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SOME MODERN CONTACTS BETWEEN COURTS OF EQUITY AND GOVERNMENT POLICY

By William H. Lloyd*

No one is, perhaps, so acutely aware of the unsystematic character of our law as the teacher. He must, in the first place, agree with his colleagues upon their respective spheres of influence; and then, in endeavoring to present his subject to his students in a complete and orderly manner, he is constantly confronted with problems that tempt him to poaching expeditions on his colleagues’ most treasured preserves. He must, if he desires to be understood, present his material with traditional arrangements constantly in mind, yet as he sits surrounded by the advance reports no one is more conscious than he, of shifts of emphasis and interest in the law that leave some historic titles barren, and disturb the symmetry of others. But the annoyance of the cloistered mind at the disorder of the law is seldom reflected by the active bar, nourished on and seasoned by confusion as it is; too busy on the firing line to notice problems of strategy. The anomalous state of modern equity is an example.

It is familiar history that the expansion of equity was due to the use of the chancellors’ court as an instrument of law reform, supplying deficiencies substantive and procedural in the common law, due very largely to the inability of the common law courts to cope with the economic changes, and the increasing complexity of society in a period of world wide discoveries and great commercial expansion. By the early years of the nineteenth century chancery had completed its work; Mr. Justice Story’s

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book sums it up. Not that the doctrines and remedies of equity are incapable of extension to new but analogous situations; they are so extended. But as an aid in the growth of the law equity had gone about as far as the machinery invented by the mediaeval chancellors could successfully carry it. In the wake of the industrial revolution came problems varied and novel, due to increasing population and higher standards of living, to the growth of corporations and other forms of association, to scientific discoveries and inventions—problems at times quite beyond the competency of both ancient systems—law and equity. An era of legislation followed which has not only given new form to many titles of substantive law but also set up new tribunals for the more effective accomplishment of its purposes.

Our judicial organization and the great body of American law is based on conditions prevailing in the years immediately following independence, when the country comprised a homogeneous pioneer rural community with small towns as centers of distribution. The legal problems were simple and familiar, capable of solution by the leisurely application of traditional methods. Not so the problems of a highly industrialized urban society. As Dean Pound has pointed out there is at present, as in Tudor England, a reversion to justice without law which takes place when the orthodox legal machinery for the time being is not fulfilling its ends, either because its procedure is inadequate to meet the needs of a generation impatient of formalism, or because the substance of its doctrines have not expanded to meet the needs of the times.¹ Hence the movement from judicial to executive justice administered by a variety of boards, commissions and other state and municipal agencies, the jurisdiction and powers conferred on these extra-judicial bodies resting on legislation passed at various times to meet pressing emergencies in a manner thoroughly unsystematic and capricious. Unlike continental Europe where long experience under highly centralized and absolute monarchies had prepared the ground for a trained bureaucracy and a consciously developed system of administrative law,² our people have clung to theories of decentralization and amateur officials that cannot be reconciled with the proper co-ordination of our prolific social machinery hastily installed for the handling of situ-

¹Pound, Executive Justice, (1907) 55 Am. L. Reg. 137.
tions beyond the traditional competency of the courts. Administrative law is, indeed, a new word in our jurisprudence, not to be found as a title in the textbooks and encyclopaedias of law in common use among lawyers. There is no such title in the American Digest System, although it now appears for cross references in the Descriptive Word Index to the Third Decennial Digest. To students of political science we owe it, chiefly, that the bar is beginning to understand that, on its legal side, public administration is confronted with problems presented by various departments of the government that have a common philosophy and may be studied and compared collectively with profit. As hereafter the substantive content of administrative law itself becomes better defined, so the respective spheres of influence of the newer tribunals and the old will be more precisely limited. Just now there are fields partly in the possession of both, and in the discussion of some of the modern decisions on the jurisdiction and functions of various public commissions faint echoes are heard of the controversies of Lord Ellesmere and Sir Edward Coke. Fortunately, or unfortunately impatient souls would say, we have no dictator to settle these questions with a nod of the head. Democracy itself is torn between a desire for the efficiency and expedition promised by the administrative specialist and the security that is sometimes actually and sometimes mistakenly supposed to be guaranteed by the rule of law.

