EQUITY
DOCTRINES & REMEDIES

RP MEAGHER QC
WMC GUMMOW JRF LEHANE

2nd Edition

Butterworths

Equity

Doctrines and Remedies

Second Edition

R P MEAGHER, QC
W M C GUMMOW
J R F LEHANE

with a Foreword from the First Edition by

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Foreword to the First Edition

The lawyer dreads the layman's question, What is Equity? For no crisp answer will satisfy the earnest inquirer. He must be told a long story, if he has the patience to listen. He must learn how Equity emerged from the mists of the Middle Ages an amorphous and unruly thing, and how it gradually took shape as a coherent body of law, albeit upon many disparate topics. He must be made to see the single bright thread running through the whole of Equity's dealing with those topics, and for that purpose he must be taken back, as we are in the pages of this book, to the time when the Chancellors of England found themselves entrusted with a wider power of exercising the King's prerogative of administering justice between subjects than was enjoyed by the King's Judges. On the one hand the Chancellors might proceed, like the Judges, according to the Common Law, according, as was said, "to the right of the laws and statutes of the realm, *secundum legem and consuetudinem Angliae*", but on the other hand they might proceed "according to the rule of equity, *secundum aequum et bonum*"[1] wherever the Common Law might seem to fall short of that ideal in either the rights it conceded or the remedies it gave. For the exercise of the latter power they had no guidance or point of reference save in their own opinions as to the standards of conscientiousness to which the conduct of other people should be required to conform; for "equity" was as vague as *aequum et bonum*. The inquirer must be told how this extraordinary power to prevent the injustices and supply the deficiencies that were perceived in the operation of the Common Law attracted a swelling volume of business the pressure of which, together no doubt with a lively appreciation of the advantages of consistency, led the Chancellors to an increasing adherence to precedent; and how in consequence principles became established, determining when the Chancery would intervene and what it would do.

So Equity grew. When, in the seventeenth century, Selden enlivened his table talk with a cynical likening of the measure of Equity to the length of the Chancellor's foot he was much behind the times, for the metamorphosis of the Chancellor's power unrestrained by objective rules into a jurisdiction applying a body of positive law had made great progress already. The Chancery, it is true, had faced and was still facing strong opposition, but it had won recognition as a tribunal which the proper administration of justice in England required, and one moreover in which true judicial restraints were being applied. Within twenty years of Selden's death the great Nottingham was at work demonstrating that Equity had become a jurisdiction of orderly principles, and was developing that jurisdiction with energy and clearsightedness.

[1] 4 Inst 79.

Indeed, as early as 1616, James I, finding the urgings of the ambitious Bacon congenial to his royal philosophy, had ended the battle between Coke and Ellesmere by decreeing that the Chancellor should give to his subjects upon their several complaints such relief in Equity (notwithstanding any former proceedings at the Common Law against them) as should stand with the true merits and justice of their cases and with the former ancient and continued practice and precedency of his Chancery.[2] The disgruntled Coke could hardly have reflected then that his beloved Common Law was saved by the defeat of its champion; indeed he was later to be charged before the King with having made the comment that the Common Law of England would be overthrown and the light of the law would be obscured.[3] Yet, looking back now to the growth of Equity which Coke so signally failed to arrest and to the concurrent growth of the Common Law which he strove so bravely and even recklessly to defend, we cannot fail to appreciate the force of Maitland's verdict: "Somehow or other, England, after a fashion all her own, had stumbled upon a scheme for the reconciliation of permanence with progress . . . the old private law could be preserved because the Court of Chancery was composing an appendix to it . . . . And so our old law maintained its continuity . . . . Bacon could tell King James that the Chancery was the court of his absolute power. But if we look abroad we shall find good reason for thinking that but for these institutions (the Star Chamber and the Chancery) our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the 'ungodly jumble' would have made way for Roman jurisprudence and for despotism. Were we to say that equity saved the common law, and that the Star Chamber saved the constitution, even in this paradox there would be some truth".[4]

It will hardly satisfy the lay inquirer to be told, but it will be salutary for the lawyer to remind himself, that Equity is the appendix that the Chancery was composing for the saving of the Common Law, and is not an independent system of law. Coke, implacable opponent of the Chancery as he was, insisted on this very point when he wrote of one Robert Parning: "This man knowing that he knew not the common law, could never well judge in equity (which is a just corrective of the law in some cases)";[5] and in a side note he made the point neatly with a pun: "*Ubi non est scientia non est conscientia*".

