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The Sword of Equity

Gary Watt

The hero of Book V of Spenser's *Faerie Queene* is Artegall, the knight of justice.[1] Taken as a child by Astraea, who, like her mother Themis, was a goddess of justice; Artegall was tutored by her "to weigh both right and wrong/ In equall balance with due recompence, / And equitie to measure out along, / According to the line of conscience, / when so it needs with rigour to dispence". (5.1.7)[2] Yet when the time came for Astraea to leave the earth and take her place as the constellation *Virgo*,[3] her parting gift to Artegall was not a pair of scales,[4] but a sword "to make him dreaded more".[5]

[1] This chapter is based on a paper entitled "equity *in extremis*" delivered at the University of Verona in May 2007. I am grateful to Paola Baseotto for suggesting on that occasion that I might find some treasures for my theme in Book V of Spenser's *Fairie Queene*.

[2] Parenthetical numerals refer sequentially to the book, canto and stanza numbers of the poem. The text is taken from J C Smith and E de Selincourt (eds) *Spenser: Poetical Works* (Oxford: Oxford University Press, 1912).

[3] Astraea's abandonment of the mortal world was a recurrent motif in Elizabethan literature, not least because the virgin Astraea invited flattering comparison with Elizabeth herself (see Frances A. Yates, "Queen Elizabeth as Astraea" (1947) 10 Journal of the Warburg and Courtauld Institutes 27). See, further, P. Raffield, "'Terras Astraea reliquit': *Titus Andronicus* and the Loss of Justice" in P. Raffield and G. Watt (eds.) *Shakespeare and the Law* (Oxford: Hart Publishing Ltd, 2008).

[4] As *Virgo* she keeps her set of scales, which is the adjacent constellation of *Libra*, in heaven.

[5] The sword, Chrysaor was the same used by Jupiter/Zeus (the father of Astraea) to fight the Titans. Spenser reports that Astraea found it in her father's house. He leaves open the possibility that she might have stolen the sword. It would not be altogether surprising if she had. After all, this is a goddess who, by Spenser's account, abducted the infant child Artegall and hid him in a cave. Of course, if this depiction of

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The purpose of this paper is to demonstrate that the equity of English law, which will be my primary focus here, still wields a dreadful sword. This should surprise us, since the avowed aim of English equity is "to soften and mollify the Extremity of the Law"[6] or, as Spenser put it, "to dispence" with "rigour" (5.1.7). The equity of English law professes to reform "the rigor, hardness, and edge of the law",[7] and therefore pretends to have no sharp edges of its own. In one context it claims to do the "minimum" necessary to achieve justice,[8] but in other contexts equity can be extremely zealous in its correction of extreme wrongs. In this it follows the example of Artegall, who is reported to have "flam'd with zeale of vengeance inwardly" (5.1.14) when, at the very start of his adventure, he encountered the headless corpse of a lady who had been killed by a wicked knight. The language of equity in English law sometimes betrays a similar zeal in the face of extreme oppression. An example can be found in the reign of Elizabeth I, when the law was very hard upon defaulting debtors. If a debtor's attempt to repay his debt was thwarted by an extremity such as flood[9] or plague,[10] the common law considered the extreme circumstances to be no defence. Equity, on the other hand, intervened to relieve against harsh penalties and forfeitures. Thus in one case, in which the creditor alleged that payment was late because the sun had gone down, when in fact it might simply have

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Astraea risked a poor reflection on Queen Elizabeth, Spenser more than off-set that risk by his intense identification of Elizabeth with the Faerie Queene herself.

[6] *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, *per* Lord Chancellor Ellesmere.

[7] *Dudley* v *Dudley* (1705) Prec. in Ch. 241, 244.

[8] *Dillwyn* v *Llewellyn* (1862) 4 De GF & J 517; *Baker* v *Baker* (1993) 25 HLR 408; *Dodsworth* v *Dodsworth* (1973) 228 EG 1115.

[9] Reg Lib B 1579, fo. 138 (cited by G Spence, *The Equitable Jurisdiction of the Court of Chancery* (Philadelphia: Lea and Blanchard, 1846) Vol I part II p 629 note (c).).

[10] B 1582, fo.269 (cited Spence *ibid*).

been a cloudy day,[11] the judge's ire was clearly roused. The order reports that this "kind of dealing this court doth utterly condemn". It subsequently became a truism that equity will not "aid a forfeiture",[12] and yet equity went further. It produced the maxim "equity abhors a forfeiture", which today is especially respected in the US.[13] The word "abhor" betrays an immoderate passion lurking beneath equity's intervention. In the course of this study we will examine other instances in which equity over-steps the proper bounds of moderation and we will see that zealous severity is only one half of equity's extremism. The Sword of Equity is double-edged. When it falls to the right it causes harm because it is too severe, and when it falls to the left it causes harm because it is too indulgent. I will illustrate these twin dangers by reference to English law whilst demonstrating that the same extremes have been observed, criticized and satirized in literature outside of the law.

