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What is "Equity"? Of Comparative Law, Time Travel and Judicial Cultures

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See table of contents

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Article abstract

What is "equity"? Does it mean the same as the word "équité" in French ? Can the word "equity", used in an English or an American legal text, be translated readily by *équité* without being misleading? The answer to those two last questions is no. In the language of the common law, "equity" means something very specific and much more complicated than what we have in mind when we say *équité* in our civil law traditions. The present paper, adapted from a lecture given in Brasilia, attempts to shed some light on this awkward subject, as it compares the notion of *équité* in the French civil law tradition with the concept of equity indigenous to the English common law tradition. The mode of presentation used is that of the imaginary time machine: specialists of *équité* are thus interviewed one by one (Montesquieu, Portalis, Justice Magnaud) in chronological order, followed by English judges associated with the development of equity (Lord Coke, Chancellor Ellesmere and Lord Denning), Those historical figures use examples borrowed from their own time in order to illustrate the workings of *équité*/equity: in France the principle of liability for things and the abuse of rights theory, in England the trust, the estoppel and the injunction. As a conclusion, we discover that equity does not necessarily mean fair, and that *équité* has to express itself indirectly under the guise of judicial interpretation.

What is "Equity"? Of Comparative Law, Time Travel and Judicial Cultures

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ABSTRACT

What is "equity"? Does it mean the same as the word "équité" in French? Can the word "equity", used in an English or an American legal text, be translated readily by équité *without being misleading? The answer to those two last questions is no. In the language of the common law, "equity" means something very specific and much more complicated than what we have in mind when we say* équité *in our civil law traditions. The present paper, adapted from a lecture given in Brasilia, attempts to shed some light on this awkward subject, as it compares the notion of* équité *in the French civil law tradition with the concept of equity indigenous to the English common law tradition. The mode of presentation used is that of the imaginary time machine :*

RÉSUMÉ

Qu'est-ce que l'equity? Le vocable renvoie-t-il à la même réalité juridique que le terme « équité » en français? Le mot equity, employé dans un texte anglais ou américain, peut-il être traduit par « équité » sans induire le lecteur de tradition civiliste en erreur? La réponse à ces deux interrogations est négative. Sur la toile de fond de la common law, l'equity représente une notion spécifique, beaucoup plus complexe que celle que nous avons à l'esprit lorsque nous nous référons à l'équité dans la tradition de droit civil. Le présent article, version écrite d'une conférence prononcée à Brasilia, tente d'éclairer quelque peu cette notion difficile en comparant l'équité de la tradition civiliste française avec l'equity propre à la tradition de common law anglaise. Le mode de

(2009) 39 *R.G.D.* 203-228

specialists of équité *are thusinterviewed one by one (Montesquieu, Portalis, Justice Magnaud) in chronological order, followed by English judges associated with the development of equity (Lord Coke, Chancellor Ellesmere and Lord Denning). Those historical figures use examples borrowed from their own time in order to illustrate the workings of* équité / *equity : in France the principle of liability for things and the abuse of rights theory, in England the trust, the estoppel and the injunction. As a conclusion, we discover that equity does not necessarily mean fair, and that* équité *has to express itself indirectly under the guise of judicial interpretation.*

présentation retenu est celui de la machine imaginaire à remonter le temps : des spécialistes de l'équité sont ainsi interrogés l'un après l'autre (Montesquieu, Portalis, le juge Magnaud), suivis par des juges anglais associés au développement de l'equity (Lord Coke, le chancelier Ellesmere et Lord Denning). Ces personnages historiques recourent à des concepts juridiques propres à leur époque afin d'illustrer la nature de l'équité / equity : en France, le principe de la responsabilité du fait des choses et la théorie de l'abus de droit, en Angleterre le trust, l'estoppel et l'injonction. En conclusion, nous découvrirons qu'equity ne rime pas nécessairement avec justice, et que l'équité ne peut s'exprimer que de manière indirecte sous couvert d'interprétation.

Key-words : *comparative private law, common law, equity, legal history, judges*

Mots-Clés : *Droit privé comparé, common law, équité, histoire du droit, juges.*

TABLE OF CONTENTS

I. *Équité* in the French civil law system *The outlaw* 207

A. « Dieu nous préserve de l'équité des Parlements » *Montesquieu on* equité *before the French Revolution* 207

B. The 1804 Civil Code and judicial *équité Portalis on judges*, equité *and the spirit of the Code* 209
1. A "dream" Code providing for everything 210
2. ... but it does not really and judges must help 210
C. Can French judges be *équitables*, and how? *Judge Magnaud on judicial creativity nonetheless* 211
1. The principle of liability for things (art. 1384 al. 1 C. civ.) 212
2. The abuse of rights theory (art. 1382 C. civ.) 213
II. Equity in the English common law system *The partner of the (common) law* 216
A. What is "equity" in the English system? 216
1. Lord Coke on the royal common law courts 217
2. Chancellor Ellesmere on the rise of the equitable jurisdiction 218
B. Is equity now the same as fairness? *Lord Denning on equity today* 221
1. Equity divorced from fairness 221
a. Equity needs the common law to exist 221
b. The creation of a single set of courts 222
c. The meaning of equity today 223
2. Fairness at the heart of equitable remedies 224
3. All judges may be fair 225

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1. What is "equity"? Does it mean the same as the word "équité" in French, or "equidade" in Portuguese? When you read the word "equity" in an English or an American legal text, can you translate it as "équité" or "equidade" without being misleading? These were the questions I had been invited to answer in a speech at the University of Brasilia's Faculty of Law in April 2008,[1] on the subject of equity/*équité* in civil and common law traditions.

