

Is the Law of Equity Equitable in Aristotle's Sense?

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Everyone who weighs in on the issue agrees that it is difficult to say exactly what, conceptually speaking, ties together the doctrines collected in the law of equity. One answer is: nothing, really. This view, which we might call equity nominalism, is well expressed by Maitland's famous claim that equity is "that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity."¹

There are two principal alternatives to equity nominalism. One is the view that the law of equity does equity in Aristotle's sense, by correcting for errors that arise owing to the generality of legal rules. This view appears early in the development of the law of equity, in the two most historically significant principled defenses of the independence of the Court of Chancery, St. German's *Doctor and Student* (1523)² and Lord Ellesmere's judgment in *The Earl of Oxford's Case* (1615).³ Both St. German and Lord Ellesmere represented the Aristotelian account as consistent with the second principal alternative to equity nominalism, the view that equity prevents persons from exercising their legal rights when doing so would be contrary to

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¹ F.W. Maitland, *Equity; Also, the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge: Cambridge University Press, 1929), 1.

² William Muchall (ed.), *St. German's Doctor and Student* (Cincinnati: Robert Clarke, 1886).

³ *The Earl of Oxford's Case* 1 Chan. Rep. 1, 21 E.R. 485 (1615).

conscience. Neither, however, was explicit about how the two views should be understood to relate.

In this paper I want to ask whether the law of equity is equitable in Aristotle's sense. The bulk of it is dedicated to answering the prior question, what would the law of equity have to look like to conclude that it is equitable in Aristotle's sense. The answer depends of course on how we understand Aristotle. As characterized by St. German and Ellesmere, we will see, equity in Aristotle's sense is an idea reflected in elements of the common law no less than in the law of equity. This would mean the answer to my question is yes, but in a way that does not offer a helpful answer to the equity nominalists. I will suggest, however, that on a more careful reading, and subject to what I will argue is a friendly amendment, Aristotle's account of equity illuminates the structure of some features we might think distinctive of equitable doctrines (though there are hard cases, most notably express trusts). If sound, this result is interesting for several reasons. First, we can arguably find in Aristotle a link between the idea that equity corrects errors arising from the generality of legal rules and the idea that equity prevents persons from insisting on their rights in at least some of the circumstances that would have been described in Chancery as being contrary to conscience. Second, the Aristotelian account provides a compelling justification for distinguishing between law and equity (though not for its expression in the jurisdictional distinction collapsed by the Judicature Acts). Finally, we can find in this account an answer to the long-standing worry that equity is subversive of the rule of law.⁴

I will begin with a sketch of Aristotle's account of equity as I understand it, and then consider its expression in support of equitable construction, an approach to statutory interpretation given its classical articulation and defence in the late sixteenth century. I will turn then to take a close look at *The Earl of Oxford's Case*. The case merits our attention for a few

⁴ Classic early expressions of this worry are found in "A Replication of a Serjeant at the Laws of England," an anonymous response to St. German's *Doctor and Student* (reproduced in Muchall (ed.)), and in John Selden, *Table Talk*.

reasons. As well as being “the wellspring of equity in modern English law,”⁵ it marks (I believe) the first judicial invocation of Aristotle’s account in defence of the independence of Chancery.⁶ Furthermore, there is hardly a stronger representation of the explanatory and justificatory power of that account than in Lord Ellesmere’s judgment: “The Cause why there is Chancery...” he writes, and then glosses Aristotle.⁷ Most importantly, we will see, many of the issues raised by my question run through the case, and through a consideration of it we get close to isolating what on Aristotle’s account is distinctive of equity. I will refine that idea through a consideration of some doctrines in present-day law. In conclusion I will consider the limitations of the Aristotelian reconstruction of the law of equity and briefly raise the question of its relation to the rule of law.

One last introductory point, concerning terminology. From now on I will adopt the customary practice of using “Equity” to name the doctrines picked out by Maitland’s criterion and “equity” to name the idea or ideas to which those doctrines arguably give expression. And I will call the view that Equity is equitable in Aristotle’s sense “the Aristotelian account of Equity,” and the account of equity we find in the *Nicomachean Ethics* and the *Rhetoric* “Aristotle’s account of equity.”

Aristotle’s account of equity

Equity, Aristotle tells us in the *Nicomachean Ethics*, is a kind of justice, “not the legally just but a

⁵ Gary Watt, *Equity Stirring* (Oxford: Hart, 2009) 67.

⁶ Though not credited; see n16. Chancery was granted extraordinary jurisdiction by at least 1349 (Watt 51) and was associated with equity at least by 1468 (Watt 49 n10). What is new with St. German is the claim that Chancery’s extraordinary jurisdiction is justified by the fact that it does equity in Aristotle’s sense.

⁷ 1 Chan Rep. 6, 21 E.R. 486.

correction of legal justice” (*EN* 5.10, 1137b11-12).⁸ Correction is sometimes necessary because all law is universal and, owing to its universality, can lead to error in particular cases. Legal justice, then, seems to be that justice upheld, or that can be upheld, through legislation or general legal rules.⁹

Later in the same passage Aristotle says something slightly different: “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” (*EN* 5.10, 1137b25-26). Here Aristotle says that equity is better not than legal justice but rather than the errors to which we would be led if we upheld legal justice come what may. There is a subtle difference here. Saying that equity is a correction of, and to that extent better than, legal justice implies or at least invites the thought that equity comprises or expresses a set of principles independent of any particular regime of positive legislation and to which any such regime is subject. Saying instead that equity is better than the errors to which we would be led if we upheld legal justice come what may invites the familiar idea that equity invites us to go by the spirit but not the letter of the law, and so to realize something implicit in the positive law, rather than subject it to an external standard. Let’s say that the first expresses an external account of equity and the second an internal account. Aristotle’s account, I will argue, is not quite either. To see why we need to work through its details.

“The nature of the equitable,” Aristotle concludes in *EN*, is “a correction of law where it is defective owing to its universality” (*EN* 5.10, 1137b27-28). There are two possible sources of this defect. The first is the legislator. Sometimes a case arises for which the relevant legislation fails to provide an answer it could have had it been more carefully crafted. In such cases, Aristotle says, we ask what the legislator would have said had she been present, and treat that

⁸ This and all other quotations from the *Nicomachean Ethics* are taken from J.O Urmson’s revision of W.D. Ross’s translation in Jonathan Barnes (ed.), *The Complete Works of Aristotle* Vol. 2 (Princeton: Princeton University Press, 1984).

⁹ Aristotle seems to have legislation in mind but he sometimes just talks about the law and in any case nothing in his account, it seems to me, resists application to the common law.

answer as law. Sometimes, however, the source of the equity-correcting defect isn't in the legislator, but in the nature of the matter of practical affairs, which sometimes resist being captured in general rules. In the face of the nature of practical affairs the careful legislator adopts either or both of two strategies. First, she legislates “as if that held good always which in fact only holds good usually” (*Rh* 1.13, 1374a31),¹⁰ stipulating, for example, that borrowed goods must be returned to their owners, notwithstanding that this is not always the case (when, for example, the owner has since gone mad).¹¹ Second, she chooses a general term notwithstanding that its extension cannot be precisely fixed, “such as the kinds and sizes of weapons that may be used to inflict wound—a lifetime would be too short to make out a complete list of these” (*Rh* 1.1.3, 1374a33-34). Imagine someone is accused of assault with a weapon, on the basis that he was wearing a ring when he lifted his hand to strike or actually struck someone else. According to the letter of the law (the text of which Aristotle does not provide) he is guilty of assault with a weapon. But, Aristotle says, “he is innocent really”—presumably only of the more serious wrong of assault with a weapon and not of assault *simpliciter*—“and it is equity that declares him to be so” (*Rh* 1.13 1374b1-2).

Now sometimes, Aristotle tells us, the heterogeneity of world of practical affairs is such that it resists subsumption under general rules. In such cases equity requires that the judge issue a fact-specific decree, “[f]or when the thing is indefinite the rule is also indefinite, like the lead rule used in making the Lesbian moulding; the rule adopts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts” (*EN* 5.10, 1137b29-33). In such cases no law will do. (He unfortunately does not give us an example.) The weapon example, however, does not seem to be like this. There the wrongdoer's innocence of the greater offence follows from a correct interpretation of, rather than a departure from, the law. So it seems that in at least some

¹⁰ This and all other quotations from the *Rhetoric* are taken from W. Rhys Roberts's translation in Jonathan Barnes (ed.) *The Complete Works of Aristotle* Vol. 2 (Princeton: Princeton University Press, 1984).

