

1

AN OVERVIEW OF EQUITY

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1.1 Introduction

Equity is a chameleonic word, taking its colour from the context in which it is used. For the purposes of this Sourcebook, equity refers to the principles, doctrines and remedies applied by Australian courts exercising the jurisdiction of the English Court of Chancery prior to the enactment of judicature legislation which reformed the structure of the court system in the mid-nineteenth century (see [1.3.3b]). Equity, in this sense, is intelligible without having to acquire an understanding of legal history, but the understanding will be deeper if that history is known. This chapter identifies some of the landmarks of that history.

The final section summarises some of the more common equitable maxims. The student will occasionally encounter them when reading the cases, and should consider their value in applying equitable doctrine to the circumstances of an individual case.

1.2 Definition

1.2.1 Dictionary definition

1.2.1a *Macquarie Dictionary* and *Thesaurus Online*

equity/ 'ekweti/ (say 'ekwuhtee) *noun* (*plural* equities)

- (1) the quality of being fair or impartial; fairness; impartiality.
- (2) that which is fair and just.
- (3) *Law*
 - (a) the application of the dictates of conscience or the principles of natural justice to the settlement of controversies.
 - (b) a system of jurisprudence or a book of doctrines and rules developed in England and followed in other common law countries, serving to supplement and remedy the limitations and the inflexibility of the common law.
 - (c) an equitable right or claim.

NOTE

This book is concerned with meanings 3(a)–(c) above. Consider the relationship between these meanings and meanings 1 and 2 above. Reflect also on the relationship (and occasional tension) between 3(a) and 3(b).

1.2.2 Philosopher and jurist

1.2.2a Aristotle, *Nicomachean Ethics*, tr WD Ross (Oxford University Press, 1908) Book V: Moral Virtue

Chapter 10: Equity, a corrective of legal justice

And this is the nature of the equitable, a correction of the law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law. That about some things it is impossible to lay down a law, so that a decree is needed ... It is plain, then, what the equitable is, and that it is just and is better than one kind of justice. It is evident also from this who the equitable man is; the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law on his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character.

1.2.2b *Earl of Oxford's Case* (1615) 1 Ch Rep 1, 6; 21 ER 485, 486

Lord Ellesmere LC

The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.

The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called *Summum ius*.

NOTE

Aristotle and Lord Ellesmere justified equity on the ground that it modifies the law where the inflexible application of legal rules causes injustice in individual cases. When studying the individual equitable doctrines, consider whether this is a convincing justification for equitable intervention.

QUESTION

Is equity still needed now that legislation can remedy defects in the law?

1.3 History

1.3.1 Origins

1.3.1a JH Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2002) 99–102

The Chancery (*cancellaria*) began as the royal secretariat, housed in the king's chapel. In origin it was no more a court of law than the Exchequer, but was a department of state descended from the Anglo-Saxon scriptorium where royal writs and charters were drawn and sealed. The head of department, the chancellor, had the custody of the great seal of England, which was used to authenticate the documents which his clerks prepared. Royal grants of property, privilege, dignity or office, charters, writs and commissions, all had to 'pass the seal' in Chancery. The original writs of the common law emanated from the same department, and through them the chancellor was associated with the ordinary administration of justice.

The chancellor has always been primarily an officer of state and a minister of the Crown. Most medieval chancellors were also bishops, or even archbishops. Some chancellors, notably Cardinal Wolsey (1515–29) and Lord Clarendon (1658–67), were prime ministers in all but name ... Yet the majority of chancellors have been lawyers and until 1875 spent most of their time sitting in court ...

The chancellor's English jurisdiction, so called because the bills and pleadings were written in the vernacular tongue, grew not from the departmental work of the Chancery but from the jurisdiction of the king's council to deal with bills of complaint. We have seen that in the fourteenth century bills addressed to the king in council, complaining of interference with the common law, were passed on to the judges. Later in the century bills of this kind were addressed to the chancellor alone, whose function in such cases was not to dispense justice so much as to facilitate its achievement in other courts, to serve as 'a convenient clearing-house for all kinds of business transacted elsewhere' (Sayles, 76 *Selden Society* lxxi, lxxix). The jurisdiction was still that of the council, and the chancellor was – by a kind of fiction – deemed to be acting on behalf of 'the king and his council in Chancery.' By the time of Richard II (1377–1399), a further development had occurred. Bills increasingly sought a specific remedy from the chancellor himself, irrespective of whether proceedings were pending at common law, and it is evident that the chancellor had begun to issue process and grant decrees in Chancery instead of sending the petition elsewhere. ... Decrees were at first made in the name of the king in council, and then by the 'court', sometimes reciting the presence of judges and king's serjeants, councillors and advisers; but during the fifteenth century the chancellor came to issue decrees in his own name. In making such decrees, medieval councillors or chancellors did not regard themselves as administering a system of law different from the law of England. They were reinforcing the law by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. They came not to destroy the law, but to fulfil it (FW Maitland, *Equity* (1909) 17).

