

RECALLING PAST CONVERGENCE: EQUITY PROCEDURE AND THE UNITED STATES' FORGOTTEN INQUISITORIAL TRADITION

Amalia Kessler*

Ph.D., Stanford University, 2001

Lewis Talbot and Nadine Hearn Shelton Professor of International
Legal Studies, and Professor (By Courtesy) of History
Stanford Law School, U.S.A.

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Resumen

Hoy en día se escucha decir con frecuencia que los sistemas jurídicos basados en el derecho romano, o derecho civil, y el llamado «common law» están convergiendo—incluso en cuanto se refiere a las normas procesales. Aunque los estudiosos del tema tienden a afirmar que dicha convergencia es producto de la reciente globalización, un examen de la historia del procedimiento de “equity” en los Estados Unidos sugiere que la convergencia procesal no es nueva en absoluto. Los tribunales de “chancery” del siglo XIX en los EE.UU. aplicaban una modalidad de procedimiento que facultaba a los funcionarios judiciales frente a los abogados y litigantes y que se basaba en un enfoque escrito, orientado hacia la confidencialidad, para recibir el testimonio de un testigo. En este sentido, el procedimiento de “equity” de los EE.UU. acogió aspectos clave del modelo de procedimiento inquisitorio asociado de tiempo atrás con la tradición del derecho civil basada en los cánones romanos y considerado un anatema en el “common law”. Esta historia sugiere que la convergencia es mucho más antigua

* J.D., Yale Law School, 1999; M.A., Stanford University 1996, A.B., Harvard College, 1994.

de lo que generalmente suponemos, y de contera, también sirve como valioso recordatorio de los límites de nuestras categorías comparativas estándar de análisis.

Palabras Clave

Historia Jurídica de los Estados Unidos - Historia Jurídica Inglesa - Procedimiento de Equity- Derecho y Procedimiento Comparado – Convergencia - Tribunales de Chancery – Inquisitorio – Acusatorio - Common Law - Derecho Civil.

Abstract

We commonly hear today that civil law and common law legal systems are converging—including as concerns the law of procedure. Although scholars tend to claim that such convergence is a product of recent globalization, an examination of the history of equity procedure in the United States suggests that procedural convergence is in no way new. Nineteenth-century U.S. chancery courts applied a mode of procedure that empowered court officials vis-à-vis lawyers and litigants and that relied on a written, secrecy-oriented approach to taking witness testimony. In these respects, U.S. equity procedure embraced key aspects of the inquisitorial model of procedure long associated with the Roman-canon-based civil law tradition and thought to be anathema to the common law. This history suggests that convergence is much older than we generally assume, and in so doing, also serves as a valuable reminder of the limits of our standard comparative categories of analysis.

KeyWords

United States Legal History - English Legal History - Equity Procedure - Comparative Law and Procedure – Convergence - Chancery Courts – Inquisitorial – Adversarial - Common Law - Civil Law

Summary

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INTRODUCTION

Among scholars of civil procedure today, there is a great deal of talk about convergence. The notion that the procedural systems of the world are firmly divided between those of common law and civil law origin has given way to a new emphasis on commonality. Various common law and civil law procedural systems, we are told, are each beginning to embrace features long associated with their presumably alien counterparts. Among the most prominent of recent examples regularly cited as evidence of such convergence is England's 1998 adoption of the Lord Woolf Reforms, pursuant to which English judges have been endowed with far greater authority in relation to litigants and their lawyers, thus minimizing the adversarial nature of litigation.¹ Similarly, scholars emphasizing a trend towards procedural convergence have pointed to the explosion of interest over the last decade or so in both continental Europe and Latin America in adopting some form of class action, a device long deemed to be uniquely suited to the procedural systems of the United States (Faulk, 2000, pp. 205, 228-34; Nagreda, 2009).

Such convergence, in turn, is often explained as an offshoot of modern-day globalization. From this perspective, one of two causal accounts is offered. First, convergence is depicted as a product of functional pressures that, because of processes of globalization, are now making themselves felt across the world. On this view, for example, democracies everywhere are under increased pressure to afford justice to citizenries that, especially with the mid-twentieth century rise of the social welfare state, have become increasingly accustomed to the notion that government is responsible for attending to their various needs.

Such pressure helps explain the interest shared by many legal systems across the globe (and clearly manifest, for example, in the Lord Woolf Reforms) in promoting more accurate and efficient court judgments (Friedman, 1985, pp. 30-34, 153-56; Jolowicz, 2000, pp. 85-93).

Alternatively, convergence is depicted as a product of influence in an interconnected global environment. On this theory, certain legal systems and their actors—including, perhaps most prominently, the United States and its lawyers—have been able to take advantage of geopolitical imbalances of power in an increasingly globalized context to exercise disproportionate power in shaping the development of the world's legal systems. Along these lines, for example, some have pointed to recent jurisprudence of the European Court of Human Rights (ECHR) concerning the right to a fair hearing, as guaranteed by Article 6 of the European Convention on Human Rights. Pursuant to this jurisprudence, longstanding aspects of French (and French-derived procedure) —including, the important advisory role traditionally played by the *juge rapporteur* and *avocat général*— have been deemed impermissible. In the view of some scholars, the ECHR's recent line of argument is best explained as a product of the growing influence in Europe of American and English lawyers and their starkly adversarial conception of procedural justice (Mitchel, 2005)².

It is not my goal in this paper to dispute either of these two accounts of convergence, both of which are likely correct to at least some extent. My aim is instead to emphasize the extent to which both accounts rely on globalization as a driving force, thus suggesting that convergence is of relatively recent origin. In reality, however, the existence of points of convergence between what we think of as common law and civil law procedural systems long predates modern-day globalization. And this, in turn, is a reminder that what we now call globalization is itself simply the latest phase in a centuries-long trend of increased socio-economic, cultural, and legal interchange across territorial boundaries. As Reinhard Zimmerman and other advocates of the

harmonization of European private law have rightly emphasized, in the centuries before the late eighteenth-century emergence of the modern nation-state, medieval and early modern European societies were profoundly transnational. Accordingly, European law faculties (on both sides of the English Channel) taught students from throughout Europe a form of common, transnational law—namely, the *ius commune* (Schulze, 1992, pp. 270, 276-284; Zimmermann, 1995, pp. 82-89). As European states began engaging in projects of colonization and conquest from the fifteenth century onward, so too they brought their law—including the *ius commune*—to much of the rest of the world. From the perspective of the long *durée*, in other words, the recent, late twentieth- and early twenty-first century trend towards increased economic interdependence and cultural homogeneity that we know by the name of globalization is but the latest outgrowth of a much older trajectory. And as this suggests, convergence in the law of civil procedure—including across common law and civil law systems—is nothing new.

