1888

A Historical Sketch of the Struggle for the Establishment of a Chancery Jurisdiction in Massachusetts

Edwin Hamlin Woodruff
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Part of the Law Commons

Recommended Citation

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
An Historical Sketch
of the
Struggle for the Establishment
of a
CHANCERY JURISDICTION
in
Massachusetts:

THESIS
by
EDWIN HAMLIN WOODRUFF
1888.
The course of chancery never did run smooth; and, even when it has succeeded in filtering its way into the judicial system of a state, it has had difficulty in finding a pervious medium. In England, it was turned to the Chancellor and through him built up a great court of its own; in Pennsylvania, it hid itself under common law forms, stimulating their remedial functions; in Massachusetts, it beat against legislative strength and won a way to unobstructed exercise of power.

What lends peculiar interest to the history of chancery jurisdiction in Massachusetts is that the opposition continued to so late a day, and that, even after the province became a state, there was no decided effort to evade or pervert existing laws, in order to provide some substitute for the lack of equitable remedies. The common law prevailed in unmitigated rigor, and that too in a state which, of all states in the Union, has ever been looked to for examples of administrative reform.

The object of this essay is to trace the history
of the struggle for the establishment of a chancery jurisdiction in Massachusetts and to discover, if possible, the sources of the prejudice which for nearly two hundred and fifty years prevented the full acknowledgment of the right of equity to apply its remedies within the state.

The charter of the Colony of Massachusetts Bay, granted in 1628, provided that the legislative and judicial powers of the corporation should be lodged in the General Court, an assembly consisting of the Governor, Assistants, and freemen. By charter, the legislative functions of this body were to establish laws for settling the forms and ceremonies of government and magistracy, and to provide for the number, kind, and election of officers of administration; its designated judicial power was to impose lawful correction upon offenders, according to the course of corporations in England.

The charter was not intended to be the frame of government for a new state, but, when granted, it was regarded as a franchise bestowed after the manner of those enjoyed by English guilds and other commercial companies of the time. It was contemplated that the corporation should exist in England and that its officers
should reside there. For these reasons there was no provision in the charter for the establishment of judiciaries in the colony.

Two years after the charter was granted, the corporation moved to its territory in America and from the time of the removal until the revocation of the charter this instrument could only have been regarded, if regarded at all, as one in which specific limitations and not particular grants of power were to be looked for. It has been contended that the first meeting of the corporation was the only one in which it acted within the lawful scope of the authority delegated in its charter. [Chalmers, Political Annals, p. 151.] From the first meeting of the General Court in the colony the government was in fact carried on alongside and not within, the charter. When deemed proper, towns and courts were erected, taxes were levied, and the principle of representation was introduced, although none of these acts were provided for in the charter. [Hutchinson, Hist. Mass. 3d ed. vol. ii, pp. 10, 11. Washburn, Judicial Hist. Mass. p. 27.] An instrument creating a business corporation would not serve for the written constitution of a body politic. Here then, in effect, was a govern-
ment established independent of the colony charter, and in order to understand the administration of justice in the colony it is necessary to look to the force that formed and dominated that government and controlled its administration in all departments.

The year following the establishment of the colony in New England it was enacted that only church members were to be admitted to the freedom of the commonwealth; and the intent of this provision, as declared later, was that no one was to be admitted unless he were a church member "in full communion". These acts restricted all participation in the government, either as officers or electors, to those who were active church members. The clergy, zealous for the establishment of a religious commonwealth were autocrats in their holy office, and were all powerful in the administration of law, as well as in its enactment. During the earlier period of the colony under the charter
there was no place for a chancery jurisdiction. The
government was an unlimited theocracy where law was ad-
ministered with all of the sanction of ecclesiastical
authority,—an authority in which the conscience of e-
quity must have been supposed to inhere. This system
was at times more rigorous than the common law and at
other times more generous of remedies than the most con-
scientious system of equity could have been. Few of
the magistrates were lawyers, [Washburn, Judicial Hist.
Mass. p. 50] and, in the words of a contemporary writer,
the General and Quarter Courts had "the power of Parlia-
ment, King's Bench, Common Pleas, Chancery, High Commiss-
ion and Star Chamber and all the other Courts of Eng-
land. Matters of debt, trespass and upon the
case and equity, yea, and of heresy also are tried by a
jury." [Lechford, Plaine-dealing, (1641), reprinted in

However, as the colony grew in population and pros-
perity, new courts were erected, and their original and
appellate jurisdiction declared, and a body of substan-
tive law grew out of the multiplied interests of the
people. Decisions began to stiffen into precedents;