A master of Equity of our own time, Viscount Simonds, while quick to acknowledge that Equity not only is related to the Common Law but cannot be understood apart from it, has added the comment that the description of Equity as an appendix to the Common Law is barely adequate to the great body of substantive law which originated in the Court of Chancery, to the large contribution that Equity has made to the judge-made law which constitutes so important a part of the law of England.[6] Lord Simonds, resolute opponent as he was of rogue reformers who would lay impious hands on the ark of the Law, was not one to suggest that modern equity Judges may no longer contribute to the substantive law and continue the development of the principles of their own special discipline; but he insisted that "the range of its (Equity's) authority

[2]Holdsworth, *History of English Law*, vol 1, p 465.
[3]See generally, Bowen, *The Lion and the Throne*, pp 376, 377.
[4]Maitland, *Historical Essays* (1957 Collection by Cam), p 134.
[5]4 Inst 79.
[6]Barker, *The Character of England*, (Oxford, 1947), pp 117, 124.

can only be determined by seeing what jurisdiction the great equity Judges of the past assumed and how they justified that assumption".[7] The last five words might well be written in letters of fire. An understanding of the conceptual foundations of established principles, and that alone, provides a permissible foundation for further advance.

In this book are reflected the participation of Judges both in England and in Australasia in the development that has taken place and at the same time their faithfulness in general to the concept of Equity as truly law, as law to be studied and understood, as law to be carried to greater heights and depths not by headstrong invention of wilful distortion but by sound judicial processes.

A hundred years ago the Court of Chancery in England reached the end of its career, its history bright with illustrious names. The next century was to see the great tradition continued in new courts, at home and abroad, both where the Judicature system was in force and where it was not; and the result is a rich harvest, in the Australian and New Zealand reports as well as the English, of material for the study of equitable principles. We do well today to take stock of the total achievement. This the authors of the present work have set themselves to do, investigating the whole field so far as it is not covered in Mr Justice Jacobs' exhaustive work on Trusts. The task obviously has demanded immense industry but much more than industry, for here, presented with understanding, and critically as is proper, is Equity as it stands today, a structure that commands our admiration, ready to be made more admirable still.

The very selection of Equity as a specific subject for study emphasises the fallacy, which the authors are at pains to expose, in the description, too often unthinkingly repeated, of the Judicature system as having worked a fusion of the Common Law and Equity. The Common Law remains, a proud inheritance, as surely basic to legal thinking in the antipodes as in England itself—shorn indeed of that noble ornament the system of pleading that shines in the third edition of Bullen and Leake as a refined and polished instrument for arriving at the issues between parties—but in its substance one of the great achievements of the human mind. And Equity remains also, the saving supplement and complement of the Common Law at the ends of the earth as in England, prevailing over the Common Law in cases of conflict but ensuring, by its persistence and by the very fact of its prevailing, the survival of the Common Law and the enduring influence of English jurisprudence as a whole in the history of civilisation.

The task of successfully carrying forward the two bodies of law together, in a world that is changing swiftly but in some respects is ever the same, is for constructive but reverent hands to undertake.

Frank W Kitto

The University of New England,
Armidale,
March, 1975.

[7] *Chapman v Chapman*, [1954] AC 429 at p 444.