It is beyond the scope of this brief paper to provide a comprehensive history of procedural convergence. Instead, I focus on one particular site of convergence—namely, the Anglo-American tradition of equity as it emerged in the early nineteenth century in the newly established United States. Given the widespread tendency to assume that common law (and especially American) procedure is distinctively—indeed, necessarily—adversarial, the example of equity procedure is a particularly striking reminder that procedural convergence is in no way a uniquely modern phenomenon. As this history teaches, the United States borrowed greatly from the inquisitorial tradition of the civil law and its Roman-canon heritage.

I. ANGLO-AMERICAN EQUITY PROCEDURE AND ITS ROMAN-CANON ROOTS

While my interest in this paper is in American equity procedure, such procedure derived from English practice, and we must therefore begin with the English Court of Chancery, the birthplace of equity. Relatively little is known about the early

development of Chancery jurisdiction, but it is clear that the court had deep roots in the Roman-canon tradition.

As its name suggests, Chancery originated as the jurisdiction of the chancellor, who served as keeper of the great seal, which was used to authenticate royal documents, including the writs that authorized litigants to proceed before the common law courts. By the late thirteenth century, many litigants seeking justice began directly petitioning the king, rather than the common-law courts—perhaps because their claims did not fall within the established and increasingly rigid common-law writs. In the fourteenth century, as such petitions became more numerous, the king's council started delegating them to individual councilors, and from such delegations there arose a variety of courts, including that of the chancellor—namely, the Chancery (Baker, 2002, p.98-99).

Petitions thus delegated by the king's council (and, soon thereafter, addressed directly to the chancellor) came to constitute the "English Side" of Chancery jurisdiction—thus designated because these petitions were drafted in the vernacular and to distinguish them from those of Chancery's "Latin Side," which concerned matters, such as questions relating to royal grants, that arose from the chancellor's administrative work (Baker, 2002, p.100-103). While petitions on the English Side were initially formulated as appeals to the chancellor's conscience and the chancellor was thus relatively unrestrained by formal doctrine in his effort to do justice, chancery jurisprudence became increasingly formalized with the passage of time. By the early seventeenth century, it had developed into an entirely separate institutional and doctrinal system of justice known as equity (p.105-1011; Macnair, 1999, p.30).

Until Henry VIII broke with the Catholic Church in the first third of the sixteenth century, many chancellors continued to be leading ecclesiastics, often bishops or archbishops, trained in the law of the Church, and not in the common law (Baker, 2002, p. 99; 2003, p. 180). As the chancellor was the Chancery Court's only judge, he was greatly in need of assistance and

turned for help to his clerical staff—particularly, the twelve *clerici ad robas* (p. 99, 100; 2003, p. 182)³. These clerks, dating back at least as far as the thirteenth century, had initially aided the chancellor primarily in his administrative duties (Heward, 1990). But from the fourteenth century onward, as the English side of Chancery emerged and the judicial workload became increasingly heavy, they began to focus primarily on these cases. By the late fifteenth century, they came to be known as masters (Baker, 2002, p. 100).

At least through the fifteenth century, masters, like the chancellors of this period, were largely clerics. And through the early seventeenth century, and then again from 1633 through the English Revolution of 1640, they were almost all doctors of law, trained in the Roman-canon law, rather than in the common law (Baker, 2002, p. 183; Heward, 1990, pp.7)⁴. Because masters were trained as civilians, the Chancery Court's reference of a case to a master continued, as of the early seventeenth century, to be described as a "reference to the Doctors" (Macnair, 1999, p.32).

Although it is evident that the early Chancellors and, for a longer period, masters were trained in the Roman-canon law, it is less clear what effect this training had on the development of equity doctrine and procedure. Indeed, the extent to which equity was influenced by the Roman-canon tradition has been a subject of longstanding controversy, not only among later historians, but also among early-modern contemporaries. The primary points of dispute, however, have concerned the substantive law of equity.⁵ As concerns equity procedure, my focus here, it is widely agreed that the parallels with the Roman-canon tradition are quite strong (Baker, 2002, p. 106; 2003, p. 180). But before describing this procedure in any detail, it is necessary briefly to examine how the system of equity and its personnel made its way to the "new world."

As of the early seventeenth century, when the first English colonies were created in North America, the equity system in England was well established. Although equity was relatively slow to take hold in the new colonies,⁶ some type of chancery

court had been established in many of the thirteen colonies as of 1776 (Bryant, 1954, p.595, 598). But with the American Revolution, there reemerged a longstanding association between equity and tyranny that had first been forged in the crucible of the English Revolution.

In seventeenth-century England, the conflict between parliamentarians and royalists manifested itself, in part, in an institutional struggle between courts of common law, on the one hand, and those courts associated with the Roman-canon tradition (namely, equity and ecclesiastical courts), on the other. Parliamentarians embraced the common-law courts as bastions of England's ancient constitution, and thus, of its citizens' immemorial, customary rights (including rights to sovereignty) (Pocock, 1987). They depicted the equity and ecclesiastical courts, in contrast, as emanating from the royal will and tending towards popish subservience, such that these institutions threatened to promote (royal and popish) tyranny (Knafla, 1977; Meyler, n.d).

The various equity courts of early-modern England had initially arisen, as was true of Chancery, when petitions directed to the king were delegated to individual members of the king's council, who eventually came to form their own separate courts. Whereas Chancery had emerged as a separate court, distinct from the king's council, by the fifteenth century, the other conciliar courts, including Star Chamber, Requests, and Admiralty, did not do so until the sixteenth century—and thus, they, even more than Chancery, continued to be closely associated with, and deemed institutional embodiments of, the royal will. Since the monarchy in the 1630s turned to the Star Chamber to prosecute highly unpopular cases of sedition and ecclesiastical offenses, it, of all the equity courts, came to be particularly hated and feared. But in the view of the parliamentarians, many of whom were also Puritans, the ecclesiastical courts also posed a great threat. Especially loathsome was the Court of High Commission, which was established in the 1580s, as a forum in which the king, as head

of the Church of England, could exercise jurisdiction in criminal matters. As a criminal court operating largely under the king's thumb and employing Roman-canon procedure, the Court of High Commission was widely viewed as a spiritual counterpart to the Star Chamber and thus was also despised (Baker, 2002, p. 117, 119, 131).