Some chancery jurisdiction was conferred upon the county courts, [Statutes 1671. Records Mass. Bay. vol. iv. pt. 2, p. 488; 1682. ib., vol. v. p. 375.] but by 1685 the applications to the General Court for relief had become so numerous that complainants suffered great expense and inconvenience by being obliged to wait for the dispatch of business of more public concern before their causes could be heard and decided. In that year it was sought to remedy these delays by a law which empowered the magistrates of each county court to act as a court of chancery. From the county court, appeals might be taken to the Court of Assistants and this was final unless the General Court afterwards saw fit to direct a new trial in the County Court or admit a hearing and determination in the General Court. [Records of Mass. Bay. vol. v. pp. 477, 478.] It has been said that this act continued in force until the grant of the province charter in 1691, [Charles River Bridge v. Warren Bridge. 7 Pick. 368.] yet, that it was not continuously in force until that year is suggested by a retroactive
provision in an act passed in 1698 (Gul. III, 10) giving the Superior Court and Common Pleas power to chance penalties annexed to specialties and forfeiture of estates on condition, and making the remedy applicable to all causes of that kind which had been tried since April 1686. This might imply that if the act of 1685 had continued in force until 1691 the retroactive relief would not have been given for causes tried between 1685 and 1691. The significance of the date, April 1686, lies in the fact that it marks the time of holding the last Court of Assistants under the colony charter.

The act of 1685, reciting that "wherein there is matter of apparent equity, there hath been no way provided for relief against the rigour of the common law but by application to the General Court" shows that by the time of the revocation of the Colony Charter, and before the granting of the province charter there had come to be, in Massachusetts a clear recognition of the existence of, and necessity for an equity jurisdiction in its stricter sense as an essential part of the judicial system of the commonwealth; and from this time on it is the course of this more definable equity jurisdiction that is to be followed.
With the revocation of the colony charter in 1684 the hold of the clergy on the state was relaxed and the theocracy fell. The corporation of the Governor and Company of Massachusetts Bay which was created for business purposes and then almost immediately became a religious commonwealth was now succeeded under the new charter, by a province exercising the proper functions of a state. The province charter was a written political constitution and provided for the government of a dependent state. We find in this constitution as would be expected, express provision for a judiciary. The General Court was given "full power and authority to erect and constitute judicatories and courts of record to be held in the name of us, our heirs and successors, for the hearing, trying and determining of all manner of crimes, offenses, pleas, processes, plaints, actions, matters, causes and things whatsoever". The province charter further gave the right of appeal to the King in Council where the matter in difference was over £300.

The new charter arrived in May 1692, and on the 25th of the following November, the General Court passed a law establishing permanent courts of justice.
Among these was a high court of chancery, - the first separate equity court created in Massachusetts. It was to be held by the Governor, or by a chancellor appointed by him, assisted by eight or more of the Council. This act, however, also gave to the judges of the other courts created thereby, power to chancer any penal bond to the just debt and damages,- a proviso that afforded great equitable relief after royal authority had refused to allow the General Court to create a court of chancery.

In the following year the provision of the law of 1692, relating to the establishment of a court of chancery, was repealed and another act to effect the object was passed. The reason given in the preamble for the change was that the court as constituted "was found by experience not agreeable with the circumstances of this province in divers respects not then so well considered or foreseen". By the new act the court was to have jurisdiction in matters of equity not relievable at common law, "and (as the new act added) not otherwise." The constitution of the court was changed and now it was to be held by three commissioners, being freeholders within the province whom the governor was to appoint with the advice
and consent of the Council. Five masters in chancery were also to be appointed in the same manner.

But the King in Council would not allow the General Court to establish a court of chancery in Massachusetts, broad as was the provision in the charter which allowed the General Court to erect judicatories, and in spite of the fact that, before this time, one of the reasons specifically given to the agents of the colony in England for the refusal to restore the old colony charter had been that it did not allow the General Court to establish a court of chancery. [*Manduit's Miscellanies, Mass. Hist. Soc. Coll. 1st ser. vol. ix., p. 274.]* The reason for the refusal undoubtedly was the same that was declared later by Sir Edward Northey, Attorney General, in an opinion on this subject submitted to Queen Anne in April, 1704. After reciting the provision in the charter which allowed the General Court to erect judicatories he says: "On consideration of this clause, if there be no other clauses that exclude the power of the Crown, I am of opinion Her Majesty may, by her prerogative, erect a court of equity in the said province as by her royal authority they are erected in other Her Majesty's
and it seems to me that the General Assembly there cannot by virtue of this clause erect a court of equity. [1 Chalmers' Colonial opinions, pp. 182,183.]

It was afterwards understood in the colonies that power to erect a court of chancery belonged to the Crown, or followed the custodianship of the great seal. This right however was the subject of much dispute in New York and Pennsylvania. Governor Hunter writing from New York to the Lords of Trade, May 7, 1711, says: "In both provinces (New York and New Jersey) I have been pelted with petitions for a court of chancery I had ordered the Committees of both Councils to form a scheme for such a court but to no purpose, the trust of the seals, they say, constitute a chancellor and unless the governor can part with the seals there can be no chancellor but himself. (Docs. rel. col. hist. N. Y. vol. v. p. 208).

