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## A History of Equity in Pennsylvania

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# A HISTORY OF EQUITY IN PENNSYLVANIA

Equity in Pennsylvania has run an interesting and varied course. Alternatively upheld and attacked, butt of the jealousy between the Assembly and the Governor as to who should administrate it, misunderstood by a people who feared the powers it might give the judiciary, its survival and present form in the Commonwealth today can be understood only by a knowledge of its history. That history may be conveniently discussed with reference first, to the various unsuccessful attempts previous to 1836 to establish a court of chancery or a court having chancery powers; second, the administration of equitable principles in common law forms and actions; and third, the vesting, in 1836 and thereafter, of limited chancery powers in certain courts.<sup>1</sup>

## ATTEMPTS AT CHANCERY POWERS PRIOR TO 1836

Chancery jurisdiction was first exercised in Pennsylvania by the Court of Assizes and by the Governor of New York<sup>2</sup> because the government of New York, from 1664 until 1681, except for a brief period (1673-1674), extended over portions of what is now Pennsylvania.<sup>3</sup> The grant of a charter to William Penn<sup>4</sup> and the execution to him by the Duke of York of three deeds precluding any possible future pretensions to the territory by the Duke or his heirs,<sup>5</sup> vested the judiciary of the state in the Founder.

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<sup>1</sup>Fisher: "Equity in Pennsylvania", *Anglo-American Essays*, Vol. II, p. 810.

<sup>2</sup>Lloyd: "Early Courts of Pennsylvania", p. 162; Wilson: "Chancery in the Colonies", *Anglo-American-Legal Essays*, Vol. II, p. 797; Rawle: "Equity in Pennsylvania", 4; Hazard's *Annals of Pa.*, 424.

<sup>3</sup>Egle: "History of Pa.", 40-42; Donehoo: "Pennsylvania, A History", Vol. I, 111; Smith's *New York*, Vol. I, 14-15; Hazard's *Annals of Pa.*, 356-367.

<sup>4</sup>The charter was granted to Penn on March 4, 1681. *Charter & Laws of Pa.*, 81; Lloyd; 40-41; *Penna. Archives, 1664-1747*, 52.

<sup>5</sup>*Ibid.*

That Penn was permitted to set up courts of equity in the new colony is shown by the fifth section of the Charter,<sup>6</sup> which gave him the right of establishing courts with such powers and form of procedure as should seem to him most convenient.<sup>7</sup> Penn was not jealous of his powers. In deference to the wishes of the people, while still in England, he drew up the Frame of Government, which served as the Constitution under which the province was organized, entrusting the government to the Governor and freemen of the province.<sup>8</sup> By it the freemen were to elect the Provincial Council and General Assembly. The power of erecting courts was given to the Governor and Council but seems never to have been exercised, for when new courts were created, the concurrence of the Assembly was invariably required to the bill creating them.<sup>9</sup>

William Markham, Penn's cousin, preceded him to the colony as deputy governor. He arrived July 1, 1681, but did little to establish a government though he did hold a court at Upland in November.<sup>10</sup> Penn reached the new province in the fall of 1682. One of his first acts was to send out notice for holding a court at which he stated his intention of calling the Assembly and recommended that the Duke of York's laws be followed in the interim. The county courts established by the Duke of York apparently met with Penn's approval and were continued by him.<sup>11</sup> On December tenth following, the Assembly met alone, no Provincial Council having been elected, and passed the Great Law of Pennsylvania,<sup>12</sup> which provided in part that in every county one court should be erected. Appeal lay to a Provincial Court of no less than five judges meeting in quarterly session, and from there to the Provincial Council, the court

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<sup>6</sup>Rawle, 5; Lausatt: "Equity in Pennsylvania", 228.

<sup>7</sup>Lloyd, 41; Rawle, 4.

<sup>8</sup>Duke of York's Laws, 97; Lewes: "Courts of Penna.", 1 Penna. Bar Ass'n Rep. 355.

<sup>9</sup>Lloyd, 43; Lewes, 355; Rawle, 51 note.

<sup>10</sup>Lloyd, 42.

<sup>11</sup>Lewes, 356; Lloyd; 48.

<sup>12</sup>Lloyd, 48; Rawle, 6.

of final jurisdiction.<sup>13</sup> The jurisdiction of the county courts was very vague and seems not to have included equity powers.<sup>14</sup> Perhaps this was due to Penn's lack of admiration for equity courts. In a letter dated August 16, 1683, he describes the Indians as "not disquieted with bills of lading or exchange nor perplexed by chancery suits", and refers to the erection of courts of justice in every county.<sup>15</sup> Until the establishment of the provincial court in 1684, therefore, the Provincial Council when necessary exercised chancery powers as had previously been done by the Governor of New York.<sup>16</sup>

The year 1684 saw the passage of two bills respecting equity courts. The first provided that the county courts should be courts of equity as well as law;<sup>17</sup> the second, that a provincial court should be created both as a court of appeal from the county courts and to try all cases, at law and in equity not triable in the county court.<sup>18</sup> Not much is known of the procedure under these acts. Notwithstanding the statement of Mr. Laussat to the contrary,<sup>19</sup> the distinction between the law and equity sides of these courts was strongly marked, equity procedure being according to the rules of chancery practice.<sup>20</sup> For example, there are instances in the early history of Pennsylvania when the court sitting in equity modified its own judgment previously entered as a court of law.<sup>21</sup> Little business seems to have been transacted on the equity side of the courts,<sup>22</sup> and what little there was consisted, as one authority says, of "that universal justice which corrects, mitigates and supplies accord-

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<sup>13</sup>Rawle, 5.

<sup>14</sup>Lewes, 357.

<sup>15</sup>Penn's letter of August 16, 1683 to the Free Society of Traders, Rawle, 6; Fisher, 811.

<sup>16</sup>Lloyd, 166; Wilson, 797; Rawle, 8.

<sup>17</sup>Rawle, 9; Lloyd, 167; 1 Colonial Records 47; Charter & Laws of Pa., 167.

<sup>18</sup>Rawle, 9; Lloyd, 167; Fisher, 811; Brightly: "Equity Jurisprudence", 129; Duke of York's Laws, 167-168; 1 Col. Rec. 47.

<sup>19</sup>Laussatt, 20.

<sup>20</sup>Rawle, 10; Lewes, 538.

<sup>21</sup>Lloyd, 168.

