

A History of Chancery and Its Equity From Medieval England to Today's Tennessee

By Russell Fowler



A medieval English court. Photos and artwork are from the Tennessee Historical Society, Library of Congress or are in the public domain.

Tennessee's Chancery Court has roots in Greece, Rome and England

The states of Tennessee, Delaware and Mississippi are the three states maintaining distinctly separate courts of equity: Chancery Court. Yet every jurisdiction, state and federal, maintains equity jurisprudence, even if more commonly administered in the same tribunal. Equity is a product of centuries of historical development, and an appreciation of history is required for its understanding. As Justice Holmes observed, "The life of the law has not been logic: it has been experience."¹

The story of equity is one of centuries of struggle inherent in the dual nature of equity: the systematic restraint of its theory and the practical resourcefulness of its purpose.

The concept of equity originates in the law of ancient Greece and Rome. Aristotle pondered it much, and his view of equity has been described by the preeminent Aristotelian expert Sir Ernest Barker:

In a sense, equity is a correction of the law, where it fails on account of its generality: in another sense it is fulfilling of the real law. In either sense it gives the law that flexibility in

which it has been accused of failing: through equity, law is alive to the play of circumstances; through equity, it can meet new stimulus with an answering reaction.²

Aristotle further observed that equity is bound to follow legislative enactments. He said, "That laws properly enacted, should themselves define the issue of all cases as far as possible, and leave as little as possible to the discretion of the judges."³

Rome's magistrates, the praetors, administered through their precedential

edicts the practical equity of the Roman Republic. The praetors' function was as follows:

They had to work with a primitive system of law based on the Twelve Tables, standard and rigid forms of procedure, and ancient custom. What they did was to build up alongside that primitive system more flexible intuitions, enabling the law of the Republic to keep pace with its economic and social development and its increasing contact with foreign peoples. This was the *ius honorarium*, the 'Roman Equity.'⁴

England's Chancery

However, it is to England that America and Tennessee owe their equity jurisprudence. Our equity's cradle, the High Court of Chancery, orientated as an offshoot of the King's Council or *Curia Regis* in medieval England. When the law courts failed to provide "an adequate remedy at law," often due to unfair or moribund legal technicalities or corruption, subjects sought the help of the king, "the fountain of justice."⁵ The king first referred these petitions to his council, and later his chief minister, the powerful Lord Chancellor, handled them.⁶ The chancellor was England's top bureaucrat, secretary of state,⁷ and Keeper of the Seal.⁸ All legal actions in the law courts began with the issuance of writs from his office, the Chancery.⁹ In the early Middle Ages, Chancery, as the great secretariat and writ shop of government, operated in a corner of the hall where the king presided separated by a screen called a *cancelli*. It is from this source that the chancellor received his name.¹⁰ Until 2005, the Lord Chancellor presided over the House of Lords, by tradition sitting on a red sack of English wool before the throne. The Lord Chancellor still carries and presents the monarch with the official speech prepared by the government at the opening of each British Parliament.

By the year 1280, in the reign of Edward I, the Lord Chancellor clearly had his own court and established jurisdiction. Petitions, or "bills," were now addressed directly to the chancellor instead of the king.¹¹ In resolving cases, the chancellor, who acted as judge and



The rolls were Chancery Court decrees written on sheepskin.

jury, would look to the right and justice of matters and was neither bound by the oppressive formalities of the law courts nor intimidated by the powerful who could sometimes circumvent, corrupt, or bully the normal legal processes. Furthermore, unlike the law courts that only acted upon a defendant's property (*in rem*), he acted against the person of the respondent (*in personam*).¹² Thus, the chancellor's court was efficient and probing.

The chancellor could also construct new remedies or "extraordinary" solutions not offered by inflexible law court procedures and writs. His most powerful tools were the decree of injunction (a court order to do or not to do something) and the subpoena (a writ requiring personal appearance before

him to answer questions). These were enforced by the irresistible contempt power. As said, the chancellor "carried the Bible in a mailed fist."¹³ He could even enjoin the execution of judgments won in the law courts.¹⁴ Chancery became particularly adept in rooting out fraud and was known for protecting "widows and orphans," even against rich and powerful barons. Court sessions were held in Westminster Hall in London where the Lord Chancellor presided from his marble chair.

