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Historical Introduction

key points

KEY POINTS

- equity means fairness or justice;
- equity was introduced to meet the deficiencies in common law;
- common law had many shortcomings: it lacked flexibility in remedies; it failed to recognise rights such as the right of a mortgagor or of a beneficiary under a trust, and the writ system was inadequate;
- equity provided a 'gloss on common law', rather than a complete system of rules, and worked alongside common law;
- equity was administered initially by the king with assistance from the Chancellor, who was a religious person;
- the Chancellor later took sole control of equity and the Chancery Court was established;
- equity became inflexible and unpopular and consequently there were many conflicts with the common law;
- equity and common law were fused under the Judicature Acts 1873–5; and
- equity continues to exist as a separate system of law.

1.1 THE INTRODUCTION OF COMMON LAW

Until the Norman Conquest, there was no single system of law in England and Wales. The legal system before 1066 mainly consisted of customs that were local to a particular area and were administered and enforced locally or by the King's Council. After 1066, a system of royal courts was introduced as well as a unified system of rules, which initially existed alongside the local rules. It was a gradual process but eventually a system of law was in place that was 'common to all' in England and became common law.

1.2 THE INADEQUACY OF COMMON LAW

The introduction of common law was welcomed at first, but gradually litigants became dissatisfied because it had a number of limitations. There were three main ways in which the common law was inadequate.

(a) The Writ System

Applications to court could only be made if the claimant had the correct *writ*. Without the correct writ, no application could be made. A claimant could either use the established writ, or if none covered the claim exactly, then the court would issue a new writ. There was an initial flexibility in allowing new writs to be issued, and many litigants were later successful and were granted a remedy. Larger property owners such as the lords and barons were often forced to make compensation payments, and they felt that the law was too willing to allow claimants to come to court. As a result, after 1285, it was decreed that no new writs could be introduced. From then on, the claim of any litigant had to be based on one of the existing writs and if none fitted the claim, here the case could not be brought to court. This caused hardship to many who were prevented from accessing the court. It had the effect of making the common law very rigid and inflexible.

(b) The Limitations in the Remedies Provided under Common Law

Common law was very inflexible in the types of remedies that it could provide. Damages could be claimed 'as of right' under common law if a litigant was successful but this was often not the most appropriate remedy.

EXAMPLE

Silas lives next to Jude. His house is some way from the main road to the nearest town and so he uses a quicker route through Jude's garden to get to the main road. He regularly uses this route, although he does not have permission from Jude. The law would regard Silas as a trespasser. Jude would be able to claim damages from Silas, but he would prefer an order from the court to stop Silas from using his garden because it interferes with his own enjoyment and money does not adequately compensate him for this.

In this example, the appropriate remedy for Jude is an *injunction*, which is an order from the court that usually prevents certain behaviour.

In other situations, the claimant may wish to force the defendant to act in a particular way, as shown in the example below.

EXAMPLE

X enters into an agreement with Y to purchase Y's house. If Y refuses to proceed with the sale, damages will not fully compensate X for the loss of this opportunity. X has looked at many houses over the past six months, and he has decided that Y's house satisfies all his requirements. The most appropriate remedy in this case would be an *order for specific performance*. This order would force Y to sell to X.

Such a remedy was not available initially under common law.

(c) The Failure of Common Law to Recognise Certain Rights

The common law was also very rigid in the type of right that it was prepared to recognise. Common law would not recognise the rights of someone who did not own the property at law but had been given rights to enjoy that property. Today we know these rights as rights of a beneficiary under *a trust*. These rights are enforceable against the owner (the trustee) at law, and a remedy may be granted if the trustee will not allow the beneficiary a right but instead claims the property for himself. Common law also did not recognise the rights of a mortgagor (the borrower) under *a mortgage*. Equity recognised the rights of mortgagors and would uphold their rights to recover the property against a mortgagee (the lender) on repayment of the money borrowed.