Particularly after Charles I married a French Catholic, and rumors of a possible return to Catholicism spread, fear of royal tyranny came to merge with fear of popish tyranny, such that any judicial institution that was in any way associated with the Roman-canon tradition, came to be viewed as a potential weapon in a royalist and popish plot to dominate England (Hibbard, 1983). To a significant extent, this parliamentarian and Puritan viewpoint won the day, and in 1641, the English Revolutionaries dismantled the Star Chamber and other conciliar courts, as well as the Court of High Commission, and a few years later, they abolished the other ecclesiastical courts (Baker, 2002, p. 213). While the Court of Chancery survived, it was — and long continued to be— tarred by the conceptual link forged in the revolutionary era between courts drawing on the Roman-canon tradition, on the one hand, and the perceived threat of tyranny, on the other. Thus, not surprisingly, when more than a century later, the American Revolutionaries rose up against what Thomas Paine described as “the remains of monarchical tyranny”(Paine, 2003), they reverted to the link between equity and tyranny forged by an earlier generation of revolutionaries (Friedman, 1985; Moschzisker, 1927, pp. 288-289).

This reversion was facilitated by the fact that during the colonial period, judges were frequently appointed by royal governors, such that they were generally associated with monarchical control (Beale, 1921). In addition, from the revolutionary perspective, the very structure and justification of courts of equity —the commitment of adjudication to a judge, rather than to a jury of one's peers, and the discretion granted judges (at least in theory) in administering procedure and ordering relief— seemed to validate and encourage the

exercise of arbitrary power.⁷ And particularly troubling to many of the revolutionary generation was the equitable approach to gathering witness testimony. As I will describe at greater length shortly, testimony in equity was traditionally taken outside the presence of the parties by an examining officer appointed by the court on the basis of written interrogatories prepared by the parties, and the recorded narrative of such testimony was then kept secret until all witnesses had been examined. In the eyes of many early Americans, such practices smacked of the inquisition itself, thus constituting a kind of bastion of the reactionary, “Old World” right in the heart of the United States’ grand, revolutionary experiment.

Distrust of equity therefore quickly manifested itself in a frontal attack on its traditional methods for gathering witness testimony. In Section 30 of the Judiciary Act of 1789 ch. 20, 1 Stat. 73, 88, § 30, the U.S. Congress declared that federal courts must adopt the common-law method of presenting testimony orally in the courtroom, thereby eschewing the equitable tradition of testimony gathered and kept in secret on the basis of pre-prepared, written interrogatories: “[T]he mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law” (1789, ch. 20, § 30).

With the gradual subsiding of revolutionary fervor in the years after 1776, there occurred a quiet resurgence of traditional equitable practice. The reasons for this resurgence are quite complex and are yet to be fully explained. But for present purposes, the key point is that the early nineteenth century witnessed a renewed interest in equity procedure. Accordingly, on April 29, 1802, Congress enacted legislation providing that, in those states where courts permitted practitioners to rely on testimony taken in the traditional, equitable way—namely, through out-of-court, *ex parte* examination—federal courts sitting in equity could do the same, despite Section 30 of the Judiciary Act of 1789: “[I]n all suits in equity, it shall be in

the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by deposition.”⁸ This return to the equitable tradition of written, *ex parte* testimony was enshrined in Rules 25 and 28 of the first edition of the Federal Rules of Equity,⁹ issued by the U.S. Supreme Court in February 1822.¹⁰ These Rules provided that the regular, established mode for procuring witness testimony in equity cases was before court-appointed officers designated to take and record the testimony outside the courtroom.

As of the early nineteenth century, Congress’ effort in 1789 to reject equity’s longstanding tradition of gathering witness testimony in writing, outside the courtroom had failed, and federal courts rapidly returned to an equity tradition inherited from England and dating back in North America to the early seventeenth century. Indeed, the link between the equity system established in the federal courts and its English ancestor was enshrined in Rule 33 of the Federal Equity Rules of 1822, which specified that “[i]n all cases where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery of England.” Likewise, the traditional English model of equity was reinforced through the major nineteenth-century American treatises on equity practice, which were, in fact, revised editions of the leading English treatises, updated to include discussions of American practice and citations to American case law.¹¹ And key American states, including the highly influential state of New York under the leadership of Chancellor James Kent, made a concerted effort to adhere to the traditional English model of equity procedure (Kessler, 2011).

What then was the equitable procedure that in broad outline was embraced by early nineteenth-century American equity courts, including the federal courts sitting in equity? It was in all major respects—including, most importantly, pleading and the taking of testimony—much more similar to the procedure of the civil law systems of contemporary continental Europe and Latin America than to that of the common law. As concerns

pleading, the suit commenced when the plaintiff filed a bill of complaint, in which he provided a detailed narrative account of his various legal claims and the facts supporting them. In sharp contrast to common law pleading, in other words, the plaintiff in equity was in no way required to narrow his dispute to a single legal claim, as narrowly defined by the available forms of action (Subrin, 1987, pp. 909,915-17). In response to the bill of complaint, the defendant was required to appear and file an answer under oath, in which he, like the plaintiff, was free to raise any and all claims, defenses, and supporting facts.¹² Thereafter, the plaintiff filed a “replication,” or reply, and the case was deemed “at issue,” such that the taking of testimony could begin (Macnair, 1999, p. 53; Mitford & Tyler, 1978, pp. 67-69, 458).

As concerns the taking of testimony, the centerpiece of the adversarial common-law trial, equity procedure employed a radically different methodology. Under the common law, testimony was taken orally by the parties’ lawyers in the public courtroom, in the presence not only of the judge, but also the opposing litigant, the jury, and the audience as a whole. Such publicity was thought to be essential for oral, adversarial cross-examination, and thus for promoting witness veracity and detecting falsehood. The logic of cross-examination was that witnesses who testified in public—before the parties and members of their community sitting as jurors and in the audience—would feel great pressure to speak truthfully. And should they lie, they would experience much discomfort and anxiety, signs of which they would necessarily exhibit in their demeanor, which would, in turn, be observed by the fact-finding jury.

In sharp contrast to this publicity-oriented approach, equity procedure developed a commitment to secrecy as the best possible method for ensuring truthful testimony and ferreting out falsehoods. But to understand how this now unfamiliar logic of secrecy worked, it is necessary to begin by describing at some length equity’s procedural mechanisms for the taking of

testimony. Once these are clearly established, it will be possible to show how, as in the Roman-canon tradition, these were understood as truth-promoting devices.

