

No Adequate Remedy at Law: Equity in Massachusetts 1692-1877

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Abstract

Although Massachusetts became the leading jurisdiction for trust law in the United States across the nineteenth century, it never established a separate court resembling the High Court of Chancery in England. This Article asks how the judicial system of Massachusetts functioned without a separate court of chancery. The Article explains that Massachusetts managed by gradually integrating the distinctive elements of English equity into its common law courts. Beginning in the 1690s, the legislature passed laws authorizing components of equity for use in the common law courts. By 1836 the commonwealth's Supreme Judicial Court could oversee discovery, entertain cases with multiple parties, and grant injunctions and specific performance. The court could also administer certain areas of substantive law, including trust, guardianship, and settlement of estates, that in England belonged to the jurisdiction of the Court of Chancery. Thus, the Supreme Judicial Court had concurrent jurisdictions in law and equity early in the nineteenth century. In this respect the court resembled the federal courts before the merger of law and equity in the Federal Rules of Civil Procedure in 1938. The long process of adding the powers and substantive law of equity to the common law courts of Massachusetts ended in 1877, when the legislature granted the Supreme Judicial Court general equity jurisdiction.

* J.D., Yale Law School 2008; A.B., Harvard College 2004. In this Article the spellings of English and antiquarian sources are Americanized and modernized, but the titles of statutes and newspapers are not. Words that appear abbreviated in the originals are written out, and obvious misspellings are corrected without disclosure. Statutes promulgated by the General Court of the Commonwealth of Massachusetts after 1780 are cited as follows: STAT. [year] c. [chapter number] § [section number] or REV STAT. c. [chapter number] § [section number] ([year]).

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INTRODUCTION

After the American Revolution, each newly-independent state confronted, at least implicitly, the question whether to establish a separate court of chancery similar to the English High Court of Chancery, or to place the powers of English equity in another part of its judicial system. Thus, New York retained the separate court of chancery that it had possessed during the colonial period.¹ By contrast, Pennsylvania's courts openly integrated common law and equity.² Massachusetts did not establish a separate court of chancery, nor did it automatically vest the powers and substantive jurisdiction of English equity in its common law courts.³ The history of equity in Massachusetts is particularly important, because across the nineteenth century Massachusetts became the leading American jurisdiction in the law of trusts, the most characteristic sphere of equitable jurisdiction.⁴

¹ HENRY WILSON SCOTT, *THE COURTS OF THE STATE OF NEW YORK: THEIR HISTORY, DEVELOPMENT AND JURISDICTION* 363-67 (1909).

² ANTONY LAUSSAT, *AN ESSAY ON EQUITY IN PENNSYLVANIA* 42 (Philadelphia, Robert Desilver 1826) ("The jurisprudence of Pennsylvania is thus changed in a very important particular. Its foundation is not the common law of England, in its restricted sense, but the common law incorporated with equity . . .").

³ *See infra* Part I.

⁴ *See, e.g.*, *In re Cunningham's Estate*, 149 A.2d 72, 84 (Pa. 1959) ("[T]he Pennsylvania Apportionment Rule was abandoned in 1947 by the Restatement, 'Trusts,' and in lieu thereof the Massachusetts Rule was adopted."); *Coates v. Coates*, 304 S.W.2d 874, 876 (Mo. 1957) ("[T]he Restatement of the Law of Trusts and under the Uniform Principal and Income Act . . . have also adopted the Massachusetts rule, 'if the trustee has the option of receiving a dividend either in cash or in the shares of the declaring corporation, the dividend is income irrespective of the choice made by the trustee.'"); *In re Bank of N.Y. & Fifth Ave. Bank*, 105 N.Y.S.2d 211, 220 (N.Y. Sup. Ct. 1951) ("In 1935 the American Law Institute adopted the Pennsylvania Rule in its Restatement of the law of Trusts, Section 236. In 1948, however, the Institute . . . found that the trend among the states, by decision and statute, is now to follow the Massachusetts Rule, and that the latter is in general more satisfactory, and amended section 236 of the Restatement of the Law of Trusts to accord with the Massachusetts Rule.").

Several commentators have noted the absence of a separate court of chancery in Massachusetts.⁵ Others have discussed *why* Massachusetts did not have a separate court of chancery and recounted the political opposition to such a court.⁶ This Article asks *how* the judicial system of Massachusetts functioned without a separate court of chancery resembling the High Court of Chancery in England. The Article explains that Massachusetts managed by gradually integrating equity into its common law courts. In this Article, the term “equity” refers to the remedies, procedures, and substantive law that were available the English Court of Chancery and that could not be supported in the English courts of common law.⁷

Four characteristics distinguished the English Court of Chancery from the common law courts. First, the English Court of Chancery allowed discovery.⁸ Second, the Court permitted

⁵ See, e.g., ZECHARIAH CHAFEE, JR., ET AL., ADVANCE PAMPHLET, CASES ON EQUITY: JURISDICTION AND SPECIFIC PERFORMANCE 10 (2d ed. 1946); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 311-313 (San Francisco, Bancroft 1881); 1 THOMAS W. WATERMAN, THE AMERICAN CHANCERY DIGEST xxxiv-xxxvi (Gould Banks & Gould 1851); Stanley N. Katz, The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century, in LAW IN AMERICAN HISTORY 264-65 (Donald Fleming and Bernard Bailyn eds., 1971); William F. Walsh, The Growing Function of Equity in the Development of the Law, in 3 LAW: A CENTURY OF PROGRESS 1835-1935 at 150-51 (Alison Reppy ed., 1937).

⁶ William J. Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U. L. REV. 269 (1951); Edwin H. Woodruff, *Chancery in Massachusetts*, 9 B.U. L. REV. 168 (1929) (originally published at 5 L.Q. REV. 370 (1889)).

⁷ Joseph Story distinguished between “what, in England, constitutes Equity Jurisprudence” and “Equity, as correcting, mitigating, or interpreting the law.” 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 1 and 10 (Boston, Hilliard Gray 1836) [hereafter STORY, EQUITY JURISPRUDENCE]. See also *id.* at 26 (“Equity Jurisprudence may, therefore, properly be said to be that portion of remedial justice, which is exclusively administered by a Court of Equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a Court of Common Law.”); Joseph Story, “Equity,” in JOSEPH STORY AND THE ENCYCLOPEDIA AMERICANA 58-60 (Morris L. Cohen ed., 2006); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 918-21 (1987) [hereafter Subrin, *Equity*] (describing equity procedure in the English Court of Chancery).

⁸ See 2 HENRY BALLOW, A TREATISE OF EQUITY 651-66 (John Fonblanque and Antony Laussat ed., Boston, Hilliard Gray, 4th Am. ed. 1835).

joinder of parties and issues in multiparty practice.⁹ Third, the Court granted the equitable remedies of specific performance and injunction.¹⁰ Fourth, the Court administered certain areas of substantive law, including trust, guardianship, and settlement of estates, that in England came under the purview of the Court of Chancery.¹¹ This Article demonstrates how these four distinguishing traits of the English Court of Equity were integrated into the common law courts of Massachusetts. The Article also takes notice of other aspects of English equity, including relief of penal bonds, the equity of redemption, trustee process, and masters in chancery, that became part of practice of the common law courts.

The integration of equity into the common law courts of Massachusetts took place over several decades. Statutes promulgated by Massachusetts' legislature, the General Court,

⁹ See 1 STORY, EQUITY JURISPRUDENCE, *supra* note 7, at 418 (“The relief [afforded by a court of chancery] is more complete, adequate, and perfect [than can be had at common law], inasmuch as it adapts itself to the special circumstances of each particular case . . . bringing all the parties in interest before the Court, so as to prevent multiplicity of suits and interminable litigation.”); JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY 39 (Philadelphia, Byrne, 3d ed. 1812) (“All persons concerned in the demand [of a bill in chancery], or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court.”).

¹⁰ See 1 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 125-57 (Hartford, O. D. Cooke, 2d Am. ed. 1822) (injunction); 1 BALLOW, *supra* note 8, at 43-45 (specific performance); 2 BALLOW, *supra* note 8, at 490-91 (redemption).

¹¹ See 2 BALLOW, *supra* note 8, at 325-467 (trust) and 468-86 (guardianship). The Court of Chancery in England did not prove wills. *Id.* at 564 (“The ecclesiastical court is the proper place to try wills and to prove them, and the chancellor will not try them . . .”). However, the Court of Chancery played an important role in supervising the administration of the assets of a deceased person. *Id.* at 564 n.(a). For example, the Court of Chancery could issue a decree affecting all the creditors of an estate, a practice that spared the estate from litigating multiple suits. MITFORD, *supra* note 9, at 135-36. See also 1 STORY, EQUITY JURISPRUDENCE, *supra* note 7, at 507-08 (“[W]e all know, that both the Courts of Common Law and the Ecclesiastical Courts have cognizance of administrations . . . Courts of Equity, therefore, in assuming general jurisdiction over case of administration . . . found themselves upon the notion of a constructive trust in the Executors or Administrators. But the fact of its being a constructive trust is not the sole ground of jurisdiction. Other auxiliary grounds also exist; such as the necessity of taking accounts, and compelling a discovery; the consideration, that the remedy at law, when it exists, is not plain, adequate, and complete.”).

gradually validated components of equity for use in the common law courts. In the 1690s, the provincial legislature authorized the Supreme Judicial Court to grant the equity of redemption, to chancer penal bonds, and to oversee the settlement of estates and guardianship of lunatics and minors.¹² The legislature also authorized justices of the peace to take depositions *de bene esse* and *in perpetuam rei memoriam*.¹³ In 1758 the legislature promulgated an act permitting the use of trustee process in the province.¹⁴ Following the American Revolution, the legislature of the Commonwealth of Massachusetts passed several laws revising and supplementing the forms of equity that had existed in the province.¹⁵

From 1817 to 1836, Massachusetts experienced an intense period of legislative activity regarding equity. In 1817 the legislature significantly expanded the equity jurisdiction of the Supreme Judicial Court by allowing the court to enforce trusts, grant specific performance, and create rules for the regulation of practice in chancery in Massachusetts.¹⁶ In its rules, the Supreme Judicial Court adopted a procedure for discovery.¹⁷ In an act of 1823, the legislature authorized the court to grant injunctions in certain cases.¹⁸ The same act allowed the court to hear cases between more than two parties.¹⁹

By 1836 the Supreme Judicial Court of Massachusetts possessed the four distinctive features of English equity – discovery, multiparty practice, equitable remedy, and particular

¹² See *infra* notes 50-55 (chancering of penal bonds), notes 56-63 (settlement of estates and guardianship), notes 79-85 (equity of redemption), and accompanying text.

¹³ See *infra* notes 64-78 and accompanying text.

¹⁴ See *infra* notes 91-102 and accompanying text.

¹⁵ See *infra* Part III.A.

¹⁶ See *infra* notes 135-38 and accompanying text.

¹⁷ See *infra* notes 139-49 and accompanying text.

¹⁸ See *infra* note 160 and accompanying text.

¹⁹ See *infra* note 159 and accompanying text.

branches of substantive law such as trust.²⁰ The court could sit in common law or in equity, depending on the nature of the cause before the court. By administering law and equity separately within the same court, the Supreme Judicial Court resembled the federal courts before the merger of law and equity in the Federal Rules of Civil Procedure in 1938.²¹

It is difficult to gauge to what extent contemporary legislators were aware of the expansion of equity in Massachusetts. The titles of some of the acts indicate affirmative endorsement of equitable procedures and remedies, for example, “An act giving remedies in equity” or “An act for hearing and determining cases in equity.” Until 1817, all of these acts dealt with the equity of redemption for mortgagors and with chancering of penal bonds.²² Subsequent acts that referred to equity in their titles addressed trust law, specific performance, discovery of documents, suits with two or more parties, and injunctions.²³

²⁰ See *infra* notes 199-202 and accompanying text.

²¹ Regarding the separate administration of law and equity in the federal system, see An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses, 1 Stat. 275, 276 (1792) (establishing separate processes for actions at law and bills in equity); SAMUEL T. SPEAR, LAW OF THE FEDERAL JUDICIARY 22-25 (New York, Baker Voorhis 1883); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 287 (1927); see also Charles E. Clark & James William Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 393 (1935) (arguing that law and equity should no longer be separately administered in the federal courts).

²² STAT. 1815 c. 137 (“An act in addition to the several acts for giving remedies in equity”); STAT. 1798 c. 77 (“An act in addition to an act, entitled, ‘An act for giving remedies in equity’”); STAT. 1785 c. 22 (“An act giving remedies in equity”); An Act in Addition to an Act, Intituled [*sic*] an Act for the Hearing and Determining of Cases in Equity, Made and Passed in the Tenth Year of the Reign of King William the Third [1735], in THE CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 499-500 (Gaunt 2001) (1814) [hereafter COLONIAL AND PROVINCIAL LAWS]; An Act for Hearing and Determining Cases in Equity [1698], in *id.* at 324-26.