In 1720, the Pennsylvania House of Representatives itself, by resolutions, addressed a request to Governor Keith asking him to open and hold a court of chancery with the assistance of such of his Council as he should think fit. (Penna. col. records vol. iii. p. 91.) The fact that in Pennsylvania this equity court held by the
governor was undisturbed by the home government, and continued for fifteen years, while acts passed repeatedly, from 1684 to 1720, by the General Assembly, establishing a chancery jurisdiction had been negatived at home, tends to confirm the opinion that the Crown, when it refused to allow the General Court of Massachusetts to erect a court of chancery, considered that the right to erect such a court was exclusively a royal prerogative. A statement of the several attempts, from 1684 to 1720, in Pennsylvania, is given, with citation of authorities, in an article by Sydney G. Fisher, in the Law Quarterly Review, vol. i. pp. 455, 457.

In January, 1735-6, the Governor of Pennsylvania fell into a dispute with the House of Representatives over the question as to where the power to create a court of equity in the colony was lodged. The governor's attitude is fully explained in a report sent by him to the House; (Penna. Col. Records, vol. iv. pp. 27-32.) and an elaborate denial, upon legal grounds, of the governor's power in the matter was transmitted to him in return. (Ib., pp. 41-45). In New York, too, chiefly by reason of the decisions of the Court of Chancery favor
able to the King in his suits for quit-rents, the right
of the governor to hold the court of his own motion was
848, 946, 947; and see also other references from the
index vol.) With reference to the right of the governor
of Massachusetts in this respect, Governor Bernard in his
answer of Sept. 5, 1763 to the Queries proposed by the
Lords Commissioners of Trade and Plantations says: "It
might have been made a question whether the governor of
this province has not the power of chancellor delivered
to him with the great seal as well as other royal govern-
ors; but it is impracticable to set up such a claim now
after a non-usage of 70 years and after several govern-
ors had in effect disclaimed it by consenting to bills
for establishing a court of chancery which have been
disallowed at home." (Quoted in Gray's note to Quincy's
Reports, p. 539; the answer being from a MS. copy in
the possession of George Bancroft.)

"The governor [of British colonies] has the custody
of the great seal and is chancellor within his province,
with the same powers of judicature that the Lord High
Chancellor has in England." (Stokes' View of const. of
Brit. Colonies. (1783) p. 185.) Had the Crown consent-
ed to the Massachusetts acts of 1692 and 1693, erecting a court of chancery, it would have amounted to an acknowledgment of the right of the General Court to erect such a court; although by those particular acts the interests of the Crown might not have suffered, inasmuch as the first of those acts directed that the court should be held by the governor, or chancellor appointed by him, assisted by eight or more of the Council; and the second act provided that the court should be held by appointees of the governor.

It is important to observe that direct hostility to a court of chancery began to be expressed almost as soon as the first efforts were made to establish such a court in the province. At least as early as January 1703-4 Governor Dudley had been endeavoring to obtain a commission from the Crown for a court of equity; and a letter signed by several persons in the province was sent to Sir Henry Ashurst, in England, soliciting his influence against the proposed establishment of the court. This opposition appears in a rare, anonymous tract entitled "The Deplorable State of New England," published in London in 1708, and reprinted in Mass. Hist. Soc. Coll. 5th
ser. vol. vi. At p. 109*, in an effort to show the evil

designs of Governor Dudley upon the charter and courts

of the province, there is given a letter, from the Gover-

nor's son Paul to a friend in England, dated January 12,

1703-4, wherein the son says: "This country will never

be worth living in for lawyers and gentlemen till the

charter is taken away. My father and I sometimes talk

of the Queen's establishing a court of chancery in this

country; I have writ abroad about it to Mr. Blathwayt.

If the matter should succeed you might get some place

worth your return." At p. 168* this feeling about erect-
ing a court of chancery reappears incidentally when the

author aims to show that Governor Dudley used offices

within his gift to win representatives to his interests.

This particular legislator had formerly opposed Dudley,

but "unto the surprise of the whole house tack'd about

and gone over to Colonel Dudley's interests; though 'tis

not so many months ago that we have (now in London) his

hand with others unto an honest letter to that honorable

person Sir Henry Ashurst to solicit his endeavors to

deliver the country from a plot against the charter and

all the courts* of justice in it, with a sham court of
chancery (or rather of bribery) which Governor Dudley was then pursuing". A letter dated Jan. 20, 1707-8, from Increase Mather to Governor Dudley (Mass. Hist. Soc. Coll. 1st ser., vol. iii, p. 126.) further exhibits this hostility: "Sir H. Ashurst writes to me that it would fill a quire of paper for him to give a full account of your contrivances to ruin your country, both this and the neighboring colony. Your son Paul's letter, dated January 12, 1703-4, to W. Wharton, seems to those that have read it to be nothing short of a demonstration that both of you have been contriving to destroy the charter privileges of the province; and to obtain a commission for a court of chancery, alias, a court of bribery. A gentleman in London gave ten pounds for that letter so that his friends in New England might see what was plotting against them.