<sup>22</sup>Fisher, 811.

ing to popular rather than technical notions of equity" because "the suggestion of right reason prevailed more than the principles of any established code."<sup>23</sup>

This rarity of equity cases may have been due to the lack of a clear conception by the people of the equitable powers of these courts, for, in 1687, the Assembly asked the Council to explain how far the courts "may be the judge of equity as well as law."<sup>24</sup> The Council made the evasive and equivocal reply that "the law doth supply and answer all occasions of appeal and is a plainer rule to proceed by."<sup>25</sup> It has been said that this action of the Council resulted in the cessation of the equity practice and caused a resort to the Provincial Court in all future attempts to alter or reverse judgments at law.<sup>26</sup>

The Council was not alone in its uncertainty. There is evidence of a real clash of public opinion regarding equitable powers at this early period. On the one hand, there was a party distinctly opposed to, and distrustful of, equitable powers,<sup>27</sup> principally because of the practice of equity courts in reversing judgments previously obtained at law.<sup>28</sup> This opposition at one time went so far as to compel the introduction of a bill to strike out the word "equity" from the powers given the courts. Though the bill died after a first reading, it "doubtless represented the views of many in the Province."<sup>29</sup> On the other hand, there continued throughout the history of Pennsylvania a party which wanted courts of equity and made efforts to get them.<sup>30</sup>

For a time the parties seem to have reached a compromise in the act passed in 1690 confirming the equity jurisdiction of the county courts but limiting it to causes under ten pounds. Provision was also made that all ap-

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<sup>23</sup>McCall's address before the Law Academy of Philadelphia, 1838; Lewes, 358.

<sup>24</sup>Lloyd, 168; Rawle, 10; Wilson, 798.

<sup>25</sup>Rawle, 10; Lloyd, 168; Wilson, 798; Lewes, 359.

<sup>26</sup>Col. Rec. 441; Lewes, 359.

<sup>27</sup>Lewes, 359.

<sup>28</sup>Fisher, 813; Brightly, 29; Wilson, 798; Lloyd, 169.

<sup>29</sup>Lewes, 359.

<sup>30</sup>See note 28, *supra*.

peals in law and equity from the county courts should be determined by the Provincial Court.<sup>31</sup> This act had a precarious existence. It was repealed by the English government in 1693, re-enacted the same year, and again re-enacted in 1700.<sup>32</sup> Evidently it produced no results,<sup>33</sup> and the champions of equity again got busy. They won what seemed at first a signal victory in 1701 by the passage of an elaborate act remodelling the courts of the colony and apparently repealing all prior regulations concerning equity.<sup>34</sup> By this act equity powers were given to the Common Pleas Courts with appeal to the Supreme Court. Procedure was to be by bill and answer with such other pleadings as were necessary in chancery courts.<sup>35</sup> But the victory was more apparent than real. Nothing seems to have come of this act,<sup>36</sup> for in 1703 complaint was made that to the great oppression of the people no court of equity had been held in pursuance of this law. In 1705 the act was repealed by the home government.<sup>37</sup>

At this time another discordant element was added. There began the long and bitter quarrel between the Governor, the Provincial Council and the General Assembly on the question of the Governor's right to be the Chancellor.<sup>38</sup> The Governor contended that his commission entitled him to be Chancellor. The Assembly vehemently opposed any extension of his power. Through three entire sessions the battle was waged.<sup>39</sup> Finally, in 1710, following the death of Governor Evans, who had been adamant in his claims, the Assembly succeeded in passing an act providing that the Common Pleas Court should hold a court of equity four times each year in every county, observing as far as applicable the rules and practice of the High Court of Chancery

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<sup>31</sup>Rawle, 10; Fisher, 811; Wilson, 798; Lloyd, 168.

<sup>32</sup>Lloyd, 169; Rawle, 11, note.

<sup>33</sup>Fisher, 812.

<sup>34</sup>Rawle, 11; Brightly, 29; Fisher, 812.

<sup>35</sup>Lloyd, 170; Rawle, 12; Wilson, 798; 2 Col. Rec. 23.

<sup>36</sup>Fisher, 812; Lloyd, 170; Rawle, 12.

<sup>37</sup>Rawle, 12; Lloyd, 170-171; Brightly, 30; 2 Col. Rec. 115.

<sup>38</sup>Rawle, 13.

<sup>39</sup>Rawle, 13; Lloyd, 171; 1 Col. Rec. 274, 288.

in England. Questions of fact were to be decided by issues at law before the Common Pleas, and appeals could be taken to the Supreme Court.<sup>40</sup> The act was shortlived. Within three years, in 1713, it was repealed on the ground that it made proceedings in equity very dilatory and unnecessarily increased the business of the common law courts.<sup>41</sup>

The proponents of equity were die-hards. Two years later they made another attempt through the passage of an act establishing a Supreme or Provincial Court of Law and Equity whose procedure should be according to English Chancery practice. Again they met defeat. In 1719 England repealed the act.<sup>42</sup>

William Keith had become governor in 1717. He was greeted with vigorous complaints concerning the administration of justice. Courts had not been held for many years and "the confusion of the judiciary had reached an alarming height and was the cause of great injury to the colonists."<sup>43</sup> To remedy these conditions courts of inferior and superior jurisdiction were immediately erected.<sup>44</sup> In 1720 Keith, taking advantage of the great popularity and influence he had acquired by his support of the people against the proprietors, sent a message to the Assembly informing them that "it having been represented to him that a court of chancery was very much wanted, he had consulted those learned in the law and others of good judgment, who all agreed that the office of chancellor could only be lawfully executed by him, who by virtue of the great

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<sup>40</sup>Rawle, 16; Lloyd, 174.

<sup>41</sup>Wilson, 799; Brightly, 30; Rawle, 17; Lloyd, 175.

<sup>42</sup>Rawle, 17; Wilson, 799; Lloyd, 177; Brightly, 30. Some explanation might be in order as to why there was always a space of several years between the enactment of a statute and its repeal. By the terms of the charter, the colonists had five years within which to transmit their laws for approval. Thus, they would keep them here and act under them as long as they decently could and then send them to England. Upon repeal by England, the colonists would pass others as nearly similar as they dared. Rawle, 18; Wilson, 799.

<sup>43</sup>Laussatt, 22; Rawle, 19.

<sup>44</sup>Laussatt, 22.

seal, might be understood to act as the King's representative." He added, however, that the opinion of the Assembly would direct his conduct. On the next day, March 4, a resolution was unanimously passed by the Assembly requesting that for the present the Governor, with the assistance of such of his Council as he should think fit, open and hold a court of equity in the province.<sup>45</sup>

The Council debated upon the resolution at Philadelphia on June 8;<sup>46</sup> tabled it for further consideration; then, on August 6, decided that the Governor might "safely comply." In accordance with the wishes of the Governor, it was provided that no decree should be pronounced without the assent of two or more of his oldest six councillors.<sup>47</sup> Four days later the Governor issued a proclamation creating a court of chancery with the same powers and jurisdiction as the Court of Chancery in England.<sup>48</sup>

This provision for the introduction of chancery powers differed from all previous attempts. All the preceding legislation had been designed to give chancery jurisdiction to the common law courts—to create courts having a law and an equity side. The proclamation of 1720 created a chancery court as a distinct tribunal. It was the first, last and only separate court of chancery Pennsylvania ever had.<sup>49</sup>

This was one court of equity that England seems not to have objected to nor interfered with. We are led to wonder why. Was it the influence of the Governor, or the fact that this act alone set up a separate court of chancery, or had the defeat of the previous acts been caused by those who sought to vest chancery powers in the Governor? Whatever the reason, the court lasted sixteen years and transacted considerable business.<sup>50</sup>

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<sup>45</sup>Brownson, "Equity in Pennsylvania", 18; Lloyd, 177; Rawle, 19; Laussatt, 23.

<sup>46</sup>3 Col. Rec. 90-91.