The exacting edge

The rule of equity is metal, as all law should be, but it is not the metal of the iron-man Talus. Talus, the squire or *famulus* of Artegall, wields a ferrous flail and is unyielding in the extreme. The metal of equity is not, or should not be, the metal of a sword - with

[11] B 1575, fo.42 (cited Spence *ibid*).
[12] *Sympson* v *Turner* (1700) 1 Eq Cas Abr 220 (cited in J H Baker and SFC Milsom, *Sources of English Legal History: Private Law to 1750* (London, Butterworths, 1986) at 132.
[13] "It is a familiar saying that equity abhors a forfeiture" (*Roshek Realty Co.* v. *Roshek Bros. Co*. 249 Iowa 349, 358, 87 N.W.2d 8, 13 (1957)); "Equity abhors a forfeiture, and the law does not favor it. This is elementary; in fact, it is axiomatic in every jurisdiction of the country" (*Malmberg* v. *Baugh*, 62 Utah 331, 342, 218 Pac. 975, 979 (1923)). The observation in the latter case that the law does not favour forfeiture is interesting. It might suggest that equity has chosen the language of abhorrence to make clear that its disapproval is of a greater degree than that of the general law.

harmful edges left and right. Neither, at the other extreme, should it be liquid metal such as mercury which runs where it will. The rule of equity is, as Aristotle said,[14] a rule made of lead. It is pliable in the hands of the judge and therefore adaptable to the circumstances of the case. It is a flexible rule. It is somewhat surprising, therefore, that English equity professes at least one its rules to be "an inflexible one". This is how Lord Herschell described the rule which requires a fiduciary to account for unauthorized profits.[15] An early example of its operation is provided by the case of *Keech* v. *Sandford.*[16] A trustee sought to take advantage of an opportunity to renew a lease after the landlord had made it clear that he would not offer the renewal to the beneficiary of the trust who was the current tenant. The trustee's gain was therefore in no sense made at the expense of the trust, yet the trustee was barred from taking the renewal. Lord King LC held that:

> This may seem harsh that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed.[17]

One of the best modern examples of the operation of the rule is provided by the decision of the House of Lords in *Boardman* v *Phipps.*[18] Boardman was a solicitor acting on behalf of a trust who, in that capacity and acting as proxy to the trustees, had attended the Annual General Meeting of a company in which the trust had a substantial shareholding.

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[14] *Nichomachean Ethics*, Book V. See, further, below.
15 *Bray v. Ford* [1896] AC 44 at 51.
16 (1726) Sel Cas Ch 61.
17 *Ibid* at 62.
[18] [1967] 2 AC 46.

Unhappy with the state of the company, he and one of the beneficiaries (his co-defendant) decided to launch a take-over bid for those shares in the company that were not already owned by the trust. Boardman wrote to the beneficiaries outlining his plans to take a personal interest in the company, thereby giving them an opportunity to raise any objections they might have to his so doing. No objections having been made, Boardman proceeded with the take-over. In the event, the take-over was successful and the value of the shares in the company increased in value, to the great profit of the trust and Boardman personally. Despite this, one of the trust beneficiaries brought an action against Boardman for an account of the unauthorized profits Boardman had made in his fiduciary capacity. At trial, Wilberforce J. found as a fact that the beneficiary had not been fully informed of the matter and had not given his positive consent to Boardman's personal acquisition of the shares. On that basis the judge ordered Boardman to make the account. This was despite the fact that the trust had never expressed any desire to purchase the shares and was technically unable to buy them (although it could have applied to court for authority to do so). The judge's order was ultimately upheld by a bare majority of the House of Lords (Lord Upjohn and Viscount Dilhorne dissenting). The fact that Boardman had acted honestly and in good faith was no defence; neither was the fact that the trust beneficiaries had suffered no harm; neither was the fact that the breach of fiduciary duty had actually produced a gain for the trust. The inflexible rule against unauthorised fiduciary gains was rigorously upheld, and Boardman was required to disgorge his profit. Equity will not allow the wrongful state to stand wherein a fiduciary holds unauthorised gains acquired by reason of his position of trust.

The point had been forcefully made a few years earlier by the House of Lords in the case of *Regal (Hastings) Ltd v. Gulliver*.[19] Regal was considering applying for shares in a subsidiary company, but was unable to afford them, whereupon the directors of Regal subscribed for themselves and made a profit. The directors would not have been in a position to profit had they not been directors and so were held liable to account. Lord Russell of Killowen said:

> the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford*... and similar authorities applies to them in full force.[20]

Lord Wright added that:

> both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship.[21]

19 [1967] 2 AC 134 (the case was originally reported in [1942] 2 All ER 378).
[20] *Ibid* at 146G-147A.
21 *Ibid* at 154F.

In *Parker v. McKenna*,[22] James LJ likewise cut off any inquiry into particular justice between the parties.