After the act of 1693 no further attempt was made by the General Court of the province to erect a separate court of equity; yet from the fact that, during the entire period of the province charter, rules of practice were not well established in the courts, and that, with but four exceptions, none of the thirty-three judges
who at various times sat in the Superior Court of the province were lawyers, it may be conjectured that much informal equity was administered by the law courts without knowing that such relief belonged to a court of chancery. An account of the method of obtaining equitable relief during this period can best be given in the words of Benjamin Pratt of Massachusetts, who was one of the great lawyers in the colonies and, in 1761, was appointed Chief-Justice of New York: "There is no court of chancery in the charter governments of New England nor any court vested with power to determine causes in equity, save only that the justices of the inferior court and the Justices of the Superior Court respectively have power to give relief on mortgages bonds and other penalties contained in deeds: These acts were: 1693, jurisdiction to chancer penal bonds; 1698, 1735, over the redemption of lands after the default of mortgagor; 1713, 1719, over the redemption of lands after sale under an execution. In all other chancery and equitable matters both the crown and subject are without redress. This introduced a practice of petitioning the legislative courts for relief.
and prompted those courts to interpose their authority. These petitions becoming numerous, in order to give the greater dispatch to such business, the legislative courts transacted such business, by orders and resolves without the solemnity of passing acts for such purposes; and have further extended this power by resolves and orders beyond what a court of chancery ever attempted to decree, even to the suspending of public laws, which orders and resolves are not sent home for the royal assent. The tendency of these measures is too obvious to need any observations thereon. [Pownall. Administration of the colonies. 5th ed. (1774). vol. i. p. 113.] Governor Hutchinson, in a speech to the two Houses in 1772, strongly protested against such an assumption of judicial power by the General Court. [Mass. state papers. 1765-1775. p. 314.]

As a result then, it is found that although Massachusetts was not allowed a court of chancery under the province charter, yet equitable relief might be freely obtained upon application to the legislative courts; that the common law courts, by their statutory powers, could administer equity in three frequent classes of
cases; and that the judges of the common law courts, being laymen presiding over courts having no strict rules of practice, might be expected, at times, to give the usual layman's elastic interpretation to the law, and even occasionally to supply defects in the law itself.

The State. 1780-1877.

In the first constitution adopted by the State of Massachusetts the provision giving the General Court authority to erect judicatories is in the same words as the provision for that purpose in the province charter, save only that there is a substitution of the "commonwealth" for the "King". The sort of equity power which had been exercised by the legislature in the province was retained by the legislature in the state and was not transferred to any of the judicatories established under the constitution. By the first General Court the jurisdiction of the new Supreme Judicial Court was declared to be the same as that which had been possessed by the Superior Court of the province. [Laws 1781, ch. 17.]

Massachusetts as a state began with no court of chancery, but with a constitutional authority in the legis-
lature to establish a chancery jurisdiction whenever it might choose to do so. It has been said that "whenever there exists no provision in the jurisprudence of a country for its full exercise (i.e., of equity) the consequences must ever be that after the common law courts have engrafted into their practice as much as can be there assumed, the legislature has been compelled to exercise the rest; or else leave a large space for the appropriate field of judicial action unoccupied". [Johnson, J. in Livingston's Lessee v. Moore. 7 Peters, 548.]

What was the result in Massachusetts?

A separate court of equity was not created, although meagre chancery powers were given to the common law courts. It is not necessary to specify here the successive acts of the General Court by which those limited powers were slowly and grudgingly dealt out to the Supreme Judicial Court; nor is it necessary to follow case by case the judicial interpretation of those acts. In order to realize how limited the chancery jurisdiction was it is sufficient to remember that it was seventy-five years after the adoption of the constitution before that jurisdiction was extended to the three great causes for
equitable relief, in 1855 to fraud, and in 1856 to accident and mistake. [Laws 1855, ch. 194. Laws 1856, ch. 38.

A succinct and thorough review of the equity statutes and decisions in the State of Massachusetts is given in Pomeroy's "Equity Jurisprudence", vol. i. pp. 341-352.

The attempt from this point on will be to seek for expressions of feeling collateral with statutes and judicial decisions and, by so doing, follow the contest itself rather than its formulated results.

For the first twenty-five years after Massachusetts became a state, politics and the administration of the other departments of the new government occupied public attention to the exclusion of any particular inquiry concerning the judiciary. [Essay on the establishment of a chancery jurisdiction in Massachusetts. p. vii.] By 1808, however, the necessity for an equity jurisdiction had become insistent. The decisions of the Supreme Judicial Court were now being reported and their publication established precedents which did not allow the court to exercise the same freedom of equitable adaptation of law to particular cases as was possible before the decisions were reported for the public. [Essay on the estab. etc. p. 13]
The court might recognize the existence of a trust but could not compel an execution of it; there might be an admission of the violation of a legal right, yet there was no judicial authority to grant an injunction or compel a discovery; and a complainant was remediless who had a new cause of complaint which, because it could not have been foreseen, was not yet provided for by law.