Pursuant to the traditions of equity, a party seeking witness testimony did not summon his witness to the public courtroom to be questioned orally but instead drafted a set of written interrogatories to be administered by the court. Once a party filed interrogatories with the court, the latter appointed an officer whose responsibility it was to present the interrogatories to the witness. The officer then recorded the testimony—in the form of a narrative, rather than as a verbatim transcript of questions asked and answered—and transmitted this record back to the court (Macnair, 1999, pp. 166.-168; Mitford & Tyler, 1878, p.458). While the mode of taking witness testimony varied somewhat between states, and between the different federal courts (Daniell, 1894, p.1168 n.3), the procedure and personnel were largely identical in function, if not in name, to that employed in the English Court of Chancery. Both the English Court of Chancery and American courts of equity typically drew a distinction between testimony taken locally, when the witness resided in the vicinity of the court, and that taken when the witness lived at some distance. Typically, when the witness resided in the vicinity of the court, permanent court officials known as examiners (or sometimes in the United States, standing commissioners) were responsible for administering interrogatories (Mitford & Tyler, 1878, pp.429-439). If the witnesses resided further afield, the court appointed private individuals, designated “commissioners,” to take the testimony on a case-by-case basis—presumably because it was inefficient to require the busy examiners to travel to the witnesses.¹³

Once all testimony and documentary evidence was gathered, the parties presented it at a hearing, after which the judge would either enter a final decree, resolving the dispute, or an interlocutory decree, ordering further proceedings. Such further proceedings were generally directed towards the determination of disputed questions of fact and often took the form of a

reference to a master (Mitford & Tyler, 1878, p. 469), whose fees were to be paid by the litigants.¹⁴ Masters were asked to report on a nearly infinite variety of questions. As explained by Murray Hoffman, a master in the early nineteenth-century New York Court of Chancery: “In general there is no question of law or equity, no disputed fact, which a master may not have occasion to decide, or respecting which he may not be called upon to report his opinion to the court.”¹⁵ Likewise, Edmund Robert Daniell’s *Pleading and Practice of the High Court of Chancery*, a leading nineteenth-century treatise on equity practice, used in both England and the United States, advised readers that “[t]he cases in which the Master may be directed to make inquiries into facts are so numerous and various in their nature, that it is impossible to point out the rules by which each inquiry is to be pursued in the Master’s office” (Daniell, 1894, p. 1215).

Whatever the nature of the inquiry that the master was delegated to undertake—and settling an account between the litigants was probably the most common—the decree appointing the master typically provided him authority to determine whatever fact-finding was required in the case and to direct the necessary discovery, including ordering the parties and/or witnesses to produce documents and to submit to examination under oath (Bennet, 1834; Hoffman, 1824, pp. 9-36). Thus, unlike what the common-law jury had long since become, the master was not simply a passive audience for whatever evidence the parties chose to present, but instead played an active, inquisitorial role in determining what evidence should be heard and which questions asked.¹⁶

As for the mode of taking testimony, if the parties or witnesses whom the master sought to examine lived at some distance from the court, the master would resort to the standard method of appointing a commission. But if the witness resided in the vicinity of the court, the master himself would serve the function of the examiner or standing commissioner, administering written interrogatories prepared by the parties (and, when he deemed necessary, by himself as well), recording a narrative of the

testimony, and then transmitting it back to the court (Hoffman, 1824, pp.47-58). Once the master collected all the evidence he considered necessary, he wrote a report to the court, presenting his findings as directed in the order of reference.

II. THE LOGIC OF SECRECY

The equity tradition reminds us that, contrary to the widespread assumption today, inquisitorial modes of adjudication are not entirely alien to the legal culture of the United States. This is not, of course to suggest, that the United States ever adopted a fully inquisitorial mode of procedure—but the same could be said of the civil procedure administered by civil law systems. In other words, the civil procedure of both equity and the civil law retained important accusatorial elements—including, not least, the fact that proceedings were always initiated by the plaintiffs themselves, rather than by court officials.¹⁷ That said, American equity did embrace key features of inquisitorial procedure, including perhaps most importantly, its secrecy-oriented approach to witness testimony.

In the logic of equity, secrecy was key to promoting truthful testimony. This was the logic of the Roman-canon law, whose expositors throughout the medieval and early-modern periods regularly justified the tradition of secret examination by citing the biblical story of Susanna and the Elders from the Book of Daniel. As explained by the legal historian R.H. Helmholz:

The Book of Daniel recounts that when Susanna resisted the advances of the elders, they resolved to revenge themselves by accusing her of adultery with an imaginary young man. After Susanna had been condemned to death in an open trial, Daniel intervened. He questioned the two elders separately about the supposed crime. One of them placed her action under a yew tree; the other under a clove tree. Thus was their perjury revealed and the life of an innocent woman saved. Proceduralists saw in this story clear support for their system of ... canonical procedure. (1995, pp. 1557, 1573-1574)

As in the Roman-canon law tradition, equity procedure was premised on the belief that, to the extent that witnesses were examined in private, outside the presence of either party, this decreased the likelihood of perjury or error. Taking testimony in secret reduced any temptation witnesses might have (on their own, or under party pressure) to alter their testimony for the purpose of making it consistent with that of others—and without any need for the court to order sequestration in the particular case. And if it was determined that a witness had made a false statement in response to an interrogatory, the written, secretive mode of taking the testimony was thought to indicate—in a way that a similarly false statement in response to oral cross-examination would not—that the witness's entire testimony should be disregarded as likely perjurious. As one treatise-writer explained, in common-law "tribunals the witness is not only examined orally, but is subjected to a severe and rapid cross-examination, without sufficient time for reflection or for deliberate answers, and hence may often misrepresent facts, from infirmity of recollection or mistake"(Henderson, 1904, p. 363).

In contrast, according to the course of chancery, the testimony of the witness is taken upon interrogatories in writing, deliberately propounded to him by the examiner, no other person being present; and where ample time is allowed for calm recollection, and any mistakes in his first answers may be corrected at the close of the examination, when the whole is distinctly read over him; there is ground to presume that a false statement of fact is the result either of bad design or of gross ignorance of the truth, and culpable recklessness of assertion; in either of which cases all confidence in his testimony must be lost, or at least essentially impaired.(Henderson, 1904, p. 364)

To maintain the secrecy deemed necessary to avoid error and fraud and thereby arrive at the truth, equity courts developed an interlocking set of procedures all focused on this goal. First, witness testimony, as recorded by an examiner or commissioner prior to referring the case to a master, was not to be revealed until the court ordered its publication. Such an order of publication

would be entered only after all witnesses had been examined. And no further examinations were permitted—absent some showing of extraordinary circumstances—once publication had occurred. In this way, each witness would be required to testify entirely from memory (Bennet, 1834, p. 14-14; Hoffman, 1824, p.40-47; Macnair, 1999, p.166-167). Indeed, one of the main reasons why equity traditionally relied on court-appointed officers to take testimony, rather than permitting the parties to do so themselves, was to guarantee its secrecy until publication. If the parties or their counsel were allowed to undertake the examination, they would gain knowledge that might influence their litigation strategy, including the witnesses they chose to call and the interrogatories they put to them. Court-appointed officers, in contrast, lacked any personal connection with the parties and the litigation and thus were thought to have no incentive to promote the interests of either side. As for the questions posed by these court-appointed officers, it was the parties themselves, who drafted written interrogatories, which they filed with the Court for use by the officer. To ensure that the testimony thus taken did indeed remain perfectly secret until the court ordered its publication, stringent requirements existed regarding how narratives recorded in the field were to be sealed and returned to the court.¹⁸