An example of a subject that lies on the border line of equity and administrative law is nuisance. Here equity first interposed centuries ago because the remedy by assize of nuisance had broken down, owing to its archaic procedure, and the remedy by action on the case for damages was in many instances inadequate. For a long time the remedy by injunction was sufficiently effective, and it still is so for some purposes. But the abnormal growth and continual change that characterizes our cities and their suburbs makes it increasingly difficult for a judge sitting as chancellor to determine what is a nuisance under the circumstances of the case, without arrogating to himself alone the determination of the policy to be adopted for the development of the entire neighborhood. The lack of harmony in the many cases dealing with garages and gasoline filling stations is an illustration of the embarrassment that a judge is frequently subjected to in the decision of a question that is less a matter of law than municipal policy.
Zoning systems and systematic town planning anticipate such problems and to that extent relieve courts of equity from the decision of difficult and embarrassing neighborhood disputes due to the haphazard growth of American cities. In this way the special character and interests of a community may be protected by a consensus of opinion voiced in general ordinances, instead of being left to the uncertainties resulting from the varying degrees of litigious pugnacity in the individuals affected. It may be urged that the substitution of bureaucratic direction for individual pugnacity as the arbiter of conflicting interests is a sad departure from the sturdy ways of our ancestors. A tear may be dropped for the progress of socialism. But the use or abuse of unpopular epithets does not really make much difference if the majority of property owners finally decide that they prefer the at least presumptive security of a zoning ordinance to the unpredictable hazards of successive bills in equity for injunctions. It is worth noting that such protection as real property heretofore enjoyed, in its development for restricted use, resulted from the specific enforcement by courts of equity of agreements between vendor and vendee as to the use of the land conveyed, a doctrine the origin of which no doubt lies in the fact that in the early years of the nineteenth century there was no thought of systematic town planning under state or municipal direction. On the other hand the growth of public town planning may have been retarded through the existence of an equitable doctrine that protected private initiative in settling the course of new developments while leaving the older communities to their customary architectural anarchy.

Another example of a situation that outgrew the capacity of chancery is found in a line of cases of which Powell Duffryn Steam Coal Co. v. Taft Vale Railway Co., is a leading example. There an injunction was refused to restrain the defendants, lessees of a railway, from interfering with the use of the railway by the plaintiffs, it being impossible for the plaintiffs to exercise their legal rights without danger unless there was a continuous use of signals by the defendants' employees. Specific performance of contracts involving complicated details and calling for continuous supervision over long periods of time will, according to the traditional view, be refused. But this attitude is somewhat

3L. R. (1874) 9 Ch. App. 331.
relaxed in later cases where there is a public interest in the enforcement of such-contracts entered into by railroads or other agencies of transportation enjoying public franchises. Nevertheless, in spite of this extension of the jurisdiction of courts of equity, candor compels one to admit that the machinery of the public service commission is better adapted to the hearing and decision of such disputes, which usually involve technical problems of engineering and questions of community interests, than proceedings in equity before judges hampered by the necessity of conforming to the traditional practice of the courts, without the expert knowledge and special experience that would best fit them to cope with powerful and well advised litigants, and with no representation of the public except insofar as the contending parties can by plausible argument identify their own with the public’s interest. Yet it would be premature to say that because so much of this field is now covered by the activities of the public service commissions and similar bodies, that this branch of equity jurisdiction is in any sense obsolete. Recourse must necessarily be had to the administrative body where state or federal statute requires it. But even the practitioner in this highly specialized form of litigation would hesitate to say that there are not gaps in the statutory regulations and procedure that can only be closed by an occasional resort to equity.

The foregoing are illustrations of cases where the executive branch of the government has been empowered to carry into effect policies, and to reconcile conflicting interests in disputes, for the investigation and determination of which neither law nor equity are properly equipped. In other striking instances courts of equity have been harnessed anew to the work of administration. Now the courts are held by judges who are public servants and who have always been required to perform services not strictly judicial that have varied with the fashions and patterns of the times. Anciently the business of the common law side of the court of chancery was nearly all administrative. But for a long time emphasis has rested on the judicial side of this