The High Court of Chancery became so popular that the chancellor had to rely greatly on the assistance of his skilled clerks, particularly his chief clerk, who originally just managed Chancery records or "rolls." The rolls were Chancery Court decrees written on sheepskin. The bottom of the last order was sewn to the top of the next and rolled.¹⁵ These grew to an enormous size and number. The head clerk in charge of these cumbersome records was called the "Master of the Rolls." In an illiterate medieval world, Chancery, with its mysterious writings, writs, rolls, ribbons and wax, seemed almost magical to many, especially to the poor and powerless peasants

it often helped because conscience and equity demanded it.¹⁶

Lord Chancellor Ellesmere wrote of Chancery Court's benevolence: "It is the refuge of the poor and afflicted, it is the alter and sanctuary for such as against the might of rich men and the countenance of great men . . ." ¹⁷ Thus through countless decisions arose the maxim of equity: "Equity Delights in Equality"¹⁸ or "Equality Is Equity,"¹⁹ which forbid Chancery from awarding preferences among creditors and, more importantly, making prejudicial "distinctions in personal rank, in social positions, in forms of procedure"²⁰ or between rich and poor.

The early chancellors were preeminent churchmen, the most literate of

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medieval society.²¹ These clerics applied moral precepts of fairness to the deciding of cases (or “equity”). The chancellor became known as the “Keeper of the King’s Conscience.” Most notable of the churchmen chancellors was Cardinal Wolsey, who, although untrained in the law, had an abundance of confidence (and arrogance) and street smarts.²² In order to combat deficiencies and technicalities in the law and frauds, chancellors created its law of trusts and the concept of equitable ownership of property. And while the common law had evolved in response to land disputes, Chancery’s creative equity responded to the disputes occasioned by the growth of trade, urbanization, and new forms of wealth. Hence, chancellors would refine the law of corporations, partnerships, and contracts in recognition of these emerging concepts of property and duties, thereby facilitating commercialism. In this manner, equity once again facilitated economic development as it had in ancient Rome.

Recognizing the value of the distinction between law and equity, the adroit Henry V (1387-1422), of Agincourt and later Shakespeare fame, commanded that the clerks and apprentices in Chancery (known as the Office of the Six Clerks) should not socialize with the law court clerks and attorneys at law.²³ Lawyers devoted to Chancery practice appeared and were called “solicitors in equity” and were trained and housed at the Inns of Chancery on Chancery Lane in London. The Chancery clerks also worked at the Inns of Chancery. These clerks developed their own distinctive form of writing known as “Chancery hand.” Chancery judicial business continued to grow and the Master of the Rolls would be assigned or referred accountings and other judicial tasks by the chancellor. Eventually the post would evolve into an appellate judgeship.

From 1529 to 1532, Sir Thomas More served as Lord Chancellor, the first non-cleric in the position. He would become the second English chancellor



Sir Thomas More established binding Chancery procedural rules and brought the order of precedent to equity.

declared a saint. The first was Thomas Becket, who was also the first commoner to rise to importance in English history. Both Becket and More died martyrs for resisting the secular power of state-building kings named Henry. For our purposes, however, More is more important for successfully healing the rift between the law courts and Chancery.

A masterful lawyer, Chancellor More established binding Chancery procedural rules and brought the order of precedent to equity, especially concerning injunctions against common law proceedings and judgments.¹⁴ Owing much to More, equity became a highly organized and predictable system of law. Most significant were its “maxims of equity,” such as “Equity will not suffer a wrong without a remedy,” “Equity will undo what fraud hath done,” and “Equity follows the law.” The maxims serve as the foundation of all equity jurisprudence,²⁵ which became a fully and carefully developed body of law grounded upon precedent. Sir William Blackstone lauded this fact:

[I]f a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to reside might entertain of conscience in every particular

case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible.²⁶

By the reign of James I, tension between the law courts and Chancery grew to a crisis when Sir Edward Coke, judge in the Court of King’s Bench (the principal law court), overruled a Chancery Court decision of Lord Chancellor Ellesmere that had overridden a common law court judgment. Ellesmere appealed to King James. The king, guided by his attorney general, Francis Bacon, who later became Lord Chancellor, ruled that when decisions of the law courts and Chancery conflict, Chancery’s decisions prevail. It was reasoned that Chancery, within the confines of equity jurisprudence, was created to achieve the king’s justice, even if circumventing normal legal processes. Therefore, when in conflict, applicable equitable principles trump those of law.²⁷

