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Origin of Equity Jurisdiction and Jurisprudence

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THE ORIGIN OF EQUITY JURISDICTION AND JURISPRUDENCE.

An Analytical Study.

WRITTEN IN PARTIAL FULFILLMENT OF REQUIREMENTS FOR THE DEGREE OF JURIS DOCTOR.

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Introductory Statement.

It is not our purpose in this thesis to attempt a complete and detailed history of equity as it exists in England and in the United States. To do this would involve little more than a compilation of what has already been quite elaborately treated by some of the great legal minds of England and America.

We propose to treat rather of the nature of Equity as it existed in the Roman Law, its influence in the English law, the primitive condition of the law at the time of the origin of Equity, and of the causes which made courts of Equity necessary. Our treatment of the subject is therefore analytical rather than historical.

Some general account, however, of the origin of Equitable Jurisdiction, of the sources from which the principles and doctrines of the Equity jurisprudence took their rise, and of the causes which led to the establishment of the court of chancery with its methods of procedure separate and distinct from the common law tribunal, with their rigid forms of action is essential to an accurate conception of the nature and true function of Equity as it exists at the present day.

We shall therefore preface our work with a brief historical sketch exhibiting the system in its beginnings and descriptive of the early movements of that progress through
which its principles have been developed into a great body of doctrinal rules which constitute an important department of the municipal law.
The growth of Equity as a part of English law was anticipated by a similar development of the same notions in Roman Jurisprudence. In point of fact, Equity as administered by the early English Chancellors, and the jurisdiction of their court were directly borrowed from the Aequitas and judicial powers of the Roman magistrates; the one cannot be fully understood without some knowledge of the other. This intimate connection between the two systems is a sufficient reason for the following brief statement of the mode in which Aequitas was introduced into the Roman law, and of the important part which it performed under the great jurists and magistrates of the Empire in shaping the doctrines of that system of jurisprudence.

The researchers of modern juridical scholars have exposed the falsity of much that has been written by English authors such as Coke and Blackstone with respect to the origin of this law and have demonstrated the existence of the closest relations between the Roman jurisprudence and the early English common law. These relations with the growing Common law were disturbed, and finally broken, from political motives and considerations; but with the Equity jurisprudence they became, for that very reason, even more intimate and have so continued until the present day.

In the earliest period of Roman law of which there is any remaining trace, and for a considerable time after the
epoch of legislation known as the twelve tables, there were five actions (legis actiones) for the enforcement of all civil rights. Nothing could exceed the arbitrariness and formalism of these legal proceedings. Absolute accuracy was required in complying with the established phrases and acts; any omission or mistake of a word or a movement was fatal. Gaius who wrote long after they were abolished, says of them: "But all of these actions of the law fell gradually into great discredit, because the over-subtlety of the ancient jurists made the slightest error fatal." These actions finally became obsolete and disappeared, except one of them, which under a modified form was retained for certain very special cases until a late period of the Empire. The analogy between them and the old "real actions" of the English law is striking and complete. Their place in all ordinary controversies, was supplied by a species of judicial proceedings much more simple and natural to which the generic name formula was given.

These formulas were the regular steps or processes in a cause prior to the trial, reduced to writing, but always carefully governed by strict rules and conducted in conformity with prescribed forms. The parties appeared before the magistrate and the formula was prepared by him, or under his direction. It contained what we would call the "Pleadings", namely a statement of the plaintiff's cause of action, bearing different names in different actions, expressed in
technical language which varied according to the action and the defense; it also contained the appointment of the lay person who was to try the issue and render judgment, the judex, or the arbiter; the rule of law which was to govern him, not stated, as an abstract proposition, but simply as a direction, in short and technical terms, to render such a judgment if the plaintiff proved the case stated in the pleading, otherwise to dismiss the suit. This entire formula was contained in a few brief sentences and the technical words or phrases used indicated clearly the nature of the action, the relief to be given, the defenses to be admitted and the legal rule to be followed. The contrast between its brevity, simplicity and at the same time comprehensiveness, and the repetitions, redundancy and obscurity of the later Common Law special pleadings is very striking. The formulas being thus prepared before the magistrate (the cause being at that stage "in jure") the parties then went before the "judex," or "arbiter" and proceeded with the trial the cause being at that time "in judicio." He heard the testimony and the arguments of counsel, and rendered the judgment; but the cause was then taken before the magistrate a second time, whose power it was to enforce the judgment, and who also possessed revisory authority over the decision of the judex. It is plain that the duties and functions of the judex corresponded closely with those of our jury; and even his power in rendering the judgment was not essentially
different from that of the jury in giving their verdict, since the judgment itself, which ought to be rendered, was prescribed in the direction of the formula, and the judex had no more authority than the jury has in determining the rule of law which should govern the rights of the parties. The functions of the magistrates were more complex.

