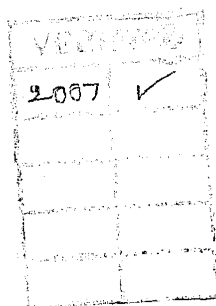
apparent enthusiasm, by the Court of Appeal in *Esso Petroleum Co., Ltd.* v. *Mardon*[1] and *Batty* v. *Metropolitan Property Realizations, Ltd.*[2] and it now seems to be the law that, notwithstanding the existence of a contract, a plaintiff, if he has an independent cause of action in tort, may frame his action accordingly if to do so affords him any advantage. However, as a matter of public policy, a plaintiff can never enforce an unenforceable contract by framing his action in tort, and there are many authorities to support this proposition.[3]

The "pigeonhole" approach owes its existence in English law to the medieval writ system. It can, occasionally, cause injustice. This is well illustrated by the anomalous doctrine of privity of contract. *X* enters into a contract with *Y* for the benefit of *Z*. There is no logical reason why *Z* should not be able to sue upon that contract for to allow him to do so would impose upon *Y* no greater obligation than he had agreed to undertake. Nevertheless *Z* has no right of action.[4]



P 532

[1] [1976] Q.B. 801; [1976] 2 All E.R. 5.
[2] [1978] Q.B. 554; [1978] 2 All E.R. 445.
[3] Examples are *Jennings* v. *Rundall* (1799), 8 Term Rep. 335; *R. Leslie, Ltd.* v. *Sheill*, [1914] 3 K.B. 607; *cf. Burnard* v. *Haggis* (1863), 14 C.B.N.S. 45.
[4] *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; cf. *Beswick* v. *Beswick*, [1968] A.C. 58; [1967] 2 All E.R. 1197; see p. 52, *post*.

The English legal system : equity

CHAPTER 2

Equity

A ORIGINS OF EQUITY

It may be apparent from the preceding chapter that substantive common law and procedure were hidebound by formality and restrictions. The common law partly avoided its own rigidity by the extensive use of fictions. Fictions were used for three basic purposes. First, they were employed to avoid the severity of the criminal law, benefit of clergy being the most notable example.[1] Secondly, fictions were used to extend the scope of the original writs in order to expand substantive law; trover and ejectment were both extended far beyond their literal scope to this end.[2] Finally, fictions were used to assume jurisdiction. Early fictions, such as the writ of pone, were used to acquire jurisdiction from the local courts in matters concerning title to land. Subsequently the common law courts used fictions to acquire jurisdiction from one another. Quominus and Bill of Middlesex[3] are notable examples of this trend which can be explained by the fact that judicial salaries depended upon the volume of litigation conducted.

However fictions were not capable in themselves of remedying all the defects of common law. These included the strictness of the application of common law doctrines and the inadequacy of the remedies available at common law. The overriding defect was, of course, the way in which substantive law was entirely bound up with procedure. Legislation, the principal modern agency of law reform, was not widely used in the Middle Ages.

Consequently an alternative means of providing a gloss on the common law was required. This led to the evolution of the second major historical source of English law—equity.

Equity is not peculiar to the English legal system. Continental systems of law recognise the existence of equity. However, in continental systems equity is purely conceptual. It is almost a synonym for "natural justice".

[1] See p. 17, *ante*.
[2] See p. 25, *ante*.
[3] See pp. 7, 9, *ante*.

In England this is not so. Natural justice is not a concept which forms the basis of English decisions although it no doubt affects the interpretation which judges put on the law. Hence equity in the English legal system does not mean natural justice[1] although its rules are in part based on the concept of justice, particularly where these rules were created to remedy injustice in the common law. Equity, in English law, has been defined by Maitland as—

> "that body of rules administered by our English Courts which were it not for the operation of the Judicature Acts, would be administered by those Courts which would be known as Courts of Equity".

This definition may appear to beg the question but it serves to illustrate that the nature of modern equity can be understood only by reference to its historical origins and development.