<sup>47</sup>3 Col. Rec. 115-116.

<sup>48</sup>Laussatt, 23; Lloyd, 176, 180; Rawle, 21.

<sup>49</sup>Rawle, 22; Lloyd, 180; Brownson, 18.

<sup>50</sup>Wilson, 801; Lloyd, 184; Rawle, 22.

Keith had functioned without much opposition or distrust; but when he was removed in 1726, his successor, Gordon, lacking the confidence of the people, met with determined opposition in the exercise of his chancery powers. The people were jealous of any powers exercised by the King or by his representative, the Governor. They also objected to the heavy fees charged and to the requirement that persons from every part of the province should attend the court at Philadelphia.<sup>51</sup> The opposition culminated in a petition to the assembly complaining that the court violated the Charter of Privileges granted by Penn to the people in 1701 which provided that no person should at any time be obligated to answer any complaint relating to property before the Governor or Council or in any place but the ordinary court of justice.<sup>52</sup>

The Assembly took the same view. In 1735, having passed a resolution that the Court of Chancery was contrary to the Charter of Privileges, they addressed a questionnaire to the Attorney General and Solicitor General of England to ascertain their opinion as to the legality of the court. Both replied that authority was validly granted to Penn to erect courts; that the erection and holding of the Chancery court was not contrary to the Charter of Privileges; and that the resolution of 1735, *supra*, did not make the court illegal. On one point they disagreed. The Attorney General said that assent of the Legislature to establishing the court had been given by the resolution of 1720; the Solicitor General held that the assent had not been given, but was not necessary.<sup>53</sup>

An angry correspondence, between the Governor and Provincial Council on one side and the Assembly on the other, resulted from the introduction of a bill seeking to wrest chancery powers from the Governor and place them in the Courts of Common Pleas. The Assembly adjourned without passing the bill, leaving the Governor free to conduct his Chancery court until his death several months later.

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<sup>51</sup>Brownson, 18-19; Fisher, 812.

<sup>52</sup>Charter of Privileges, sec. 6; Lloyd, 184.

<sup>53</sup>1 Dallas, appendix; Brightly, 32.

Logan, the new Governor, yielded to the views of the Assembly and no subsequent governor has ever attempted to act as chancellor.<sup>54</sup>

Little was accomplished toward the introduction of chancery jurisdiction in the next hundred years.<sup>55</sup> By the Constitution of 1776 the common pleas courts were given the power of a court of equity so far as related to perpetuation of testimony, obtaining of evidence from places outside the state, and protection of the property of the insane. The Assembly was given power to grant to the courts such other chancery powers as should be found necessary and not inconsistent with the Constitution.<sup>56</sup> Previous to the adoption of the Constitution, as will hereafter appear, the common law courts had adopted the practice of administering equitable principles in common law actions. The Constitution did not affect this practice. It was merely intended to deny to the courts the right to adopt chancery forms and remedies without the sanction of the legislature, still permitting them to apply equitable principles.<sup>57</sup>

In pursuance of the constitutional provision, the legislature passed two acts, one providing a method of supplying lost instruments;<sup>58</sup> the other, supplying a proceeding in the nature of a bill of discovery against garnishees in foreign attachments.<sup>59</sup>

The constitutional convention of 1790 witnessed the last great battle for a separate court of chancery. The first draft of the new constitution presented to the convention contained a provision for a high court of chancery of state wide jurisdiction, and a court of chancery in each judicial district. Strenuous efforts were made by some of the most able members of the convention to have the provision adopted; but a determined opposition, after long debate, succeeded in having the provision stricken out in the com-

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<sup>54</sup>Lloyd, 185, 187-188; Rawle, 51-52.

<sup>55</sup>Brightly, 33; Fisher, 812; Lloyd, 192.

<sup>56</sup>Rawle, 59; Fisher, 812; Lloyd, 193; 1 Smith's Laws 427.

<sup>57</sup>3 Wharton, 466.

<sup>58</sup>Act of March 28, 1786; 2 Smith's Laws 375.

<sup>59</sup>Act of Sept. 28, 1789; 2 Smith's Laws 504; Rawle, 59; Lloyd, 173.

mittee of the whole. As a consequence, the only change made regarding equity was a provision which empowered the legislature to expand the existing equity powers and to set up a separate court of chancery if they saw fit.<sup>60</sup> This latter power was never exercised. In fact, for nearly fifty years the Assembly practically ignored the power thus given them by the Constitution. From 1790 to 1836 the only additional powers given to the courts were powers to appoint, dismiss and compel trustees to account; to compel answers under oath in certain cases of execution; and to compel specific performance of contracts to sell lands in cases where the vendor had died.<sup>61</sup>

Thus, for a period of over one hundred and fifty years, with the exception of the brief period of sixteen years (1720-1736), the Commonwealth of Pennsylvania was compelled to administer justice without the aid of a court of equity, and indeed, without a court possessing, except to a very limited extent, any chancery powers.<sup>62</sup>

#### EQUITABLE PRINCIPLES THROUGH COMMON LAW FORMS

The necessity for some method of administering equitable principles was appreciated by the courts at an early date. It was soon found that in a growing and enlightened community with great natural resources, varied industries and increasing commerce, the lack of some method of administering equitable principles meant, in many cases, a failure of justice.<sup>63</sup> As early as 1785 Chief Justice McKean had stated that "the want of a court with equitable powers like those of chancery in England had long been felt in Pennsylvania."<sup>64</sup>

In the absence of a court having equity powers, the common law courts were compelled, in order to prevent this failure of justice, to invent some method of administering

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<sup>60</sup>Rawle, 60; Lloyd, 194.

<sup>61</sup>Rawle, 61.

<sup>62</sup>Lloyd, 195.

<sup>63</sup>Rawle, 57.

<sup>64</sup>Wharton v. Morris, 1 Dallas 125.

equity. This was accomplished by the adoption of the principles, doctrines and rules of equity as a part of the common law of the state. Common law actions were used to enforce purely equitable claims; purely equitable defenses were permitted in common law actions; and, at rare times, purely equitable reliefs were obtained by means of actions at law.<sup>65</sup> The courts "adopted equitable principles without disturbing the landmarks of the law. They let in the changes called for by progressive improvement at every point where they had a real and living place of usefulness. In the absence of a court of chancery they wrought them into the law as it was, and administered them with admirable ingenuity through the common law forms."<sup>66</sup>

The precise time at which the courts began this practice is not known.<sup>67</sup> Some authorities say it was done from the beginning; others deny this.<sup>68</sup> The first reported case upon the subject is *Swift v. Hawkins*, 1 Dallas 17, decided in 1768, in which, in an action of debt on a bond, the defendant was permitted to prove the failure of consideration on the ground that since "there was no court of chancery in the province" it was necessary in order to prevent a failure of justice. The Chief Justice who had sat in the Common Pleas as early as 1732<sup>69</sup> added that he had known this to be the constant practice for thirty-nine years past. This would carry the practice back to 1729, before the abolition of the court of chancery established by Keith.

