Lecture One:

Legal History

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American Law in a Global Context

The Triumph of Equity

SIXTEEN

The Triumph of Equity

Developed over centuries, in response to specific problems, the common law forms of action are multiple and overlapping. Even a system as seemingly unified as the estates in land is hardly a system of logical unity. The estates in land are complicated and do not resolve all interests in property; other rules—for instance, to govern warranty by the owner in sales or leases—were not resolved by the common law until prompted by modernizing statutes in the twentieth century.

The courts of equity were a distinct legal system that developed out of the office of the king called the chancery. The initial judge of equity was the chancellor. The origins of equity—drawn mainly from Roman law, canon law, and judicial prudence—are still debated, but by the fifteenth century it was a firmly established jurisdiction and body of law that competed with the common law. Its most important differences from the courts of law were three:

1. The purpose of equity was to correct the common law in the way that Aristotle described the idea of *epieikeia*: "[The] law is always a general statement, yet there are cases which it is not possible to cover in a general statement." This purpose of correcting the common law in particular cases

was sometimes expressed as seeking to realize the spirit as opposed to the plain letter of the law.[1]

The major critique of equity was that it was uncertain and therefore contrary to the requirement of law as the fair and precise regulation of private rights. The liberal view of law, as expressed by Immanuel Kant in his *Philosophy of Right* (1797), is that the law must be well defined and equally available to all. The danger of equity is that its decisions would vary as John Selden said, "with the length of the Chancellor's foot."

2. The courts of equity operated by commanding the defendant to engage in a particular action. The common law operated by granting a judgment, usually for an amount of money, called *damages*.

3. Courts of equity operated without juries. The chancellor or the judge in equity decided the case as does a civil law judge, by resort to principles, called "maxims," often enunciated in general principles, with a diminished influence of precedent. Juries were essentially limited to cases that arose under the common law.

Law and equity are unified today in what appears to be a single body of law, but in fact each remedy in the law continues to conform either to the principles of law or to the principles of equity. This has led to some overlap and to choices for lawyers that arise in conditions of overlapping opportunity to resolve disputes. Equity functions by commanding a specific act, such as specific performance of a contract. The command was eventually (and still is) expressed in an *injunction*. This has resulted in overlapping remedies in many cases. Suppose that A brings a lawsuit against B in Oregon on the basis of an incident that occurred in New York. A does this simply because he wants to make it difficult and expensive for B to defend himself in the lawsuit. B can request a dismissal of the action on the grounds of *forum non conveniens*. An alternative remedy for B would be to go to a court in New York and petition for an injunction against A's suing him in Oregon. The injunction would not cancel the Oregon lawsuit, but if A disobeyed the injunction, the New York court could imprison him for contempt of court.[2] The likely reso-

[1] On the Aristotelian idea of equity, see the superb essay by Paul Vinogradoff, "Equity," in his *Common-Sense in Law* (New York: Henry Holt and Co., 1946).

[2] On the contempt power, review the discussion in Chapter Eleven.

lution would be that the judge in New York could decide whether to grant the injunction. The case would not go to a jury.

The dramatic problem in the evolution of the law was, Which body of law was superior? Would equity rule, or would the common law remain supreme? The following materials document the resolution of this conflict in the early sixteenth century:

Excerpts from Julius Goebel,

The Development of Legal Institutions (1930):[3]
The Contest with Chancery.

Introduction

None of the common law courts' battles was more bitterly fought, and none was more dramatic than the fight with Chancery after (Sir Edward) Coke was elevated to King's Bench in 1613. To comprehend the real issue at stake we must remember the position of the Chancellor at the opening of the 17th century, and his intimate relation with the King. Remember also that the Chancery does not proceed according to the course of the common law, but its principles of practice and justification are derived from other sources, including ecclesiastical law. Chancery assumes the right and power to open up final judgments of the common law courts. This right Coke denies. The issue is a battle for the principle of *res judicata*.

