sense, seems to be a field open to much further investigation and more adequate treatment.

Perhaps there were few events that had any real spectacular interest. Hallam says; "The cases reckoned cognizable in the Chancery grew silently more and more numerous but with little overt opposition from the courts of law until the time of Sir

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<sup>14</sup> Vol. 1, page 17.

Edward Coke. That great master of the common law was inspired not only with the jealousy of this irregular and encroaching jurisdiction which most lawyers seem to have felt but with a tenaciousness of his own dignity."<sup>15</sup>

Here the "overt act" he speaks of was the procuring by Coke of the indictment of those who had secured the injunction against the judgment of the King's Bench, which precipitated the contest before mentioned. But whether there were "overt acts" or not in such a sense as this, there was a continual struggle from the beginning and an impression that it was a silent opposition or passive jealousy, which might perhaps be gained from the statement of Hallam, does not comport with any other comment. Nothing certainly could better illustrate the extent and bitterness of the quarrel than the history of the Statute of Uses, familiar to every lawyer. Procured by the lawyers to regain the authority lost to their courts by the innovation of the doctrine of trusts developed by the Chancery jurisdiction, it could never have come into existence except as a direct result of this contest. And Hallam, speaking of this statute as a victory for the lawyers, says: "But this victory, if I may use such an expression (since it would have freed them in a most important point from the Chancellor's control), they threw away by one of those timid and narrow constructions which had already turned so much to their prejudice and they permitted trust estates, by the introduction of a few more words into a conveyance, to maintain their ground contra-distinguished from the legal seizin under the protection and guaranty as before of the courts of equity."<sup>16</sup>

If there was jealousy and bitterness in this long contest, there seems also to have been occasionally attempts, at least, toward amicable compromise and reconciliation.

Although the great Chancellor of Henry VIII, Sir Thomas More, issued but few injunctions, the judges nevertheless complained. He, therefore, caused a docket to be made showing the list of them and his son-in-law, William Roper, in his quaint biography of More, then continues: "Which done, he invited all the judges to dinner with him in the council chamber at Westminster where after dinner when he had broken with them what complaints he had heard of his injunctions and moreover showed them both the number and causes of everyone of them so plainly

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<sup>15</sup> Constitutional History, page 197.

<sup>16</sup> Eng. Const., page 197.

that, upon full debating of these matters, they were all enforced to confess that they in like case could have done no otherwise themselves, then offered he this unto them, that if the justices of every court unto whom the reformation of the rigor of the law by reason of their office most specially appertained, would upon reasonable considerations by their own discretions as they were, he thought, in conscience bound, mitigate and reform the rigor of the law themselves, there should from thenceforth by him no more injunctions be granted. Whereupon, when they refused to condescend, then, said he, unto them, 'Forasmuch as yourselves, my lords, drive me to the necessity for awarding our injunctions to relieve the people's injury, you cannot hereafter any more justly blame me'.<sup>17</sup>

And Swift says: "From this (defective state of judicial policy) originated the court of equity, and had courts of law in early times extended relief and enlarged their jurisdiction according to the progressive improvements of society with the liberal spirit and comprehensive views of Lord Mansfield, the existence of a court of equity as a distinct tribunal had never been necessary."<sup>18</sup>

Even so brief a retrospect then, as this, brings home to us the magnitude of the problem of the development of justice. Mr. Coudert says: "There is in all modern states to-day a general conflict between certainty in the law and concrete justice in its application to particular cases, in other words, between the effort to have a general rule, everywhere equally applicable to all cases at all times, and the effort to reach what may seem to be concrete right dealing between the parties at bar upon the particular facts in each case. On the one side is made an appeal to progress, on the other to precedent."<sup>19</sup> But this is not peculiar to modern states, nor a problem of to-day. It began when the first dispute between the first men was settled without recourse to force by an authority to which they submitted and it will continue as long as there shall be a conflict of opinion and a struggle for existence. But will the problem it presents increase or decrease as the standard of duty among men in their relations to each other becomes all the time higher and the individual effort to live out a life that is complete and satisfying becomes more complex on every hand?

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<sup>17</sup> Page 113.

<sup>18</sup> Vol. II. page 15.

<sup>19</sup> "Certainty and Justice," page 1.

What difference is there in the persistent refusal of the court to abandon or modify the worn out fellow servant doctrine, a rule absolutely unsupported by modern sentiment, and the flat refusal of the common law judges six hundred years ago to abandon a rule that permitted no redress to a party who might in court have lost his cause through the gross fraud of the other? The judges themselves denounce it but the supposed homage to precedent prevents relief from it. There is still here a repetition of the eternal conflict between precedent and justice. What is the application of the admonition of Sir Thomas More, one of the great men of English history, to the judges, or the meaning of the language of Swift? Let us come nearer home. In *Tingler v. Chamberlain*,<sup>20</sup> the court decided that the Statute of Perpetuities forbade one leaving property to A for life and remainder to his heirs. The decision was based upon the former case of *Leake v. Watson*.