[Essay on the estab. etc. p. 77]

In 1808, there was submitted to the legislature a committee report [Quoted by Judge Story in an article "On chancery jurisdiction", North American Review, vol. xi. (1820) p. 161.] which dwelt upon the failure of legal remedies in the state and complained that there was no adequate legal power in the law courts to compel an accounting; that one partner might seize the books and papers of the firm and there was no process to reach them by law; that there was no way by which the marshalling of assets could be enforced; and that testamentary trustees might take the devised estates and then refuse to execute their trusts,—there being no power to compel them what in equity and good conscience they ought to do.

[The reluctance which has always been preserved in our
legislature to the establishment of chancery powers, if it shall be continued, will go a great way to discourage devises and conveyances in trust; there can be no common law powers adequate to the management of claims of this nature. In this and some other branches of our jurisprudence every one will acknowledge there is a defect for want of a court of chancery''. Sullivan, Hist. of land titles in Mass., p. 215. (1801). The committee reported that they were not aware of any solid objection to the establishment of a court of equity in the commonwealth, and said, as if in view of opposition, that the right to trial by jury would be preserved inviolate and the decisions of that court must be guided as much by settled principles as were those of the courts of law.

Soon after attention was thus directed to this subject there was a bill before the House of Representatives for the establishment of a separate court of equity modelled after the English High Court of Chancery and having full equity powers; [Essay on the estab. etc. p. 22.] but the bill was not passed, and an address to the legislature for their instruction on the subject of equity and courts of equity was of no avail. [The address is the
"Essay on the establishment of a chancery jurisdiction in Massachusetts" cited several times in this paper. The "Essay" was published anonymously and without date in 1810, and, upon the authority of Judge Metcalf and the Monthly Anthology, it is attributed to Erastus Worth-ington. The legislature not only refused at that time to give more relief, but, as if to rebuke future attempts in this direction, waited several years before giving any additional equitable remedies of importance. [Laws 1817. ch. 87.]

The objections made to the establishment of a court of equity were that the chancellor would possess a dangerous discretion, that the court was unnecessary, that generally the consequences of giving a court such powers were to be feared and, not the least effective objection was that the court would be an innovation. [Essay on the estab., etc. p. 86.] The terrors of the court were the terrors of the unknown. An idea prevailed that it would be unavailing and dangerous to attempt any legislation on the subject. Many who had contemplated some action to remedy the defects in the administration of justice shrank from the task and there were at that time not more
than four or five men who made any considerable exertion to effect the needed reform. [Essay on the estab., etc. p. 85.]

But the evils resulting from the refusal to give a chancery jurisdiction arose continually before the common law judges who, while they confined themselves strictly within the bounds of the powers granted to them and were obliged to turn away without relief suitors whose equitable rights were admitted, nevertheless took occasion in their opinions to protest, as vigorously as judicial propriety would allow, against this prejudice of the legislature. In the very first volume of the Massachusetts Reports the Supreme Court directs the attention of the legislature to the lack of an equitable remedy in cases of trust. The court says: "If the conveyance was in trust the court could not have compelled the execution of it; and until the legislature shall give us further powers we can do nothing upon subjects of that nature". [Prescott v. Tarbell, 1 Mass. 208 (1804).] Judge Jackson in Bridgen v. Cheever, [10 Mass. 453 (1813)] complains that "this is one of the numerous cases in which suitors are exposed to loss and inconvenience for want of a court
with general chancery powers. But it is not for us to remedy the inconvenience ". And the same judge in Vose v. Grant. 15 Mass. 517, 522, (1819). utters a yet louder complaint: "If these suggestions should lead to any adequate remedy for the plaintiff and those who are situated like him, or on the other hand should show that our law furnishes no remedy, and thus prevent further trouble and expense to all parties concerned: the result in either case will be useful to the community". 

"This is one of the numerous cases which are constantly occurring which show the necessity of a court of chancery for the complete distribution of justice among the people. It is the boast of the common law that it permits no wrong without furnishing a remedy; but this is true only when there are courts competent to exercise all the judicial powers which that law requires for its due administration. A court of chancery exercises a most important part of these judicial powers".

It is naturally with a great degree of interest that we look for Judge Story's participation in this contest in his own state over a branch of jurisprudence with which his name is now so eminently connected.
Like most of the more learned lawyers in the commonwealth he was earnestly in favor of the creation of a court of chancery; but, when he gives his opinion upon the subject, his advocacy is found tempered with politic concessions to the opposition,—concessions, however, which do not substantially modify his expression of belief that the court should be established. In 1820, and in well-chosen time before the assembling of a constitutional convention to be held in the latter part of that year, he presented anonymously his views on the question.

[Story "On chancery jurisdiction". North Amer. Review, vol. xi. (1820), pp. 140, et seq.] He did not do this with a dogmatic assertion that any opposition to chancery was unwise and unreasonable, and thereby excite in the obstructionists the antagonism of pride as well as of ignorance, but extolled the existing system while he unobtrusively declared that the establishment of a proper court of equity would prove "a real blessing."