1.3 THE ORIGINS AND DEVELOPMENT OF EQUITY

Equity developed as a way of responding to the many problems of the common law. Many were dissatisfied once they discovered that there was no writ to cover their claim and they were left without any right to go before the court. The last resort for these claimants was to petition the king asking that the case should be heard or that a remedy other than damages be granted or that rights under a trust or a mortgage should be recognised and a remedy could be sought. The king exercised his discretion when making any decision so cases were decided on their individual facts. Many litigants were successful, and this success persuaded others to approach the king for relief. The decisions were not consistent, and today they would be regarded as being made on their merits rather than following previous decisions. Of course, because many were successful, these cases grew in number and eventually the king sought the assistance of the Chancellor. Initially the decisions were made in the king's name, but by the end of the fifteenth century, they were made in the name of the Chancellor alone. At this stage, equity began to be regarded as a separate system of law supplementing the gaps and deficiencies in the common law.

1.4 THE ROLE OF THE LORD CHANCELLOR AND THE CHANCERY COURT

(a) The Chancellor

The Chancellor was an important figure in the fourteenth and fifteenth century both as a figure close to the king and party to major decisions and also as a religious person. He was the obvious person to assist the king in deciding the petitions made to him. The Chancellor was responsible for deciding cases in ecclesiastical law or canon law. The Chancellor's religious roots were important because they affected the basis on which he made decisions, as he would always base them on fairness or conscience. The Chancellor was described as the 'keeper of the king's conscience'. However, one of the early criticisms of equity was the breadth of discretion that was reserved at first for the king and later for the Chancellor. The extent of discretion varied with whoever was Chancellor at the time. Some had a greater sense of justice and morality than others and were more willing to intervene than others. For this reason, equity was said to vary 'according to the length of the Chancellor's foot'. By the seventeenth century, lawyers replaced the ecclesiastics who had held the role of Chancellor. Today, there remains an element of discretion in the areas of law where

equity plays a significant part. An important example is where the court decides on where the ownership of the family home lies. In these cases, the court will usually decide the case on the basis of an implied trust, and here the court continues to retain for itself significant discretion, in particular, when quantifying the shares of the individual parties, as shown in *Stack v. Dowden* [2007] UKHL 17.

(b) The Court of Chancery

The decisions of the king and Chancellor were initially heard on an ad hoc basis without any particular procedure. Gradually the decision-making became formalised and decisions were heard in the Court of Chancery. This court was once an administrative department for the king but it later grew into a separate court which administered equity. The court had separate rules and procedures from those of the common law courts. At first the Chancellor alone could decide cases, which naturally led to inordinate delays in cases reaching final judgment. In the early part of the nineteenth century, additional judges were appointed, who sat specifically in the Court of Chancery, and these judges could also decide cases. The most well known was the Master of the Rolls, a role created in 1833, although the first additional judge of the court was the vice chancellor appointed in 1813. At this stage there were two separate systems of law in operation: common law and equity. Cases could be brought in both the common law courts and the Court of Chancery, but costs could be incurred if an action was started in the wrong court. For example, if a case claiming an injunction was brought in the common law court, it could not be heard and the costs of the hearing would normally be borne by the claimant.

1.5 THE DEFECTS OF EQUITY

Equity's ability to resolve disputes on the basis of discretion was at first welcomed by dissatisfied litigants, many of whom were able to bring actions where previously they had no right. There was always a chance that their case would be decided favourably. Gradually, with the impact of law reporting, cases were decided on the basis of past decisions rather than purely on the merits of the case before the courts, and the law adopted the system of precedent, which took away much of the flexibility of equity. Equity became slow and cumbersome and had none of the initial advantages but instead many of the defects that had been directed at the common law, centuries earlier, had emerged.

One of the most serious defects was the need to bring separate actions in a single dispute, which was both time-consuming and wasteful.

EXAMPLE

Edgar entered into a contract with his neighbour for the supply of hay and straw for his cattle over the winter. He has paid in advance for the hay. The straw has not been delivered, and the hay delivered last week is of such poor quality he has had to purchase more from another farmer. Edgar would have to bring an action in the Chancery courts for an order for specific performance of the contract to supply the straw and a separate action in the common law courts for damages for his loss over the supply of the hay. These actions would run parallel to each other and involve two separate sets of lawyers and separate costs.

Fusion of Common Law and Equity

During the nineteenth century, several acts were passed to address the problems of the conflict between common law and equity and also of having two separate systems of law operating at the same time.