2. The present paper represents the written version of this Brazilian lecture. As such, it follows the rhythm and manner of that speech rather than the more elaborate style traditionally

1. This research trip to Brazil was made possible by a grant from the University of Ottawa "Vision 2010" fund.

required in classical academic writings. Besides, the method used to explore the subject — as will be explained below — is that of fictional interviews with historical characters, thus another valid reason to employ a "spoken" style. Furthermore, this paper is also written in "conference-style" in that it does not pretend to cover all the material available on each subject within comprehensive footnotes. The lecture itself resulted from in-depth research related to my doctoral thesis on judicial fairness; a wealth of references on equity, *équité* and judges in civil and common law systems can thus be found there[2]. Accordingly, only a few footnotes are inserted in the present text, particularly when a direct quotation or affirmation requires it; the main purpose of this publication lays elsewhere. The reason I was encouraged to give this conference a written echo is that in the language of the common law, "equity" means something very specific, something much more complicated than what we have in mind when we say *équité* in our civil law traditions.[3] This is clear to anyone familiar with common law legal history. But most civil lawyers enjoy no such familiarity, and as a result they naturally find the common law notion rather perplexing. For that reason, I believe my Brazilian speech might shed some additional light on this complex subject, since it compares precisely the notion of *équité*, in the French civil law tradition, with that of equity, a concept indigenous to the English common law system.[4]

3. To accomplish this — and here I return to the text of my conference —, I shall draw inspiration from an American

2. Anne-Françoise DEBRUCHE, *Équité du juge et territoires du droit privé*, Bruxelles, Bruylant et Cowansville, Yvon Blais, 2008. This thesis has been awarded the Canada Prize of the International Academy of Comparative Law in 2006.

3. I wish here to thank Professor Alain-François Bisson of the Civil Law Section of the Faculty of Law, University of Ottawa for his encouragement and his active help in the publication of this conference. Any inaccuracy in the following pages, though, is solely mine. I also would like to thank Ronald J. Eady, retired Professor at Glebe Collegiate Institute, for his help in re-reading this text in search of minute English mistakes.

4. For other highlights and comparative attempts, see for instance Ralph A. NEWMAN (ed.), *Equity in the World's Legal Systems*, Bruxelles, Bruylant, 1973, and Alfredo M. RABELLO (ed.), *Æquitas and Equity : Equity in Civil Law and Mixed Jurisdictions*, Jerusalem, The Hebrew University of Jerusalem, 1997, as well as Hessel E. YNTEMA, "Equity in the Civil Law and the Common Law", (1967) 15 *American Journal of Comparative Law* 60, 60-86.

movie entitled *Bill & Ted's Excellent Adventure*. In this movie, two teenagers (Bill and Ted) who are going to fail their history course use a time machine to summon historical characters such as Socrates, Napoleon, Freud, Gengis Khan, etc. and learn their history lessons directly from them. The movie undoubtedly did not amount to a *chef-d'œuvre du septième art*, but I thought I could apply the time machine idea to my presentation of equity and *équité* in the common and civil law traditions to make it more vivid and entertaining.

4. So, let us imagine just for one second that I have a time machine, and that I can go to interview key historical figures in those two legal traditions. I would select six of them — three for the civil law side, three for the common law side — and ask them questions about equity and *équité*. For the French legal tradition, where *équité* is almost officially outlawed, I would choose as the first part of my conference to speak in turn to Montesquieu (about *équité* before the French Revolution of 1789), to Portalis (the "father" of the 1804 *Civil Code*) and to a very "rebellious" judge, Justice Magnaud (about *équité* as it exists and operates in modern times). Then, for the common law tradition and in the second part, I would enjoy discussing equity with Lord Coke and Chancellor Ellesmere, both great judges (and rivals) in sixteenth- and seventeenth-century England. They would know how it all started. And for the contemporary version of equity, I would ask Lord Denning, a famous English judge who died recently. Are you ready for the ride? Then let us program the time machine for France in the eighteenth century and meet Montesquieu.

I. *ÉQUITÉ* IN THE FRENCH CIVIL LAW SYSTEM *THE OUTLAW*

A. "DIEU NOUS PRÉSERVE DE L'ÉQUITÉ DES PARLEMENTS" *MONTESQUIEU ON* ÉQUITÉ *BEFORE THE FRENCH REVOLUTION*

5. Montesquieu was a lawyer and a judge. He was the President of the Parliament of Bordeaux ("parliaments" were the highest courts in France, there were twelve of them all in the principal French cities). Judicial duties then were not as

Montesquieu

stressful as they are now — the Parliament of Bordeaux definitely did not have to decide the same number of cases as, for example, the *Supremo Tribunal Federal* here in Brasilia. So Montesquieu had plenty of time on his hands to read and think. The still famous result of these reflections was the book *L'esprit des lois* (*The Spirit of the Laws*) — a comparative study of law in a new scientific, Newtonian fashion. In this book, Montesquieu proposes his now classic theory about the separation of the three state powers — legislative, executive and judicial. So, what does he think about *équité* in the French system before the Revolution? Can he define it for us? When I ask him those questions, he makes a disgusted face.

6. "*Équité*! What a plague. I know all about it, because I used to sit as President at the Parliament of Bordeaux. You know what '*équité*' was for my colleagues? The right to decide everything they wanted, to judge however they wanted, and not to give reasons for their decisions. It means judges in the Parliaments can refuse to apply royal ordinances (what the English call statutes, or legislation) when they feel it is 'just' to do so. '*Équité*' is just the whims of my fellow judges, that's all. It certainly is not fair or just. *Dieu nous préserve de l'équité des Parlements*! (God preserves us from the *équité* of the Parliaments).[5] In my opinion, judges should just be the mouth of the law; they should be made to serve it like little automatons."[6]

7. So, what we learn from Montesquieu is that *équité* had a negative connotation in the French *Ancien Régime*. It was seen as equivalent to judicial arbitrariness. Montesquieu's wish regarding the transformation of the judicial role was granted in 1789, when the French Revolution tried to remedy past excesses by stripping judges of all law-making power

5. This expression is proverbial in French law: Henri ROLAND, Laurent BOYER, *Adages du droit français*, Paris, Litec, 2nd ed., 1986, pp. 233-238.