The most important magistrates, after the development of the Roman law had fairly commenced, and down to the period under the Empire at which the administration was entirely remodeled, were the Praetors, Urban and Peregrine, (Praetor Urbanus, Praetor Peregrinum). The praetor in the totality of his juridical functions, corresponded both to the English common law courts and the Chancellor. As the English courts, by means of their legislative functions have built up the greater part of the law of England, so did the praetors, by the exercise of the same function, construct the largest part of the Roman jurisprudence, which was afterwards put into a scientific shape by the great jurists of the Empire, and was finally codified in the Pandects of Justinian. This legislative work of theirs was done in a manner and form so outwardly different from that of the English judges, that we have apparently failed to observe the identity. This identity, however, exists and the differences are wholly formal. The legislative work of the English and American courts has been and still is done in the judgments and opinions rendered upon the decision of cases after the events
have happened which called for such official utterances. The same work of the Roman praetors was done in the Edicts (Edicta) which they issued upon taking office, and which in the course of time became one continuous body of law, each magistrate taking what had been left by his predecessors, and altering, amending, or adding, as the needs of an advancing civilization required. The form of this edict was peculiar. Instead of laying down abstract propositions defining primary rights and duties, or publishing formal commands similar to modern statutory enactments, the magistrates announced that under certain specified circumstances, a remedy would be granted by means of a designated action, where the prior law gave no such remedy; or that under certain circumstances, if a person attempted to enforce a rule of the prior law by action, a defense which had not existed before would be admitted and sustained.

The jurisdiction of the praetors which was exercised by means of the formulas, and in which a judex or other lay person was called in to decide the issues of fact was called his "ordinary" jurisdiction. In the later periods of the Republic, there came into being another jurisdiction termed the "Extraordinary" jurisdiction. In causes coming under this jurisdiction, the magistrate himself decided both the law and fact, without the intervention of any judex, and unhampered by any technical requirements as to the kind of
formula or proper form of action. The plaintiff alleged the facts making out his cause of action; the defendant set forth his defense; and the magistrate decided. By this method remedies could be given which were not provided for in any existing form of action, and equitable notions could therefore be applied more freely, and thus incorporated into the rapidly growing mass of the national jurisprudence. In this "extraordinary" jurisdiction we can plainly see the prototype of English chancery procedure, while the ordinary methods by formulas were certainly the analogues of the common Law forms of action.

The "extraordinary" jurisdiction continued for a long time side by side with the ordinary, growing in extent and importance until it became the only mode in common use. By a constitution of the Emperor Diocletian (A. D. 294), all causes in the province were required to be tried in this manner; and finally the same rule was made universal throughout the Empire. Here, again, we may see another of the repetitions which history exhibits under the operation of like social forces. This important event in Roman Jurisprudence was in all its essential elements similar to the legislation of Great Britain, and of the American States, by which all distinction between suits in Equity and actions at Law has been abolished, and the two jurisdictions have been combined in the same proceeding and conferred upon the same tribunal.
As we have already stated, the legislative work of the praetors was accomplished by the introduction of new actions, whereby a right could be enforced, which the law prior to that time did not recognize, or which it perhaps absolutely denied. The number of particular actions thus invented or allowed by the praetorian law was large, and they could have been separated in various classes. We propose to arrange them in three groups. The early law of Rome which existed prior to the time when the praetorian development actually commenced, and the external form of which was preserved through a large part of that development—the jus civile—was stern, rigid and arbitrary, paying little or no attention to abstract right, and justice, reflecting in great part the characters and customs of primitive Rome. Certain prescribed actions and defenses appropriate for certain facts and circumstances were admitted, but for other facts and circumstances differing from those to which the existing actions or defenses were exactly adopted, it furnished no remedy. In their work of building up a broader system of jurisprudence upon the Roman basis of this ancient jus civile, the praetors, in the first place introduced a new class of actions which were substantially the same as those provided by the existing law, unaltered in any of their essential features, but larger in the scope of their operation. The old established actions of the jus civile were employed,
therefore, without changing the technical words, phrases and parts of their formulae, but extended this application to new facts and circumstances. These new facts and circumstances did not differ greatly from the subject matter to which the actions had been originally adapted by the former law; they necessarily came within the same general principle which had been the rule of decision before the scope of the actions was enlarged. Similarly, the English law courts have in later times used the ancient actions of covenant and debt, trespass, without altering their technical forms, for the decision of issues which had not arisen in the earlier periods of the common law. The second of the three groups or classes, contained a larger number of new actions first allowed by the praetors, which though not substantially the same, were analogous or similar in their nature and objects to those which existed in the ancient jus civile. The formulas of these new actions bore a general resemblance to those of the old, and were indeed patterned after them, but still differed from them in various important particulars.