¹¹ Aristotle does not use this (or any) example, but it was a common one in the classical period.

cases in which the equity-correcting defect arises owing to the nature of practical affairs the solution is found by asking what the legislator would say if she were there (just as it is in cases in which the problem could have been avoided by more careful legislation). This is because we can imagine the legislator to have the end of the legislation in mind.¹² In Aristotle's example, if the aim of the law was to single out, for more serious treatment, assaults committed with weapons from those committed without, then we could reasonably conclude that the fact that the defendant was wearing a ring should not bring him under the provision.

A puzzle now arises at this point of the *Nicomachean Ethics* account. He tells us that "it is evident" from this account of equity "who the equitable man is." He "chooses and does such acts, and is no stickler for justice in a bad sense but tends to take less than his share though he has the law on his side" (*EN* 1137b34-1138a1). According to the account to this point, equity in a sense gets the law right: the ring-wearing assaulter, recall, is "innocent *really*." Here, however, Aristotle says equity asks you to take *less* than your due.

The first step to reconciling the two senses of equity is to note that each has a different addressee. The correction of legal justice is the responsibility of the judge. The injunction to be content with less than one's due is addressed to the claimant.¹³ That undoes the flat-out contradiction, but, it seems, at the cost of making "equity" stand for two independent ideas. This is conceptually disappointing and furthermore fails to account for the fact that Aristotle seemed to think the ideas are at least closely enough related that the second "is evident" from the first. The more complete solution, I think, is to say that the law that the stickler stands on is the letter of the law, uncorrected by equity. Above we saw that for Aristotle one wrong that equity corrects is the conviction of the innocent, or, more generally, legislative over-breadth—or, more generally still,

¹² And this is why presumably we should ask her when the error lies in the way in which she drafted the legislation.

¹³ As are a number of other things Aristotle tells us equity bids us to do in the *Rhetoric*, for example to remember benefits rather than injuries and to be patient when wronged (*Rh* 1.13 1374b10-23).

the overreach of legal rules. My claim is that we see here a second, namely, the opportunistic exploitation by claimants of the letter of the law.¹⁴

We can now return to the question I left unanswered above, namely whether Aristotle held an external or an internal account of equity. On the first, again, equity comprises or expresses a set of principles independent of any particular regime of positive legislation and to which any such regime is subject. On the second equity invites us to go by the spirit but not the letter of the law, and so to realize something implicit in the positive law, rather than subject it to an external standard. I suggested that the answer was not quite either.

Let's begin by seeing why it can't quite be the second. As we saw above in cases in which the equity-correcting defect in the law is owed to the legislator and in at least some cases in which it is owed to the nature of practical affairs the solution is to ask ourselves what the legislator would say in the present case were she asked. This sounds like an internal account. But if equity is a kind of justice, as Aristotle holds, we must suppose that the legislator seeks to do the kind of justice equity upholds. So "the legislator" here is not, or not necessarily, the particular author of the particular law, because she may not in fact have sought and would not now seek to do the kind of justice equity upholds. Instead by asking what the legislator would do we must be invoking an objective standard.¹⁵ This is not quite an external account as I characterized one because the standard is formal rather than substantive. In Aristotle's assault example, the legislator in the particular case realizes equity not by determining what ends the law ought to pursue but rather by ensuring that the burdens imposed by their pursuit fall where they ought. Similarly, the legislator can be supposed to seek to prevent the opportunistic exploitation of the letter of the law.

¹⁴ As Henry Smith suggests in "An Economic Analysis of Law versus Equity." http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf at p 4 n10.

¹⁵ We will see below that this is just how common lawyers, starting at least with Plowden, interpreted Aristotle.

This is Aristotle's account of equity in a nutshell. We find part of its core (but only part) in Lord Ellesmere's justification of the independence of the Chancery in *The Earl of Oxford's Case*. There he says:

The Cause why there is Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.¹⁶

Below we will look closely at Ellesmere's argument. But it will set the stage both conceptually and historically to pause, first, to consider the striking fact that the very idea from Aristotle invoked by Ellesmere here had been for years invoked to explain a kind of equity it was the responsibility of common law judges to see done.

Equitable construction

Especially striking for our story, given that Coke wrote the King's Bench judgment in favour of the parties who reappeared as defendants in *The Earl of Oxford's Case*, is the fact that an oft-quoted formulation of this non-Equitable sense of equity comes from Coke's first *Institute*. He writes:

“*Equitie*” is a construction made by the judges, that cases out of the letter of a statute, yet being with the same mischief, or cause of making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-makers could not possibly set downe all cases in expresse terms.¹⁷

Coke here echoes, and I'd guess drew upon, Edmond Plowden's annotation to *Eyston v. Studd*, a

¹⁶ 1 Chan. Rep. 6; 21 E.R. 486. In fact Lord Ellesmere does not credit Aristotle but there is a fairly clear, though doubly indirect, link. The first step is that Lord Ellesmere explicitly drew elsewhere in his judgment on St. German's *Doctor and Student*. St. German, in turn, obviously drew on Aristotle, but he too did not credit him. It turns out he got his Aristotle indirectly, from Jean Gerson. See Paul Vinogradoff, “Reason and Conscience in Sixteenth-Century Jurisprudence” (1908) 46 *Law Quarterly Review* 373, 374-75.

¹⁷ Sir Edward Coke, *Commentary on Littleton* 21.24.b.

1574 case in the second volume of his Reports.

Eyston, Plowden argues, illustrated the principle that “it is not the words of the law, but the internal sense of it that make the law.”¹⁸ He continues:

And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called *equitas*, enlarges or diminishes the letter according to its discretion.¹⁹

There are, then, two kinds of equity on Plowden’s account. The first, which on his telling comes from Aristotle, diminishes the letter of law—that is, is corrects for a law’s over-generality by excepting someone who seems to be caught by it. An example is excusing an infant or someone of unsound mind from conviction for a felony. Another is excusing a sheriff for selling perishable goods gathered from a shipwreck before a year and a day had passed, contrary to statute. By the letter of the law, he is guilty. “[B]ut on the other hand,” Plowden argues,

if we follow the sense and meaning of the Act, he has done well, and shall not be punished, for the meaning of the Act is, that such things as could be kept for a year without spoil or damage should be kept so long, but if the things are so perishable that they cannot be preserved a whole year, not perhaps two days, then it was not the intent of the makers of Act that the sheriff should let them fall into decay, but rather than he should immediately make the most of them he could: so that although the sheriff has done contrary to the words of the law by selling the goods within a year, yet he has not broken the law, but has punctually observed it, inasmuch as he has observed the intent and meaning of the makers of the law.²⁰

¹⁸ 2 Plowden 465, 75 E.R. 695.

¹⁹ *Id.*

²⁰ 2 Plowden 466, 75 E.R. 697.

This sort of equity is necessary, Plowden argues, because no law maker can foresee all things which may happen, and therefore “if there is any defect in the law, it should be reformed by equity, which is no part of the law, but a moral virtue which corrects the law.”²¹

The second kind of equity has the opposite effect. It extends the reach of statutes to cases not covered by their letter. Here Plowden’s authority is Bracton, on whose account “[e]quity is the bringing together of things, that which desires like right in like cases and puts all like things on an equality,”²² but he could have invoked Aristotle on this point as well: when Aristotle describes a legislator erring by oversimplicity, the problem he has in mind is a case outside of the letter of the law (*EN* 5.10 1137b19-24). An example (from Plowden) is a case in which a plaintiff was allowed a remedy provided by statute for someone ejected from his land when the defendant had through nuisance made the plaintiff’s property unusable, on the ground that that was an effect “in like degree” with the harm explicitly contemplated by the letter of the law.

