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SOME ANOMALIES OF PRACTICE.

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Our Anglo-Saxon ancestors, in the evolution of a legal and social system during the stormy period of the feudal ages, developed the common law, and they looked upon it and called it good; and Lord Coke, than whom none was greater of his kind, declared this common law to be "the perfection of human reason;" and so it has been revered and almost worshiped by succeeding generations of lawyers, English and American.

Having thus constructed this wonderful system of common law, the very "perfection of human reason," the English people then set about to develop a system of equity for "the correction of that wherein the law was deficient," as Mr. Justice Blackstone assures us.

Thus, these two systems, the one perfect, and the other correcting its imperfections, grew up together side by side in English jurisprudence and together formed the fullness of that legal system which our ancestors brought with them in their very persons to America.

It was natural that from such an incongruous beginning there should be developed in the various colonies interesting and amusing legal anomalies; and although the various colonies all derived their laws from the same source, it is not strange that under different local conditions were developed different systems of practice and different views of the common law and the correcting system of equity. Most of them believed, with old Selden, that equity was "a roguish thing;" that there was no rule or standard for its application more certain than the "length of the
Chancellor's foot," and that, therefore, it ought to be kept "beyond the seas," lest it might be employed as an engine of oppression and an instrument of tyranny; and so, for a long time the stern rigor of the common law registered its harsh judgments, and its special instances of gross injustice, without the mollifying influence of equity. But with the growth of civilization and the accumulation of property our ancestors began to realize that the system of equity was as much their birth-right as that of common law; that as Englishmen they were entitled to demand that the harshness of the common law, born of the severities of the feudal system and ministering to the tyranny of the feudal lords, should be softened by the generous rules and christianizing influence of equity. In the fullness of time in each of the colonies were established tribunals for the administration of equity differing in character, constitution and personnel, but all having the common purpose of administering justice ex aequo et bono in such matters as were not remedied by the common law. It is true their jurisdiction and terms were uncertain and varying; and as late as the middle of the eighteenth century, it was said that there was "no court in chancery in the Charter Governments of New England, nor any court vested with power to determine cases in equity save only on mortgages, bonds and other penalties contained in deeds;" still, in most of the colonies, in some way or another, when the exigency arose, demanding the interposition of equity, there was discovered to be some tribunal which had some authority to grant relief. In some of the colonies the governors alone acted as courts of equity; in others they acted with their councils; in yet others the Legislature, usually by a Committee; in others equity judges were appointed, and in yet others the courts of law took cognizance of equitable subjects.

This confusion of courts and of procedure in matters of equity continued till the beginning of this century, when the joint labors of Chancellor Kent and Mr. Justice Story began to bring order out of chaos. But still their labors resulted only in establishing substantive equity; procedure remained as incongruous as before; and in the very State to which the labors and learning of Chancellor Kent had given distinction and superiority in jurisprudence, was first adopted the Code of Mr. David Dudley Field, the primary effect, if not purpose, of which was to obliterate the distinctions between law and equity, to dispense with separate courts for the administration of these two systems of law and equity, and to homologate the single system of law and practice. Many other States adopted the Code system; some adhered to the Federal
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In the system in which the courts have jurisdiction of "all cases in law and equity" and yet maintained the distinctions of pleading and procedure existing in England at the time of the Revolution; while a third class maintained their separate courts of law and equity. Thus has grown up in the United States three different systems of procedure with some corresponding differences in substantive law.

In the list of Code States will be found, besides New York, the two Carolinas, Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Missouri, Kansas, Nebraska, Colorado, Nevada, California, Oregon and the covey of new States recently admitted. To the old system of separate tribunals belong the States of New Jersey, Delaware, Tennessee, Alabama, Mississippi—and Maryland, Virginia and Kentucky have Chancery Courts in their principal cities. To the intermediate class, represented by the Federal Courts, may be assigned the six New England States and Pennsylvania, Maryland, the two Virginias, Georgia, Florida, Michigan, Illinois and Texas; while Louisana seems to maintain a system sui juris, built upon the Code Napoleon.

The practice of the Federal Courts as courts of equity is uniform throughout the United States, the Supreme Court, in the exercise of jurisdiction conferred upon it, having ordained that in all particulars not specially regulated by rule or statute, the practice of the Circuit Court shall be regulated by the "Practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the circumstances of local convenience of the district where the court is held;" while by statute, the practice, pleadings and procedure in law causes in the Federal Courts are required "to conform as near as may be to the practice, pleadings and procedure in the Courts of the State where the Federal Court is held." Thus exists not only great variety of procedure in the several State courts, but an equally great diversity of the law side of the Federal Courts; and the course of practice throughout the United States, instead of being a broad national high-way, is a tortuous path over mountain, brake and fen, and on through forest, savanna, prairie and desert into a hopeless cul de sac.