Spence, EQUITY JURISDICTION.[4]
Volume I, pages 673–676

The most frequent exercise of the jurisdiction of the Court in granting injunctions, was to restrain proceedings at law. It must have been very soon found that without such an interference, it would be impossible for the Court to carry out the jurisdiction it had assumed, of controlling the law on the principles of equity and conscience. Accordingly, from the time of Henry VI (1422–61, 1470–71) downwards, we find numerous instances of the granting of such injunctions. These injunctions were enforced not only against the parties and their solicitors, but their counsel also, as we learn from the cases of Serjeants Glanvil and Powtrel, and of "Master Robert Snagg." The Chancellors having, as before noticed, persevered in granting injunctions to restrain proceedings at law even after judgment; their right was vehemently opposed in the time of Edward IV (1461–1470, 1471–1483). In one case, 21 Edward IV, Fairfax held that the Court of the King's Bench had the power of granting injunctions to restrain parties from resorting to any means of delaying actions, even before judgment, in cases within the jurisdiction of the Courts of Common Law; but the Court of Chancery, as we learn from subsequent authorities, still continued to restrain proceedings at law by action on the case, where a bill was filed in that court for specific performance. In the 22 Edw. IV., Hussey, C.J. of the King's Bench, and Fairfax, J., in the case then before them, declared, that as for the penalty that could not be recovered, and if the Chancellor shall commit any of the parties, the judges would release them on their being brought up before them by *habeas corpus*: Fairfax, however, said he would go to the Chancellor, and endeavor to persuade him to withdraw the injunction; but the Chancellor appears to have been inflexible, and the exercise of the jurisdiction was continued.

The jealousy of the common law judges against this jurisdiction displayed itself again in the reign of Henry VIII (1509–1547); indeed, Robert Wolsey, when Chancellor, appears to have been rather unscrupulous in granting injunctions. Sir Thomas More endeavored, by a conference with the judges, to allay this jealousy; however it broke forth again in the reign of Elizabeth, and a barrister was indicted in the Court of King's Bench under the statute of praemunire, for exhibiting a bill in Chancery for an injunction after judgment of law in that court.

In the reign of James I (1603–25), there was an open rupture between Lord Ellesmere and Lord Coke as to the right of the Courts of Chancery to grant injunctions after judgment. That sovereign took upon himself to settle the matter. For that purpose he desired the attorney-general, Sir Francis Bacon, and the king's counsel to certify what had been the ancient practice in the time of his predecessors. They accordingly certified, that in the time of Henry VII, Henry VIII, Edward VI, and Mary and Elizabeth, there has been a great many injunctions granted after judgement in actions of different natures, real

[3] Julius Goebel, *Cases and Materials on the Development of Legal Institutions* (New York: Columbia Law School Press, 1931).

[4] George Spence, *The Equitable Jurisdiction of the Court of Chancery* (Philadelphia: Lea and Blanchard, 1846–50).

and personal, in the king's several Courts of the King's Bench, Common Pleas, and the Justices in Eyre. King James (14th July, 1616), on this certificate ordered that thenceforth the ancient practice as so certified should be continued. In 1655, the Lords Commissioners held, that where there was an original equity arising out of the nature of the transaction, which was not properly cognizable at law, that the party was not estopped by the verdict from seeking relief in the Court of Chancery, and the Court has since interfered, even after execution executed. . . .

Though injunctions were granted by the Court of Chancery to restrain proceedings in the Ecclesiastical Court, and in the Exchequer, the Court of Chancery would not permit those courts, or any other court, to restrain any one from proceeding in the Court of Chancery—"No court can hinder the point of equity in this court." So that the King's Bench injunctions and prohibitions, if any such were issued, must have been disregarded.

The struggle between Edward Coke as chief justice of the King's Bench and Lord Ellesmere as chancellor came to a head in the following dispute:

Courtney v. Glanvil

Easter Term, 12 James I (1614).
In B R. Cro. Jac. 343.[5]

[Glanvil sold Courtney a topaz misrepresented to be a diamond and other jewels for 360 pounds rather than the 20 pounds they were worth. Courtney gave a bond to secure payment for the full amount with bond by Hampton for the full amount, which Glanvil planned to collect through a fast claim on the bond in court, which was granted. Courtney learned of the plot and went to chancery court himself to

[5] Everyone with a proper education in England is supposed to know that James I began his reign in 1603. "B.R." is *Banco Regis*, or the Court of Kings Bench. "Cro. Jac." is the abbreviation for *George Croke's Reports from the Reign of King James*, where this report appeared on page 343.

set aside the grant of the claim on the bond. After an initial refusal of relief, the chancery court awarded Courtney a rescission of the sale, allowing Glanvil to keep the rock and 100 pounds but ordering Courtney to release Hampton from any claims. Glanvil did not make the release, and the chancery court ordered him imprisoned. Glanvil then sued in the King's Bench, a law court, seeking his release.]

