

THE FUSION OF LAW AND EQUITY.

In the fusion of law and equity lies, in the opinion of the writer, the one great object to be achieved, if we would reach anything like a true reformation of the evils of the present administration of justice. From time to time we have had amendments made to our procedural methods, which have more or less ameliorated the situation, but these have been mere nibblings at the edge of things and not bites to the center. What we must have is *one* system of rights, as the Romans had in the full flower of their jurisprudence. Until we have taken steps to achieve that we are simply walking round and round like one lost. Indeed, we have in reality no system of law at all, but instead we have three *no* systems—a system of real property law, a system of law and a system of equity, each one standing out separate and distinct from the others. Could anything be more chaotic than this—this which deals with nearly the most important of human concerns? One would imagine that the people of any organized, civilized society would see to it that the first thing to engage their attention would be the law—its simplicity and its adaptation to their needs, for all must admit that the demand is imperative, and that the demand must be properly met, else great evil results. Yet not only has nothing of moment been done (except the overturn in England by the Judicature Act of 1873, which most unfortunately stopped short), but besides great opportunities have been missed, as for instance that furnished by the statute *In Consimili Casu* of the second of Westminster passed in 1285. But at that time kings' writs were almost sacred things, which it was almost sacrilegious to touch, at least the common law judges thought so, and hence after several new writs were extracted from the statute, all forward movement ceased. From that time until the Judicature Act of 1873, nothing substantial was done, with the result that equity as an entirely new system of rights pursued its way without let or hindrance. Jeremy Bentham was as one crying in the wilderness, Romilly and his associates devoted themselves

to a remedy of the most apparent flagrant abuses of the day, which had little or nothing to do with the substantive law, while John Austin devoted his great abilities to making clear what we already had.

How great the difference is between our two systems of law and equity is not appreciated unless attention is very particularly attracted to it. Contract is one thing at law, quite another thing in equity. If a partner, who as such and on behalf of his partnership undertakes to enter into a contract with a corporation of which he is a director, it is a good contract at law—there are juristic persons on each side and all the other elements of a contract are present; but in equity it is quite different. Under that system it is treated as no contract at all, by reason of the fact that looked at from the point of view of equity the two opposite parties have in reality contracted with themselves. Again, the defenses to a contract at law are quite limited, while under equity one may even have contracts given up to be cancelled on grounds to which a court of law would pay no attention. So, in transactions and contracts flowing from them between parties having certain relations with each other, while the transactions and contracts might be perfectly good at law, they would be valueless in equity in the absence of the complaining party's having had independent advice. Take consideration, which lies at the very heart of the common law contract. At law any consideration, no matter how small, will support a contract and a suit on it for the breach; but if one wishes to have the contract specifically enforced, as he cannot do at law, he must allege and prove, at least in this state,¹ the full value of the property, together with a number of other things altogether negligible at law. These are instanced, simply as examples, and not by any means as exhaustive, for the treatises on equity show on every page the great difference between the two systems. Hence, it would be a work of supererogation to pursue this matter further.

The Roman system at the beginning and for centuries as

¹ California.

a matter of fact was even more rigid and formal, if possible, than was the common law. This was, in fact, a necessary incident of all archaic life. In the nature of things *form* will then dominate everything. The archaic man looks at a tree and sees nothing but its shape. His imagination is not moved except fearsomely; he may fear a branch will fall upon and kill or injure him but beyond that he has no conceptions—the great and varied parts which the tree plays in the drama of life are strangers to him—the form is everything. Hence the tremendous part that form plays in all the operations of archaic life. If a rain is to be produced or a drought to be ended, the form of the remedy must be followed to the letter else no result follows. All this is perhaps nowhere so well shown as in Fraser's Golden Bough. This is the reason that we become so addicted to form and neglect altogether the substance. Form has so persisted that today it controls our law to a most mischievous extent, so that we say, as though it were a matter of course, law deals with form, equity with substance. Now in reality unless form is of the substance itself, as for instance where two witnesses to a will are made prerequisites to a valid testament, it should never control. The inept way we have of correcting this is by setting up a new system which, still letting the old system live on to work more mischief, will prohibit its voice from being heard in the particular transaction under examination. The result is that we have a system of laws beyond any comprehension by the man from Mars.

