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Equity and administration

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Introduction

Each generation of lawyers in common law systems encounters the question: what is the nature of the source of law known by lawyers as equity? Long-standing opinions offer partial answers. Most speak of equity as being, and having been, founded in the justice of sometimes qualifying and dispensing with rules of the standing legal order. In this way most opinions on the nature of equity in common law systems liken equity in common law systems to general notions of equity. However, in England and jurisdictions whose legal systems derive from the English legal system, descriptions of equity also contain some historical element. For, in England and many jurisdictions descended from the English legal system, the dispensation of justice by equitable methods came to occur successively through the Sovereign, the Lord Chancellor, the Court of Chancery and hence courts of equity. To speak of equity in common law systems is therefore to speak of a jurisdiction, in a core sense of the word.[1] It is to speak of a source of law that continues to qualify and dispense with elements of the standing legal order, where settled principles so permit or require.

The problem addressed in this collection of essays is how to advance the understanding of modern equity from this basic position. In particular, how can the understanding of equity be advanced by means of the terms, concepts and habits of thought familiar to lawyers today?

One way is to understand equity as a body of doctrine that operates negatively. Non-legal as well as legal notions of equity support this understanding, which will be discussed later in this chapter and in other chapters

[1] Cf. C.C. Langdell, *A Brief Survey of Equity Jurisdiction* (Cambridge, Mass.: Harvard Law Review Association, 1908), 22–3.

of this collection. Even before equity became established as a system of principles, doctrines and remedies that were recognised, applied and granted by the English courts, it was settled that equity could operate by qualifying the ordinary legal rights of persons according both to the judge-made common law and, sometimes, parliamentary legislation. It was also recognised early that equity could require the consequences of otherwise lawful transactions to be undone, where the circumstances offended equitable principles. Such operations are negative: they prevent, restrain and undo proscribed actions and their consequences. And these negative operations of equity were prominent not only in historical English equity: a negative role for equity continues to be recognised in English law and all the national legal systems that possess a system of equity as part of their common law inheritance from England. However, it is inadequate to perceive equity as operating negatively only. It also operates in other ways. Yet these other important qualities of equity jurisprudence are little understood.

Among these qualities is the facilitative nature of equity. Many uniquely equitable principles, doctrines and remedies have the purpose of aiding and regulating the performance of practical tasks of administration. Rather than hinder desirable action and its consequences, equity commonly promotes it. Thus, when equity qualifies a person's ability to enforce his or her strict legal rights – a negative operation – on most occasions equity positively aids the performance of administrative processes, rather than obstructs the performance of legal responsibilities. How that is done is explored by the various essays in this collection. At times, equity does not positively and explicitly aid the performance of practical administrative tasks. However, where that is the case, equity often facilitates practical action in a different way. By abstaining where it might otherwise intervene, equity declines to interfere in the performance of administrative tasks. For example, where the performance of practical tasks might be hindered, equity often qualifies its general principles so as to facilitate practical action. In modern English legal jargon, equity often 'disapplies' its general principles where to do so assists administration.

Because administrative tasks are practical, equity's facilitative character ought to be clearest from its attitude towards administration. A wide variety of administrative tasks is to be found. They range from the administration of the assets of trusts, through the administration of insolvent estates and of solvent and insolvent business associations, and to the administration of the affairs of the legislative, executive and judicial

branches of government. The concept of administration is accordingly wide. However, to define administration in this way for the purpose of the present enquiry is not to define it so widely as to become meaningless. The most telling situations in which equity's facilitative character can be seen are those where equity facilitates deliberately created schemes, transactions and sets of legal relations, especially where ongoing management of a state of affairs is required. Hence the examination of how equity operates upon settlements created deliberately by private transactions, as well as upon schemes established by parliamentary legislation and otherwise. At base, the variety of situations to be encountered are either (1) situations in which private persons are responsible for performing the practical tasks of administration envisaged or required by a private transaction, and in which equitable doctrines and remedies aid the proper performance of those persons' responsibilities, or (2) situations in which the responsibility of administration rather lies with the courts, in the exercise of equitable jurisdiction to administer certain legal relations. In the case of express trusts, for example, the categories overlap. The arrangement can be privately created and require the administration of the trust by private persons; yet courts of equity have administrative jurisdiction in respect of express trusts.