1.3.1b Petition c 1417–1424, No 117 from WP Baildon (ed), *Select Cases in Chancery* (Selden Society, 1896) vol 10

To the most reverend and most gracious Father in God, the Bishop of Durham, Chancellor of England,

Humbly beseecheth your continual orator, Thomas Messendyn the younger, that whereas Thomas Messendyn his father enfeoffed Richard Pierson, parson of the church of Hatcliffe, John West, parson of the church of Bradley, John Barneby of Barton the younger, and John See of Little Coates, of certain land and tenements in the town of Healing in the County of Lincoln, to the value of £10 a year, on condition that the said enfeoffees should enfeoff the said suppliant in the lands and tenements aforesaid when he should come to the age of 18 years; and now the said suppliant is of the age of 18 years and more, and he hath many times requested the said feoffees to enfeoff him in the said lands and tenements according to the wish and condition of his said father; and they do utterly refuse, and say that they will hold the said lands and tenements to their own use: May it please your most gracious Lordship to grant certain writs to send for the said feoffees on certain pains by you to be limited, to answer before you in the Chancery, and to declare wherefore they will not enfeoff the said suppliant according to the wish and condition aforesaid; for God and in way of charity; considering, most gracious Lord, that the said suppliant can have no recovery at common law.

NOTE

This is a translation of a petition written in French. The arrangement said to have been created by the suppliant's father was the use. The use was the early form of trust and, in modern terminology, the complaint is one for breach of trust: land was conveyed to various persons (the feoffees) on condition that they conveyed it to the complainant (enfeoffed him) when he was 18. The petition requests the Chancellor to investigate the allegation that the feoffees retained the land for themselves instead of keeping their promise to convey it to the complainant.

1.3.2 Conflict between common law and equity

1.3.2a Joshua Getzler, 'Patterns of Fusion' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 175

Sometime in the early 1530s, two centuries after the inception of Chancery's jurisdiction in equity, the Lord Chancellor of England invited the common law judges to dinner. Sir Thomas More's purpose in throwing this entertainment was to discuss the judges' vehement objections to the Chancery's practice of issuing common injunctions, which forbade plaintiffs from pursuing unconscionable claims in the common law courts. Sir Thomas, himself a skilled common lawyer

and the first such to sit on the Woolsack, suggested that Chancery would desist from intervening if only the law courts would exercise their discretion to 'mitigate and reform the rigour of the law'. But the judges refused, as More later recounted, because 'they may by the verdict of the jury cast off all quarrels from themselves upon them, which they account their chief defence' [WF Roper, *The Lyfe of Sir Thomas More* (ed EV Hitchcock, London 1935) 44–5]. At this time came perhaps the fateful step towards the splitting of legal and equitable jurisdictions in England. When the common lawyers refused to admit the broadest range of factual evidence into curial deliberations, and then to develop legal tests and principles to sift such an expanded admission of evidence and guide the jury, they thereby ensured the survival and growth of the ameliorating Chancery jurisdiction. For the rest of the sixteenth century litigants flocked to the Chancery and the other prerogative courts of equity, and their business came to rival that of the common law courts, whose business relatively declined.

1.3.2b *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485

In the late sixteenth century chancellors began issuing orders, known as common injunctions, restraining plaintiffs from executing a judgment obtained at common law where the judgment had been obtained unconscionably. In *Finch v Throckmorton* (1597) 118 Selden Soc 441 the common law judges resolved that this kind of 'intermeddling' in common law matters should be prohibited. However, Thomas Egerton, appointed Chancellor by King James I as Lord Ellesmere, continued the practice of issuing common injunctions. The common law judges, led by Coke CJ, released litigants who had been imprisoned for disobeying the injunctions.

The issue was brought to a head in this case involving land owned by Magdalene College, Cambridge. The land was initially sold to Queen Elizabeth I and leased, the lease eventually being held by Warren. The College later took the view that the original sale was void under the Ecclesiastical Leases Act 1571 and instead leased the land to Smith. Warren brought an action of ejectment at common law to evict Smith. Coke CJ held that the original transfer of land was void and that Smith could not be evicted. The Earl of Oxford, claiming to be owner of the land following a resale of the land by Elizabeth I, later reopened the case in Chancery before Lord Ellesmere. Smith refused to respond to the equity suit and was committed to prison for contempt of court. At the same time Lord Ellesmere granted a common injunction against the enforcement of any common law judgment to release Smith from prison.