Hamersley J. in a courageous dissenting opinion said: "The rule of 'stare decisis' is wise and salutary, it is based upon the supreme importance of certainty in the law, but there are instances where the necessities of truth and justice demand a modification of former decisions. . . . I must accept my share of responsibility for a passive concurrence in some cases where the doctrine of *Leake v. Watson* has been accepted. . . . It is an evil to be compelled to acknowledge a mistake in recent decisions, but it is a greater evil to be compelled to repeat time after time a statement which we, in common with all the profession, know is not true and time after time to take from the near relatives of a testator property which was in truth lawfully given to them and hand it over to strangers."

Now in our system of government, the courts look to the legislature to furnish relief from principles outworn. And, perhaps, precedent can call to its defense the theory that English equity was in its origin a species of legislation, different from "judicial legislation" as commonly understood. I do not know how that may be.

There was no separation of powers at the beginning in Parliament. Neither in the first General Court of Connecticut was there any such separation. In it was the whole power, legislative, executive and judicial. Parliament tried cases in early times itself with a jury. Why was not the promulgation of an equitable principle by the council, or afterward by the

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<sup>20</sup> 71 Conn. 466.

Chancellor, as its representative, whereby a rule of law became amended, and a new rule established, the exercise, in fact, of the power of legislation? If it was the act of the King exercising his prerogative and later of the King through his Chancellor, that is the very theory according to which the English Constitution developed—the laws were ordained by the Sovereign with the consent of the Parliament, and such is the caption of English statutes to this day.

As against precedent speaking in this wise, I suppose the answer to be made that this does not touch the real problem of the development of justice at all, as both the systems of law and equity have developed it, in a greater or less degree, by address to methods of interpretation and enlightened sentiment, sufficient to make it an adequate expression of what law really is, a rule or principle which in the words of Mr. Coudert has "an ideal existence in a dominant public opinion." It is a slow, sometimes a discouraging process. When rights of property have become fixed *stare decisis* must stand. But precedent must be the servant, not the master of the law. There come times when responsibility passes beyond the branch of the legislature. Though the origin of equity and its development represent from the beginning to end the spirit of complete justice in a people, working for expression, yet its own course has been retarded and stained by all those imperfections of common human nature which must accompany social development of every kind. It was the irony that the Chancery court should suppose itself through all its history to be the guardian of the orphan and the refuge of the poor, which roused Dickens to the bitter satire of *Bleak House*.

English sentiment against it has been upon occasion so extreme that it was supposed advisable to terminate its very existence. The Rump Parliament, in the language of Hallam, "voted the abolition of the Court of Chancery, a measure provoked by its insufferable delay, its engrossing of almost all suits and the uncertainty of its decisions." But with all vicissitudes, the equity principles have gone on. It is all a question of names. Equity has developed into a system of settled principles and crystallized into precedents, and is as much an integral part of the law of the land as the common law.

"The law," says Hobbes, "is the public conscience," and, "I would fain know to what end there should be any other court of equity at all either before the Chancery or any other

person, besides the judges of the civil or Common Pleas." The question is one that he asked two hundred years ago. The course of things since makes plain what there is every reason to believe is to be the answer in the future.

If the difficulties seem large that may be supposed to attend such a development of our system as will end all distinction between legal rights and equitable ones, we must remember that far greater hopes than this for the development of English jurisprudence have been entertained.

Sir Frederick Pollock has been bold enough, even, to look forward to a time when there will be no diversity in the common law as administered here and in England, to a time when there shall be a vital union between them, to a day when our own Supreme Court and the House of Lords shall be found working together, consulting and advising with each other upon important principles of law, promoting the uniformity of the entire body of jurisprudence of the English-speaking world. There cannot be better words than his to express the vision of such a time: "Some one may ask whether we look to see these things ourselves, or hope for them in our children's time. I cannot tell; the movement of ideas will not be measured beforehand in days or years. Our children and grandchildren may have to abide its coming, or it may come suddenly when we are least hopeful. Dreams are not versed in issuable matter, and have no dates. Only I feel that this one looks forward, and will be seen as waking light some day. If anyone, being of little faith or over-curious, must needs ask in what day, I can answer only in the same fashion. We may know the signs though we know not when they will come. These things will be when we look back on our dissensions in the past as brethren grown up to man's estate and dwelling in unity look back upon the bickerings of the nursery and the jealousies of the classroom; when there is no use for the word 'foreigner' between Cape Wrath and the Rio Grande, and the federated navies of the English-speaking nations keep the peace of the ocean under the Northern lights and under the Southern Cross, from Vancouver to Sydney and from the Channel to the Gulf of Mexico; when an indestructible union of even wider grasp and higher potency than the federal bond of these States has knit our descendants into an invincible and indestructible concord."

ROBERT L. MUNGER.

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