> this Court . . . is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the *safety of mankind* requires that no agent shall be able to put his principal to the danger of such an inquiry as that. [23] (emphasis added)

The fiduciary is subjected to the full rigour of the law, not because this is fair and just as between the fiduciary and his principal, but, for the same reason that Lord Angelo arraigned Claudio in *Measure for Measure*: "to make him an example" (1.5.72).[24] Commenting on *Boardman* v *Phipps*, Professor Gareth Jones has observed that: "there are cases where the innocent fiduciary must suffer, like Admiral Byng. Policy may demand a public sacrifice of the fiduciary's profit".[25]

John Byng was an English Admiral sent in 1756 to relieve Minorca from the French. The French commander, the Marquis de la Galissonniere, signaled his fleet to retreat. Deciding it would be imprudent to pursue the French with his damaged fleet, Admiral Byng resolved to return to Gibraltar with a view to defending it from French attack. In short, the actions of the French commander where not so very different from

[22] (1874) R 10 Ch App 124
23 *Ibid* at 125.
[24] William Shakespeare, *Measure for Measure* (J Bate and E Rasmussen (eds.) *William Shakespeare: Complete Works* (the "RSC edition") (Basingstoke: Macmillan, 2007). Something like a mirror image of the "sword as strict law" is presented a little earlier in this passage where Angelo is said to blunt his own nature in pursuit of strict law. (Throughout this chapter, references to the works of Shakespeare are to the "RSC edition" unless otherwise stated.).
[25] Gareth Jones *Unjust Enrichment and the Fiduciary's Duty of Loyalty* (1968) 84 LQR 477 at 487.

those of the English commander, with this one crucial distinction: the English commander had been ordered to displace the French. For this technical failure, Byng was court-martialled for dereliction of duty. It appears that the English authorities preferred to believe the French account of Byng's retreat in preference to Byng's account of the prior French retreat. The truth was that Byng was being primed to suffer as scapegoat for the failings of the Admiralty in an atmosphere of national outrage at the loss of Minorca. He was found guilty on 27 January 1757, which verdict was followed by a plea to King George II to exercise the royal prerogative of mercy. This was an appeal to equity in its original sense – equity as royal relaxation of the King's strict law. On this occasion, royal mercy was not forthcoming. The King, beholden to political and commercial pressure to maintain excellence in Britain's maritime affairs, was unmoved. Thus, on the 14th day of March 1757, Admiral John Byng was executed on the quarterdeck of his own ship; every captain in the immediate vicinity having been ordered to attend with their ships. Byng's monument, at the family's burial place in Southill, Bedfordshire, still bears this legend:

> To the Perpetual Disgrace of Public Justice, the Hon. John Byng, Esq., Admiral of the Blue, fell a Martyr to Political Persecution, March 14th, in the year MDCCLVII; when Bravery and Loyalty were insufficient Securities for the Life and Honour of a Naval Officer.

The execution of Byng was satirised by Voltaire in *Candide.*[26] Candide's companion, the world-weary Martin, observes ruefully that in England it is deemed good to kill an Admiral from time to time 'pour encourager les autres':[27]

> En causant ainsi ils abordèrent à Portsmouth; une multitude de peuple couvrait le rivage, et regardait attentivement un assez gros homme qui était à genoux, les yeux bandés, sur le tillac d'un des vaisseaux de la flotte; quatre soldats, postés vis-à-vis de cet homme, lui tirèrent chacun trois balles dans le crâne le plus paisiblement du monde, et toute l'assemblée s'en retourna extrêmement satisfaite.
>
> "Qu'est-ce donc que tout ceci?" dit Candide, "et quel démon exerce partout son empire?" Il demanda qui était ce gros homme qu'on venait de tuer en cérémonie.
>
> "C'est un amiral", lui répondit-on.
>
> "Et pourquoi tuer cet amiral?"
>
> "C'est, lui dit-on, parce qu'il n'a pas fait tuer assez de monde ; il a livré un combat à un amiral français, et on a trouvé qu'il n'était pas assez près de lui".

[26] François-Marie Arouet Voltaire, *Voltaire, Candide, ou l'Optimisme; traduit de l'Allemand de M. le Docteur Ralph* (Paris: Sirène, 1759) ch. 23. (online facsimile edition: http://oll.libertyfund.org/title/973 accessed 13th May 2008).
27 Ibid. (tr: "To encourage the others").

> "Mais", dit Candide, "l'amiral français était aussi loin de l'amiral anglais que celui-ci l'était de l'autre!"
>
> "Cela est incontestable", lui répliqua-t-on ; "mais dans ce pays-ci il est bon de tuer de temps en temps un amiral pour encourager les autres."

In a case like *Boardman v Phipps*, there may be nothing to choose between fairness to the beneficiaries and the trustees, just as there was an equality between the failures of the French and English Admirals, but an example will be made of the trustee just as an example is made of the English Admiral Byng. American law adopts the same rule. Where a party "has put himself in a position in which thought of self was to be renounced" equity insists that selflessness is strictly enforced, "however hard the abnegation".[28]

The American academic John H. Langbein characterizes the rule in economic terms. He says that equity is driven by efficiency and that it is sometimes "over efficient". His specific concern is with that version of the rule which requires a trustee to act selflessly for the sole benefit of the trust beneficiaries:

> The trust law sole interest rule is *Bleak House* law, born of the despair that Lord Chancellor Eldon voiced in 1803 that "however honest the circumstances" of a particular

[28] *Meinhard Salmon* 164 N.E. 545 (N.Y. 1928) per Cardozo J at 548.