6. Baron de MONTESQUIEU, *Œuvres complètes: L'esprit des lois*, Paris, Seuil, 1964, p. 589.

and by transferring it to the legislative assembly instead. Just like Montesquieu, the revolutionaries believed that judges were not to create or alter the law anymore; they were only to serve it and apply it like automatons. The *French Civil Code* of 1804 was born in this context. This is a good reason to meet Portalis, considered the "father" of this Code, and ask him about how judges were to apply it.

B. THE 1804 *CIVIL CODE* AND JUDICIAL *ÉQUITÉ* *PORTALIS ON JUDGES*, ÉQUITÉ *AND THE SPIRIT OF THE CODE*

Portalis

8. Ready for a ride in the time machine again? We find Portalis on a cold evening in 1801 (the 21st of January), just after he pronounced what is known today as the "Preliminary discourse" on the new *Civil Code* before the legislative assembly. He seems exhausted, and also worried: the Tribunat (one of the assemblies) will certainly refuse to vote his Code. I am pleased to be able to reassure him: Napoleon will help by "purging" the Tribunat of its reluctant members. Not only will the Code be adopted, it will become a landmark in the civil law landscape of many countries.[7] So I ask him my questions about judicial *équité*: is there any room left for judicial fairness or *équité* under his new *Civil Code*? This is what Portalis answered.

9. "Your question", he starts, "is a very difficult one. It has troubled very much the commission I presided over as we strove to write our *Civil Code*. You see, we felt that we were caught between two conflicting realities, two opposing trends."

7. Among the numerous publications prompted by the bicentenary of the *French Civil Code*, see for instance, in close connection with Portalis, Jean-Luc A. CHARTIER, *Portalis, le père du Code civil*, Paris, Fayard, 2004, as well as the collective book entitled *Le discours et le Code — Portalis, deux siècles après le Code Napoléon*, Paris, Litec, 2004.

1. A "dream" Code providing for everything

10. "The first element we had to take into account was the ideal expressed by many people around us, who envisioned the future Code as a perfect legislative achievement. They sincerely believed the Code should provide for every possible situation : there would be a rule for everything. Every citizen would be able to open the Code and know exactly what the law was in respect of his particular problem. Accordingly, the Code would also be concise and user-friendly. As a consequence, of course, judges would have no particular role to play when applying the Code. They would be akin to the mere automatons Montesquieu spoke about."

2. ... but it does not really and judges must help

11. "But of course, we at the commission knew better — and honestly, tell me of a trained jurist who would not! How could a legislative text possibly cover every possible factual situation and at the same time be brief? If we had had to provide for everything, our Code would have been kilometres long! This was the other reality we had to take into account. So we tried to encapsulate the diversity of human situations within large, general and abstract legal concepts. Civil liability is a good example of this. It all boils down to a quasi-mathematical formula : prove the fault, the damage and the causal link and you establish the liability of the tortfeaser. And this is where, of course, our Code will need judicial help in order to function properly. How do you define the fault? The damage? The causal link? If we had had to include definitions for all the legal concepts we use, again, the Code would have been much longer. So it will be up to the judges and the *jurisprudents* (the authors) to define these concepts. And it will also be the task of judges to apply them on a case-to-case basis, thus helping practitioners and authors to understand the legal notions even better. Therefore, you understand that judges will have a key role to play if our *Civil Code* is to be a success. They will have to interpret it, it is as simple as that. Even if this disappoints those who wanted judges merely to be the 'mouth of the law', it is unavoidable. And to answer your question about judicial

équité or fairness, this is where it will lay : in interpreting the *Civil Code*.[8] Except for a few exceptional references here and there, *équité* has been officially outlawed from our new legal system, but it probably will creep back under the guise of interpretation."

12. Thus spoke Portalis, and his reasoning seemed highly logical. Centuries later, we know he was right. Through interpretation, judges in civil law systems have managed to be very creative and *équitables* indeed, despite the fact that *équité* has no official place in the civil legal system.[9] In order to take the measure of this, I propose we ride through time again and interview a famous "rebel" judge of the late French nineteenth century, called Judge Magnaud.

C. CAN FRENCH JUDGES BE *ÉQUITABLE*, AND HOW? *JUDGE MAGNAUD ON JUDICIAL CREATIVITY NONETHELESS*

13. Justice Magnaud was the President of the Civil Court in Château-Thierry, a town in Picardie, between 1887 and 1906. He has remained famous for putting aside the letter of the codes (civil and criminal alike) when he deemed applying it blindly would produce unfair practical results (this earned him the nickname the "good judge").[10] So I ask Justice

8. "Quand la loi est claire, il faut la suivre; quand elle est obscure, il faut en approfondir les dispositions. Si l'on manque de loi, il faut consulter l'usage ou l'équité. L'équité est le retour à la loi naturelle, dans le silence, l'opposition ou l'obscurité des lois positives" : « Discours préliminaire » dit de Portalis, in Pierre-Antoine FENET, *Recueil complet des travaux préparatoires du Code civil*, tome 1, Paris, 1827, p. 474. The last words echo those of art. 4 of the *French Civil Code*, which still condemns judges refusing to decide a case "sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi".

9. For a comprehensive enumeration, see for instance Christophe ALBIGES, *De l'équité en droit privé*, Paris, Librairie générale de droit et de jurisprudence, 2000, pp. 109-117. The most famous example of explicit reference to *equité* in the *French Civil Code* occurs in the context of contractual interpretation (art. 1135 C. civ.), but see also art. 565 C. civ. (movable accession), which is similar to art. 975 C.C.Q. As for implicit references, more numerous than explicit ones, see among others art. 1244-1 C. civ. (grant of an extra-time to pay a debt), art. 208 C. civ. (deciding the amount of an obligation of support) and art. 645 C. civ. (use of running water).