The matter was referred to King James I in the Privy Council. He issued a declaration affirming the injunction, stating that 'it properly belongeth to our princely office to take care and provide that our subjects have equal and indifferent justice ministered to them; and that when their case deserveth to be relieved in course of equity by suit in our Court of Chancery, they should not be abandoned and exposed to perish under the rigour and extremity of our laws, we ... do approve, ratifie and confirm, as well the practice of our Court of Chancery' (D Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, 1890, 114).

1.3.3 Reform and renewal

1.3.3a Charles Dickens, *Bleak House* (first published 1853)

London, Michaelmas Term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. On such an afternoon, if ever, the Lord High Chancellor ought to be sitting here – as here he is – with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon, some score of members of the High Court of Chancery bar ought to be – as here they are – mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be – as are they not? – ranged in a line, in a long matted well (but you might look in vain for Truth at the bottom of it), between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them.

Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the stained glass windows lose their colour, and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect, and by the drawl languidly echoing to the roof from the padded dais where the Lord High Chancellor looks into the lantern that has no light in it, and where the attendant wigs are all stuck in a fog-bank! This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give – and who does not often give – the warning, 'Suffer any wrong that can be done you, rather than come here!'

NOTE

It is generally agreed that *Bleak House* is set in or about 1827, when Lord Lyndhurst had just succeeded Lord Eldon as Chancellor. On the nineteenth-century reforms to Chancery, see M Lobban, 'Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery' (2004) 22 *Law and History Review* 389, 565; P Polden, 'The Court of Chancery 1820–1875'

in *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol XI, 646–91; MJ Leeming, 'Five Judicature Fallacies' in JT Gleeson et al (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) 169.

1.3.3b *Judicature Act 1873* (Imp)

Section 25(11)

Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

1.3.3c *Law Reform (Law and Equity) Act 1972* (NSW)

Section 5: Rules of equity to prevail

In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of common law relating to the same matter, the rules of equity shall prevail.

NOTE

The delayed introduction of judicature legislation in New South Wales has arguably had a significant effect on the development of equitable doctrine in Australia. Most other States adopted the *Judicature Act* model not long after it was enacted in England: *Judicature Act 1876* (Qld); *Supreme Court Act 1878* (SA); *Supreme Court Civil Procedure Act 1932* (Tas); *Supreme Court (Judicature) Act 1883* (Vic); *Supreme Court Act 1880* (WA). The relevant legislation for the Territories is the *Supreme Court Act 1933* (ACT) (s 33 being the equivalent of s 25(11) above) and the *Supreme Court Act 1979* (NT) (s 68 reproduces s 25(11)).

Queensland and South Australia had pioneered innovative models of fusion prior to the adoption of the English model: see B McPherson, *The Supreme Court of Queensland* (Butterworths, 1989) 138; G Taylor, 'South Australia's Judicature Act Reforms of 1853' (2001) 22(1) *Journal of Legal History* 55.

QUESTION

Did the judicature legislation remove the defects of Chancery identified by Charles Dickens in *Bleak House*? If not, what defects was the legislation intended to remove?

1.3.3d Keith Mason, 'Fusion: Fallacy, Future or Finished?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thomson Reuters, 2005)

In 1765, William Blackstone in his *Commentaries on the Laws of England*, formulated the general law rule of reception of English law into 'settled' colonies, which all Australian colonies were later presumed to be. He proclaimed that 'all the English laws then in being ... [were] immediately there in force'. This principle was qualified by the statement that the colonists carried with them 'only so much of the English law as is applicable to their own situation and the condition of an infant colony'. The uncertain operation of Blackstone's rule had led to difficulties in New South Wales by the 1820s, but no one doubted that the general law of England (including Chancery law) was part of the colonists' inheritance. Ellis Bent, who was Judge-Advocate during Governor Macquarie's time, granted equitable relief where appropriate, although he had no specific statutory authority to do so. The Civil Supreme Court created under the second *Charter of Justice* in 1814 was declared among other things to be a Court of Equity having equitable jurisdiction.