Glanvil was committed to the Fleet (in prison for civil contempt) the last day of Michaelmas term, 11 James I (November 29, 1613) for not performing a decree in Chancery; and upon a habeas corpus returned, the case was informed to be thus:[6]

Glanvil sold to Courtney, being a young gentleman, a jewel, which he pretended to be of the value of three hundred and sixty pounds, whereas in truth it was worth but twenty pounds, and three other jewels to the value of one hundred pounds; and for his security he took a bond of six hundred pounds in the name of one Hampton, and procured an action to be brought in the said Hampton's name, and the action to be confessed, and Glanvil paid all the charges of both parties, and the confession was out of Court in the vacation.

Courtney finding this deceit, that the jewel was not worth above twenty pounds, which was delivered to him at the rate of three hundred and sixty pounds, exhibited his bill in Chancery for relief, and afterward brought a writ of error to reverse this judgment; but the judgment was affirmed.

Afterwards, upon a hearing in Chancery, it was decreed, that Glanvil should take again his jewel and one hundred pounds, and that he should procure Hampton to release and acknowledge satisfaction: and for not performing this decree he was imprisoned.

Coke, Chief Justice, said, that this decree and imprisonment, being after a judgment at the common law, was unlawful, and that this Court ought to relieve him; and for proof he cited a judgment in Easter Term, 5 Edw. 4 Roll 35. *Cobb v. Moor*, where Cobb procured an action of debt to be brought against Moor, and the action to be confessed by attorney, and a writ of error to be brought thereupon, and the judgment to be affirmed; and all this was done in the absence of Moor, who, being beyond sea, upon his return exhibited his bill in Chancery, to

[6] Habeas corpus is the writ at law that requires the jailor to "produce the body" and justify the confinement.

be relieved concerning this practice, there being no debt due: and it was resolved, that after a judgment at the common law he could not be relieved there, but was inforced to deliver his bill in Parliament. And there was a special Act made for his relief. He also cited another precedent in Michaelmas term, 39 and 40 Eliz. *Sir Moyle Finch v. Throgmorton*. . . . An action was brought, and upon special verdict, the question being upon a lease for years by the Queen, rendering rent, and for non-payment to be void. In 3 Eliz. Sir Moyle Finch purchased the reversion, and entered for non-payment of the rent in 9 Eliz. And because it was resolved to be a limitation, and to be a lease void without office, and that the patentee might avoid this lease, and was judged accordingly, and this judgment affirmed in a writ of error; Throgmorton afterwards exhibited a bill in Chancery, complaining, that at the same time that the default of payment was in 9 Eliz. He did send the rent by his servant, who was robbed thereof; which when he knew, he paid it immediately the day after, and that the Queen accepted thereof; and that he continued the payment until 30 Eliz. When the Queen sold it; and that the Queen sold it as a reversion; and charged with this lease; therefore it was against conscience that the patentee should avoid it. And to this bill Sir Moyle Finch pleaded the proceedings at the common law and demanded judgment, if he might now proceed in a Court of Equity. And all the Judges of England were hereupon assembled, and these matters debated before them; and resolved by them all, that although the said bill comprehended much matter of equity, and there was very good cause he should have been relieved, if he has complained before the judgment obtained at the common law, yet now having suffered a judgment at the common law, although it were by way of defence, he comes too late to be relieved in a Court of Equity; and cannot now examine any pretence of equity after a judgment at the common law.—Wherefore Coke and all the Court held her, that the party ought to be bailed; and then let him to bail unto the next term, and he was then discharged. Vide 22 Edw. 4 pl. 37.

These are the moves in the chess game: (1) Glanvil got a judgment at law requiring Hampton to pay the bond; (2) Courtney got a decree in equity restraining Glanvil from enforcing his judgment; (3) Glanvil refused to obey; (4) Equity ordered the imprisonment of Glanvil for civil contempt—he should be kept in jail until he performed—and (5), on a writ of habeas corpus, Coke orders the release of Glanvil. Now what will happen?

Argument Proving from Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery

1 Chan. Rep. App. 1-49

A question raised in the Court of King's Bench, Whether after a judgment given at the Common Law, the Chancery could in any case give relief in Equity? Or, Whether it were not debarred thereof by the Statutes of 27 E. e, cap. 1, and of 4 H. 4, cap. 23. . . .

