THE STAGE OF EQUITY.

Roscoe Pound in sketching the development of legal systems has found it possible to strike a mean among the different systems and to divide their progress into four stages. They are: (a) the stage of primitive law, (b) the stage of strict law, (c) the stage of equity or natural law, and (d) the stage of maturity of law.[1] The learned commentator has suggested that we are, at the present time, in the stage of socialization of law when legal and political institutions are consciously directed towards the furtherance of human ends, the satisfaction of human wants with the least sacrifice of human demands.

In the stage of primitive law the end sought was the keeping of the peace, and the means employed to accomplish this object consisted, in the main, of a tariff of composition whereby vengeance might be bought off rather than injury be compensated for. The contribution to our present law from this stage is to be found in the insistence upon peaceable order in society. The end of strict law was security, and exaggerated formalism, given expression in a catalogue of legal remedies, was the means for achieving it. It was thought that formalism was the twin sister of liberty preventing and safeguarding the individual against an arbitrary exercise of magisterial power. The contribution of this stage, particularly in English law, has been an insistence upon certainty and uniformity. Individualism was the prime characteristic of this stage of legal development. The strict law insists upon full and exact performance at all events of a duty undertaken in legal form; it makes no allowance for accident and has no mercy for defaulters. The accomplishment of an ethical ideal was the end of the stage of equity of natural law, and the means employed to achieve this end was the emphasis and enforcement of duties rather than the fitting of claims into the divisions or sub-divisions of a portfolio of remedies. The contribution of this period has been the infusion of good faith and moral conduct into our law. In the maturity of law, the fourth stage referred to above, we find the contributions of the second and third stages. The watchwords of the maturity of law were security and equality, maintained principally by a system of rights.

It has been truly said that classification of law may be compared to tearing a seamless web. The statement is even more applic-

[1] See Roscoe Pound: The End of Law as Developed in Legal Rules and Doctrines, (1914), 27 Harv. L. Rev. 195.

able to the field of legal history. It is exceedingly difficult to define the beginning of a new stage in the progress of the law, and it is practically impossible to state categorically that at a certain time one end was solely, or even substantially, sought and that one method to accomplish that end was invoked. One may properly delimit a certain period on the ground that there was an emphasis placed upon certain particular factors. It is proposed in this paper to examine and discuss the leading features of the third stage, that of equity or natural law, from which many of the liberal standards and tendencies of our modern law, as distinguished from crystallized and arid dogmas, are derived. Arbitrary fiats and barren principles manifesting the spirit of the period of the strict law were weighed in this stage in scales of greater moral precision. The ancient spectacles of tradition and rigidity through which the members of the legal profession looked in the earlier period were discarded, and the validity of legal principles was scrutinized through the lens of ethics, morality or good conduct.

Maine in his *Ancient Law* put forward his famous triad, fictions, equity and legislation, as agencies by which law is brought into harmony with society. The first place may be given to equity because through it the interference with existing law was open and avowed. Equity in English law did not in the main depend upon the prerogative of any person or institution external to the law but rather on the special nature of its principles to which it was alleged all persons ought to conform. The very conception of such a set of principles belongs to a more advanced stage of thought than that from which originated the theory and application of fictions. The word "equity" and its equivalents have throughout legal history been current terms of jurists and publicists. Whatever words are used, the general notion underlying them is that of a doctrine or authority capable of abrogating or ameliorating the hardship which otherwise would ensue either from the literal extension of positive rules of the period of strict law, or from the literal exclusion of cases from those rules notwithstanding that the cases fall within the true spirit of them.[2] Equity has been described as any body of principles existing by the side of the original civil law and claiming incidentally to supersede, in part, at least, the civil law in virtue of a superior sanctity inherent in the principles.

There are two distinct, and almost opposite, processes through which the purpose of equity has been realized. In the more ancient of these we observe that equitable principles were applied by some

[2] See Allen: *Law in the Making,* chap. V.

one, usually the King or a great officer of state, who could dispense with the operation of rules in his discretion, conceived it may be as a reasonable discretion but not defined beforehand. The other, the more modern process, is the rational interpretation and qualification of the rules themselves by a scientific and dialectic method. The first process operated through occasional interference, and, although the interferences might have been frequent, every interference was an isolated act. In England, the intervention of the King's Council, the Chancery and the Chancellor at first was occasional and was not governed by any definite principle or principles. The second process growing out of the first has given the content to the technical term equity in English law.

