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*The place of Equity in modern procedure and in the curriculum in present day law schools will be discussed in a series of three articles, of which this is the first.*

# EQUITY: SYSTEM OR PROCESS?\*

PHILIP A. RYAN†

THE NATURE OF EQUITY has troubled legal scholars for many years. It has been viewed as a closed but flexible department of our jurisprudence, and it has been equated with procedure. No matter what the framework of discussion, however, everyone recognizes a value, intangible and compelling, which surpasses strict legal rules. This consensus on the value but disagreement on the nature of Equity invites the effort to obtain a satisfactory personal insight.

As pointed out by Professor Chafee, "Equity is a way of looking at the administration of justice."<sup>1</sup> It is also true that there are different ways — at least three — of looking at Equity. Each may be necessary and useful, depending on the problem to be solved. But distinction and differentiation are important if we are to use the right tools for the right problems.

The first and traditional view is that "Equity is that body of rules which is administered only by those courts which are known as courts of Equity."<sup>2</sup> This is only partially true historically,<sup>3</sup> and the truth that is in the statement does not go beyond giving us a catalog of such rules as are found in numerous texts and treatises and collections of cases. In this view, Equity is a "department" or an "established branch of our American

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<sup>1</sup> SELECTED ESSAYS ON EQUITY iii (Re ed. 1955) (hereinafter cited as Re); see also Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. LEGAL ED. 422 (1956), wherein are discussed the "equitable attitude" and "the equitable way of dealing with a case."

<sup>2</sup> MAITLAND, EQUITY 1 (Brunyate ed. 1936), quoted in Glenn and Redden, *Equity: A Visit to the Founding Fathers*, in Re 12, 15.

<sup>3</sup> See Adams, *The Origin of English Equity*, in Re 1; Keigwin, *The Origin of Equity*, 18 GEO. L. J. 15 (1929); Spence, *The History of the Court of Chancery*, in 2 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 219 (1908).

as well as of the English jurisprudence."<sup>4</sup> It is in every sense of the word a "system" to which "it is impossible that any *new* general principles should be added. . . ."<sup>5</sup> It is thought that to go further would turn the Chancellor into a legislator — which indeed he once was — contrary to the spirit of the times and the constitutional separation of powers.<sup>6</sup> However, the principles embraced in the system are said to possess "an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age."<sup>7</sup> This view necessarily limits the capacity of Equity, as a tool for a more perfect administration of justice, to the inherent potency of the general principles already encompassed within the "system."<sup>8</sup> It remains to be seen whether that is all the potency we need.

But leaving aside for the moment the validity of this view, it nevertheless gives us a useful tool for determining such an issue as the right to jury trial. To quote Professor Chafee: "There is only one genuine reason today for distinguishing an action at law from a suit in equity — the constitutional right to jury trial in civil cases."<sup>9</sup>

<sup>4</sup> 1 POMEROY, EQUITY JURISPRUDENCE § 46 (5th ed. 1941).

<sup>5</sup> 1 *id.* § 60.

<sup>6</sup> *Cf.* 1 *id.* § 35; 1 STORY, EQUITY JURISPRUDENCE § 19 (14th ed. 1918).

<sup>7</sup> 1 POMEROY, EQUITY JURISPRUDENCE § 67 (5th ed. 1941).

<sup>8</sup> *Ibid.*:

Its great underlying principles, which are the constant source, the never-failing roots, of its particular rules, are unquestionably principles of right, justice, and morality, so far as the same can become the elements of a positive human jurisprudence; and these principles, being once incorporated into the system, and being essentially unlimited, have communicated their own vitality and power of adaptation to the entire branch of the national jurisprudence of which they are, so to speak, the substructure.

