

EQUITY

HISTORICAL INTRODUCTION

Before 1066 all laws were local and enforced in the manorial, shire and hundred courts. Under the Normans, Royal Courts began to emerge from the King's Council (*Curia Regis*). These did not take over the jurisdiction of the local courts immediately, but over a long period of time the local courts lost jurisdiction over cases and thus lost income. A practice was started of sending judges around the country to hold assizes (or sittings) to hear cases locally. This enabled the judges, over a period of roughly 200 years, to take the best local laws and apply them throughout the land, thus creating law which was 'common' to the whole country ie, common law.

Originally the King's Council carried out the three functions of state, namely legislative, executive and judicial. It dealt with all cases in which the King had a direct interest, like breaches of the peace. Eventually the courts split off from the Council and formed the main common law courts. The Court of Exchequer, which dealt with the collection of revenues, was the first to separate, in the reign of Henry I (1100-1135). The Court of Common Pleas stayed in Westminster Hall to deal with disputes between individuals, while the King's Council travelled round the country. The Court of King's Bench separated sometime after 1230. Justices of the Peace (or magistrates) originated from a Royal Proclamation of 1195 creating 'Knights of the Peace' to assist the Sheriff in enforcing the law. They were later given judicial functions and dealt with minor crimes.

COMMON LAW PROCEDURES

PRECEDENT

As the work of the common law courts grew, the judges began to use previous decisions as a guide for later cases. This was the beginning of the doctrine of precedent.

THE WRIT SYSTEM

The judges also developed the writ system. A writ is simply a document setting out the details of a claim. Writs were issued to create new rights not recognised by the local courts and this helped to attract business. Over a period of time the writ system became extremely formal and beset with technicalities and claims would only be allowed if they could fit into an existing writ. The rule was 'no writ, no remedy'. For example, certain writs of trespass would only be issued for those acts done with force and arms against the King's Peace. If the two requirements were not met, a person had no claim.

Even if a writ was obtained, the judges would often spend more time examining the validity of the writ than the merits of the claim. Writs were issued by the clerks in the Chancellor's Office and they began to issue new writs to overcome these difficulties, in effect creating new legal rights.

In 1258 the Provisions of Oxford forbade the issue of new writs without the permission of the King in Council. As a result the common law became rigid and the rules operated unjustly. In 1285 the Statute of Westminster II authorised the clerks to issue new writs but only if claims were in 'like cases' to those before 1258. This was restrictive and made further development of the common law very technical.

OTHER DEFECTS IN THE COMMON LAW

There were also other faults with the common law courts, for example:

- * the common law courts used juries which could be intimidated and corrupted.
- * the common law had only one remedy, damages, which was often inadequate.
- * the common law paid too much attention to formalities, eg if a contract was made which required written evidence for its enforcement, then lack of such evidence meant that the common law courts would grant no remedy.
- * the common law courts did not recognise the trust.

THE DEVELOPMENT OF EQUITY

MEANING

The word "equity" means fair or just in its wider sense, but its legal meaning is the rules developed to mitigate the severity of the common law.

PETITIONING THE KING

Disappointed litigants began to petition the King as the "Fountain of Justice", the procedure being to present a petition (or bill) asking him to do justice in respect of some complaint. For a time the King in Council determined these petitions himself, but as the work increased he passed them to the Chancellor as the "Keeper of the King's Conscience".

The Chancellor was usually a clergyman, generally a bishop, and learned in the civil and canon law. The King, through his Chancellor, eventually set up a special court, the Court of Chancery, to deal with these petitions. The Chancellor supervised the Chancery where clerks (who originally worked behind a wooden screen - *cancellaria* - hence Chancery) issued writs, commissions and other legal documents.

The Chancellor dealt with these petitions on the basis of what was morally right. The Chancellor would give or withhold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him.

In 1474 the Chancellor issued the first decree in his own name, which began the independence of the Court of Chancery from the King's Council.

NEW PROCEDURES

Equity was not bound by the writ system and cases were heard in English instead of Latin. The Chancellor did not use juries and he concerned himself with questions of fact. He could order a party to disclose documents. The Chancellor issued subpoenas compelling the attendance of the defendant or witnesses whom he could examine on oath.

NEW RIGHTS

Equity created new rights by recognising trusts and giving beneficiaries rights against trustees. (A trust arises if one party gives property to trustees to hold for the use of beneficiaries.) The common law did not recognise such a device and regarded the trustees as owners.

Equity also developed the equity of redemption. At common law, under a mortgage, if the mortgagor had not repaid the loan once the legal redemption date had passed, he would lose the property but remain liable to repay the loan. Equity allowed him to keep the property if he repaid the loan with

interest. This right to redeem the property is known as the equity of redemption.

NEW REMEDIES

Equity created new remedies:

- (a) Specific performance, which is an order telling a party to perform their part of a contract. This was useful where damages were not adequate, eg, in the sale of land. Thus if the seller refused to sell after signing a contract, the buyer could obtain an order of specific performance making the seller sell the house.
- (b) Rectification, which allowed a written document to be changed if it did not represent the actual agreement made by the parties.
- (c) Rescission, which allowed parties to a contract to be put back in their original position in the case of a contract induced by a misrepresentation.
- (d) Injunctions, usually an order to stop a person doing a particular act, like acting in breach of contract (a prohibitory injunction).