His said majesty being informed of this Difference between his two Courts of Chancery and King's Bench, and being informed that there were many Precedents in the Chancery in the times of King Henry VII (1485–1509). And continually since, whereof a Note was delivered to his said Majesty, That such as complained there to be relived in Equity after Judgments at Common Law, (in Cases where the Judges could not relieve them) directed, That his Attorney General, calling to him the Rest of his Learned Counsel, should peruse the said Precedents, and certify his Majesty the Truth thereof with their Opinions.

Whereupon they returned to his majesty this answer as followeth:

According to your majesty's Commandment we have advisedly considered of the Note delivered unto us of the Precedents of Complainings and Proceedings in Chancery after Judgments at Common Law; and have also seen and perused the Originals, out of which the same Note was abstracted; upon all which we do find and observe the Points following: . . .

The Case

A. hath a Judgment and Execution in the King's Bench or Common Pleas against B. in an action of Debt of 1000 £, and in an *Ejectione Firmae* of the Manor of D. B. complains in the Chancery to be relieved against these Judgments according to Equity and Conscience, allowing the Judgment to be lawful and good by the Rigour and strict Rules of the law, and the Matter in Equity to be such, as the Judges of the

Common law being no Judges in Equity, but bound by their Oaths to do the Law, cannot give any Remedy or Relief for the same, either by Error or Attaint, or by any other Means.

Question

Whether the Chancery may relieve B. in this or such like Cases, or else leave him utterly remediless and undone? And if the Chancery be restrained herein by any Statute of Praemunire, then by what Statute, and by what Words in any Statute is the Chancery so restrained, and Conscience and Equity excluded, banished and damned?

Which Case his majesty referred again to his said Attorney and Learned Counsel, calling to them the Prince's Attorney, who returned this Answer. . . .

Upon which Certificate the King gave his Judgment as followeth.

Forasmuch as Mercy and Justice be the true Supporters of our Royal Throne, and that it properly belongeth unto us in our Princely Office to take Care and provide, that our Subjects have equal and indifferent Justice ministered unto them: And that where 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 Rigor and Extremity of our Laws, We in our Princely Judgment having well weighed and with mature Deliberation considered of the several Reports of our learned Counsel, and all the parts of them, do approve, ratify and confirm, as well the Practice of our Court of Chancery expressed in their first certificate as the Opinions for the law upon the Statute mentioned in their later Certificate, the same having Relation unto the case sent unto them by our Chancellor: And do will and command that our Chancellor, or Keeper of the Great Seal for the Time being, shall not hereafter desist to give unto our Subjects, upon their several Complaints now or hereafter to be made, such Relief in Equity (notwithstanding any Proceedings at the Common Law against them) as shall stand with the Merit and Justice of their Cause, and with the former, ancient and continued Practice and Presidency of our Chancery have done: And for that it appertaineth to our Princely Office only to judge over all Judges, and to discern and determine such Differences, as at any time may and shall arise between our several Courts touching their Jurisdictions, and the same to settle and determine, as we in our Princely Wisdom shall find to stand most with our Honour, and the Example of our Royal Progenitors in the Best Times, and the general Weals and Good of our People, for which we are to answer unto God who hath placed us over them; Our Will and Pleasure is, that our whole Proceedings therein, by the Decrees formerly set down, be inrolled in Chancery, there to remain of Record, for the better extinguishing of the like Differences and Questions that may arise in future Times.

Per ipsum Regem 18 July 14, 1616.

Fran. Bacon,[7] Hen. Yelverton

In the end, then, the king decreed that his chancellor should prevail over Chief Justice Coke and his common law. Coke had succeeded in consolidating the jurisdiction of law into a national system of courts, rather than the many local and ecclesiastical courts that had existed before him, and he had won what would be later seen as a victory over Parliament in 1610 when he established the power of the courts to overrule an act of Parliament on the ground that it violated "common right or reason," which we discussed in Chapter Four. Equity, however, proved a more formidable opponent. Why was that? Because the institutions of equity were tied directly to the king? Or because equity could beat Coke at his own game of linking the common law and reason? Equity appealed to even higher principles of reason and natural justice.

The term *equity* as it is used in Anglo-American law fluctuates among different meanings. One meaning is that we have seen drawn from Aristotle: Equity has the function of correcting hard-and-fast rules by appealing to criteria of natural justice. At the same time, a second meaning of equity locates the concept in a set of English institutions that apply a specific body of law. The courts of equity gradually acquired jurisdiction over certain problems that the law had undervalued. For example, equity supplied relief for fraud and for the reformation of contracts after mistakes had been made in the drafting. In this sense, equity is much more like the civilian concept of "general equity" described by Dean François Gény and followed by French scholars in the interpretation of Article 565 of the *Code civil*, which requires "natural equity."