<sup>9</sup> *Re iv.*

As Pomeroy and others have reiterated, this system of principles is flexible enough to meet the needs of the times. As it is handed down to us, however, it may need elucidation, and the judges may need prodding to use to the fullest its marvelous adaptability. Old principles may need explanation, and, upon occasion, a long-accepted principle may turn out to be in conflict with another principle of the system. This elucidation and prodding generally come from those steeped in the "system" in the best sense of the word. Witness Pound's masterful analysis<sup>10</sup> of the dictum of *Gee v. Pritchard*<sup>11</sup> that Equity would protect only property rights, and his arguments against this maxim as an absolute. Some years later we find the matter being clarified in a case in the District of Columbia in which Judge Edgerton stated:

The doctrine that equity jurisdiction is limited to the protection of property rights conflicts with the familiar principle that equity may give preventive relief when the legal remedy of money damages, if available at all, is inadequate to redress a wrong.<sup>12</sup>

In brief, the view that Equity is a closed system with an inherent capacity for flexible adaptation to new needs is productive of fruitful results in limited areas. The difficulty remains whether such a view is adequate in a time when it may be said that "legislators are properly preoccupied with public affairs; they have little time to spend on curing defects in private law."<sup>13</sup>

A second way of looking at Equity involves us directly in the classical jurisprudential debate between Langdell-Ames-Maitland and Spence-Pomeroy-Hohfeld on

<sup>10</sup> Pound, *Equitable Relief Against Defamation and Injuries to Personality*, in *Re* 364.

<sup>11</sup> 2 Swanst. 402, 36 Eng. Rep. 670 (Ch. 1818).

<sup>12</sup> *Berrien v. Pollitzer*, 83 U.S. App. D.C. 23, 24, 165 F.2d 21, 22 (1947).

<sup>13</sup> *Re iv* (Foreword by Chafee).

whether Equity did or did not conflict with the common law.<sup>14</sup> With the fusion of law and Equity, this seemingly theoretical debate has become important for the practicing lawyer.

Should a complaint under a code-merger system of pleading be dismissed if the theory of the complaint is an equitable action for partnership accounting which fails of proof at trial, but the facts proved show a hiring and agreement to pay for services? In *Jackson v. Strong*,<sup>15</sup> the court dismissed the complaint:

The inherent and fundamental differences between actions at law and suits in equity

<sup>14</sup> The substance of this debate is best derived from the words of the debaters themselves. Langdell:

Shutting our eyes then to the fact that equitable rights are a fiction, and assuming them to have an actual existence, what is their nature, what is their extent, and what is the field which they occupy? 1. They must not violate the law. 2. They must follow the analogy of one or more classes of legal rights. 3. There is no exclusive field for them to occupy; for the entire field is occupied by legal rights. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former. Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 659, 673 (1900); quoted in Cook, *Equitable Defenses*, in Re 38, 40, n.8.

Hohfeld:

[I]n case of conflict, as distinguished from concurrence, a jural relation is finally determined by the equitable rule rather than by the legal.

1. Since in any sovereign state, there must, in the last analysis, be but a single system of *genuine law*, since the various principles and rules of that system must be consistent with one another, and since, accordingly, all *genuine* jural relations must be consistent with one another, *two conflicting rules, the one "legal" and the other "equitable," cannot be valid and determinative to the exclusion of the other.* Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 557 (1913); quoted in Cook, *Equitable Defenses*, in Re 38, 42 n.16.

<sup>15</sup> 222 N.Y. 149, 118 N.E. 512 (1917). For a discussion of the case, see Kharas, *A Century of Law-Equity Merger in New York*, in Re 65, 75.

cannot be ignored. . . . "If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose."<sup>16</sup>

This argument "seems to be based . . . on an idea that under the code we still have 'courts of law' and 'courts of equity.'"<sup>17</sup> This, of course, is not true under a merged system, and the decision seems to stem from the Langdell view that equitable rights are a fiction. If this is true, no legal cause of action being stated, there was nothing for the judicial powers to operate upon, regardless of what was proved.