Within this framework, masters were legitimated and constrained by these fundamental structuring principles of secrecy. While they possessed the inquisitorial authority to determine what evidence, including which witnesses, they required to be brought before them,¹⁹ this authority was far from limitless because masters had to abide by equity's well-established rules prohibiting repeat testimony—rules that limited which witnesses masters could call, as well as the questions they could pose on behalf of the parties (or on their own initiative). The master who opted to take testimony himself was prohibited, like an examiner or commissioner, from questioning a witness who had been previously examined regarding the same facts. And in order to examine this witness concerning new facts, or to examine a new witness concerning facts about which another

had already testified, the master was required to seek special court authorization (Hoffman, 1824, pp. 40-47). Likewise, in drawing on the evidence necessary to write his report, the master relied, in part, on examinations undertaken prior to the order of reference, which had themselves been done in secret—namely, by examiners or commissioners in private, outside the presence of the parties and kept under wraps until all examinations were completed and the court ordered publication.

A classic account of these procedures designed to promote (pre-publication) secrecy, as well as of the rationale behind them, appears in the judicial opinions of James Kent, author of the famous *Commentaries on American Law* and Chancellor of the New York Court of Chancery. Kent's influence was such that his opinions regarding equity practice were cited widely in both state and federal courts and played a leading role in the shaping of equity practice throughout the nation. As Kent explained in the very influential case of *Remsen v. Remsen*,²⁰ the reason why "examinations in chief are not permitted, after publication" is that "there is very great danger of abuse from public examinations, by which parties are enabled to detect the weak parts of the adversary's case, or of their own, and to hunt up or fabricate testimony to meet the pressure or exigency of the inquiry." Accordingly, once the court ordered the publication of all testimony, further testimony before the master was not to be allowed, unless directed by the court, and then only as to issues regarding which the witness had not previously testified: "It is also upon the same grounds, that a witness, who has been examined in chief before the hearing, cannot be re-examined before the master, without an order, and, then, not to any matter to which he had before been examined; and that a witness, once examined, before the master, cannot be re-examined without an order" (*Remsen v. Remsen*, 2 Johns. Ch. 495. N.Y. Ch. 1817).

Federal case law from the same period fully embraced these principles of secrecy. Thus, for example, in *Gass v. Stinson*,²¹ U.S. Supreme Court Justice Story—the author of two highly

influential treatises on equity (Story, 1839; 1840) —held that once testimony had been made public, a party seeking to undertake further examinations for the purpose of challenging the witness’s competency or credibility was required to obtain the court’s permission. A motion to take additional testimony for the purpose of challenging witness competency would be granted only “if the incompetency of the witness was [not] known before the commission to take his deposition was issued; for an interrogatory might then have been put to him, directly on the point” (10 F., 1837, Cas.71). In contrast, where the motion was to take additional testimony for the purpose of challenging witness credibility, this was almost always permitted.

Citing the authority of Lord Hardwicke, Chancellor of England in the mid-eighteenth century, Justice Story explained that one of the reasons why courts more readily grant post-publication motions to take testimony challenging witness credibility, as opposed to witness competency, is that “matters examined to in such cases are not material to the merits of the cause, but only relative to the character of the witnesses”. In permitting such examinations as to credibility, however, courts must be careful to ensure that “the interrogatories are confined to general interrogatories as to credit, or to such particular facts only, as are not material to what is already in issue in the cause” (*Gass v. Stinson*, 10 F., 1837, Cas.71). Only in this way can the court “prevent the party under color of an examination to credit, from procuring testimony to overcome the testimony already taken in the cause, and published, in violation of the fundamental principle of the court, which does not allow any new evidence of the facts in issue after publication” (10 F., 1837, Cas.71). In sum, Justice Story reaffirmed the longstanding and fundamental tenet of equity jurisprudence that the veracity of witness testimony was to be ensured by maintaining (pre-publication) secrecy.

This insistence on the virtues of secrecy was alien to the common law. As Chancellor Kent, Justice Story, and their contemporaries were well aware, this was the logic of Susanna

and the Elders—the logic, in other words, of the Roman-canon tradition.

III. A Concluding Note: The Limits of Our Comparative Categories and the Dialogic Virtue of Convergence

Because the United States is a common law country, we assume that its procedural system is necessarily adversarial, but instead, as I have argued in this paper, it has at key moments embraced many features of the inquisitorial procedure that we associate with the civil law tradition. The fact that American equity procedure appropriated some of the procedural devices and logic of the Roman-canon law serves as an important reminder that legal systems that we associate with the common law tradition have long borrowed from those of the civil law and vice versa.

That there are limits to the accuracy of the categories of common law and civil does not mean that they are without utility. To the contrary, recognized for what they are—as ideal types, rather than realistic depictions—these categories are useful as heuristic devices. In particular, they can help to identify in broad brush some of the core characteristics or tendencies of the legal systems associated with each tradition. Thus, while Anglo-American procedure does have its own history of inquisitorial practices, these were less central to the development of the Anglo-American common law than to the development of the European civil law. And one key reason for this goes, in turn, to another distinguishing set of tendencies that the categories of common law and civil law can help us to recognize—namely, the fact that, over the long run, civil law systems have exhibited a much greater willingness to professionalize government office (including the judiciary) than have common law systems.

