SACRED EQUITY or WHY EQUITY IS NOT AS LONG AS THE CHANCELLOR'S FOOT AND HOW PRACTITIONERS CAN MAKE USE OF IT

On equity rests the good fortune of the Realm. Since its inception around the 13th century, equity has always remained a vexatious thorn in the side of common law and statute. From depriving the fruits of title to land through to intricate tax avoidance schemes, trusts are one such of equity's daughters who is much the source of bitter envy against legal authorities. John Seldon unfairly criticised equity 'as long as the Chancellor's foot'. We may forgive the mistaken bystander from believing equity to be as such; akin to a moral dance over the ages: changing fashion depending on whomever holds that most ancient and noble of high offices of State. And yet, if we begin to understand the high Mediæval ecclesiastical mind behind equity — rich in the wisdom of St. Thomas Aquinas, St. Augustine and ultimately Aristotle — the observer and practitioner of equity will come to learn equity the confused beast is actually equity the perfectly rational personification of Aristotelean natural law. To fully appreciate this, we must turn to the case upon which equity's survival today rests, and that is, of course, the *Earl of Oxford's Case*[1]; a case which remains with neutral determination and thus is good law. By turning to the facts behind the jurisprudence on page 486 of the judgement, we shall come to see why Lord Ellesmere was right to say equity can only be understood as that of the law of God for those disproportioned, that of good conscience and that of the dual jurisdiction and moderation of common law. It is these arguments that will be our headings and in exploring them with what brevity allows come to learn that there is so much more available to practitioners when we release the caged lion that equity has become.

The arm of God

The first point turns to God's authority. Now this is a controversial enough topic as it is; not only from the Catholic and Protestant stranglehold for English jurisprudence since the Reformation but the further competition other religions like Islam and Hinduism and even growing secularism have in empowering the force behind equity and England's laws overall. There is no denying Christianity

[1] (1615) 21 ER 485

had a part to play in founding the English legal system. How much it remains is open to debate beyond the scope of this discussion. Nevertheless, to understand equity, we must turn to the 13th century: an era of Scholastic revival in the inductive natural law across seminaries in Europe. Key to it all was the school of Saint Dominic; led competently and thoroughly by Saint Thomas Aquinas from Rome. Rediscovering Aristotle, the Church developed a new way of seeing the faith and ultimately our relationship with authority: the chief of which was God, and His with us. God was no more a purely mystical force to solve man's insufferable problems through hard prayer and random miracles. God had, and became, limitation. A limitation governed and equivocal to reason. In particular, inductive reason. It was this logic that came to realise that there were certain qualities of the common law which were contrary to prudence. That is, the right action for the right circumstances overall. The classic example is the impoverished crusader lord who returns from the Holy Land only to find the land, hereditaments and tenements he gave to his steward, brother or friend now becoming inalienably the property of another without recourse. As such, the law turned to the Church and the Church to equity. That is, is the common law always right? And is there a tenable way out? And so came the use, and from the use the modern trust. This had nothing to do with precedent and well founded exploration of technical legal issues. This was a mere matter of common sense. Played out, 'this is my land and I'm going away for a while. Why should my absence forfeit my rights to property?' The anxiously useful questions of the crusading lord or modern investment bank. Well, the Holy arm of equity here is that it balanced natural imbalances. The landowner is deprived of his land and thus deprived of his rights. The steward is now owner of the property, and he knows that this should not have, nor was it interned, to happen. Balancing excesses and deficiencies is not the work of the common law: the task here is following precedent. Achieving the golden mean is the work of Aristotelean logic. A logic that was developed in the 13th century and a logic that aimed at providing a universal golden mean in all areas of public life to achieve that *summum bonum* of St. Thomas Aquinas which in layman's terms we would understand as God's will or being at one with God or in harmony with nature. Whatever our view on faith, this is a vital argument for understanding equity's true intention. If we are to use the tool of equity as it was designed — rather than as a joint demand to common law — like God it must be as a force readily understood by all; that works outside the ambit of man-made creation like case law but which serves an ultimate and complete flourishing of human nature instead of consistently matching former examples to achieve one man's liberty.