[7] The opinion is reported by the philosopher Francis Bacon, who became chancellor in 1618.

The most significant legal creation of equity was the idea of equitable ownership of land. This implied that one form of title would be protected at law (legal title) and another form of title protected in equity (equitable title). This was a remarkable idea that first led to a surrogate for the nonexisting systems of wills for testamentary succession. The idea began, it seems, with landowners' granting the "use" of the land to another. Then the use could spring from one person to another. These uses were protected in equity as equitable estates. Thus a primitive mechanism was set for transferring property at death. The use would spring from one person to another at death, and this transfer would be protected in equity. These procedures found statutory recognition and regulation in the Statute of Uses (1535). The Statute of Wills followed in 1540.

Once equitable ownership of land and chattels became institutionalized, the road was open for the significant invention of the trust. The trust is a three-party transaction. The person who sets up the trust is called the *trustor* or *settlor*. This person conveys legal ownership in the corpus of the trust (the *res*) to the trustee to hold and manage the assets for the sake of a third person, the beneficiary of the trust. Thus, if a parent wants to take care of his children without his children having control of relevant assets, the parent conveys the assets to a trustee (very often a bank) to hold and manage for the sake of the children, the beneficiaries of the trust. The bank gets legal title. The children receive equitable title. In civil law countries, one can achieve the same functional result by using contractual mechanisms such as the *Treuhand* under German law.[8]

The trust has become an indispensable instrument of American law, largely because it is so useful in avoiding probate. Probate is illustrated in the case on the rule against perpetuities considered in the previous chapter. When someone dies in a common law jurisdiction, the property does not transfer directly to the heirs. It goes into "probate," which means that it comes under the jurisdiction of a special branch of the judiciary called the *probate court*. It comes under the control of either an executor (under a will) or an administrator (when there is no will), who works with the

[8] The *Treuhand* in Germany is a creation of the courts and the scholars. Except for some special situations (e.g., wills, corporate law), it has no explicit foundation in the civil code. The general definition of *Treuhand* comes quite close to the American understanding of the trust: One can speak of a *Treuhand* when a person is granted rights, which she can dispose of freely but which she is supposed to exercise not in the interest of herself but of other persons or objective purposes.

probate court to make sure that all taxes and debts are paid before the property passes to the beneficiaries designated under the will or under the law (when there is no will). The trust serves to circumvent the role of probate. If the testator establishes a trust, the property remains in the hands of the trustee to distribute according to the terms of the trust. Typically, when the settlor dies, the trustee transfers the property to the beneficiaries. This avoids the cumbersome process of having the property tied up in probate. For this reason, the law of trusts is often taught together with estate planning in a course called "Trusts and Estates." (Note in this latter sense *estate* does not refer to estates in land but rather to the entire wealth of the decedent at the time of death. This is the object of the "estate tax" recently suspended for ten years under federal legislation.)

The notion of equitable ownership has undergone important evolution, largely due to the law of mortgages. In a mortgage transaction, the mortgagor transfers legal title to a mortgagee, who holds the assets as security for a debt. The mortgagee is either a bank or a mortgage company. The mortgagor retains the beneficial use of the property and therefore is analogous to the beneficiary of a trust. The difference between the trust and the mortgage is that the former establishes legal relations among three parties—the trustor, the trustee, and the beneficiary. The mortgage is a two-party transaction,[9] with the trustor and beneficiary united in a single party.

The mortgage has given rise to an important shift in the meaning of the word *equity*. Suppose that you buy a house worth $500,000. You cannot afford the entire purchase price, and therefore you take out a mortgage for $300,000. You borrow that amount from a bank, and, to secure the debt, you transfer legal title to the bank. You pay off the loan by making a payment on the principal, plus interest, every month. In the case of default, the bank will not claim the entire value of the house but merely the amount necessary to cover the outstanding debt. If, at the time of default, you owe only $250,000, and the value of the house has gone up to $600,000, then you have a residual ownership interest in the

[9] This is a slight exaggeration because, in the contemporary law of mortgages, there are many third parties waiting in the wings. These are the investors who buy the mortgage, with the accompanying interest-bearing debt, from the mortgagee. Thus a secondary market—comparable to the securities markets—has developed in mortgages. This has not happened in the field of trusts, where the obligation of the trustee to manage the property is personal and not transferable to third parties.

house. This ownership interest is called the *equity of redemption* because it is analogous to the equitable ownership claimed by the beneficiary of a trust. Thus there has arisen a new way of speaking about ownership in cases where assets are encumbered by debt. If you still owe $250,000 on a house worth $600,000, someone might ask you, "How much equity do you have in your house?" The answer would be $350,000.