10. Jacques FOUCART-BORVILLE, *Le mythe du bon juge de Château-Thierry : le président Magnaud*, Amiens, Bibliothèque municipale, 2000.

Juge Magnaud

Magnaud about judicial *équité* and how he understands it. His answer echoes what we know about him :

14. "'*Équité*' is at the core of our judicial mission. The *Civil Code* was written in 1804, more than a century ago. Society has changed, notably because of the industrial revolution bringing new dangerous machines to life. So many provisions in the Code are outdated. Numerous new problems are not provided for by the legislator. Thus, if judges applied the Code as it is, literally, they would end up delivering unfair judgments. I disagree with those saying it is not up to the judges to change the law in order to adapt it to new circumstances. The Court of Cassation may quash me every time for it, but I do not care. Judges may and should devise new legal concepts to deal with the injustices of our time. Cunning colleagues will be able to link those new concepts to existing sections of the Code, thus appearing only as 'interpreting' them. Personally, I do not always feel compelled to do that — which explains my skirmishes with appeal courts, naturally. There are two good examples I can give you of such creative interpretations bringing forth new legal concepts and helping the courts cope with the challenges set by our modern times. The first one is the principle of liability for things, and the second one is the abuse of rights theory."

1. The principle of liability for things (art. 1384, al. 1 C. civ.)

15. "The codifiers of 1804 knew no such thing as a general principle of liability for things — I mean, being held responsible if a thing in your custody harms somebody else. This stands to reason : the only dangerous things they knew about in 1804 were buildings and animals, so they devoted two specific articles to them and created a regime of strict liability for damages caused by those two 'things'. But in my time, with the Industrial Revolution, we started being confronted

with cases involving other very dangerous things : machines in factories, motors in cars, boilers on boats and trains to name only a few. They could explode and harm people grievously, and the victims were without a remedy. They were unable to establish the fault of the machine's owner (after all who knows why the dratted thing exploded?) — which made the general principle of liability based on fault, damage and causal link unavailable for them. And as for strict liability for things, as I said, the "dangerous things" in the *Civil Code* were only buildings and animals. So they had no cause of action and could not be compensated. But could we judges abandon those persons to their misery? We thought not."

16. "The Court of Cassation very astutely found a way to help them.[11] In the *Civil Code*, the articles about stricter liability — for damage caused by persons under the supervision of some others, like parents for children, employers for employees, etc., and for damage caused by animals and buildings — start with an introductive sentence in art. 1384 : "*A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.*" This is where the Court of Cassation found a place to anchor a new general principle of liability for things, of course. Judges read the opening line as if it were a specific principle, instead of a literary introductive sentence. Personally, I think it serves the codifiers right : do not write something useless, or it will be used against you! The result was legally elegant, because the general principle of liability for things could be 'read' as such in the *Civil Code* : on the face of it, judges were literally applying the Code. But of course, it actually created a new head of strict liability that has since helped us dealing with the accidents brought by the Industrial Revolution. A really elegant move, indeed!"

2. The abuse of rights theory (art. 1382 C. civ.)

17. "As for the theory of abuse of rights, it has been connected to the *Civil Code* in much the same manner. But let

11. Cass. civ., June 16th, 1896, *D.* 1897.I.433.

me tell you first how it came about. The right of ownership may be defined as 'absolute' by our *Civil Code*, but it nonetheless bears its own inherent limitations. The first one flows from the fact that no owner is a lonely Robinson Crusoe on an island : each right of ownership has to respect competing rights of ownership — some balance needs to be found. The second limitation is connected to the fact that subjective rights are given and sanctioned by state institutions under certain implicit conditions. Thus, for instance, you can not use a given right — such as the right of ownership — for antisocial purposes, because this would fly in the face of the general spirit of the system. Imagine a land owner who dislikes his neighbour very much, and for that very reason displays an ugly hanged man on his outer wall just to make his neighbour, already in a state of grave depression, even more depressed.[12] Or paints his house all black for the same purpose. His right of ownership may in theory allow him to do everything he pleases with his property, but if what he does is solely motivated by malice, it will become a fault — and engage his civil liability. This is how the theory of abuse of rights has been traced to the *Civil Code* and its general principle of liability, by the way. Using one's right for pure malice, or using it in a disproportionate manner, qualifies as a 'fault' in the words of art. 1382 of the *Civil Code*."

18. "Thus, through the abuse of rights theory, as well as through the timely 'discovery' of a general principle of liability for things, French judges have been able to give equitable, fair judgements in our changing times."

19. Such was the explanation of Justice Magnaud about judicial *équité*. We understand *équité* should always be disguised as interpreting the *Civil Code*, because the new balance of powers between judges and the legislator after the French Revolution requires it — even if some judges don't care for such disguises, like Justice Magnaud or other judges today. The examples given by Justice Magnaud — liability for things and abuse of rights — are excellent illustrations of

12. Regrettably, an actual case : Chambéry, July 21st, 1914, *Gaz. Trib.* January 19th, 1916.

judicial creativity because they grew so much after his time. Let me finish the story!

20. Liability for things has become such a large basis of liability in France today that it seriously competes with personal liability in most cases. Any "thing" can be a source of liability for its guardian, be it in movement or not, potentially dangerous or not: a sinking ship,[13] a crashing plane,[14] a carpet a guest trips upon,[15] a pitchfork used by a farmer to hit somebody with,[16] even ice on a road if formed as the result of the cooling of factory fumes — if a car driver slides on it, the factory can be held responsible.[17] Even a person can be considered to be a "thing" in that respect: in a 1968 case, a lady was talking to the driver, still seated in his parked car, while she was leaning on the open door. A cyclist collided with her and was injured. Guess what: the *driver* was held responsible for the accident because he was the guardian of the "thing" — the "thing" being composed of the car *and of the lady leaning on it.*[18] In other civil systems, personal liability of the lady would have been the way to go, but it would have been harder to establish because her fault would have had to be proven. With liability for things, only the act of the thing and the custody are to be established — it is a strict form of liability. No wonder it enjoys such a wide popularity among French litigants!