How do we tell whether the letter of the law ought to be restrained or enlarged by equity? When interpreting a statute, Plowden writes, “it is a good way” to ask ourselves what the lawmaker “being an upright and reasonable man” would say. Plowden, then, follows Aristotle here on every point, down to representing the legislator objectively (as I argued we ought to understand Aristotle doing). His language on this point is in turn adopted word for word by Matthew Hale whose formulation of equitable construction is relied on in the celebrated case *Riggs v Palmer*.²³ Hale wrote

By an equitable construction, a case not within the letter of the statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers could not set down

²¹ 2 Plowden 466, 75 E.R. 698.

²² Samuel Thorne (ed.), *Bracton on the Laws and Customs of England* v 2 (Cambridge: Harvard UP, 1968) 25. Coke quoted the same passage following his definition of equity.

²³ 115 N.Y. 506 (1889).

every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto.²⁴

It is worth taking a moment to consider the way in which this idea is deployed in the reasoning in *Riggs*.²⁵

Elmer Palmer stood to inherit a valuable piece of property from his grandfather, but feared that he was going to change his will. So he murdered him, and claimed the property. The puzzle facing the court was that, in the words of Justice Earl, writing for the majority, “[the] statutes regulating the making, proof and effect of will, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.”²⁶ The majority found, however, that the statutes could be controlled, in either of two ways. The first is that they, like all statutes, are subject to equitable construction. The court finds it “inconceivable” that “it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate,”²⁷ and so on this basis find against *Riggs*.

²⁴ Matthew Bacon, *A New Abridgment of the Law* Vol. 4 (Dublin: Luke White, 1783), 649.

²⁵ In fact it is not quite this idea on which the court relies. *Riggs* is not a case where equity extends but rather limits the effects of a statute. Not everyone is attentive to Plowden’s distinction.

²⁶ *Riggs* at 509.

²⁷ *Riggs* at 511.

How far in the details can this be accounted for in Aristotle's terms? We would not want to say, I don't think, that the legislature here erred in failing to explicitly exclude murderous heirs from the benefits provided by the legislation. The case seems rather more akin to an example offered by St. German:

[I]f a law were made in a city, that no man under the pain of death should open the gates of the city before the sun-rising; yet if the citizens before that hour flying from their enemies, come to the gates of the city, and one for saving of the citizens openeth the gates before the hour appointed by the law, he offendeth not the law, for that case is excepted from the said general law by equity.²⁸

Both are cases in which legislators justifiable legislate as "as if that held good always which in fact only holds good usually" (*Rh* 1.13, 1374a31).

The second way the statutes can be controlled in their operation and effect, Justice Earl continues, is "by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."²⁹ Each of these maxims describes a rich and complex idea or set of ideas, but I don't think it oversimplifies to suggest that each in its own way describes and forbids conduct that is opportunistic in the sense exemplified by the claimant who is a stickler for her rights. So though Justice Earl does not use this language, he in effect offers as an alternative rationale for denying Riggs's claim that allow it would work an inequity in the second as well as the first of the two senses that comprise Aristotle's account. The only significant point that separates the Court in *Riggs* from Aristotle on this point is that for Aristotle, I argued, the two sides of equity are unified in a single judgment that a finding in favour of

²⁸ *Doctor and Student* 45. This is a case of necessity, as are some other examples St. German uses to illustrate equity. It is an interesting question how far in the details the defence of necessity exhibits the structure of an equitable doctrine in the Aristotelian sense. I discuss this below in n67, against the background of a more fine-grained description of the Aristotelian account.

²⁹ *Ibid.*

someone like Riggs would work an inequity and in so doing misapply the law.

Here, then, is a puzzle. Aristotle's account of equity has served as the basis of a particular kind of statutory interpretation, a matter squarely in the responsibility of judges of the common law. And it has done so since well before *The Earl of Oxford's Case*. Now, Lord Ellesmere was well aware of this. In a passage of the judgment in which he emphasized the harmony between common law and Equity he wrote "Judges themselves do play the Chancellors Parts (upon Statutes, making Construction of them according to Equity, varying from the Rules and Grounds of Law."³⁰ So how then does Aristotle's account of equity support the distinctiveness of claims in Equity (if it does)?

The Earl of Oxford's Case and the Earl of Oxford's case

The facts of *The Earl of Oxford's Case* and the judicial history of the litigation to which those facts gave rise and of which the reported Chancery decision is a part (close to but not yet at its resolution) are enormously complex, and have been detailed elsewhere.³¹ Here I will retell only what is necessary to properly frame the elements of the judgment that I want to consider.³²

The case centered on a dispute over a piece of land in London. The land had been sold

³⁰ 1 Chan. Rep. 13 75 E.R. 488. There is no closing parenthesis in the paragraph. Ellesmere continues: "...and enlarging them [statutes] *pro bono publico*, against the Letter *and Intent* of the Makers." I've added emphasis at the point at which his characterization of equitable construction departs from Plowden, Coke and Hale (and, I've argued, Aristotle). I don't know whether too much should be made of this. We might imagine Ellesmere was representing the common law judges as more activist (as we'd now say) than their own self-description would suggest, so as to make the chancellor's interventions seem less dramatic. That would be consistent with the spirit of the surrounding passages.

³¹ See Mark Fortier, "Equity and Ideas," in Daniel Fischlin and Mark Fortier, *Royal Subjects: Essays on the Writings of James VI and I* (Detroit: Wayne State University Press, 2002), 268-74, Mark Fortier, *The Culture of Equity in Early Modern England* (Hampshire: Ashgate, 2005), 4-5, Watt, *Equity Stirring*, 67-72 and, for an especially detailed account, David Ibbetson, "*The Earl of Oxford's Case*" (unpublished).

³² I will draw here generally on the report in 1 Chan Rep. 1 and the sources listed in n31 though in particular on Ibbetson's paper for some points, acknowledged below.

by Magdalen College, Cambridge to Benedict Spinola, a Genoan merchant to whom the college was in debt, by way of an intermediate transfer to Queen Elizabeth. This contrivance aimed to avoid a statute (13 Eliz. c. 10) that provided that “all leases, gifts, grants, reoffends, conveyances or estates, to be made, had, or suffered by any master and fellows of” *inter alia* “any college, dean, and chapter of any cathedral or collegiate church” to “any person or persons, bodies politic or corporate, other than for the term of 21 years, or three lives, shall be utterly void.”³³ The thought evidently was that, the statute notwithstanding, a transfer from the Queen would grant unimpeachable title to the transferee. This, it seems, was taken to be the case in good faith by Spinola and by Edward de Veer, the Earl of Oxford, to whom he sold the land in 1580. The Earl built 130 houses. One of these houses came to be leased to John Warren, by way of a number of intermediaries.

The dispute that began the litigious story started when Barnaby Goche, Master of Magdalene, claimed to lease the land to John Smith. Warren brought an action of ejection against Smith but his lease expired before it could be heard. Warren asked the court to decide the question anyway. A jury found in his favour, holding that Smith had taken possession unlawfully. This decision was reversed on appeal to the Court of King’s Bench. In a lengthy and careful judgment, Chief Justice Coke held that the initial transfer of land was void on the grounds *inter alia* that it was caught by the prohibition in 13 Eliz. c. 10.³⁴ The Queen, the court held, was a person for the purposes of the statute and, more importantly, as “the fountain of justice and common right” could not be exempted by construction from a statute that aims at the public goods of the maintenance of religion, the advancement of learning, and the sustenance of the poor.

³³ *The Case of the Master and Fellows of Magdalen College in Cambridge* 11 Co. Rep. 66b, 67a, 77 E.R. 1235, 1236-37.

³⁴ The Court also considered and rejected the argument that the transfer was saved by later statutory provisions. I cannot (and need not) go into the details here.

In the mean time Edward de Vere had died and was succeeded as Earl of Oxford by his son Henry de Vere, still a minor. The new Earl of Oxford and Thomas Wood, another tenant dispossessed by Magdalen College, brought the case to Chancery. The defendants Goche and Smith refused to answer the bill, arguing that the initial conveyance to Spinola was void by statute. Two Masters in Chancery ordered them to appear but they refused on grounds that the matter was not in Chancery's jurisdiction. They were thereupon committed to Fleet prison for contempt.