> transaction, "no Court is equal to the examination and ascertainment of the truth in much the greater number of cases".[29]

John H. Langbein argues that the technique of avoiding all possible conflicts sometimes obstructs the aim of serving the beneficiaries' best interest and he calls for the law to "allow inquiry into the merits of a trustee's defense that the conduct in question served the best interest of the beneficiary".[30] He identifies four historical trends which he says justify a relaxation of the strict rule. First, the courts are more efficient in fact-finding than they were when the strict rule was established, so there is no need for "crude overdeterrence"; Second, the shift from reliance upon the unskilled gentleman amateur trustee to the skilled paid professional trustee; Third, improvements in trust accounting and information retention brought about by the Information Technology revolution; Fourth, "Professional trustees do not serve for honor, they serve for hire; accordingly, they serve not in the sole interest of the beneficiary but also to make money for themselves and their shareholders".[31] Significant though these trends are, only the first and third indicate clearly that the original reasons for the rule might no longer apply. If anything, the historical moves towards paid professionalism (Langbein's second and fourth trends) suggest that the strict rule may be more necessary than ever.

There is no doubt some truth in Langbein's suggestion that the strict rule is over-efficient, and his observation that it is a reaction to economic constraints, but this cannot wholly explain the retention and continual restatement of the rule since the Judicature

[29] John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest? (2005) 114 Yale Law Journal 929, 947 (citing *Ex parte James* (1803) 8 Ves. Jun. 337, 345).
[30] "Questioning The Trust Law Duty Of Loyalty [etc]" ibid. at pp. 987-990.
[31] Ibid.

Acts of 1873-5. The rule might have been created through an error of over-efficiency, but it has been retained through an error of over-righteousness. The irony is that English equity was established to counter precisely this problem of over-righteous law. Christopher St Germain, in his *Dialogues*, observes that "Extreme righteousness is extreme wrong: as who saith, if thou shalt take all that the words of the law give thee, thou shalt sometimes do against the law".[32] He no doubt had in mind Aristotle's notion, set out in Book V of his *Nichomachean Ethics*,[33] that equity is a necessary correction to the strictness of general law:

> When the law speaks universally…and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over simplicity, to correct the omission-to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice - not better than absolute justice but better than the error that arises from the absoluteness of the statement.[34]

And St Germain also had in mind, no doubt, the related sense that extreme law is extremely harmful, which is encapsulated in Cicero's maxim *summum ius, summum injuria*.[35] Yet he clearly also had in mind the Old Testament wisdom of *The Book of Ecclesiastes*: "Be not righteous over much; neither make thyself over wise: why

[32] *Dialogues in English Between A Doctor of Divinity and A Student in the Laws of England, of The Grounds of the said laws, and of conscience* (London: Peter Treverys, 1530) chapter XVI.
[33] And developed more fully in his *Rhetoric*.
[34] W. D. Ross (ed) *Aristotle: Nicomachean Ethics* (Oxford: Clarendon Press, 1908) Book V chapter 10.
[35] See, generally, J. Von Stroux, '*Summum ius, summa iniuria': Ein Kapitel der Geschichte der interpretatio iuris* (Leipzig: Teubner, 1926).

shouldest thou destroy thyself?"[36] The observation that equity, like the law, is sometimes "over-righteous" is not a new one. C K Allen observed that "[t]here is an 'over-righteousness' of equity as unfortunate in its consequences as the 'over-righteousness' of law".[37] The point is also encapsulated in dramatic fashion in *The Merchant of Venice* in Portia's over-zealous response to Shylock's insistence upon strict law. She taunts him: "[t]hou shalt have justice, more than thou desirest". Portia is not a true figure of equity. She figures the extreme edge of equity; she wields equity as a sword.

Langbein is not alone in questioning the inflexibility of the strict rule of fiduciary propriety. In addition to a host of academics,[38] there are even voices within the English judiciary stirring against the strictness of the rule (albeit in the corporate context rather than the context of traditional trusts).[39] In the Court of Appeal in *Murad* v. *Al-Saraj*,[40] Arden LJ noted that:

> It may be that the time has come when the court should revisit the operation of the inflexible rule of equity in harsh circumstances, as where the trustee has acted in perfect good faith and without any deception or concealment, and in the belief that he was acting in the best interests of the beneficiary…it would not be impossible for a modern court to

[36] Chapter 7 verse 16. This English translation is taken from the King James Bible of 1611. Christopher St Germaine wrote *Dialogues* before the publication in print of the first English translation of the whole Bible. (The "Coverdale" Bible was printed on the 4th October 1535.)
[37] *Law in the Making* (4th edn) (Oxford: OUP, 1946) 340. (The first edition of the book appeared in 1927.)
[38] See, e.g. L Sealy, *Company Law and Commercial Reality* (London: Sweet & Maxwell, 1984) pp.38-40; J Lowry and R Edmunds, "The No Conflict--No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism" [2000] J.B.L. 122, 123.
[39] See, for example, *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237; [2007] B.C.C. 139, Court of Appeal, per Sir Peter Gibson at para. [51].
[40] [2005] EWCA Civ 959.