EQUITY AND THE COMMON LAW

RIVALRY BETWEEN THE COURTS

The Court of Equity (or Chancery) became very popular because of its flexibility; its superior procedures; and its more appropriate remedies. Problems arose as to the issue of injunctions: the common law courts objected to the Chancellor issuing injunctions restraining the parties to an action at common law either from proceeding with it or, having obtained judgement, from entering it in cases where, in the Chancellor's opinion, injustice would result. Consequently, a certain rivalry developed between the two courts and this came to a head in the *Earl of Oxford's Case* (1616) 1 Rep Ch 1 in which the common law court gave a verdict in favour of one party and the Court of Equity then issued an injunction to prevent that party enforcing that judgement. The dispute was referred to the King who asked the Attorney General to make a ruling. It was decided that in cases of conflict between common law and equity, equity was to prevail. From that time on the common law and equity worked together, side by side.

As equity was developing, it had no fixed rules of its own and each Chancellor gave judgement according to his own conscience. This led to criticism about the outcome of cases and John Selden, an eminent seventeenth century jurist, declared, "Equity varies with the length of the Chancellor's foot". To combat this criticism Lord Nottingham (Lord Chancellor 1673-82) started to introduce a more systematic approach to cases and by the nineteenth century, equity had become as rigid as the common law. Delays were caused by an inadequate number of judges and the officials depended on fees paid by the litigants so that there was every incentive to prolong litigation for individual tasks and multiply these tasks.

Some attempt was made to assimilate the remedies granted by the Court of Chancery and the common law courts. Thus under the Common Law Procedure Act 1854 the common law courts were given some power to award equitable remedies and the Chancery Amendment Act 1858 gave the Chancellor the power to grant damages in addition to, or in substitution for, an injunction or a decree of specific performance.

THE JUDICATURE ACTS 1873-75

The Judicature Acts 1873-75 rationalised the position. They created one system of courts by amalgamating the common law courts and the court of

equity to form the Supreme Court of Judicature which would administer common law and equity.

The Supreme Court of Judicature consists of the High Court divided into divisions known as the Queen's Bench Division, Chancery Division, and the Probate, Divorce and Admiralty Division (re-named the Family Division in 1970 and the work reassigned); the Court of Appeal; and, since the Supreme Court Act 1981, the Crown Court. Each Division exercises both legal and equitable jurisdiction. Thus any issue can be adjudicated in any Division; and any point of law or equity can be raised and determined in any Division; but, for the sake of administrative convenience, cases are allocated to the Divisions according to their general subject-matter. Thus the court "is now not a Court of Law or a Court of Equity, it is a Court of complete jurisdiction." (*Pugh v Heath* (1882), per Lord Cairns.)

It was foreseen that a court which applied the rules both of common law and of equity would face a conflict where the common law rules would produce one result, and equity another. Section 25 of the Judicature Act 1873 provided that if there was any conflict between these principles, then equity was to prevail. However, this did not fuse the principles of common law and equity, which still remain as separate bodies of rules. "The two streams have met and still run in the same channel, but their waters do not mix" (Maitland).

NEW REMEDIES

In recent times the courts have used their equitable jurisdiction to develop new remedies:

MAREVA INJUNCTIONS

In 1975 the Court of Appeal recognised the Mareva injunction for the first time. This is a court order freezing the assets of a party to an action or stopping that party moving the assets out of the country.

In *Mareva v International Bulkcarriers* [1975] 2 Lloyd's Rep 509, a shipowner let the 'Mareva' to a foreign charterer, with payment half monthly in advance. The charterer defaulted on a payment. The shipowner found out that the charterers had money in an English bank and sought an injunction freezing the account. It was held that an order would be granted to stop the charterers from moving the money abroad before the case was heard. Normally the application will be *ex parte*, which means that one party applies without giving notice to the other side for if the other party did have notice, they could move the assets.

In *The Due Process of Law* (1980) Lord Denning described the Mareva injunction as "The greatest piece of judicial law reform in my time".

ANTON PILLER ORDERS

In 1974 the High Court started to grant what later became known as Anton Piller orders. This is an order to a defendant to allow the plaintiff on to the defendant's premises to inspect, copy or remove documents or other objects relating to the plaintiff's property. The aim is to stop the defendant removing or destroying vital evidence. The defendant may refuse entry, but such action would be regarded as contempt of court, for which the defendant could be sent to prison. Once again it is an *ex parte* application. The use of such orders was confirmed in the following case.

In *Anton Piller v Manufacturing Processes Ltd* [1976] Ch 55, the plaintiffs made electrical equipment and employed the defendants as their agent in the UK. They suspected that he was selling their technical drawings to competitors and so applied for an order. The court held that an *ex parte* mandatory injunction would be granted, to the effect that the plaintiff could enter the defendant's premises and inspect relevant documents.

These orders have been used for breach of copyright, passing off and matrimonial disputes.

THE SUBJECT-MATTER OF EQUITY

It may be helpful to the understanding of equity to list the subjects which should properly be included within it. No list can be exhaustive. However, the following matters are assigned to the Chancery Division by the Supreme Court Act 1981:

- * The sale, exchange or partition of land, or the raising of charges on land;
- * The redemption or foreclosure of mortgages;
- * The execution of trusts;
- * The administration of the estates of deceased persons;
- * Bankruptcy;
- * The dissolution of partnerships or the taking of partnership or other accounts;
- * The rectification, setting aside or cancellation of deeds or other instruments in writing;
- * Probate business, other than non-contentious or common form business;
- * Patents, trade marks, registered designs or copyright;
- * The appointment of a guardian of a minor's estate;
- * All causes and matters involving the exercise of the High Court's jurisdiction under the enactments relating to companies.