Necessary changes were made in the statement of the plaintiff's cause of action, of the defendant's defense, or of the direction of the judgment, addressed to the judex or arbiter. New cases were thus provided for; new rules of law were introduced; old ones were modified or repealed. The number of particular actions embraced in this class was large,
and in the course of the legal development from age to age, the praetors were enabled by their means to soften the rigors of the old law, to remove its arbitrariness, and to mold its doctrines into a nearer conformity with the principles of right and justice. The actions comprised in this class and the services which they rendered in improving the Roman law were strictly analogous to the actions of ejectment, case, trover, and especially assumpsit, and the work which they have performed in expounding and ameliorating the common law. The third class consists of the new actions introduced from time to time, which were quite different, both in principle and in form, from any that had existed under the old law. In their invention, the magistrate disencumbered all connection with the ancient methods, and by their use, more than by any other method, he constructed a jurisprudence founded upon and penetrated by equitable doctrines which finally supplanted the old jus civile, and became the Roman Law, as it was scientifically arranged by the great jurists of the Empire, and is known to us as the Pandects and Institutes of Justinian.

The material used in the work of improving the jus civile originated in what was termed the jus gentium, or law of nations. This law was found in those rules of conduct which the magistrates found existing alike in the legal systems of all the people with which Rome came in contact. These rules they conceived to have a certain universal sanc-
tion as founded upon fundamental principles of human nature. At a later day, the civic law of morality which was termed legally, the lex naturae was invoked. It was found that the jus gentium and lex naturae were frequently identically the same in principle. Hence arose the conception that the natural law and the law of nations were one and the same; or that the doctrines which were found common to all national forms of government were dictated by and formed basic principles of the natural law.

The particular rules of Roman jurisprudence derived from this morality, or law of nature, were called "Aequitas" from the word aequum, because they were deemed to be impartial in their operation and therefore applicable to all people alike. The law of nature was considered to be the ruling force in government and in all the machinery of government, and therefore it was presumed to have absolute authority. To bring the entire juridical system into conformity with this all embracing morality, and to allow only those actions, to render those decisions which would be in strict conformity with the moral, was the purpose of the Roman magistrates and jurists. Therefore, when to adhere to the form or substance of the primitive jus civile would do a moral wrong and produce an inequitable result, (inaequum) the praetor in seeking conformity with the law of nature, provided a remedy by means of an appropriate action or defense. Gradually the circumstances under which the praetor would interfere grew more
certain, so that a great body of principles based upon the
natural law was introduced into the Roman system of juris-
prudence, which constituted Equity. This body of law was
not a separate department of the law; it permeated the en-
tire system, displacing what was harsh and unjust, and bring-
ing the whole into an accord with prevalent moral nations.
Originally, aequitas conveyed the idea of universality, a
regard for the interests of all whose interests were worthy
of regard, in contrast strikingly with the maintainance of
an exclusive or partial regard for the interests of some.
The latter had been the dominating characteristic of the old
jus civile. Following the introduction of Christianity, and
after its influence had been felt throughout the then known
world, the meaning of aequitas became enlarged and was then
made to include our modern conceptions of right, justice
and morality. This point, however, is not within our prøv-
ince.

Thus we determine that there are many analogies between
the growth of Equity at Roman and English law. The same
causes operated to make it a necessity; that the same methods
were up to a certain point pursued to make possible, that in
principle the same results were reached. These similarities
in the two systems are striking. No less striking, however,
are the differences.