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63 Blackstone, Commentaries 47.
as well as other courts. Even without the aid of the doctrine of the separation of the powers, it is customary to think of the court as standing apart from disputes between official and citizen. But the passion for minding the business of others which paradoxically rules this land of the free has forced upon the courts duties unwelcomed and unsought. It was long the policy of chancery not to interfere in the administration of the criminal law; a sound policy and carefully adhered to so long as the rise and fall of the Court of Star Chamber was held in remembrance as part of our political tradition. The twentieth century, however, has seen an increasing tendency, through statutory extensions of the law of nuisance, to convert the courts, in the exercise of equity powers, into instruments of police. The so-called “padlocking” cases are a familiar instance. National prohibition has greatly extended this jurisdiction and the fact that it has proved perhaps the most successful and effective implement in the enforcement of the law may tempt legislatures to apply similar methods to other newly invented forms of misconduct. The possibilities of such extensions are unlimited, once the injunction, with its indefinite sanctions, is accepted as a normal method of suppressing the unruly instincts of the community. Only in trade and labor disputes has serious objection been urged to the extension of chancery’s powers and that on economic rather than juristic grounds. A very slight change in the constitutional temperament, if it may be so described, may lead to a state of mind where the injunction may become, by common consent, the most useful adjunct of administrative despotism ever invented. At present no one save a few grumblers seems to mind government by injunction except trade unions.

On the other hand, far more frequently has the aid of chancery been sought as a check upon administrative action. So many bills of this sort are brought every year that a survey of this field would involve a review of a large part of the modern law of injunctions. Over sixty such cases were counted in the title "injunctions" in a recent volume of the Current Digest of the

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American Digest System that touched almost every phase of state and local government. A significant statutory strengthening of this jurisdiction has conferred upon Federal district courts under the national prohibition act jurisdiction to review "by appropriate proceedings in a court of equity" the refusal of the commissioner of internal revenue to grant permits to deal in denatured alcohol. Here the district court sitting in equity is charged with what is in effect an administrative appeal. On the other hand, the jurisdiction may be restricted, as by a law forbidding injunctions to prevent the execution of public statutes by officers of the law. Usually injunctions against administrative acts are sought on some general theory of equitable jurisdiction such as the protection of personal or property rights, guaranteed by the constitution, where the legal remedy is inadequate. Our habit is to regard the courts as the lone watch dogs of the constitution, a responsibility that might have been imposed on other branches of the government, or at least divided. With weary reiteration it is said that equity will not restrain the enforcement of the criminal law or of penal proceedings. But as statutory administrative regulations have multiplied, enforced by penal proceedings; allegations of irreparable injury have been accepted as the basis for injunctions where the validity or constitutionality of the law or ordinance under which the public authorities were proceeding was in question, or where the number of prosecutions begun or threatened seemed to indicate a needless multiplicity of actions.

Closely allied are the tax cases. It has been said many times that equity will not enjoin the collection of a tax unless it is not only apparent that the collection is illegal but that the property owner is without an adequate remedy by ordinary legal process.

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a process which too frequently is the aged and embalmed remnant of early American legislation. It is urged that a court of equity would be hampered in doing complete justice, since it cannot apportion the tax or make a new assessment. There are also reasons of policy involved founded on the necessity for the prompt collection of taxes for the support of the government. Nevertheless, there are frequent instances in which the illegality of a tax, or its assessment, has been regarded as sufficient reason for enjoining its collection on the ground of lack of remedy or inadequacy of remedy that are indistinguishable, or distinguished with difficulty, from those decisions that take the opposite view.\textsuperscript{19} Here as in other cases that might be cited, in spite of an avowed policy of non-interference with the administration, in spite of a marked reluctance to interpose in fiscal affairs of the state, courts of equity have been drawn in as arbiters of public law, probably, in the first place, because under our crude political conditions there were, unfortunately, no other bodies of educated public servants capable of solving administrative problems according to general principles.

This borderland of the executive and judicial functions has an embarrassing side to the law teacher when compelled to fix his attention on that perennial source of annoyance, the curriculum. Tradition has placed these problems in the equity course, in the sections dealing with injunctions and bills of peace. But in a course on administrative law, which every year becomes more essential if we are to keep abreast of the times, the same group of problems viewed from a slightly different angle springs up in the section dealing with relief against administrative action, and bills for injunctions must be considered along with mandamus, certiorari and statutory appeals. These cases are vital to a course on administrative law. As our political system is now constituted they cannot be disregarded. They are not so vital to equity—that is there are more things to be taught in equity than can possibly be crowded into the allotted hours and it would relieve the tension if the course on administrative law would take over all those cases where equitable relief is sought by or against public officers, commissions, boards and other administrative agencies.

care being taken that the student taking equity alone is put on his guard as to the importance of this group of problems not covered.