The swing of the legal pendulum from strict law to equity or natural law might be attributed to the very strictness of the earlier stage, but it is suggested that there was a deeper and an inherent reason. A legal principle, in whatever period, aims at establishing a generalization for an indefinite variety of cases. Uniformity and universality must characterize it and these are essential qualities in it. Aristotle, in calling attention to this fact, stated that legal rules are necessarily general while the circumstances of every case are particular, and it is beyond the power of human insight to lay down in advance a rule which will fit all future variations and complications of practice. He concluded that law must be supplemented by equity, ἐπιεκεια, there must be a power of adaptation and flexible treatment sometimes resulting in decisions which will be even at variance with formally recognized law and yet will turn out to be intrinsically just. The trite saying that "the exception proves the rule" betokens the fact that no generalization can be completely general and that human calculation is imperfect. Of necessity, in legal systems, a discretionary, a meliorating and moderating influence has been added to the rigours of formulated law. C. K. Allen in his *Law in the Making* has pointed out that law like surgery "loses" a certain number of patients. It has been the function of equity to cut down this loss, not by an entire abrogation of the general rule which might result in a serious lack of uniformity and a prevalence of caprice and disorder but by a modification of the rule in the particular case. In England during the period of strict law the centre of gravity was to be found in the letter of the rule, and there was a strong tendency to sacrifice the particular to the general, justice to certainty. In the stage of equity there was a more direct quest after right. There was a wide discretionary power in the judge to draw on his own notions of what was fair and just. The progress of the law is always related to the problem of keeping the flexible

function of equity proportionate to the elements of certainty and stable tradition. A capricious treatment of principles would prove quite as destructive of justice as a rigid application of general or even obsolete rules. On the other hand, a purely traditional legalistic viewpoint on the part of the bench and bar toward many of the acute issues which to-day vex our political, social, industrial and economic life may do untold damage, stimulating to resentful excesses of radical opinion and action, and rendering far more difficult that wise adjustment of law to experience without which orderly social progress is impossible.

In a system so comprehensive and explicit as the Roman the conception of *aequitas* or *aequum et bonum* was firmly embedded. To regard it as a vague counsel of perfection with little practical application is apparently inconsistent with the Corpus Juris. It was not discountenanced, as future judicial interpretation was discountenanced, by the sovereign but, in the fourth century, it was expressed by imperial legislation to be a positive duty of the judge.[3] The stage of liberalization succeeding the period of strict law was represented in Roman law by the classical period, the Empire to Diocletian, and in the law of continental Europe by the period of the law-of-nature schools in the seventeenth and eighteenth centuries. In England, equity was brought to bear upon the legal system long before the jurisdiction of the Chancellor had developed and before the word had attained the technical connotation which it bears to-day in English law. The older process of equity mentioned above predominated in the King's administration of special remedial justice during the fourteenth and fifteenth centuries. Equity in the modern form, exercising a moderating influence in English law, was inherent in our "jurisprudence" long before it became more specialized first by the King's Council, then by the Chancery and then by the Chancellor apart from the Council. Professor Hazeltine has demonstrated this fact, and has shewn that there was to be found in the early common law courts the conception of equity and in many cases premonitions of modern equity. In view of the development of Roman law it is very probable that the common law would have found, if the Chancellor had not taken jurisdiction, that a vigorous element of equity was indispensable to its existence. Furthermore, there is this early evidence to indicate that the dual system of courts in England, administering on one side common law with its rigid rules, and on the other side administering equity, conscience or good faith, is not the anointed method of adjudicating which many students of and writers on English law appear to believe. But the period

[3] *Ibid.*

of strict law set in too quickly in England, and a *rigor juris* in the form of an elaborate writ procedure—a folio of remedies—triumphed over a humanistic interpretation. In the fourteenth century the common law as a consequence was in danger of becoming entangled in technicalities and losing touch with the standards of justice of the nation. The free handling of legal institutions, and the creative power of the judges in framing the developing rules of law began to degenerate in the rigid framing of writs. Sophistic methods of pleading hampered the earlier progressive movement. It was at this critical time that the Court of Chancery came forward with fresh impulses under the influence of ecclesiastical Chancellors who had some acquaintance with Roman law and knowledge of canon law. These Chancellors, supported by a recognition of conscience as a source of law, inaugurated the new stage in the development of English law. As the common law courts of King's Bench, Common Pleas and Exchequer were already established and their judges and practitioners were jealous concerning their jurisdiction, the Chancellor, of necessity, could not claim any paramount right to exercise an over-riding interference with the common law. The Chancellor, taking as the basis of his jurisdiction the maxim, *aequitas agit in personam,* exercised that jurisdiction in a manner which did not bring him into direct conflict with the common law judges. Equitable rights were not to supplant common law rights, and, in most cases, equitable rights were predicated upon the very existence of common law rights.