The arm of conscience

It is on this point of human virtue that we turn to the second arm of equity: conscience. Of course, the Aristotelean notion of conscience so readily available in the 13th century is inextricably linked to the soul. Again, the Aristotelean notion of soul: a faculty of distinguishing rights from wrongs by careful reasoning not by following the precedents of common law but the virtues of a case. Cicero, that other great giant of equity, did much to crystallise the cardinal virtues behind equity in helping us to understand its true use. Those are courage, justice, temperance and wisdom. That is, what decision requires the greatest voluntary effort to overcome the greatest fundamental challenge? As before on God, how do we balance right from wrong through managing excess and deficiency? What is the most restrained and deliberate decision? What source covers all the relevant facts: not only legal but wider political and economic considerations of a judicial decision? Exploring the early application of equity — especially on uses — we see these principles, rather than concepts like precedent and legal issues, taking the fore in judicial action in the Court of Chancery. Post Reformation, equity comes heavily under fire: at first for being 'papist' and then during the Enlightenment for being 'merely irrational'. Neither view gives equity its just consideration; instead half-ashamedly attempting to drag it kicking and screaming from the altar to the dignified crèche of common law. To help unravel this conflict, we have to turn to the works of Friedrich Nietzsche who has much (though only by implication) to say of equity. Nietzsche understood the high Mediæval Church's mindset was geared towards stability. A successful, rational society that married facts as they were with irrefutable laws of nature. The one most famously bourn by Nietzsche, and most relevant for us in understanding the conscience of equity, is the *will to power*. The idea, based on nature, that in accepting our failings and striving towards them voluntarily — Christ like carrying our own cross to rebalance excess and deficiency — justice is best brought to society. Sometimes rules, like the common law and statute today, set up more obstacles than they believe they intended to solve. The conscience of equity is the blow touch to melt that rigid ice and keep the water of justice flowing for the benefit of all. What Lord Eldon described as a moral force correcting the law. Especially when we work towards a common objective; which ADR is leading in for bringing about dialogue and shared vision against parties but which the common law, and the system equity misguidedly finds itself in today, offers only through the successor to trial by combat.

Equity's marriage to common law

Having addressed the first two arms of equity, we turn to the final arm, and that is its interrelationship with common law. We are all familiar with the Normal inception of common law. How King William I introduced a system to universalise principles and precedents once controlled by the varied jurisdictions under Anglo-Saxon law. So what is the point of equity? Surely a universal system would eventually filter good from bad and achieve as close as possible to perfect justice as human nature would allow? In theory, a noble idea. In practice, one that the 13th century church realised was not the case. The earlier example on uses stands proof to this. As does Lord Mansfield's learned judgment in *Moses v. Macferlan*[2] on unconscionable behaviour in promissory notes; again harking back to Aristotle's balancing act of excess and deficiency and how the result of this decision will benefit not only the individual, as Mr. Moses had in this case, but the whole of society too. A position the common law would have been quite unable and discomfortable in achieving through its strictures. So let us ask the other question: why not do away with common law? Well, that would be just as disastrous! Whilst the source of equity is natural law, natural law makes no sense without facts to apply it to. Just like mathematics to accounting or essence to matter in a definition, natural law needs a host. It needs experience. This is why highwaymen, pirates and terrorists validly have codes amongst themselves — deformed variations in part of equity — but far from meeting the true natures of human experience. The beauty of common law is its flexibility to adapt to the actual experience of man in his distinct ages. And yet, when it goes awry, the mothering hand of equity brings the law back in line with nature's example. There is an argument that equity has had its day. After all, the child will succeed the parent and the apprentice the master some day. But unlike these authority figures, equity is, by its nature, eternal and can never be succeeded. But common law remains an ever evolving pupil: hungry, curious and sympathetic to adapt to the fashions of its times whilst balancing the traditions of its past.

We could bring statue law into this balancing act; although, at this time, all we can say of statute law is how, at best, it is superfluous to the equation; at worst, obstructive. After all, there is a reason why Lord Ellesmere and Sir Edward Coke in *Dr. Bonham's Case*[3] relegated statute to the bottom of the judicial authority pile. The Bill of Rights 1689 claims there is no higher authority than Parliament itself and even Blackstone in his First Book on the Commentaries of the Laws of England misguidedly declares as such. But if we read into the Act, its reasoning seems to be

[2] (1760) 2 Bur 1005

[3] 8 Co. Rep. 107

Parliament is the highest authority because we say so. A more democratic version of Louis XIV's maxim '*L'Ét at, c'est moi*'; and this, of course, is distinguished from common law's prudent steps to mirror human behaviour and equity's immutable and unequivocal jurisdiction. We need not recall the statutes over the ages which have proven quite obstructive to state progress.

What is equity and how do practitioners use it?

So in exploring the *Earl of Oxford's Case*, we have attempted to answer the question what equity really is and how should practitioners apply it to make the most of its utility. The personification of natural law, equity is the corrector to common law; as common law was and should remain the corrector to those opinions with swords behind them we call statute. Of course, the English system far exceeds the civl law; which is statue on steroids: burning the opinion of political factions into law with great difficulty to adapt to changing needs like common law. All the same, equity's Mediæval moral origin reveals that equity must not freeze into a slightly more flexible version of the common law: painfully brought about by the Judicature Acts of 1873 and 1875. Instead, equity should feel free to make judgements based on moral passions highly in conformity to achieving fulfilment, or *eudaemonia*, of as many of the Aristotelean intellectual, spiritual, physical and public virtues as possible: free from consideration of precedent and party political opinion. In light of this, we may safely say that equity is not determined by the length of the Chancellor's foot but a flexible and deeply rule based system that gives legal practitioners the flexibly they need to solve novel problems which statute, and then common law fails to answer.

If a practitioner is interested in using equity correctly, I recommend the works of Aristotle, Cicero and the authorities of the Roman and Cannon law to begin to understand what virtues make up equity.