Here is the point in the story that the reported *Earl of Oxford's Case* appears.³⁵ The judgment seeks to justify imprisoning the defendants for contempt in refusing to answer the Earl of Oxford's bill. Lord Ellesmere's main point is to justify Chancery's claim to jurisdiction in the case. While his argument begins by making out a prima facie case for the plaintiffs (on which more in a moment), its core is a defence in principle of the conceptual independence of Equity from the common law and so of the jurisdictional independence of Chancery. The plaintiffs did win on the substantive point soon after, on grounds that included but were not limited to the arguments canvassed by Lord Ellesmere in making out the prima facie case in *The Earl of Oxford's Case* (on which, too, more in a moment).³⁶ On May 6, 1616 Ellesmere issued an injunction granting the Earl and his tenants quiet enjoyment of the land and staying all common law suits against him. That was not the end of the battle, but it was its legal conclusion.

Let's see, then, how the argument of *The Earl of Oxford's Case* unfolds. According to Lord Ellesmere both the law of God and Equity support the plaintiffs' claim, and nothing in Law opposes it. By the Law of God "He that builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof."³⁷ Here defendants claim houses and gardens they

³⁵ As Ibbetson shows in "*The Earl of Oxford's Case.*"

³⁶ The source of the non-reported arguments is the Chancery rolls, my source for the content of which is Prof. Ibbetson's paper.

³⁷ This is Ellesmere's gloss on *Deuteronomy* 28:30.

have neither built nor planted: less metaphorically in asserting title to the disputed land they claim too the benefit of the improvements made by the Earl and his tenants. But just as the common law will not recognize a contract to be good without consideration, here Equity insists that persons in the defendant's position render *quid pro quo*. (This, note, is all that the plaintiffs sought at this point of the litigation, that is, to be compensated for the improvements they had made to the land. Below we will consider the conceptual significance of the distinction between this and the remedy they eventually were granted.) Against this, Ellesmere tells us, the defendants "would silence Equity" on two grounds: they have a judgment at law and that judgment is based upon a statute. His answer to each comprises the defence of the independence of Equity for which the case is famous. I'll take them up in reverse order, because the really important work is done in the first.

Ellesmere rejects the argument that the plaintiffs' claim cannot be heard because the defendant's judgment at common law was based on a statute on two grounds. Each seeks to show that in entertaining the plaintiffs' bill, Chancery would not be disrespecting the authority of statutes any more than common law judges do. First, just five years earlier Coke had, in *Dr. Bonhman's Case*, declared that the common law can control acts of parliament and declare them void if they are against common right or reason. Chancery was not proposing to do anything so drastic. Second, as noted above, Ellesmere claims that common law judges themselves "play the Chancellors Parts" in taking the equitable construction of statutes to be law properly speaking.³⁸

More basic is the argument that because defendants have a judgment at Law Chancery has no jurisdiction. It is here that Ellesmere invokes Aristotle, again by claiming that

The Cause why there is Chancery is, for that Mens Actions are so divers and infinite,
That it is impossible to make any general Law which may aptly meet with every

³⁸ Though, again, as noted above (n30), Ellesmere characterizes equitable construction as a more activist approach to statutory interpretation than do Plowden and Coke.

particular Act, and not fail in some Circumstances.³⁹

Left there one might guess the idea would be that, to take the present case as an example, Ellesmere would argue that Coke had misinterpreted 13 Eliz. c. 10 in *The Case of the Master and Fellows of Magdalen College in Cambridge*. On this view, Chancery wouldn't do anything the common law courts do not or cannot do, but rather serves as a court of appeal.⁴⁰ But this isn't Ellesmere's line. Part of the background, only implicitly acknowledged by a cite to St. German, is that this answer is pretty clearly ruled out by a statute (4 Henry 4 c. 22) that declared that judgments in the king's courts are final. In *Doctor and Student* St. German's student supports the statute on the ground that "[i]f judgment given in the king's courts should be examined in the *chancery* before the king's council, or any other place, the plaintiffs or defendants should seldom come to the effect of their suit, ne the law should never have end."⁴¹ But he holds that it does not prevent aggrieved plaintiffs from going to Chancery after losing at common law. How is this possible? St. German gestures toward an answer more explicitly articulated by Ellesmere.

The conceptual set up comes immediately after the passage invoking Aristotle.

Ellesmere adds:

The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, to what Nature soever the be, and to soften and mollify the Extremity of the Law, which is called *Summum Jus*.⁴²

Key is the idea that the office of the Chancellor corrects defendant's consciences for particular

³⁹ 1 Chan. Rep. 6; 21 E.R. 486.

⁴⁰ This is Hobbes's view. See *A Dialogue Between a Lawyer and a Student of the Common Laws of England*, Joseph Cropsey (ed.) (Chicago: University of Chicago Press, 1971), especially at 70 (32 in the original pagination). Hobbes is forced into this view by the depth of his commitment to the view that all law and so all courts must be understood to seek to do equity. I try to sort through the place of Hobbes's treatment of equity in his legal theory in "Hobbes on Equity" in David Dyzenhaus and Thomas Poole (eds.), *Hobbes and the Law* (Cambridge: Cambridge University Press, forthcoming).

⁴¹ *Doctor and Student* 50.

⁴² 1 Chan. Rep. 6-7; 21 E.R. 486.

sorts of wrongs: that is, it prevents persons from exercising their legal rights when doing so would be contrary to conscience. What it does not do is second guess the common law courts' findings as to what the law requires in the particular case: "[I]n this Case there is no Opposition to the Judgment; neither will the Truth or justice of the Judgment be examined in this Court, not any Circumstance depending thereupon." How does the Aristotelian account fit in here? Ellesmere does not say. What he does next is give some examples. Let's have a look and see what answer might be essayed on Ellesmere's behalf.

The first is a staple, discussed in *Doctor and Student*. Defendant discharges a debt owed the plaintiff but either fails to secure an acquittance (a written receipt) or loses it. By common law he will be compelled to pay again but Chancery will enjoin the creditor from enforcing the judgment. Now the creditor is a clear example of what Aristotle would have described as someone who is a stickler in bad way, and equally a clear example of someone who Chancery would characterize as seeking to enforce a legal right when doing so would be against conscience. This suggests we might graft the relation between the two senses of equity in Aristotle's account onto the relationship between the element of Aristotle's account that Ellesmere invokes, that equity steps in when the law fails in the particular circumstances, and the older idea that equity prevents persons from exercising their rights when doing so would be against conscience. Recall that for Aristotle equity requires a judge to correct for errors arising owing to the generality of law *and* asks a claimant to be content with less than she is owed despite having the law on her side. I suggested these could be reconciled by taking the law that the stickler has on her side as the letter, uncorrected by equity. So a guiding principle for the judge that seeks to do equity is that she interpret the law in a way that prevents its opportunistic exploitation. Perhaps then we can attribute to Ellesmere, by analogy, the idea that the failures of law that Chancery seeks to set aright are those that permit defendants to act in a manner contrary to conscience, by standing on their strict rights.

This analysis shows that the debtor's case isn't a particularly good example of the claim

Ellesmere hopes it will illustrate, that Equity and so Chancery do not second guess judgments at common law. That's because the case where a debtor fails to secure or loses an acquittance cannot plausibly be supposed to a case not in the law-maker's contemplation. To hold that it was, and to on that ground exempt the creditor, would *just* amount to rejecting the law. What is harsh about the common law here is its indifference to evidence that the debtor had discharged her debt; what is distinctive about Chancery here is its willingness to accept it, owing to its distinctive rules of procedure. There is no doubt that this was a very important element of the development of Equity.⁴³ But it doesn't make Ellesmere's point, and his invocation of Aristotle helps show that. It is hard to see how in this case Chancery would *not* be finding that in fact the debt was discharged, and so how it could not be denying the truth of the judgment at common law (however sound the view that the common law rule and the rules of evidence on which it relied were unjustifiably harsh might be).