1. The Common Law Procedure Act 1854 allowed common law courts limited power to grant equitable remedies; the Chancery courts also had the power to decide questions of common law. Even trial by jury was introduced into Chancery cases.
2. The Chancery Amendment Act 1858 gave the Chancery courts the power to award damages either as an alternative to or in addition to an equitable remedy.
3. The Judicature Acts 1873–5 were the most significant pieces of legislation passed to solve the problems of having separate systems of law. The main effect of the Acts was to merge the two systems of common law and equity so there was now only one system of law and procedure in England and Wales. All the judges of the newly formed Supreme Court of Judicature had jurisdiction in cases in both equity and common law. Under the 1873 Act it was laid down that in any matter where the rules of common law and equity conflicted, the rules of equity were to prevail.

Although it was assumed that after 1875 there was just one system of law operating in England and Wales and that the rules of equity and common law had fused, this has since been called into question. For more than five hundred years two separate systems of law operated, so it was inevitable that some differences would remain. However, the cases in which these differences are important are comparatively rare. Nevertheless, the courts continue to recognise that there are two systems of rules in practice, equity and common law. As stated by Lord Toulson in *Mark Redler and Co Solicitors* [2014] UKSC 58, 'One hundred and forty years after the Judicature Act 1873, the stitching together of equity and common law continues to cause problems at the seams.'

One example of an area where the distinction between common law and equity remains lies in the process of recovery of property from someone who has wrongfully taken it, known as *tracing*. Today tracing in equity and tracing in common law are based on different rules. In equity, tracing can only take place where there is a fiduciary relationship, which is not necessary at common law. This difference was criticised by Lord Millett in *Foskett v. McKeown* [2001] 1 AC 102, but it remains.

1.6 THE EMERGENCE OF THE TRUST

The trust emerged at the time of the Crusades. Knights would leave to go abroad to fight for the Crusades, and they were likely to be absent for some time, possibly many years. Therefore they would leave their property with another who was entrusted with it for safekeeping. The property would be transferred into the name of the friend to be kept for the knight's return and also for the enjoyment of the rest of his family.

The transferor was called a *feoffor* and involved transferring the legal estate in the land to a *feoffee to use* (the trustee) to hold it to the use of a *cestui que use* (the beneficiary). The right of the claimant was a right called a *use*. If the *feoffee to use* refused to transfer the property to the *cestui que use*, the common law courts would not recognise his right. At common law the *feoffee to use* was regarded as the owner of the property, but as he had made a promise to the knight who had chosen him to care for his property, it was unconscionable for him to deny the claimant beneficiary a right. Such an act would offend the conscience of the court of equity.

The emergence of the trust from the original use giving enforceable rights to the beneficiary was complex, slow and involved attempts by the Crown to argue that the beneficiary owned the property so that tax would become payable on his death, whereas if he only owed a lesser interest, it could be avoided.

EXAMPLE

Today a trust would arise in the following situation:
Sami (the settlor) ----- Tony (the trustee)
(owns Blackacre Farm)

Ben (the beneficiary)

Sami is the legal owner of Blackacre Farm. He transfers the legal title to his land to Tony, who now becomes owner of the property at *law*. However, if Sami tells Tony he is not the absolute owner of this property but instead Tony is now to hold the property for Ben, age thirteen, who cannot own land for himself because he is too

young, then the law will recognise Ben's rights; and if Tony tries to take the land for his own enjoyment, then this is perceived as a breach of trust and the court will come to the aid of Ben and enforce his rights against Tony.

1.7 THE MAXIMS OF EQUITY

One of the main contributions of equity was the introduction of a number of maxims that can be applied generally when cases are decided in court. Maxims are used for guidance rather than as binding principles of law. There are countless examples of cases that have been decided over the past centuries with reference to one or more of these maxims. The following are some examples of the most widely used maxims, but there are many others.

(a) Equity Will Not Suffer a Wrong without a Remedy

One of the main criticisms of common law was its lack of flexibility in the remedies that it was able to grant and its failure to recognise certain rights such as the rights of a beneficiary under a trust. Equity will not automatically grant a remedy in all circumstances, but it will intervene to ensure a fair result.

(b) Equity Will Not Assist a Volunteer

Equity will not uphold a claim of someone who has not given consideration for the promise. Beneficiaries under a trust are volunteers, but equity will enforce their rights if the formalities and other requirements necessary for the creation of a valid trust have been complied with. Where the trust is not fully constituted, the court will not enforce the trust. This is discussed further in Chapter 5 under constitution of a trust.