Following the English Civil War and the execution of Charles I, Chancery was almost abolished by Parliament because it was so associated with royal prerogative.²⁸ However, the Lord Protector, Oliver Cromwell, wanted to keep Chancery.²⁹ It was too ingrained in the English judicial system to be permanently dissolved,³⁰ but it was suspended for four years.³¹ Following reforms by a three-lawyer commission,³² a more procedurally controlled Chancery was introduced by Parliament.³³

Another royal court that had grown out of the council like Chancery was the infamous Court of Star Chamber. It was a “court of criminal equity”³⁴ and handled important criminal cases such as treason and political corruption. The inquisitorial Star Chamber, which sometimes resorted to torture, got its name from the azure blue ceiling decorated with gilded stars where it met.³⁵ It did not survive the Civil War.³⁶ Yet while Star Chamber, like Charles I, was put to

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death for its abuses, Chancery, its sister conciliar court, thrived as it experienced further “doctrinalization” under the great chancellorships of Nottingham, Hardwicke and Eldon. This was aided by published reports of decisions and the institution of appellate review by the House of Lords.³⁷ Star Chamber did not survive for the very reasons Chancery did. While Star Chamber was unbridled by rules and precedent, Chancery jurisprudence had shaken off arbitrary whim and rested upon fixed principles and internal constraints.

Although never as unpopular as Star Chamber, by the early nineteenth century, Chancery Court did become subject to criticism because of outrageous delays, moribund and inflexible rules, corruption and excessive fees.³⁸ Hence, ironically, Chancery had become the perpetrator of the judicial abuses it had been established to remedy.³⁹ In other words, equity had become inade-

quate. Reflecting the frustration, the ultraconservative Duke of Wellington, certainly no friend of reform in general, called Chancery “that damned court.”⁴⁰ Various piecemeal reforms were enacted beginning in 1833 but proved insufficient.⁴¹ One of the harshest critics was Charles Dickens. His novel *Bleak House* centers on the terrible cost and delays of Chancery in the Victorian era. As suits dragged on for generations, litigants turned into paupers. Dickens wrote of Chancery at the time: “Suffer any wrong that can be done you, rather than come here!”⁴²



Chancery Court at Lincoln's Inn, London

Equity Comes to America with the Settlers

A simplified Equity jurisprudence was brought to America with the English settlers, although in the early colonial period equity cases were often heard by the governors and their council. Later Chancery Courts were established,

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C11-0318-012 (3/11)

which was seen as an enlightened reform by lawyers and symbolized maturing American law. Robert Livingston, the Chancellor of New York, administered the first presidential oath of office to George Washington. One of the greatest Chancery lawyers of the period was Alexander Hamilton. In defending the proposed equitable jurisdiction of federal courts, Hamilton wrote in *The Federalist Papers*: “There is hardly a subject of litigation between individuals which may not involve those ingredients of fraud, accident, trust, or hardship, which would render the matter an object of equitable rather than legal jurisdiction, as the distinction is known and established in several of the States.”⁴³

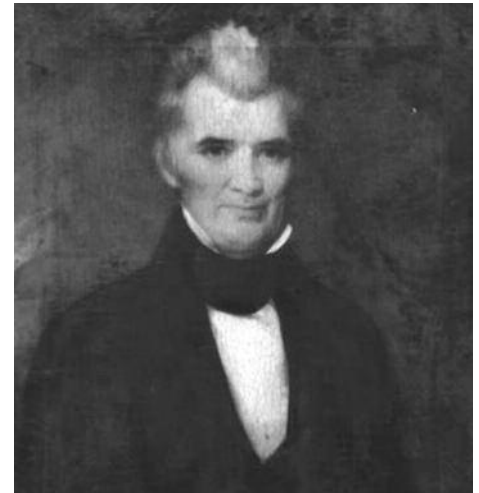
Like during the English Civil War, Chancery and equity had become unpopular with many during the revolutionary era, this time being seen as too aristocratic, arbitrary, and British, but this began to change upon James Kent’s assuming the chancellorship of New York. Kent (1763-1847) was a graceful legal writer, teacher, and Chancellor of New York from 1814 to 1823,⁴⁴ and “he

grand scope. . . . I might once and a while be embarrassed by a technical rule, but I most always found principle suited to my views of the case.”⁴⁷

Chancellor Kent rendered such well-reasoned opinions that they served to make equity relevant to a rapidly developing United States and restored trust in Chancery. Therefore, once again, as in Rome and medieval England, equity helped to make law responsive to new societal needs. Chancellor Kent’s most famous work was his 1827 four-volume *Commentaries on American Law*, which became a primary legal authority and textbook for law students for generations.⁴⁸ Oliver Wendell Holmes Jr. edited the 12th edition in 1873.