The rest of Ellesmere's examples either parallel the first or involve misconduct on the defendant's part, for example duress. Examples in this second group can more easily be cast in a structure that makes Ellesmere's main point, depending on how we understand the substantive claims on which they rest. Suppose I enter into a contract under duress from the other party. We might find that the pressure undermined my consent to the terms of the contract. If we left it to Chancery to make this judgment that this case would be like the first. But we might find that I consented, in a way and to a degree to bind me to the contract, but that owing to the fact that my consent was got by undue pressure, the defendant ought not to be permitted to exercise his rights under the contract. Then Chancery would indeed be leaving the common law judgment untouched (let's suppose I'd first lost at common law) and finding in my favour notwithstanding

⁴³ On which see Mike Macnair, "Equity and Conscience" 27 O.J.L.S. 659. Macnair argues that in its use to characterize the distinctive jurisdiction of Chancery, "conscience" first meant not moral conscience but rather private knowledge of facts unprovable at common law owing to the common laws rules of evidence. This, Macnair argues, begins to changes around St. German's time. One can see both ideas at work in discussions of Equity at least as late as Blackstone. See his *Commentaries on the Law of England* v. 3 (1768) (Chicago: University of Chicago Press, 1979) 437.

it.

Let's adopt the second construal and work with it through the rest of the Aristotelian account. This seems to be a case in which the relevant general rule is one adopted "as if that held good always which in fact only holds good usually" (*Rh* 1.13, 1374a31). But we might ask why the rule cannot be made more fine-grained, why the correction should not apply to the rule and not just in the particular case. This would then turn the case into one in which the source of the equity-corrected error was in the legislator rather than the nature of practical affairs. We might ask this of Aristotle's example too: Might not "weapon" be defined in such a way as to exclude a ring from the outset? Perhaps not. The analogous question can, however, fairly be put to another example of his. "Equity," Aristotle tells us, "must be applied to forgivable actions; *and* it must make us distinguish between wrongdoings on the one hand, and mistakes, or misfortunes, on the other" (*Rh* 1374b4-6; my emphasis). He then spells out these distinctions as follows:

A misfortune is an act, not due to wickedness, that has unexpected results; a mistake is an act, also not due to turpitude, that has results that might have been expected; a wrongdoing has results that might have been expected, but *is* due to turpitude. (*Rh* 1.13, 1374b6-10)

Nowadays these distinctions are simply reflected in the rules of liability. So it doesn't seem to be in the nature of practical affairs that general rules need to be so general as to leave these discriminations to equity.

Perhaps, however, there are other sorts of constraints on the level and scope at which rules need to be cast that need to be taken as found in a way analogous to what Aristotle calls the nature of practical affairs. A weak sort is custom. Evidence on this point is thin, but it seems that precision at the level of sorting levels of fault would not have been characteristic of statutes in Aristotle's time. Draco's law of homicide (still in force when Aristotle wrote), for example, is fairly detailed on procedural matters concerning prosecution and pardon, but very course-grained

on the substantive law.⁴⁴ So it might be a contingent but important fact about conventions of statutory composition in Aristotle's context that shuffles to equity the task of distinguishing among levels of fault.

I would suggest that there are considerations that serve to fix the level and scope at which rules are cast—and so provide the scaffolding for the operation of equity—that, modally speaking, lie between the contingency of custom of the sort that arguably underlies Aristotle's example (and perhaps some of Ellesmere's) and the necessity (as Aristotle would have it, at least) of the nature of practical affairs. An illustration is suggested by the claimants' arguments in *The Earl of Oxford's Case*.

Recall the prima facie case made out on the plaintiffs behalf by Ellesmere. Their claim (at least at this point), recall, was not for title to the disputed property but rather for the increased value represented by the improvements that had made to it. It is the injustice of exploiting their claim at law to title to acquire houses they had not built and gardens they had not planted that on Ellesmere's reckoning was contrary to conscience.

So cast plaintiffs' claim was essentially a claim in unjust enrichment. The historical antecedent of the cause of action in unjust enrichment was a claim for money had and received. While squarely a common law action, money had and received was in the eighteenth century cast in terms striking similar to the way in which Ellesmere described Equity. There is first of all the language in which it was described. In *Moses v Macferlan* (1760), Lord Mansfield—who elsewhere called it an action “in the nature of a bill in equity”⁴⁵—wrote that “[i]n one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by

⁴⁴ See *Archaic Times to the End of the Peloponnesian War*, ed. Charles W. Fornara (Cambridge: Cambridge University Press, 1983) 18-20.

⁴⁵ *Clark v. Shee* (1774) 1 Cowp.197,199; 98 E.R. 1041, 1042.

the ties of natural justice and equity to refund the money.”⁴⁶ Perhaps too much should not be made of this: “equity” need not bear the technical sense relevant to Equity. More telling is Mansfield’s argument that finding in the plaintiff’s favour in this case is consistent with the lower court’s finding in the defendant’s favour.

Moses had endorsed four promissory notes made to him by a third party, Jacob, to Macferlan, on the latter’s promise that he would enforce them only against Jacob. He then sued Moses and won, as the court did not accept any evidence in proof of the spoken agreement. In justifying finding for Moses, Mansfield wrote:

The ground of this action is not, “that the judgment was wrong:” but, “that, (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money”...Money may be recovered by a right and legal judgment: and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.⁴⁷

The parallels with Ellesmere’s first example, of the debtor, are striking, so much so that one might think that Moses’s claim shares its weaknesses as an example of a distinctively equitable claim. That is, as with the debtor, Moses’s claim rests, in part, on matters of rules of evidence. As a consequence (again, as in the debtor’s case) it is difficult to see how Moses success does *not* rest simply on a different finding of fact, notwithstanding Mansfield’s claim that the ground of his action does not rest on claiming that the first judgment was wrong.

There clearly is a subtle but deep distinction between the debtor case and a claim in the

⁴⁶ 2 Burr.1005,1012; 97 E.R. 676, 681. Telling as well, perhaps, is the full name of the cause of action: money had and received to the use of the plaintiff. It’s tempting to think this is the trust-precuser “use.” “Use” had more than one meaning during its use as a legal term of art, however, so maybe this inference is unwarranted. Thanks to Lionel Smith for this point.

⁴⁷ 2 Burr. 1010; 97 E.R. 679.

present-day cause of action in unjust enrichment.⁴⁸ The point is best made with what is taken by many to be the paradigmatic claim in unjust enrichment, the claim for the value of money paid under a liability mistake.⁴⁹ A liability mistake is a mistake as to one's legal obligations. P forgetfully repays a debt to D twice over, for example. (To sharpen the example let's say D received the second payment innocently, having forgotten the first as well.) It matters what sort of mistake P has made because liability mistakes do not prevent title from passing. Other mistakes do. If P paid D thinking D was E, for example, P would have retained legal title to the money. Her claim would have been for the return of her property. In the liability mistake case it cannot be, for she has transferred ownership. This is what makes the case paradigmatic: but for the action in unjust enrichment, P would have no claim. D has none of her property, and has broken no promise to her.

So in the paradigmatic case plaintiff's claim does not dispute the loss of legal title. A claim in conversion would have failed and a judgment in her favour in a case in which she frames her claim in unjust enrichment does not contradict that. Instead it holds that while insufficient to prevent the passage of title, it follows from P's having been mistaken as to the legal quality of her payment that D is under a duty to make good to her the value by which he was enriched by coming into ownership of the payment. So if what we might call the law of transfer—those doctrines that *inter alia* specify the conditions under which title passes along with possession—is taken as found then there are arguably certain key structural elements of an equitable claim in the action in unjust enrichment. The claim prevents the transferee from exercising the rights she has

⁴⁸ (Possibly the point I want to make here could have been made with *Moses*. I don't know enough about the relevant law at the time to say.)