In the Roman system the magistrates were willing to do
what the early English common law judges refused to do, that
is, to promote and control the entire legal development as the needs of an expanding empire demanded. Therefore no separate court or tribunal was necessary at Roman law. The Common Law judges on the contrary resisted any form of innovation upon their established procedure. By so doing they cramped the legal growth, whereas the Roman judges led the way in reform movements and were frequently in anticipation of the needs of their growing communities. Whereas the Roman Praetors effected their reforms by the exercise of their own jurisdiction, the English judges formed new tribunals.

Like that of all peoples in the early stages of their development, the law of England during the Anglo-Saxon and early Norman period was largely the result of circumstance and founded principally upon the customs which circumstance made prevalent. The very primitive Saxon Codes with the exception of a few excerpts from Holy Writ, and fewer fragments of the then known remains of Roman law, were chiefly repetitions of prior existent customs which had come down through tradition. The Saxon folk courts and the Witanagemote were not composed of professional judges and guided themselves in the decision of particular controversies in the light of established customs which when stabilized had the same force and effect as our own positive law.

William the Conqueror allowed the local folk courts of the Saxons to continue in existence. With the manor courts of the Norman Barons, they formed the tribunals of first re-
sort for the settlement of ordinary disputes through several reigns after that of William the Conqueror. As the more strictly professional tribunals grew in importance, these courts gradually fell into disuse until the traveling justices appointed by the King's Court as representing the crown superseded them entirely. William, however, made some important innovations. In the Curia Regis (King's Court) which then, and for a considerable time afterwards, was a body composed of Barons and high ecclesiastics with legislative, judicial and administrative functions as yet unseparated, he appointed a Chief Justiciary to preside over the hearing of suits. This creation of a permanent judicial officer was the germ of the professional common law tribunals having a supreme jurisdiction throughout England, which subsequently became established as a part of the government, distinct from the legislative and the executive. As occasion required, he also appointed itinerant justices to travel about and hold "pleas" or preside over the shire courts in the different counties. These officers were temporary and they ceased to function as such when their special duties had been performed. They were, however, the beginning of a judicial system which still prevails in England, and which has been adopted in many of the American states.

The organization made and allowed by William continued without any substantial change, but yet with gradual modifications and necessary improvements through several succeed-
ing reigns. The business of the King's Court steadily in-
creased; under Henry II its judicial functions were finally 
separated from the legislative, and from that time on, until 
its abolition in 1874, it has continued to be the highest 
common law tribunal of original jurisdiction under the name 
of the Court of King's Bench. In the reign of Henry I, it-
inerant justices were sometimes appointed as by William the 
Victor, under Henry II their office and function were 
made permanent; but during the reign of Edward III, their 
places were filled and their duties performed by the justices 
of the superior courts, acting under special commissions 
empowering them to hold courts of oyer and terminer. 

These itinerant justices "justices in eyre" went 
from county to county holding pleas--civil and criminal, and 
as a consequence, the old local courts of the shire, hundred 
and manor were abandoned as means of determining controversies 
between litigant parties. The King's Court even after it 
became a purely judicial body, was attached to the person of 
the King, and followed him in his journeys and residences 
in different parts of the realm. The great inconvenience 
resulting to suitors because of this transitory quality of 
the court was remedied by the Magna Charta which provided 
in one of its articles that "Common Pleas shall no longer 
follow the king." In obedience to this mandate of the Char-
ter, justices were appointed to hear controversies concern-
ing lands and other matters merely civil--known as "common 
pleas" and the new tribunal composed of these judges was fix-
ed at Westminster. Thus commenced the Court of Common Bench.
The third superior common law tribunal acquired its powers in a much more irregular manner. In the arrangement of his government, William the Conqueror had established a board of high officials to superintend and manage the royal revenues, and a number of barons, with the chief justiciary were required to attend the sittings of this board, in order to decide the legal questions which might arise. These judicial assessors in the course of time became the Court of Exchequer, a tribunal whose authority originally extended only to the decision of causes directly connected with the revenue, but its jurisdiction was subsequently enlarged, through the use of legal fictions, and thus made to a certain extent, concurrent with that of the two other superior law courts. The office of Chancellor was very ancient. It had existed before the Conquest, and was continued by William. Under his successors, the Chancellor soon became the most important functionary of the king's government, the personal advisor and representative of the Crown, but in the earliest times, without any real judicial powers and duties annexed to the position. How these functions were acquired, it is our purpose to describe. The three superior law courts whose origin has just been traced, have remained with some statutory modifications through the succeeding centuries, until by the Judicature Act of 1873, they and the Court of Chancery, and certain other courts were abolished as distinct tribunals,
and were consolidated into one "supreme court of Judicature."