21. As for abuse of rights, it has colonized every legal domain. In France, about every real right can be abused. In contracts, company law, sureties, labour law, civil proceedings — the theory of abuse of rights is potentially everywhere. In the realm of intellectual property, it has been included in a French statute providing that even the right of a deceased artist's family to refuse the publicisation of his works can be abused.[19] A famous illustration of this is a 1987 case where the widow of a famous Japanese born, French naturalized

13. Cass. civ. 2nd, January 23rd, 1959, *D.* 1959, jur. 281.
14. Cass. civ. 2nd, January 23rd, 1959, *D.* 1959, jur. 101.
15. Cass. civ. 1st, April 28th, 1981, *Bull. civ.* I, n° 137, p. 114.
16. Cass. civ. 2nd, May 20th, 1974, *J.C.P.* 1975.II.18183.
17. Lyon, March 14th, 1975, *D.* 1975.Somm.100.
18. Cass. civ. 2nd, May 2nd, 1968, *Gaz. Pal.* 1968.II.109.
19. *Statute of March the 11th, 1957*, art. 20, as modified in 1985 and now incorporated in art. L. 121-3 and L. 111-3 of the *Code de la propriété intellectuelle.*

painter refused a publishing company permission to print a book about his work. This refusal was deemed to be an abuse of right by the Versailles Court of Appeal.[20] Even within the confines of family law, the sting of abuse of right may be felt. Thus, for example, the refusal of a divorced Jewish believer to give to his ex-wife the necessary document (gueth) enabling her to re-marry according to the Jewish faith was considered to be an abuse of right.[21]

22. As a conclusion to my brief presentation of *équité* in the French civil law system, I think we need to remember this. *Équité* there means the same as judicial fairness. It is usually opposed to strict law, which is the product of the automatic application of statutory law. Judicial fairness, or *équité*, can only be expressed through indirect means, such as interpretation of codes or statutes. If judges refuse to apply the letter of legislative law in the name of *équité*, their decision will be quashed by the Court of Cassation. But interpretation allows much judicial fairness to come through, as we saw with the examples of liability for things and abuse of rights. Now is the time to discover how much different equity is in the common law tradition.

II. EQUITY IN THE ENGLISH COMMON LAW SYSTEM *THE PARTNER OF THE (COMMON) LAW*

23. As I told you in my introduction, I will use my virtual time machine to interview three leading English judges : Lord Coke, Chancellor Ellesmere and Lord Denning. Thanks to the first two, we will get a clearer understanding of how "equity" appeared in the common law landscape, and of what it means. The third, Lord Denning, will help us figure out some of the implications of equity in common law systems today.

A. WHAT IS "EQUITY" IN THE ENGLISH SYSTEM?

24. A time machine is definitely required to interview Lord Coke and Chancellor Ellesmere : they were influential figures

20. Versailles, March 3rd, 1987, *D.* 1987.382.
21. Cass. civ. 2nd, December 13th, 1972, *D.* 1973.493.

of English law at the turn of the seventeenth century. The two are famous — among other things — for a dispute that found them at odds in 1616. Since the subject of this dispute was the clash between common law and equity, I propose we go to find them precisely at that time.[22]

1. Lord Coke on the royal common law courts

25. Lord Coke was a brilliant common law jurist. He knew the common law so well his law reports and law treatises remain well known to this day. After being a preeminent lawyer, he became head of the common law court of King's Bench in 1613. When we meet him three years later, he already has had his row with Chancellor Ellesmere about the role of equity — so he should be able to tell us much about it. As you imagine, my question to him will be about the definition of equity in the English system. What is it exactly?

Lord Coke

26. "Equity!" exclaims Lord Coke with much of the same disgust Montesquieu expressed when asked about *équité*. "I have no wish to talk about equity. Damn the Chancellor, damn the King and damn equity — they may all roast in hell for all I care. You don't understand? Let me tell you first about our great achievement in England: the common law. As you know, I used to sit as Chief Justice in the King's Bench. The King's Bench is one of the three original royal courts, along with the Common Pleas and the Exchequer. It all started after the Norman invasion of 1066. The Norman kings had promised justice for all, and the application of the customs of

22. For this history of equity, I used mostly John H. BAKER, *An Introduction to English Legal History*, 4th ed., London, Butterworths, 2002, pp. 97-116; see also the additional references at pp. 115-116. The clash between Coke and Ellesmere has been researched by Baker himself ("The Common Lawyers and the Chancery: 1616", in John H. BAKER, *The Legal Profession and the Common Law: Historical Essays*, London, The Hambledon Press, 1986, pp. 205-229), but see also John P. DAWSON, "Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616", (1941) 36 *Illinois Law Review* 127-152.

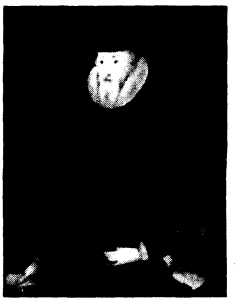
the realm. The royal courts appeared to honour those royal promises. They progressively came to apply a general custom of the realm, which was to be known as the 'common law' for the whole kingdom. This common law represented a great progress compared to the law applied before by the local and feudal courts. The procedure before the royal courts was more effective. It starts with a royal writ, and evidence is rational — we use the jury in many civil and criminal cases. Our weakness is that our procedure is also very formal; for instance, if you do not find the right writ in our existing list, you don't have an action and are without a remedy. Occasionally, this formal procedure would lead to unfair results and people started to petition the King, appealing to his oath of justice for all. Busy as he was, the King passed down those petitions to his dratted Chancellor, and this is how our troubles started. This despicable office worm decided he could quash our decisions when he thought they were 'unfair', given the circumstances of the case, and gathered clerks around him to handle even more cases. Before we knew it, a 'Chancery Court' had sprouted and was making a nuisance of itself. I confess the common law is far from perfect, but it is also to the benefit of all English subjects and it guarantees their most fundamental freedoms — from arbitrary imprisonment, from violence, from wicked dispossessions, and many others. And you know the worst? This has given the King an idea : he thought that if he used additional courts, he could tune them better to his will. Thus, he makes much use of the ill-famed Star Chamber, a criminal court of 'equity' that can imprison and execute royal opponents. All this is against the common law, naturally — but what more can I do?"