Tennessee’s Chancery Court Is Created

Kent’s influence stretched to the American frontier, and a demonstration of a young state’s legal maturity became the establishment of chancery courts. Hence, one of Tennessee Gov. William Carroll’s most lasting achievements was the creation of Tennessee’s Chancery



Tennessee Gov. William Carroll was known as the “father of Tennessee Chancery.”

bench in 1827. The boundary between the two vast divisions was the Cumberland. Court sessions for the Western Division were held at Franklin, Columbia, Charlotte, Jackson and Paris. In the Eastern Division, Chancery was convened at Rogersville, Greeneville, Kingston, Carthage and McMinnville.

Of monumental influence on American lawyers, judges and legislators were the legal treatises of Harvard law professor and United States Supreme Court Justice Joseph Story (1775-1845) of Marblehead, Mass. The gregarious Story, appointed by James Madison to the high court at the age of 32 after a stint in Congress, was John Marshall’s right hand, a legal anglophile, and prolific writer and erstwhile poet. The subjects of his legal volumes included equity jurisprudence and procedure, bailments, conflict of laws, agency, partnership, pleadings, bills of exchange, promissory notes, and constitutional law.

In opposition to the codification movement seeking to replace the common law with a uniform code, Story’s books Americanized⁴⁹ and modernized⁵⁰ the common law, including equity, and transmitted legal principles to an isolated frontier far from law libraries containing the precedents that are the fuel of a common law system. As the penultimate authority of equity, his volumes on the subject are so

“One of Tennessee Gov. William Carroll’s most lasting achievements was the creation of Tennessee’s Chancery Court, where its equitable remedies would protect ‘the poor, widows, orphans, and incompetents.’”

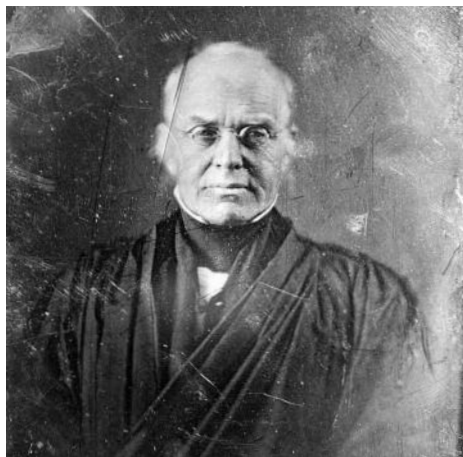
became the most famous chancellor in American history.”⁴⁵ According to Joseph Story, “Mr. Chancellor Kent brought to it the fullness of his own extraordinary learning, unconquerable diligence, and brilliant talents.”⁴⁶ Kent frankly wrote that

I took the court as if it had been a new institution, and never before known to the United States. I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable This gave me

Court, where its equitable remedies would protect “the poor, widows, orphans, and incompetents.” Therefore, Gov. Carroll, a non-lawyer, is known as “the Father of Tennessee Chancery.” The Supreme Court formerly handled equity cases. The first two Chancellors were William E. Anderson (1791-1841) of Davidson County for the Western Chancery Division and Nathan Green (1792-1866) of Wilson County for the Eastern Division. Both were elected by the General Assembly and took the

influential that they are cited by British courts to this day. Many basic rules of state law are traceable back through the case law to an original citation to a work of Story.

Through his writings alone, “no man has done more to create American



Justice Joseph Story painstakingly demonstrated that equity is completely infused and bound by precedent like the rest of the common law.

law.”⁵¹ His influence on early constitutional law was also tremendous, and the images of Marshall and Story appropriately adorn the bronze doors of the Supreme Court building.

Defending equity in America, Justice Story painstakingly demonstrated that equity is neither the ever-changing will of a favorably situated chancellor-politician presiding at the moment, nor is it amorphous ideals of “natural justice,”⁵² but is predictable in substance and procedure because it is completely infused and bound by precedent like the rest of the common law. Moreover, he instructed that equity is more than a set of unique and useful remedies; it is a system or “science” of law that includes types of suits, defenses, estoppels, rules of adjudication, and carefully designed processes. Story further argued that the common law cannot function without equity, and equity cannot exist without the common law. They are mutually

dependent.⁵³ In addition to being controlled by procedure and precedent, Story stressed that equity is always grounded by the fundamental rule: “Whenever a complete, certain, and adequate remedy exists at law, courts of equity have generally no jurisdiction.”⁵⁴ Overall, Story exerted much of his great legal talent in proving a lie the famous words of the English Commonwealth era lawyer and parliamentarian John Selden:

