Equity & Trusts

Assignment

The success of the early Chancery Courts and the continued vigour of equity in the centuries that followed, marked a triumph not just for the desire to bring a coherent, rational and flexible jurisprudence to the narrow semantic and procedural concerns of the early writ based Common Law, but also for the Judicial appetite for discretion.

Discuss.

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 i.e., 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 overwhelmed with technicalities and claims which 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, e.g. 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 - cancelleria - 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. oR0Iv Visit coursework fe in fe fo fe for fe more cours fe Do fe not fe redistribute oR0Iv

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Equity created new remedies: cobf bfr sebfbfw orbf bfk inbf fobf bf.

(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, e.g., 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. coge ger segegew orge gek inge foge ge.

(b) Rectification, which allowed a written document to be changed if it did not represent the actual agreement made by the parties. lozwest, please do not redistribute this cours. We work very hard to create this website, and we trust our visitors to respect it for the good of other students. Please, do not circulate this cours elsewhere on the internet. Anybody found doing so will be permanently banned.

(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. cobe ber sebebew orbe bek inbe fobe be.

(d) Injunctions, usually an order to stop a person doing a particular act, like acting in breach of contract (a prohibitory injunction). wDpZKvIhr from wDpZKvIhr coursewrok wDpZKvIhr work wDpZKvIhr info wDpZKvIhr

EQUITY AND THE COMMON LAW coef efr seefefw oref efk inef foef ef.

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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**[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. This writing from www.coursework.info

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"*[2]*. To combat this criticism Lord Nottingham 'the father of modern equity'*[3]* and Lord Chancellor between1673-82 started to introduce a more systematic approach to cases and by the nineteenth century, equity had become as rigid as the common law. Lord Eldon confirmed this in **Gee V. Pritchard***[4]* statingthat: coef efr seefefw oref efk inef foef ef;

"nothing would inflict on me greater pain, in quitting this place than the recollection that I had done anything to justify the reproach that equity of the Court varies like the Chancellor's foot" Make9C9E Visit coursework cf in cf fo cf for cf more hypothesis cf Do cf not cf redistribute Make9C9E

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. oii from oii coursewrok oii work oii info oii

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. This was followed in Ireland by the Supreme Court of Judicature Act 1877. This Act replaced the common law court and the equity law court with that of the Supreme Court of Judicature. This court was divided into two divisions the Court of Appeal and the High Court of Justice. Initially the High Court of Justice was divided into five divisions; the Chancery, Queen's Bench, Common Pleas, Exchequer and Probate and Matrimonial. The Common Pleas division was merged with the Queen's Bench division in 1887 and in 1897 the Exchequer and the Probate and Matrimonial divisions were merged with the Queen's Bench. By the turn of the century only the Chancery and the Queen's Bench were in existence.

The effect of the Judicature Act was described as:

"The same system of Jurisprudence now prevails in all Divisions of the High Court; and if; upon the facts pleaded, the plaintiff could, before the Judicature Act, have had in Equity the relief which he seeks in this action, he is now entitled to it in this court. That Act changed forms of procedure, but did not alter rights or remedies"*[5]*.

Thus the court "is now not a Court of Law or a Court of Equity, it is a Court of complete jurisdiction"*[6]*. 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 28 of the Supreme Court Judicature Act 1877 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"*[7]* this was illustrated in **Walsh V. Londsdale***[8]* where Jessel MR summed up the case by stating:

"There are not two estates as there were formerly, one estate at the common law by reason of payment of the rent from year to year and an estate in equity under the agreement. There is only one court and equity rules prevail in it".

Another objection expressed by many commentators was that any type of fusion or meeting between equity and the common law would result in the common law consuming equity because courts are more comfortable relying on the precedent based system of the
common law than with developing flexible new approaches to problems that equity demands. There was a general fear that equity would cease to develop and its important contribution would eventually be lost to the legal community. This overlooks the fact that throughout their existence equity and the common law have developed whenever the courts believed that existing legal doctrines did not satisfy the demand for decisions which paralleled exiting morals. The best example is the development of negligence liability by the House of Lords in **Donohue v Stevenson** based on their appreciation of the general principles of fairness and justice. Therefore, "equitable" principles will develop, whether fused or separate from the common law, whenever it is believed that the existing doctrines are producing unjust results. When there is a perceived need to protect

obligations of loyalty we can count on the courts to find ways of accomplishing this via equity or via the common law. It is not inappropriate at this stage to mention the attitude of Lord Denning on this topic - in his book The Discipline of Law[9] he states:

"In the 19th century the law of England was dominated by the difference between Law and Equity. Law had its own strict rules. Equity was, or should have been, more flexible. It was the means by which the needs of the people could be met".

In my view, if there is a danger in a fusion of equity and law, it is not that the common law will consume equity but that certain parts of the common law may atrophy if courts are given easier access to equitable principles and remedies. Being much more flexible and discretionary equity allows courts to resolve disputes as they think just and is therefore a more attractive tool to solve the difficult cases. In and of itself this shift from a more rigid system to a more flexible one is not inherently bad but it could lead to a decline in the extent to which clear and objective reasons are provided for judicial decisions and a consequent decline in judicial predictability.

It could be proven that procedurally the Common Law and the Law of Equity have fused, however through indebt research in this area it is clearly evident that Equity and Common Law have retained there own distinct identity.