²³ STAT. 1829 c. 121 (“An act giving further remedies in equity”) (injunction); STAT. 1827 c. 88 (“An act giving relief in equity in cases of waste and nuisance”) (injunction); STAT. 1827 c. 23 (“An act in addition to the several acts giving further remedies in equity”) (injunction); STAT. 1823 c. 140 (“An act in addition to an act, entitled ‘An act for giving further remedies in equity’”) (discovery of documents, suits with two or more parties, and injunction); STAT. 1817 c. 87 (“An act for giving further remedies in equity”) (trust and specific performance).

Even as statutes gradually added the remedies and procedures of equity to the common law courts, attempts were also made to set up a separate court of chancery, first in the province of Massachusetts under British rule, and then in the Commonwealth of Massachusetts after independence. Part I of this Article recounts these failed attempts to establish a separate court of chancery. Part II examines the gradual accretion of equity in the Supreme Judicial Court before the American Revolution, while Part III discusses the continuation of this process after the Revolution.

This Article does not focus on sources that might explain *why* Massachusetts adopted an equitable procedure or remedy at a particular time; rather, the Article is concerned with identifying the process by which equity emerged in the common law courts of Massachusetts. This account relies heavily on statutes; the case law is scant because regular reporting of cases in Massachusetts did not begin until 1804, and even then the coverage was not comprehensive. This Article was researched in printed sources; manuscript sources may enrich this account. However, even these limited sources reveal that by 1836, Massachusetts had effectively combined law and equity in a single court.

PART I: FAILURE TO ESTABLISH A SEPARATE COURT OF CHANCERY

A. Colonial and Provincial Massachusetts

Prior to the American Revolution, the governments of Massachusetts made two attempts to provide equitable remedies through the courts. The colonial charter, granted by Charles I in 1628, gave the General Court both legislative and judicial powers.²⁴ Petitioners seeking relief in equity applied directly to the General Court.²⁵ The General Court became sufficiently overwhelmed by petitions that in 1685 it authorized the county courts to act as courts of chancery, with appeal to the intermediary courts of assistants, and then to the General Court.²⁶

The plan of 1685 was short-lived, however, because the High Court of Chancery in England had already cancelled the colonial charter in 1684.²⁷ William and Mary granted a new, provincial charter in 1691.²⁸ This charter empowered the General Court “to erect and constitute judicatories and courts of record, or other courts.”²⁹ The General Court subsequently passed an act establishing a court of chancery in 1692.³⁰ However, the Privy Council disallowed the act on

²⁴ SAMUEL ELIOT MORISON, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 7 (1917).

²⁵ Curran, *supra* note 6, at 271; Woodruff, *supra* note 6, at 170.

²⁶ Acts Respecting Courts, Their Powers and Duties § 18 [1685], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 93-94. The anonymous editors of this book arranged the colonial acts (i.e., acts passed before 1692) by subject. In this instance they collected all the colonial acts regarding courts into a single chapter and chronologically listed the acts as sections within the chapter.

²⁷ MORISON, *supra* note 27, at 9.

²⁸ The Charter of the Province of Massachusetts Bay in New England [1691], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 18-37.

²⁹ *Id.* at 31-32; GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 194-95 (Burlington, Vt., Goodrich 1858).

³⁰ An Act for the Establishing of Judicatories, and Courts of Justice, Within this Province [1692], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 222-23, as amended by An Act for a New Establishment and Regulation of the Chancery [1693], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 274-76.

the grounds that only the Crown could establish a court of chancery in the province.³¹ Thus, at the time of the American Revolution, no separate court of chancery had ever existed in Massachusetts.³²

B. The Commonwealth of Massachusetts

Massachusetts did not create a separate court of chancery after the Revolution. The men who framed the commonwealth's constitution in 1780 granted the General Court the same authority "to erect and constitute judicatories" that it had previously possessed under the provincial charter.³³ The General Court refrained from establishing a separate court of chancery.

After 1780 there were two significant attempts to set up a court of chancery in Massachusetts, both led by Joseph Story. In 1808 Story chaired a legislative committee that introduced a bill that would have established a separate court of equity.³⁴ The bill was read twice but denied a third reading.³⁵

³¹ 1 LEGAL PAPERS OF JOHN ADAMS xliii n.38 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereafter LEGAL PAPERS]; CHALMERS, *supra* note 29, at 195.

³² For another account of chancery in colonial Massachusetts, see Solon D. Wilson, *Courts of Chancery in America – Colonial Period*, 18 AM. L. REV. 226, 226-32 (1884).

³³ MASS. CONST. pt. I, art. III (1780).

³⁴ *Judiciary System*, COLUMBIAN CENTINEL (Boston, Mass.), Jan. 27, 1808, at [1] ("The committee on the subject of the Judiciary, having reported three bills [including] a third for erecting a Court of Equity . . . a motion was made, as the chairman of the committee (Mr. Story, of Salem,) was about to obtain leave of absence, that the bills might be taken up for general discussion."). For another reference to the bill in the press, see *Legislature of Massachusetts*, SUN (Pittsfield, Mass.), Jan. 23, 2008, at [2] (in section covering Sat., Jan. 16).

³⁵ *House of Representatives*, SALEM GAZETTE (Salem, Mass.), Feb. 5, 1808, at [1] ("A bill reported some time since, by Mr. Story, from the committee on the judiciary system, for the formation of a Court of Chancery, to provide 'relief in equity,' was read a second time, and denied a third reading."). In 1810 Erastus Worthington published an essay directed to legislators in an attempt to persuade them to establish a court of chancery, but this effort had no apparent effect. ERASTUS WORTHINGTON, AN ESSAY ON THE ESTABLISHMENT OF A CHANCERY JURISDICTION IN MASSACHUSETTS (Boston, Edward Oliver 1810).

Story tried again as a delegate at the state's constitutional convention in 1820. By then an associate justice of the United States Supreme Court, he chaired the convention's committee on the judiciary.³⁶ The committee proposed a resolution containing two amendments to the constitution: first, that a two-thirds vote of the General Court be required to remove judges and, second, that the legislature might establish "a supreme court of equity, distinct from the supreme court of law" if "the public good require[d] it."³⁷ The delegates vigorously debated the amendment regarding removal of judges and almost completely ignored the provision regarding the court of equity.³⁸

Only one delegate, Mr. Freeman of Sandwich, was recorded as mentioning the court of equity. He "would have been in favor of the whole resolution if that part of it relating to the power of establishing a supreme court of chancery, and court of appeals, had not been struck out."³⁹ The next day, Daniel Webster successfully moved to strike the resolution in its entirety and replace it with a new proposal for the removal of judges.⁴⁰ The provision for a court of chancery was either purposefully left out or lost in the legislative shuffle.

³⁶ JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS, BEGUN AND HOLDEN AT BOSTON, NOVEMBER 15, 1820, at 33 (Nathan and Charles Hale eds., Boston, Daily Advertiser 1858) [hereafter CONVENTION]. Story discussed his plan for the administration of equity in Massachusetts and responded to objections to a separate court of chancery in an article in the *North American Review* that has been attributed to him. See *On Chancery Jurisdiction*, 11 N. AM. REV. AND MISC. J. 140, 155-164 (1820) ("We have . . . a few words to say as to the question of the general utility of courts of equity . . . because if a convention be called to revise the constitution of this state, it is not improbable that a proposition will be made to provide for the distinct and independent establishment of such a court . . .").

³⁷ CONVENTION, *supra* note 36, at 138. For the committee's report, see *id.* at 136-37.

³⁸ *Id.* at 472-86.

³⁹ *Id.* at 477.

⁴⁰ *Id.* at 489.

Story was not present on the first day of the debate because he was ill.⁴¹ When he returned, Story was distracted by a tiff with Webster, who made an oblique reference to Story's simultaneous participation in politics and service on the federal Supreme Court.⁴² Story's absence and subsequent inattention may have contributed to the resolution's failure.

Concern about expense and delay in the English Chancery proceedings may have also discouraged legislators in Massachusetts from establishing such a court.⁴³ In the early nineteenth century, the popular press published a variety of anecdotes ridiculing the Court of Chancery in England.⁴⁴ For example, in the fall of 1819 this jest circulated in several newspapers in Massachusetts: "When the question was agitated in London, which would be the best site to put

⁴¹ *Id.* at 480.

⁴² *Id.* at 523-524.

⁴³ For accounts of the expense and delay of chancery, see A.H. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950*, at 137-38 (1980); Charles Synge Christopher, *Progress in the Administration of Justice During the Victorian Period*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 523-27 (John Henry Wigmore et al. eds. 1907). See also Woodruff, *supra* note 6, at 183 ("The grounds of argument most convincing with laymen of the opposition [to a separate court of chancery] were those unfailing ones – delay and expense – which the general public can understand without having a technical knowledge of the methods and remedies of equity jurisprudence.").

⁴⁴ See, e.g., *Court of Chancery*, NEW-ENGLAND GALAXY & MASONIC GAZETTE (Boston, Mass.), Sept. 8, 1820, at [4] ("Court of Chancery: When Mr. Erksine was one day pressing the cause of a client with great earnestness, in the Court of King's Bench, Lord Ellenborough, a little provoked at his perseverance, observed to him that his client might carry his case into chancery. Has your lordship, replied Mr. Erksine, the heart to send a fellow creature there? The force of Mr. Erksine's observation will be understood from the case of Sir Watkin Lewis. [He has a case] now in the high court of chancery, that has been pending 47 years. . . . The English papers mention this case without any marks of censure or surprise. The truth is, that such occurrences are too common in England to excite wonder. And yet there are people in this country who would persuade us that the English system of law 'is the most stupendous fabric of wisdom that was ever reared by the genius of man.'") (also published at *Court of Chancery*, BERKSHIRE STAR (Stockbridge, Mass.), Oct. 26, 1820, at [2]); *Bishop Warburton's Opinion of the Court of Chancery*, HAMPDEN PATRIOT (Springfield, Mass.), Nov. 25, 1819, at [4] ("Bishop Warburton's [presumably William Warburton (1698-1779), Bishop of Gloucester (1760-1779)] opinion of the court of Chancery: 'As unfit as I am for heaven, I had rather hear the last trumpet than a citation from the Court of Chancery. If ever you have seen Michelangelo's Last Judgment, you have there, in the figure of the Devil, who is pulling at a poor sinner, the true representation of a chancery lawyer, who has caught hold of your purse.'").

Napoleon, so that he could not get out . . . a gentleman, who had a suit long depending, advised ministers to put him in a court of chancery.”⁴⁵

Another concern that may have influenced legislators in Massachusetts was the fear that such a court might diminish the right to trial by jury enshrined in the commonwealth’s constitution.⁴⁶ The legislators may also have been prejudiced against creating a separate court of chancery because of the historic connection of the English Court of Chancery with the prerogative power of the king.⁴⁷ It is also possible that legislators were wary of a separate court of chancery because they were ignorant of the nature of equity jurisprudence.⁴⁸

⁴⁵ *A Safe Place to Keep Napoleon*, BERKSHIRE STAR (Stockbridge, Mass.), Oct. 14, 1819, at [4]; *A Safe Place to Put Napoleon*, HAMPDEN FEDERALIST (Springfield, Mass.), Sept. 29, 1819, at [4]; *A Safe Place to Put Napoleon*, BOSTON INTELLIGENCER AND EVENING GAZETTE (Boston, Mass.), Sept. 4, 1819, at [4]; *Court of Chancery*, BOSTON COMMERCIAL GAZETTE (Boston, Mass.), Sept. 2, 1819, at [4].

⁴⁶ MASS. CONST. pt. I, art. XV (1780) (“In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury”); CHAFEE, JR., ET AL., *supra* note 5, at 10-11; WORTHINGTON, *supra* note 35, at 86 (“If [the opponents of a separate court of chancery] believe [the court’s] creation will impair the right of trial by jury, let them show the manner in which this will be done.”); Joseph Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 22 (1921) (“The situation at about the time of the American Revolution was that Judges in the North were still regarded as tools of the King and as enemies of the popular will. . . . [I]n the North the Judges were very unpopular; the jury was looked on as the representative of the real will of the people, and it became the purpose of statesmanship to throw everything possible into the hands of the jury. . . . [I]n the North at least the people were very jealous of giving any jurisdiction to the Court of Equity, there being no jury in that Court.”).

⁴⁷ CHAFEE, JR., ET AL., *supra* note 5, at 10; Curran, *supra* note 6, at 272 (“A court of chancery was regarded as part of a king’s prerogative, unsuitable for a democratic state. The people believed chancery to be inextricably bound to monarchy and tyranny.”); Walsh, *supra* note 5, at 151 (“In Massachusetts the original fear of chancery courts administered by royal governors and the distrust of law coming so directly from the king, which together with the Crown’s denial of the authority of the colonial assembly to establish such courts had prevented the establishment of courts of equity in the colony, resulted in such a marked prejudice against equity in the popular mind, based on ignorance of its nature and purpose, that every effort to establish a general equity jurisdiction in the courts of that state failed”).