Equity is a roguish thing: for law we have measure, know what to trust too. Equity is according to ye conscience of him that is Chancellor, and as it is larger or narrower so is equity. ‘Tis all one as if they should make the standard for the measure we call a foot, a Chancellor’s foot; what an uncertain measure would be this. One Chancellor has a long foot another a short foot, a third an indifferent foot; ‘tis the same thing in the

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Chancellor's Conscience.⁵⁵

Justice Story abhorred Selden's vision of equity, not simply for the arbitrariness inflicted upon individual litigants, but also for the danger presented to society:

If ... a Court of Equity ... did possess the unbounded jurisdiction, which has been thus generally ascertained to it, or correcting, controlling, moderating, and even superseding the law, and enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, arbitrio et bono, according to his own notions and conscience, but still acting with a despotic and sovereign authority.⁵⁶

Like his heroes in equity, Francis Bacon⁵⁷ and Alexander Hamilton,⁵⁸ Joseph Story would vigorously defend separate state courts of law and equity. He did so not simply upon the judicial expertise separation promoted. He asserted that merger of law and equity would endanger the extraordinary nature of equitable remedies. Law court judges would be tempted to resort to the

more coercive equitable remedies when legal remedies are adequate, thereby undermining the predictability and valuable constraints of the common law. Likewise, common law rules and procedure would undermine the flexibility of equity and perhaps defeat the purpose it was intended to serve.⁵⁹ This value applies to the administration of law and equity within the same tribunal.

Finally, Justice Story saw "rival coordinate courts"⁶⁰ of law and equity as internal "checks and balances to each other,"⁶¹ within the judicial branch of government. Hence, Story explained equity, a legal institution once suffering from an image of being too undemocratic, as having values commensurate with American ideals of constitutionalism. Other important American scholars of equity jurisprudence from then to now include John Norton Pomeroy, Henry L. McClintock, Edward D. Re, Dan B. Dobbs and Doug Rendleman.

Notable early Tennessee equity scholars were two chancellors of the antebellum era: Andrew McCampbell of Henry County and William B. Turley of Montgomery County. McCampbell served as Chancellor of West Tennessee from 1839 to 1848. He declined nomination to the United States Supreme Court by President James K. Polk in order to remain on the Chancery bench. William B. Turley (1800-1851) was called "the most brilliant judge we ever



Tennessee Chancellor Henry R. Gibson published *Gibson's Suits in Chancery*, still an influential Tennessee legal treatise.

had" by U.S. Supreme Court Justice Horace H. Lurton of Tennessee. He is also known as "The John Marshall of Tennessee." This reputation was forged during 15 years on the state Supreme Court. Historian Samuel Cole Williams termed this time "the golden era of Tennessee jurisprudence." Judge Turley's opinions created much of the foundation of Tennessee common law. In 1850, he stunned Tennessee's legal community by resigning from the court in order to accept the Chancery bench in Memphis. Yet one morning in May 1851, as Chancellor Turley walked down the street in Raleigh, Tenn., he suddenly stumbled and fell. While attempting to regain his balance by the use of his walking stick, it snapped in two under his weight and he was impaled on a jagged half that ran through his chest near his heart. He died on May 27, 1851, after five days of torment. His grave is at Elmwood Cemetery in Memphis with a small marker that only reads: "Turley."

The Civil War greatly impacted the composition of Tennessee courts and their function. At one point, the Confederate state government fled from Nashville to Memphis before ceasing to operate. Likewise, the Supreme Court terminated its operation at the height of hostilities. With Union control of Tennessee, Military Governor Andrew Johnson began rebuilding the judiciary, most successfully at the trial court level. In the interim, military commissions heard civil cases in parts of Tennessee.

APPELLATE BRIEFS AND ARGUMENTS

State and Federal Court

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References available upon request.

Chancery Courts were generally the first trial courts to resume operation. By the late nineteenth century, Tennessee had taken its place as a leader of equity jurisprudence, most importantly due to Chancellor Henry Gibson.

Gibson (1837-1938) of Knox County was chancellor of the Second Chancery Division of Tennessee from 1886 to 1894. More importantly, in 1891, he published *Gibson's Suits in Chancery*, which is called "the Bible of Chancery Court." It swiftly eclipsed its chief competitor, W. J. Hick's *The Tennessee Manual of Chancery Pleading and Practice* (1883), and has gone through eight editions and remains to this day the most influential Tennessee legal treatise. It is regularly cited with approval by appellate courts, and it has practically assumed the power of controlling precedent. Gibson served in Congress 1885 to 1905. He died at the age of 100 in Washington, D.C.