⁴⁹ In his final work on the topic, Peter Birks defined the law of unjust enrichment as “the law of all events materially identical to the mistaken payment of a non-existent debt.” Peter Birks, *Unjust Enrichment* 2d ed. (Oxford: Oxford University Press, 2005) 3. The centrality of this case is perhaps a legacy of unjust enrichment's roots in money had and received. The first example in Lord Mansfield's canonical list of cases in which the action would lie is money paid by mistake. 2 Burr. 1013; 97 E.R. 681.

gained; or, perhaps we might say, requires her to exercise them for the plaintiff's benefit.⁵⁰

Two points about the equitable reconstruction of unjust enrichment merit consideration. The first is just that it rests on taking the law of transfer as found.⁵¹ The doctrines that distinguish between those mistakes that prevent title from passing and those that do not bear a lot of weight here. A case can be made that they reflect a sound conceptual distinction.⁵² Along with mistakes as to the identity of the transferee, mistakes as to the identity and quantity of the subject of the transfer leave ownership with the transferor. So long as I intended to transfer *this* to *you*, it becomes yours. *Why* I chose to transfer it is another matter. So arguably the distinction reflects something like the distinction between intention and motive. Now that distinction, in turn, is notoriously indeterminate. But one might argue that knowledge of the identity of the transferee and of the subject matter of the transfer are constitutive of transactions through which property changes hands. Those elements, we might say, are the objects of the transferor's intention; her reasons for undertaking that transfer are her motive. Of course, even if all this is sound we might still ask why this distinction should bear the conceptual weight it does. But the point here is that it is an example of a consideration that fixes the generality and scope of legal rules that is deeper than custom though more contingent than the nature of practical reality.⁵³

Second, even if all this is sound there is something arguably essential to the Aristotelian account missing from the claim in unjust enrichment. The defendant may be utterly unaware of being in receipt of the disputed enrichment. Imagine she has received a bank transfer in an account she rarely checks, in an amount that would not trigger her suspicion. It would be a

⁵⁰ If it is alright to put it this way, then it really is tempting to think of the "use" in money had and received to the use of the plaintiff as the precursor to the trust.

⁵¹ As indeed does the autonomy of unjust enrichment, especially if the law of unjust enrichment is understood as Birks argued it ought to be. See above n 49.

⁵² This is David Fox's view. See "The Transfer of Legal Title to Money," *Restitution Law Review* 60 (1996).

⁵³ I discuss another such consideration below, in n 67.

stretch to say that she is a stickler for her rights in a bad way. One might respond that if the case comes to trial then she must have refused to make restitution and at that point opportunistically stood on her common law rights of ownership. But it is orthodoxy that the cause of action was complete at the point of receipt of the disputed enrichment.⁵⁴

Let's return to *The Earl of Oxford's Case*. Recall that in the end the plaintiffs were not awarded the value of the improvements that they had made to the land, ownership of which King's Bench held had remained with Magdalen College all along. Instead Ellesmere issued an injunction that the Earl and his tenants have quiet enjoyment of the land and that all suits at common law be stayed. We can't understand this as a remedy for unjust enrichment, because it awards more than restitution would require. It is instead the remedial expression of a different element of the facts, namely that the plaintiffs had relied in good faith on the belief that they had acquired rights via a transaction to which the defendants, on those terms, had unquestionably consented and which had been to their benefit but that they now sought to be declared void. The remedy expresses the view that owing to these considerations the College was now estopped from reclaiming the land.⁵⁵ There are complexities to this claim that will take us to far afield.⁵⁶ So let's leave *The Earl of Oxford's Case* behind and turn to consider estoppel in its present-day form.

Estoppel

Let's pause to bring the big picture back into focus. I am considering the plausibility of the

⁵⁴ One might object to this rule, either on the grounds that it violates the maxim that ought implied can, or that it is inconsistent with other elements of the law of unjust enrichment, in particular the defence of change of position. I argue that neither is the case in "The Normative Foundations of Unjust Enrichment" in Chambers, Mitchell, and Penner (eds.), *The Philosophical Foundations of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 91-92.

⁵⁵ As Ibbetson suggests in "*The Earl of Oxford's Case*."

⁵⁶ Central among these is the question whether estoppel, however generously understood, could do this work in the face of the finding by the King's Bench that the initial transfer of land was void by statute. I'm not sure that it could, for reasons akin to those that disallow us to contract out of the criminal code.

Aristotelian account of Equity by reconstructing and supplementing Lord Ellesmere's defence of it in *The Earl of Oxford's Case*. The Aristotelian account of Equity claims that some conceptual unity is brought to Equity if we think of it, as St. German and Lord Ellesmere proposed, as comprising doctrines that do equity in Aristotle's sense. Now St. German and especially Lord Ellesmere were aiming to justify the jurisdictional distinction between the courts of common law and Chancery. That's not on the table here, of course. But each sought to ground the jurisdictional difference in a conceptual one, between common law and Equity. An account of Equity must explain this conceptual distinction. It must explain, that is, what we might call the *independence thesis*, which comprises two propositions, each claiming a different sort of independence on behalf of Equity. The first proposition claims that Equity is independent in the sense that it doesn't *simply* get the law (the common law, that is) right, as equity in the sense in the equitable construction of statutes does. The second proposition is that a claim in Equity is independent of the common law in the sense that it in some sense leaves the defendant's common law rights intact. In this section I will, first, outline an understanding of estoppel according to which its operation respects the independence thesis. Then I will ask whether so understood estoppel is equitable in Aristotle's sense.

Estoppel was first a common law doctrine. Estoppel by representation, as it is often called, disallows A from enforcing a right against B if B had relied on A's misrepresentation of a fact relevant to the dealings between them. The idea of a distinctly equitable variety of estoppel arrived late on the scene, after the *Judicature Acts*. The emergence of equitable or promissory estoppel is often credited to Denning J's opinion in *Central London Property Trust Ltd v. High Trees House Ltd*.⁵⁷ High Trees had leased a set of flats from Central London in London in 1937.

⁵⁷ [1947] K.B. 130. The matter of the attribution is a bit complex for a few reasons. Significant elements of Denning's reasoning were *obiter*. Further, he suggested that strictly speaking the relevant principle in the case wasn't estoppel. While by this he meant to say that it wasn't estoppel as traditionally understood, the principle that he said he preferred was much broader than most understandings of estoppel, even if we take it to be a sword rather than merely a shield: "a

Occupancy fell considerably as the second world war began and the parties reached an agreement to reduce the rates by half. By 1945 the flats were full and Central London sued for payment for the full rent beginning in June 1945. The court held that they were entitled to it because the condition that motivated the reduction in rent had passed. Denning added in *obiter dicta* that had Central London sued for full rent for a prior period they would have lost. In other words, they would have been estopped from enforcing their contractual rights. What is novel is that estoppel here applies not to the representation of a fact in the present but a future-directed promise (assessed retroactively in this case).

So is promissory estoppel—I'll just say “estoppel” from now on—equitable in Aristotle's sense? Estoppel prevents a party from enforcing rights against another who has reasonably relied on a representation that she will not do so. We could say that it prevents her, that is, from being a stickler in a bad way. So far so good. Trickier is the other element of the Aristotelian account. Can we say that estoppel corrects an error arising from a rule owing to its generality? The short answer is yes. The longer answer is that there are two candidate rules. Which we should say is the object of the equitable correction depend on which of two possible ways we should understand the relationship between estoppel and consideration.

On the first understanding, estoppel is in effect an alternative to consideration. On this account, by adopting the doctrine of promissory estoppel we have rejected what is often called “the doctrine of consideration,” the rule that, setting aside agreements under seal, a promise is binding if and only if given in exchange for consideration. The effect of accepting *High Trees* on this view is that it is now also the case that a promise is also binding if (on the most narrow formulation of promissory estoppel) another has been induced to rely on it and has so relied to her detriment. On this view, the doctrine of consideration errs owing to its generality in the sense that it misrepresents as both necessary and sufficient a condition that is only sufficient. We *might*

promise intending to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.”

say that it is an example of a rule declared “as if that held good always which in fact only holds good usually” and so adopts a strategy to cope with the nature of practical reality. But there is no obvious reason why we wouldn’t just say that in accepting *High Trees* we have changed the law, or, perhaps, now gotten it right. So on this view the doctrine of promissory estoppel does not support the claim that Equity satisfies the independence thesis.

On the second understanding estoppel does not operate at the same level as consideration. Let me illustrate with an example which resembles *High Trees* but avoids some complications the facts of that case introduce.⁵⁸ Suppose a landlord agrees to accept rent late from her tenant, after a date after which, according to the lease, the landlord has a right to evict the tenant. The landlord is estopped from evicting the tenant. On the second understanding of the relationship between consideration and estoppel the tenant has not by virtue of this agreement acquired a contractual right against the landlord; nor has their agreement altered the terms of the contract. Instead the defendant has acquired a right that the landlord not exercise a right she has under the contract. Or perhaps it is better put (though probably equivalent) to say that the landlord has temporarily forfeited her right to exercise a right under the contract.