⁴⁸ Walsh, *supra* note 5, at 151; *see also* Woodruff, *supra* note 6, at 183 (“The great reason for the obstruction [of efforts to establish a separate court of chancery], from the time when the subject first came to the attention of the state legislature, was undoubtedly the wide-spread ignorance of

The legislators may have declined to support a separate court of chancery in Massachusetts because they did not see a need for one. When the commonwealth's constitutional convention met in 1820, the Supreme Judicial Court could already enforce trusts and grant specific performance.⁴⁹ By 1836 the court possessed the essential features of English equity, as well as some forms of equity that originated outside the English Court of Chancery. Story's efforts to institute a separate court of chancery may have come too late; by the time he took up the cause of a separate court of chancery, the gradual accumulation of equity in the common law courts of Massachusetts had been underway for more than a century.

the true nature of equity jurisprudence. . . . From the general ignorance of the nature of equity jurisprudence arose the common belief that the abuses in equity were immanent in the system itself and were not merely remediable defects of its administration.”).

⁴⁹ See *infra* notes 136-38 and accompanying text.

PART II: EQUITY IN MASSACHUSETTS BEFORE THE REVOLUTION

The gradual accumulation of English equity in Massachusetts began in the 1690s. During that decade, the General Court promulgated laws regarding chancering of penal bonds, settlement of estates, guardianship of minors and lunatics, the equity of redemption of a mortgaged estate, and the taking of depositions *de bene esse* and *in perpetuam rei memoriam*. In 1713 the legislature passed an act allowing debtors to redeem lands taken in execution for debts. An act of 1758 authorized the use of trustee process in the province.

A. 1692: Chancering Penal Bonds

In the act of 1692 “for the establishing of judicatories, and courts of justice” in the province, the General Court authorized any justice of the provincial judicial courts to “chancer” penal bonds.⁵⁰ A penal bond was a conditional obligation requiring the obligor to perform an act or forfeit a sum of money.⁵¹ For example, a bond could require the obligor to repay a principal sum of money, borrowed from the obligee, with interest.⁵² By chancering a bond, a court relieved a defaulting debtor from the forfeiture due under the bond.⁵³ The Court of Chancery in

⁵⁰ See COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 222-23. The provision for chancering was included in the same section providing for the separate court of chancery that had been disallowed by the Privy Council. *Id.* See also “Chancer,” in 1 JOHN BOUVIER, BOUVIER’S LAW DICTIONARY 456 (Francis Rawle, ed., 8th ed., 3d rev. 1914).

⁵¹ WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 61 (2d ed. 1994) (“A penal bond consisted of the bond itself, promising to pay a specified sum of money on a specified date, and a condition promising performance of some other promise prior to that date and providing that the promise in the bond would be void if the promise in the condition were so performed.”). Regarding the history of penal bonds in England, see A.W.B. Simpson, *The Penal Bond with Conditional Defeasance*, 82 L.Q. REV. 392 (1966).

⁵² “Bond,” in 1 BOUVIER, *supra* note 50, at 375.

⁵³ NELSON, *supra* note 51, at 61 (noting that if the penal sum was “in excess of a plaintiff’s ‘just debt and damages,’ a defendant could petition the court to exercise chancery powers conferred

England provided relief against penal bonds from the fifteenth century,⁵⁴ however, the term “chancering” appears to have originated in New England.⁵⁵

B. 1692-94: Settlement of Estates and Guardianship

In 1692 the provincial government also passed a law regarding the settlement of estates. The General Court authorized “the judge of probate of wills and granting of administrations” in each county to “call [an] administrator[] to account for and touching the goods of an intestate” and distribute the intestate’s assets according to the provisions of the act.⁵⁶ An later act, passed in 1752, required an executor of an estate “to stand accountable to the judge of probate . . . for and concerning the estate of the testator in his or her hands or possession, and touching his or her proceedings in discharge of said trust”⁵⁷

In the 1690s, the newly-formed provincial government also passed laws regarding the guardianship of minors and of “idiots and distracted persons.”⁵⁸ In 1693 the General Court empowered “the judge of probate in each county . . . to allow guardians that shall be chosen by

by statute and to reduce the damages to a just amount, namely, the value of the performance promised in the condition to the bond.”); Simpson, *supra* note 51, at 415.

⁵⁴ Simpson, *supra* note 51, at 416.

⁵⁵ According to *Bouvier’s Law Dictionary*, the practice of “chancering” bonds “arose in parts of New England at a time when the courts had no equity jurisdiction, and were sometimes compelled to act upon equitable principles.” “Chancer,” in 1 BOUVIER, *supra* note 50, at 456.

⁵⁶ An Act for the Settlement and Distribution of the Estates of Intestates [1692], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 230. The act of 1692 contained the earliest statutory reference to judges of probate in Massachusetts. The laws of the prior, colonial government authorized the magistrates of county courts “to make probate of any will of any deceased party” and “to grant administration.” Acts Respecting Wills and the Distribution of Intestate Estates § 1 [1649], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 204.

⁵⁷ An Act for Further Regulating the Proceedings of the Courts of Probate Within this Province [1752], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 592.

⁵⁸ An Act for the Relief of Idiots and Distracted Persons [1694], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 276-77; An Act for the Explaining and Altering of Some Clauses and Sentences, and the Repealing of Some Others Contained in Several Acts Made and Passed at the Second Session of this Court in October Last [1693] [hereafter Explaining and Altering Act], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 253 (guardianship of minors).

minors of fourteen years of age, and to appoint guardians for such as shall be within that age”⁵⁹ An act of 1694 directed the selectmen or overseers of the poor in each town “to take effectual care” of any “impotent or distracted person” in their jurisdiction.⁶⁰ However, this act did not prescribe a process for deciding whether or not a person was mentally disabled.⁶¹ In 1735 the legislature authorized the judge “for the probate of wills and for granting letters of administration” in each county to determine whether a person was “an idiot or distracted.”⁶² In the same act, the legislature provided that a judge of probate could “administer an oath unto any person . . . probably suspected of making any concealment, embezzlement or conveying away” the assets of an “idiot, non compos, lunatic or distracted person.”⁶³

C. 1695: Depositions De Bene Esse and In Perpetuam Rei Memoriam

Depositions in the equity tradition differed from the oral deposition authorized by the Federal Rules of Civil Procedure.⁶⁴ In the equity tradition, the purpose of the deposition was to bring witness testimony before a court.⁶⁵ A court-appointed officer took the testimony of a

⁵⁹ Explaining and Altering Act, in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 253.

⁶⁰ An Act for the Relief of Idiots and Distracted Persons [1694], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 276. The act further provided that the “justices of the peace within the same county, at their general sessions, [could] order and dispose the estate of such impotent or distracted person.” *Id.* at 277. The “superior court of judicature” had to approve the sale a distracted person’s housing or land. *Id.*

⁶¹ An Act in Further Addition to an act, Intituled “An Act for the Relief of Idiots and Distracted Persons” [1736], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 515 (noting that there was “no method prescribed in the said act [of 1693] how it may be inquired of and known whether the person said to be a lunatic, idiot, or non compos be so or not”).

⁶² An Act in Further Addition to an Act, Intituled “An Act for the Relief of Idiots and Distracted Persons” [1736], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 515

⁶³ *Id.* at 516.

⁶⁴ See FED. R. CIV. P. 30; FED. R. CIV. P. 32; Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1206 (2005) (comparing “modern” depositions and depositions “in the equity tradition”).

⁶⁵ Kessler, *supra* note 64, at 1206.

witness by recording the witness's replies to written interrogatories and then submitting the written record to the court.⁶⁶

In 1695 the General Court passed a law "for taking of affidavits out of court."⁶⁷ The "affidavits" described in the act appear to have been much like depositions *de bene esse* and *in perpetuam rei memoriam* in English equity.⁶⁸ The first kind of affidavit addressed by the act closely resembled a deposition *de bene esse*.⁶⁹ The act of 1695 provided that when a witness in a civil cause might become unable to testify in court "by reason of [his or her] going to sea, living more than thirty miles distant from the place where the cause [was] to be tried, age, sickness, or other bodily infirmity," a justice of the peace (JP) could "take [an] affidavit[] out of court."⁷⁰

⁶⁶ *Id.*

⁶⁷ An Act for Taking Affidavits Out of Court [1695], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 288-89. The text of this act can be found in the appendix.

⁶⁸ See 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 681 (Philadelphia, Lee & Blanchard 1846) (discussing "the jurisdiction exercised [by the English Court of Chancery] for obtaining and recording the evidence of witnesses whose testimony was likely to be lost before any trial could be had of an existing or anticipated question, or what [was] called taking the examination of witnesses *de bene esse* and *in perpetuam rei memoriam*").

⁶⁹ For descriptions of depositions *de bene esse*, see, e.g., Rule LXX, Rules of Practice for the Courts of Equity in the United States (1842), 42 U.S. (1 How.) xlii, lxiii (1843); Rule XXIV, Rules of Practice for the Courts of Equity in the United States (1822), 20 U.S. (7 Wheat.) v, x (1822); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING §§ 307-310 (Boston, Little Brown, 2d ed. 1840) [hereafter STORY, EQUITY PLEADING]; 2 MADDOCK, *supra* note 10, at 250 ("[W]here after a suit is commenced, but before, in the regular course of proceedings the Witnesses can be examined, their testimony is likely to be lost, the court, on motion . . . will grant a commission to examine such Witnesses *de bene esse* . . ."); Kessler, *supra* note 64 at 1205 n.125 (describing the use of depositions *de bene esse* in the federal courts in the nineteenth century); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. REV. 691, 698 (1998) [hereafter Subrin, *Discovery*] (also describing the use of depositions *de bene esse* in the federal courts in the nineteenth century).

⁷⁰ An Act for Taking Affidavits Out of Court [1695], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 288.

The purpose of the affidavit was to allow the “witness[] indifferently [to] testify [his or her] certain knowledge and the whole truth in the cause [he or she was] to speak unto.”⁷¹

The statute required the JP to notify the adverse party of the time and place of taking the affidavit.⁷² The adverse party could “be present at the time of taking [the] affidavit, if he [thought] fit.”⁷³ The law stated that “every such witness [should] be carefully examined and cautioned to testify the whole truth, and . . . sworn.”⁷⁴ The statute further stipulated that “no person interested [should] write or draw up the testimony of any witness in such cause, nor any attorney in his client’s cause.”⁷⁵ The law instructed the JP to return the affidavit under seal to the court.⁷⁶

The law of 1695 also allowed two JPs to take “affidavits relating to the possession of any house or lands, or any other matter, *in perpetuam rei memoriam*.”⁷⁷ The statute did not describe a procedure for this kind of affidavit.⁷⁸

D. 1698: Equity of Redemption for Mortgagors

In 1698 the General Court passed an act “for hearing and determining of cases of equity” that empowered the provincial courts to grant the equity of redemption to mortgagors.⁷⁹ The act noted that the practice of chancering penal bonds was “found to give great ease and satisfaction

⁷¹ *Id.*

⁷² *Id.* at 288-89.

⁷³ *Id.* at 289. The law did not state explicitly whether or not the adverse party could cross-examine the witness. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ An Act for Hearing and Determining Cases in Equity [1698], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 324-26. The text of this act can be found in the appendix.

unto his majesty's subjects."⁸⁰ The act further stated that the General Court had received "applications" for "further provision . . . for relief in equity, in cases not relievable by the rules of the common law" ⁸¹

The act of 1698 accordingly authorized the provincial courts to grant the equity of redemption, a remedy available in the English Court of Chancery, to mortgagors.⁸² This remedy allowed a mortgagor to redeem the mortgaged lands by performing the condition of the mortgage after the scheduled time for payment had run. By the act of 1698, a provincial court in Massachusetts could make a judgment in a real action for foreclosure conditional for two months, during which time the mortgagor could prevent execution and retain the property by discharging the debt owed to the mortgagee.⁸³ Once the mortgagee took possession of the property, the mortgagor could still reclaim it within three years "by tendering payment of the original debt and damages, or such part thereof as was remaining unpaid, at the time of [the mortgagee's] entry."⁸⁴ The statute instructed the court to calculate the final sum due by the mortgagor to the mortgagee, taking into account "disbursements . . . laid out [by the mortgagee]

⁸⁰ *Id.* at 324.

⁸¹ *Id.*

⁸² For the origins of the equity of redemption in the High Court of Chancery in England, see R.W. TURNER, THE EQUITY OF REDEMPTION 27-30 (1931).

⁸³ An Act for Hearing and Determining Cases in Equity [1698], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 324 ("[I]n real actions upon mortgage . . . the judgment [against the mortgagor was] to be conditional [so] that the mortgagor or vendor, or his heirs, executors and administrators [could] pay unto the plaintiff such sum as the court . . . determine[d] to be justly due thereupon, within two months time . . .").