The local folk courts left in existence at the conquest and even the itinerant justices and the central King's Court for a while continued to administer a law which was largely a thing of custom. The progress of society, the increase in importance of property rights, the artificial system which we call feudalism, with its mass of arbitrary rules and usages, all demanded and rapidly produced a more certain, complete and authoritative jurisprudence for the entire realm, than the existing popular customs, however ancient and widely observed. This work of building up a positive jurisprudence upon the foundations of the saxon customs and feudal usages, this initial activity in creating the Common Law of England, was done not by parliamentary legislation, nor by royal decree, but by the justices in their decisions of civil and criminal causes. The law which had been chiefly customary and therefore unwritten, preserved only by tradition was changed in its form by being embodied in a series of judicial precedents preserved in the records of the courts, or published in the books of reports, and thus it became, so far as these precedents expressed its principles and rules, a written law.

In this work of constructing a jurisprudence, the early common law judges as well as the Chancellor at a later day drew largely from their own knowledge of the Roman law. The Common Law of England in its earliest formative period, was
much indebted to that Roman jurisprudence which enters so largely into the judicial systems of all the western nations of the European continent. Besides the proof furnished by the law itself, several important facts connected with the external history of its primitive stages point to this conclusion. The clergy who possessed most of the learning of the times were students of the Roman law. The earliest justices of the common law courts, as well as the chancellors were generally taken from the higher rank of ecclesiastics; and on all occasions where it was necessary for them to legislate in the decision of particular cases, to create new rules for relations hitherto undetermined they naturally had recourse to the code with which they were familiar, borrowed many of its doctrines, and adopted them as grounds for their judgments. Nor was a knowledge of the Roman law confined to the courts; its study became a part of what we now term—higher education.

Had it not been for several very powerful causes, partly growing out of the English national character, or rather out of the character of the Norman kings and barons who ruled over England, and partly arising from external events connected with the government itself, it is probable that this work of assimilation and of building up the common law with materials taken from Roman legislation, would have continued throughout its entire formative period. As the corpus juris civilis contains the results of the labors of the great phil-
osophic jurists who brought the jurisprudence of Rome to its highest point of excellence, and as its rules so far as they are concerned with private rights and relations, are based upon principles of justice and equity, it is also certain that if this work of assimilation had thus gone on, the common law of England would from an early day have been molded into the likeness of its original. Through the decisions of its own courts the principles of justice and equity would everywhere have been adopted, and would have appeared throughout the entire structure. All this would have been accomplished in the ordinary cause of development, by the ordinary common law tribunals, without any necessity for the creation of a separate court which should be charged with the special function of administering these principles of right, justice and equity. The growth of the English law would have been identical in its external form with that of Rome; it would have proceeded in an orderly, unbroken manner through the instrumentality of the single species of courts, and the present double nature of the national jurisprudence—the two great developments of "Law" and "Equity" would have been obviated. This result, however, was prevented by several patent causes which checked the progress of the law toward equity, narrowed its development into an arbitrary and rigid form, with little regard for abstract right, and made it necessary that a new jurisdiction should be erected to administer a separate system more in accordance with natural
justice and the rules of a Christian morality. These causes we proceed to treat.

The one which was perhaps, the source and explanation of all the others, consisted in the rigid character, external and internal, which the common law assumed after it began to be embodied in judicial precedents, and the unreasoning respect shown by the judges for these decisions merely as precedents. There was, of course, a time before the character of the law as a lex scripta became well established, when this rigidity and inflexibility was not exhibited. The history of civilized jurisprudence can show nothing of the same kind comparable with the blink conservatism with which the common law judges were accustomed to regard rules and doctrines once formulated by precedent, and the stubborn resistance which they interposed to any change in the spirit or form of the law which had been established.