27. I left a very discouraged Lord Coke, and wondered what Chancellor Ellesmere would have to say about his Chancery Court, and about equity.

2. Chancellor Ellesmere on the rise of the equitable jurisdiction

28. As could be expected, I found Chancellor Ellesmere in excellent spirits. For him, I had several questions : what exactly was a Chancellor? And what about this new Chancery

Court? What was equity? He was only too pleased to answer them.



Chancellor Ellesmere

29. "I am the Lord Chancellor of England. That means, first of all, that I am keeper of the King's seal and head of his 'Chancery', or private administration. My clerks write all the royal messages in the King's name, like those writs you need to start an action before the royal courts of common law. But being the Chancellor also implies that I am the keeper of the King's conscience. Many of us Chancellors were members of the Church as well (even if I personally am not). We are thus the ideal persons to advise the King on delicate matters of the State, or any affair of importance. This is what explains the birth of the Court of Chancery. The common law proved so unsatisfactory, shortcomings of justice were so numerous, that I had to intervene on a case-to-case basis to put things right. Of course I could not handle all these cases. So I gathered my best clerks around me and together, we now form the new Court of Chancery. I am aware this new jurisdiction is, to put it in lay terms, a 'smash hit'. Our procedure is so much better than the procedure before the courts of common law."

30. "First, it is all in English, the language of the people — can you believe the common law courts still use Norman French? Naturally, no one but expensive lawyers can understand a word of it. Secondly, our procedure at the Chancery Court gives much power to the judge. It is inquisitorial, like Church procedure. The judge is allowed to interrogate witnesses and actively search for evidence. In the accusatorial proceedings of the common law, on the contrary, all is left to the parties and judges just sit there idly. Finally, our best feature is that our procedure is not formal. We are not bound by any forms of action and can order any remedy we think fit. Those excellent features of our procedure in Chancery answer, by themselves, the question of 'where do you find equity?' The answer is: *we are more equitable than the common law.* We reach fairer results in the cases we decide, because we try to look into the 'conscience' of the parties and because we can order the best remedy at the end."

31. "For these reasons, what we do in our Chancery Court *is* equity. This explains why our court is also called 'the Court of Equity'. It is all very simple, really : we *are* equity. Our good King James fully recognizes that. Lord Coke had tried to make a case against us in the name of the common law courts, arguing we at the Court of Chancery were undermining their jurisdiction with our equitable judgments. Nonsense, of course! And the King saw that : he sided with us and declared we could upturn common law judgments any time we saw fit in the interest of justice and equity."

32. Such was the interview of Lord Ellesmere; as you heard, the man was extremely pleased with himself. If you look in common law history books, 1616 was a dark year for the common law, and the star of the Court of Equity (the Court of Chancery) had never shone as brightly. But how did it end? Did the common law lose the battle against equity? And what is equity today in common law systems? These questions I would like to ask from Lord Denning, a great English judge of the twentieth century who died in 1999. He was a brilliant jurist, an excellent legal writer and an unconventional man — after being promoted from the Court of Appeal to the House of Lords, he asked to be demoted because he found the House of Lords too boring. The Court of Appeal, he felt, was where legal things really happened![23] I managed to visit Lord Denning after he decided a famous case in 1947 with the Court of Appeal, *High Trees*,[24] and asked him my questions about equity. I also asked him about abuse of rights, because I was curious. Those are his answers, and this will be my longest interview.

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23. The style of Lord Denning shines in the judgments he wrote, as well as in his monographs on legal development in his time (such as Alfred DENNING, *The Discipline of Law*, London, Butterworths, 1979). See also his autobiography entitled *The Family Story*, London, Butterworths, 1981, and Jeffrey L. JOWELL (ed.), *Lord Denning : The Judge and the Law*, London, Sweet & Maxwell, 1984.

24. *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] 1 K.B. 130.

B. IS EQUITY NOW THE SAME AS FAIRNESS?
LORD DENNING ON EQUITY TODAY

1. Equity divorced from fairness

Lord Denning

33. "So", he said, "you are wondering what became of common law and equity after 1616? As a matter of fact, many things happened, and all were in favour of the common law. First of all, the civil war and restoration of the seventeenth century led to a decrease of the royal prerogative, including within so-called equitable jurisdictions. The Star Chamber was abolished, and the Court of Chancery survived — but barely. It had to respect common law decisions and to employ judges trained in the common law tradition (no longer in Roman nor canon law). Access to the Chancery Court was restricted to claimants who had been equitable themselves — they had to show 'clean hands', according to the maxim 'he who seeks equity must do equity'. Thus the notion of 'equity' at the heart of the Chancery jurisdiction became more personal, less objective. It was not anymore an equity due to everyone, like the Roman 'æquitas'."

a. Equity needs the common law to exist

34. "More fundamentally, Chancery judges realized they needed the common law to function as a court. Their decisions were always based on the common law — and its shortcomings — but they never developed a new substantive law covering every legal domain. Admittedly, they created a few new remedies (I will talk about them later) and some substantive rules. It is precisely this whole body of norms produced by the Chancery Court that we now call 'equity'. Let me give you an illustration of this dependency on the common law, and of the interaction between equitable and common law rules — thus, rules produced by the Court of Equity (the Court of Chancery) and the common law courts. Let us consider the trust as an institution."