(c) Equity Will Not Perfect an Imperfect Gift

Where a donor attempts to make a gift to a donee but fails to comply with the formalities of transfer, the court will not intervene in order to perfect the gift even where there is evidence that the donor intended a gift to be made.

(d) He Who Comes to Equity Must Come with Clean Hands

Any claimant for a remedy in equity will be denied a right if he has not behaved in good conscience himself over the matter. Unconscionable behaviour in another sphere will not affect the claim. In *Argyll (Duchess) v. Argyll (Duke)* [1967] Ch 302,

the Duchess of Argyll brought an action against her husband to stop him from publishing confidential material about her. He argued that she could not claim an injunction because she had committed adultery and so did not come to the court with 'clean hands'. The court ignored her adultery as it was not material in the case.

(e) Equity Looks to Substance and Not Form

This is a practical maxim showing that equity looks at the substance of an agreement rather than the form of an agreement, which means it is concerned with the desired effect rather than the form in which the agreement has been put.

(f) Equity Regards That as Done which Ought to Be Done

If X is obliged to carry out an act under a contract with Y that is specifically enforceable, equity will regard X as having already carried out what he promised to do. This is because he can be compelled to do so by the court. In *Walsh v. Lonsdale* (1882) LR 21 Ch D 9, a contract to grant a lease was treated by the court as creating an equitable lease on exactly the same terms.

(g) Delay Defeats Equity

The courts of equity will not uphold the claimant's rights where he has unduly delayed in bringing the action. The discretionary nature of equity allows the court to decide what is an unreasonable delay. In *Nelson v. Rye* [1996] 2 All ER 186, a claim for past earnings by a musician, which he argued had been wrongfully retained by his manager, was refused because he had significantly delayed in bringing a claim.

(h) Where Equities Are Equal, the First in Time Prevails

This principle applies where two or more claimants have equitable interests in the same piece of property but none of them holds a legal estate. The court will uphold the claim of the claimant whose equitable interest was created first.

(i) Equity Follows the Law

This rule reflects the early growth of equity. The rules of common law were acknowledged to be the law, and equity only intervened where the common law failed. Equity did not aim to overrule the common law and accepted that where possible it should follow the law. This maxim has been adopted very recently in the context of jointly owned land. In *Stack v. Dowden* [2007] UKHL 17, Baroness Hale held that where there are two owners at law (always joint tenants under the Law of Property

Act 1925), typically 'equity follows the law' and they will be regarded as joint tenants in equity. On the facts of this case the maxim did not apply because Baroness Hale found exceptional circumstances that displaced it.

(j) Equity Is Equality

This principle is applied where two or more claimants have rights in equity in property and the court must decide how to quantify each share in equity. This is a maxim such that it can be ignored if the parties have expressly declared how their interests are to be held.

(k) Equity Will Not Allow a Statute to Be an Instrument of Fraud

A claimant may rely on the lack of formalities in the transfer of rights as a way of claiming property. An example would be where the strict requirements of the Law of Property Act 1925 have not been adhered to in the transfer of land. Equity may step in to prevent the statute being relied on in order to prevent rights arising. An example arose in the case of *Rocheffoucauld v. Boustead* [1897] 1 Ch 196 where a court upheld a claim to land in spite of the lack of written evidence required by statute because the defendant owner of property knew that he held it under trust and it was not intended to be held by him personally. This case and the maxim on which it is based are discussed further in Chapter 6.

1.8 THE ROLE OF EQUITY TODAY

The role of equity and its capacity to develop the law has diminished over the centuries, and it can be questioned whether it has a significant creative role today. Initially a key characteristic of equity was its creativity and ability to respond to new situations, but gradually the creativity was lost.

In 1975 Lord Denning famously pronounced 'equity is not past the age of child-bearing' in *Eves v. Eves* [1975] 1 WLR 1338. He continued, 'one of her latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world [see *Gissing v. Gissing* [1971] AC 886] ... and we have nourished it.' The truth of this statement can be challenged since new rights to compare with the trust and the mortgage have not been introduced, but it is possible to show examples of creativity over the past fifty years.

Among the best recent examples of the creativity of equity are the two new forms of injunction: the *Mareva* injunction (the freezing order) and the *Anton Piller* order (the search order). The freezing order allows the court to make an order preventing the defendant from dissipating or removing his assets from the jurisdiction. Lord