HESPERIAN STUDENT.

VOL. 4, *University of Nebraska.* NO 10.

DECEMBER, Qui non Proficit, Deficit. 1875.

English Judicature

The past two years will be memorable, among many other things, for the changes they have wrought in the English judiciary system. For five centuries in England the Court of Chancery has existed with a special equity jurisdiction and special forms of procedure, separate and distinct from the Comaon Law courts of the realm.

On the 5th day of August, 1873, an act was passed abolishing the venerable Court of Chancery, as a distinct factor in the heretofore dual system, and which consolidates all the superior courts of England, including the Court of Chancery, into one Supreme Court of England, which is to be presided over by the Lord Chancellor and without distinguishing, so far as form is concerned, between law and equity, to administer justice on equitable principles. The old forms of pleading are abolished; the summons by which the suit is commenced is indorsed with a statement of the nature of the claim made or the relief or remedy sought, the defendant files a statement of his defense and the plaintiff replies if necessary. Causes will be tried before one or more of the Judges sitting with or without accessors or a jury or may be sent to a referee for hearing.

The system thus briefly sketched went into effect, I believe, on the second day of November, 1875, and in its main features is substantially the same as that adopted in this country a number of years since.

In many particulars this is doubtless a progressive movement, while it is equally true that in the main it is but restorative of the ancient English judicature. The general reader is aware that in early times the Supreme Court of the realm was the *Aula Regis* or great council of the King, wherein the King sat personally and which followed his person and administered equal justice according to the rules both of law and equity or of either as might be necessary from the nature of the case. But while these facts may be well known to many, comparatively few, even students of the law, fairly comprehend the origin, nature and influence of the English Court of Chancery and the relation it sustained in its special equity jurisdiction to English judicature as a whole. Since the fall of this *officina justitiæ* must be recorded, a topical review of its history may not prove uninteresting.

When the primitive Court of the Realm, the *Aula Regis*, became burdensome and inefficient from its migratory character and was finally broken up, its jurisdiction was consequently divided among various courts, as the Common Pleas, the King's Bench and the Court of Chancery which with others were subsequently and permanently located at Westminster. The clause of *Magna Charta* guaranteeing the new order of things ran thus: *communia placita non curiam nostram sequentur, sed in aliquo loco tenentur.*

The history of that time, however, shows that the Court of Chancery exercising its ordinary jurisdiction, existed at the time of the great charter and it has been said to be as ancient as the Kingdom itself. The simple question of origin, when and from whence it came, I leave to antiquarians. I care to speak only of its later history, how it came to have an original jurisdiction in cases of an equitable character, independent of the courts of the Common Law. Leaving this point out of view, the abolishment of the English Court of Chancery would have but little meaning and would be comparatively an insignificant event.

At the time of the partitioning of the jurisdiction of the *Aula Regis*, the idea of a special equity jurisdiction in Chancery, such as appears later in its history, does not seem to have existed or at least was not considered by the learned writers upon early English law.* There exists no record of that time which shows that suits were brought immediately in the Court of Chancery because of the inherent equitable character of the case, but it is clearly shown that Chancery jurisdiction in the first instance was chiefly confined to particular cases wherein there was a defect of legal administration, as:

1. The want of a proper or perfect writ. Questions touching the validity of the writ upon which the action at law was founded were properly raised and disposed of in the Court of Chancery the source from whence all the writs came.

2. Petitioning for the writ of *habeas corpus* to release the complainant from illegal imprisonment.

3. Some special ground of equitable interference on the part of the Court of Chancery as representing the king, not depending upon the peculiar equitable nature of the case, but because of some obstruction to the ordinary administration of justice. For example, "by reason of the wealth or power of the wrongdoer," "that the defendant is surrounded by many men of his own maintenance," or the extreme poverty and inability of the complaining party to prosecute his suit according to the forms of law.†

Able writers and investigators have concluded that the original equitable jurisdiction in Chancery as contradistinguished from the above and from that of the courts of the Common Law began in the reign of Edward III, when by proclamation matters of grace were referred to the Chancellor.‡ Though the exact time is a point of some dispute it is certain that this special equity jurisdiction became well established and acted upon by the time of Richard II.§ Thus from the office of the Chancellor, as keeper o the seal and the King's conscience, from whom issued all the writs of the King, gradually grew the modern Court of Chancery with its extended equity jurisdiction filling no small space in the history of English jurisprudence.