Wherever disputes over practical administrative tasks are justiciable, the law applied to decide those disputes can itself become an object of controversy. At the simplest, the law might be attacked for intervening too little or too much – and in either case hampering practical activity. It should not be surprising, then, to find that some instances in which equity assumes a facilitative role are controversial. For example, specific relief can facilitate the administration of a legislative scheme: properly granted, an injunction can keep a responsible person to the performance of his or her obligations under the scheme. However, what begins as facilitation can end as disruption. If an equitable doctrine is overly strengthened to further the attainment of desirable ends, other valuable activities may at the same time be stifled by equity's efforts to aid administration. Does this falsify the assertion that equity possesses a facilitative character? It is suggested not. Disagreements over how to delimit particular equitable remedies and doctrines are disagreements on a level of detail. While important, they should not be allowed to distract attention from more enduring and general features of equity. One such feature is the facilitative character of equity. The essays in this book have been collected together in the view that this role is basic to equity, and ought to be better understood.

The chapters that follow seek to better the current understanding of modern equity by studying its facilitative role. The chapters methodically examine a range of areas in which persons may or must conduct tasks and processes of practical kinds, and in which equity aids the satisfactory completion of those practical activities. The areas of conduct are ones in which the tasks and processes arise in relation to arrangements deliberately created by transacting parties or an individual acting alone or even by the legislative or executive branches of government. Examples are the schemes and arrangements established by declaring a trust, forming a partnership, forming a registered company, enacting parliamentary legislation, making subordinate legislation, devising an administrative scheme for implementation by the executive branch of government or a public authority and establishing procedures for the administration of justice by courts. Hence the title of this chapter and of this book: equity and administration. Some of the chapters directly address the nature of equity, either examining its historical development towards the system of equity known today, or by focusing on modern equity as such. Some chapters concentrate on present controversies regarding how, and how far, equity properly applies in aiding administration. While the emphasis of the chapters differs, all reveal, whether directly or indirectly, the strength of equity's facilitative nature. A later section of this chapter will suggest how each other chapter does so.

This chapter focuses less on controversial matters of doctrine arising in each area where equity aids administration and more on what those controversies indicate about the general characteristics of equity today. It outlines the types of activity that equity aids and the ways in which equity provides that assistance. The chapter also indicates the importance of taking a long view when pursuing these questions. Little investigation is needed before the value of a long perspective becomes apparent. Over short and long intervals, lines of equitable doctrine that aid administration in one area of activity have been extended to other areas and adjusted in recognition of the peculiar set of considerations – of principle and practicality – that exist in a given area. That is particularly seen in the extension of doctrines and remedies from the law of trusts to other areas, including constitutional and administrative law. However, before addressing the points just set out, something should first be said of other perspectives on modern equity and why a need exists to appreciate equity specifically as law that facilitates practical action.

Other perspectives on equity

The question of how contemporary lawyers ought to view equity within common law systems is complicated by at least two influences. Both depend on the fact that equity is a complex system, like all large systems of doctrines and rules.

The first complicating influence is that equity can be seen variously. Complex systems have many features. How the system is viewed and understood depends on which of its features are examined. The nature of the system can appear to change as first one set of features is examined and then another. The apparent variation creates a dilemma as to how the system ought to be viewed and portrayed.

Also complicating the matter is the influence of contemporary interests and needs. According to the interests and concerns of the day, radically different accounts of equity have been offered at different times. In the eighteenth century it was fashionable to view Chancery equity through maxims. The perspective on equity afforded by equitable maxims was desired so much that the maxims were propagated with an intensity that now seems curious. A more structured perspective of equity was reached through the trichotomy favoured by Mr Justice Story, borrowing from Fonblanque and Jeremy.[2] According to this, equity divides into the exclusive, concurrent and auxiliary jurisdictions. The exclusive is the jurisdiction in which equity supplies a remedy while the common law supplies none; the concurrent jurisdiction is that in which equity provides a remedy that could also be obtained at law; while the auxiliary jurisdiction of equity is that in which both equity and the common law supply a remedy, but the common law remedy is deficient in some way that is overcome by the equitable remedy.

Both these perspectives are instructive, and even important,[3] to an understanding of modern equity. However, modern equity is usually viewed otherwise. The view that equity operates negatively has already been mentioned. An understanding of equity based on that or certain other current perspectives on equity is likely to be inaccurate unless accompanied by perspectives that convey what appears from other

[2] D.E.C. Yale, 'A Trichotomy of Equity' (1985) 6 J.L.H. 194; M. Macnair, 'Equity and Conscience' (2007) 27 O.J.L.S. 659, 664–5. See also W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1772), vol. 3, 438, 439, 441 (referring to the concurrent and exclusive jurisdictions of equity).