This court should be modelled after the English High Court of Chancery,—but only so far as might be applicable to the conditions in Massachusetts. It was true that many evils resulted from a maladministration of chancery
powers, but those powers need not be maladministered. And yet there was much good in the very rigor of the common law and absence of a chancery jurisdiction. The people were trained to attention and prudence in all their transactions, for, if they lacked these qualities, they were not unlikely to acquire, in their dealings, merely equitable rights against one another, which a common law court would not protest. Story apparently felt that the people of Massachusetts would not be unsusceptible to praise and he proceeds to address himself to state pride: "There is now a wholesome thrift and accuracy about our concerns that disciplines us to close attention and gives us an almost instantaneous perception of what is proper. We have at all times and almost instinctively the air and character, and pride of real business men who look at their title deeds before they lock them up, and, what is of quite as much importance, look at them diligently afterwards. We do not slumber over our rights but are instant in season and out of season; we do not awaken from our dreams of indolence for the first time after the lapse of twenty or thirty years and then consult a solicitor as to the best mode
of framing a bill that shall relieve us from the ill effects of delay and forgetfulness, and hardship, and folly. Our laws hitherto have secured only the vigilant and not the sound sleepers. *Vigilantibus non dormientibus leges subvenient.* Now, it is most desirable to perpetuate this course of things, to prevent litigation and to encourage legal certainty. And all this a good court of equity sustained by a learned, intrepid and discriminating Chancellor, such as Lord Eldon or Mr. Chancellor Kent, would accomplish; but all this would be lost under different auspices, as may be seen in some parts of the Union. Without adverting to the learned Judges of the State bench, we could name a gentleman at the bar of Massachusetts whose cautious, well-instructed, modest, powerful mind would adorn such an equity bench and create an equity bar. [Story, "On chancery jurisdiction". *North Amer. Review.* vol. xiv. (1820). p. 157.]

When the constitutional convention met in that year, Story was made chairman of the judiciary committee which reported that a court of equity seemed indispensable to a perfect administration of public justice, and recommended a resolution, (which was stricken out by the
convention), "that the legislature may, if the public
good shall require it, establish a Supreme Court of Equi-
ty distinct from the Supreme Court of Law". [Journal
of the debates and proceedings: convention to revise the
as the legislature already had that power the resolution
could only have been intended as a standing announcement
of the fact that such a court was lacking in the common-
wealth.

The contest thereafter was one of unwearied per-
sistency on the part of those in favor of a chancery ju-
risdiction, and their success was only won inch by inch.
The Supreme Judicial Court, having in mind the prejudice
against chancery, confined itself within the narrowest
possible limits in administering whatever chancery pow-
er\rs were gained for it from the legislature, [Dwight v.
Warren Bridge, 6 Pick. 395 (1828)] but directed the at-
tention of the legislature to the frequent failure of
remedial power in the law. "If the common law or trus-
tee process will not reach such a case it only shows that
there is yet a defect in the laws which can be supplied
only by the legislature". [Parker, Ch. J. in Black v. Black. 4 Pick. 238. (1826)]. "It may be an inadequate remedy and no doubt this is a proper case for a court of equity, but without more ample jurisdiction it is impossible for us to grant relief in equity." [Wilde, J. in Manning v. 5th Parish in Gloucester. 6 Pick. 19, 20. (1827)].

