

Understanding Equity

Owen Barfield

*In its February and October 2007 editions of **Associative Economics Monthly** (edited by Christopher Houghton Budd and Arthur Edwards), the **Centre for Associative Economics** reproduced an abridged version of an essay written in the early 1930s by Owen Barfield (1898-1997), a lawyer. Barfield refers to the contribution to economics of the Austrian philosopher, Rudolf Steiner,* an influence that no doubt informed his own research. But Barfield's ideas on English equity serve to this day as valuable stand-alone insights.*

Barfield provides a powerful explanation of the origin of the term equity as understood in English law and, therefore, in the field of commerce. With the precision of a legal mind, he makes comprehensible one of the most fundamental yet subtle aspects of modern economic life - its reliance on equity, both as regards the rights between human beings and its use to mean, misleadingly, acquired wealth.

Not everyone is minded to engage in the complexities of law, and yet we need to understand them for we rely on them. As Barfield quietly unfolds his logical exposition, the reader finds himself arriving inside, as it were, the meaning of equity, and thus better able to recognise its deep significance for human affairs, but also the danger of too superficial, too ill-informed, and too selfish an interpretation of that significance.

Barfield also conveys a powerful image of how equity became transposed from rights life to economic life. Today, with equity also a synonym for share ownership, recognising the nature of this transposition and looking afresh at the significance of equity can help us understand the nature of the stock corporation also.

For stock ownership combines two distinct elements - the right to have a say (voting) and the right to a return to and on one's investment (pecuniary). These two elements should not be conflated for it does not follow that the pecuniary right entails or requires the right to vote. Investors could equally say - and often in effect do say - "you decide" to those to whom they have entrusted their capital. As concerns the nature of the modern corporation and how it might evolve, this is a crucial question to consider.

* Economics - The World as One Economy. Rudolf Steiner. New Economy Publications, Canterbury 1996.

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In his lectures on economics, Rudolf Steiner speaks of the way in which the economic process of the production and consumption of commodities subsists between two poles: Nature and Spirit (in more English and economic parlance, land and intelligence - Eds.). In the first place human labour operates upon nature; in the second place the creating and organising spirit works upon human labour, 'saving' it and making it more and more productive; and in this way the thing which we call capital is built up. Steiner goes on to point out how it is not merely morally but also economically necessary that - as a third stage - the capital so accumulated should be placed at the service of the spirit and thus allowed indirectly (that is, via its disbursement on educative and other spiritual activities) to flow back into the land and into further production. Instead of this the spirit is omitted, and as a result huge masses of capital ... pile up in mortgages and land-values and produce a terrible congestion, that most people today consider, illusorily, as wealth.

If we ask, what makes possible the accumulation of capital, its conversion into personal wealth and, above all, its congestion in the form of land-values and upon the security of land, the answer is short and simple. It is the fact that there is a law of property, that men have certain rights as against each other, rights which the law guarantees and will if necessary enforce. The history of the law of property is the history of these rights. The basic distinction is, of course, the distinction between land on the one side and all other kinds of property on the other. English law calls these two classes Real Property and Personal Property.

To understand the law of real property, it is necessary to be able to think with a certain amount of sympathy of the feudal system. In a feudal society, we have, to begin with, a social organism in which the land is everything and the human being (except possibly for a few exalted nobles) is attached to it. The notion that the word 'law' involves a separate, abstract system of personal rights, rights independent of topography and attaching equally to all men simply because they are men, is as yet hardly existent. The very rights themselves spring, as it were, from the soil.

It was only gradually that there first emerged from this older conception of 'real' property, and afterwards grew up side by side with it, steadily increasing in relative importance, that very different conception of 'personal' property, which covers the sort of property that is easily transferable by simple delivery and in which (as far as the law is concerned) any man may acquire a good right, irrespective of his status or the place of his birth, by paying the price which its owner demands for it. The distinction between real property and personal

property is, however, not quite as simple as it is apt to appear. One is tempted by the terms themselves to think of land as having been called 'real', because it is nice and solid and immovable, while 'personal' property would be the kind of property (cash and so forth) which can be carried on the person. But this is not really the meaning of the terms.

What is a right? How is its nature defined and determined? The lawyer answers this question by asking another. If my client's right is infringed, what sort of action can I bring, and against whom? It is in the answer to this question that the origin of the difference between real and personal property is to be found. The owner's right to his land was a right which he could enforce against the whole world. It was a right in rent — to the thing itself — so that if he were dispossessed, he could bring an action for the recovery of the thing itself. But the law at first recognised no such right in the case of personal property. He who was deprived of this could not, at law, enforce its return. His sole remedy was an action for damages against the person who had wronged him. Such an action was called a 'personal' action.