⁸⁴ *Id.* at 325. A later act made the equity of redemption of mortgages attachable. An Act in Explanation of and Further Addition to the Act for Making Lands and Tenements Liable to the Payment of Debts [1735], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 501. The legislature may have promulgated the act of 1735 in response to the Debt Recovery Act passed by the British Parliament in 1732. See *infra* note 86.

on [the redeemed] housing or lands for the advancement and bettering of the same, over and above what the rents profits or improvements thereof made . . . amount[ed] unto.”⁸⁵

E. 1713: Equity of Redemption for Debtors

In 1713 the General Court passed an act allowing a debtor to redeem his or her land or tenement when it was levied or taken in execution for debt.⁸⁶ The act noted that a provincial law promulgated in 1696 made the lands and tenements of debtors “liable to the payment of debts.”⁸⁷ According to the text of the act of 1713, a debtor was often then “without remedy to recover his estate back” when “through the perverseness of [a] creditor or corruption of [an] officer,

⁸⁵ An Act for Hearing and Determining Cases in Equity [1698], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 325.

⁸⁶ An Act in Addition to the Act for Making Lands and Tenements Liable to the Payment of Debts [1713], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 401. The equity of redemption for debtors may have been limited or suspended in provincial Massachusetts after 1732, when the British Parliament passed the Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America (the Debt Recovery Act). Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 *HARV. L. REV.* 385, 390 (2006) (“[I]n most colonies, debtors' equity rights to redeem real property after a mortgagee had obtained a legal judgment on a mortgage were either strongly curtailed or abolished [following passage of the Debt Recovery Act]. The Debt Recovery Act required that courts sell land, houses, and slaves to satisfy debts according to the same procedures used for chattel property. Often this was interpreted as requiring land to be sold during the process of execution at law, with the purchaser obtaining a fee simple title interest, free of familial redemption rights.”). *See also* An Act in Explanation of and Further Addition to the Act for Making Lands and Tenements Liable to the Payment of Debts [1735], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 501 (making the equity of redemption of mortgages attachable). The legislature of the Commonwealth of Massachusetts passed an act permitting the equity of redemption for debtors in 1783. *See infra* notes 103-04 and accompanying text.

⁸⁷ An Act in Addition to the Act for Making Lands and Tenements Liable to the Payment of Debts [1713], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 401. For the act of 1696, *see* An Act for Making of Lands and Tenements Liable to the Payment of Debts [1696], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 292.

executions for small sums [were] laid on part of [the debtor's] housing and lands . . . in such manner as grievously to discommode or spoil the remainder.”⁸⁸

In order to mitigate the harsh consequences of the act making land and tenements liable to execution, the act of 1713 gave a debtor, or the debtor's heirs, one year from the levying of an execution “to bring his suit against the creditor, or [the creditor's] heirs or tenant in possession, and recover back [the debtor's] estate, upon paying the full sum for which the same was taken, with interest from that time.”⁸⁹ The act directed the court to consider the rents the creditor had collected from the estate and the sums he had expended “for repairing or bettering” of the estate in order to compute the final sum due by the debtor to the creditor in a manner “agreeable to the provision made in the act for equity of redemption of estates upon mortgage forfeited for the condition broken.”⁹⁰

F. 1758: Trustee Process

In 1758 the legislature passed an act “to enable creditors to receive their just debts out of the effects of their absent or absconding debtors.”⁹¹ This act introduced into Massachusetts a practice that came to be known as trustee process.⁹² Trustee process allowed a creditor to reach

⁸⁸ An Act in Addition to the Act for Making Lands and Tenements Liable to the Payment of Debts [1713], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 401.

⁸⁹ *Id.*

⁹⁰ *Id.* The act of 1713 also included a section regarding the equity of redemption for mortgagors, specifying that the time of commencement of the three years for redemption should “be reckoned and accounted from the time of the mortgagee's entry into and taking possession of [the] forfeited estate . . .” *Id.* at 402.

⁹¹ An Act to Enable Creditors to Receive Their Just Debts Out of the Effects of Their Absent or Absconding Debtors [1758] [hereafter Absent Debtors Act], in *COLONIAL AND PROVINCIAL LAWS*, *supra* note 22, at 614-17.

⁹² The act of 1758 does not use the term “trustee process.” However, Luther Stearns Cushing, in his treatise on trustee process, stated that “the statute of 1794, c. 65, which . . . provides and regulates the proceedings in what is commonly called the Trustee Process” was a “revision of the provincial statute of 32 Geo. 2, c. 2 [1758], with some additions and alterations . . .” LUTHER

assets that were protected from common law attachment, for example assets transferred by a debtor to a third party and debts due to a debtor.⁹³ According to the act of 1758, a creditor entitled to certain writs of action against a “person absconding or absent” out of the province could attach the absent person’s goods.⁹⁴ If the “absent or absconding” debtor left “his goods or effects . . . in the hands of his attorney, factor, agent or trustee” such that the goods could not “be exposed to view, or . . . be come at so as to be attached,” then the creditor could file a writ of declaration against the debtor in the court of common pleas located in the county where the

STEARNS CUSHING, A PRACTICAL TREATISE ON THE TRUSTEE PROCESS, OR FOREIGN ATTACHMENT OF THE LAWS OF MASSACHUSETTS AND MAINE 2 (Boston, Hilliard Gray 1833).

⁹³ SAMUEL HOWE, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN MASSACHUSETTS 62-66 (Richard S. Fay and Jonathan Chapman eds., Boston, Hilliard Gray 1834); CUSHING, *supra* note 92, at 1-2 (“[The ordinary right of attachment] does not extend to debts due to [defendants], or to such goods or estate as they may have concealed or entrusted in the hands of others, and which are so situated that they cannot be taken into the custody To enable creditors to reach and appropriate such property of their debtors is the object of the statute [of Massachusetts] of 1794, c. 65, which, for that purpose, provides and regulated the proceedings in what is commonly called Trustee Process.”).

⁹⁴ Absent Debtors Act [1758], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 614. The relevant writs of action were “debt, detinue, account, covenant or case, in trover, indebitatus assumpsit, [and] express contract.” *Id.*

trustee resided.⁹⁵ The court could then summon the trustee “to defend the suit on behalf of his principal throughout the course of the law.”⁹⁶

Trustee process was Massachusetts’ version of foreign attachment, which was a remedy peculiar to urban courts such as the Lord Mayor’s Court in London.⁹⁷ The Lord Mayor’s Court

⁹⁵ *Id.* at 614-15. According to Cushing, “the trustee process [was] the only remedy for creditors . . . not party” to a voluntary assignment between a debtor, his assignee, and rival creditors. CUSHING, *supra* note 92, at 84. In the absence of a system of bankruptcy in Massachusetts, the practice of voluntary assignments became “the ordinary mode of adjustment between debtor and creditor.” *Id.* at 80. In a voluntary assignment, a debtor assigned property to an assignee for the payment of debts due to creditors who consented to the terms and conditions the instrument that created the assignment. While voluntary assignment ensured a proportionate distribution of a debtor’s goods among creditors who were party to the assignment, the practice still left any creditor who was not party to the assignment without a remedy. *Id.* at 80-82. Trustee process made an assignee answerable to the plaintiff for any surplus beyond the debts for which the property was assigned. In other words, if an assignee held personal chattel worth \$100 in order to satisfy debts totaling \$75, a plaintiff could use the trustee process to reach the surplus of \$25. *Id.* at 84.

⁹⁶ Absent Debtors Act [1758], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 615. Trustee process, as applied in Massachusetts, differed in at least one respect from the marshalling of assets in the English Court of Chancery. In 1829 the Supreme Judicial Court determined that it could not compel assignees who held both chattel property and choses in actions to pay one group of creditors out of the chattel property and another set of creditors out of the debts that would eventually be collected on the choses in action. *Lupton v. Cutter*, 25 Mass. (8 Pick.) 298, 313 and 316 (1829) (“The plaintiff [asks] the Court so to mold this process as to oblige the assignees to pay the creditors, for whom they hold in trust, out of the proceeds of the debts assigned to [the trustees], so as to relieve the goods, which were in their hands under the assignment, from the trust, and thus subject [the assignees] to this process, by analogy to the principle of marshalling assets, which is known and practiced in courts of equity Considering . . . the long practice under the statute, during which the principle now set up has not been advanced, we do not think ourselves authorized to adopt it.”). The court noted that its predecessors could “have availed themselves of well settled principles of equity” to construe the trustee process statute of 1794 (which replaced the statute of 1758) in a manner analogous to the marshalling of assets. *Id.* at 313-14; for the statute of 1794, see *infra* note 120 and accompanying text.

⁹⁷ 1 MODERN LAW DICTIONARY BY THE EDITORS OF THE *LAW CHRONICLE* 32 (London, Day 1860) (defining foreign attachment as “a peculiar and ancient remedy open to creditors within the jurisdiction of the city of London, Exeter, and some other ancient cities, by which they are enabled to satisfy their own debts by attaching or seizing the money or goods of their debtor in the hands of a stranger or third party within the jurisdiction of such city.”). Foreign attachment was also available in many maritime towns in Europe, and the practice may have come to Boston because the city was a major port. ALEXANDER PULLING, A PRACTICAL TREATISE ON THE LAWS,

was a court of law and equity.⁹⁸ According to Alexander Pulling, who published a treatise on the laws of the city of London in 1842, the court's equitable jurisdiction "comprehend[ed] all subjects usually cognizable in the [English] Court of Chancery."⁹⁹ The Lord Mayor's Court was to exercise its equity jurisdiction only when "it appear[ed] that the Court of Chancery would aid the plaintiff" in an action.¹⁰⁰ The Lord Mayor's Court offered "the advantage to the citizens of an expedition and inexpensive court of equity"¹⁰¹ However, the court engaged in a "limited amount of business" on its equity side, probably because of "the facility with which causes [were] removable from thence by *certiorari*, into the High Court of Chancery."¹⁰²

CUSTOMS, AND REGULATIONS OF THE CITY AND PORT OF LONDON 188 (London, Stevens and Norton 1842) ("This customary mode of proceeding still exists in other ancient cities and towns in England [besides London], as Bristol, Exeter, Lancaster, and in most maritime towns on the continent of Europe."). See also 4 WILLIAM CHARLES WHITE, COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS 1268 (Boston, Munroe Francis & Parker 1809-11) ("In this state there is a process given by statute, in imitation of the Foreign Attachment of the English Law; whereby a creditor may attach any property or credits of his debtor in the hands of a third person. This third person is called in the English law, the *garnishee*: in our law he is called the *trustee*."). The Supreme Judicial Court of Massachusetts did not regard trustee process as part of the common law. *Black v. Black*, 21 Mass. (4 Pick.) 234, 249 (1826) ("If *the common law, or the trustee process*, will not reach such a case, it only shows that there is yet a defect in the laws, which can be supplied only by the legislature.") (emphasis added).

⁹⁸ PULLING, *supra* note 97, at 177.

⁹⁹ *Id.* at 195.

¹⁰⁰ *Id.* at 199.

¹⁰¹ *Id.* at 195 ("The lord mayor's court also has an equitable jurisdiction over all the controversies arising within the city and liberties, resembling in a great deal that of the Court of Chancery.").

¹⁰² *Id.* at 199 n.(a).

PART III: EQUITY IN MASSACHUSETTS AFTER THE REVOLUTION

In the 1780s and 1790s the General Court passed a series of acts maintaining the laws regarding equity that had been in force in Massachusetts during the provincial period. In 1817 the legislature promulgated the first of a series of important acts that allowed the Supreme Judicial Court to enforce trusts, grant specific performance and injunctions, hear multiparty suits, and entertain bills of discovery. By 1836 the Supreme Judicial Court could perform all four essential functions of the English Court of Chancery.

A. 1780s-1790s: Revisiting Old Laws

The General Court of the Commonwealth of Massachusetts held its first legislative session in 1780. Over the next eighteen years, the General Court revised and supplemented the laws regarding settlement of estates, guardianship, trustee process, the equity of redemption, chancering bonds, and depositions.