The friends of chancery gradually became more numerous and their cause strengthened; but the prejudice of the opposition became more confirmed and not always scrupulous as to the means it used in the effort to defeat the establishment of an equity jurisdiction. The contest in the legislature in 1846 shows to what extremity the argument against chancery had been reduced. A bill was reported to the House of Representatives from the Committee on Probate and Chancery. The second and important section, upon which the whole debate turned, read as follows: "Upon a bill of discovery in cases of fraud, accident, and mistake, under the provisions of the 8th section of the 81st chapter of the Revised Statutes, if the complainant have not a plain adequate and complete remedy at common law, he may insert in his bill a prayer
for relief and thereupon the court shall have power to hear and determine the same in equity; provided that all issues of fact arising in the case shall, when required by either party, be tried by a jury". This section was defeated. The most effective speech against it was made by Mr. Crowninshield, of Boston who expressed a wish that the equity power which had been given to the Supreme Court from time to time might be taken away and, in the course of the debate, be held up before the House the large volume containing the bill, answer, etc., in the case of Flagg v. Mann. (2 Summers, 486.) and said: "Why, Mr. Speaker, did this House ever see a bill in equity; if not, I will show you one." This theatrical climax was received with a burst of applause and a gentleman who spoke on the same side declared that there was no need of argument; that the book had settled the question. There was some indignation when it came out later that half of the book was blank leaves and that the case contained no more testimony than do many common law cases. [Editorial in the Law Reporter (Boston), vol. viii. p. 556. (April, 1846). The editor, F. W. Chandler was a member of the House of Representatives of
A good fight for chancery had been made, but no comprehensive results were achieved until ten years later. Jurisdiction in cases of fraud, accident, and mistake was given by the acts of 1855 and 1856, already referred to; and in 1857 an act was passed by the legislature giving the Supreme Judicial Court "full equity jurisdiction according to the usage and practice of courts of Chancery in all cases where there is not a plain adequate and complete remedy at law". [Laws 1857, ch. 214.] It would seem that this might have conferred upon the Supreme Judicial Court as full chancery powers as those exercised by the English High Court of Chancery, by the United States courts, and by equity courts generally. These courts held that a limitation to cases "where there is not a plain adequate and complete remedy at law" referred to such inadequacy as existed in England at the time of the origin of chancery, and that the right to equitable relief was independent of any present inadequacy of common law remedies. [Story J. in Bean v. Smith 2 Mason 270.] Had the same interpretation been put upon this provision by the Supreme Judicial Court of Massachusetts, the act of 1857 would have effected the com-
plete establishment of a full chancery jurisdiction in the commonwealth, but that court, having been confirmed by long practice in the habit of strict construction of all equity statutes, declined to accept full jurisdiction and to administer relief according to the rule prevailing elsewhere. The court held that "remedy at law" must refer to remedies at law as they existed under the statutes and according to the course of practice in Massachusetts, and that this would exclude jurisdiction in some cases where the English Court of Chancery would have assumed jurisdiction. [Pratt v. Pond. 5 Allen, 60. (1862).] This interpretation practically excluded jurisdiction in all cases except where the suitor would be remediless without it, even going to the extent of holding that, if the party could secure relief by his own act, he could not have relief in equity, - the lawfulness of his act to be determined when the other party should sue him for it. [Boston and Fairhaven Iron Works v. Montague. 108 Mass. 248, 251. (1871). Amer. Law Review (Boston). vol. ix. p. 780; and cases there cited.] Such an interpretation left the rights of one who sought a remedy in court extremely uncertain until he had been at
the expense and trouble of an actual attempt to secure equitable relief.

Matters went on in this way for twenty years. In 1875 the old method was revived of curing by legislative enactment the defects in existing system with its limited jurisdiction. [Laws 1875, ch. 235. ] Finally however, in 1877 after a struggle of so many years equity won full recognition as a complementary part of the judicial system of Massachusetts. The terms of the act which closed the contest were comprehensive and designed to leave no room for judicial interpretation to limit the broad equity jurisdiction which was granted: "The Supreme Judicial Court shall have jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence; and, in respect of all such matters and cases, shall be a court of general equity jurisdiction." [Laws 1877, ch. 178. ]

In no other state in the Union was there such long and stubborn resistance made to the establishment of chancery. The great reason for the obstruction, from the time when the subject first came to the attention of the state legislature, was undoubtedly the wide-spread
In the legal profession the opposition or indifference resulted from ignorance of the subject, together with a disinclination to study a system whose application was so limited in the commonwealth. The Supreme Judicial Court itself makes a public confession of its embarrassment in dealing with even the limited equity powers conferred upon it and shows a mild surprise and considerable uncertainty when asked to grant so common a chancery remedy as an injunction: "To us who have been used only to common law proceedings it could not but appear a novel application to award process in the nature of an execution against a party who had been only summoned to hear a complaint against him, but whose time of appearance had not yet come. It seemed to resemble a little the course ascribed to the judge renowned in classic poetry, Castigat auditque. But upon examining chancery decisions in England and New York we are satisfied that there are cases which require the exercise of the power of preventing as well as compensating mischief. * * * *

Coming to the exercise of this jurisdiction hesitatingly
and sparingly conferred by the legislature, so recently as we have done, and accustomed as we have been to the restraints of the common law it cannot be expected that we shall be more ready to extend power by construction than those who have been long familiar with this useful, though somewhat indefinable branch of jurisprudence. Parker Ch. J. in Charles River Bridge v. Warren Bridge. 6 Pick. 400, (1828). "This court cannot be desirous of enlarging its jurisdiction, or of assuming the trial of facts in any case and certainly not in the exercise of a jurisdiction [equity] reluctantly given by the legislature and by no means coveted by us." [Ib. 7 Pick. 370 (1829).] "It is one of the most obvious disadvantages of the present mode of administering the [equity] power that those who are charged with it are, by incessant engagements in the ordinary course of their functions, rendered in a manner disqualified for the exercise of duties which, to be well discharged, require the undivided application of a single mind. We, however, must submit to the ordinances of higher powers and be content with discharging our duty honestly until the legislature in their wisdom shall see fit to make a better disposi-
tion of this branch of the judicial power. \[\text{Ib. p. 367}\]
The grounds of argument most convincing with the laymen of the opposition were those unfailing ones, delay and expense, which the general public can understand without having a technical knowledge of the methods and remedies of equity jurisprudence. Then, too, the abuses of chancery in England and the effort that was being made there for reform during the first half of the present century,—a period concurrent with the struggle for the establishment of a court of equity in the state of Massachusetts,—were not without their influence in retarding the adoption of full equity powers in the commonwealth. \[\text{In England this more modern feeling against chancery began to find expression in parliament in 1810 \cite{Hansard\textsuperscript{\textregistered} Parl. debates. 1st ser. vol. xvii, p. 181.} and reached, in intensity, something like a climax with the publication of Dickens\textsuperscript{\textregistered}'s "Bleak House" in 1853.}\]
In addition, there still remained those reasons heretofore mentioned, which had been given in 1808 when an attempt was made in the legislature at that time to erect a court of chancery. From the general ignorance of the nature of equity jurisprudence arose the common belief that the abuses in equity were immanent in the
system itself and were not merely remediable defects in its administration.