The frequent occurrence of cases in which the rules of the law produced manifest injustice, and of cases where legal principles established by precedents could not apply, together with the unwillingness of the common law judges to allow any modification of doctrines already established through prior decisions, furnished the necessity as well as the occasion for another tribunal, which was to adopt different methods.
When the same difficulty of rigidity, arbitrariness, and non-conformity to the needs of a growing society began first to be severely felt in the application of the law in Rome, the magistrates supplied the remedy by means already at their disposal. The praetors constantly invented new actions and defenses, preserving in them, however, a resemblance to the old; and in time they freed their jurisprudence entirely from the restraints of ancient methods, and introduced the notion of aequitas by which the whole body of judicial legislation became in time reconstructed. The remarkable feature is that this process of development was completed without any violent or sudden changes in existing judicial institutions. Thus the Roman law preserved its unity. The English common law judges set themselves, however, with an ironclad determination against the modification of doctrines and rules long established by precedent, against any relaxation of the settled methods which made the rights of suitors to depend upon the strictest observance of the most arbitrary and technical forms. This attitude of the English common law judges is not to be taken, however, as an indication that their conservatism was so absolute as to prevent any improvements or progress in the law. We attempt merely to indicate the general attitude during the period in which the court of chancery took its rise and for a considerably long period thereafter.
The improvement which an advancing civilization effect-
ed in the nation itself was to a partial extent reflected
in the law. It is certain, nevertheless, that the English
common law was always far behind the progress of the English
people, and in many instances retained the impress of its
primitive barbarism. Parliamentary legislation occasionally
interfered and affected a special reform; the principles of
Equity reacted slightly upon the law; but still the common
law judges as a body manifested the blind conservatism we
have attempted to describe down to comparatively modern times.
At the risk of appearing presumptuous, we are incline to as-
cribe that conservatism to the natural stubborness of the Eng-
lish mind and method of thought.

Lord Mansfield was the first great English judge, cons-
ciously to adopt, and with systematic purpose, to effect the
policy of the Roman praetors. He endeavored to give new
life to the growth of the common law, and by means of equit-
able principles to reform it from within. Mansfield, however,
has been accused of ignorance of the English law. To the
careful reader of history and to the student of Mansfield it
will appear that despite the devastating affect of the "Let-
ters of Junius", Lord Mansfield began the work which was later
taken up by many of the able judges, who have graced the Eng-
lish bench within the present century, and by the State and
national courts of the country, until the Common Law has now
become a truly scientific and philosophical code.

We have thus far attempted to analyse the causes existing in the early condition of the common law, and to show the attitude which rendered necessary a procedure capable of being adopted to a variety of circumstances, and of awarding a variety of special remedies. We now proceed to state the origin of this tribunal and the principal events connected with the establishment of its jurisdiction.

Under the early Norman Kings, the Crown was aided by a Council of Barons and high ecclesiastics which consisted of two branches—the General Council, which was occasionally called together, and was the historical predecessor of the Parliament, and a Special Council, very much smaller in number, which was in constant attendance upon the King, and was the original of the present Privy Council. This Special Council aided the Crown in the exercise of its prerogative, which embraced a judicial function over matters that did not come within the jurisdiction of the ordinary courts. The extent of this judicial power of the King, was from the nature of the country and its unsettled condition, very poorly defined. It is probable also that this extraordinary jurisdiction of the King and council was not always exercised without some opposition, especially when the matters in controversy fell within the authority of the common law courts.

Together with this extra-ordinary judicial function
exercised by the King or by the select Council "in his name and stead", there grew up the jurisdiction of the Chancellor. We are concerned with only those powers of his, which were judicial. Certain it is that he had an ordinary jurisdiction similar to that held by the common law courts, and independent of the extraordinary prerogative jurisdiction possessed by the King and Council, and afterwards delegated to the Chancellor himself. Proceedings in causes arising before the Chancellor, under his ordinary jurisdiction were commenced by common law process and not by bill or petition; he could not summon a jury, but issues of fact in these proceedings were sent for trial before the King's Bench.

In addition to this ordinary function as a common law judge, the Chancellor began to exercise the extraordinary jurisdiction—that of Grace—by delegation either from the King or select Council. It is probable that the judicial power of the Chancellor as a law judge, and his consequent familiarity with the laws of the realm and experience in adjudicating, were the reasons why, when any case came before the King, which for any reason could not be tried by the Crown or Council, such case was referred to the Chancellor for his sole decision. Thus commenced the extraordinary Equitable jurisdiction of the Chancellor.