> conclude as a matter of policy that, without losing the deterrent effect of the rule, the harshness of it should be tempered in some circumstances.[41]

Her ladyship noted that equity "tempers the harsh wind to the shorn lamb", but so far as this inflexible rule is concerned, her ladyship quite rightly preferred to leave the lamb in the cold for the time being. Equity could hardly in good conscience temper a rule which equity had itself chosen to make so intemperate. Her ladyship acknowledged that any relaxation of the strict equitable rule must be left to the House of Lords.[42]

There is, however, a twist in the tale. It turns out that, whilst in theory maintaining the public symbol of the rule, equity has found a practical way to temper its extremity after all.[43] It was Lord Herschell in *Bray v. Ford* who described the rule as "inflexible",[44] but in the very same case his Lordship acknowledged that the rule might be departed from "without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing".[45] Even in *Boardman* v *Phipps*, the House of Lords upheld the judgment of Wilberforce J that Boardman should be paid a *quantum meruit* out of the trust fund "on a liberal scale", by way of remuneration for his hard work in service of the trust. This was despite the fact that he had been ordered to disgorge all his unauthorized profit in accordance with the "strict rule". Thus equity shouts deterrence

[41] Para. [82]. Her ladyship notes that "Certainly the Canadian courts have modified the effect of equity's inflexible rule (see *Peso Silver Mines Ltd* v *Cropper* (1966) 58 DLR (2d) 1; see also the decision of the Privy Council on appeal from Australia in *Queensland Mines* v *Hudson* (1978) 52 AJLR 399)".
[42] *Murad* v *Al-Saraj* [2005] EWCA Civ 959, per Arden LJ at para [82].
[43] *Ibid* at para. [81].
44 [1896] AC 44 at 51.
45 *Ibid*.

and whispers justice. Or, to put it another way, it seems that even where equity wields the sword, it also quietly weighs the scales.

The indulgent edge

According to Plato, "equity and indulgence are infractions of the perfect and strict rule of justice".[46] We can agree that a law perfectly suited to society would need no process of equity to correct it; that equity would have no role to play if the law were as perfect as it is strict. Yet since the law is not perfect, it should not be strict; and where imperfect law is strict, equity should soften it to make it more perfect. Aristotle reasoned that the problem lies not in the imperfection of the law, but in the imperfection of nature. In an imperfect world such as this, a perfect law is one which will bend to accommodate the rough contours of reality. For Aristotle, equity is not an infraction of the perfect rule, since it does not break the rule. Rather, equity is a flexible rule. It is, as we noted earlier, like the lead rule that builders use to shape stones to fit upon the bed rock of nature. We should be reluctant to apply the metaphor to divine law, since divine law should not be moulded to fit the vagaries of human experience - hence Sir Thomas More, the sometime head of the English Court of Chancery, rejected the notion that divine law might be represented as a "rule of lead"[47] – but human law is a different matter. The equity of English law is by nature indulgent and compliant to the particular circumstances. Yet even equity of this sort must hold true to its own substance. If the rule is bent too far it

[46] *Laws*, Book VI (Benjamin Jowett (ed) *The Dialogues of Plato* (Oxford: Clarendon Press, 1871).
[47] Sir Thomas More, *Utopia* (1516) Book I.

will become twisted and if it is stretched too far it will be stretched too thin. Equity should be indulgent, but not extremely so.

Portia's actual treatment of Shylock in the court scene in *The Merchant of Venice* was distinctly lacking in mercy, but there was nothing lacking in her advocacy for the quality of mercy. The observation that "earthly power doth then show likest God's / When mercy seasons justice" (4.1.196-7) is at home in the Judeo-Christian tradition as in the Aristotelian. The essence of the observation is that justice is the meat of the matter, and mercy the seasoning merely. A law that is all mercy is as unhealthy and as unpalatable as a meal that is all seasoning. The observation that mercy "becomes / The throned monarch better than his crown", is only true because the monarch has a throne and crown. The seasoning of mercy is only "becoming" in a monarch who does not neglect the meat of the matter. In the third part of Shakespeare's *Henry VI*, the king is rebuked for entertaining mercy at the risk of his crown. Queen Margaret had ordered that Richard Plantagenet, Duke of York should be decapitated and his head set upon the gates of York, that "York may overlook the town of York" (1.4.180). York had plotted to usurp the king, so Queen Margaret naturally expects that Henry will be delighted at the spectacle of his enemy's disgrace. Instead, the King is appalled by the barbarity of the display and disclaims it for fear for his soul. It falls to Lord Clifford to rebuke the king: "My gracious liege, this too much lenity / And harmful pity must be laid aside. / To whom do lions cast their gentle looks? / Not to the beast that would usurp their den." (2.2.9-12). It is only in moderation that mercy becomes the monarch better than his

crown. Too much mercy, like too much lenity, is unbecoming. So too, equity must avoid the extreme of indulgence. Too much indulgence, like too much pity, is harmful.