Epitomizing then the results of this inquiry into the course of equity in Massachusetts it is found that during the period of the theocracy which governed the colony from the settlement until the revocation of the charter in 1684, there was no system of equity administered by the courts of justice. The inhabitants of the colony were "a people amongst whom religion and law were almost identical and in whose character both were so thoroughly interfused that the mildest and the severest acts of public discipline were alike made venerable and awful". [Hawthorne, Scarlet Letter. ch. ii]

By 1685 equity had come to be regarded by the colonists as a system of jurisprudence in itself. Efforts were made by the General Court in 1692 and 1693 to erect a court of chancery but, because erected by the General Court instead of by virtue of the great seal, there was a refusal of the necessary approval by the Crown. Suitors for equitable relief then betook themselves to the legislature itself which supplied by its own judgments a substitute for the remedies of the forbidden court of chancery. In the province to the time of the
adoption of the state constitution and even for sometime thereafter, though in a much smaller degree, the uses of a court of chancery were sewed in part by the legislative courts and by the common law courts, when the latter found an opportunity by a freer declaration of the common law to mitigate the evils arising from the lack of an equitable jurisdiction.

But it was after the adoption of the state constitution that the great defects in the system of remedial justice became much more painfully apparent. Prejudice, engendered chiefly by ignorance of equity jurisprudence, forbade the establishment of a court of chancery. All equity jurisdiction, except the narrowest, was denied to the common law court by the legislature; and these courts, while lamenting that a failure of justice must result, constantly refused to assume any equitable powers by implication beyond those granted by the express terms of the statutes conferring the jurisdiction. The suitor was sent out of court remediless,—being told that equity and good conscience were on his side but also that there was no provision of law whereby his wrongs could be redressed. A member of the Massachusetts bar looking back over an honorable professional
career of more than half a century recalls his earlier days as a practitioner and says: "When I look back upon my early entrance upon the profession I see that the state of law at that time, especially the remedial part of it, was wretched. I seem to have lived in the dark ages." [Hon. Samuel E. Sewall: Address at the Harvard Law School dinner, Harvard University: Commemoration of the 250th anniversary, 1886. pp. 90, 21.]

Little by little chancery powers were conferred upon the common law courts and finally in 1877, equity was given its full and proper freedom in the commonwealth.

Edwin H. [Signature]
Works Cited.

Adams, Brooks. Emancipation of Boston, 1887.


Dickens, Chas. Bleak House. (Preface, 1853.)

Essay on the establishment of a chancery jurisdiction in Massachusetts; Boston and Portland, [1819].


Gray, Horace, Jr. Note on equity in the colony of Massachusetts. (Quincy's Reports.)


Hawthorne, Nathaniel. Scarlet Letter, Boston, 1850.
Hutchinson, Thos. History of Massachusetts. 3d ed. vol. ii
Boston, 1795.


Hist. Soc. Coll. 3d. ser., vol. iii.)

Massachusetts. Constitutional Convention, 1820-21:
Journal of the debates, etc. Boston, 1821.

Massachusetts. Laws, 1817, 1855, 1856, 1857, 1875, 1877.
Records of the Governor and Company of
Massachusetts Bay. 1628-86. 5 v. Boston, 1853-54.

17 Mass., 4 Pickering, 6 Pickering, 7 Pickering,

Massachusetts (State papers) : Speeches of the Governors;
1765-1775. Boston, 1818.

Massachusetts. Historical Society. Collections 1st ser.,
vol. iii., ix ; 3d ser., vol. iii ; 5th ser., vol. vi
Boston, 1810-79.

New York. Documents relating to the Colonial History of


Pennsylvania. (Colonial records.) Minutes of the Provin-
Pomeroy, J. N. Treatise on equity jurisprudence. Vol. i.
San Francisco, 1886.

Perry, Wm. S. Historical Collections relating to the
American colonial church. Vol. ii. Hartford, Conn.,
1873.

Pownall, Thos. Administration of the colonies. 5th ed.
Vol. i. London, 1744.


Sullivan, James. History of land titles in Massachusetts
Boston, 1801.

United States. Supreme Courts. 7 Peters.

United States. Circuit Court Reports. 2 Mason.

Washburn, Emory. Sketches of the judicial history of
Massachusetts. 1630-1775. Boston, 1840.