The Roman was indeed the very slave of form. Outside of the four consensual contracts, which required the solemn expression of both parties to every agreement, the Roman law required a certain ceremony without the performance of which no obligation was created and on which alone recovery was possible, the Romans apparently having no suable contract as such. Hence unless an obligation were created by following the particular form no action could be had. This was pursuant to the interpretation of the Twelve Tables, and was of the very essence of the *jus civile*. The Roman system being thus strict and rigid the question arises how it was that it trium-

phantly rose into the clear sky of equity, and how it was that in its rise the Romans were enabled to blend what seemed discordant elements into a harmonious whole, so that their law now dominates nearly the whole civilized world. It properly lies within our subject to answer this, and to explain if we can why in England under apparently similar conditions a like result was not attained. We cannot understand things without knowing and understanding their history.

With a system like that of the Romans, based on very narrow foundations, formulated according to limited experience, and set in rigidities beyond the power of the people to break, what was Rome to do when she came to the Mediterranean and faced the entire civilized world? Evidently such a system would not answer even if it were available. But it was not available. Every Roman subject was not a Roman citizen. It is true that Roman citizenship was enlarged from time to time, but it was not until Caracalla's time in the early part of the third century that every one subject to Rome was made a Roman citizen. The *jus civile* was only available to citizens; the subjects not citizens, had not the benefit of municipal law, nor had they the many privileges of a Roman citizen. They were, in fact, outcasts as matters stood. Maine says that the "alien or denizen could have no share in any institution supposed to be coeval with the state." Hence the Romans would not apply their own law (*jus civile*) to any controversy between foreigners or between a foreigner and a Roman citizen, as this would involve the notion of superiority of such a law to their own. So, according to Maine, "the expedient to which they resorted was that of selecting the rules of law common to Roman and to the different Italian communities in which the immigrants were born." This is what they called the law of nations, because they supposed all nations used it, and it got to be with them almost synonymous with the law of nature of the Greeks. Again we have Maine saying that the *jus gentium* "was in fact the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing and who sent successive swarms of immigrants to Roman soil. When-

ever a particular usage was seen to be practiced by a large number of separate races in common, it was set down as a part of the law common to all nations or *jus gentium*." Maine affirms that it was the Greek theory of a law of nature which set it on its feet and gave it vivifying power.²

The best statement that the writer has seen of *jus gentium* is given by Sohm in his *Institutes of Roman Law* in the translation by Ledlie. This is as follows:

"The *jus gentium* was and never had been anything else but a portion of positive Roman law which commercial usage and other sources of law, more especially the praetorian edict, had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few quite exceptional cases where they did so (as *e. g.* in the case of hypotheca) they never failed to impress their institutions with a national Roman character. The antithesis between *jus civile* and *jus gentium* was merely the outward expression of the growing consciousness that the Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. The *jus gentium* was that part of the private law of Rome which in its fundamental conceptions was in accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the seaboard of the Mediterranean. In other words, *jus gentium* was that portion of the positive law of Rome which appeared to the Romans themselves as a kind of '*ratio scripta*,' a law which obtains among all nations and is common to all mankind."

This expedient of the *jus gentium* was, as we have seen, a necessity if Rome was to advance in a legal way. To be sure the Roman did not like it, any more than he did the foreigners "from whose institutions," says Maine, "it was derived and for whose benefit it was intended." But his own system was defective and insufficient and must in the nature of things have been eked out by something else. To administer this system a praetor peregrinus was set up and to him and his successors we owe the great and beneficent extension of the Roman law. At the beginning of his term, which like that of all Roman officials

² Maine undoubtedly works the law of nature a little too much, and his views are to be corrected by Pollock's notes e and g, in his edition of Maine's Ancient Law.

lasted a year, he proclaimed the equitable rules which would govern him in the decision of cases. His successor would adopt, if he thought well of it, his predecessor's edicts and add others of his own, until in Hadrian's time these edicts having acquired considerable volume were gathered together by competent hands and were made law technically by a *senatus consultum*. This is known as the Perpetual Edict of Hadrian and is doubtless the first treatise on equity known to the world.