I will illustrate the danger of extreme leniency by means of two examples from English law. The first example is the courts' recognition of so-called "common intention constructive trusts". The second example is the courts' willingness to enforce an express trust against the estate of deceased person, even though the deceased person created no such trust in their will and had made no irrevocably binding trust when they were alive.

i Common intention constructive trusts

The statutory law governing the declaration of an express trust of land is stated in the plainest language: "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will".[48] The statutory requirement of documentary formality could not be clearer: an express trust of land is unenforceable unless it is evidenced in writing.[49] There is, however, an extremely indulgent exception to the rule. The very next subsection of the statute provides that the strict formality requirement "does not affect the creation or operation of resulting, implied or constructive trusts".[50] This subsection represents a significant chink in the armour of the Act. Faced with home-sharers, usually romantic cohabitants, who have failed to regularize their property ownership by means of an express trust and signed memorandum, the courts have almost invariably softened the extremity of the law by constructing a trust to bind the conscience of the party in whose

[48] *Ibid*.
[49] The Law of Property Act 1925, s. 53(1)(b)
[50] The Law of Property Act 1925, s. 53(2)

name the legal title is held. Once constructed, the effect of the trust is to require the legal owner to hold their legal entitlement to the land for the benefit not only of themselves but also for the person with whom they share their home. Cases in which the courts have, like the iron-man Talus, stuck to the letter of the statute and kept the armour of the Act impenetrable in the face of practical hardship to a long-term cohabitant have been rare indeed.[51] Rather, the courts have adopted the tactic of "inferring" – literally "carrying in"[52] – a common understanding between the parties which the parties never in fact held. The leading case is the decision of the House of Lords in *Lloyds Bank v Rosset*.[53] The facts of the case are fairly typical. Mr Rosset had received a loan to buy a derelict house on the understanding that the house would be in his name alone. Mrs Rosset did a limited amount of work towards the renovation of the house, in particular she helped with the interior decorations. However, the vast bulk of the work was carried out by contractors employed and paid for by the husband. Following matrimonial problems, the husband left home, leaving his wife and children in the premises. The loan which the husband had taken out was not, in the event, repaid. Consequently, the bank brought proceedings for possession. The husband raised no defence to that action, but the wife did resist. She claimed to have a beneficial interest in the house under a trust. The House of Lords held

[51] *Burns* v *Burns* [1984] Ch 317, Court of Appeal, is a frequently cited example of real hardship to which the court made no concession. The plaintiff, Valerie Burns, had been living with the defendant for 19 years, 17 in the house which was the subject of the dispute. She and the defendant, Patrick Burns, had never married, however. The house had been purchased in the name of the defendant, and he paid the purchase price. The plaintiff made no contribution to the purchase price or the mortgage repayments, but had brought up their two children, performed domestic duties and recently contributed from her own earnings towards household expenses. She also bought various fittings, and a washing machine, and redecorated the interior of the house. The plaintiff left the defendant and claimed a beneficial interest in the house. It was held that she was not entitled to any beneficial interest in the house.
[52] Latin: *in-fero*; Greek: φορος.
[53] [1991] 1 AC 107.

that she did not. His Lordship held that Mrs Rosset would succeed if she could show that it was the parties' common intention that she should have a beneficial interest in the land, for in such circumstances it would unconscionable for Mr Rosset to deny her the intended interest. His Lordship identified two alternative routes to establishing the common intention necessary to raise the trust. First, that there had been some express understanding between Mr and Mrs Rosset that they would share the property beneficially in equity; and, second, that she had made substantial direct financial contributions to the purchase price "whether initially or by payment of mortgage instalments".[54] The fact that Lord Bridge thought it "extremely doubtful" [55] that an indirect or an insubstantial or a non-financial contribution would suffice as evidence to infer a common intention to share has been cited as evidence that the Rosset formulation does too little to protect the financially weaker party (usually a woman). That may be true, but such commentators usually overlook the possibility that a man and woman like Mr and Mrs Rosset might act in concert to defeat their bank, and commentators who focus on such gender-bias as may be inherent in the requirement of direct financial contribution tend to overlook or downplay the existence of Lord Bridge's extremely indulgent alternative route to establishing a common intention constructive trust:

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement

[54] *Rosset ibid*, at 133.
55 *Ibid.*

> or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, *however imperfectly remembered and however imprecise their terms may have been"*.[56] (Emphasis added.)

If this tactic of recognizing common intention on the merest informal evidence were not indulgent enough, the courts have even here "been generous in their interpretation". This observation is made, not by an overly-critical academic, but by the Law Commission of England and Wales in its 2007 report on *Cohabitation: The Financial Consequences of Relationship Breakdown*.[57] "Generous" is a usefully ambiguous word. Some years ago, when I was a junior academic, a judicial member of the English House of Lords visited my law school. He was in conversation with my Head of Department when he turned to me and asked, "what is your teaching load like?" With my Head of Department listening intently for my answer, I replied with that one word: "generous". The word is usefully ambiguous because it connotes benevolence whilst implying excess. One can be generous to a fault. It is in this sense that the Law Commission was using the word. The Commission says that "[t]he courts have been generous in their interpretation", but what it means to say is that "the courts have been generous to a fault".