The practice of delegating the cases to the Chancellor for his sole decision, grew rapidly until it became the acc-
epted mode of dealing with such controversies. It was a
natural method and a necessary one. Gradually the Court of
Chancery, a regular tribunal for administering Equitable
relief and extraordinary remedies came definitely into exist-
ence.

The delegation made by this order of the King conferred
a general authority to give relief in all matters require-
ing the exercise of the prerogative of grace. This authority
differed wholly from that upon which the jurisdiction of
the law courts was based. These latter tribunals acquired
jurisdiction in each case which came before them by virtue
of a delegation from the Crown, contained in the particular
writ on which the case was founded, and a writ for that pur-
pose could only be issued in cases provided for by the pos-
itive rules of the Common Law. This was one of the fundam-
ental distinctions between the jurisdiction of the English
common law courts under their ancient organization, and that
of the English Court of Chancery. The principles upon which
the Chancellor was to base his decision in controversies
coming within the extraordinary jurisdiction thus conferred
upon him, were Homesty, Equity, and Conscience. The usual
mode of instituting suits in Chancery became, that by bill
or petition, without any writ issued on behalf of the plain-
tiff.

Purposely avoiding the historical treatment of the grow-
th of Courts of Chancery, we shall examine the authority vested in them. These courts possessed and exercised the power, which belonged to no common law court, of ascertaining the facts in contested cases by an examination of the parties under oath:—the "probing their consciences"—a method which gave it an enormous advantage in the discovery of the truth, and which has only within our own times been extended to other tribunals. Again, the Chancellor was able to grant the remedy of prevention, which was wholly beyond the capacity of the law courts. He seems to have used this kind of relief with great freedom, unrestrained by the rules which have since been settled with respect to the "injunction."

As the business of the court increased and became regular and constant, the practice was established in the reign of Richard II., of addressing the suitors bills or petitions directly to the Chancellor, and not to the King or his Council.

During the reigns of Henry IV and Henry V., the Commons complained from time to time that the Court of Chancery was usurping powers and invading the domain of the common law judges. It is a very remarkable fact, however, that this opposition never went to the extent of denouncing the Equity jurisdiction as wholly unnecessary; it was always conceded that the law courts could furnish no adequate remedy for certain classes of wrongs, and that a separate tribunal was, therefore, necessary. As a result of these complaints, statutes were passed which forbade the Chancellor from interfer-
ing in a few specified instances of legal cognizance, but did not abridge his general jurisdiction. In the reign of Edward IV., the Court of Chancery was in full operation; the mode of procedure by bill, filed by complainant, and a subpoena issued thereon to the defendant, was settled; and the principles of its Equitable jurisdiction were ascertained and established upon the basis and with the limitations which have continued to the present time. No more opposition to the Court was made by the Commons although the law judges from time to time until as late as the reign of James I., still denied the power of the Chancellor to interfere with matters pending before their own courts, and especially disputed his authority to restrain the proceedings in an action at law by means of his injunction. The controversy between the law and the Equity courts with respect to the line which separates their jurisdiction, has in fact never been completely settled; and perhaps it must necessarily continue until the two jurisdictions are blended into one.

The court of Equity having existed as a separate tribunal for so many centuries has at length disappeared in Great Britain and in most of the American States. The reforming tendency of the present age is strongly toward an obliteration of the lines which have hitherto divided the two jurisdictions. Thus in England and in most of the States of this country, the separate tribunals of law and of Equity have been abolished: the two jurisdictions have been so far
combined that both are administered by the same court and judge; legal and equitable rights are enforced, and legal and equitable remedies are granted in one and the same action. The distinctions which hitherto existed between the two modes of procedure have been so far as possible abrogated—one kind of action being established for all judicial controversies. In the national courts of the United States, and in most of the States, and two departments of law and equity are still maintained distinct in their rules, in their procedure and in their remedies, but the jurisdiction to administer both systems is possessed and exercised by the same tribunal, which in one case acts as a court of law, and in the other as a court of Equity.

In this manner we have attempted to point out the underlying causes which gave rise to the origin of Equity. This has involved a comparison of early Roman Law with the more rigid rules of the ancient Common Law System. In conclusion let it again be remembered, that we have endeavored studiously to avoid any semblance of an historical treatment of the subject. We have tried to be analytical.
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