Prior to the Revolution, the equity administered by the common law courts was not technical. It was the so-called natural justice. In *Pollard v. Shaaffer*, 2 Dallas 212, it was said: "A court of chancery judges every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail." Equity as a system with settled and unchanging rules was apparently neither studied nor appreciated. In his eulogium of Chief Justice

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<sup>65</sup>Brightly, 35.

<sup>66</sup>Mitchell, C. J., in *Morton's Estate*, 201 Pa. 271.

<sup>67</sup>Fisher, 814; Lloyd, 190.

<sup>68</sup>Pro: Brightly, 35; Con: Rawle, 52.

<sup>69</sup>Lloyd, 190; Rawle, 55.

Tilghman, Horace Binney called it a "spurious equity compounded of the temper of the judge and of the findings of the jury with nothing but a strong feeling of integrity to prevent it from becoming as much the bane of personal security as it was the bane of science."<sup>70</sup>

After the Revolution, due chiefly to the efforts of Chief Justice Tilghman, the technical doctrines of English chancery were studied and this natural equity disappeared.<sup>71</sup> There followed a steady expansion of equity administration by the courts. "I do not like the idea", said Justice Huston, "that our equitable powers are more extensive in one form of action than another."<sup>72</sup> It was even said, subsequently, that "In Pennsylvania equity is law"<sup>73</sup> and that "all courts in Pennsylvania are courts of equity, whether proceeding by bill or action at law."<sup>74</sup>

There is no better illustration of the elasticity and facility of expansion of the common law than that shown by the ingenuity of the courts in applying equitable principles through the rigid common law forms in Pennsylvania.

#### EQUITABLE DEFENSES

Equitable defenses seem to have been permitted in common law actions a considerable time before equitable rights were enforced. The relaxation of the common law rigor in this respect began so early and successfully that the time when it did not exist is now unascertainable. Two means grew up through which an equitable defense could be pleaded: the first, under the general pleas; and the second, under special pleas.<sup>75</sup> Of the general pleas, the plea of *payment* was most widely used and probably the best,<sup>76</sup> the principle being that is presumed

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<sup>70</sup>Fisher, 815.

<sup>71</sup>Fisher, 814.

<sup>72</sup>Prelock v. Bye, 3 Rawle 183.

<sup>73</sup>Hawthron v. Bronson, 16 S. & R. 269.

<sup>74</sup>Sime v. Norris, 8 Phila. 84, Sharswood, J.

<sup>75</sup>Laussatt, 66.

<sup>76</sup>Laussatt, 75.

to be paid that which in equity and good conscience ought to be paid.<sup>77</sup> To prevent surprise defendant was required to give notice of the equitable matters to be proved.<sup>78</sup> Plaintiff in turn could reply that an equitable case was not made out<sup>79</sup> or give evidence to rebut defendant's equity.<sup>80</sup> For a time resort was had to the plea of *non-assumpsit*,<sup>81</sup> but use of this plea was severely criticized and seems to have been abandoned at an early date.<sup>82</sup> The third general plea availed of was *performance* or *covenants performed*. This plea, because it was originally useable only where covenants were in the affirmative had been abandoned at an early date. By a series of liberal decisions it was resuscitated by the Pennsylvania courts and made a vehicle of equity<sup>83</sup> on the same principle as that applied in the plea of *payment*.<sup>84</sup> The final general plea used was that of *not guilty* in actions of ejectment by reason of statutory requirement.<sup>85</sup> It was available, however, only when the demand of the plaintiff was personal, not real.

Except in suits in ejectment where the claim was real, whenever the general pleas were for any reason inconvenient or improper the defendant was permitted to set up his equity in a special plea.<sup>86</sup> Thus protected, a defendant was

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<sup>77</sup>*Sparkes v. Garrigues*, 1 Bin. 164; *Robinson v. Eldridge*, 10 S. & R. 142; *Cope v. Smith's Ex'rs*, 8 S. & R. 116; *Gochenaur v. Cooper*, 8 S. & R. 203; *Galbraith v. Ankrim*, 2 Browne 120; *Hollingsworth v. Ogle*, 1 Dallas 260; *Griffith v. Chew*, 8 S. & R. 25.

<sup>78</sup>*Troubat & Haly: Manual of Pennsylvania Practice*, 131; *Brownson*, 42; *Laussatt*, 73.

<sup>79</sup>*Robinson v. Eldridge*, 10 S. & R. 142.

<sup>80</sup>*McCUTCHEON v. NIGH*, 10 S. & R. 344; *Robinson v. Eldridge*, 10 S. & R. 142; *Jordan v. Cooper*, 3 S. & R. 589.

<sup>81</sup>*Stansbury v. Marks*, 4 Dall. 130; *Laussatt*, 74; *Brownson*, 43.

<sup>82</sup>*Dunlap v. Miles*, 4 Yeates 370, by *Tilghman, C. J.*

<sup>83</sup>*Laussatt*, 78.

<sup>84</sup>*Bender v. Fronberger*, 4 Dall. 439.

<sup>85</sup>The plea of *not guilty* was required because by statute that plea was the only one permitted in actions of ejectment. *Laussatt*, 79; *Brownson*, 44.

<sup>86</sup>*Laussatt*, 81; *Brownson*, 44; *Pollard v. Shaaffer*, 1 Dall. 214; *Murray v. Williamson*, 3 Bin. 136; *Hartzell v. Reiss*, 1 Bin. 291; *Jordan v. Cooper*, 3 S. & R. 578.

assured of his equitable rights in the courts of law of Pennsylvania as completely as in the English courts of chancery.<sup>87</sup> The importance of these various pleas is now mainly historical since the Practice Act of 1915 in all actions within its scope has abolished all pleas and substituted an affidavit of defense.<sup>88</sup> In this form equitable defenses at law persist today. Some illustrations of the early practice follow.

At common law lack of consideration was never a defense to a sealed instrument. Equity made the important distinction that while want of consideration was no defense, failure of an intended consideration justified a bar to an action on the instrument. At an early date the Pennsylvania courts permitted this equitable defense.<sup>89</sup> Thus, in a suit on a bond, defendant was permitted to show the failure of consideration through a plea of payment.<sup>90</sup> Similarly, defendant in a scire facias sur mortgage was allowed to show that only part of the sum for which the mortgage was given had actually been advanced to him;<sup>91</sup> and likewise where a chose in action was assigned, failure of intended payment defeated the suit.<sup>92</sup>

In a suit on a bond obtained by a suggestion of falsehood or concealment of truth, the Pennsylvania courts allowed the equitable defense of fraud. In *Baring v. Shippen*<sup>93</sup> defendant was permitted to show that a bond obtained from him by C, to raise money for defendant's use had been assigned to the plaintiff as security for C's private debts. Under the plea of payment the defense was held to be good. In

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<sup>87</sup>Laussatt, 87.

<sup>88</sup>1915 P. L. 483. By the amendment of April 22, 1929, P. L. 627, where defendant alleges new matter, or set-off, or counter-claim, he must set out such separately and label under the respective heading. By section 3 of the Practice Act all pleas are abolished.

<sup>89</sup>Swift v. Hawkins, 1 Dall. 17; Baling v. Shippens, 2 Bin. 166; Bryson v. Ker, 4 S. & R. 309; Hech v. Shener, 4 S. & R. 256; Solomon v. Kimmel, 5 Bin. 234.