In contrast to continental legal systems, English (and later American) justice as a whole was marked by a characteristically Anglo-American (or common law) tendency not to develop a large, state-controlled and -funded bureaucracy. As a result,

English and American equity courts were both understaffed. Indeed, in both countries, the Chancery was a one-judge court. Moreover, in England, between 1300 and 1800, there were rarely more than fifteen judges in Chancery and the common-law courts combined (Dawson, 1960, pp-70-72). The chancellor could, of course, rely on masters to provide key help in the fact-gathering process, and indeed, the master's judicial role was created precisely because a single judge could not possibly manage the entire caseload. But there were relatively few masters.²² And when witnesses were to be examined at some remove from the court, Chancery had to rely on lay commissioners. In contrast, to take the example of a neighboring civil law country, France by the early eighteenth century had more than 5,000 royal judges—a difference that remains significant, even when France's larger population is taken into account. Moreover, French judges had numerous full-time assistants to whom they could turn to engage in the difficult and time-consuming work of fact-finding.²³

Given equity's commitment to a form of procedure that entailed substantial inquisitorial elements, and thus its ultimate dependence on judicial officers to undertake many core functions, this common-law tendency to eschew bureaucratization proved quite fateful. There was, in short, a core tension between the court's mode of procedure and its limited, ad hoc staffing.²⁴ And as John Dawson has powerfully argued, this tension would contribute to the ultimate demise of equity as a distinctive substantive and procedural tradition (Dawson, 1960, pp. 170-172).

In addition to reminding us of the limits of our standard comparative categories of analysis, the example of equity procedure teaches the core lesson that, while there is now much talk about a new procedural convergence, such convergence is in fact far from new. In this respect, the example of equity procedure is particularly telling because it strikes at the heart of one of the most deep-rooted and widely shared conceptions about American legal culture—namely, that it is exclusively and distinctively adversarial.

That said, the fact that forms of borrowing and thus convergence have long been with us does not mean that we are moving inexorably towards total harmonization, nor should it. In contrast to those who are now arguing, for example, for the creation of a single body of European private law, I—like I suspect most lawyers trained within the United States—have an abiding respect for the virtues of difference. There are, in short, multiple ways to approach the same procedural goal—and of course, multiple goals as well to which any given procedural system might aspire. And while procedural convergence is, as I have been arguing, the norm, so too is the coexistence of important pressures towards divergence.

From my perspective therefore, the recognition that procedural convergence is old hat is significant not because it promises an ultimate harmonization of the law, but because it serves as a valuable reminder of shared commonalities, which can in turn, help to encourage mutual respect and understanding. Often in short supply, such respect and understanding have seemed at times to be particularly lacking in current debates stemming from such contentious procedural practices as, for example, the American law of discovery and punitive damages. My own hope is that an awareness of convergence, both past and present, might in the future provide a much-needed, common point of entry for more productive discussion and dialogue across the world's procedural systems.

Bibliography

- _____ (1789) Act to Establish the Judicial Courts of the United States. Ch. 20, 1 Stat. 73, 88, § 30.
- _____ (1792). Act of May 8. Ch. 36, 1 Stat. 275, 276, § 2.
- Act to Amend the Judicial System of the United States. (1802). Ch. 31, 2 Stat. 156, 166, § 25.
- BAKER, J.H. (2002). *An introduction to English Legal History* (4.th ed., p.98-103, 105-111, 117, 119, 131, 182, 213). London: Butterworths LexisNexis.
- BAKER, J.H. (2003). *The Oxford History of the Laws of England* (Vol. VI: 1483-1558, pp. 180-181). Oxford: Oxford University Press.
- BEALE, J. H. (1921). Equity in America, 1 *CAMBRIDGE L.J.* 21, 22.
- BENNET, W. (1834). *A Dissertation on the Nature of the Various Proceedings in The Master's Office in the Court of Chancery, with Directions for Carrying the Most Usual References to a Master into Effect* (pp.10-15). London: Henry Butterworth.
- BRYANT, J (1954). *The Office of the Master in Chancery: Colonial Development*, 40 *Am. Bar. Ass'n J.* 595, 595, 598.
- DANIELL, E. (1894). *Pleading and Practice of the High Court of Chancery* (6.th ed., p.1168 n. 3, 1187). Boston: Little, Brown & Co.
- DAWSON, J. (1960). *A History of Lay Judges 153-782* (pp.170-172).
- Eiffert v. Craps*, 44 F. 164 (D.S.C. 1890)
- ENGELMANN, A. & MILLAR, R. (1927). *A History of Continental Civil Procedure* (pp.719, 723). Boston: Little Brown.
- FAULK, R. O. (2001). Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution, 10 *Mich. St. U. Det. C. L.J. Int'l L.* 205, 228-34 & N. 84.

- _____ (1822) Federal Equity Rules. *Rule 25*.
- _____ (1822) Federal Equity Rules. *Rule 28*.
- _____ (1822) Federal Equity Rules. *Rule 33*.
- _____ (1842) Federal Equity Rules. *Rule 77*.
- _____ Federal Rules of Civil Procedure. *P.32*.
- FRIEDMAN, L.M. (1985). *TOTAL JUSTICE* (pp. 30-34, 153-56). New York, NY: Rusell Sage Foundation.
- FRIEDMAN, L. M. (1985). *A History of American Law 54-55* (2.nd ed.). New York: Simon and Schuster.
- GLASSON, E. & TISSIER, A. (1925). *Traité théorique et pratique d'organisation judiciaire, de compétence et de procédure civile* (3.rd ed., p. 855). Sirey: troisième.
- HARGRAVE, F. (1787). *A Treatise of the Maisters of the Chauncerie in A Collection of Tracts Relative to the Law of England* 297. London: T. Wright.
- HEMHOLZ, R. (1995). The Bible in the Service of the Canon Law, 70 *Chi.-Kent L. Rev.* 1557, 1573-74.
- HENDERSON, J. (1904). *Chancery Practice with Especial Reference to the Office and Duties of Masters in Chancery, Registers, Auditors, Commissioners in Chancery, Court Commissioners, Master Commissioners, referees, etc.* (p.363). Chicago: T. H. Flood and company.
- HEWARD, E. (1990). *Masters in Ordinary* 1-4 (pp.9, 11, 77, 309).
- HIBBARD, C. (1983). *Charles I and the Popish Plot*. Chapel Hill: University of North Carolina Press.
- HOFFMAN, M. (1824). *The Offices and Duties of Masters in Chancery and Practice in the Master's Office XXI* (pp.22, 47-58). New York: Gould & Banks.
- HOPKINS, J. (1933). *The Federal Equity Rules* (8.th ed., pp.129-132).
- JOLOWICZ, J.A. (2000). *On Civil procedure* (pp. 57-58, 85-93, 239-242). Cambridge, E.E.U.U.: Cambridge University Press.