But the troubles of the curriculum committee are only a pale reflection of the confusion of thought that pervades our political system. In spite of much grumbling and continual criticism of the courts, the unpleasant truth remains that our lamentable failure, so far, in nation and state, to develop an intelligent, high minded, non-partisan civil service leaves many branches of the administration with few officials to whom the man in the street can appeal with any degree of confidence in their capacity, impartiality or integrity. We cannot have our cake and eat it. We cannot have the spoils system and the type of administration our publicists envisage. Of recent years there has been, in this respect, an improvement in the type and quality of permanent officials, more particularly in the Federal service, and today the supervision of public functionaries is, practically, divided between the courts in the exercise of their equitable as well as statutory powers, and the various boards, commissions and officials that make up the ruling hierarchy of the administration proper. It will be most interesting to watch the further growth of this divided jurisdiction. If the executive officers increase in prestige by sound, efficient and impartial administration, it is to be expected that public confidence will award them the status they deserve and that the courts will be led to abandon their habitual interference with executive functions. Public opinion will support and legislation will strengthen the authority of its officers and boards when and only when they emancipate themselves from the pressure of the party machine and build up a tradition of authority. Until then Mr. Citizen will continue to choose his public agents with a gesture of contempt, will use them when he can, and at other times will fight them with every technicality that the legal art can devise.

There is a further possibility that the convenience of the injunction as a weapon of offense may produce a state of mind on the part of the bureaucracy itself that may lead to the unofficial incorporation of courts of equity in the administrative system. The chancellor was originally an executive officer and he may become that once more, justifying the fears of colonial Massachusetts and Pennsylvania. He was also once an ecclesiastic
and he may once more as a quasi ecclesiastic assist in a campaign of intensive purification. If a bishop could become a chancellor, surely a chancellor may become a bishop. There are, one may add, many instances where both government and public are more concerned with the prompt and authoritative interpretation of a statute or the legality of official procedure than with the orthodoxy of the means by which this interpretation is produced. In many cases where an injunction is formally sought the true object of the proceeding is to obtain what is in effect a declaratory judgment upon the point in doubt—such as the legality of a municipal bond issue, the validity of a scheme of public improvement, the interpretation of obscure administrative details in a recent statute. General acquiescence in such procedure is part of the modern tendency toward prophylaxis. There is indeed no good reason why there should not be preventive law as well as medicine, and, until American public law is recast on more symmetrical lines, one must count on the continued employment of courts of equity in this field. In exploring this territory where the executive and judicial powers meet, the viewpoint of the publicist and the administrative official is functional. They see equity working with well tested machinery and in the possession of a formidable weapon for offense and defense—the injunction. The problem for them is how this weapon—the most powerful instrument of the law—may be applied most advantageously to the purposes of government and at the same time be prevented from interfering with the operations of government. The viewpoint of the jurist is rational. He knows his instrument and is concerned chiefly with the technique of its use in which he has the assistance of a tradition embodied in many treatises and precedents. He proceeds with caution lest he blunt the fine edge of his tool, but like all technicians he will not trust his instrument in untrained hands, and to his specialized mind the public functionary in the art of administering justice is a mere amateur. In the reform of civil procedure, long overdue in this country, a rearrangement of the courts and a redistribution of jurisdiction might transfer not a little of this part of equitable jurisprudence to a division of the court that would specialize in public law, a practical adaptation of contemporary European methods to American conditions. But the process of change, if it comes, will be slow. So vast are the interests involved, so amorphous, so complicated the structure of our institutions, so new the
physical conditions under which we live that it may turn out that this generation has not the capacity, the political insight, to make a thorough audit of the economic and juristic melange that constitutes our social system. It may be intellectually unable to frame a system of public law at this time sufficiently simple and popular to stand a chance of relative permanence. Even so, and granting a present lethargy in constitution building, our publicists must do what they can to reduce the friction and confusion that characterizes our incorrigible pioneering attitude toward public life, some phases of which our topic illustrates.