<sup>90</sup>See note 89 supra.

<sup>91</sup>Mackey v. Brownfield, 13 S. & R. 239.

<sup>92</sup>Baynton v. Hughes, 1 Dallas 23; Solomon v. Kimmel, 5 Bin. 234; Bury v. Hartman, 4 S. & R. 177.

<sup>93</sup>2 Bin. 154.

*Carpenter v. Goff*<sup>94</sup> defendant relying on an oath taken by plaintiff in a judicial proceeding had given a bond in compromise. He was permitted to show that plaintiff had been guilty of perjury. The reports contain numerous other cases of equitable defense for fraud.<sup>95</sup>

Mistake was a defense at common law only when defendant could prove an inability to read. Equity, ever more liberal, relieved a party when a plain mistake was proved by conclusive evidence; and Pennsylvania followed this equity practice.<sup>96</sup> The equitable principles relating to the defense of accident were also applied in Pennsylvania.<sup>97</sup> At an early date Chief Justice Tilghman said it often had been decided that when a bond was given for the purchase money of land to which the title afterwards proved to be defective, the obligor could not recover.<sup>98</sup> There is even an early case that smacks of the defense of hardship. Defendant pleaded that the house which he had covenanted to keep in repair had been destroyed by the British Army under General Howe in 1777 and the court declaring enforcement inequitable relieved him from the agreement.<sup>99</sup>

Of all equitable defenses, perhaps equitable set-offs were most frequently used.<sup>1</sup> Defalcation was permitted;<sup>2</sup> and if defendant's claim exceeded plaintiff's the jury was permitted, where defendant pleaded payment and gave notice of defalcation, to render a verdict for the defendant

<sup>94</sup>S. & R. 165.

<sup>95</sup>Some other cases are: *Heck v. Shener*, 4 S. & R. 256; *Robinson v. Eldridge*, 10 S. & R. 142; *Sparkes v. Garrigues*, 1 Bin. 164; *Miller v. Henderson*, 10 S. & R. 292.

<sup>96</sup>*Laussatt*, 72; *Galbraith v. Ankrim*, 2 Browne 120.

<sup>97</sup>*Laussatt*, 72.

<sup>98</sup>*Solomon v. Kimmel*, 5 Bin. 233; see also *Pollard v. Shaffer*, 1 Dall. 210 in an action of covenant.

<sup>99</sup>*Pollard v. Shaffer*, 1 Dall. 214.

<sup>1</sup>*Murray v. Williamson*, 3 Bin. 135; *Laussatt*, 76.

<sup>2</sup>*Waln v. Bk. of No. Amer.*, 8 S. & R. 88; *Commissioners of Berks Co. v. Ross*, 3 Bin. 539; *Jacks v. Moore*, 1 Yeates 391; *Boyd v. Thompson*, 2 Yeates 210.

on which he could have judgment and execution.<sup>3</sup> This was a great gain over chancery in England which obliged defendant to submit to judgment for the plaintiff at law and bring a separate suit in equity.<sup>4</sup>

The advantage thus gained by Pennsylvania courts is further illustrated by the protection of defendant's equitable title in suits of ejectment.<sup>5</sup> If the equity of the defendant was founded on non-performance of a particular act by plaintiff, such as payment of purchase money or making title to a part of the land,<sup>6</sup> doing the act was made a prerequisite to recovery by the plaintiff; and could be relied on in the defense, or judgment would be arrested by the court until plaintiff had performed. The equitable principle applied was that he who seeks equity must do equity.<sup>7</sup> When, however, the equity of defendant totally denied title in the plaintiff, recourse was had to the principle that everything shall be presumed to be done which in good conscience ought to have been done, and recovery was denied the plaintiff.<sup>8</sup> It even was provided by statute that a quiet possession of seven years under an equitable *right* gave equitable *title* to the land.<sup>9</sup>

One of the most commonly known methods of asserting an equitable defense at law today is a motion to open judgment. When a judgment is obtained unfairly at law, instead of resorting to a bill in equity, a rule is taken to show cause why the judgment should not be opened and the party complaining let into a defense on the merits.<sup>10</sup>

#### EQUITABLE CLAIMS

It was not long before the injustice of allowing equit-

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<sup>3</sup>Purdon's Digest, 237; Brownson, 43; Balsbaugh v. Frazier, 7 Harris 95; King v. Diehl, 9 S. & R. 409; Anderson's Ex'rs v. Long, 10 S. & R. 62.

<sup>4</sup>Laussatt, 77.

<sup>5</sup>Brownson, 43; Laussatt, 79.

<sup>6</sup>Mathers v. Akewright, 2 Bin. 93.

<sup>7</sup>Griffith v. Cochrane, 5 Bin. 105; McCall v. Lenox, 9 S. & R. 315.

<sup>8</sup>McCall v. Lenox, 9 S. & R. 315; Griffin v. Cochrane, 5 Bin. 105;

Laussatt, 80; Brownson, 44.

<sup>9</sup>Act of 1705; 1 Smith's Laws 48; Laussatt, 81.

<sup>10</sup>Fisher, 818.

able defenses while refusing the enforcement of equitable claims was seen. The first reported case was decided in 1791<sup>11</sup> in which a plaintiff who had lost a bond was permitted to recover by proving the debt of which it was evidence, contrary to the common law which required proferret. The courts were not slow to apply equitable principles to other types of claims.

It was necessary, however, to make use of the common law actions. Again the courts were resourceful. Of the means employed as a carriage for equitable demands five are worthy of special notice: ejectment, *indebitatus assumpsit*, replevin, conditional verdicts and writ of *scire facias*. By ejectment as to land, replevin as to personalty and *indebitatus assumpsit* as to funds, the courts succeeded in providing adequate equitable relief wherever chancery would have acted in like circumstances to protect an equitable title.<sup>12</sup> These actions were somewhat similar in nature, and it is safe to say that where a remedy was supplied through one, on principle it could be supplied in a proper case through the other two. For that reason, a case involving ejectment, for example, would when the *res* was personalty or funds, be authority for the use of replevin or *indebitatus assumpsit*.

Where these complementary remedies were for some reason inadequate, as where injunctive relief was necessary, the conditional verdict was used. By this method, the jury gave a very high verdict in damages conditioned on the defendant performing the act desired within a specified time.

The final important means was the writ of *scire facias*.<sup>13</sup> Although there are not many cases of its application in the reports, it was capable of extensive use. By it defendant could be called upon to show cause why he should not do or cease doing a certain act, and thus the way was opened for injunctive relief. It possessed the two great advantages

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<sup>11</sup>*Commonwealth v. Coates*, 1 Yeates 2.

<sup>12</sup>(Ejectment) *Hawn v. Borris*, 4 Bin. 78; (*indebitatus assumpsit*) *Martzell v. Stauffer*, 3 P. & W. 398; (replevin) *Weaver v. Laurence*, 1 Dall. 157; *Laussatt*, 58. By reason of the act of 1887, P. L. 271, *indeb. assumpsit* is now comprised in *assumpsit*.