In Great Britain, Parliament enacted the Supreme Court of the Judicature Act of 1875.⁶² This measure corrected the problems in British Chancery bemoaned by Jeremy Bentham, Charles Dickens, and other judicial reformers. The enactments and strong chancellors caused Chancery to retrieve its zeal for creative and inquisitive justice. As stated in a 1921 British law court decision: "If in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books."⁶³ The common law courts and Chancery were merged into one court: The High Court of Justice. However, jurisdiction of the Chancery Court was placed in the Chancery Division of the High Court and thereby the distinction between law and equity survived.⁶⁴ This would have pleased Joseph Story.

U.S. Equity Reform

The United States also experienced reform of equity. Under the able leadership of Supreme Court Justice Horace H. Lurton, who had served as chancellor in Tennessee and traveled to England to study equity practice in 1911, the

federal "Equity Rules" achieved much needed revision and precision.⁶⁵ Because of perceived anti-labor abuse, legislation limited injunctions against labor strikes

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such as the 1932 federal Norris-La Guardia Act.⁶⁶ Moreover, amid controversy, by mid-century, instead of only providing relief to individuals in private disputes, injunctions were accessed to implement public policy. This involved

judges in issues never envisioned by Story and the chancellors of old, such as the protection of constitutional and civil rights through decrees, assuming control of prisons and requiring and managing desegregation of public schools.

Some legal scholars would rebuke this public use of injunctive relief, as best represented by Professor Gary L. McDowell of Dickenson College in his 1982 book, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy*.⁶⁷ Contrarily, governmental equity was enthusiastically encouraged by Professor Peter Charles Hoffer of the University of Georgia in his 1990 book, *The Law's Conscience: Equitable Constitutionalism in America*.⁶⁸ Both professors argued that equity's history, purpose and philosophy supported their position. While McDowell saw equity's new public or "sociological" uses as violating its basic constraining concepts established by its history and its procedure,

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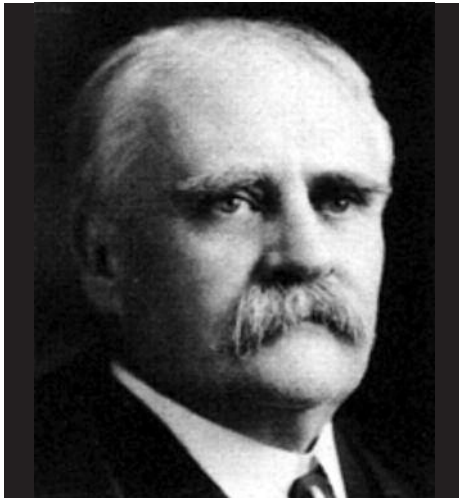
JOSEPH MCKINNEY'S practice includes civil litigation, commercial & business litigation, labor & employment litigation and minority business enterprises. She is a member of the Tennessee Bar Association, Nashville Bar Association and the Naiper-Looby Bar Association. Joseph received his B.A. from Rhodes College and his J.D. from the University of Memphis.

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Justice Horace H. Lurton served as chancellor in Tennessee and traveled to England to study equity practice in 1911.

Hoffer believed that by freeing equity from the imposition of its procedural compressions, it could bring needed equitable ideals of fairness, innovation, trusteeship, equality and reality to constitutional interpretation.

McDowell dissented from these non-traditional injunctions as disregarding the “no adequate remedy at law” requirement, believing their admirable aims achievable through money judgments and processes that are more democratic. Hoffer countered that these new injunctions were an effective and democratic means of fulfilling the Constitution’s equitable goals due to the inadequacy of other avenues. Both professors pointed to *Brown v. Board of Education*⁶⁹ (Brown II) as the exemplar of their thesis. Thus, McDowell faulted and Hoffer praised Brown’s use of public injunctive relief, a difference rooted in their differing views of the meaning of equity itself: McDowell seeing equity as a limited system of private law and Hoffer as the animating and broader spirit of all law, including the highest law of the Constitution.