- KESSLER, A. (2011) *Constructing an Ideal: Chancellor Kent, Justice Story, and the Surprising Revival of Equity in Early Nineteenth-Century America, L'équité et ses métamorphoses -Institut Michel Villey*, vol. 2.
- LUMBARD V. HOLDIMAN, (1904). 115 Ill. App. 458
- MACNAIR, M. (1999). *The Law of proof in early modern equity* (pp.1, 13, 30, 32, 53, 58, 166-168, 173-174). Berlin: Duncker & Humblot.
- MEYLER, B. (n.d.). *Substitute Chancellors: The Role of the Jury in the Contest Between Common Law and Equity 1-11* (unpublished paper) (on file with author).
- MILLAR, R. (1952). *Civil Procedure of the Trial Court in Historical Perspective* (pp. 206-207). New York: Law Center of New York University for the National Conference of Judicial Councils.
- MITCHEL DE S.-O.-I'É. Lasser. (2005). The European Pasteurization of French Law. *90 Cornell L. Rev.* 995, 1073-74
- MITFORD, J. & TYLER, S. (1878). *Mitford's and Tyler's Pleadings and Practice in Equity* (pp. 63-69, 429-430, 458, 469). New York: Baker, Voorhis & Co.
- MOSCHZISKER, R. (1927). Equity Jurisdiction in the Federal Courts. *75 U. Pa. L. Rev.* 287, 288-89.
- NAGREDA, R. A. (2009). Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism. *62 Vanderbilt Law Review* 1.
- PAINE, T. (2003). *Common Sense and Other Writings* 9. New York: Modern Library.
- PARKES, J. (1828). *A History of the Court of Chancery, with Practical Remarks on the Recent Commission, Report, and Evidence, and on the Means of Improving the Administration of Justice in the English Courts of Equity* (pp. 303-317, 449-451). London: Longman, Rees, Orme, Brown & Green.

- POCOCK, J. G.A. (1987) *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (2.nd ed.). Cambridge: Cambridge University Press.
- REMSEN V. REMSEN 2 Johns. (N.Y. Ch.1817) Ch. 495.
- SCHULZE, R. (1992). European Legal History: A New Field of Legal Science, *13 J. Legal Hist.*, 270, 276-284.
- SUBRIN, S. (1987) How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, *135 U. Pa. L. Rev.* 909, 915-917.
- STORY, J. (1939). *Commentaries on Equity Jurisprudence, as Administered in England and America* (2.nd ed.). London: A. Maxwell.
- STORY, J. (1840). *Commentaries on Equity Pleadings and the Incidents Thereof According to the Practice of the Courts of Equity of England and America*, (2.nd ed.). Boston: Charles C. Little & James Brown.
- STÜRNER, R. (2000). Some European Remarks on a New Joint Project of the American Law Institute and Unidroit. *34 Int'l Law* 1071, 1076.
- TAYLOR, R. (1996), A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure, *31 Tex. Int'l L.J.* 181, 190.
- VAN HOOK V. PENDLETON, 28 F. Cas. 998, 1000 (C.C.S.D.N.Y. 1848) (No. 16,852).
- WILLIAM, A. (1979). *The Police of Paris 1718-1789* (pp.119, 135-136). Baton Rouge: Louisiana State University Press.
- WOLLOCH, I. (1994). *The New Regime: Transformations of the French Civic Order 1789-1820s* (pp.297-320). New York: Norton.
- ZIMMERMANN, R. (1995). Civil Code and Civil Law: The "Europeanization" of Private Law Within the European Community and the Re-Emergence of a European Legal Science, *1 Colum. J. Eur. L.* 63, 82-89.

Notes

- 1 Included within this authority, for example, is the power to direct that only one expert be used. Although the parties retain the formal power of appointment, this new approach avoids the adversarial battle of experts and thereby approximates the practice in most civil law systems, where the expert is expected to produce a neutral, objective report (Jolowicz, 2000, pp. 57-58, 239-42; Stürner, 2000).
- 2 Describing the widely held French view that “the link between the European decisions (and Europe generally), American judicial imperialism, and the death of French civil-law particularism could hardly be more apparent.”
- 3 These twelve were called *clerici ad robas* because they received liveries of robes.
- 4 During the first three decades of the seventeenth century, most masters were common lawyers, but in 1633, the Privy Council declared that at least eight of the eleven masters must be civilians. Thereafter, and until the English Revolution, only civilians were named masters (Macnair, 1999, p. 32). Indeed, according to one anonymous master, writing in the late sixteenth or early seventeenth century, masters “were [once] called *clerici*, because they were auntientlie all of them cleorrgie men” (Hargrave, 1787; Heward, 1990, p.1).
- 5 As of the late fourteenth century, masters sometimes joined the chancellor on the bench when he tried matters of maritime, martial and ecclesiastical law, all of which drew heavily on the Roman-canon tradition (Heward, 1990, pp. 9, 11). And according to an account by an anonymous master writing at some point between 1596 and 1603, masters through the mid-sixteenth century regularly attended sessions of the House of Lords so that they could provide advice regarding matters of civil and canon law: “The reason of their attendance there I take to be ... [that the Lords] may ... bee informed by the masters of the chauncery (of which the greatestt number have alwaies bene chosen men, skillful in the civill and canon lawes) in lawes that they shall make touchinge foraine matters, whowe the same shall accorde with equitie, *jus gentium*, and the lawes of other nations” (Hargrave, 1787, p.309). It remains far from clear, however, that the civil law had much direct influence on the development of the substantive law of equity or on the development of English law more generally (Baker, 2003, pp. 180-81).
- 6 This is likely because equity focused on more complex legal arrangements than were usually needed in the relatively undeveloped colonial societies, and because, as described below, for many colonial transplants, there remained lingering associations between equity and tyrannical rule (Bryant, 1954, p.595).
- 7 As the American revolutionary generation was so influenced by French Enlightenment thought, it also seems probable that its distaste for equity stemmed in part from contemporary French reformers’ complaints about the arbitrary nature of judicial decision-making. For an overview of the French experience, see Isser Wolloch, I. (1994). *The New Regime: Transformations of the French Civic Order, 1789-1820s* (pp. 297-320). New York: Norton.