One of the best proofs of this over-indulgent equity is the case of *Grant* v *Edwards.*[58] In *Grant* v *Edwards* the defendant explained to his lover that he did not want to place her name with his on the legal title to his land because it might prejudice

56 *Lloyds Bank v. Rosset*, note 142 above, at 132.
[57] Law Commission Report 307, 3rd July 2007. Appendix A (which is a summary of the current law) para. [A32].
[58] [1986] 3 WLR 114, Court of Appeal.

matrimonial proceedings pending between the defendant and his wife. The court held that this express "excuse" qualified as evidence of a common intention between the parties that the claimant should entitled to a beneficial interest in the land. As Nourse LJ put it:

> these facts appear to me to raise a clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house; otherwise no excuse for not putting her name onto the title would have been needed.[59]

Simon Gardner has criticised this type of reasoning:

> If I give an excuse for rejecting an invitation to what I expect to be dull party, it does not mean that I thereby agree to come: on the contrary, it means that I do not agree to come, but for one reason or another I find it hard to say outright.[60]

The Law Commission cites the case of *Grant* v *Edwards*, along with another,[61] when it observes that the courts "have been prepared to treat excuses for not putting one party on the title documents as evidence of an express common intention to share, even though it

[59] [1986] Ch 638 at 649
[60] *Rethinking Family Property* (1993) 109 *LQR* 263 at 265.
[61] *Eves* v *Eves* [1975] 1 WLR 1338, Court of Appeal. In this case the defendant explained that he would not place the claimant's name on the legal title because she was under 21. This was a lie. The law had recently been reformed to allow anybody over the age of 18 to hold legal title to land.

is clear that the private intention of the legal owner is that no such share should arise".[62] It is notable how the courts' indulgent relaxation of the law so often amounts to an oppressive denial of an individual's actual intentions. We will encounter this phenomenon again in the next section. Remarkably, the outcome of *Grant v Edwards* was an award to the claimant of a half-share in the defendant's house, all of which means that the court in this case effectively forced a re-distribution of wealth between the parties. In his quest for justice, Artegall encountered a giant, bearing an "huge great paire of ballance in his hand" (5.2.30)[63] whose version of equity was not dissimilar:

> He sayd that he would all the earth vptake,
> And all the sea, deuided each from either:
> So would he of the fire one ballaunce make,
> And one of th'ayre, without or wind, or wether:
> Then would he ballaunce heauen and hell together,
> And all that did within them all containe;
> Of all whose weight, he would not misse a fether.
> And looke what surplus did of each remaine,
> He would to his owne part restore the same againe. (5.2.31)

[62] Law Commission of England and Wales, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Report 307) 3rd July 2007, appendix A para. [A32].
[63] Parenthetical numerals refer sequentially to the book, canto and stanza numbers of the poem. The text is taken from J C Smith and E de Selincourt (eds) *Spenser: Poetical Works* (Oxford: Oxford University Press, 1912).

> For why, he sayd they all vnequall were,
>
> And had encroched vppon others share,
>
> Like as the sea (which plaine he shewed there)
>
> Had worne the earth, so did the fire the aire;
>
> So all the rest did others parts empaire.
>
> And so were realmes and nations run awry.
>
> All which he vndertooke for to repaire,
>
> In sort as they were formed aunciently;
>
> And all things would reduce vnto equality. (5.2.32)
>
> Therefore the vulgar did about him flocke,
>
> And cluster thicke vnto his leasings vaine,
>
> Like foolish flies about an hony crocke,
>
> In hope by him great benefite to gaine,
>
> And vncontrolled freedome to obtaine… (5.2.33)

Spenser rightly identifies the giant's false equity, his forced equality, with "uncontrolled freedom". It is excessive indulgence by another name.

ii The enforcement of trusts against the will

In this section we will consider a second example of the courts' excessive equity, an example in which the name of conscience is abused. I have explored this example

elsewhere,[64] so I will only treat it briefly here. It concerns the courts' willingness to enforce an express trust against the estate of deceased person, even though the deceased person created no such trust in their will and had not done enough to make any trust irrevocably binding on them when they were alive. The prime instance is the case of *Pennington v Waine.*[65]

Mr Pennington was a partner in a firm of auditors acting for a private limited company in which Mrs Crampton held a number of shares. She informed Mr Pennington that she wished to transfer 400 of her shares in the company to her nephew, Harold. She signed a share transfer form to that effect and gave it to Mr Pennington. He placed the form on file and took no further action prior to Mrs Crampton's death, except to write to Harold. In that letter he enclosed a form for Harold to sign his consent to become a director of the company, and the letter informed Harold that Mr Pennington's firm had been instructed to arrange for the transfer of the 400 shares and that Harold need take no further action. Mrs Crampton also informed Harold directly of her intention to transfer shares to him and of her desire that he should become a director of the company.