The praetor peregrinus was a true law maker, in fact a legislator. In this there was no pretense. He did not, when changing the law, pretend that he was doing nothing but declaring it. In fact, he proclaimed in advance what he would do. In this respect he was different from the English chancellor. The latter had no legislative functions, but the functions alone of a judge who decided the causes before him as they arose between contending parties. Yet to the great mass of equity decisions it is doubtful if there is a single Parliamentary contribution—the whole of it is judge-made law, the very best law of all, when properly administered.³

John Austin says that the original meaning given to equity by the Romans is that of "universal or general law as opposed to partial or particular." The *jus gentium*:

"being the law common to these various nations or administered equally or universally to members of these various nations, it was also styled *jus aequum*, *jus aequabile*, *aequitas*; though the term *aequitas* seems to have denoted properly, not this common or equal law, but conformity or consonance to this common or equal law."

Thus it was that those who were not Roman citizens had their controversies settled by the praetor peregrinus and the controversies between citizens on one side and foreigners on the other were similarly settled. And thus it was that formless contracts were enforced as between the before named parties. In other words the law of the *jus civile* did not apply to any of such cases but only that law which the praetor could gather from the *jus gentium*. It is plain to be seen from what has been stated,

³For the difference between the praetor and the chancellor, see Bryce, II Studies in History and Jurisprudence, 281 ff.

how a great system of equity must have grown up and how superior the law was as administered by the praetor peregrinus to the *jus civile* under its procedural methods. When as in Caracalla's time every Roman subject became a Roman citizen there was nothing to stand in the way of this equity's becoming nearly the sole law of Rome. As admirably stated by John Austin: "The *jus gentium* therefore was so conspicuously better than the proper Roman law that naturally it gradually passed into the latter or became incorporated with the latter."

Why was it that the Englishman did not do the same thing as the Roman? Why was it with the same condition of things existing, a narrow, incomplete system of laws, based on custom and inexperience, requiring amendment on contact with business and commerce, that the law was not so corrected and changed as to make it applicable to the new conditions? That it was not constitutes one of the greatest misfortunes that ever happened in England.

The great uncertainty involved in having two systems of law where there should be the greatest certainty in that which underlies the deepest concerns of man, the being turned out of one court because in the opinion of the judge the wrong court had been selected, the manifest ineptitudes involved in the manner in which equity treated the law, the time involved in studying the two systems, the duplication of courts, the abuses necessarily attendant on such a chaotic condition of things, the two systems of rights not easily understandable by the common man, are only some of the many evils for which we have been paying for over seven hundred years. The system of equity, as built up by the English judges, is the greatest mass of legal literature in the world. It is monumental in character, not only in quantity but in quality; and it is a million pities that all this learning and labor should have been expended upon an imperfect system.

Think of the absurdity of preserving intact an old, barbaric system and along with it another created for the purpose of preventing the operation of the former system! One would suppose that those parts of the system which were not permissible of operation would be wiped out altogether but instead

of that we have them existing and not existing. Equity follows the law, so it is said, but the way it follows it is to prevent its being put into operation. This is illustrated in the case of the common law form of mortgage, which equity concedes conveys the legal title, but at the same time prevents that legal title from being put in force, and in the case of equitable estoppel which does not convey the title but prevents the legal title from being used as such. But why pursue the subject; the absurdities connected with the two systems are such as to move the gods to uncontrollable laughter, if such things could be brought within the dominion of humor. We have not yet answered the question as to why such a condition of things should have been suffered in England in face of the great Roman example. Pomeroy attributes the difference, firstly, to the strict construction of writs by the English judges; secondly, to their illiberal construction of the statute *In Consimili Casu*; thirdly, to the antagonism between the government and the church. Undoubtedly these have all been causal, particularly the judicial treatment of the statute *In Consimili Casu*, for there can be no doubt that had that statute been hospitably treated and subsequently enlarged it would have given birth to a system of equity with, perhaps, stomach enough to swallow the rest of the law. But while all these were causal in the opinion of the writer there was no such paramountcy as in the different political conditions of Rome. As we have seen, in Rome one part of the political system was made up of those who were free and who alone had the benefit of their own laws; the other part was made up of subjects, who had no such benefit. For the latter, laws differing entirely from those of the former had to be resorted to, and from this in quite a natural way arose one system alone. In England on the contrary all were subjects of the crown, all possessed the freedom of the courts and all were subjects of the same laws. There was, consequently, no reason for any resort to foreign law, which by a friendly competition might easily prove to be superior to their own. The question, however, is not one of mere historic curiosity, but one the solution of which may enable us to remedy the evils upon which have gathered the moss

of ages. It does seem as though we should no longer submit ourselves and our progeny to the great absurdities and incongruities of the present system. To be told that we can not be heard in equity because there is a remedy at law, that if the inferior tribunal can give us an adequate remedy (which in reality it hardly ever can) we can not be heard in equity, as our own courts have been telling us ever since the foundation of our states and which undoubtedly is the law of the land, does get on one's nerves if one's nerves are at all acute.