Several theories have been advanced to explain the origin of this extended equity jurisdiction in Chancery with its peculiar forms and methods, other than the proclamation of Edward III, which was simply confirmatory of a practice which had long existed. Some of these are ingenious and interesting. It is sufficient to give the one commonly accepted by learned English writers.**

Originally appeals for relief of a purely equitable character were made directly to the King or by petitions to Parliament, the king being bound by his coronation oath to deliver his subjects *aquam et rectam justitiam*. These petitions becoming burdensome to Parliament it readily found a substitute which had more time to determine such matters and began to refer them to the *Legale Concilium Regis*; and finally they were by the King referred to his Chancellor. This came ultimately to be the settled practice from which it is but a single step forward to the later one of appealing directly to the Chancellor and his associates as a Court of Equity in similar cases. Adding the fact that the chancellor was usually an ecclesiastic and familiar with the forms and fictions of the civil law, we have the nucleus of that court of equity which grew to such gigantic proportions under Woolsey and was adorned by such consummate genius and learning as belonged to Finch and Hardwick. The statutes of mortmain and other acts of legislation had much to do in augmenting its jurisdiction and power.

The fundamental principles of the new English system are the fusion of law and equity and the abolition of the old forms and distinctions in pleadings in legal and equitable cases. This, however, is not a fusion of rights but of judicatures. The distinction in fact between law and equity is admitted by legal writers, though Mr. Austin maintains that it is unnecessary and while this distinction is well rooted in England she has concluded that one set of Courts and Judges is sufficient to determine the whole of a controversy, and the rights of the parties whether legal or equitable and that too under a uniform course of pleading. Indeed no satisfactory reason why this should not be so has yet been given and in this matter the Mother Country is but following the plan adopted in this county in 1848. Henceforth Westminster will be a common hall of justice instead of six juridical staircases steep and dangerous.

To an American this radical change in English Jurisprudence, bubbling quietly to the surface after a quarter century of fermentation, is wonderful and instructive. The old system fortified by its centuries of custom and the wisdom of the sages, seemed well-nigh impregnable. But the modern idea overcame it as the modern idea bids fair to overcome other venerable English institutions. The fact that the English Bar so wonderfully centralized and so powerful should submit to the introduction of the new judicature is no slight indication of the burdensome intricacies and defects of the old.

To the law students of coming years this is a matter of special interest. For them, the English Court of Chancery as an institution separate and complete in itself, has passed into history and the American student will find in the new English judicature a similarity to that of his own country, begetting interest and when contrasted with the old system, much easier of comprehension for the ordinary intellect. The Court of Chancery is a thing of the past, of which I think the most subtle mind learned in the law can scarcely say *olim meminisse juvabit.*

J. STUART DALES.

*3 Black. Comm., 50. The Legal Judic. in Chancery Stated chap. 2, page 24.

†1st Chan. Cal. 8, 14, 130.

‡Parkes Hist. Chan. 35, 1st Equity Abr. Courts B. note a.

§Legal Judic. in Chan., Stated 29, 32, 33. Parkes Hist. Chan. 39 to 44, 54. Rex v standish 1 Mod. R. 59.

**Parkes Hist. Chan. App. 502. Legal Judic. in Chan Stated 27, 28, 29. 3 Black Comm. 507, 52, Parkes Hist. Chan. 56.

Individuality.

In the establishment of the Universe, according to the eternal principle of perfect fitness, every sphere was made to revolve with its own velocity in its own particular orbit; every element attracts or repulses according to its own peculiar properties, yet all serve in their turn to aid in carrying out the mysterious plan of the Supreme Intelligence. So in the organization of human society, according to the same mysterious plan, every individual is driven on by his own peculiar motors in his particular sphere of action. Here each has a place to fill, each a function to perform assigned to him by the eternal law of intellectual precedence. And yet all in their way contribute to the one great end of their being, the mutual amelioration of all.

The sage and the wiseacre, the philosopher and the dolt, the priest and the criminal are as truly complements of each other, as the mountain and its corresponding valley or the land and the sea. Each would be incomplete without the other.

Neither the purpose nor the desire of man is satisfied with a passive neutrality; well directed activity alone can accomplish the *summum bonum* of life. But what direction shall that activity take? "Reason is here no guide, but still a guard. 'Tis here to rectify, not overthrow." If Providence has marked out our course and given the motors to action, is not that an impious hand which reason would raise to stop us? If, perchance, a divine hand has kindled the sacred fire of genius is it not unwise to attempt to quench it?

It has been said that in every life there is a pivot upon which the decisive turn is made. With many, O how many! this was the time when in the fever of youth, excited by hope and frenzied by ambition, they chose their course of life. Can there be a more sublime picture, a more solemn scene than that of a young man electing the theme of his future? He is standing on the great divide. One step to east is the mountain spring which, after a thousand silent meanderings, enters the stormy waters of the Atlantic, and but a pace to the west is the source of that brooklet which, buffeted by a thousand cataracts, finally reaches the peaceful Pacific. A little to the right is a path leading up the barren, rough and rugged hill