<sup>13</sup>*Laussatt*, 139.

of equity practice: joinder of all parties concerned in the event; and a plastic decree. The operation of these common law methods we shall now see in the types of relief afforded.

### TRUSTS

In contradiction to the common law which did not recognize an equitable title, the courts of Pennsylvania went to considerable lengths to protect the interest of a cestui que trust. When chancery would presume a trust to have arisen and would compel its execution, the Pennsylvania courts would do likewise through the medium of allowing the equitable owner to maintain an action as if he had legal title.<sup>14</sup> The same medium was employed to remove a fraudulent, insolvent, or mismanaging trustee, the court directing the sheriff to vest the trust res in the court to be held until a new trustee was appointed to take the title.<sup>15</sup> Constructive<sup>16</sup> and resulting<sup>17</sup> trusts were enforced, too, by recognition of the equitable title. A voluntary deed of trust which had been recorded was held valid against subsequent purchasers for value from the settlor.<sup>18</sup> On the trustee's death the legal title, subject to the trust, descended to his heirs.<sup>19</sup>

A remarkable case of following the trust res is *Pierce v. McKeehan*, 3 W. & S. 280. In that case, P had received funds impressed with a trust for the benefit of C. P bought realty with funds; sold the realty and took bonds in payment; then transferred the bonds to an assignee for the benefit of his creditors. C was permitted to maintain an action of debt against the assignee. Said the court, "The equity powers of our courts are sufficient protection of the

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<sup>14</sup>(Ejectment) *Hawn v. Norris*, 4 Bin. 78; *Kauffelt v. Bower*, 7 S. & R. 81; *Peebles v. Reading*, 8 S. & R. 491; *Laussatt*, 51 .

<sup>15</sup>*Indebitatus assumpsit*: *Martzell v. Stauffer*, 3 P. & W. 398.

<sup>16</sup>*Indebitatus assumpsit*: *Aycenina v. Peries*, 6 W. & S. 258; *Ejectment*: *Peebles v. Reading*, 8 S. & R. 484; *Thompson v. White*, 1 Dallas 447; *German v. Gabbold*, 3 Bin. 302.

<sup>17</sup>Action of partition for land: *Stewart v. Brown*, 2 S. & R. 462. See *Jackson v. Ringling*, 4 W. & S. 149 and cases there cited.

<sup>18</sup>*Lancaster v. Dolan*, 1 Rawle 231.

<sup>19</sup>*Crunkleton v. Evert*, 3 Yeates 570; *Jenks v. Backhouse*, 1 Bin. 91.

cestui que trust, and when the amount of the fund is uncertain, it may be ascertained through a jury."

By use of the trust theory legatees were permitted to recover bequests;<sup>20</sup> and creditors, to sue for their respective shares after an account by an assignee for the benefit of creditors.<sup>21</sup> In addition to the protection afforded by the common law courts, statutes were enacted at an early date. An outline of this legislation appears in *McInness' Estate*, 4 Wh. 182.

### SPECIFIC PERFORMANCE

One of equity's proudest claims to superiority over the common law was that it granted specific relief. Pennsylvania through common law actions secured the same end. Where the vendee of real estate sought specific performance, he was permitted to use the action of ejectment based on his equitable title.<sup>22</sup> A vendee of personalty used *replevin*.<sup>23</sup> The principle applied was that equity looks on things agreed to be done as actually done,<sup>24</sup> and relief was given whenever chancery would have given relief in similar circumstances.<sup>25</sup> Ejectment is still used frequently.

A vendee could also get specific performance by bringing an action of covenant, *assumpsit* or debt asking for a verdict for the value of the subject matter of the contract, or such other sum as would compel the vendor to perform rather than pay damages. The jury would give a verdict for damages to be released on the vendor's performing in a specified time and paying the costs.<sup>26</sup>

<sup>20</sup>*Seibert v. Butz*, 9 Watts 490.

<sup>21</sup>*Gray v. Bell*, 4 Watts 410; *Vanarsdale v. Richards*, 1 Wh. 408; *Wilhelm v. Miley*, 5 S. & R. 137.

<sup>22</sup>*P. & L. Digest of Dec.*, Vol. 5, c. 7408. At law a legal title had been required: 10 A. & E. Encyc., 482. The first reported case was *Hawn v. Norris*, 4 Bin. 78 (1811) in which the court said this power had been frequently exercised before 1790.

<sup>23</sup>*Shearick v. Huber*, 6 Bin. 5 (family picture); *Smyth v. Craig*, 3 W. & S. 14.

<sup>24</sup>*Christy v. Brien*, 14 Pa. 249.

<sup>25</sup>*Brawdy v. Brawdy*, 7 Pa. 158; *Laussatt*, 60.

<sup>26</sup>*Irvine v. Bull*, 7 Watts 323; *Stevenson v. Kleppinger*, 5 Watts

The vendor, too, could get specific performance. He was allowed to recover in an action of debt, covenant or assumpsit the purchase price agreed on in the contract of sale<sup>27</sup> in direct violation of the common law rule that in an action at law the vendor could recover only damages for breach of contract.<sup>28</sup> The action was in the nature of a bill in equity with equitable principles governing.<sup>29</sup>

A second method for a vendor to secure performance where the vendee had gone into possession was by ejectment<sup>30</sup> or replevin.<sup>31</sup> Suit was brought to constrain the vendee either to abandon possession or perform his duties under the contract. The vendee could use the contract as an equitable defense only on condition that he perform his duty within a specified time. If the vendor had conveyed title, however, this remedy was not available.<sup>32</sup> Ejectment is still used in Pennsylvania.<sup>33</sup>

### INJUNCTIVE RELIEF

Various devices were employed as substitutes for the injunctive process of equity. The writ of estrepment, extended and improved by legislative action, was used to restrain the commission of waste.<sup>34</sup> Nuisances were checked to some extent by verdicts for large damages rendered by the jury under the direction of the court.<sup>35</sup> The damages were released by the plaintiff if the defendant ceased his wrong-

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420; *Decamp v. Feay*, 5 S. & R. 323; *Findlay v. Keim*, 62 Pa. 116; *Wafflenzer v. Roth*, 93 Pa. 443.

<sup>27</sup>*Magaw v. Lathrop*, 4 W. & S. 316; *Ellet v. Paxon*, 2 W. & S. 418; *Murray v. Ellis*, 112 Pa. 485; *Tripp v. Bishop*, 56 Pa. 427; *Bower v. Cone*, 62 Pa. 149.

<sup>28</sup>29 A. & E. Encyc., 719-720.

<sup>29</sup>*Magaw v. Lathrop*, 4 W. & S. 321; *Huber v. Burke*, 11 S. & R. 238.

<sup>30</sup>*Greenlee v. Greenlee*, 22 Pa. 226; *Shaw v. Bayard*, 4 Pa. 257; *Riel v. Gannon*, 161 Pa. 289.

<sup>31</sup>*Henderson v. Lauck*, 21 Pa. 359.

<sup>32</sup>*Forum* (Dickinson School of Law) Vol. XI, p. 100.

<sup>33</sup>*Adams v. Barrel*, 26 Pa. Super. Ct. 461.

<sup>34</sup>*Byrne v. Boyle*, 37 Pa. 260.