The Chancellor, making decrees *in personam* addressed to the defendant directly and taking as his standard for adjudicating (to mention some of the older terms) "conscience," "equity," "reason and good faith," "right and reason," would order that the defendant who had a common law right or title should do equity with respect to it. For example, John Doe, intending to go to the Crusades, conveyed his farm, Blackacre, to Richard Rowe and his heirs, who undertook to hold it *ad opus,* on behalf of him, John Doe, for life and in the event of his death, for John Doe's son. On John Doe's return from the Crusades, Richard Rowe, fortified with the legal title, refused to recognize any duty towards John Doe with respect to Blackacre. In a common law court John Doe would be told that by virtue of the conveyance Richard Rowe was now the tenant in fee simple, the owner of Blackacre. The Chancellor, upon perceiving the breach of faith on the part of Richard Rowe, would, while admitting that Richard Rowe had the legal title, decide that Richard Rowe must hold that title for and on behalf of John Doe. If Richard Rowe

failed to observe this personal decree the Chancellor would consign him to prison for contempt of court in disobeying it. Maitland's statement that equity came not to destroy the law but to fulfil it rings very true. Every jot and tittle of the law was to be obeyed but when this was done something might yet be needed, something which equity and good conscience would require. Equity, as understood in English law, was not a self-sufficient system; at every point, it presupposed the existence of the common law. Parliament might have abolished equity and anarchy would not have resulted, although in many respects the common law would have been unjust and even absurd. As a matter of legal history it is interesting to observe that common law only was administered by the Courts of Upper Canada from 1794 to 1837. There was no Chancery Court there during that period but there is no reason to believe that any great confusion resulted. What we do find, however, is that the judges of the common law Courts made a conscious effort to ameliorate the rigours of the common law and to do equity.

In the example given above there was no remedy at common law for the common law courts neither recognized nor enforced the trust. True, in the case of a breach of contract there was the remedy of damages at common law, but if the Chancellor was convinced that damages in the particular case were not adequate he would ordinarily give the extraordinary remedy of specific performance. In the case of a threatened tort common law afforded no remedy to prevent the commission of the wrong; the plaintiff must wait until the horse was stolen before he could move the common law court. The Chancellor, upon being satisfied that damages would not be an adequate remedy if the wrong were accomplished, would issue a decree, called an injunction, to the defendant forbidding him to do the threatened act. The foregoing gives us the answer to the question: When did the Chancellor intervene and give a remedy? The answer may be phrased thus: When he was satisfied that there was in a philosophical, theological or ethical conception of good conscience and equity a duty cast upon the defendant to act or to refrain from acting in a certain way, and when there was no remedy in the premises at common law or when there was an inadequate remedy at common law. The purgative effect upon English law was incalculable as a result of the Chancellors asking, when a person seeking relief came before him, should the defendant in equity and good conscience do or refrain from doing something, is there any remedy at common law and, if so, is it adequate? A constant searching and testing of the common law principles was the process of reform carried out by a court separated and distinct from the courts which administered

the common law. The Chancellor, greedy for jurisdiction, was no doubt full ready to take cognizance of a plaintiff's suit, but it became established that a plea of lack of equity was valid if the defendant could show that a common law court would in the particular instance give the plaintiff a remedy that was adequate. The Chancellor did not only administer equity and good conscience against the defendant. In many instances relief would be refused, or a conditional decree would be given, to a plaintiff who himself had been guilty of some unconscionable conduct. The courts in exercising equitable jurisdiction still invoke the maxim, "He who comes into Equity must come in with clean hands."[4]

The law of real property in England was richly glossed by equity. The development of the law of contracts has been influenced to a large extent by equitable doctrines with respect to fraud, undue influence, duress and mistake. The remedies of cancellation, rectification and specific performance were created in the Court of Chancery. The substantive law of torts was practically untouched while, on the adjectival side, the remedy of injunction is given where damages are inadequate. The Court of Chancery kept clear of the province of criminal law as its sister tribunal, the Court of Star Chamber, administered, what has been perhaps mistakenly called, criminal equity. The headings of equitable jurisdiction are not related. Every particular subject-matter of jurisdiction of the Chancery Court may be traced to a case or cases where the Chancellor, applying his standard of conscience, was of the opinion that relief should be granted, particularly in view of the fact that no relief or an inadequate relief was given by the common law. The only bond which kept the various appendices under the general heading of equity was jurisdictional.