[3] See J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed. (Sydney: LexisNexis Butterworths, 2015), [25–075]–[25–095] (on rescission).

dominant features of equity. However, modern portrayals of equity tend towards stereotypes. To adjust and correct these other perspectives on equity, concentration on equity's facilitative nature is needed.

Four perspectives

Probably the commonest perspective on modern equity is that it is straightforwardly discretionary, largely unconstrained by boundaries or rules. Historically, this seems to have been particularly true of the justice administered by the Lord Chancellor before courts of equity, so called, had come into being.[4] In modern times, Lord Denning liked to apply this view of equity.[5] More recently again, it is evident in a case of relief against forfeiture, *Çukurova Finance Ltd* v. *Alfa Telecom Ltd (No. 4)*.[6] Three members of the Privy Council there said that when relief is granted from forfeiture, the relationship of the parties is restored not on terms earlier agreed by the parties themselves but on terms set by equity. Their Lordships stressed equity's 'free discretion' to set these terms, and spoke of the breadth, flexibility and greatness of equitable discretion.[7] Though not commonly applied in modern judicial decisions, such a view of equity is often encountered both in litigation and legal writing.[8] Ironically, it has a robust existence as a straw man.

From a second position, equity is seen as an 'alibi'[9] for non-compliance with ordinary legal obligations and rules. Thus, equity has been criticised for holding that, where a disposition of property is not completed, a party who was intended to gain certain common law proprietary rights upon

[4] Macnair, 'Equity and Conscience', 670–1; M. Macnair, 'Arbitrary Chancellors and the Problem of Predictability', in E. Koops and W.J. Zwalve (eds.), *Law and Equity: Approaches in Roman Law and Common Law* (Leiden: Martinus Nijhoff, 2014), 81–94.

[5] See A. Denning, 'The Need for a New Equity' [1952] C.L.P. 1; *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286, 1289; *Eves* v. *Eves* [1975] 1 W.L.R. 1338, 1341.

[6] [2015] 2 W.L.R. 875; [2013] UKPC 20.

[7] [2015] 2 W.L.R. 875, [22]–[24], transposing certain statements in cases on the construction of statutory provisions for relief from forfeiture to the jurisdiction under the judge-made law. Although their Lordships said this free discretion could only be exercised in 'exceptional' cases, it is submitted that that constraint is unreal given (1) the nature of the discretion as stated by their Lordships (see also at [97]–[98]) and (2) that modern equity does not possess such a free discretion (nor the asserted 'exceptional' one).

[8] For a recent example, see J.W. Carter, W. Courtney, E. Peden, A. Stewart and G.J. Tolhurst, 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 13 J.C.L. 99, 109.

[9] B. Rudden, 'Equity as Alibi', in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem, 1992), 30–46.

completion nevertheless has equivalent rights in equity.[10] A variant position is that equity operates through 'subterfuge' of ordinary legal obligations and rules. In *Yeates* v. *Line*,[11] the court held that an agreement with the effect but not the purpose of disposing of an interest in land was outside a statutory provision that '[a] contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each'.[12] Although the court's reasoning made no '[overt] ... appeal to "equity"',[13] an implicit appeal to equity is said to have involved the court in ignoring the words of the legislation 'on the basis of an all-encompassing subterfuge'.[14] The view of equity as alibi or subterfuge is summed up in the statement that equity cases 'never come close to dealing with the principled question of *why* equity can act [as equity acts]: it just *does*'.[15]

A third view is that equity obscures truth and normal modes of rational thinking.[16] While this overlaps in part with the previous view, it also exists independently. It holds that equity obscures truth and rationality by being expressed in diffuse and contradictory principles, thus violating a principle that like cases are to be treated alike. Thus, equity is said to violate, or at least undermine, the rule of law.[17] The fact that some equitable doctrines can be stated in words that have more than one meaning, and meanings that operate 'at different levels of generality', has been noted and criticised for undermining rational thinking.[18] Such equitable language is said to put rational analysis of the law beyond grasp.[19]