1. Redemption and Chancering Bonds

The legislature passed laws regarding the equity of redemption in 1783 and 1785.¹⁰³ The act of 1783 allowed a debtor to redeem land taken in execution within one year of the date of

¹⁰³ The legislature may have passed laws regarding the equity of redemption in 1783 and 1785 in response to the economic circumstances that led to Shay's Rebellion. GEORGE RICHARDS MINOT, *THE HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS* 13 (Boston, James W. Burditt 1810) ("Another effect of the war which was exceedingly operative in the commotions that took place in Massachusetts, if it may not be called their primary cause, was the accumulation of private debts."); Priest, *supra* note 86, at 447 ("In the late 1780s, debtors' movements such as Shay's Rebellion in Massachusetts led state legislatures to enact laws temporarily relieving debtors of the severity of the remedial regime that treated land as legally equivalent to chattel property."); Claire Priest, Note, *Colonial Courts and Secured Credit: Early American Commercial Litigation and Shay's Rebellion*, 108 *YALE L.J.* 2413 (1999) (describing the economic context of Shay's Rebellion). See also Jonathan M. Chu, *Debt Litigation and Shay's Rebellion*, in *IN DEBT TO SHAY'S: THE BICENTENNIAL OF AN AGRARIAN REBELLION* 81 (Robert A. Gross ed., 1993) (suggesting that the court system in Massachusetts in the 1780s favored debtors rather than creditors).

execution.¹⁰⁴ The act also allowed a debtor to redeem the rents and profits of an estate for life levied on execution by paying the sum due to the creditor at any point before the debt with interest was satisfied by the rents and profits of the estate.¹⁰⁵ The act of 1785, entitled “an act giving remedies in equity,” amended the equity of redemption for mortgagors by requiring two witnesses to confirm a mortgagee’s “peaceable and open entry” on the mortgaged estate so that the court could more easily ascertain the commencement of the three-year period for redemption.¹⁰⁶ This act also preserved the practice of chancering penal bonds.¹⁰⁷

2. Settlement of Estates and Guardianship

¹⁰⁴ STAT. 1783 c. 57 § 3. The equity of redemption for debtors may have been curtailed or suspended in Massachusetts from the passage of the Debt Recovery Act by the British Parliament in 1732 to the promulgation of the act of 1783. *See supra* note 86. For another act of Massachusetts regarding the equity of redemption for debtors, *see* REV. STAT. c. 73 §§ 27-29 (1836) (allowing a debtor to bring a bill in equity for redemption).

¹⁰⁵ STAT. 1783 c. 57 § 3.

¹⁰⁶ STAT. 1785 c. 22. For an earlier act regarding the commencement of the period for redemption, *see supra* note 90 and accompanying text. An act of 1798 replaced the act of 1698 that authorized the equity of redemption in the commonwealth and the act of 1735 that made the equity of redemption for mortgagors attachable by creditors. STAT. 1798 c. 77; *see also supra* notes 79-85 and accompanying text (discussing the original statutes). The act of 1798 also allowed a mortgagor’s equity of redemption in a piece of real estate to be attached and sold at auction. STAT. 1798 c. 77. After 1818, a mortgagor could bring an action to recover a sum overpaid to a mortgagee if the overpayment occurred because the mortgagee did not accurately report the rents he received from the mortgaged property. STAT. 1818 c. 98; *see also* Wood v. Felton, 26 Mass. (9 Pick.) 171, 177 (1829) (“[T]here is a count for money had and received, and if the plaintiff has overpaid the debt secured by the mortgage, he is, in virtue of the St. 1818, c. 98, § 3, entitled to recover such excess in this form of action.”). In 1826, the Supreme Judicial Court found that if a mortgagor commenced process to regain his property but died before the court issued a decree, his heirs could bring a bill of revivor to renew the suit. Putnam v. Putnam, 21 Mass. (4 Pick.) 139, 140 (1826) (“[T]here is no necessity, because by the common law, suits will be lost by the death of the plaintiff or defendant that the same inconvenient rule should be applied to this process . . .”). All the acts promulgated before 1836 regarding redemption of mortgages were incorporated into REV. STAT. c. 107 (1836).

¹⁰⁷ STAT. 1785 c. 22.

In 1784 the legislature established courts of probate in every county.¹⁰⁸ As before, these courts were responsible “for taking the probate of wills, and granting administrations on the estates of persons deceased . . . , for appointing guardians to minors, idiots, and distracted persons; [and] for examining and allowing the accounts of executors, administrators or guardians.”¹⁰⁹ The judges of probate had “full power and authority to make out such process or processes, as [they found] needful for the discharge of the trust reposed” in them.¹¹⁰

¹⁰⁸ STAT. 1783 c. 46. The court also passed an act “directing the descent of intestate estates” that year. STAT. 1783 c. 36. Before 1784, Massachusetts had judges of probate. MASS. CONST. pt. III, art. IV (1780) (providing that “the judges of probate . . . [should] hold their courts at such place or places, on fixed days, as the convenience of the people shall require.”). According to Chief Justice Parsons of the Supreme Judicial Court, in the provincial era “the judges of probate were considered as surrogates of the governor and council, who derived from the royal charter the authority to prove wills and to grant administrations.” *Wales v. Willard*, 2 Mass. (1 Tyng) 120, 120 (1806). A provincial act to establish “Courts of Probate in the several counties” had been “negated by the king.” *Id.*

¹⁰⁹ STAT. 1783 c. 40 § 1. Statutes describing the general power of executors and administrators included STAT. 1783 c. 32 §§ 1-4; STAT. 1783 c. 36; STAT. 1784 c. 2.; STAT. 1788 c. 51 §§ 1-5; STAT. 1788 c. 66. Statutes regarding the potential liabilities of executors and administrators included STAT. 1783 c. 24; STAT. 1786 c. 55 § 2; STAT. 1788 c. 47; STAT. 1788 c. 66. Statutes governing guardians included Stat. 1783 c. 38 (empowering judges of probate to appoint guardians); STAT. 1786 c. 55 § 2 (guardians’ liabilities and privileges); STAT. 1788 c. 66 (limiting the time within which suits could be brought against them); STAT. 1789 c. 46 (general liabilities and privileges); STAT. 1806 c. 102 (could be appointed to drunkards and idlers); STAT. 1818 c. 60 (providing that once complaint requesting a guardian for someone was filed with probate court, any transfer of property by person for whom guardian was requested was void); STAT. 1818 c. 112 (allowing guardians of spendthrifts to sell whole of real estate when partial sale would injure the residue); STAT. 1823 c. 146 (permitting a married woman to join with guardian of her husband in selling real estate). An act of 1817 entitled “An act to regulate the jurisdiction and proceedings of the courts of probate” synthesized prior acts regarding courts of probate, including the appointment and powers of judges, the Supreme Court of Probate, the processes of the courts of probate, and their regulation of executors, administrators, trustees, and guardians. STAT. 1817 c. 190.

¹¹⁰ STAT. 1783 c. 40 § 2. This included the power to issue writs of *scire facias* by which executors and administrators could be summoned, and the goods and estate of the deceased attached. STAT. 1784 c. 28. Judges of probate were also empowered to make partition in certain cases. STAT. 1783 c. 36; *see also* STAT. 1817 c. 190 (allowing judges of probate to cause division of real estate or assignment of dower). After 1789 a judge of probate could assign a referee to settle the accounts of executors and administrators. STAT. 1789 c. 11. An act of 1809 authorized judges of probate to remove executors, guardians, and administrators who had

The act of 1784 also designated the Supreme Judicial Court as the Supreme Court of Probate.¹¹¹ Its appellate jurisdiction included “all matters determinable by the judges of probate, in their respective counties; and all appeals from any order or decree of a judge of probate.”¹¹² The court also had original jurisdiction over “all matters wherein the judge of probate of any county [was] a party, or interested.”¹¹³

In 1783 the legislature granted the Supreme Judicial Court the power to compel performance in a particular situation related to the settlement of estates. The court could grant license to an executor or administrator to convey real estate in pursuance of a contract made by a deceased person upon the application of the person with whom the contract was made, so long as the person requesting conveyance had either performed his or her part of the contract or was prepared to do so.¹¹⁴

“become insane or otherwise incapable of discharging the trusts reposed in them.” STAT. 1809 c. 84. Judges of probate could also order personal property of wards and *cestui que trust* to be invested in stock. STAT. 1817 c. 190.

¹¹¹ STAT. 1783 c. 40 § 31.

¹¹² *Id.* See, e.g., *Winship v. Bass*, 12 Mass. (11 Tyng) 199, 199 (1815) (“This case comes before us as the Supreme Court of Probate, on an appeal from a decree of the Judge of Probate for the county of Suffolk, by which the appellant, who had been appointed one of the executors of Edward Tyler, was removed and discharged from that trust.”).

¹¹³ STAT. 1783 c. 40 § 31.

¹¹⁴ STAT. 1783 c. 32 § 4. For an example of the court acting under the jurisdiction of this statute, see *Root v. Blake*, 31 Mass. (14 Pick.) 271, 273-74 (1833) (“By [STAT. 1783 c. 32 s. 4] the legislature obviously intended to give a preference to the claim of an obligee in such a case, to that of the heirs or creditors of the obligor. . . . There is no reason, therefore, why the Court should not decree a specific performance of this contract, in the same manner as if Goodell were now living. The Court accordingly order and decree, that upon the performance of the conditions of sale, as specified in the obligation of Goodell, the whole estate shall be conveyed to the plaintiffs by his administrator and heirs, as prayed for in the bill.”). See also *Inhabitants of Hampshire County v. Inhabitants of Franklin County*, 16 Mass. (15 Tyng) 76, 82 (1819) (Allen and Alvord, attorneys for the defendants) (“[S]o early after the adoption of our constitution as March, 1784, authority was given by statute to the justices of the Courts of common law, to permit executors and administrators to divest heirs of their vested inheritance, not merely for the payment of the debts of the deceased, but in conformity to an agreement made by him in his lifetime.”) (citing STAT. 1783 c. 32 § 4). In 1836 the legislature directed the Supreme Judicial

The act of 1783 also allowed the probate courts to use a procedure “for the discovery of” property unlawfully detained by executors and administrators.¹¹⁵ According to the Supreme Judicial Court, this procedure was “analogous to the power exercised by the Court of Chancery, in England, upon a bill for discovery.”¹¹⁶ In this proceeding, a judge of probate could “call before him and . . . examine upon oath” an executor, administrator, or person “having lawful right or claim to the estate of any person deceased” who was suspected of having “concealed, embezzled or conveyed away any of the money, goods or chattels left by the testator or intestate, for the discovery of the same.”¹¹⁷ The act further provided that the “person suspected and complained of” could be examined orally or questioned by interrogatories.¹¹⁸

Court “to hear and determine every such case, according to the course of proceedings in chancery.” REV. STAT. 1836 c. 74 § 9 (1836).

¹¹⁵ STAT. 1783 c. 32.

¹¹⁶ *Selectmen of Boston v. Boylston*, 4 Mass. (3 Tyng) 318, 322 (1808) (“The process, in which this question arises, has been stated by the appellants to be grounded on the provision of the statute, [1783, c. 32, § 12,] which authorizes the Probate Court to convene before them, and examine upon oath, any person suspected of embezzling, conveying away, &c., the goods, effects, &c., of a deceased person. It is at least questionable, in the opinion of the Court, whether an executor or administrator can be, under any circumstances, liable to an examination pursuant to that provision of the statute. But, if he is, it is very clear that the authority of the Court, under that provision, extends only to an examination for the purpose of discovery. No other power is given by the statute; and, in that extent, it is analogous to the power exercised by the Court of Chancery, in England, upon a bill for discovery.”).

¹¹⁷ STAT. 1783 c. 32 § 11 (emphasis added). Witnesses who were not suspected, but who refused to give evidence, were subject to the same liability as witnesses who refused to appear before the Court of Common Pleas. *Id.* § 13.

¹¹⁸ *Id.* § 11. If a “person suspected” refused to answer questions, the judge of probate could commit him or her “unto the common gaol of the county . . . until he or she consent[ed] to be examined and answer interrogatories upon oath as aforesaid, or be released by the consent of the person suspecting and complaining against him or her, or by order of the Supreme Judicial Court.” *Id.* The judge of probate could also imprison executors and administrators who refused to appear and render full account of the property for which they were responsible. *Id.* § 12. This statute was amended in the Revised Statutes of 1836, which specified that “all such interrogatories and answers shall be answered in writing, and shall be signed by the party examined, and filed in the probate court.” REV. STAT. c. 65 § 7 (1836). The process was also extended to “anyone suspected of having concealed, embezzled, or having conveyed away any of the money, goods or effects of a ward.” REV. STAT. c. 79 § 27 (1836).

Through its jurisdiction over the settlement of estates, the Supreme Judicial Court could also hear cases with multiple parties. A statute passed in 1785 allowed two or more heirs to join “in actions of waste, ejectment, or other real actions, where possession of the inheritance alleged to have descended, [was] the object of the suit.”¹¹⁹

3. Trustee Process

In 1794 the legislature passed a lightly revised version of the trustee process act of 1758, which made trustee process available to bodies politic and corporations and adjusted the list of actions in which trustee process was available.¹²⁰

4. Depositions

In 1797 the General Court promulgated a statute regarding depositions *de bene esse* and depositions “in perpetual remembrance of a thing.”¹²¹ This statute included more procedural details than the statute of 1695. For example, the statute of 1797 specified a penalty for a

¹¹⁹ STAT. 1785 c. 62 § 3.