Certainly there are differences between law and Equity as historically developed. As pointed out, we must know these differences as long as our society preserves the right to jury trial in legal actions. But is there a conflict between the two? Long ago in the great quarrel between Coke and Ellesmere it was thought that there was, and Equity emerged as the superior system.<sup>18</sup> But in later times legal semanticists have said that there was no such conflict and that "legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former."<sup>19</sup> Others, looking at our jurisprudence as a whole and relying on the principle of contradiction, have said that we have one system made up of legal and equitable rights and that where the two conflict the equitable right is paramount.<sup>20</sup> Where law and Equity are sepa-

<sup>16</sup> 222 N.Y. at 154, 118 N.E. at 513.

<sup>17</sup> Cook, *Equitable Defenses*, in Re 38, 44.

<sup>18</sup> For an account of this dispute, see WILSON, LIFE OF JAMES I 94-95 (1653), reprinted in SCOTT & SIMPSON, CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES 605-06 (2d ed. 1946).

<sup>19</sup> Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 659, 673 (1900); quoted in Cook, *Equitable Defenses*, in Re 38, 40 n.8.

<sup>20</sup> For example, when a binding contract for the sale of land has been made, the vendee is said to be the owner in Equity, *i.e.*, he has equitable title.

rately administered, the only difficulty in giving recognition to the superior equitable right is procedural; where fusion has been attempted, imperfect procedural processes and lack of appreciation of the superiority of Equity are the main obstacles.<sup>21</sup>

This brings us to a third way of looking at Equity. What is the essence of Equity? It is certainly far from satisfying to be told that it is a body of rules administered by courts of Equity in England prior to the Judicature Acts which took effect in 1875. Our appreciation is still incomplete even if we could speak from memory all the principles and rules which determine equitable causes; indeed, even if we could recognize their intrinsic and universal moral worth as well. What is necessary is to have some adequate grasp of Equity as a built-in dynamism necessary for progress in any system which purports to administer justice. In a time when distinctions between legal and equitable actions have been abolished and the Chancellor is not standing by to supervise, correct, and supplement the administration of strict law, such an inquiry becomes very important.

As Professor Emmerglick has pointed out, separate Equity courts provided individualized justice by the use of a well-

The law courts would recognize only the vendor as the owner. However, in "net substantive legal effect," to use Cook's phrase (Cook, *Equitable Defenses*, in Re 38, 47), the vendee is the owner, since he may call upon a court of Equity to force the vendor to convey. Under the law as a whole, *i.e.*, common law and Equity, there can be only one owner as between the two claimants. The conflict is resolved in favor of the vendee inasmuch as he can get specific performance, a remedy not possessed by the common law and which it is powerless to prevent. See *supra* note 14.

<sup>21</sup> See Cook, *Equitable Defenses*, in Re 38, 44; Kharas, *A Century of Law-Equity Merger in New York*, in Re 65, 75.

tempered judicial discretion illuminated by moral principles. "Moral concepts were first made into equitable principles and then into rules of law"<sup>22</sup> when their inherent persuasive force coerced acceptance by courts of law. In this view, Equity is a mode of giving morality a juridical character.<sup>23</sup> This view presupposes that there is some objective morality which needs only a strong and duly authorized Chancellor to be made effective and operative in a particular case. Equity in the abstract, therefore, is a process, and the Chancellor is the human agency to accomplish the process. If the general rule of the strict law does not provide justice, Equity will step in to fill the gap. Sometimes this thought is expressed by saying that the Chancellor enforced "natural justice."<sup>24</sup> This view has been criticized as a "will-of-the-wisp of Stoic speculation or Grotian dogma which once held sway over the minds of men."<sup>25</sup> But even this critic admits that "in part . . . equity represents higher ethical standards"<sup>26</sup> — which seems to be just as much of a "will-of-the-wisp" as "natural justice."

Whether the wellspring of Equity be viewed as "natural justice," "higher ethical

<sup>22</sup> Emmerglick, *A Century of the New Equity*, in Re 53, 59.