[10] See, for example, *Curtis* v. *Pulbrook* [2011] 1 B.C.L.C. 638, [47]; [2011] EWHC 167 (Ch); W. Swadling, 'The Vendor-Purchaser Constructive Trust', in S. Degeling and J. Edelman (eds.), *Equity in Commercial Law* (Sydney: Lawbook Co., 2005), 480–1.
[11] [2013] Ch. 363, [29]–[35]; [2012] EWHC 3085 (Ch).
[12] Law of Property (Miscellaneous Provisions) Act 1989 (UK), s. 2(1).
[13] M. Dixon, 'To Write or Not to Write?' [2013] Conv. 1, 1. [14] *Ibid.*, 1.
[15] *Ibid.*, 1 (italics original). Similarly, P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U.W.A. L. Rev. 1, 22, 99.
[16] P. Birks and A. Pretto, 'Preface', in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford: Hart Publishing, 2002), xi.
[17] Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', 16–17; A. Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 O.J.L.S. 1, 4–5 and *passim*. Cf. H.E. Smith, 'Property, Equity, and the Rule of Law', in L.M. Austin and D. Klimchuk (eds.), *Private Law and the Rule of Law* (Oxford University Press, 2014), ch. 10.
[18] Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', 48.
[19] W. Swadling, 'The Fiction of the Constructive Trust' (2011) 64 C.L.P. 399, 433.

The fourth view to be considered is that equity is compulsory. Equity can ordain legal results that surprise transacting parties who thought they would achieve some other legal result; it can even directly contradict what the parties intended. The 'imposition' of fiduciary duties on joint venturers who did not believe they were in fiduciary relations with one another, and equity's refusal to enforce penal stipulations, are illustrations of this view.

By combining such perspectives on equity together, greater rhetorical force has been gained. Developing the argument that the language of equity places rational analysis of the law beyond grasp, it has been said that '[a]ll forms of appeal to very broad ideas tend to allow intuition to operate unrestrained by an analysis anchored in authority'.[20] That suggests a link with the first and second views of equity outlined earlier. It suggests that because equity employs broad language, it is unclear what the language denotes. The language is said to allow a court to decide a case unconstrained by prior judicial decisions. Broad language and language with meanings on several levels of generality are said to become alibis for an unconstrained equitable discretion.

Four views evaluated

These rhetorical claims about equity have little of substance behind them. Nevertheless, each of the four views has enough currency for it to be tendered in argument – adversarial, scholarly or otherwise – in the twenty-first century. Each is more prominent in legal discussion and argument than the view that much of equity has a facilitative nature. To show why a study of equity and administration is valuable to one who seeks to understand the nature of the modern law, it is therefore necessary to evaluate those four views of equity on their own terms and to suggest where corrections are necessary.

Discretionary equity

The first of these views may be briefly discussed. Any support for the view that equity is straightforwardly discretionary, unconstrained by boundaries and rules, must be very limited. When counsel have asserted that modern equity is widely discretionary in something like the way it once was historically, the courts have denied counsel's assertions.[21] Similarly,

[20] Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', 22.

[21] *Re Telescriptor Syndicate Ltd* [1903] 2 Ch. 174, 195; *Re Diplock's Estate* [1948] Ch. 465, 481–2; *Bridge* v. *Campbell Discount Co. Ltd* [1961] 1 Q.B. 445, 449; Denning, 'The Need for a New Equity', 8. See also *Australian Broadcasting Corporation* v. *Lenah Game Meats*

when the courts have asserted a widely discretionary equitable jurisdiction, decisions based on those opinions have often been queried, qualified and overruled.[22] Those denials, queries, qualifications and over-rulings can leave scant support for the view that modern equity is strongly discretionary in the way that the Lord Chancellor's powers were, early in equity's history.[23] Decisions in which equitable discretion has been asserted or applied with no or few constraints are unorthodox. Equity in modern common law jurisdictions is not equity dispensed outside the system of law.[24]

Equity as alibi or subterfuge

The weaknesses of the view that modern equity is an alibi can also be shortly stated. To take its extreme variant – that equity is subterfuge – where a court exercising equitable jurisdiction delivers its reasons for judgment without offering a normative explanation for its application of a particular rule it is difficult to see this as subterfuge. A judge discharges his or her duty to give reasons by explaining how the relevant rules apply on the facts of the case, and with what results. Regardless of whether the case concerns common law, statutory or equitable rights and entitlements, the judge has no duty to give a normative explanation of the rules applied.[25] The absence of such a duty is not attributable to equity.