¹²⁰ STAT. 1794 c. 65 (The trustee process could be used by “any person or persons, body politic or corporate, entitled to any personal action, excepting detinue, replevin, actions on the case for slanderous words or malicious prosecutions, or actions of trespass for assault and battery.”); CUSHING, *supra* note 92, at 2. For other acts revising trustee process, see REV. STAT. c. 109 § 4 (1836) (allowing persons who were not residents of Massachusetts to be summoned by trustee process); STAT. 1833 c. 171 (authorizing the Supreme Judicial Court to issue a trustee writ “in all cases, where an original writ would lie to that court”); STAT. 1832 c. 164 (allowing the use of trustee process to attach goods, effects, and credits held for a defendant by corporations and political entities); STAT. 1818 c. 148 (providing that if an alleged trustee assigned the goods held for a debtor to *another* party, the court could make the assignee a party to the suit); STAT. 1817 c. 148 § 2 (requiring that the alleged trustee be examined by written interrogatories). For examples of cases involving trustee process, see *Hawes v. Langton*, 25 Mass. (8 Pick.) 67 (1829); *Ray v. Underwood*, 20 Mass. (3 Pick.) 302 (1825); *Chealy v. Brewer*, 7 Mass. (6 Tyng) 259 (1811); *Chapman v. Phillips*, 25 Mass. (8 Pick.) 25 (1808).

¹²¹ STAT. 1797 c. 35. This statute also allowed the admission of written testimony “on the appeal or review of [a] cause” when in “the trial . . . either party shall make it appear probable to the court, that it will not be in his power to produce the witnesses, there testifying.” *Id.* § 5.

deponent who failed to appear when summoned.¹²² The statute again required that the deponent “be carefully examined, and cautioned and sworn to testify the whole truth and nothing but the truth.”¹²³ The testimony was to be “reduced to writing . . . only by the Justice taking the Deposition or by the Deponent or some disinterested person, in the presence of the said Justice . . .”¹²⁴

The statute of 1797 also detailed a process for taking a deposition “in perpetual remembrance of a thing,” which an individual could request before there was any relevant cause pending before a court, arbitrator, or referee.¹²⁵ Two JPs were required to join in taking such a deposition.¹²⁶ The act instructed the JPs to “cause such [persons] as they know to be interested, to be duly notified of the time and place of the caption.”¹²⁷ At the “caption,” the deposition was to be “reduced to writing by one of the Justices, or by the deponent in their presence, and

¹²² A JP issued summons to the deponent, and if the deponent did not appear according to the summons, he could “be subject to like actions, forfeitures and attachments, as are provided by law, where witnesses are summoned to court and do not appear.” *Id.* § 4. This may refer to STAT. 1784 c. 28 § 6 (stating that if a deponent did not appear when summoned and served with costs he or she would “be liable to the action of the aggrieved party for all damages by him sustained by such default”).

¹²³ STAT. 1797 c. 35 § 3.

¹²⁴ *Id.* Like the act of 1695, the act of 1798 did not mention written interrogatories.

¹²⁵ *Id.* § 8. For descriptions of this kind of deposition, see STORY, EQUITY PLEADING, *supra* note 69, §§ 300-306; 1 MADDOCK, *supra* note 10, at 185 (“When the Testimony of Witnesses is in danger of being lost before the matter to which it relates can be made the subject of Judicial investigation, a Court of Equity will lend its aid to preserve and perpetuate the testimony; and as the Courts of Common law cannot generally examine Witnesses except *viva voce*, upon Trial of an Action, the Courts of Equity will supply this defect by taking and preserving the testimony of Witnesses going abroad, or resident out of the Kingdom . . .”); Kessler, *supra* note 64, at 1205 n.125. For an example of this kind of deposition in a case in Massachusetts, see *Welles v. Winsor*, 20 Mass. (3 Pick.) 74, 76 (1825) (“A deposition taken in perpetuum can be used only by those at whose request it was taken, or some one claiming title to the subject matter to which it relates under such persons.”).

¹²⁶ STAT. 1797 c. 35 § 8.

¹²⁷ *Id.*

subscribed”¹²⁸ The statute then required the JPs to “administer the oath and certify the caption.”¹²⁹ Once taken, the deposition was to be recorded in the office of the appropriate Register of Deeds.¹³⁰

The statute of 1797 also empowered the Supreme Judicial Court and the Court of Common Pleas to authorize such depositions to be taken “either within or without the Commonwealth, in any action, suit or controversy, pending in said courts, respectively, on such terms and conditions as they from time to time shall proscribe.”¹³¹ The statute also allowed the courts to admit a foreign deposition as evidence as long as the deposition was taken before a JP, notary, “or other person legally empowered to take depositions in the state or country where such deposition shall be taken and certified.”¹³²

The statute specified that a deposition was only to be used when the deponent could not testify in person: “[I]n every case . . . oral testimony examined, and cross examined, in open court, is to be preferred to depositions, when it can be reasonably had.”¹³³ An adverse party could challenge the use of a deposition by showing that “the reasons for taking the said

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* The proper register for a deposition regarding real estate was in the county where the real estate was located. If the deposition related to personal property, the deposition went to the register in the county where the person requesting the deposition resided. *Id.*

¹³¹ *Id.* § 7. A *dedimus* could not issue in any case “unless a cause [were] so far pending that proper parties [were or might] be in Court, with such a knowledge of the matters in controversy, as to frame with pertinence all the interrogatories necessary to support their respective allegations.” *Armory v. Fellowes*, 5 Mass. (4 Tyng) 219, 222 (1809). *See also* Subrin, *Discovery*, *supra* note 69, at 698-99 (discussing the use of a *dedimus potestatem* in the federal courts before the Federal Rules of Civil Procedure).

¹³² STAT. 1797 c. 35 § 6.

¹³³ *Id.* § 7.

deposition no longer exist[ed]” and that the deponent was “within the said distance, and able personally to appear.”¹³⁴

B. 1817: Trust, Specific Performance, Rules for Chancery Practice, and Bill of Discovery

In 1817 the legislature passed an act “giving further remedies in equity,” significantly enhancing the Supreme Judicial Court’s equity powers.¹³⁵ Before 1817 the Supreme Judicial Court claimed that it could not enforce a trust, grant specific performance, or entertain a bill of discovery; after the act, the court could perform all of these functions.¹³⁶ The act of 1817 gave

¹³⁴ *Id.* For subsequent acts regarding depositions, see STAT. 1837 c. 236 (stating that witnesses who entered Massachusetts could be summoned and compelled to give a deposition, even if they did not have a “place of abode” in the commonwealth); STAT. 1826 c. 86 § 4 (authorizing JPs and justices to issue a *caus* against a person who refused or neglected to obey a summons to depose, “compelling him or her to attend”).

¹³⁵ STAT. 1817 c. 87. The text of this act can be found in the appendix. This act provoked some commentary in the popular press, including a debate between “Juridicus,” who disapproved the measure, and an anonymous interlocutor, who defended it. See *Communication*, BOSTON PATRIOT AND DAILY CHRONICLE (Boston, Mass.), Feb. 23, 1818, at [2] (“In a spirit of candor, can we contemplate the act “For giving further remedies in equity” . . . without fear and apprehension? . . . Here is a sweeping clause with a vengeance, a clause which may unsettle the foundations of half the estates in the Country . . . Are [the judges] to plunge at once into the chaos of the English decisions in Chancery[,] or are they to apply them only so far as they are applicable and establish principles of our own? . . . Here is a new jurisdiction created . . .”); *Communication*, BOSTON DAILY ADVERTISER (Boston, Mass.), Feb. 26, 1818, at [2] (“If Juridicus had taken the least pains to inform himself, he would have learned that the law . . . was the subject of more discussion and deliberation than any one other law that has received the sanction of that body for years. The law lately passed does not, as Juridicus supposes, introduce the whole English Chancery system . . . The law may probably be attacked by the false and shallow reasoning of the common lawyers, but it will introduce a more liberal system of practice into our courts . . .”); *Communication*, BOSTON PATRIOT AND DAILY CHRONICLE (Boston, Mass.), Mar. 5, 1818, at [2] (the reply of Juridicus to the writer in the *Daily Advertiser*).

¹³⁶ See, e.g., *Newhall v. Wheeler*, 7 Mass. (6 Tyng) 189, 198 (1810) (stating that Massachusetts had “no court to compel the specific performance of a trust”); *Widgery v. Haskell*, 5 Mass. (4 Tyng) 144, 154 (1809) (“Let it be remembered that in this state we have no Court, which can compel a discovery, or an execution of a trust.”); *Gray v. President of Portland Bank*, 3 Mass. (2 Tyng) 364, 386 (1807) (“In the case put of a breach of contract in not conveying real property, this Court has no means of effectuating a specific performance of the contract; and there is the same deficiency of power in the present case.”); *Prescott v. Tarbell*, 1 Mass. (1 Will.) 204, 208 (1804) (“If the conveyance was in trust, this Court could not have compelled the execution of it;

the Supreme Judicial Court the “power and authority to hear and determine in equity all cases of trust arising under deeds, wills, or in the settlement of estates.”¹³⁷ The act also permitted the court “to hear and determine in equity . . . all cases of contract in writing, where a party claim[ed] the specific performance of the same, and in which there [was] not a plain, adequate, and complete remedy at law.”¹³⁸

According to the Supreme Judicial Court, the act of 1817 was also the source of the court’s ability to entertain a bill of discovery.¹³⁹ The act authorized the court “to issue all such writs and processes as may be necessary or proper to carry into effect hereby granted; and to make, from time, to time, all necessary rules and orders”¹⁴⁰ Pursuant to the act’s authorization, the court passed its first “Rules for the Regulation of Practice in Chancery” in 1818.¹⁴¹ In its rules, the Supreme Judicial Court “adopt[ed], as the outlines of [its] practice, the

and, until the legislature shall think proper to give us further powers, we can do nothing upon subjects of that nature.”).

¹³⁷ STAT. 1817 c. 87. The phrase “arising under deeds, wills, or in the settlement of estates” created some difficulties of interpretation for the court. *Holland v. Dickinson*, 27 Mass. (10 Pick.) 4, 6 (1830) (“It is not easy to determine from the language itself, what is the meaning of this clause of the statute.”). For examples of the court’s interpretation of “trust arising under deeds, wills, or in the settlement of estates,” see *id.* at 6-7 (declining to recognize a trust between a widow and the children of her deceased husband, despite the existence of a parole agreement); *Gibbens v. Peeler*, 25 Mass. (8 Pick.) 254, 263 (1829) (recognizing implied trusts charged upon executors and administrators by reason of their official duties, or the neglect thereof). The Revised Statutes of 1836 solved this interpretive problem by extending to the Supreme Judicial Court jurisdiction over “all suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate.” REV. STAT. c. 81 § 8 (1836).

¹³⁸ STAT. 1817 c. 87.

¹³⁹ *Tirrell v. Merrill*, 17 Mass. (16 Tyng) 117, 121 (1821) (“We cannot entertain a bill of discovery, except in case of trust created by deed or will; and *that jurisdiction is created only by the last statute respecting the equity powers of this Court.*”) (citing STAT. 1817 c. 87) (emphasis added).

¹⁴⁰ STAT. 1817 c. 87.

¹⁴¹ Rules for the Regulation of Practice in Chancery, in 14 DOUGLAS ATKINS TYNG, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 466-69 (Boston, Little Brown 1883) [hereafter Chancery Rules (1818)]. The text of these rules can be found in the appendix.

practice of the English Courts of Equity . . . not repugnant to the constitution and laws of the commonwealth.”¹⁴² The rules then outlined a process for discovery procedures.

The rules called for a plaintiff to submit a “bill of complaint” to the court containing “a full, clear, and explicit statement of the . . . case, and conclude with a general interrogatory.”¹⁴³ The plaintiff could propose specific interrogatories “when his case require[d] it.”¹⁴⁴ The court would then issue a subpoena compelling the defendant to appear in the Supreme Judicial Court.¹⁴⁵ The defendant was to file a plea, demurrer, or answer that responded to the general interrogatory in the bill “fully, directly, and particularly, to every material allegation or statement of the bill, as if [the defendant] had thereto been particularly interrogated.”¹⁴⁶ After the defendant answered the bill, witnesses could be examined “upon interrogatories . . . filed in the clerk’s office by the party producing the witness, and upon . . . cross interrogatories . . . filed by the adverse party.”¹⁴⁷ The last rule provided that “[w]henever it [became] necessary or proper to have any fact tried and determined by a jury, the court [would] direct an issue for that purpose to be formed by parties, containing a distinct affirmation of the points in question, and a denial or traverse thereof.”¹⁴⁸ The issue “thus formed and joined, [would then] be submitted to a jury in the same court in which the suit [was] depending.”¹⁴⁹

¹⁴² *Id.* at 466.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 468. “All testimony [was to] be by depositions.” *Id.*

¹⁴⁸ *Id.* at 469.