<sup>23</sup> That this was true historically seems amply demonstrated by Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 L.Q. REV. 223 (1955). At 230-31 the author states: "The duties of conscience, as determined by Christian ethics, thus became the standard by which the judge had to assess the obligations of the parties. The positive law alone could not be decisive. . . ." And at 238: "The Chancellors used their learning of canon law to give a new legal shape to an existing jurisdiction."

<sup>24</sup> 1 POMEROY, *Equity Jurisprudence* § 67 (5th ed. 1941).

<sup>25</sup> Patterson, *What is Equity?*, 9 A.B.A.J. 647 (1923).

<sup>26</sup> *Id.* at 648.

standards," or the like, we are inevitably led to philosophic inquiry as to the contents of such concepts as "justice," "morality," "good faith," "honesty," and "conscience" — ideas which mean much to thinking men of whatever age or station. These ideas are intuitively perceived by the great mass of men, and, while it may be possible to go far in defining and ordering them in a philosophic system, the important point is that they are workable concepts even if not precisely defined. They are "felt necessities," to use the phrase of Holmes. And the people, not the judges, are the ones who first "feel" these "necessities" or moral aspirations.

Under the common-law system as it originated, the opportunity for translating these felt moral mandates into law was rigidly circumscribed by jurisdictional and procedural limitations. But even under that system new principles were planted and grew.<sup>27</sup> The Chancellor was much more successful in improving the law, although in consulting his own conscience and making his decree equivalent to *arbitrium boni viri*, he was subject to the criticism that Equity varied with

<sup>27</sup> E.g., Case of the Humber Ferry, Y.B. 22 Assizes 9 (1348). Keigwin calls this case "a very sensational advance upon the older law; but it does not appear that the court took this step upon the recommendation of any dignitary dispensing the equity of that day." Keigwin, *The Origin of Equity*, 18 Geo. L.J. 299, 326 (1930). His comment clearly indicates the view that Equity is a process for the improvement of the law and that the particular way in which this process is put into operation (by the Chancellor under the older system; by a unified court under the newer system), is not so important as the process actually being in operation. For a modern example of judicial improvement of purely "legal" doctrine, see MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), opinion by Cardozo, J., and the discussion of this case by Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 376 (1939).

the length of the Chancellor's foot. The exercise of discretion necessarily injects a certain degree of uncertainty into the law, but if that is the price of progress, we must live with it. The system which is most certain is the system which is completely static. It is still possible for men to plan their affairs with adequate certainty, even though they are subject to review by courts anxious to do the most perfect justice according to the present state of moral knowledge. Further, knowledge of such review would cause increased speculation and awareness as to what is right and what is wrong under given circumstances. In other words, all citizens have the duty to be good citizens. Ignorance of the law does not excuse in the criminal field; it is not going too far to require good faith and conscience as factors in all civil transactions, and to employ them as standards of decision when these transactions are subjected to the judicial power.

There has been no recent attempt, however, to connect Equity with a moral system which everyone recognizes and accepts. Perhaps this is too great a task in this time of divergent philosophies. Only the earlier Chancellor had no trouble equating Equity with morals. And that was in a time when, in the main, there was but one philosophy, that of the Western world into which had been drawn the best of the Roman, Greek, and Judaic traditions as refined by Christianity.

Some twenty years ago Max Radin wrote a brilliant essay in which he traced the historical and conceptual development of Equity as a legal dynamism from the *ἐπιείκεια* of Aristotle through its Roman manifestation, *aequitas*; to its English formalization. He showed that to Aristotle *ἐπιείκεια* was a "straightening out of the law in those places

where it fails because of its general character."<sup>28</sup> It is different from and superior to justice according to law. This is "a logical concept, sufficiently abstracted from . . . time and space to be as much entitled to the epithet of eternal as law itself."<sup>29</sup> But,