For similar reasons a distinction arose between two different kinds of personal property. Just as there is real property and personal property, so personal property itself may consist either of 'things-in-possession' or 'things-in-action'. The difference is again a question of rights. If I see my watch lying on your table, I am entitled to pick it up and carry it away without your permission. In order to recover 'my' £10 against your will, I must bring an action. These rights to the possession of property, as distinct from property itself, are called things — or choses-in-action. My watch, on the other hand is classified as a chose-in-possession. Thus, choses-in-possession are concrete, ascertained chattels; choses-in-action are, in essence, rights enabling me to obtain something if I choose. These rights may be contingent only, for there may be nothing to be got. Yet though choses-in-action are only 'rights' to property, they are also a form of property itself. They may be bought and sold, and a large part of the buying and selling that goes on in the world today is concerned with them.

We can now amplify a little the original distinction between real property and personal property into three categories: real property, choses-in-possession, and choses-in-action

It is obvious that choses-in-action lie at the opposite pole to realty. On the one hand, the actual possession and enjoyment of something ascertained is guaranteed by the law; on the other hand, it is only a right to possess something unascertained which is supported.

The gradual recognition of this often not very clearly defined right to possess is, in England, closely bound up with the history of equity. What is equity? How has it come about that this academic name for a universal principle of justice or equality is now used in such peculiarly technical ways, so that, for instance, a man who has signed a contract to purchase a house is said to 'have the equity' in it and the shares of the most bogus and disreputable limited company that can possibly be imagined are properly called 'equity shares'?

When A lends money to B — you have a relation between two persons. The history of equity is precisely the history of the recognition of this relation between two persons by the Courts. Equity begins as soon as the 'relation between two persons' begins to be recognised as a thing, as an object no less 'real' in fact though not in name than a piece of land.

In the origin of the English common law everything depended on using the correct words in your summons. A right was only enforceable if there happened to be some established form of action which would fit the particular infringement of which you had to complain. If not, no matter how unjustly you had been treated, the courts could do nothing for you.

This cramping limitation of the right of action lasted in England well into the thirteenth century and the remedy, when it came, took a rather curious form. People who had a genuine grievance, for which, owing to formal reasons, no relief was available at law, turned to the king as the ultimate fountain of justice; and the person who had to deal with their petitions was the king's highest official, the Chancellor. Down to the Reformation this official was invariably an ecclesiastic, known as the 'keeper of the king's conscience'. The relief which the Chancellor gave to oppressed and remediless suitors became more and more systematic, until it eventually resulted in a whole set of courts existing parallel to and yet quite distinct from those of the common law and known as the Courts of Equity or 'courts of conscience'.

The term 'courts of conscience' was in many ways a singularly correct description of the courts of equity and indeed it conceals in itself the very essence of equity. For, while on the one hand it is still necessary today for a lawyer to have some understanding of the meaning of this phrase, 'courts of conscience', even for the ordinary practical purposes of his business, at the other end of the scale it carries us deep into human consciousness.

What does it mean? Equity is a branch of civil law, and the court would only move at the instance of a plaintiff with some grievance. But in spite of this, the principle which underlay the relief granted was not, as at common law, the satisfaction of the

aggrieved plaintiff. On the contrary, the court was concerned to clear the conscience of the defendant. A man might be a notorious rogue, but nevertheless he could succeed in evicting from a piece of land (if he could show that it was technically 'his') another man whose personal right to the land was universally admitted to be far better than his own.

This was where equity stepped in. When such a situation arose, the sufferer could apply to the Chancellor and, if satisfied of the rights of the case, the Chancellor would say, in effect, to the oppressor: 'It is perfectly true you have this legal right to the land, and if you choose to go to law to enforce it the common law will assist you. I cannot stop that. But there is something else that I both can and shall do. The moment you begin any such action, in order to prevent you going on with it, I shall imprison your person for contempt of my court.' Thus the would-be oppressor was helpless. He had a legal 'right' but equity prevented him from enforcing it for 'personal' reasons. The maxim was: 'Equity acts in personam.'

There was another sense in which the courts of equity were 'courts of conscience.' The person who applied for relief must be able to show that his own conscience was clear. Otherwise the court would not help him. 'He who seeks equity must do equity.' In enforcing this principle the Chancellor would particularly take into account the degree of knowledge of certain significant facts which the parties could be shown to have possessed at the time when they acted. (This is the important equitable doctrine of 'notice'.)