However, when Mrs Crampton died, her will made no disposition of the shares in favour of Harold, so the question arose whether she had made an effective disposition during her lifetime. At first instance the court noted that there was no evidence that the gift had been intended to take effect in the future or subject to any condition precedent. Accordingly the court could have held the gift to be ineffective, but instead it held that the gift had been effective immediately the share transfer forms had been executed even

[64] "Unconscionability in Property Law: A Fairy-Tale Ending?" in M. Dixon and G. Ll H Griffiths, *Contemporary Perspectives on Property, Equity and Trusts Law* (Oxford: OUP, 2007) pp.117-137.
[65] [2002] 1 WLR 2075, Court of Appeal.

though the forms were never delivered to Harold or to the company. Their Lordships' held that Mrs Crampton's disposition had been effective on two grounds. One ground was technical, the other was anything but. It is the latter which concerns us. Arden LJ held that it would be unconscionable for Mrs Crampton to resile from the transfer she had embarked upon. Her ladyship described unconscionability as a "policy consideration"[66] that operates in favour of holding that a transfer has been perfected, but surely Mrs Crampton's own intentions are not capable, without more,[67] of creating a burden on her own conscience. Despite these concerns, Schiemann LJ agreed with Arden LJ's reasoning without discussion and Clarke LJ agreed that "if unconscionability is the test . . . it would have been unconscionable of Mrs Crampton, as at the time of her death (if not earlier), to assert that the beneficial interest in the 400 shares had not passed to Harold".[68]

Arden LJ was no doubt sincerely motivated to achieve a just outcome for the parties in the case. To assist her in that mission her ladyship invoked equity's long tradition of protecting an intended donee from the rigours of equity's own maxim, "equity does not assist a volunteer". Employing a literary metaphor,[69] her ladyship described the maxim as a harsh wind blowing against a "shorn lamb" (i.e. the donee)" and she determined to "temper the wind" to the lamb by finding some way to make the gift effective despite the inconvenient timing of Mrs Crampton's death.

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[66] *Ibid* at 2091.
[67] She did not raise an expectation in the donee that was in any significant way relied upon to his detriment. Certainly there was no detrimental reliance sufficient to bind her conscience.
[68] [2002] 1 WLR 2075 at 2095.
[69] "*God tempers the wind*, said Maria, *to the shorn lamb*" (Laurence Sterne, *A Sentimental Journey through France and Italy, By Mr. Yorick* (London: for T. Becket and P. A. De Hondt, 1768) 'Maria'. It has been noted that Sterne was probably quoting H. Estienne, *Les prémices* (1594): "Dieu mesure la froid à la brébis tondue".

Her ladyship was undoubtedly successful, but one is bound to conclude that the aid supplied to the donee comes in somewhat wooly form. Her ladyship held that:

> There are…policy considerations which…militate in favour of holding a gift to be completely constituted. These would include effectuating, rather than frustrating, the clear and continuing intention of the donor, and preventing the donor from acting in a manner which is unconscionable.[70]

How can the court claim to be simultaneously assisting and compelling the donor? A genuine bilateral or common intention between parties might conceivably bind the conscience of one to the other, but a unilateral intention of gift cannot bind the donor until it has been acted upon by the donor[71] (or, exceptionally, as in a case of estoppel, acted upon by the donee) in a way that makes the gift irrevocable.

Equity should not, in Hamlet's words, be "cruel…to be kind" (3.4.176), but neither should it be "kind to be cruel". The image of Astraea with her scales in heaven – within her reach, but beyond ours - warns us that earthly justice will never attain perfection. Even equity, which should blunt the sharpness of the law, sometime sharpens itself in the process and makes a sword of itself. We should not be surprised that our equity leans occasionally a little to the left, or a little to the right. Our equity is not sufficient to prevent all bias, but we should strive to correct bias without over-correcting it. To return to another metaphor, it is kindness to temper the wind to the shorn lamb, but

[70] Ibid at 2091.
[71] By execution of a deed of gift or by transfer of the subject matter of the gift to the intended donee. See, G. Watt, *Trusts and Equity*, 3rd edn., (Oxford: OUP, 2008) chapter 4.

for the equity of law to cover the lamb in wool is folly in the extreme; for the law *is* the wind, and the very form and deeds of law are cruel. As Hamlet elsewhere says, when contemplating the work of the law: "[i]s not parchment made of sheepskins?"(5.1.85)

Conclusion

The problem with the courts' willingness to enforce an express trust against the estate of a deceased person, even though the deceased person created no such trust in their will and had made no irrevocably binding trust when they were alive, is that the courts' intervention undermines the principle that the gratuitous disposition of property should be a wholly voluntary act. Equity's behaviour in officially "assisting" in a disposition, especially where it claims to do so in response to the donor's "unconscionability", is that it amounts almost to a type of forfeiture – the very thing that equity professes to abhor. It seems that when equity indulges one party by bending the law to an extreme, it harms the public as whole, and when it seeks to protect the public as a whole, it harms the individual unduly. We have seen how the severe edge justifies its extremity by reference to the public good. One case claimed that the "safety of mankind" requires that trustees should be held to very strict standards of accountability.[72] No doubt such extremity sets a fine, albeit fearsome, example to other trustees; but what kind of example is set to cohabitants when equity so generously indulges their failure to comply with formality? If it were not harmful enough that equity wields a double-edged sword, with one edge severe and one edge indulgent, it appears on close examination that the reasons for

[72] *Parker v. McKenna* (1874) R 10 Ch App 124, above.

indulgence and severity are at odds with each other. The severe edge seeks to encourage "les autres" to perfect obedience to the rule, but the indulgent edge encourages "les autres" to neglect the rule. The two edges are not of self-same metal, but are divided against themselves.