¹⁴⁹ *Id.*

C. 1823: Discovery of Documents, Injunctions, and Multiparty Practice

In the English Court of Chancery, bills of discovery could be used “for the discovery of facts in the knowledge of the defendant, or of deeds or writings, or other things, in his custody or power”¹⁵⁰ Although the Supreme Judicial Court’s rules of 1818 invoked “the practice of the English Courts of Equity” as the model for its own practice, the rules made no direct reference to the discovery of documents. However, in 1823 the legislature passed a law authorizing the court to compel the production of documents.¹⁵¹ This act, “giving further remedies in equity,” allowed the Supreme Judicial Court to “compel . . . discoveries” and “make . . . injunctions” in cases in which “any goods or chattels, deed, bond, note, bill, specialty, writing or other personal property, of any person or persons shall be taken or detained, from him or them, and secreted or withheld, so that the same cannot be found, or come at, to be replevied.”¹⁵²

In 1826 the Supreme Judicial Court confirmed that the act of 1823 granted the court the power to compel discovery of documents. In *Chandler v. Chandler*, the administrators of an intestate brought a bill in equity asking the court to compel the intestate’s former partners to account.¹⁵³ Chief Justice Parsons declared that the case “clearly came within the statute of 1823, c. 140, [which] commit[ted] to [the] Court equity jurisdiction in cases of partnership accounts.”¹⁵⁴ He acknowledged that it was “absolutely necessary, in order that justice might be done, that the jurisdiction given by the statute of 1823 should exist somewhere” and that “as the

¹⁵⁰ 1 MADDOCK, *supra* note 10, at 196.

¹⁵¹ STAT. 1823 c. 140. For another statute regarding the bill of discovery, *see* STAT. 1818 c. 122 § 2 (allowing bills of discovery to be used “in relation to the avenging of losses in maritime cases”).

¹⁵² STAT. 1823 c. 140.

¹⁵³ *Chandler v. Chandler*, 21 Mass. (4 Pick.) 78, 78-80 (1826).

¹⁵⁴ *Id.* at 82.

legislature . . . imposed the duty on [the Supreme Judicial Court] they must to the best of their ability discharge it.”¹⁵⁵

Justice Parsons noted that the case was “one of exceedingly complicated transactions” and that it seemed to him “impossible that [the case] should ever be justly or satisfactorily settled without the application of those powers which belong to a court of equity alone.”¹⁵⁶ He concluded that “the means usually employed by courts of chancery in like cases, such as compulsive discovery, production of books and papers, and an examination of accounts by some skillful person, under the control of the Court, [were] absolutely indispensable” to the resolution of the case.¹⁵⁷ Justice Parsons concluded by appointing a master “to examine and report upon the whole transactions of these partnerships, with proper power to enable him to execute that trust.”¹⁵⁸

The act of 1823 also allowed the court to “hear and determine in equity, all disputes between co-partners, joint-tenants and tenants in common, and their legal representatives, in cases where there is no adequate remedy at law.”¹⁵⁹ The act therefore permitted the court to hear

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 83.

¹⁵⁹ STAT. 1823 c. 140. Attempts to bring corporators in manufacturing corporations within the jurisdiction of this statute failed. *See Pratt v. Bacon*, 27 Mass. (10 Pick.) 123, 125 (1830) (“[T]he members of a manufacturing corporation, in their legal relations to each other, differ essentially and radically from partners, joint-tenants and tenants in common; and however beneficial it might be for the members of corporations, now so extensively multiplied through the Commonwealth, to have the aid of a court of equity, in adjusting the multifarious and perplexing controversies, which are likely to arise out of this relation, still we are all of opinion, that by no reasonable construction of the statute relied upon, can their case be brought within the equity jurisdiction given by that statute.”); *Russell v. M’Lellan*, 31 Mass. (14 Pick.) 63, 64 (1833) (“In many things there is a similarity between corporators and partners. Corporators are interested in the profit and loss of the business, and so are partners. But there are such strong and obvious differences between them, as leave no doubt but that the statute does not embrace corporators as co-partners.”).

cases between multiple parties, although in limited situations. In cases between partners, joint tenants, and tenants in common, the court could also “compel such discoveries and disclosures, and make such orders injunctions and decrees” as it thought necessary.¹⁶⁰

D. 1826: Masters in Chancery

In 1826 the legislature instructed the governor of Massachusetts to appoint two masters in chancery for each county in the commonwealth. The masters were authorized “under the direction of the [Supreme Judicial Court], or any justice thereof, [to] do and perform all the duties, which according to the rules and practice of chancery, are usually performed by a master in chancery.”¹⁶¹ After being “sworn to faithful discharge of their duties,” masters served a four-year term of office.¹⁶² Parties paying costs were to compensate the masters for the cases on which the masters worked.¹⁶³

E. 1827: Injunctions

In 1827 the legislature promulgated an act “giving relief in equity in cases of waste and nuisance.”¹⁶⁴ The act permitted the court to “hear and determine in equity, any matter touching waste or nuisance, in which there [was] not a plain, adequate, and complete remedy at law, and when it shall be necessary or proper to have any fact in such a case tried by a jury.”¹⁶⁵ The act also authorized the court to “issue writs of injunction to stay any waste or nuisance, and issue all such other writs and processes, and make all such orders and decrees in the case, according to the

¹⁶⁰ STAT. 1823 c. 140.

¹⁶¹ STAT. 1826 c. 109 § 4.

¹⁶² *Id.*

¹⁶³ *Id.* In 1838 the legislature gave masters in chancery “the same power to compel witnesses to attend and testify in causes to be heard or tried before them, as . . . courts of record.” STAT. 1838 c. 42.

¹⁶⁴ STAT. 1827 c. 88.

¹⁶⁵ *Id.*

course of proceedings in chancery.”¹⁶⁶ In 1827 the legislature also passed “an act in addition to the several acts giving further remedies in equity,” which authorized any justice of the Supreme Judicial Court “to issue all such writs and processes . . . necessary to carry into full effect” decrees, orders, or injunctions already in force.¹⁶⁷

F. 1836: Consolidation of the Laws and a New Edition of Rules for Chancery Practice

There were several significant additions the Supreme Judicial Court’s equity powers in 1836. The legislature extended the court’s jurisdiction in equity to suits between more than two parties,¹⁶⁸ to suits for contribution between parties liable for the same debt,¹⁶⁹ and to suits by creditors to recover payment of a deceased person’s debts from all of the deceased’s heirs and devisees.¹⁷⁰ The legislature also generalized the court’s power to issue injunctions.¹⁷¹ The Supreme Judicial Court promulgated a new set of rules for the regulation of practice in chancery.¹⁷²

¹⁶⁶ *Id.* The first reported injunction by the Supreme Judicial Court under the authority of this act occurred in 1835, when the court enjoined a defendant from diverting water from a sawmill at specified times. *Bliss v. Rice*, 34 Mass. (17 Pick.) 23 (1835). It is of course possible that the Court issued an injunction in an unreported case or during vacation. For other statutes regarding injunctions *see* STAT. 1833 c. 145 (authorizing the Supreme Judicial Court to issue injunctions when a creditor applied to the court for an appointment of receivers or trustees after a corporation’s charter had expired or been annulled); STAT. 1829 c. 121 (permitting the Supreme Judicial Court, or any one of its justices, to issue in term time or vacation writs of injunction to stay the cutting and removal of trees upon debtors’ estates attached by due course of law).

¹⁶⁷ STAT. 1827 c. 23.

¹⁶⁸ REV. STAT. c. 81 § 8 (1836).

¹⁶⁹ *Id.*

¹⁷⁰ REV. STAT. c. 70 § 16 (1836).

¹⁷¹ REV. STAT. c. 81 § 9 (1836) (granting the Supreme Judicial Court the “power to make and award all such . . . injunctions . . . as may be necessary to carry into full effect” all the powers “given to [the court] by the laws of the Commonwealth”).

¹⁷² Rules for the Regulation of Practice in Chancery [hereafter Chancery Rules (1836)], *in* RULES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 49-65 (1836) [hereafter SJC RULES 1836]. The text of these rules can be found in the appendix.

In the Revised Statutes of 1836, the legislature collected most of the laws pertaining to the court's equity jurisdiction in one section, entitled "jurisdiction in cases in equity," located in the chapter "of the Supreme Judicial Court."¹⁷³ The section regarding "jurisdiction in cases in equity" listed nine subject areas in which the Supreme Judicial Court was given the "power to hear and determine [a case] in equity . . . when [a party did not have] a plain, adequate, and complete remedy at the common law."¹⁷⁴ The legislature had already granted equity jurisdiction in most of these subject areas: redemption of mortgages in 1698,¹⁷⁵ trusts and specific performance in 1817,¹⁷⁶ suits compelling re-delivery of goods and suits between partners, joint tenants, and tenants in common in 1823,¹⁷⁷ and suits concerning waste and nuisance in 1827.¹⁷⁸

The section made provision for a new area in which the Supreme Judicial Court could hear a case in equity. The statute gave the court general jurisdiction in cases of contribution, permitting the court to hear in equity all cases "by or between any other persons, who are respectively liable for the same debt or demand, when there is more than one person liable at the same time for such contribution."¹⁷⁹ The statute specifically authorized the court to hear suits for contribution "by or between devisees, legatees or heirs, who are liable for the debts of a deceased testator or intestate."¹⁸⁰

The statute also generalized the Supreme Judicial Court's power to hear cases with more than two parties. Since 1823, the court had been able to hear cases between multiple partners,

¹⁷³ REV. STAT. c. 81 § 8 (1836). The text of this section can be found in the appendix.

¹⁷⁴ *Id.*

¹⁷⁵ An Act for Hearing and Determining Cases in Equity [1698], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 324-26.

¹⁷⁶ STAT. 1817 c. 87.

¹⁷⁷ STAT. 1823 c. 140.

¹⁷⁸ STAT. 1827 c. 88.

¹⁷⁹ REV. STAT. c. 81 § 8 (1836).

¹⁸⁰ *Id.*

joint tenants, and tenants in common.¹⁸¹ In 1832 the legislature allowed the court to hear cases between multiple joint trustees, co-executors, and co-administrators.¹⁸² The Revised Statutes of 1836 granted the court a general power to hear all “cases in which there [were] more than two parties having distinct rights or interests, which [could not] be justly and definitively decided and adjusted in one action at common law.”¹⁸³

The legislature authorized the Supreme Judicial Court to entertain a bill of discovery in any of the subject areas listed in the section regarding the court’s equity jurisdiction and in “any other case, when a discovery [might] be lawfully required, according to the course of proceedings in chancery.”¹⁸⁴ The statute also granted the Supreme Judicial Court the “power to make and award all such judgments, decrees, orders, and injunctions, to issue all such executions and other writs and processes, and to do all such other acts, as may be necessary to carry into full effect” all the powers “given to [the court] by the laws of the Commonwealth.”¹⁸⁵

¹⁸¹ STAT. 1823 c. 140.

¹⁸² STAT. 1832 c. 162.

¹⁸³ REV. STAT. c. 81 § 8 (1836).

¹⁸⁴ *Id.* Frank W. Grinnell’s study of discovery in Massachusetts brushed by the all rules and statutes discussed to this point, dating “statutory discovery in Massachusetts” from the Practice Act of 1851. Frank W. Grinnell, *Discovery in Massachusetts: Part I*, 16 HARV. L. REV. 110, 111 (1902) (“Statutory discovery in Massachusetts dates back to the Practice Act of 1851. Before that time there were limited rights to discovery in equity, but there were only eight or ten reported cases”); *see also infra* notes 203-08 and accompanying text (regarding the Practice Act of 1851).

¹⁸⁵ REV. STAT. c. 81 § 9 (1836). In addition to this general authorization, the legislature subsequently passed laws specifically allowing the court to issue injunctions in particular situations. *See* STAT. 1853 c. 156 (restraining the unauthorized use of a person’s name in a business); STAT. 1852 c. 312 § 46 (protecting a private right or interest that had been injured or threatened by a private corporation); STAT. 1852 c. 197 (preventing fraudulent use of trademarks); STAT. 1851 c. 319 (preventing the erection and use of buildings for stables and bowling alleys); STAT. 1851 c. 233 § 71 (staying waste of land mortgaged, pending action for foreclosure or possession); STAT. 1847 c. 32 (restraining towns from raising, borrowing, or spending money for illegal purposes); STAT. 1839 c. 60 (regulating the surplus revenue of the United States received by a city or town); STAT. 1838 c. 14 (restraining a bank from further proceeding with business when it was insolvent or its further progress would be hazardous to the

The Revised Statutes of 1836 also provided that a creditor could use a bill in equity to recover payment of a deceased person's debts from all of the deceased's heirs, devisees, legatees, and next of kin when the deceased's administrator or executor could not be held liable for the debts.¹⁸⁶ Even if a creditor sued in equity rather than at common law, any party to the suit could elect to have a jury determine the sum due.¹⁸⁷ The court would then decide "according to the course of proceedings in chancery," how much each defendant owed the plaintiff.¹⁸⁸

public); REV. STAT. c. 44 § 22 (1836) (recovering company debts from stockholders and officers of a corporation).