35. "Trusts were born thanks to the competing jurisdiction of the courts of common law and of the Court of Chancery. In order to understand it, it is better to use a factual example — let us take the situation of the Franciscan friars. The Franciscan friars could not hold title to property according to the rules of their order. Therefore, rich people willing to donate lands or houses to them could not do so. The lawyers for these rich people thought of a way to circumvent this difficulty. They advised that the title to the land or house should be transferred to a person of trust — for instance a lawyer like themselves. This person of trust would then hold the land or the house for the benefit of the Franciscan friars, and would let them enjoy the property. From the perspective of the royal courts of common law, the person holding the title to the land or house would be the lawyer, or person of trust — the 'trustee' — and the Franciscans would hold no title at all. But what would happen if the lawyer betrayed the trust placed in him and took the land or the house for himself? What could the Franciscans do? You already guess the answer. They would petition a different court than the common law courts, a court sensitive to questions of fairness, conscience, and trust: the Court of Equity. And it worked. The protection granted by the Court of Chancery to trust beneficiaries such as the Franciscans was gradually translated into the recognition of a different version of title on land. The beneficiary of a trust came to be seen as holding an 'equitable title' (meaning a title recognized by the Court of Equity), that could be successfully opposed to the trustee's 'legal title' (the title recognized by the common law courts)."

36. "So, you understand what I meant when I said that the Court of Chancery did not create a whole new law. It only *added* elements to the existing common law. Thus equity leans on the common law like some orchids on trees in the rainforest: it needs it to feed and to grow."

b. The creation of a single set of courts

37. "In 1873-1875, the three courts of common law and the Court of Equity were merged into a single set of courts

(which are still the courts in England today) by the *Judicature Acts*. But the rules of equity and the rules of common law remained separate. You can see why they had to remain so, if you think of the trust. What makes the trust unique is that two parties hold simultaneously a real right akin to ownership of a thing. Those two real rights are equal, but different. One is guaranteed according to the rules of the common law (the legal estate of the trustee), the other thanks to the rules of equity (the equitable estate of the beneficiary). This scheme is very efficient nowadays in many areas of the law, from company law to family law. But you still cannot fully understand this if you ignore how it developed, that is, the story of the Court of Chancery."

c. *The meaning of equity today*

38. "So to go back to your questions, what is equity for us today? It means the body of norms developed by the Court of Chancery, also called Court of Equity — like the trust, the injunction, etc. Equity is a judge-made law developed in parallel to the common law, another body of judge-made rules created by other courts. Can we say that equity in the sense we mean it is fair? Well, no. As the Court of Equity developed its own set of rules, it also tended to follow some system of precedent and to become a 'real' court. In other words, it was not necessarily fair anymore. The application of equitable rules may now lead to unfair decisions, just like the application of common law rules can. Because they are *rules*, they may lead to unfair applications in particular cases. So we never equate equity with fairness anymore : those are two different concepts to us. The search for fairness may have justified the birth of the Court of Chancery, but it disappeared as the Court grew."

39. "So, where is fairness in common law systems today, if it is not anymore present as such in equity as a body of norms? We find it at the heart of equitable remedies, and at the core of the judicial mission itself."

2. Fairness at the heart of equitable remedies

40. "The Court of Chancery, as I have explained, tried to propose solutions and remedies to the King's subjects who had fallen victims to the shortcomings induced by the formalism of the common law. One of the main defects of actions at common law was that often you could only obtain damages when you won your action. This may sound fine in civil liability suits, but it is not so adequate in the context of a contractual action. To improve on this, the Court of Chancery offered remedies in species, called 'specific performance' in contractual matters, and 'injunctions' in all other domains. Specific performance is the performance in kind of a contractual obligation. An injunction, on the other hand, is a judicial order to do or not to do something — to give back a piece of land, to abstain from interfering with a right of way, etc. You imagine how litigants might prefer this to damages at common law?"

41. "But the price to pay for those equitable remedies (so called because they were first created by the equitable court of the Chancellor) is that they have always been 'discretionary'. The judge sitting in the Chancery Court would only grant specific performance or injunctions when he saw fit — when he thought it just, or fair according to all the circumstances of the case before him. He would take into account the behaviour of the parties (thus looking into their 'conscience'), as well as compare the benefit of granting the remedy with the damage it could possibly cause — what is called the 'balance of convenience'. This judicial discretion remains at the heart of these two remedies today. When you ask English — or Canadian, or American — judges to give you specific performance or an injunction, they will only grant it if they feel it is just to do so. Therefore, those remedies allow the judge to follow his personal sense of fairness and still retain the spirit of equity as it was at the beginning of the jurisdiction of the court of Chancery."

3. All judges may be fair

42. "But judges today also are the successors of the Chancery judges because they all have equity in the first sense, meaning fairness, at the heart of their mission. All judges have the means to try to reach a fair judgment in each case thanks to diverse remedies and mechanisms developed by judges before them — whether in common law or in equity. To illustrate this, I will now turn to your last question : what do we do about situations of abuse of rights in the common law system?"

43. "As such, abuse of rights does not qualify as a tort — meaning in our system a specific quasi-delict. Our civil liability system is based on a limited list of quasi-delicts, and you have to find one to fit your case or you are without a remedy — the legacy of the formalism of the common law again, I am afraid. As I say, abuse of rights does not correspond to an existing tort, which means you can not sue on it directly. But does it mean any abuse of right may rest unpunished in our system? Absolutely not! Judges have tools at their disposal that they may use to sanction it, either at the procedural level or at the substantive level."