- 8 An Act to Amend the Judicial System of the United States, 1802, ch. 31, 2 Stat. 156, 166, § 25. This 1802 statute specified that federal courts choosing to rely on depositions were to ensure that these were “taken in conformity to the regulations prescribed by law for the courts of the highest original jurisdiction in equity ... in that state in which the court of the United States may be holden.” Accordingly, the statute’s authorization to rely on depositions did not “extend to the circuit courts which may be holden in those states, in which testimony in chancery is not taken by deposition.” Given the Jeffersonian commitment to state, as opposed to federal power, this effort to recognize the continuing force of equitable tradition had the added virtue of bringing federal equity practice in line with that of the states. It should also be emphasized that, as used in the equity tradition (and thus in Congress’ statute of April 29, 1802), the term “deposition” was synonymous with “examination” and must therefore not be confused with the procedural device by this name currently employed in the United States (Fed. R. Civ. P. 30; Fed. R. Civ. P. 32). In the modern-day deposition, testimony is taken by the parties themselves in oral, adversarial fashion. Its primary purpose (unless the deponent proves unavailable at the time of trial) is not to bring witness testimony before the court—a function served, instead, by in-court trial testimony—but rather to assist the parties in the discovery process, whereby often inadmissible testimony is gathered. In contrast, in the equity tradition, the term “deposition” referred to testimony taken outside the parties’ presence by a court-appointed officer, based on written interrogatories. And this *ex parte* procedure was the primary vehicle for bringing witness testimony before the court.
- 9 Rule 25 provided that “[t]estimony may be taken according to the acts of Congress, or under a commission,” Fed. R. Eq. 25 (1822), and Rule 28 that “[w]itnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause ...,” Fed. R. Eq. 28 (1822).
- 10 Congress first authorized the Federal Rules of Equity in an Act of May 8, 1792, which permitted “such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning” the “forms of writs, executions and other processes.” An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses, ch. 36, 1 Stat. 275, 276, § 2.
- 11 See, for example, Mitford, J. & Tyler, S. (1878). *Mitford’s and Tyler’s Pleadings and Practice in Equity*. New York: Baker, Voorhis & Co and Daniell, E. (1894). *Pleading and Practice of the High Court of Chancery* (6th ed., p.1168 n. 3, 1187). Boston: Little, Brown & Co., which were originally English treatises and were then modified to accommodate American practice. Both treatises were reissued in several editions.
- 12 That the defendant was required to answer under oath distinguished equity from law (where parties were disqualified from serving as witnesses) and was widely viewed as one of equity’s great virtues (Mitford & Tyler, 1878, pp. 63-66; Macnair, 1999, p. 58; Millar, 1952, pp.206-207).

- 13 Until the late sixteenth century, English chancery generally designated local notables, including priests (usually an abbot or bishop), to serve as commissioners. Thereafter, however, the court began to rely on the parties themselves to choose the commissioners (Daniell, 1894, p.1197; Macnair, 1999, pp. 173-74).
- 14 “The compensation to be allowed to every master in chancery for his services in any particular case, shall be fixed by the circuit court, in its discretion, having regard to all the circumstance thereof, and the compensation shall be charged upon and borne by such parties in the cause as the Court shall direct” (The New Federal Equity Rules 129-1932. (8.th ed. 1933) [discussing and collecting cases regarding the provision in Fed. R. Eq. 82 (1842)]; Parkes, 1828, pp. 303-17, 449-51 [describing the English practice]).
- 15 Hoffman’s account of New York chancery practice is relevant to federal practice for a number of reasons, not least of which is that federal courts in New York relied on masters from the New York Court of Chancery through the first third of the nineteenth century (Van Hook v. Pendleton, 28 F. Cas. 998, 1000 (C.C.S.D.N.Y. 1848) (No. 16,852)). It was only when the United States Circuit Court for the Southern District of New York issued its own local rules on October 27, 1828 that the court established its own set of federal masters.
- 16 “Interrogatories may be framed by the master” (Hoffman, 1824, p.22). See also, Fed. R. Eq. 77 (1842) “The master ... shall have authority ... to direct the mode in which the matters requiring evidence shall be provided before him; and generally to do all other acts and direct all other proceedings in the matters before him which he may deem necessary and proper”.
- 17 Another important accusatorial element was the fact that the parties themselves, rather than court officials, were responsible for drafting interrogatories (though not for administering them to witnesses). In this respect as well, equity was much like the systems of civil procedure that developed in continental Europe. In Old Regime France, for example, the parties identified the witnesses and submitted articles for their examination to court-appointed officers (Engelmann & Millar, 1927). One suspects that this deviation from the pure inquisitorial model followed, at least in part, from the fact that the court-appointed officers had no knowledge of the case.
- 18 See, for example, *Eiffert v. Craps*, 44 F. 164 (D.S.C. 1890), where the defendant moved to strike testimony taken by the plaintiff on the ground that the commission charged with taking the testimony had failed to transmit it back to the court in a manner ensuring that it would be seen by no one else prior to publication. In particular, the defendant complained that when the package with the testimony arrived at the courthouse, the clerk discovered that the envelope was open, “presenting the appearance of having been worn in the mail, the opposite corner of the envelope presenting the same appearance.” The court denied defendant’s motion to strike the testimony because it concluded that there was no indication that the rule of secrecy had been broken. In the process, however, it acknowledged the well-established principle of equity jurisprudence that testimony taken on commission was to be kept absolutely secret until publication: “This commission was issued under the

authority of Eq. Rule 67, and is in accordance with the well-established rule of the court of chancery. The commissioners did their duty in all respects as to the certification and mailing of the package. There is no reason to suspect that the contents of the package were seen by any one. I am satisfied that the abrasion of the envelope occurred in the transmission in mailbags.”

- 19 Rule 77 of the Federal Equity Rules of 1842 confirmed the master’s long-standing equitable authority “to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties”.
- 20 2 Johns. Ch. 495 (N.Y. Ch. 1817). *Remsen* was cited as authority regarding equity practice as far afield as Illinois and as late as 1904 \. (*Lumbard v. Holdiman*, 115 Ill. App. 458 (1904).
- 21 *Gass v. Stinson*, 10 F. Cas. 70 (C.C.D. Mass. 1837) (No. 5261).
- 22 There appear to have been only twelve masters (Baker, 2002, p.100; Heward, 1990, pp. 1–2, 46). According to Baker, these masters, however, were themselves assisted by various kinds of clerks, about whom even less is known (2002, p. 100; 2003, pp. 182–86).
- 23 Thus, for example, the primary royal trial court of general jurisdiction in Old Regime Paris—the *Châtelet*—had at its disposal an entire company of commissioners (*commissaries-enquêteurs-examineurs*) to take witnesses testimony. By the late seventeenth-century, the number of such commissioners available to this one court alone was 48 (William, 1979, p. 119). In addition, Old Regime French courts could call on groups of sworn excerpts (*experts jurés*), haling from the officially established and regulated guild system, to provide expert testimony (Engelmann Millar, 1927, pp. 719; Glasson & Tissier, 1925, p.855; Taylor, 1996, 181- 190).
- 24 Dawson argues that because Chancery “distributed to laymen all the functions that it could,” it cannot properly be categorized as inquisitorial. But setting aside questions of terminology, it is clear that Chancery procedure bore a striking resemblance to that employed in continental courts, though there were some notable differences—most importantly, Chancery’s failure to develop a large professional staff. And as Dawson asserts, in this respect, “[Chancery] followed the pattern of government that had been established in England centuries before” (1960, p.172).