Equity, in its original sense of natural justice, was administered in the common law courts until the fourteenth century. Common law judges, particularly the judges of the Court of Exchequer, could exercise some discretion in their application of the law particularly in the question of whether or not to recognise the validity of writs issued out of the Chancery. This discretion was, no doubt, exercised on the basis of doing justice in individual cases and thus amounted to what the continental lawyer would describe as equity. Unfortunately during the fourteenth century the common law became hidebound by formality and so became rigid and inflexible. Provided a litigant could find a writ to fit his case and could surmount the intricacies of pleading attendant upon the writ he had a right to a remedy. No discretion was involved. It has always been a feature of the common law that common law remedies are available as of right. The plaintiff who can show the infringement of his legal right must be granted a remedy irrespective of his conduct or personality.

During this period, also, common law judges ceased to be drawn from the ranks of clerics and were recruited from the ranks of a legal profession whose inclination was toward learning and mastering the intricacies of pleading rather than attempting to reform the law.

Furthermore the political climate of the Middle Ages resulted in measures such as the Provisions of Oxford 1258, the tendency of which was to restrict the expansion of the writ system and to force it to develop along very narrow lines.

Finally the General Eyre, probably the last organ through which equity could be applied in the common law courts, declined in the same period as a result of local unpopularity.

Consequently the common law became, quite early in its existence, incapable of providing a means of remedying its own inherent restrictions.

[1] But see *Earl* v. *Slater and Wheeler* (*Airlyne*), *Ltd.*, [1973] 1 All E.R. 145; [1973] 1 W.L.R. 51 in which the (now defunct) National Industrial Relations Court held that a statutory provision requiring the question of whether a dismissal of an employee was fair or unfair to be determined "in accordance with equity and the substantial merits of the case" was to be interpreted as requiring determination in accordance with common sense and common fairness rather than in accordance with the principles of equity (as opposed to common law).

This meant that injustices were bound to occur. For example a litigant who had suffered damage might not be able to find an existing form of action into which he could fit his case. Even if he found a form of action he might falter in pleading or might, in debt or detinue, be met by the defendant waging his law. Alternatively if he were a defendant it might be that a remedy would be granted against him contrary to the justice of the case.

A practice grew, in such cases, of dissatisfied litigants petitioning the King to exercise his prerogative in their favour. For a time the King in Council determined these petitions himself. Later they became so numerous that the King delegated this task to his principal minister, the Chancellor. The Chancellor was, it will be recalled, an officer of the common law since he had custody of the Great Seal and controlled the issue of original writs out of the Chancery to litigants at common law. In addition he sat, from time to time, as a judge in the Council and the Court of Exchequer Chamber. He was, until the fall of Wolsey (1515–1529), an ecclesiastic.

In 1474 there is the first recorded instance of the Chancellor issuing a decree in his own name rather than in the name of the King. At this point of time the Court of Chancery was created and became, as the common law courts had become, independent of the King and of the Council.

B COURTS OF EQUITY

1 The Court of Chancery

This was the principal court of equity and, as stated above, modern equity is the system of law administered in this court. The earliest jurisdiction of the Chancellor, often termed the "Latin" jurisdiction because the proceedings were recorded in Latin,[1] consisted of hearing petitions by litigants to whom a remedy had been denied or against whom an order had been unjustly made at common law. If there had been injustice the Chancellor would remit the case to the King's Bench for investigation. If that court found that a party had been guilty of corruption he would be punished summarily in the name of the King. This is, historically, the less important aspect of the Chancellor's jurisdiction and was extinguished with the abolition of the Court of Star Chamber to which it was transferred when Conciliar jurisdiction was transferred from the Chancellor to that court.

By far the most important aspect of the Chancellor's jurisdiction consisted of the recognition and enforcement of a diverse set of principles now identifiable as the rules of equity.