¹⁸⁶ REV. STAT. c. 70 § 16 (1836). The practice described in this statute recalls the marshalling of assets in estate administration. *Compare* REV. STAT. c. 70 § 16 (1836) with 1 STORY, EQUITY JURISPRUDENCE, *supra* note 7, at 527 ("[T]he marshalling of assets is such an arrangement of the different funds under administration, as shall enable all the parties, having Equities thereon, to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds."). *See also* Wood v. Leland, 39 Mass. (22 Pick.) 503, 506 (1839) ("The Revised Statutes, c. 70, § 16, . . . was intended to give the creditor a complete remedy in one suit, against all or any who were liable, subject only to the limitation, that no one should be liable for more than he had received from his ancestor. In a suit at law the creditor could only recover against each his aliquot part, without regard to the fact whether others were insolvent, or beyond the reach of process, or not. But it is clear that the legislature intended a broader and larger, and more direct remedy for the creditor, throwing the risk of the absence or insolvency of some, upon those who were liable; and this could be done, only according to the course of proceedings in equity, where the facts of absence or insolvency can be ascertained, and the liability of the other parties established and apportioned.").

¹⁸⁷ REV. STAT. c. 70 § 16 (1836). ("If . . . there should have been more than one person liable for the debt, the creditor may recover the same, in a bill of equity in the Supreme Judicial Court, against all the persons so liable, or as many of them as are within the reach of process; and the court shall thereupon determine, *by verdict of a jury*, if either party require it, what sum, if any is due to the plaintiff; and they shall also decide, *according to the course of proceedings in chancery*, how much each one of the defendants is liable to pay, towards the satisfaction of the debt, and may award execution and other proper process therefor.").

¹⁸⁸ *Id.* This arrangement, allowing a jury to decide an issue of law (i.e., the total sum of the debt due to a creditor) before the court determined an issue of equity (i.e., the contribution due from each defendant), recalls *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). In *Beacon Theatres*, the Supreme Court ruled that in a case containing both legal and equitable claims, the legal claims should be tried before a jury before a judge resolved the equitable claims. *Beacon Theatres*, 359 U.S., at 506-08. *See also* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344, 374 (1829) ("[A] reasonable construction of the 15th article [protecting the right to trial by jury in civil cases regarding property in Massachusetts]

In 1836 the Supreme Judicial Court issued a new version of its Rules for the Regulation of Practice in Chancery, having previously circulated a draft of the new rules to “those gentlemen who [were] most conversant with the subject, and most interested in it.”¹⁸⁹ The draft explained that the new rules were “better adapted to the increasing practice in Cases in Equity in [the] Commonwealth.”¹⁹⁰ The most significant change between the rules of 1818 and those of 1836 was the provision for liberal amendment of bills and answers.¹⁹¹

does not require that a suit in chancery shall be tried just as a suit at common law would be, and that there is no necessity that the whole case shall be put to the jury. The most that can be made of the article is, that all controverted facts deemed essential to the fair and full trial of the case, shall be passed upon by the jury, if the parties or either of them require it. And whether the facts proposed to be so tried are essential or not, must of necessity be determined by the Court.”)

¹⁸⁹ Rules for the Regulation of Practice in Chancery in Massachusetts 1 (1835) [hereafter Draft of Chancery Rules (1835)]. An original copy of the printed draft is available at the Social Law Library in Boston, Massachusetts. *See also* Chancery Rules (1836), *supra* note 172. There were thirty-four rules in the version of 1836, as opposed to thirteen in the version of 1818. The text of both editions of the chancery rules can be found in the appendix.

¹⁹⁰ Draft of Chancery Rules 1 (1835). The justices said they would take into consideration in “any addition, alteration, or amendment to the proposed Rules . . . suggested by gentlemen of the bar, or others having skill and experience in the subject” *Id.* There was only one change between the draft of 1835 and the final version of the rules in 1836. The change was an addition to Rule V, stating that a defendant could waive the necessity of answering a bill on oath, unless the bill was a bill for discovery. Chancery Rules (1836), *supra* note 172, at 51.

¹⁹¹ By the rules of 1836, a complainant could “amend his bill at any time before answer, plea, or demurrer filed, of course” Rule X, Chancery Rules (1836), *supra* note 172. A complainant could also amend the bill if the defendant demurred to the bill “for want of parties, or other defect” Rule XI, Chancery Rules (1836), *supra* note 172. A complainant could amend the bill again “[u]pon the coming in of the defendant’s answer . . . in order to meet the case made by the defendant’s answer.” Rule XVIII, Chancery Rules (1836), *supra* note 172. If the complainant excepted to the defendant’s answer to the bill as originally filed, the defendant could “answer further.” *Id.* By 1836, Massachusetts had long allowed liberal amendment of common law pleading. William E. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97, 111-12 (1973) (“[I]n September 1776 . . . the Superior Court adopted a rule providing that prior to joinder in demurrer, any plaintiff could ‘have leave to amend his Writ and declaration upon his paying the Defendant his costs’ to the date of the amendment or ‘agreeing to a Continuance at the Defendant’s Election.’ [T]he legislature provided in 1784 that judicial proceedings should not ‘be abated, arrested, quashed or reversed for any kind of circumstantial errors or mistakes . . . nor through defect or want of form only.’ The same act explicitly confirmed the power of the courts ‘on motion . . . [to] order amendments.’”) (citations omitted).

The Supreme Judicial Court published its new chancery rules in the same volume as the court's rules for common law practice.¹⁹² The common law rules included guidelines for taking depositions on interrogatories "either for a suit at common law or in equity."¹⁹³ The rules prohibited a litigant from attending "the taking of [a] deposition [on interrogatories], either himself, or by an attorney or agent."¹⁹⁴ Furthermore, the rules barred a litigant from communicating with a deponent "by interrogatories or suggestions . . . whilst giving [the deponent was giving his] deposition in answer to . . . interrogatories annexed to [a] commission."¹⁹⁵ The rules directed that a magistrate, commissioner, or examiner should take each deposition "in a place separate and apart from all other persons."¹⁹⁶ The only persons allowed to be present at a deposition were the examiner, the deponent, and a "disinterested person" appointed by the examiner "to assist him in reducing the deposition to writing."¹⁹⁷ Prior law had allowed an adverse party to be present at the taking of a deposition.¹⁹⁸

By 1836 the judicial system of Massachusetts included the four distinguishing characteristics of English equity. The Supreme Judicial Court could compel discovery of both documents and facts known to a defendant.¹⁹⁹ The court could hear cases with multiple

¹⁹² Rules for the Regulation of Practice at Common Law in Massachusetts [hereafter Common Law Rules (1836)], in SJC RULES, *supra* note 172, at 1-40. The text of the common law rules pertaining to depositions can be found in the appendix.

¹⁹³ Rule VII, Common Law Rules (1836), *supra* note 192, at 8.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ STAT. 1817 c. 181 (providing that when an adverse party did not attend a deposition, the JP taking the deposition should certify that the adverse party was duly notified of the time and place of caption); STAT. 1797 c. 35; An Act for Taking Affidavits Out of Court [1695], in COLONIAL AND PROVINCIAL LAWS, *supra* note 22, at 288-89.

¹⁹⁹ See *supra* notes 139-58, note 184, and accompanying text.

parties.²⁰⁰ The court could grant specific performance and injunctions.²⁰¹ The Supreme Judicial Court could also administer major areas of substantive law, including trust, guardianship, and settlement of estates, that were traditionally governed by the Court of Chancery in England.²⁰²

G. 1849-1877: Generalization of Equity Powers

From the late 1840s through the 1870s, the General Court engaged in another round of legislation regarding equity. In 1849 the legislature appointed three commissioners “to revise and reform the [civil] proceedings in the courts of justice” of Massachusetts.²⁰³ Within two years the commissioners proposed the “Practice Act of 1851,” which “amend[ed] some of the proceedings, practice and rules of evidence of the courts” of the commonwealth.²⁰⁴ The simplification of procedure and the merger of law and equity in New York’s Field Code may have influenced the commissioners.²⁰⁵ The Practice Act made a number of important changes to pleading at common law and reduced the number of civil actions to three: contract, tort, and replevin.²⁰⁶ The Practice Act also authorized discovery “in all civil actions” and provided detailed procedural guidelines for interrogatories.²⁰⁷

²⁰⁰ See *supra* note 119, note 159, notes 181-83, and accompanying text.

²⁰¹ See *supra* note 160 (injunction), note 138 (specific performance), and accompanying text.

²⁰² See *supra* note 137 (trust), notes 56-63 and notes 108-09 (guardianship and settlement of estates), and accompanying text.

²⁰³ THE ACT TO AMEND SOME OF THE PROCEEDINGS, PRACTICE AND RULES OF EVIDENCE OF THE COURTS OF THIS COMMONWEALTH, PASSED BY THE GENERAL COURT OF MASSACHUSETTS, IN THE YEAR 1851, at 135 (Junius Hall ed., Boston, Little Brown 1851) [hereafter PRACTICE ACT]. Benjamin Robbins Curtis of Boston, N. J. Lord of Salem, and R. A. Chapman of Springfield served as commissioners. *Id.* at 137.

²⁰⁴ STAT. 1851 c. 233. For the text of the commissioners’ report, see 2 MEMOIR OF BENJAMIN ROBBINS CURTIS LL.D. 149-71 (Benjamin R. Curtis, ed., Boston, Little Brown 1879).

²⁰⁵ THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK (Albany, Weed & Parson 1850); see also Subrin, *Equity*, *supra* note 7, at 932-39 (discussing the Field Code).

²⁰⁶ STAT. 1851 c. 233 § 1; PRACTICE ACT, *supra* note 203, at 1-2.

²⁰⁷ STAT. 1851 c. 233 §§ 98-111; PRACTICE ACT, *supra* note 203, at 43-47.

The commissioners who drafted the Practice Act stated in their report that they included “no provisions as to proceedings in equity [because they had] arrived at an opinion, that proceedings in equity [could] reasonably be conformed to a very great extent to proceedings at law [and] that this [was] the best mode of reforming those proceedings”²⁰⁸ In 1853 the legislature passed an act “giving equitable remedies in suits at law.”²⁰⁹ The act stated that suits between more than two parties and suits regarding trusts, specific performance, or contribution should be brought by action of contract.²¹⁰ Suits regarding waste and nuisance and suits to compel the redelivery of goods were to be brought by action of tort.²¹¹

The act of 1853 created procedural confusion.²¹² The legislature repealed the act in 1859 and simultaneously granted the Supreme Judicial Court “full equity jurisdiction, according to the usage and practice of courts of equity, in all . . . cases where there [was] not a plain, adequate, and complete remedy at law.”²¹³ After 1865 the superior court and the Supreme Judicial Court could “allow amendments changing a suit at law into a proceeding in equity, or a proceeding in equity into a suit at law” if the courts found such a change necessary to sustain the action.²¹⁴ In 1877 the legislature finally granted the Supreme Judicial Court “general equity jurisdiction.”²¹⁵

²⁰⁸ PRACTICE ACT, *supra* note 203, at 156.

²⁰⁹ STAT. 1853 c. 371.

²¹⁰ *Id.* § 2.

²¹¹ *Id.* § 3.

²¹² *See, e.g.,* Darling v. Roarty, 71 Mass. (5 Gray) 71 (1855) (dismissing a suit for specific performance because it was brought by a bill of equity rather than an action of contract).

²¹³ REV. STAT. c. 113 § 2 (1859) (granting equity jurisdiction); REV. STAT. c. 182 (1859) (repealing the act of 1853). The legislature also granted the Supreme Judicial Court jurisdiction in equity over cases of fraud in 1855 and over cases of accident and mistake in 1856. STAT. 1856 c. 38 § 1; STAT. 1855 c. 194 § 1.

²¹⁴ STAT. 1865 c. 179 § 1.

²¹⁵ STAT. 1877 c. 178 § 1.

CONCLUSION

Although the legislature of Massachusetts only granted the Supreme Judicial Court general equity jurisdiction in 1877, the essential elements of English equity were part of the commonwealth's judicial system decades earlier. A long succession of statutes, dating back to the earliest years of the provincial government, gradually added the remedies, procedures, and substantive law of English equity to civil practice in Massachusetts. By 1836 the Supreme Judicial Court exercised jurisdiction in both law and equity.

APPENDIX

AN ACT FOR TAKING OF AFFIDAVITS OUT OF COURT (1695).....I
AN ACT FOR HEARING AND DETERMINING OF CASES IN EQUITY (1698)II
AN ACT FOR GIVING FURTHER REMEDIES IN EQUITY (1817).....IV
RULES FOR THE REGULATION OF PRACTICE IN CHANCERY (1818).....V
REV. STAT. C. 81 § 8 (1836) (“JURISDICTION IN CASES IN EQUITY”).....VII
RULES FOR THE REGULATION OF PRACTICE AT COMMON LAW (REGARDING DEPOSITIONS) (1836).....IX
RULES FOR THE REGULATION OF PRACTICE IN CHANCERY (1836).....XIII