In addition to the substantive changes in equity, profound structural changes took place as most states merged their law and equity courts, usually renamed “Superior Court.” Despite the almost universal success of merger efforts, there were notable defeats, such as the ill-fated

merger campaign led by Gov. Andrew Johnson in Tennessee in the 1850s, with its chief argument being procedural efficiency and economy.⁷⁰

Chancery Today

Today only three states maintain distinctly separate Chancery Courts: Tennessee, Mississippi and Delaware, the last of which is known for its expertise in corporate law. Other states, such as New Jersey, have separate equity divisions within trial courts of general jurisdiction. Despite widespread merger, most recently in Arkansas in 2001,⁷¹ the United States has produced a number of influential chancellors over two centuries. They include Robert Livingston, James Kent and Rueben Walworth of New York; Kensey Johns Jr. and Collins Seitz of Delaware; and Horace Lurton and Henry Gibson of Tennessee.

The current High Lord Chancellor of England is the lawyer and politician Kenneth Clarke, and the office of Lord Chancellor remains a vital post in Britain. His office is the second highest ranking of the great officers of state. The chancellor oversees the operation of the courts but, as mentioned, since 2005, he is no longer Speaker of the House of Lords. The chancellor is now, ironically, a member of the House of Commons and in the Cabinet as the powerful Secretary of State for Justice; therefore he continues as head of the English judiciary, but his adjudicatory duties have ceased. Today the holder of the new judgeship of “Chancellor of the High Court” presides over the Chancery Division of the High Court, currently located in the Royal Courts of Justice building with the other civil courts on the Strand near St. Paul’s Cathedral. However, it will soon be moving to new quarters on Chancery Lane in London, near the site of the medieval Inns of Chancery. Accordingly, law and equity remain substantively, procedurally, and structurally separate in England. Most of English Chancery’s litigation docket is crowded with contract and partnership disputes, and the injunction is a frequent remedy.⁷²

Repeatedly proving true the words of Britain’s greatest twentieth-century jurist,⁷³ Alfred Lord Denning, that “equity is not past the age of child-bearing,”⁷⁴ new equitable answers appear for novel problems of evolving complex economies, just as equity’s imaginative responses to the needs of emerging commercialism of the Tudor age. Originating in Britain and now regularly sought in international business disputes, the Mareva injunction, which freezes assets in aid of a potential money judgment, is a good example of equity’s continued inventiveness. It is similar to an attachment and entails adequacy of remedies at law and trans-jurisdictional perplexities. Of greater liking to traditionalists, in 1999 the United States Supreme Court rejected the asset-freezing injunction in federal courts in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund Inc.*⁷⁵ 



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Notes

1. Oliver Wendell Holmes Jr., *The Common Law* 1 (1881).
2. Ernest Baker, *The Political Thought of Plato and Aristotle* 333 (1959).
3. Aristotle, *Rhetoric* 1353a-b (J. H. Freese trans., Harvard 1926).
4. J. A. Crook, *Law and Life of Rome* 24 (1967).
5. L. B. Curzon, *English Legal History* 102 (2d ed. 1979).
6. See, e.g., Theodore F. T. Plucknett, *A Concise History of the Common Law* (1956).
7. See, e.g., L. B. Curzon, *English Legal History* 104 (2d ed. 1979).
8. See Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* 282 (1980).

9. See, e.g., J. H. Baker, *An Introduction to English Legal History* 112-21 (1990).

10. W. L. Warren, *King John* 129 (1978).

11. See Bryce Lyon, *A Constitutional and Legal History of Medieval England* 616 (1980).

12. See, e.g., L. B. Curzon, *English Legal History* 106 (2d ed. 1979).

13. Dan B. Dobbs, *Handbook on the Law of Remedies* 31 (1973).

14. See L. B. Curzon, *English Legal History* 108 (2d ed. 1979).

15. See Arthur R. Hogue, *Origins of the Common Law* 180-81 (1966).

16. See A. H. Marsh, *History of the Court of Chancery and the Rise and Development of the Doctrines of Equity* 47-48 (1890).

17. *Id.*, at 48.

18. Henry R. Gibson, *Gibson's Suits in Chancery* § 2.14 (8th ed. 2004).

19. *Id.*

20. *Id.*

21. See Dan B. Dobbs, *Handbook on the Law of Remedies* 29 (1973).

22. See J. H. Baker, *An Introduction to English Legal History* 123 (1990).

23. See G. L. Harris, *Henry V: The Practice of Kingship* 78 (1985).

24. See Gordon Rupp, *Thomas More: The King's Good Servant* 38 (1978).

25. See Henry R. Gibson, *Gibson's Suits in Chancery* § 2.01 (8th ed. 2008).

26. William Blackstone, *Commentaries on the Laws of England* 440 (15th ed., A. Strahan 1809).

27. See, e.g., Charles Rembar, *The Law of The Land: The Evolution of Our Legal System* 283-86 (1980).

28. See Christopher Hill, *God's Englishman: Oliver Cromwell and the English Revolution* 140 (1970).

29. *Id.*, At 142.