It is debatable whether equity grew out of the jurisdiction of the Chancellor or whether the Chancellor's jurisdiction developed out of the principles of equity. In any event the growth of equity is inextricably tied up with the office of Chancellor. This was, at different times, both a good and

[1] The equitable jurisdiction of the Chancellor is generally described as the "English" jurisdiction since proceedings were recorded in English.

a bad feature of the system. It was a good feature in that brilliant lawyers such as Sir Thomas More (1529–1532), Lord Ellesmere (1596–1617), Sir Francis Bacon (1618–1621), Lord Nottingham (1673–1682) and Lord Hardwicke (1737–1756) were each able to create and mould principles of equity without which it is difficult to imagine how English law could today continue to function. On the other hand, since the Court of Chancery habitually bore the characteristics of the Chancellor, any personal shortcomings which he might possess would become ingrained in procedure in the court. Thus the court was brought into disrepute in the seventeenth century by the sale of offices in the court. All offices, including that of Master of the Rolls, were sold by the Chancellor.[1] Indeed so great was corruption in the court during this period that on the bursting of the South Sea Bubble in 1725 a deficiency of some £100,000 in court funds was discovered as a result of which Lord Macclesfield was impeached and fined £30,000.

A further defect in the Court of Chancery was the organisation of the court. There was an excess of court officials who attempted to extend the ambit of their duties so as to increase their revenue. Apart from the abuse which the sale of these clerkships created the proliferation of Chancery clerks naturally made litigation in the court extremely slow and expensive. The excess of court officers was equalled only by the paucity of judges. At first the Chancellor himself was the only judge. In practice he was unable to hear all cases himself and by the sixteenth century was accustomed to delegate his judicial function to the Masters in Chancery although judgment was delivered only by the Chancellor himself. The chief of these Masters was the Master of the Rolls who in 1729[2] effectively became a second judge of the court. However this did little to speed up the conduct of litigation since the parties had a right to apply to the Chancellor for a re-hearing. Arrears of work were handed down through successive Chancellors. Matters reached a head in the nineteenth century with the elevation of Lord Eldon to the office of Chancellor. Lord Eldon (1801–1827) was a distinguished lawyer but unfortunately suffered from an excess of caution. He would not deliver any judgment or make any order without considering every available authority. There are records of judgments being reserved for months and even years. While this stabilised the court it also brought it into discredit with suitors and the backlog of cases pending became enormous. In 1813 Lord Eldon approved the appointment of a Vice-Chancellor as an additional judge of the Court but this brought little improvement since an appeal lay from his decisions to the Chancellor. Apart from this measure Lord Elton stood fast against any reform and used the power of his office to thwart any attempt at reform of the judicial system. This obdurate conservatism contributed greatly to the welter of reform which in fact began shortly after his resignation from office in 1827. The Court of Chancery was finally abolished by the Judicature Acts 1873–1875 and its jurisdiction substantially transferred to the Chancery Division of the High Court.

[1] The office of Master of the Rolls was apparently worth £6,000 in the eighteenth century. See *Ex parte the Six Clerks* (1798), 3 Ves. 589.

[2] By 3 Geo. 2, c. 30.

In addition to its equitable jurisdiction the Court, because of its close association with the Crown, acquired jurisdiction over other miscellaneous matters. For example the Crown, as *parens patriae*, had protective custody of all infants within the realm; this jurisdiction, which comprised such matters as the power to appoint guardians, was assigned to the Court of Chancery but is now exercised by the Family Division.[1]

A similar concept existed in relation to persons of unsound mind; since they too were in need of protection the Sovereign assumed responsibility for the care of lunatics and their property. This responsibility was, as with infants, delegated to the Chancellor and is today exercised, for the most part, by the Court of Protection, the judges of which are judges of the Chancery Division.[2]

Procedure in the Court of Chancery

Since proceedings in the Court of Chancery were not commenced by writ the court was never a slave of procedure in the same way as were the common law courts. Consequently, Chancellors were able to create rights and remedies *de novo* as justice required. There was never any pretence that equitable rules dated from time immemorial.[3] It was this that prompted John Selden's immortal aphorism that "Equity varies as the length of the Chancellor's foot".[4]

A Chancery suit was commenced by a petition or bill filed by the plaintiff in the court. This petition originally had not to comply with any particular formality so that its potential scope was unlimited. Later, through the intervention of lawyers, uniformity and complexity came to be required in the drafting of Chancery bills and petitions which became as tortuous as common law pleadings.