On this view of estoppel its operation supports the independence thesis. It does not make more fine-grained or complete or otherwise amend the doctrine of consideration. That is because on this view estoppel does not confer rights at the level consideration does. Instead it constrains the exercise of those rights. And, secondly, in this way it leaves the rights just as they are under the contract. This second point sounds mysterious but it isn’t really. It just respects the fact if the condition that disentitles the party from exercising her rights under the contract is temporary and it passes, nothing needs to be done to reinstate the right to exercise the rights in question. Next month the landlord can demand rent on time; after occupancy rates recovered from the effects of

⁵⁸ The complication is that the agreement between *High Trees* and Central London to temporarily cut the rent in half did not result in the suspension of a discreet right under the contract, as the agreement in my example does. I don’t think this means that *High Trees* can’t be analyzed in just the same way. But it makes the analysis more complicated in a way that is independent of the basic idea.

the war Central London was entitled to the full rent.

On this understanding too accepting the doctrine of equitable estoppel amounts to accepting that there is a rule that declares “as if that held good always which in fact only holds good usually.” The rule, however, is not the doctrine of consideration. Instead what equity corrects is the second order rule that holds that one may always enforce one’s rights in contract against the other contracting party. Estoppel shows that holds only sometimes, and specifies conditions under which it does not. And in specifying those conditions it serves to prevent the estopped party from standing on her rights, from being a stickler in a bad way.

So thus understood the doctrine of estoppel is equitable in Aristotle’s sense. This requires an amendment to Aristotle’s account, though I think a friendly one. The amendment is allowing that his account accommodates the idea that second as well as first-order rules can be subject to equitable correction. Nothing he says contradicts that, but it is not reflected in any of his examples. Supporting the idea is the fact that, as the example of estoppel shows, sometimes the end of preventing someone from standing of her rights is especially well realized by constraining their exercise by her, while in a sense leaving them intact.

Now arguably this is only weak support for the Aristotelian account of Equity, because estoppel is arguably not a core Equitable doctrine. As we saw above it was a common law doctrine first and its so-called equitable version appeared after the *Judicature Act*. But two considerations bolster the significance of the fact that estoppel can be understood to be equitable in Aristotle’s sense for this paper’s question. The first is that, as we have seen, a case can be made that *The Earl of Oxford’s Case* is best understood as an estoppel case.⁵⁹ That most aptly describes the considerations that, it seems, moved Chancery, and it best accounts for the remedy that the plaintiffs eventually were awarded. The second is that the equitable structure of promissory estoppel as articulated on the Aristotelian model is, we will see, reflected in some

⁵⁹ Note that *Moses v Macferlan* is in effect an estoppel case as well, for what it’s worth.

doctrines that squarely belong to Equity.

Two examples and a significant hard case

My suggestion is that we can find in Aristotle's account of equity the idea that equity aims to prevent someone from being a stickler for their rights in a bad way—or, put another way, from opportunistically standing on those rights—by constraining the way in which she may exercise those rights. The claim that this provides an account of Equity rests on finding particularly exemplified in doctrines that are Equitable by the nominalist measure two properties: that they aim to prevent the particular wrong of being a stickler in a bad way (rather than some other sort of wrong) and that they realize this by constraining the exercise of rights (rather than by some other means). It seems to me that these properties are indeed especially well exemplified in some Equitable doctrines. I'll pick two clear examples and then turn to a hard case.

Particularly illustrative of the first property is the equitable defences of *laches*. Its distinctively equitable character can be brought into relief by comparing it to its common law analogue, statutory limitation periods.⁶⁰ A defendant raising the defence of *laches* argues that the plaintiff has left her claim unpursued for so long that it would be inequitable to allow it to go forward. So described the defence is distinguished from a claim in common law that the limitation period for bringing a suit has expired only by the fact that in the latter fixed terms are set by statute while *laches* is discretionary. The crucial distinction is that a defendant raising *laches* must show that the plaintiff can either be found to have acquiesced in the defendant's conduct or to have delayed pressing her claim to induce the defendant's reliance in a way that serves plaintiff's interests (by, say, allowing defendant to increase the amount of unauthorized profit he makes⁶¹). In short, *laches* does not, or does not only, protect the defendant's interest in

⁶⁰ I draw here on Sarah Worthington's account and analysis of *laches* and equitable defences generally in *Equity* 2d ed. (Oxford: Clarendon Press, 2006), 34-40.

⁶¹ *Id.*, 37.

getting on with her life, as it is commonly said that statutes of limitations do. It protects her in particular from the plaintiff asserting his rights after acting in a way that would lead the defendant to expect that he would not.⁶²

Particularly illustrative of the second property are rules imposed by Equity to prevent the abuse of power by decision makers. A company director will have been held to have abused her power if she issues shares so as to alter the voting majorities in a company, rather than, say to raise capital. As Sarah Worthington points out, there is a important and subtle difference between the sort of constraint imposed on someone in the company director's position and one that operates by simply limiting someone's right. The conspiring director's actions here are not *ultra vires*. She acts within, but abuses, her authority.⁶³

It seems a short step from this example to the trust. We can indeed see the basis elements of standard story of the trust and its development in the Aristotelian account. The trustee holds legal title to the trust property but is limited in the exercise of the rights she thereby has by obligations imposed on her by Equity. These obligations are not limits on the scope of those rights but rather on their exercise. The trustee must exercise those rights in the interests of the trust beneficiary, to which she is said to owe a duty of loyalty. So a trustee found in breach of fiduciary duty may, at least in some cases, aptly be said to have stood on her common law rights.

So far so good. But things get controversial as we dig a bit deeper, on two points. The first is that the Aristotelian model inclines us toward treating the beneficiary's rights as personal rather proprietary. It invites us to think of the right as a right that the trustee exercise her rights in

⁶² A similar parallel and contrast can be drawn between the common law doctrine of illegality and the equitable defence of unclean hands. *Id.* 39-40.

⁶³ Worthington, 144. I don't believe it matters to the analysis that here it is a power rather than a right (narrowly construed) that is controlled, though perhaps that complicates matters. What does matter is the distinction between abusing and exceeding one's legal authority; less important is whether it exercising that authority one is exercising a right or a power or both.

a particular way.⁶⁴ Two principal considerations can be raised again this claim. The first is that the beneficiary's right exhibits the marks of a property right. It is impersonal, for example, and transferrable. Perhaps this can be answered.⁶⁵ But even if it can a second point remains, namely that, as James Penner argues, the beneficiary's interest is in the property held in her benefit, not in the mechanism by which that interest is protected. If we can translate this factual interest into a legal one, then it follows that in an important sense the beneficiary's interests are naturally reckoned to be proprietary.⁶⁶

The second point is that the Aristotelian account invites us to treat the constructive rather than the express trust as the core case. Consider a case in which a constructive trust is imposed to prevent or—depending on your view on some complicated matters—remedy an unjust enrichment. Here Equity, treating as done what ought to be done, imposes on a person who bears legal title to an asset the obligation to exercise her rights to the benefit of another (in the limit, we might say, of that obligation: by transferring the asset to her). This squares in all details with the Aristotelian account. Less easy to explain is the express trust. This is because equity on Aristotle's account more comfortably suits alterations in a person's rights with respect the exercise of her rights that arise by operation of law so as to prevent a wrongdoing on her part. We are led from this perspective to adopt the idea that in setting up a trust one acts in a way calculated to bring it about that the law designates someone as a trustee and imposes on her fiduciary obligations with respect to another party it designates as a beneficiary. This view faces

⁶⁴ This is, perhaps, akin to the idea that McFarlane and Stevens are getting at when they claim an equitable property right is a right against a right. Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 *Journal of Equity* 1. But this idea, or at least this formulation of it, can't be quite right. That's because rights are not the sort of things against which someone can have a right. A right cannot wrong me.

⁶⁵ One step toward the answer, perhaps, is to say that the object of the beneficiary's right is not a particular person but rather an office holder, specified by a definite description rather than a proper name. Is such a right still a right *in personam*? I think so but perhaps that's controversial.

⁶⁶ James Penner, "The New Obligational Theory of the Trust: McFarlane and Stevens on Equitable Rights" (unpublished).

the objection that, as Penner puts it, the power to set up a trust seems naturally thought of as an incident of ownership.⁶⁷ It seems like something, in short, that a property owner can choose to do. The alternative view in contrast seems like an elaborate contrivance.