. . . in ordinary Greek, ἐπιείκεια become almost unqualifiedly the virtue which we have in mind when we say "kindness" or "clemency," of which the *hesed* of the Old Testament, the Χάρις of St. Paul, are extreme and one might say . . . exaggerated forms.<sup>30</sup>

While the Romans gave ἐπιείκεια the popular meaning of *clementia* or *miseriordia*, their development of *aequitas*, the *aequum et bonum*, was not equated with *clementia*. The quality of compassion was put to one side and Roman *aequitas* accepted "the function which Aristotle declared ἐπιείκεια to perform, that of straightening out the law and filling its ellipses."<sup>31</sup> According to Radin, Roman *aequitas* gave justice "a new goal to climb to," and did not, "like the popular ἐπιείκεια sacrifice consistency to . . . compassion."<sup>32</sup>

In its original form in England, Equity was not fettered by any procedural distinction from law. Thus:

The early common law courts which boasted of giving a writ for any demand certainly administered what they, as well as canonists and civilians, would have called equity. But toward the end of the thirteenth century this power of giving writs became restricted and courts could no longer profess that the law they announced was still flexible enough to follow the path of equity, even when the path was clear.

It was under such circumstances that direct application, made to the council and

chancellor for a relief that the law did not give, could put itself on a little stronger basis than a mere clamor for an act of grace. . . . The king's courts proper had given up their power to transform law into equity. And the idea of equity thus abandoned by its proper parents could therefore be absorbed by the newer and more malleable jurisdiction of the chancellor.<sup>33</sup>

#### And conceptually English Equity

began as a real ἐπιείκεια, a reservation of the power in the king's council to make exceptions in the name of mercy and compassion. The chancery extended and regularized its jurisdiction, rationalized and organized it or part of it, and proceeded as though Roman *aequitas* and Greek ἐπιείκεια were the same.<sup>34</sup>

This coupling of Equity as a supplement to the common law and Equity as an appeal for compassion gave English Equity a unique character in its origin. Later it performed solely a supplementary function which became systematized, with the result that a hardening process set in. Thus the true spirit of Equity, in many instances and over long periods, did not illuminate and animate the bench and bar as in its earlier days. This has not gone unobserved.<sup>35</sup>

One of the great deterrents to the equitable growth of our law and to an understanding of Equity in the abstract has been the cart-before-the-horse idea that in Anglo-American jurisprudence remedies create rights. Unless the common law is completely irrational, there must be some principle of decision, right or wrong, before there can be any decision at all. In more ancient times, no writ could have been procured from the

<sup>28</sup> Radin, *A Juster Justice, A More Lawful Law*, in *LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY* 537, 541 (Radin ed. 1935).

<sup>29</sup> *Id.* at 542.

<sup>30</sup> *Id.* at 545.

<sup>31</sup> *Id.* at 551.

<sup>32</sup> *Id.* at 555.

<sup>33</sup> *Id.* at 560.

<sup>34</sup> *Id.* at 562.

<sup>35</sup> Many of the articles in *Re* demonstrate this. In addition, see Pound, *The Decadence of Equity*, 5 *COLUM. L. REV.* 20 (1905); Radin, *supra* note 28, at 563; Stevens, *A Brief on Behalf of a Course in Equity*, 8 *J. LEGAL ED.* 422 (1956).

Chancery unless the Chancellor saw some merit or morality in the plaintiff's application.

This idea, however, has lately received new expression in England. Sir Raymond Evershed, M.R., in a lecture on the fusion of law and Equity, first mentioned the provision of the Judicature Act of 1873 which provided:

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 common law with reference to the same matter, the rules of equity shall prevail.<sup>36</sup>

Sir Raymond stated that it was erroneous to interpret this as meaning a right in the new court

to apply and, where necessary, to extend the rules of equity as to supersede the rules of common law, and by use of the equitable remedies, particularly the remedy of injunction, to create altogether new rights even though they involve the supersession of well-established common law principles.<sup>37</sup>

And further:

The function of equity was not . . . to destroy or supersede but to fulfill the common law; not so much to correct it as to perfect it. . . . [A]nd, in performing its function, the main contribution which equity had to make . . . was by way of the . . . remedies it provided.<sup>38</sup>

Implicit in this statement are two notions: first, that fulfillment can always be had without supersession; and, secondly, that the only thing the Chancellor had to offer was such weapons as the injunction. The first is not necessarily true as a logical matter and was questioned by Sir Henry Maine as

<sup>36</sup> Judicature Act, 1873, 36 & 37 VICT. c. 66, § 25(11).