Provided that the petition disclosed some reason for the Chancellor's intervention a writ of subpoena would be issued and served on the defendant compelling him to attend in answer to the petition. The defendant was then required to draft an answer to the allegations in the petition. This answer had to be on oath and is the origin of the modern interrogatories. It was a far longer and more detailed document than a common law defence since it disclosed not only the defence but also other factors to influence the Chancellor to exercise his discretion in favour of the defendant. Issue was thereby joined and the action proceeded to trial.

At the trial the evidence of witnesses was often not required and where testimony was required it was given on affidavit so that proceedings before the Chancellor were confined to legal arguments on both sides.[5] Where the case involved the existence of a common law right the Chancellor would call for the assistance of two common law judges to act as assessors.

[1] Wardship proceedings were transferred from the Chancery Division to the Family Division by the Administration of Justice Act 1970, s. 1; Sch. 1.

[2] See p. 183, *post*.

[3] See *Re Hallett* (1880), 13 Ch. D. 696, at p. 710, *per* JESSEL, M.R.

[4] Selden, *Table Talk*.

[5] In modern Chancery Division proceedings the evidence is usually given on affidavit in the first instance followed, in the event of a dispute on the facts, by cross-examination of the deponents.

Finally the Chancellor would issue a decree in his own name. However this was not the end of the matter. An account might remain to be taken or an estate administered. Also the unsuccessful party might always apply to the Chancellor for a rehearing which would be granted even if the first hearing had been before the Chancellor himself. Even then the matter was not closed because there might be a further appeal to the House of Lords.[1]

2 The Court of Appeal in Chancery

This court was established in 1851[2] to hear appeals from decisions of the Vice-Chancellors (of whom there were by this time three) and the Master of the Rolls. The Lord Chancellor had almost ceased to act as a first-instance judge. The court consisted of the Chancellor and two Lords Justices (the first time that this nomenclature had been adopted). In addition the Chancellor might require any Vice-Chancellor or the Master of the Rolls to sit as an additional judge. There was a further appeal from the Court of Appeal in Chancery to the House of Lords. The court was abolished by the Judicature Acts 1873–1875 and its jurisdiction effectively transferred to the Court of Appeal.

3 The Court of Requests[3]

This court emerged in the fifteenth century from a committee of the Council established to grant relief to poor litigants who were denied a remedy at common law. Hence its jurisdiction was similar to that of the Chancery although it tended only to try cases of minor importance. In these cases the court could dispense equity more quickly and cheaply than could the Court of Chancery. This made the court popular with litigants but unpopular with common lawyers since it frequently meddled in the conduct of actions proceeding in the common law courts. The court was in 1598[4] declared "illegal" and to have "not any power by commission by statute or by common law". In spite of this rebuke the court continued to hold sittings until these were suspended in 1642 on the outbreak of the civil war. The court was not formally abolished but after the Restoration, although the Court of Chancery continued to thrive, the Court of Requests did not and because of the very close association between the court and the Council Charles II did not dare to attempt to revive its jurisdiction.

C NATURE AND CONTENT OF EQUITY

1 Nature of equity

One of the best definitions of the nature of equity is that of LORD COWPER in *Dudley* v. *Dudley*.[5]

1 This appeal dates from *Shirley* v. *Fagg* (1675), 6 State Tr. 1146.
2 14 & 15 Vict., c. 83.
3 This court should not be confused with the Courts of Requests which were established in the eighteenth century to hear small claims (usually less than 40s.) and which were the forerunners of the modern county courts.
4 *Stepney* v. *Flood* (1598), Cro. Eliz. 646.
5 (1705), Prec. Ch. 241, at p. 244; cited by LORD HODSON in *National Provincial Bank, Ltd.* v. *Ainsworth*, [1965] A.C. 1175, at p. 1224; [1965] 2 All E.R. 472, at p. 480.

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

The basic nature of equity is expressed in the renowned "maxims of equity". Thus equity provided new remedies where a remedy at common law was deficient on the basis that "equity does not suffer a wrong to be without a remedy". "Equity will not assist a volunteer" embodies the principle that a decree of specific performance will not be granted to a person who has given no consideration in return for the obligation which he seeks to have enforced. Similarly equity does not provide a remedy to a person who has behaved unconscionably (for example, a beneficiary who has acquiesced in a breach of trust) since "he who comes to equity must come with clean hands".