This fundamental distinction between debt and equity now provides the foundation for corporate finance. The debt of the corporation is owed to the bondholders. The remaining value of the corporation is the equity, and this is owned collectively by the shareholders. Thus, shares of stock in public corporations are now called *equities*. The word *equity* has come a long way from its origins in the courts of equity. The one-time primitive distinction between legal and equitable ownership is now expressed in the most sophisticated branches of corporate finance.

Equitable Pleading and Maxims

Regardless of whether a plaintiff seeks relief for an equitable cause of action or seeks only an equitable remedy for a breach of a legal duty, the plaintiff must bring the suit, even today, before a court competent to act in equity. In most cases, this is the court of general jurisdiction. Chancery courts still exist in a few states, especially Delaware, which is the home of many of the corporations in the United States and so the source of much U.S. corporate law. In most states and in all federal courts, the courts of general jurisdiction may act according to their equitable powers.

Pleading in equity is now much less specialized than it once was, owing to the adoption of uniform rules of civil procedure. Still, certain pleading matters are special to equity, such as the obligation to plead jurisdiction in equity and the requirement that a plaintiff who seeks pretrial relief of an equitable nature (such as a preliminary injunction) must also seek equitable relief in the end (such as a permanent injunction).

Although precedent plays an important role in equity courts, equitable courts often base their decisions on maxims of equity that acquire their binding force from moral reasoning. There are many maxims, and they must be established either by citation to precedent or to the great books of equity, such as Joseph Story's early-nineteenth-century *Equity Jurisprudence*. A survey of the most common maxims includes the following:

- Equity Suffers No Right to Be Lost nor Wrong to be Suffered Without a Remedy.
- Equity Follows the Law (which is a restatement of the next maxim).
- Equity is Available When There Is No Adequate Remedy at Law.
- Equity Looks to Substance Rather Than Form.
- Equity Regards as Done That Which Ought to Be Done.
- Equity Acts *in Personam*, Not *in Rem*.
- Equity Delights in Doing Justice and Not Just by Halves.
- Equity Abhors Forfeitures.
- Equality is Equity.
- Equity Aids the Vigilant, Not Those Who Slumber on Their Rights.
- He Who Comes into Equity Must Come with Clean Hands.
- He Who Seeks Equity Must Do Equity.

These maxims—as well as the general idea of "balancing the equities," according to which the chancellor will not make an unjust award of too much to one party at the unfair expense of another—persist as the guiding principles for awarding all equitable relief. As principles, they are still subject, at least in part, to their precedential use, but they are also of independent influence in every equitable decree. These ideas are illustrated in the following case:

Malnar v. Whitfield

Court of Appeals of Oklahoma, Division One
1989 Ok. Civ. App. 28; 774 P.2d 1075 (1989).

MACGUIGAN, J.:

[In 1979, Whitfield, a dentist, began to build an office building. Malnar, another dentist, then bought adjoining land. After Whitfield's building was finished but before Malnar began building his own, Malnar discovered Whitfield's building and driveway were partially on Malnar's land. Failing to settle the matter peaceably, Malnar destroyed part of Whitfield's driveway and blocked the rest. Whitfield sued, seeking dam-

ages for the destruction of his drive and an injunction to force Malnar to keep it open. Malnar sought an injunction against Whitfield, to order him to remove the building from Malnar's lands, and for some further damages. The trial court granted Whitfield's injunction, granting him an easement over Malnar's lands but then giving damages to Malnar of $3180 for the value of the easement he had lost. Malnar commenced this appeal, which had already been once to the state supreme court before returning for the final judgment. He also then built an otherwise undescribed "tall structure" to interfere with Whitfield's use of his building, and Whitfield sued again, this time winning damages for indirect contempt of court. Malnar also appealed that issue, which he lost; that discussion is omitted in this excerpt. Note in the opinion, Malnar is called the *appellant*, the one who brings the appeal, or the "adjoining property owner," and Whitfield the *appellee*, the one who defends the lower decision on appeal, or the "property owner."]