Preface to the Second Edition

Two years after the publication of the First Edition of this work, Lord Diplock, with the apparent approval of his colleagues, delivered himself of a pronouncement in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 924, that to speak (as we have) of the rules of equity as an identifiable part of the present law was "about as meaningful as to speak similarly of the statute of uses or of *Quia Emptores*". This speech represents the low water-mark of modern English jurisprudence. Lord Diplock did not explain how equity vanished or what were the consequences of its disappearance. Moreover, when he spoke, *Quia Emptores* remained in force as a pillar of English real property law.

The truth is, as we have endeavoured to show in the First Edition, that equity remains as vital and fruitful a source of principle as it ever has been, because the fundamental notions of equity are universal applications of principle to continually recurring problems; they may develop but cannot age or wither.

If Baron Parke were to survey the common law today, he would be baffled and understandably dismayed by what he saw. But his great equity contemporaries would, at least if they migrated to this country, be of good heart.

We have taken the opportunity offered by a Second Edition to supplement our treatment of various topics in the First Edition, and to add chapters dealing with Restrictive Convenants and Passing-Off.

We have attempted to evaluate the great volume of material that has appeared since 1975. This tide has lapped against virtually every topic and in particular has required substantial rewriting of the chapters on Injunctions, Estoppel, Receivers and Confidential Information.

R P M
W M G
J R F L

Sydney
1 November 1983

Preface to the First Edition

There is no Australian book on the general doctrines and remedies of equity. Any student of equity, or any legal practitioner who wishes to inform himself on the subject, needs must rummage in legal digests, articles in the learned periodicals, Law School notes and English texts. Sir Frederick Jordan's *Chapters in Equity* were a masterpiece; but it did not purport to cover more than a part of the field and it is both out of date and out of print.

Because most of the standard English texts are of uneven quality (Ashburner's *Equity* and Pettit's *Equity and the Law of Trusts* being honourable exceptions), and because all of them eschew the Australian experience, the hapless practitioner who resorts to them emerges bewildered.

Jacobs on Trusts, now in its third edition, deals only with the law of trusts. The fourth edition of that work will widen its treatment from New South Wales to Australia.

The present volume is designed to cover all the doctrines and principles of equity except trusts and specialized fields already adequately covered in existing books and monographs (eg mortgages, infants and restrictive convenants), and very minor topics (eg boundaries). It deals with the development of equity and its history in Australia. It discusses in detail the effects of the Judicature System, a topic of great importance, although scarcely treated elsewhere. It deals with fundamental concepts of equity (for example, the precise meaning of the fiduciary relationship), and with equitable estates and interests, assignments, dispositions and priorities.

Doctrines of equity are then examined individually, eg estoppel, subrogation, marshalling, contribution, set-off, election, satisfaction and performance. The doctrine of conversion already is dealt with in the third edition of *Jacobs on Trusts* (Chapter 26) and this material has been reproduced in the present volume. It also covers the remedies of equity (eg specific performance, injunction, the declaration, receivers, rectification and account); and the grounds upon which equity intervenes to rescind transactions, (eg fraud, undue influence) are considered in detail.

All these aspects are discussed against a background of a case law of all the States of Australia.

The Australian case law is shown to constitute a most distinguished contribution to equitable jurisprudence.

In most chapters an effort has been made to cite all relevant English and Australian authorities, and, where appropriate, authorities from other jurisdictions; but in some (eg the chapter on injunctions) considerations of space make such a task impossible, and a more selective treatment of the authorities is necessitated.

The law stated is that obtaining on 1 January 1975. Our views are our own. Our liability is joint and several.

We have little doubt but that we can rely on the charity of our friends to draw to our attention any mistakes we might have made; if not, the malice of others will supplement that deficiency.

Unstinted praise is the due of Mr S D Robb, who fulfilled the role of research assistant whilst also in the thrall of onerous articles of clerkship, and of Miss V M D Bateman and Mrs J Flanagan, who deciphered our manuscript.

We hope that this book, whilst not a κτῆμα ἐς αἰεὶ will not be considered, in the phrase attributed to Lord Westbury, "difficult to read, disgusting to touch, and impossible to understand".

R P M
W M G
J R F L

Sydney
1 January 1975

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