Equity's effect upon English law has been felt mainly in relation to the law of property and the law of contract. It has both a positive and a negative aspect to its operation. Its positive operation is demonstrated by the principle that equity will give effect to parties' intentions notwithstanding the absence of some formality required by the common law ("equity looks on that as done which ought to be done"); thus, an agreement to create a formal lease is equivalent to the lease itself;[1] the doctrine of part performance enables a contract to be enforced even though, by reason of the Statute of Frauds, it could not be proved at common law.[2] The negative aspect of equity centres on the equitable doctrine of fraud[3] and operates to restrain persons from enforcing rights which they could otherwise enforce, where to do so would be a fraud (in the equitable sense) on other parties. Thus, to take a simple example, a trustee, notwithstanding his capacity to dispose of the legal estate, will be restrained from so doing in breach of trust;[4] the doctrine of equitable estoppel[5] is founded on a similar principle.

The negative aspect of equity is, usually, rendered effective by the remedy of injunction.

Finally, an important principle of equity is that equity acts *in personam*

1 *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9.
2 *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; this, like other equitable doctrines, is capable of expansion and adaptation: see *Steadman* v. *Steadman*, [1974] Q.B. 161; [1973] 3 All E.R. 977.
3 See p. 53, *post*.
4 For a recent illustration, see *Waller* v. *Waller*, [1967] 1 All E.R. 305; [1967] 1 W.L.R. 451; see also *Lloyds Bank, Ltd.* v. *Bundy*, [1975] Q.B. 326; [1974] 3 All E.R. 757, especially the judgment of LORD DENNING, M.R. at pp. 336–339 and 763–765 of the respective reports. The principle of "inequality of bargaining power" referred to in that judgment is now much canvassed, particularly in actions by banks against their customers.
5 *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] K.B. 130; [1956] 1 All E.R. 256n.

rather than *in rem*; thus the right of a beneficiary is essentially a personal right against the trustee rather than a right in the trust property itself. This fact is often obscured because the right is both assignable and enforceable against a transferee of the legal estate; however, the fact that it is not enforceable against a *bona fide* purchaser for value of the legal estate without notice of the trust demonstrates the personal nature of an equitable interest. An interesting illustration of the maxim that equity acts *in personam* is that specific performance may be ordered of an agreement relating to land abroad, notwithstanding that an English court would have no jurisdiction to make an order in relation to the land itself.[1]

2 Content of equity

Although equitable rules were created on the basis of conscience, they soon became uniform and certain in extent. This development was essential because most equitable rights were rights in land capable of devolution and transfer. For this reason the rules of equity affecting land law soon became quite as rigid and certain as the corresponding common law rules.

The rules of equity were nearly all created between the end of Wolsey's term of office in 1529 and the end of Lord Eldon's Chancellorship in 1827.[2] The most important of these rules are considered below. They resulted sometimes in the recognition of new rights wholly unrecognised in the common law courts (the "exclusive" jurisdiction) and sometimes in the granting of new remedies which the common law did not provide (the "concurrent" jurisdiction).

a New rights

The rights of a beneficiary under a use or trust—A use or trust may be defined as a relationship in which one person has property vested in him subject to an obligation to permit another person to have the beneficial enjoyment of the property. The first person is described as a trustee, the second as a beneficiary or *cestui que trust*.

The existence of the use, as it was first known, dates back to the thirteenth century. It had even at this date certain advantages. For example, it enabled the Franciscans to enjoy the use of vast estates even though they were pledged to poverty by their order.[3] It made it possible for crusaders to arrange for their land to be held for them while they were in the Holy Land. Until the passing of the Statute of Wills 1540, freehold land could

1 *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444.