Appellant [Malnar] contends that the trial court erred in denying Appellant's request for a mandatory injunction based upon principles of equity.

The Supreme Court in its ruling to remand this case to the trial court in *Malnar v. Whitfield*, 708 P.2d 1093, 1096 (Okl. 1985), stated:

> The other factors which must be considered are the cost of removal, the value of the benefit of removal to be gained by the party requesting the injunction, and the availability of compensation by way of money damages.

Testimony during the course of the trial established that to remove that portion of the encroaching structure and reconstruct that space at another part of the structure would cost between $45,000.00 and $60,000.00. The property was appraised at $140,000.00 at the time of the original trial and, therefore, the cost of removal is a significant part of the value of the building. Testimony reflects that Appellant constructed his building after learning of the encroaching structure, and there is some evidence that Appellant even adjusted his architectural plans to relocate his structure in such a manner as to limit the use of Appellees' structure. There is also testimony that even if the encroaching structure of Appellees was removed, because of the position that Appellant placed his building on the lot, it would be of little or no value to Appellant's structure to remove the Appellees' building. Testimony also reflected that the value of Appellant's lot prior to construction was $35,000.00 and an appraiser determined that the loss in value to Appellant's lot because of the encroaching structure reduced Appellant's fair market value by $3,180.00. Appellant therefore could be compensated by the payment of $3,180.00 whereas it would cost Appellees between $45,000.00 and $60,000.00 to remove their structure. Thus, the trial court determined that granting damages to Appellant was the most equitable method of compensating the parties. The Supreme Court in the original *Malnar v. Whitfield* decision at 1096 stated:

> Once all of those competing equities are laid before the Court, the ultimate determination is largely a matter of an exercise of the discretion of the trial court.[10]
>
> We hold after examining the evidence that the judgment given by the trial court was not against the clear weight of the evidence. . . .
>
> We also affirm the trial court's decision that the mandatory injunction should be denied by reason of Appellant's own conduct as constituting "unclean hands" as the findings of the trial court are not against the clear weight of the evidence.
>
> Appellant asserts that the trial court's denial of the mandatory injunction and the consequent award of monetary damages and easements was an error of law. Appellees contend that the trial court sitting in equity has broad powers to fashion remedies suitable for the particular facts and circumstances of the case. The equitable jurisdiction of a trial court is not dependent upon specific statutory authorization. . . . An equity court is not bound by the rigid rules of common law but may adapt its relief and mold its decisions to satisfy the requirements of the case to protect and conserve the entities of the parties. . . . This was a specific factor recognized by the Supreme Court in the appeal of the original case and remand of this matter.[11] The trial court recognized that unless it gave judicial relief to the encroachment of Appellees' structure, Appellee could not have the beneficial enjoyment and use of his build-

[10] This sentence is a jurisprudential gem. What does the court mean by discretion in this context? Compare the discussion in Chapter Three.

[11] *Malnar v. Whitfield*, 708 P.2d at 1096.

ing. The evidence further reflected that Appellant had acted oppressively and maliciously to Appellees. Consequently, as a court of equity the trial court fashioned a remedy to meet the extremely unique facts and circumstances of this case. Appellant contends that *Fairlawn Cemetery Association v. First Presbyterian Church*, prohibits the trial court from granting easements and damages. However, we find the pronouncement in *Fairlawn* distinguishable from the present case as *Fairlawn* did not state that a court cannot award easements and damages. In *Fairlawn*, defendant's encroachment transpired long after the plaintiff constructed a fence and, furthermore, the encroachment created an immediate threat to plaintiff's property. We find that the principal [maxims] of equity [are] that one who seeks equity must do equity and come into court with clean hands. In the present case the record reflects that Appellant acted in an oppressive and malicious manner. The trial court was therefore correct to grant to Appellees a limited use to maintain their present utilization of their building.

Therefore, . . . the trial court's refusal to grant a mandatory injunction; its decision to compensate Appellant by suitable monetary damages and its granting to Appellees the right of continued use and enjoyment of their property was correct.

. . . .

Affirmed.

QUESTIONS AND COMMENTS

1. It is important to distinguish at least three different ways in which the notion of equity is employed in contemporary legal opinions:
   - A. Sometimes *equity* refers to the law associated historically with the courts of equity. Remember, the primary features of these courts are that
     - (1) they had no juries,
     - (2) their remedies were always *in personam*, namely, an injunction compelling the defendant to act in a particular way, and
     - (3) the approach toward the law is flexible and suited to solving the problem before the court.