A great example might have been set at the foundation of our government by the fusion of the two systems. Indeed, if a lawyer were asked on what is based a common law of the United States, or what authority the Supreme Court has to administer such, he would very likely be puzzled. It seems to have come to us somewhat like the manna to the Israelites in the desert; they knew not whence it came but they knew it was good to eat and they ate it accordingly. The writer is aware of the case of *Robinson v. Campbell*,⁴ but what is there said by Judge Todd is not at all determinative even if it were not *obiter dictum*. By the Judiciary Act of 1789, the United States Circuit and District Courts are given certain jurisdiction in common law and equity cases on the assumption apparently that those two systems of law were laws of the United States. Had there been at the start one system of rights adopted by the general government, the great example thus set would very likely have spread over the whole country. But some think that here as in Great Britain we have had too much lawyer in our public affairs. When one's mind is directed to it, is it not reasonably plain that the ordinary lawyer must look at things in rather a narrow way—in other words that his view is not a comprehensive one? Our great presidents have all been either men who were not lawyers at all or who have not connected themselves with the law in a practical way. To the overplus of lawyers in the public affairs of Great Britain has been attributed by some, the blundering there in matters connected with the great war, as is well illustrated in that remark-

⁴3 Wheaton 212.

able book entitled, *Ordeal by Battle*, written by Frederick Scott Oliver, himself a lawyer.

It is said all this is true enough, but what are you going to do about it? This thing has existed so long that to attempt to cure it will be going from bad to worse. It is often said to the one who wishes to change the existing order, what have you to offer in its stead? You are good at destruction, but your destruction is nothing but evil if you cannot construct something better to take the place of what you destroy. In fact the objector may even go so far as to contend that there is nothing very serious the matter and if there is the curing of it is an impossibility. This has some force and a certain amount of plausibility, but difficulties are never so insurmountable as they seem, and they always grow smaller the more resolutely we approach them. It is probable that the transition from the old to the new, will be difficult and disagreeable, as nearly all transitions are, but in the end the result will be so good as to be worth what it cost. All radical changes are not to be feared; the writer recollects that after the Civil War, the great question was resumption of specie payment, our national paper being at a discount owing to the lack of specie to redeem it. John Sherman kept saying, resume specie payment at once whether there is enough metal money on hand or not; to resume is to resume. Forthwith the thing was done, there was not a particle of trouble, and our paper money at once rose to par where it has remained ever since. It must be apparent that nothing in the present instance is worth while unless it is radical. We must strike down all distinction between law and equity, and set up but one system of rights. This distinction is purely artificial in its origin and life, and we must get rid of it by artificial means. This, it is submitted, can be done by amendment of our state constitutions, and then by amending our various state statutes, so as to bring them in consonance with the new order of things. The state constitution might perhaps be amended thus:

All distinctions heretofore and now prevailing in this state between law and equity are hereby abolished; the rule that there can be no relief in equity if there be a remedy at law is hereby abolished,

and in every case where there is a conflict between the rule in equity and the rule at law such conflict must be settled in favor of the rule in equity; there shall be but one form of action in this state, and no matter how the plaintiff has shaped his case, the decision of the court must be according to the evidence, and if necessary the complaint shall be amended accordingly; in order that there may be no doubt as to the meaning of this amendment, it is hereby declared that its intent is to make a complete fusion of law and equity and thus make the law more certain and facilitate the ascertainment of the rights of litigants. The principles of equity so far as they have been recognized by the courts of this country and the principles of the common law so far as they are not in conflict with those of equity are not abrogated by this amendment, but are hereby continued in force.

The way suggested to amend our state constitutions and statutes so as to bring them in consonance with the new order of things would mainly be by so changing them as to recognize no difference between law and equity. This would be effected by striking out the word equity, wherever it appears in either the constitutions or the statutes and reframing them accordingly. For example, in California equity cases are now given on appeal a different jurisdiction from law cases. This provision would be modified so that all cases would be given the same jurisdiction on appeal. By these or similar methods (and these are merely suggestive) it seems to the writer we should reach the desired end—that of having neither actions at law nor suits in equity, but merely actions where the rights of the parties are to be determined by the law of the land.

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