

Law and Equity Essay

(a) Outline the development of common law and equity .

There was no system of law in England and Wales before 1066, as it was mainly based on customs which were just rules of behaviour and the other used to be the decisions of judges. The law in England and Wales built over the centuries. There were various methods of creating laws which were called "sources of law". However, in the 18th Century Parliament became more powerful which lead the Acts of Parliament (statues) to be the main sources of law today. Decisions made by the judges are also essential today as they interpreted Parliamentary law where there was no statue law. During the twentieth century statue law and judicial decisions continued to be the major sources of law but, in addition there were two new sources became increasingly important these were delegated legislation and European law. Delegated legislation is law made by a body other than Parliament. Parliament gives others the power to pass delegated legislation in a parent or enabling Act.

Customs are rules of behaviour that develop in a community without being deliberately invented. There are two main types of Customs: Local Customs and General Customs.

Local customs is when a person claims to have some sort of a local right as they believe that right has always been accepted locally and they are claiming the right is local custom. Judges developed tests to decide whether to uphold such customs. One of the tests were that 'the custom must have existed since time immemorial'. It was very unusual for a new custom to be considered by the judges, but there have been some case such as **Egerton v Harding (1974)** the court decided that there was a customary duty to fence land against cattle staying from the common. It is believed that the General custom was effectively the basis of the common law. When the country was brought under the centralised

As it was largely based on customs before 1066, Customs varied from place to place in the North the Dane Law was being put into operation, in the Midlands it was the Mercian Law and in the South/West part of the country Wessex law was being implemented.

However, in 1066 William of Normandy took over the England throne and set up the Curia Regis (King's Court). This court consisted of nobleman who acted as judges. As practice was started of sending judges around the country to hold assizes (or sittings) to hear cases locally.

In 1154 when King Henry II came to the throne he divided the country into circuits which lead the tours of the judges to be more regular. The judges acted as a "sifting process" where they would return to West minister and discuss the various laws that have been operated around the country. This enabled the judges, over a period of roughly 200 years, to take the best local laws and apply them throughout the land. Thus, as a result of this in 1250 there was a law which was same all around the country and this is how 'common law' was established. The principle of 'stare decisis' also came into place which meant 'stand by the decision' and forms the basis of precedent today.

There were many problems with the common law. The problems were mainly relating to the writ system which was a document containing the details of a person's claim. The first problem with the writ system was that it was too rigid; if it was filled out incorrectly it would be completely ignored. The other problem was that the nobleman limited the type of writs due to the **Provisions of Oxford 1258**, so that certain categories of claim existed. The last problem was that the only remedy that the courts could give was the damages. This was not appropriate as in some cases such as in land disputes where money could not compensate the loss of land.

People were disappointed therefore they wrote to the king to complain. The king was known as the "The Fountain of Justice". The king was overwhelmed by the complaints and passed it on the Chancellor who known as 'The Keeper of the King's Conscience' as he was both a lawyer and a priest. The chancellor had a reputation of solving the cases fairly and based on justice. The chancellor dealt with so many claims that in 1474 he was given his own court named as Court of Chancery this is when a new law came into place named "equity" meaning fairness.

Equity historically had been an important source and still plays a vital role with many of our legal concepts having developed from equitable principles. The word equity meaning "fairness" operates on its meaning when adding to our law.

Equity and Common Law both systems functioned side by side and eventually a conflict developed between these two systems and in that equity would frequently overruled common law decisions and denied them. The problem was that the Common law courts would make an order in the favour of the other party whereas the Chancery court would make an order in the favour of the other party. This conflict was later solved in **The Earl of Oxford's Case 1615** when the king came to the decision that where there was conflict equity should prevail.

However, once the equity became a body of law rather than arbitrary exercise of conscience, there was no reason that it needed its own court. Therefore, the two systems merged together by **Judicature Acts 1873-75** which established that equity and common law could both be administered by all courts and provide the system we have today. Hence, common law advanced from customs and on the other hand equity established from the problems in common law and today both systems are delivered in all courts.

(b) What has been the impact of modern equity on the common law?

The Chancellor began to introduce new procedures and remedies. He formed subpoenas where he ordered the witnesses to attend the court. The chancellor also created new remedies of injunctions, rescission, rectification and specific performance.

Injunction is an order to stop a person doing a particular act, like acting in breach of contract (a prohibitory injunction) or mandatory. For example, a landlord might bring an action against a tenant for waste, in which the right to protect the land-lord's interest in the ownership of the premises is at issue. The

landlord might apply to the court for an injunction against the tenant's continuing harmful use of the property. The injunction is an ancillary remedy in the action against the tenant. Rescission allowed the parties to a contract where they can be in their original positions in the case of a contract induced by a falsification. Rectification allowed the contracted documents to be altered and specific performance orders the party to act as promised under the contract.

✚ All four remedies mentioned above are still widely used today. Injunctions can be used in issues of domestic violence or noise pollution whereas rescission, specific performance and rectification can all be used in the law of contract.

Equity also created maxims which had to be satisfied before equitable rules could be applied. Maxims are sayings that express principles of equity. These maxims were designed to ensure that decisions were morally fair. ✚ maxim which elaborates on how equity operates is "equity acts as a shield not as a sword", this states that equity is used to protect not to punish people. The other maxim is that "he who comes to equity must come with clean hands", this illustrates that whoever uses equitable remedy must have acted equitably themselves as well. This maxim was used in the case of **D&C Builders v Rees**, in this case the couple were not allowed to rely on the equitable principle of "promissory estoppel" because they did not act fairly when did not pay back the builder what they owed him.

One of the other maxims are "delay defeats equity". This means that when a claimant takes unreasonably long time to bring an action which means that the equitable remedies will not be available. This maxim was applied in the case of **Leaf v International Galleries** where claimant realised after five years that the painting he bought was not genuine and he claimed the equitable remedy for rescission, but the court said that the delay had been too long.

Equity is still very significant today. It is being used all over the country in the areas of mortgage and trust. The area of contract is still very much based on principles of equity.

Trusts are originated entirely on equity where the trustee, who has interest in the property, should perform in the favour of the person with an "equitable interest" in the property.

Equitable principles are still being developed such as the "promissory estoppel", it is discussed in the D&C Builders. Lord Denning developed this in **The High Trees Case** it stops the person to go back on a promise. The most recent development has been of "deserted wife's equity" this was developed to overcome the problem of marriages when the marital home is on the husband's name only however now until any of the children's reach the age of 16 the wife don't have to leave the house.

In conclusion equity came into place because of the problems in the common law and is believed to have brought fairness and justice where the common law was unsuccessful and it is said that "equity provides a gloss on common law".