44. "At the procedural level, I wish to evoke two ways to sanction situations of abuse of rights. The first one is the injunction, the second one estoppel. You remember the injunction remedy developed by the Chancery? I explained it was discretionary and that the judge granted it only if he thought it fair. Imagine now someone asking for the demolition of a very small encroachment located on his land. The encroachment was made by mistake by the neighbour when he built an extension to his house. Now the plaintiff asks for the demolition of the portion of the wall that encroaches, even though he knew about it from the start and even encouraged his neighbour to build there. Well, the judge will probably refuse the injunction in demolition because it would be unfair to grant it given the circumstances. The plaintiff is acting in bad faith; the defendant honestly did not know he was doing wrong and the balance of convenience does not favour the demolition. So the abusive behaviour of the plaintiff is sanctioned through the refusal of the injunction, and the refusal

itself is allowed because the injunction is a discretionary remedy even when a proprietary right is involved."

45. "The mechanism of estoppel also works from a procedural point of view. To be estopped means, very simply, that you are prevented from denying something you affirmed previously. Estoppel may play in land law, in contracts, in family law, anywhere — like the theory of abuse of rights in your civil law systems. In contractual matters, it is called promissory estoppel. Let me tell you about the case we decided today at the Court of Appeal, *High Trees*, because it was precisely about promissory estoppel."[25]

46. "A few years before the Second World War, the plaintiff company leased buildings to the defendant company for a rent specified in a deed (a deed is an official evidence in writing). The defendant company, High Trees, sublet those buildings and for a time all was well. But when the war came, everybody fled London and High Trees could find no more tenants to occupy the buildings. Thus, High Trees became unable to pay the agreed rent, and asked the plaintiff company if they would agree to accept half the rent only while this exceptional situation lasted. The plaintiff company agreed — but on a mere piece of paper, not in an official deed. After the war, everything went back to normal and High Trees was able to pay the full rent again. But the plaintiff company went bankrupt and the curator asked High Trees to reimburse the full rent for those years during the war. The curator to the bankruptcy argued that since the diminution of the rent had been agreed upon in a simple writing only, it was not sufficient to alter the original deed. High Trees refused to pay, and went to court. This is the case we gave judgment on today."

47. "The Court of Appeal — I was the one writing the judgment, by the way — said that it was true that according to the common law of contracts, altering a deed on a mere piece of paper was not sufficient. According to the 'strict' law of contracts, High Trees should pay back all the full rent. But we found that the estoppel principle came into play here. The plaintiff company had made a representation to High Trees : it had led them to believe it was acceptable for them to pay

25. *Ibid.*

half the rent while the war lasted. High Trees relied on that representation, and paid half the rent only. If they had known they would have to pay all of it later, maybe they would have organized their affairs differently. But they did not: they trusted the affirmation by the plaintiff company. Thus, it was now unconscionable — it went against conscience — on the part of the plaintiff company to deny now what they had affirmed previously. A promissory estoppel had come into play. The plaintiff company was estopped to come back upon its words. And we decided that High Trees did not have to pay back the whole rent for the period of the war. In other systems, I surmise, the behaviour of the plaintiff company could be considered as abuse of rights in contractual matters — but you see that in the common law, we have other means to deal with this type of situation."[26]

48. "Finally, apart from procedural remedies such as injunction and estoppel, I must add we also can rely on the substance of our common law to sanction abuse of rights. Our law of torts — civil liability — is subtle enough to 'cover' many abuse of rights situations even if it does not have a specific tort of abuse of rights. Let me give you one last example."

49. "In our law of torts, there is a tort or quasi-delict called nuisance. It corresponds, roughly, to what civil law systems name 'neighbourhood disturbances' — when you use your land in a way that prevents your neighbour from enjoying his. In 1936, a case of blatant abuse of rights came before the High Court in London.[27] The plaintiff had a silver fox farm. He bred silver foxes to sell them. His neighbour hated the foxes and the farm, and to ruin the farm he decided to fire his gun near the border of his land when female foxes were pregnant, in order to make them abort. The owner of the farm went to court, but the defendant said that he was fully entitled to fire a gun on his land whenever he wanted. This, as

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26. The development of promissory estoppel after the *High Trees* case proved rather unsatisfactory, but another type of estoppel has been growing and sparkling alongside: proprietary estoppel, at work in both the contractual and property fields. See Mark PAWLOWSKI, *The Doctrine of Proprietary Estoppel*, London, Sweet & Maxwell, 1996, and Anne-Françoise DEBRUCHE, "*La common law des biens*", in Aline GRENON, Louise BÉLANGER-HARDY, *Bijuridisme canadien : Études en droit comparé*, Toronto, Carswell, 2008, pp. 143-186.

27. *Hollywood Silver Fox Farm Ltd.* v. *Emmett*, [1936] 2 K.B. 468.

such, did not qualify as a tort. He was right on this. But the judge found that since his sole intent when using his gun was to harm his neighbour, it qualified as a nuisance. His malice made his behaviour into a tort of nuisance — thus, it could be stopped by the law."

50. "I believe such a situation would be viewed as an abuse of rights in civil law countries. You see that even if we have no specific tort of abuse of right in the common law, we manage to sanction it through an existing tort, thanks to some creative judicial interpretation." Upon those words, I thanked Lord Denning and left.

51. I hope you learned as much as I did through these virtual interviews with past judges. I hope they helped you understand what equity means in the common law tradition — and that it does not mean the same as fairness, or *équité* as we say in civil law systems. "Equity" is a technical term. It refers to the body of norms and remedies created by the Court of Chancery, a rival court that rose to compete with the royal courts of common law in fifteenth-century England. Thus equity today means a judge-made law that coexists with common law rules and completes them. In this sense, injunction and specific performance are called "equitable" remedies — not because their operation is always fair, but because they were created by the Court of Equity. The same for the trust, which was devised with the help of the Court of Chancery. English, Canadian and American judges may use equitable remedies and institutions to be fair, because they allow some judicial discretion to be expressed — but again, not necessarily. So what we call *équité* in civil law traditions (and we saw examples of that) is best translated in English as fairness. As for equity in a common law context, it should not be translated and should be understood for what it is : a specific concept born out of a tumultuous history.

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