A crime is essentially an offence against the group of which the criminal is a member. It is breach of the king's peace. Whereas the infringement of an equitable right is the wronging of another individual human being. It depends on a relation between two persons. The word conscience originally means 'knowing with'. It implies a state of knowledge either shared with or at any rate considered in relation to another being. This 'knowing with' another (which, reduced to its lowest terms, is the bare admission that there is another being) is, firstly, an act of will, and, secondly, the basis of self-consciousness.

Self-consciousness is only made possible by the voluntary recognition of another self-consciousness. It becomes possible when, by an act of free will, we resist the impulse to regard other human beings as mere phenomena, as mere points on the circumference of a circle; and it is developed in us at any moment only to the extent that we are able to acknowledge with our whole heart that these others too are centres, centres of equal status with ourselves. Self-consciousness has its rise in the recognition by one being of the equality of another.

It is a gift which men can only receive at each other's hands.

To be an expression of the equality of all men is characteristic of the politico-legal structure of the state, of that life of reciprocal rights which corresponds in man himself to the life of feeling, out of which his private social relations with other men are built up. In other respects men are not equal.

The phenomenon of equity and the way in which, originating in the sphere of rights, it has gradually spread outward and incorporated itself in a metamorphosed form into the economic life, throws much light on this conception. It is characteristic of the [different] members or systems of the modern state to interpenetrate in this way. The important thing is that they should be able to be separated in our thinking about them.

The history of equity assists us to do this. We can trace its progress from the rights sphere through a changing conception of property into the economic sphere. But its nature is such that in doing so we do not easily lose sight of its essentially juristic origin. Thus, equity enables us to feel how equality — not the abstract uniformity of the bureaucratic foot-rule, not 'standardisation' — but equality in a most inward and truly human sense, is at the very heart of the life of rights.

With the advent of capitalism the ancient feudal attachment of man to the land was allowed to fade away into the background. It did not wholly disappear, but there came into existence, hovering as it were above it, a quite separate system of ownership, in which the theory was that, not the land itself was owned, but the personal right to enjoy it.

Under the feudal system it had been in some respects almost as true to say that the land owned the man as that the man owned the land. But now these personal rights had come to be felt as things no less actual and concrete than the land itself. They could be left in a will, bought and sold, dealt in. The conception of property had thus become a much freer one. It no longer involved a kind of physical oneness with the object owned. It was a personal right.¹

The characteristic of this kind of property was the ease with which it could be transferred from one

¹ Editorial Note: For some this will sound contentious, for detachment from the land (or the real economy) is often seen as the root illness of modern economic life, and the cause of our journey into abstraction. But freedom in Barfield's sense is not to be equated with abstraction per se. Rather, it consists of the ability to experience abstraction (or to err, even to do evil) so that a new reality is born, not of the earth but of heaven, not from without but from within, not from imposed scripture (or stricture) but from an experience universally had.

person to another. Thus in a sense the equitable doctrines of ownership underlay the whole phenomenon of the growth of commerce and the rise of the free cities. In commerce the relations of human beings to one another are based not on the land but on cash. This is not necessarily an evil. It is rendered evil by the egoism of human beings, but that makes other things evil also. A commercial 'bargain' is not essentially a transaction by means of which one human being 'does' another and gains something at his expense. Essentially, it is a transaction from which both are the gainers and as such is a material reflection of the spiritual significance of men's coexistence on earth.

But the development of that conception of property which equity fosters did not stop here. There remains the question of the nature of property in cash itself.

For Rudolf Steiner, a loan in its pristine form was a gift for which the consideration was not a defined contract to repay the exact amount with or without interest, but rather a tacit understanding that the present borrower would be willing to become a lender in his turn, should occasion arise. He thought it characteristic of the loan that it creates a peculiarly personal relation. Now it is just this whole sphere of personal relations, relations which are based on some kind of confidence, some 'trust' or 'credit' that is so peculiarly the sphere of equity. Trust is the soul of equity. So strong is its sense of the concreteness of the situation which is created as soon as one man places confidence in another and acts accordingly, that it will, up to the limits of possibility, presume that that confidence is justified.

The influence which such conceptions have had on the development of money and of those numerous substitutes, such as cheques, which are its virtual equivalent in many of the transactions of modern social life, can hardly be exaggerated.