30. John H. Langbein, et al., *History of the Common Law: Development of Anglo-American Legal Institutions* 350 (2009).

31. Norman F. Cantor, *Imagining the Law* 287 (1997).

32. Christopher Hill, *God's Englishman: Oliver Cromwell and the English Revolution* 144-45 (1979).

33. See *Id.*, at 170.

34. See, e.g., L. B. Curzon, *English Legal History* 182 (2d ed. 1979).

35. See *Id.*, at 179-82.

36. John H. Langbein, et al., *History of the Common Law: Development of Anglo-American Legal Institutions* 348 (2009).

37. See *id.*, at 346-47.

38. See L. B. Curzon, *English Legal History* 128-133 (2d ed. 1979); Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* 298-302 (1980).

39. See L. B. Curzon, *English Legal History* 128 (2d ed. 1979).

40. *Id.*, at 132.

41. See *id.*, at 138.

42. Charles Dickens, *Bleak House* 3 (Oxford 1987) (1853).

43. *The Federalist* No. 83, at 512 (Alexander Hamilton) (Robert Scigliano ed. (2000)).

44. See Lawrence M. Friedman, *A History of American Law* 331 (1985).

45. Darien A. McWhirter, *The Legal 100: A*

Ranking of the Individuals Who Have Most Influenced the Law 83 (1998).

46. Joseph Story, *1 Equity Jurisprudence* 62-63 (1st ed. 1836).

47. Lawrence M. Friedman, *A History of American Law* 136 (2d ed. 1985).

48. See Darien A. McWhirter, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* 85 (1998).

49. See Grant Gilmore, *The Ages of American Law* 27-28 (1977).

50. See Morton J. Horwitz, *The Transformation of American Law* 181 (1977).

51. *Cambridge Biographical Dictionary* 1406 (Magnus Magnusson, ed., 1990).

52. See Morton J. Horwitz, *The Transformation of American Law* 265 (1977).

53. See generally Joseph Story, *The Miscellaneous Writings of Joseph Story "Chancery Jurisdiction"* 148-79 (William W. Story, ed., *Lawbook Exchange* 2000) (1852) (a discussion by Story in defense of equity).

54. *Id.*, at 173-74.

55. John Selden, *Table Talk* 42 (Frederick Pollock, ed., 1927).

56. Joseph Story, *1 Commentaries on Equity Jurisprudence* 21 (3d ed. 1842).

57. See Lawrence M. Friedman, *A History of American Law* 331 (1985).

58. *The Federalist* No. 83, at 540 (Alexander Hamilton) (Robert Scigliano, ed., 2000).

59. See generally Joseph Story, *The Miscellaneous Writings of Joseph Story "Chancery Jurisdiction"* 168-70 (William W. Story, ed., *Lawbook*

Exchange 2000) (1852).

60. See Joseph Story, *The Miscellaneous Writings of Joseph Story "Chancery Jurisdiction"* 172 (William W. Story, ed., *Lawbook Exchange* 2000) (1852).

61. *Id.*

62. L. B. Curzon, *English Legal History* 139 (2d ed. 1979).

63. *Banque Belge pour l'Etranger v. Hambrouck*, 1 K.B. 321, 335 (1921).

64. See L. B. Curzon, *English Legal History* 139-40 (2d ed. 1979).

65. See *The Supreme Court Justices* 305 (Clare Cushman, ed. 1993).

66. 29 U.S.C. § 107.

67. Gary L. McDowell, *Equity and the Constitution* (Univ. of Chicago Press 1982).

68. Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Univ. of North Carolina Press 1990).

69. 349 U.S. 294 (1955).

70. See Andrew Johnson, "Legislative Message of Dec. 19, 1853," in *4 Messages of the Governors of Tennessee* 555-57 (Robert H. White, ed. 1957).

71. Ark. Const. amend. 80 6(A) (2001).

72. See Leonard Freedman, *Politics and Policy in Britain* 189 (1996).

73. Darien A. McWhirter, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* 346 (1998).

74. *Eves v. Eves*, 3 All E.R. 768, 771 (1975).

75. 527 U.S. 308 (1999).

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