<sup>37</sup> Evershed, *Reflections on the Fusion of Law and Equity After 75 Years*, 70 L.Q. REV. 326, 326-27 (1954).

<sup>38</sup> *Id.* at 328.

a practical matter.<sup>39</sup> Concerning the second, it may be stated that the Chancellor had something much more fundamental to offer. He could propose the right view of the case, deriving this view from a storehouse of moral principles which the common law either could not or would not use, or would not use extensively. This was his most important contribution, and the remedy he devised was only a means of making his determination effective. His "law" preceded his remedy.

Sir Raymond elaborates his ideas further in his lecture. One passage in particular is well worth quoting:

[W]ith our system the influence of the remedy is of very great importance because of the absence of any code of rights. With equity this has been of most remarkable significance. Let me remind you of the speech of Lord Parker in . . . *Sinclair v. Brougham*, where he pointed out that, in the course of the growth of equity, what had started as being no more than the grant in a number of similar cases of a particular remedy had ended in the creation of rights—a principle of which perhaps the most obvious instance is the trust.<sup>40</sup>

Of course, the answer to this is that some principle must have guided the Chancellor in his decision to provide the remedy in the first of the line of similar cases. If this were not true, he would not have been acting rationally.

Closely allied to the doctrine that equitable remedies created equitable rights is the view that identifies the essence of Equity with a system of remedies.<sup>41</sup> It is true that

<sup>39</sup> MAINE, *ANCIENT LAW* 65-69 (3d Am. ed. 1887).

<sup>40</sup> Evershed, *supra* note 37, at 331. Lord Parker's speech is reported in *Sinclair v. Brougham*, [1914] A.C. 398, 441-42.

<sup>41</sup> Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741 (1934). In speaking of fusion, he states at 747:

In an indiscriminate "fusing," or an indiscriminate



Equity is a process, but it is a process of a far broader and more important kind than procedure, even when this is taken in its widest possible sense. Equity viewed as a process accomplished the conversion of morality into law; procedure is merely the

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inate borrowing, these principles are likely to be lost. . . . [T]hat the ethical tone which marked equity at its best should be lost, would be a great harm. That the principles guiding the administration of equitable relief should be lost would be a calamity. There is room for both law and equity in the legal system.

So far so good, but farther on, at 749, the author reverts to the idea that rights are created by remedies when, in speaking of the proper place of Equity in the legal curriculum, he states: "[P]lace equity where it belongs and where it has always belonged, under Procedure. . . . [T]he driving force of equity has always been procedure and will remain such." Professor Bordwell recognizes, at 748, the dynamic character of Equity as the "forward element in the law," but the identification of Equity with procedure or remedies is unfortunate.

means of recognizing the conversion in a particular case, be it frequent or infrequent in type. Hence Equity is different from and superior to procedure, just as it was proved the superior of the rigid common law. Equity is a dynamic factor which must pervade all branches of our substantive law, Torts, Contracts, Property, and the like, if the law is to progress.

While the historical development and differentiation of law and Equity must ever be kept in view by the American lawyer, it is also essential to bear in mind a clear notion of Equity as a dynamic process, stripped of its accidental historical growth in Anglo-American law. Only in this way can Equity, in this time of procedural identification with law, be made to perform its necessary and salutary function. The capacity to do equity should be regarded as an inherent attribute of judicial power.

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