<sup>35</sup>*Clyde v. Clyde*, 1 Yeates 92.

doing. The ancient writ of assize of nuisance was revived and used also.<sup>36</sup>

The jurisdiction of equity in cases of trespass, infringements of trade marks and trade names, and violations of rights of personalty, was not settled prior to the time when the common pleas courts were given power to issue injunctions; and the law of unfair competition and injunctions in industrial disputes had not yet developed. Consequently, the need for a court having power to issue injunctions was not acute.

This was fortunate. While the conditional verdict and the writ of scire facias could have been called into further use, they were not an adequate substitute, and without the injunction, under present conditions, the administration of law would be greatly handicapped. An example of the failure of conditional verdicts, for instance, was where the defendant was impecunious, for a verdict for high damages could scarcely compel an act if the defendant had nothing to lose.

#### MORTGAGE-REDEMPTION AND FORECLOSURE

A mortgagor has always been permitted to enforce his equity of redemption in Pennsylvania by means of equitable ejectment, where the debt has been fully paid or he has offered to pay it.<sup>37</sup> It has also been held that since the right of redemption cannot be destroyed or taken away, it cannot be restrained or fettered, and an attempt to confine the right of redemption to the mortgagor personally was held void.<sup>38</sup>

Little difficulty has been experienced in regard to foreclosure because the act of 1705 providing foreclosure and sale by scire facias has evidently been satisfactory.<sup>39</sup> There

<sup>36</sup>Levezey v. Gergas, 2 Bin. 194.

<sup>37</sup>Crouse v. Binkley, 167 Pa. 182; Mellon v. Lemmon, 11 Pa. 56; Wells v. Van Dyke, 109 Pa. 330; Hewitt v. Huling, 11 Pa. 27; Wharf v. Howell, 5 Bin. 449; Random v. Swartz, 1 Yeates 579.

<sup>38</sup>Johnston v. Gray, 16 S. & R. 361. See also Stoever v. Stoever, 9 S. & R. 434; Brigley v. Wallace, 16 S. & R. 245.

<sup>39</sup>Bradley v. Chester R. R., 36 Pa. 151.

seems to be no case of strict foreclosure, although in one case<sup>40</sup> it was held that a mortgagor who had acquiesced a long time in the possession of the mortgagee, and who had while insolvent failed to mention the property in his return was not permitted to recover the property. In that case, however, the mortgagee had improved the land, and the mortgage debt was practically equal to the value of the land. Apparently, a strict foreclosure might result by the mortgagee going into possession, which he has a right to do when unpaid,<sup>41</sup> and, finding that the rents and profits of the land fail to pay the debt, remains in possession, unpaid, for such a long time that it would be inequitable to allow the mortgagor to redeem.

#### INTERPLEADER

The principle of interpleader was not invented by the chancellor but was borrowed by him from the common law. The common law, however, allowed interpleader in only four limited classes of cases, and after the introduction of trial by jury, it gradually gave way to chancery.

In Pennsylvania because there were no courts of equity the common law process of interpleader was not abolished but was enlarged to accord with equitable principles.<sup>42</sup> The form of procedure was simple. Where defendant wished to interplead, he would give notice to other claimants, file a suggestion admitting the debt or duty, stating his willingness to pay or perform the claim of third parties, and pray for a scire facias to bring them in to interplead. With all the parties under the jurisdiction of the court, the case was equitably decided. An excellent outline of the practice appears in *Brownfield v. Canon*, 25 Pa. 299.

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<sup>40</sup>*Stoever v. Stoever*, 9 S. & R. 434.

<sup>41</sup>*Boever v. Fenn*, 90 Pa. 359; *Soper v. Guernsey*, 71 Pa. 219. The mortgagee in possession must account for the rents and profits: *Rulensbaugh v. Ludwick*, 31 Pa. 131; *Givens v. McCalmont*, 4 Watts 460.

<sup>42</sup>*Brownfield v. Canon*, 25 Pa. 299; *McKinley v. Insurance Co.*, 278 Pa. 300.

## REFORMATION

At common law if a contract or conveyance were made in writing, or if a contract were first made orally and informally and later reduced to a written instrument, the writing was conclusive as to the terms of the contract or conveyance. This rule resulted in much injustice if the instrument did not express the actual intent of the parties thereto. In order to avoid this injustice, equity gave the remedy of reformation by which the instrument would be rectified or corrected to conform to the actual intent of the parties.

In Pennsylvania, the power of the courts of equity was assumed by the courts of law, in fact, though not in name, by admitting, when the instrument was sued upon, proof of the actual intention of the parties and enforcing the bargain which the parties intended. This practice created in some minds the erroneous impression that the parol evidence rule was not in force in Pennsylvania. That is not true. It has frequently been held that parol evidence is admissible where there has been fraud, accident, or mistake.<sup>43</sup>

The remedy provided by the common law courts was a fairly adequate substitute for reformation but it was conceded that the difficulties which in some cases "attend the plaintiff's proceeding at common law" made a bill in equity "the only safe and entire remedy."<sup>44</sup>

## MISCELLANY

In addition to the remedies outlined above, there are a number of miscellaneous cases of the application of equitable principles.<sup>45</sup> In some situations no cases were decided.

<sup>43</sup>Phillips v. Meilly, 106 Pa. 536.

<sup>44</sup>Gump's Appeal, 65 Pa. 476.

<sup>45</sup>Lang v. Keppele, 1 Bin. 125 (Suit brought against executors of deceased partner for partnership debt; at common law action could be brought only while partner alive.) McCullum v. Coxe, 1 Dall. 140 (allowed assignor to sue to use of assignee); Steele v. Phoenix Ins. Co., 3 Bin. 312 (suit could be brought without consent of assignor, and equities of the parties applied.) See also: Browne v. Weir, 5 S. & R. 403; Brindle v. McIlvaine, 9 S. & R. 77; Bury v. Hartman, 4 S. & R. 184; Canby v. Ridgway, 4 Bin. 496; North v. Turner, 9 S. & R. 249; Conrad v. Keyser, 5 S. & R. 330. That equity rights are subject to the lien

Thus as to bills of peace, bills for an account, bills to cancel deeds and other instruments, and pleas to the conscience of the defendant, the courts had supplied no substitute. Mr. Laussatt in his able argument that a separate court of equity was not required in Pennsylvania, points to possible remedies in these cases.<sup>46</sup> Bills of peace are useful in two types of cases: (1) to prevent repeated trials in ejectment, and (2) to settle in one action that rights of a complaint who may otherwise be bothered by several persons at different times in distinct actions. As to the first, the Act of 1807,<sup>47</sup> which provides that two verdicts in ejectment given in succession for either party is a bar to any future proceeding, is almost satisfactory. Further, there is no reason to prevent the courts abolishing the fiction on which any number of actions could be based, and make one suit *res adjudicata*. As to the second, Mr. Laussatt suggests the use of the writ of *scire facias* calling in the persons who will cause litigation to appear and show cause why they should not be concluded forever. The judgment would be binding on all those regularly summoned.