2 Equity after this date became rigidly defined and there have been very few equitable rights or doctrines formulated since then although the existing doctrines are constantly being revised. Notable exceptions are the enforcement of restrictive covenants (*Tulk* v. *Moxhay* (1848), 2 Ph. 774) and the doctrine of quasi-estoppel (*Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] K.B. 130; [1956] 1 All E.R. 256n.). In recent years this doctrine has been developed so as to create, in effect, new rights; see, notably, *E.R. Ives Investments, Ltd.* v. *High*, [1967] 2 Q.B. 379; [1967] 1 All E.R. 504; *Inwards* v. *Baker*, [1965] 2 Q.B. 29; [1965] 1 All E.R. 446; *Crabb* v. *Arun District Council*, [1976] Ch. 179; [1975] 3 All E.R. 865. For the difficulties involved in the recognition of a new equitable interest in land see *National Provincial Bank, Ltd.* v. *Ainsworth*, [1965] A.C. 1175; [1965] 2 All E.R. 472.

3 The papacy declared in 1279 that it was lawful for friars to be beneficiaries under uses.

not be devised by will, so that to achieve the devolution of his land in accordance with his wishes the freeholder created uses in his lifetime. None of these methods of employing the use was particularly objectionable to the Crown. However in the fourteenth and fifteenth centuries it was appreciated that the use could be a device for defrauding creditors and in particular for depriving the feudal overlord of the revenue from the incidents of feudal tenure. This loss of revenue eventually meant a loss to the Crown and it was this factor which prompted Henry VIII, never indifferent to a possible loss of revenue, to "force upon an extremely unwilling Parliament"[1] the Statute of Uses 1535. This statute attempted to abolish uses of land by providing that where a person was seised to the use, confidence or trust of another that other was to be treated as seised. Thus if land were granted "to X to the use of Y" the legal estate would vest immediately in Y and X would take no interest whatsoever. The intended effect of this statute was to abolish the use. It did not however extinguish uses altogether since there were many loopholes in the statute. For example the statute did not extend to uses of copyholds, leaseholds or pure personalty since seisin could never exist in these types of property. In addition the statute was held not to apply to "active uses", that is to say uses which imposed a positive duty on the trustee. Finally the common law judges held in 1558[2] that where there was a use upon a use (i.e. "to A to the use of B to the use of C") the Statute of Uses did not execute the second use but only the first (i.e. B, not C, took the legal estate). This was of small significance at common law since the common law judges would not recognise that the second *cestui que use* (C) had any interest. However the Court of Chancery would recognise and enforce the second use because it appeared unconscionable to defeat the donor's intention by giving the first *cestui que use* an unfettered interest. In *Sambach* v. *Dalston*[3] the Chancellor established that the second use was enforceable in equity. Thus the use or trust, as it was becoming known, had become an equitable interest. It may appear illogical that the common law courts would not recognise trusts which were a considerable source of revenue to the Court of Chancery. The reason is that the constricting writ system could not be adapted to encompass the growing law of trusts. Had it been possible to reorganise common law procedure at this stage rather than two centuries later it is probable that equity in the modern sense would never have existed.

Nevertheless trusts were enforceable only in the courts of equity. They were at no time enforceable at common law. It soon became established that the beneficiary could enforce his right not only against the trustee personally but against any transferee of the legal estate (except a bona fide purchaser without notice). Consequently the trust in equity created an interest in property as well as personal rights against the trustee.

The incidents of feudal tenure were abolished in 1660[4] but by this date

1 Maitland, *Equity*, (1916 Edn.) p. 35. For an enlightening account of the Parliamentary progress of the Statute of Uses see Plucknett, *A Concise History of the Common Law*, (5th Edn.) pp. 584–587.

2 *Tyrrel's Case* (1558), Dyer 155.

3 (1634), Toth. 188.

4 12 Car. 2, c. 24.

the trust was being used to serve other purposes. For example the trust could be used to bequeath property for charitable purposes. In the seventeenth and eighteenth centuries the trust was used in the creation of strict settlements of large estates so as to keep family estates from being broken up and sold. Another way in which the trust was employed to meet social conditions was in the creation of marriage settlements by which a father could create a trust in favour of his daughter on marriage thus giving her a beneficial interest which did not pass to the husband on marriage with the rest of her property.