The inherent difficulties arising from these different systems of practice is often greatly increased by the attempt of one State to adapt a Code of Procedure prepared for an entirely different social and business condition, omitting the "as near as may be" qualification of the Uniform Practice Act above referred to. Illustration of this was to be found in North Carolina about 1880,
During the period of Reconstruction, by the negroes of the State with the aid of Northern leaders who were there on the "fool's errand" of trying to make the fence stand with the bottom rail on top, the legal practice of the State was reconstructed by the adoption of the New York Code of Civil Procedure, with all its penalties and high-pressure machinery adapted to the conditions of an alert, eager, pushing commercial community. Rip Van Winkle himself was not more surprised on returning to his native village after his long sleep than were the lawyers of the old "Tar-heel State," in finding the smooth, easy paths of practice of a sleepy agricultural community roughly torn up by the plow-share of this new-fangled commercial machine. It was as well adapted to their condition as were the light driving buggies of the Riverside Park to the rough roads of the Black mountains, or the garb of the Broadway dandy to the turpentine stiller on the Big Tar river—no better; and North Carolina had about as much use for the system as she had for a clearing-house, a Central Park or a Stock Exchange. The clamors of the bar soon brought about an amendment which was effected by repealing the stringent requirements and the penalties of the Code, and left it a great heavy cumbersome piece of machinery without driving-wheels, steam-chest or boiler, propelled alone by the typical slow ox-team.

Similar incongruities have resulted, no doubt, from the hasty adoption of the New York Code in some of the Western States, but none probably more striking than this where the slowest of the original States was expected to keep pace with the swiftest. It was a "pace that killed;" and it will doubtless require a generation to adjust the bar to the practice, or the practice to the bar.

Tennessee presents just now a remarkable instance of incongruities in a State where the double system prevails, resulting from the urgent demand for reform and the lack of Legislative comprehension of this dual system. It was the boast of the old common law that it preserved inviolate the right of trial by jury, whereas the twelve were never allowed to sit in the High Court of Chancery. It was further peculiar to the law court that all witnesses were examined in the presence of a jury while the slow method of presenting proof in the Chancery was by deposition. There was also a well marked line of jurisdiction for the courts of equity embracing cases of fraud, accident, misconduct and trusts, which matters were generally excluded from the jurisdiction of courts of law. Such was the system and practice in Tennessee half a century ago.
Recent legislation while recognizing and preserving the separate system of courts, has so confused and confounded their practice and jurisdiction as to make them scarcely recognizable by their best friends. Gradually, during the past forty years, equitable defenses of various kinds have been admitted at law, so that not only could the consideration of a sealed instrument be inquired into, but a deed could be converted by parol proof into a mortgage according to the very fact and right of the case. At the same time the Chancery Court has been given jurisdiction of all civil causes except "injuries to person, property or character involving unliquidated damages." Thus is law in all matters of contract to be administered according to equity.

And in the matter of evidence, the change is as great as in that of jurisdiction. The deposition of any witness may be taken in any civil cause in a court of law merely upon notice to the opposite party, whether the witness be resident or non-resident, while in a chancery court witnesses may be introduced and examined orally in divorce cases and in all jury trials.

But the key-stone was laid in this arch of confusion when either party on peremptory demand was given to a jury to try any issue of fact arising in any cause in chancery, which demand might be made at any time, up to the very moment of trial, while in the courts of law a party was held conclusively to have waived his right to a jury unless he should formally make demand therefor in his first pleading tendering an issue. Thus, jury trials instead of being preserved inviolate in courts of law, were practically denied in a majority of cases, while in chancery they were to be had merely for the asking. Depositions became as common in courts of law as oral proof, and a term of the chancery court rarely passed without witnesses being examined orally in it. The Chancellor was constantly construing legal contracts, and giving judgments, and awarding execution for the collection of debt, and administering other "weightier matters of the law," while the courts of law are inquiring into accident, misconduct and fraud, and other questions of equity and good conscience. Moreover, the courts of law are authorized to issue writs of injunction, appoint receivers and execute their judgments by any appropriate final process which may be formulated pro hac vice, while the court of chancery issues writs of mandamus and supersedeas, and more common than all, fieri facias. And yet, there is not probably a State in the Union where law is administered more zealously with an eye single to the attainment of justice than in Tennessee.
These anomalies of practice will, no doubt, continue as long as the present dual system lasts. The beginning of the next century will probably find Tennessee in the list of those States which administer justice according to the forms observed in the Federal Courts, having a single system of courts, administering matters of law according to legal forms, and matters of equity according to the forms of courts of chancery. Then, amidst the "wilderness of single instances" and following "the codeless myriad of precedent," we shall no longer use the "lawless science of the law," but shall travel along the great highway of consistency and reason to ultimate right and justice.