Bills to cancel deeds and other instruments could also be replaced by the writ of *scire facias*. As to bills of account, the common law action of account render, which still survives in Pennsylvania, is a fairly satisfactory substitute.<sup>48</sup> Appeals to the conscience of the defendant have been much criticised.<sup>49</sup> As far as relates to documents in defendant's possession, once action has begun the plaintiff can petition asking for a rule to show cause why the documents in question should not be produced;<sup>50</sup> but there seems no common law method for examining defendant prior to trial.

#### A SEPARATE COURT OF EQUITY

Admirable as were the devices by which the courts

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of a judgment, see *Auwerter v. Mathiot*, 9 S. & R. 402; *Carkuff v. Anderson*, 3 Bin. 8; *Ely v. Anderson*, 5 S. & R. 126, etc.

<sup>46</sup>Laussatt, 138.

<sup>47</sup>Sec. 4. 2 Sm. Laws 477.

<sup>48</sup>Patton: *Pennsylvania Common Pleas Practice*, 179.

<sup>49</sup>Laussatt, 141.

<sup>50</sup>*Schmitt's Appeal*, 231 Pa. 473; *Arrott v. Pratt*, 4 Wh. 566.

sought to obviate the evils arising from the lack of chancery jurisdiction they were found to be inadequate to the requirements of a large and prosperous state. To give effect to equitable principles in actions strictly according to common law was no easy task.<sup>51</sup> The success of the Pennsylvania courts in so doing has been described as "the greatest achievement in modern jurisprudence."<sup>52</sup> When, however, it came to strictly equitable remedies and the practical execution of equitable doctrines, the common law failed.<sup>53</sup> The courts "squeezed equity part way into the common law; but it would not go all the way. The whole subject of preventive justice was left outside. They never found a common law substitute for injunctions, bills quia timet, or discovery."<sup>54</sup>

It is true, as has already been shown, that in some cases equitable relief was obtainable through the conditional verdict of a jury in common law action; and it has been argued that if the judges had been a little more pliant, adequate substitutes for all of chancery jurisdiction could have been provided.<sup>55</sup> For a long time able lawyers in the state maintained that the system of administering equity through common law forms was capable of this complete development.<sup>56</sup> They are supported by a distinguished judge who declared that it was "not an ignorant prejudice but high political wisdom which caused our ancestors to refuse a court of chancery any place among their judicial institutions" and he "fervently hoped" that Pennsylvania would "not extinguish the light by which the world has been walking."<sup>57</sup>

The legislature evidently thought otherwise. When the early prejudice against chancery had measurably died out, a new policy was adopted, brought about by the great-

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<sup>51</sup>Rawle, 3, 5, 6; *Huber v. Burke*, 11 S. & R. 245; *Jordan v. Cooper*, 3 S. & R. 564.

<sup>52</sup>*Morton's Estate*, 201 Pa. 271.

<sup>53</sup>Brightly, 26; Rawle, 64; Lloyd, 210.

<sup>54</sup>Fisher, 819; Rawle, 66.

<sup>55</sup>Rawle, 1; Brightly, 27; Fisher, 820.

<sup>56</sup>Lloyd, 209; Laussatt, 122 et seq.

<sup>57</sup>Black, J. in *Finley v. Aiken*, 3 Pitts. L. J. 2.

er importance of equity jurisdiction with the change of social and commercial conditions. In 1830, a commission of three was appointed by the legislature to revise the whole civil law of the state.<sup>58</sup> These men were able lawyers. After a careful study they decided that the Pennsylvania system was not equal to supplying the wants of the people. Being diplomats they heaped praise upon the existing system, while quietly suggesting that full chancery powers be given to the courts in regard to (1) trustees; (2) trusts; (3) control of private corporations, unincorporated societies and partnerships; (4) discovery; (5) interpleader; (6) injunctions; and (7) specific performance.<sup>59</sup>

In 1836,<sup>60</sup> the Assembly passed a bill giving the Supreme Court sitting in banc in Philadelphia and to the Common Pleas courts of Philadelphia, equity jurisdiction in all the cases that had been recommended by the commissioners. To the other Common Pleas courts and the Supreme Court, except as above, were given only the first three of the powers recommended. This was due to the prejudice in the interior counties where lack of familiarity with the forms of chancery procedure had created a special distaste for a change in practice.

The equity jurisdiction of the Philadelphia courts was gradually extended. In 1840, Philadelphia county was given equity jurisdiction in cases of fraud, accident, mistake, and account;<sup>61</sup> and five years later it was provided that this statute should be construed to extend "where such fraud, mistake, accident or account be actual or constructive."<sup>62</sup> The same year jurisdiction in cases of dower and partition was given.<sup>63</sup>

The administration of these equity powers in Philadelphia was so successful that in 1857 that courts of common pleas of several counties were given "the same chancery

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<sup>58</sup>Rawle, 70; Fisher, 822; Lloyd, 197.

<sup>59</sup>Lloyd, 197; Rawle, 71.

<sup>60</sup>Act of June 16, 1836, sec. 13, P. L. 789.

<sup>61</sup>Act of June 13, 1840, P. L. 671.

<sup>62</sup>Act of April 13, 1845, P. L. 542.

<sup>63</sup>Act of March 17, 1845, P. L. 160.

powers and jurisdiction which are now by law vested in the common pleas of the county and city of Philadelphia."<sup>64</sup>

Since then there have been other important but less extensive grants by the legislature. As a result, the Pennsylvania courts possess nearly the whole jurisdiction of chancery. It is well settled, however, that common pleas courts have only such powers as have been specifically conferred by statute. Cases have therefore arisen of which Pennsylvania courts have refused to take cognizance although plainly within the jurisdiction of a court possessing general chancery powers.<sup>65</sup> It would be interesting to discover what the result would be were the plaintiff in such a case to resort to a common law action and attempt to secure equitable relief on a principle laid down prior to 1836.<sup>66</sup>

As to the statutory grants of equity powers in Pennsylvania it has been held that:

(1) They give to the courts only the powers of the English court of chancery in regard to the specified subjects.<sup>67</sup>

(2) They should be liberally construed so as to extend the equity powers of the courts.<sup>68</sup>

(3) They do not deprive the courts of the power to administer equitable principles in common law forms and actions.<sup>69</sup>

Though this latter be true, advantage is not often taken of it. An interesting study might be made to determine

<sup>64</sup>Act of Feb. 14, 1857, P. L. 39.

<sup>65</sup>*Pitcairn v. Pitcairn*, 201 Pa. 372; *Wilson v. Blane*, 262 Pa. 367: "He who asserts the jurisdiction must therefore point to the statute giving it."

<sup>66</sup>In this connection it might be noted that courts of equity have refused a vendor of land specific performance where he seeks the purchase price only because his common law remedy is adequate. Thus we have the anomaly of a common law court giving the equitable relief that a court of equity refuses.

<sup>67</sup>*Kearns v. Hawley*, 188 Pa. 116.

<sup>68</sup>*Gump's Appeal*, 65 Pa. 476.

<sup>69</sup>*Biddle v. Moore*, 3 Pa. 161; *Church v. Ruland*, 64 Pa. 432; *Corson v. Mulvaney*, 49 Pa. 88.

whether some common law actions are not more suitable in some instances than the remedy provided by a court of equity.

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