     Which aspects of this opinion reflect these historical practices?
   - B. Sometimes *equity* invokes a general principle of fairness. This appears to be what the court had in mind when they referred to the "competing equities" of the case. Recall that in Romance languages, the cognate term for *equitable* is as close as one can get in these languages to the notion of fairness and fair play. Thus in French the notion of a fair trial is typically translated as *procés équitable*.
   - C. Sometimes the notion of "equitable jurisdiction" implies broad judicial power to fashion new and novel remedies, such as granting an easement (usufruct or, in French, *usufruit*) to one side in this case and damages to the other.
2. The term *équité* is used twice in the French Civil Code. There are some similarities with the Anglo-American idea of equity, particularly as used in the instant case. In the first application, § 565, the code refers to the problem of determining the ownership of two things that have become merged. The resolution of the case should be totally "subordinated to the principles of natural equity," and the judge should decide each unforeseen case on the basis of its unique circumstances. This bears a strong resemblance to the problem of adjusting the rights between the two warring neighbors in this case. In the second provision, Article 1135 of the *Code civil* guides the process of contract interpretation by specifying that contracts are binding according the demands of "*équité*, law, and custom." This sounds like equity. The Dalloz commentary says explicitly that this form of equity is not a source of law. (See Dalloz, *Code civil*, 99th ed. 2000, Art. 1135, n 1.)
3. Note that calling this case an exercise of equitable jurisdiction implies that the parties had no right to a jury trial. (See the Seventh Amendment to the Constitution, which guarantees jury trials only in "suits at common law.") Nonetheless, the court could devise a remedy that included some elements that originated in the common law rather than in equity. For example, the notion of an easement was part of the common law of estates, and damages were the characteristic remedy available at law.
4. How predictable was this case? Recall that John Selden (1584–1654),

an English jurist and scholar and cosponsor of the 1628 Petition of Right, argued that the awards of equity lacked the predictability of law in *Table Talks: Being the Discourses of John Selden, Esq. . . . Relating Especially to Religion and State* (1689), which also contains his most famous remark on equity: " 'Tis all one as if they should make the Standard for the measure, we call a Foot, a Chancellor's Foot; what an uncertain measure would this be! One Chancellor has a long Foot, another a short Foot, a Third an indifferent foot. 'Tis the same thing in the Chancellor's Conscience." Do you agree? Is the predictability of equity enhanced by its usual failure to employ a jury as the finder of fact?

5. One of the most important arenas in which equity functions in the United States is as the source of remedies against the government. Sovereign immunity generally prevents actions against the federal and state governments for damages, except in certain limited tort claims allowed by statute, such as for recoveries for injuries sustained in an automobile accident caused by a government car. (See the Federal Torts Claims Act, 28 U.S.C. § 2401.) But in a whole range of disputes from school integration to the management of state prisons, the courts have invoked the injunction as the best tool for granting constitutional relief. These actions, tried without juries, are subject to the maxims of equity as well as to constitutional principles.
6. You should think of these two chapters as an introduction to the vocabulary and the grammar of a complex body of law. All of these features of the law of property, whether arising from statutes, from the common law benches, or from equity, represent the distinctive and unifying structure of the common law. As we have seen, this structure continues to provide the deciding factor in many current legal disputes, but it can be best understood as an artifact from the peculiar history of the Anglo-American common law.

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Further Reading

An argument for a comparative understanding of equity, as well as a fuller description of the maxims of equity, is in Steve Sheppard, "Equity and the Law," in *Encyclopedia of Life Support Systems (EOLSS)* (Aaron Swabach ed.), developed under the auspices of UNESCO (Oxford: EOLSS Publishers, 2003). (See also http://www.eolss.net.) An excellent discussion of equity as the basis of constitutional remedies and constitutional law generally is Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill: University of North Carolina Press, 1990). Two works by Ralph Newman consider the comparative aspect of equity: *Equity and Law: A Comparative Study* (New York: Oceana Publications, 1961) and *Equity in the World's Legal Systems: A Comparative Study* (Brussels: Établissements Émile Bruylant, 1973); the latter includes the wonderful essay by Peter Stein, "Equitable Principles in Roman Law," which may also be found in Peter Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (London: Hambledon Press, 1988). The greatest work on equity in U.S. history remains, however, Joseph Story's *Commentary on Equity Jurisprudence* (Boston: Little, Brown and Company, 1846).