While the watchword of the period of strict law was certainty, the watchword of the succeeding period was morality or some phrase of ethical import such as equity and good conscience. The endeavour to make law and morals coincide and to reach an ethical solution of each particular controversy afforded too wide a scope for judicial discretion. As a consequence the administration of justice in this stage was uncertain. The early Chancellor was not troubled about ideas and general theories. If the Chancellor considered that the defendant's conduct was dishonest, he simply had to find a remedial device that might be enforced *in personam.* Cardinal Morton, who was the Chancellor in 1489, said:

[4] See, for example, *Leather Cloth Co., Ltd.* v. *American Leather Cloth Co., Ltd.* (1863), 4 DeG. J. & S. 137; *Browning* v. *Ryan* (1887), 4 Man. R. 486; *Litvinoff* v. *Kent* (1918), 34 T.L.R. 298.

> Every law should be in accordance with the law of God; and I know well that an executor who fraudulently misapplies the goods and does not make restitution *il sera damné* in hell; and to remedy this in accordance with conscience, as I understand it.

There was truth in the oft-quoted statement of Selden (*circum.* 1654):

> Equity in law is the same that the spirit is in religion, what everyone pleases to make it. Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor; and as that is longer or narrower so is equity. 'Tis all one as if they should make his foot the standard, one Chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the Chancellor's conscience.

With the Chancellorship of Lord Nottingham (1673-1682) there began in English equity the transformation from a heterogeneous medley of isolated empirical remedies to a body of stable principles applied through an increasingly rigid system of rules parallel with and supplementary to many of those of the common law. Lord Nottingham declared that the conscience of the Chancellor is not his natural and private conscience but a civil and official one. The hardening process was furthered by the publishing of reports and arguing from precedent. But even in 1767 we discover Lord Camden saying that,

> Nothing can call this Court into activity but conscience, good faith and reasonable diligence; where these are wanting the Court is passive and does nothing.

The hardening process however continued. In 1818, Lord Eldon said:

> It is my duty to submit my judgment to the authority of those who have gone before me.—I can not agree that the doctrines of this Court are to be changed with every succeeding Judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot.

In 1903 Buckley, J. (later Lord Wrenbury) said: "This Court is not a Court of conscience." The mind of Lord Camden was imbued with the pre-transformation idea of equity, consequently he applied to it the terminology of a bygone age. The dicta of Lords Eldon and Wrenbury may stand as neat and epigrammatic expressions of a commonplace idea. They were studious to show that an equity judge will not now decide every individual case according to the result of a ransacking search of his own conscientious principles but rather that he will follow precedents. The vague and formless material of the fifteenth and sixteenth centuries was at least to be reduced to a system of standards. Neither Eldon nor Wrenbury could have

meant that the discretionary element in applying settled standards no longer exists and that the idea of conscience had been entirely abandoned. Nor could Mr. Justice Riddell, of the Supreme Court of Ontario, have meant this in 1918 when he said:

> No judge has the right to give a judgment not judicial. It is not the duty of the judge to do justice according to some supposed rule equitable on the facts; we have got far beyond the practice of measuring by the length of Chancellor's foot.

The hardening and crystallization of equity never resulted in a *rigor aequitas* comparable with the *rigor juris*. Washing the contribution of English equity in the most cynical acid, we must conclude not only that it did in a stage where its end was directly sought liberalize English law but that it contributed much of the moral content of our modern law and left to us a heritage to be found in the elasticity and flexibility of many of our legal remedies. It is not contended that the system of dual courts is superior to the system of the Roman law where "equity" was administered in all courts. It is suggested, however, that, for a law developed by the technique of *stare decisis*, the hardening of equity in English law was delayed advantageously by the handling of equity by a new and separate court. Dual courts were not as necessary in a legal system where the technique consisted of an examination and exposition of texts by jurists and judges. The equitable standards recognized and applied by our courts of the present time are still available for bringing to bear the test of conscience on the relations of man with man.

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