But what is money? Must a 'promise to pay' be a promise to pay something or may it be a promise to pay nothing? Are these promises 'money'? What is money? Does it exist before it is issued and, if so, to whom does it belong? These are some of the questions upon which an absolutely hopeless confusion reigns today, not only in the minds of persons in the humbler walks of life but also among those whom destiny has called to the task of governing the central banks of the great nations of the world.

Having advanced to a system of ownership based on cash instead of one based on land and the family, today we appear to be in the midst of another process - the emergence of a system based on credit. The principles of equity are influential in both cases, but there is this difference. In the former process the personal element which underlies equity

was never quite lost sight of. Personal relations and the rights based on them were indeed felt to be realities, things. They were freely bought and sold - but they were never actually confused with physical things. The physical thing with which they might have been confused - the land - was there in the background in men's consciousness, in full contrast to them, and the equities hovered above it, as it were, in a different sphere. Such is the essential nature of the Trust Settlement, for example. But the obligation which is produced by a 'promise to pay', and the corresponding right called 'credit' — these things have become actually confused in men's minds with physical objects. They are indistinguishable from 'money' and money is still thought of by most people as an aggregation of physical objects.

Money in its earliest form was in fact a commodity among other commodities, and it has always been so treated by the common law. It is not regarded as evidence of a right to demand goods; it is itself goods. It is not a chose-in-action, but a chose-in-possession. Yet bank notes, when they are also currency notes or when they are legal tender and inconvertible, are indistinguishable from money. On the other hand bank notes are merely 'promises to pay'! In the nineteenth century, when all English bank notes were as a matter of course freely convertible into gold, it was settled that they are negotiable instruments and thus choses-in-action.

Such confusion on such a subject is unfortunately of more than theoretical importance. For what effect does it have when the essentially inter-personal nature of promises and 'credit' is forgotten, when rights are metamorphosed in men's minds into the semblances of physical things, so that the attempt is made to compel them to obey physical laws?

The result is that the world is caught within a network of unreal ghosts of personal obligations. A situation arises in which the whole world is in theory (but the theory is acted on) head over ears in debt to itself. Huge sums of money are owed to nobody and are withdrawn from circulation to liquidate that spectral debt. But without money the world cannot get at the goods which it produces and, as a result, it soon ceases even to produce. We therefore have a world starving to death in the midst of material plenty.²

The failure of the whole system of financial credit built up by the western world, with which we are now threatened, will not be due to a lack of personal confidence between human beings. This has probably never been greater than it is now, as is proved by the very abuses to which it is exposed.

² Written in 1932. — Eds.

NOTES

The failure will be due to ignorance of the nature of credit and the position it has come to occupy in the economic life of the world. It will be due, and so far as it has already happened, it is due, to inability to realise that confidence is an immaterial substance, and not a material one.

The failure of credit reacts on the land itself. The substitute for genuine credit, for personal trust, is collateral 'security', and people quickly come to feel that the safest of all securities is land. For it alone is indestructible. Thus the land becomes pledged deeper and deeper, as attempts grow more and more desperate to postpone the meeting of the enormous debts, the ghostly obligations, the obligations to nobody, which in fact will never be met because it is mathematically impossible that they should be. Laws are then passed which make it easier to alienate land, easier to chop it up into small separately-owned pieces, easier to pledge it.

The picture is indeed nearly as dark as it could be. Pestilence and famine have come upon men before, but they have come as the result of the natural forces of the earth. Never before have they been caused, as they are being caused today, by the natural or at any rate impersonal forces of a sort of second earth, an earth which is not the physical earth at all but is compacted of the personal relations of men with one another and of the uneasy ghosts and decaying relics of such relations. Perhaps it is for this very reason that more and more people seem to be drawn to the study of money-problems. Is this because behind the thick darkness in which money — the 'root of all evil' — is shrouded, they divine the mysterious presence of the root of all good?

Really to understand money involves understanding that above the decaying, increasingly mechanised physical body of the earth, whose future even science predicts to be increasing cold and darkness, there is coming into being another earth, an earth which is literally composed of the relations of human beings with one another, an earth whose destiny it is to become increasingly one of light. This at any rate was the image of Rudolf Steiner and it is this picture of the two earths, the 'real' and the personal, of which the old-fashioned 'trust' of settled land appears to me to be a sort of clumsy but honest caricature. Or rather it is more than this. For what is contained in this [i.e. money] most characteristic of all the creations of the old courts of equity? Apart from all other considerations, there is contained in it a certain striking and impressive form of thought; and anyone who has ever attempted to inculcate an idea with even modest pretensions to being new, will understand what an important part of the task is this establishment of a suitable form of thought, in this case a clear understanding of equity.