For what it's worth, I think that there are answers to the objections to these implications of the Aristotelian model. But I'm not going to wade into these issues here. They are complex and run very deep. And each side of the first debate in particular can, it seems to me, fairly claim to be defending orthodoxy. I will leave it to the reader to decide whether the fact that the Aristotelian account has these consequences for our understanding of trusts counts in favour of thinking of the beneficiary's rights as personal and regarding all trusts as in some sense arising by operation of law or against the Aristotelian account of equity.⁶⁸

⁶⁷ Id.

⁶⁸ Above, in n 28, I promised to return to the question how far in the details the defence of necessity exhibits the structure of an equitable doctrine in the Aristotelian sense once I'd unpacked the Aristotelian account in greater detail. Let's focus the question on one sort of case in which a plaintiff may invoke one form of the defence of necessity: the doctrine of private necessity in private law. What I will call here simply the right of necessity allows someone in peril to save herself by using the property of another, but she must compensate the property owner for any loss she imposes. The question whether this defence is equitable in the Aristotelian sense turns on how one thinks the right of necessity bears on property owners' right to exclude.

The issue here is at the heart of a debate in the seventeenth century between Grotius and Pufendorf on the right of necessity. Their differences are deep but rest on significant common ground. Each held that private property exists by convention, but that that convention cannot take any form we like. It is subject *inter alia* to the constraint that the right to exclude may extend only so far as is necessary to realize the ends for which sake we adopt the regime of private property. For Grotius those ends are material: private property will allow us to live a more comfortable life. We can realize those ends with a right to exclude that stops short of allowing us to deny the imperiled trespasser the use of our property. So the right of necessity marks a limit on property rights. The trespasser must compensate the owner for any loss she imposes because otherwise she would take more than she needs, just as she would if for example she destroyed the owner's property when she could have saved herself by merely borrowing it.

For Pufendorf the list of goods for which sake we adopt the regime of private property includes expanding the ways in which we may discharge the imperfect duty of beneficence. Property owners have the right to exclude the imperiled trespasser precisely so that they have the opportunity to waive its exercise in fulfillment of that duty. If an owner does not do so in a particular case the party in peril does no wrong in trespassing because the owner's refusal shows that he does not regard himself as subject to the duty of beneficence. Though the duty is imperfect there are circumstances, Pufendorf holds, which make its requirements determinate.

Two objections

I have only begun to sketch a complete answer to this essay's question. I think the sketch points to the short answer: at least some of it, perhaps a significant part, and in interesting ways. I'd like in this penultimate section to raise and briefly respond to two objections to the claim that my arguments support that answer.

Objection 1. Even in the small and selective sample I've canvassed, the case that Aristotle's account of equity serves as a conceptual link among the doctrines picked out by the nominal definition of Equity has not been made out. Estoppel was first and for some time known only in the common law; there are common law analogues to Equitable doctrines that control the abuse of rights. Further, and on the other hand, there are many Equitable doctrines that plainly do not seem equitable in Aristotle's sense. It's not clear there is anything distinctively equitable, for example, about Equitable as compared to common law rules of tracing.

So put the objection is perhaps unanswerable, though just how well the doctrine tallying works in favour of the Aristotelian account of Equity will depend on where, on the right view, the express trust ends up. But even if being expressive of the Aristotelian sense of equity is neither necessary nor sufficient for being an Equitable doctrine, there is, I think, something of an answer to the Equity nominalist to be found in the Aristotelian account. On my reconstruction it is a central claim of Aristotle's account of equity that a legal system cannot get by only with a set of

That is the mark of necessity. But while the property owner must allow another the use of his property, it remains his. So he is entitled to compensation for any loss the trespasser imposes.

So in a fine-grained sense, the defence of private necessity is not equitable on Grotius's account but it is on Pufendorf's. For Grotius necessity makes the limit of the right to exclude. For Pufendorf it does not limit it but rather constrains the end for which sake it may be exercised in the moment and, if circumstances pick them out uniquely, the means by which that end can be realized. What is particularly interesting here is that the question whether necessity marks a point at which equity corrects the law turns, in this debate, on the very broad question whether the facilitation of the exercise of virtue is among the goods with which the state is appropriately charged to undertake to secure. (These interpretations of Grotius and Pufendorf, I should say, are controversial. I defend them elsewhere, in a paper still in draft form.)

rules that specify the rights and duties persons hold and bear *simpliciter*, in various capacities, and owing to arrangements in which they have entered. A legal system will need a set of rules that constrain the manner in which and/or the ends to which persons exercise their rights. This second set of rules will be independent of the first in the sense I aimed to articulate above under the name of the independence thesis: in their operation they will not merely clarify the scope of the rights and duties specified by the first set and will in some sense leave those rights and duties intact.

Chancery was not established with the end of upholding a set of rules that have the properties of this set. Its jurisdictional independence and association with equity predate the invocation of Aristotle's account in the justification of both. But this analysis shows how apt that invocation was. The Equity nominalist has two things right: the collection of doctrines that eventually fell within the jurisdiction of the courts of Equity is conceptually heterogeneous and it is a matter of historical contingency that the institutional division between common law and equity came to be. Nothing in the Aristotelian account, certainly, requires it. But the Aristotelian account makes some sense of it, at least in part, and in interesting ways.

Objection 2. Even if the Aristotelian account articulates the structure of Equitable doctrines in a significant number of cases it is explanatorily unsatisfactory. The real work is done by the richly substantive idea of being a stickler in a bad way and of the allied ideas I've invoked, of standing on one's rights and of being an opportunist.

To this objection I have two answers. The first is to concede it in part. Certainly a complete articulation of the Aristotelian account requires unpacking these ideas, which ideas I have left unanalyzed here. But we should not underestimate how much work the formal structure as I've reconstructed it does. To take just one example, if I'm right it has significant implications about how we should understand the express trust. The second answer is that there is an aspect of Aristotle's account that helps us identify what opportunism consists in this context, by explaining the sort of wrong iniquity consists in. I'll consider this in the next and final section of this paper.

Equity and the rule of law

Plowden, we saw above, said that equity “is no part of the law, but a moral virtue which corrects the law.” He meant this generally, I think, but made the comment in his discussion of the sense of equity he attributed to Aristotle. One might indeed find support for this way of characterizing equity in Aristotle. He casts the idea that inequity consists in being stickler for justice in a bad sense in terms of a characterization of who the equitable person is, that is, the person who exhibits the virtue of equity. So we might then characterize the judicial obligation to interpret the law so as to prevent its opportunistic exploitation as an obligation to correct law with morality.

There is, however, another side to Aristotle’s account that lead us in another direction. The immediate context for his analysis of equity in the *Nicomachean Ethics* was a popular view according to which equity represents a departure from justice and the rule of law. This view was especially starkly expressed by Plato in a dark passage of the *Laws* in which he characterized equity as a kind of indulgence extended in cases in which people can’t bear what justice really requires (*Laws* 757d-e). Part of what Aristotle aims to do is show how equity upholds the law. This is, in part, the message in his claim, for example, that the ring-wearing assault is innocent *really* (at least of assault with a weapon).

I think we can see this thought expressed in the sense of equity that bears on Equity. Let me illustrate with an analogy with the work done by the principle of the rule of law in administrative law. The Supreme Court of Canada has held that even if its enabling statute purports to put its decisions beyond review, an administrative tribunal violates the rule of law if it exercises its powers for ends other than those for which sake those powers have been conferred—if, for example, a liquor control board refuses a restaurant owner a license because of his opposition to government policies.⁶⁹ In so acting the board exercises its power arbitrarily in the sense that it uses the tools of its mandate for ends unconnected to it. One who is a stickler for

⁶⁹ See Justice Rand’s opinion in *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

his rights, one might say, abuses those right in an analogous way, and in that way uses the law as a mere instrument for his own ends. In this way, sticklers deny that they are subject to the law while relying on others being so. Equity, on Aristotle's account, corrects the law by preventing it from being used this way. My suggestion is that it is a compelling implication of Aristotle's account of equity that iniquity consists in a kind of refusal of the rule of law and that rather than subverting the rule of law, equity (and arguably Equity) can be seen to uphold it.