That conclusion points to a general problem with arguments that equity is an alibi or a subterfuge. Labelling equity as an alibi discourages the labeller and others from examining equitable doctrines on their own terms. Without being so examined, the principles that underlie an

Pty Ltd (2001) 208 C.L.R. 199, [16]; [2001] HCA 63; *Tanwar Enterprises Pty Ltd* v. *Cauchi* (2003) 217 C.L.R. 315, [20]–[26]; [2003] HCA 57; *Twentieth Century Fox Corp.* v. *Harris* [2014] Ch. 41; [2013] EWHC 159 (Ch).

[22] See the discussion of Lord Denning's innovations by D.J. Hayton, 'Equity and Trusts', in J.L. Jowell and J.P.W.B. McAuslan (eds.), *Lord Denning: The Judge and the Law* (London: Sweet and Maxwell, 1984), ch. 3 and J. Glister and J. Lee, *Hanbury and Martin: Modern Equity*, 20th ed. (London: Sweet and Maxwell, 2015), [12–026].

[23] See S. Worthington, *Equity*, 2nd ed. (Oxford University Press, 2006), 331–3; G. Virgo, 'Restitution through the Looking Glass: Restitution within Equity and Equity within Restitution', in J. Getzler (ed.), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis, 2003), 110.

[24] At earlier periods, the opposite was the case: Macnair, 'Arbitrary Chancellors and the Problem of Predictability', in Koops and Zwalve (eds.), *Law and Equity: Approaches in Roman Law and Common Law*, 91–4. Cf. J.M. Nolan-Haley, 'The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound' (2004) 6 Cardozo J. Conflict Resol. 57, 58 ('[E]quity . . . offer[s] a form of "individualized justice" unavailable in the official legal system').

[25] Cf. H. Dagan, *Property: Values and Institutions* (Oxford University Press, 2011), ch. 1.

equitable doctrine invoked by litigants and applied by a court cannot be understood. The reasons and decision in *Yeates* v. *Line* were summarised earlier. If – undiscouraged by the 'subterfuge' label – a lawyer were to investigate *Yeates* v. *Line* for evidence of legal principle, what would the lawyer find? There is clear evidence that the court was interpreting the relevant statute purposively, not applying equitable doctrines or a free equitable discretion.[26] Purposive interpretations of statutes are not typically criticised as involving the subterfuge of legal method. Indeed, purposive interpretations are not the exclusive domain of equity. Such interpretations are 'equitable' only in the limited sense that, in times past, courts of equity sometimes interpreted a statute purposively where a court of common law would interpret the statute literally.[27] Labelling the decision in *Yeates* v. *Line* as an equitable subterfuge seems to have discouraged analysis of what the court's reasoning was – thus placing a plausible explanation of the case beyond reach. Equivalent arguments based on different examples share the same difficulty.

Equity as obscurity

The portrayal of modern equity as obscuring[28] truth and the possibility of analysis is also problematic but requires a longer response. Writers have said that the language of equity obscures real similarities between the common law and equity. The suggested similarities of law and equity as regards 'wrongs', 'damages' and 'compensation' have been stressed.[29]

[26] See *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 678, 690–1; and J.D. Heydon, 'Equity and Statute', Chapter 12 of this volume, text to nn. 139ff. See also J. Cartwright, 'Equity's Connivance in the Evasion of Legal Formalities', in Koops and Zwalve (eds.), *Law and Equity: Approaches in Roman Law and Common Law*, 112–21 who, while not addressing statutory interpretation, discussed other principles animating equity's doctrines in this area. It should be noted that, notwithstanding its title, Professor Cartwright's chapter does not argue that equity as such connived in the evasion of legal formalities: the argument is only that this was 'the effect' of certain equitable doctrines (e.g. at 108, 113).

[27] See Blackstone, *Commentaries on the Laws of England*, vol. 3, 430–1; R.S. French, 'The Interface between Equitable Principles and Public Law' (unpublished paper available at www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj29oct10.pdf), 3–5; N. Duxbury, *The Elements of Legislation* (Cambridge University Press, 2013), ch. 6.

[28] See, for example, J. Beatson, 'Unfinished Business: Integrating Equity', in J. Beatson (ed.), *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991), 246–8; P. Birks, 'Definition and Division: A Meditation on Institutes 3.13', in P. Birks (ed.), *The Classification of Obligations* (Oxford: Clarendon Press, 1997), 14–15, 33 and Burrows, 'We Do This at Common Law but That in Equity' (critiquing parts, but not all, of equity).

[29] See, for example, J. Edelman and S. Elliott, 'Money Remedies against Trustees' (2004) 18 T.L.I. 116; Burrows, 'We Do This at Common Law but That in Equity'.