Section 24 of the *Australian Courts Act 1828* (Imp), which applied in Australia by paramount force, was applicable to New South Wales as well as Tasmania, Victoria, Queensland and the Australian Capital Territory as they later emerged out of New South Wales. It provided that all laws and statutes in force in England on 25 July 1828 were to be applied 'so far as the same can be applied'. The Supreme Court of New South Wales founded in 1823 (which continues to this day) was a creature of statute and the royal prerogative. Its statutory parent was the *New South Wales Act 1823*. The 1823 Act declared it lawful for the King to establish a court of judicature styled 'the Supreme Court of New South Wales'. The Act defined the principal jurisdictions of the Court, largely by reference to English models. Jurisdiction at common law was assimilated to the civil and criminal authority of the Judges of Kings Bench, Common Pleas and Exchequer in England. As a court of equity, the Supreme Court was to have the equitable jurisdiction exercised by the Lord High Chancellor within England. In 1828, this last grant of jurisdiction was supplemented by adding 'and all such acts matters and things can or may be done by the said Lord High Chancellor within the realm of England in the exercise of the common law jurisdiction to him belonging' (*Australian Courts Act 1828* s 11). This neatly makes my point that procedural and remedial fusion in England started long before the *Judicature Act 1873* (UK).

For New South Wales the systems of common law and equity were never, as in England, to be administered by separate courts, but always by one and the same Supreme Court. But procedures and doctrines remained distinctive. A single judge wearing his equity wig could issue a common injunction directed at the prosecution or enforcement of common law proceedings or judgments pending before one of his brethren or in the Supreme Court generally.

The 19th century judges in New South Wales were well aware that law and equity were different systems, each with their different procedures. Certainly by the 1840s any thought of adopting a single procedure was abandoned. English court dress, precedents and practice came to be followed with as much rigour as colonial conditions allowed. The Privy Council also curbed centrifugal tendencies, as elsewhere throughout the Empire. English reforming statutes were

followed and adopted for use within the single Supreme Court. In 1850, the Full Court of the Supreme Court of New South Wales in *Bank of Australia v Murray* ((1850) 1 Legge 612) declined to grant any relief to a plaintiff who had proceeded by bill in equity instead of at common law. There the matter rested until the Queenslander Sir Samuel Griffith became the first Chief Justice of the High Court of Australia in 1903.

The substantive and procedural rules pertaining to matters on the common law and equity 'sides' of the Supreme Court of New South Wales operated in separate and seldom intersecting spheres, albeit administered by a single Supreme Court. The size of the Court never rose above seven in the 19th century. The shortage of judges skilled in equity and mid-century delays in handling equity matters actually encouraged moves to differentiate the Equity side of the Court. A Primary (later Chief) Judge in Equity was designated. There was even a proposal to create a separate building for Equity. The fusion reforms of the English *Judicature Act 1873* were resisted, although the judiciary and profession were divided on the issue.

... Echoes of the nineteenth, twentieth and twenty-first century debates about fusion and its consequences surfaced as early as the first volume of the Commonwealth Law Reports.

In *McLaughlin v Fosbery* ((1904) 1 CLR 546) the High Court refused to overturn an order of the New South Wales Chief Judge in Equity staying all proceedings on an action for damages for assault and false imprisonment. The underlying dispute related to the confinement of the appellant, a lunatic, on the basis of an order by his committee. The High Court held that the Supreme Court ought to have stayed proceedings in the exercise of its inherent jurisdiction to stay vexatious actions, ie reliant on the exercise of common law jurisdiction. It was therefore an error that the stay of the common law action had been granted by the Chief Judge in Equity in reliance on (Equity) lunacy jurisdiction. Since, however, the Full Court of the Supreme Court had power on appeal to disregard formal defects and irregularities in the proceedings, the High Court decided by majority to do the same. Accordingly the appeal was dismissed.

Griffith CJ (speaking for himself and Barton J) explained (at 568–9) that the Supreme Court of New South Wales was:

one Court, having under its original constitution all the powers which the Courts of Chancery and the Common Law and Ecclesiastical Courts had in England. Every Judge of the Court has the powers and authority of a Judge of the Court, and his powers are not in fact or in law impaired if he erroneously attributes the source of any particular power to the wrong Statute. ...

O'Connor J dissented strongly, stating (at 574–5):

It is said there is only the one Supreme Court invested with both common law and Equity powers, and that it is always open to the Court to apply any of its powers to facts that come before it. It is true that there is only one Supreme Court invested with all these powers, but ever since the establishment of the Court under the Charter of Justice its powers in Equity and its powers at common law have been exercised by separate divisions of the Court – separate not only in name and form, but administering in many respects different systems of jurisprudence ...

Statutory reforms were introduced to the Supreme Court of New South Wales in stages, culminating in the fusion of administration of law and equity and adoption of a common pleading