Indeed, to combat the social evil of fortune hunting husbands, wives could be restrained by the terms of the trust from disposing of future income from the trust. This was the "restraint upon anticipation" which was not abolished until 1935 when the legal position of a married woman as regards property was finally equated to that of her husband.[1] In more modern times the trust has proved an invaluable device in the avoidance of the incidence of estate duty and, latterly, capital transfer tax.

The equity of redemption—There is a maxim of equity to the effect that "equity looks to the intent and not to the form". This maxim embodies that aspect of the Chancellor's "conscience" which led equity to intervene in the common law relating to mortgages. In the sixteenth century the classical form of common law mortgage was a conveyance of the land to the mortgagee subject to a covenant to reconvey to the mortgagor on payment of the loan and interest on or before a specified date. This was construed strictly by the common law judges so that the right to a reconveyance was lost after the due date for redemption had passed. This strict view caused injustice and there are records of persons amassing vast fortunes by the simple expedient of advancing money on mortgage and absenting themselves until after the due date for redemption. This practice was the very type of occurrence calculated to prompt the intervention of the Chancellor and so it did. The Court of Chancery recognised a right to redeem after the due date for redemption has passed at law. This right was termed the "equity of redemption" and was an equitable interest in land which the mortgagor could deal with in the same way as a beneficiary under a trust could deal with his beneficial interest. Thus any person who took the legal estate in the land took it subject to the equity of redemption (unless he took it for value without notice). The only way in which the mortgagee could free himself of the fetter of the equity of redemption was to apply to the Court of Chancery to foreclose the mortgage.[2]

The effect of equity recognising these new rights in land was that the Court of Chancery acquired a vast quantity of litigation since by the nineteenth century most estates were the subject of settlements or mortgages.

b *New remedies*

Injunction—An injunction is an order of the court compelling or restraining

[1] Law Reform (Married Women and Tortfeasors) Act 1935.

[2] Mortgage by conveyance of the fee simple was abolished by the Law of Property Act 1925 which substituted mortgage by grant of a term of years and created also the charge by way of legal mortage. Any attempt at mortgage by conveyance now takes effect as a lease for a term of 3,000 years.

the performance of some act. An injunction which orders the defendant to perform some act is termed "mandatory", as opposed to a "prohibitory" injunction which restrains the defendant from committing some wrong, usually a tort.

The injunction is an equitable remedy but it had its counterpart in the common law writ of prohibition. This writ could be directed at inferior courts to prevent them from exceeding their jurisdiction[1] or at the sheriff to prevent the defendant infringing the plaintiff's right. However the injunction went beyond this writ since it could be directed at the defendant personally ("equity acts *in personam*") and failure to comply resulted in the imprisonment of the defendant for contempt of court.

Injunctions could be issued by the Chancellor not only in respect of equitable interests but also as a remedy for the infringement of common law rights. Thus equity contributed to the growth of the law of torts by providing a remedy where damages were inadequate redress, for example to restrain the commission of a nuisance or the publication of a libel. Unfortunately, the Court of Chancery could not, until 1858, award damages so that the plaintiff who sought damages and an injunction would have to bring two separate actions. The Chancery Amendment Act 1858 (Lord Cairns' Act) eventually remedied this by enabling the Court of Chancery to award damages as well as an injunction.

One particular form of injunction was the bone of contention between the common law courts and the Court of Chancery. This was the "common injunction" by which the Chancellor could restrain a litigant from proceeding to enforce his common law right in the common law courts or from enforcing a judgment obtained at common law, where this would violate principles of equity.[2]

Injunctions, like all equitable remedies, are discretionary. Even where the plaintiff can show that he has an equitable right he will not be awarded an injunction unless he has acted with conscience. In addition an injunction will not be granted where damages would be an adequate remedy nor where the interests of the public at large outweigh those of the individual. Thus in a recent case,[3] the Court of Appeal, by majority, refused to grant an injunction against a cricket club to restrain the playing of cricket on a village ground, where it had been played since 1905, although the plaintiff, an adjoining householder whose property had been damaged in the past and was likely to be damaged in the future by cricket balls, had established that the playing of cricket there constituted a private nuisance and recovered substantial damages. However this discretion can only limit rather than extend the scope of injunctions. Thus there is no discretion to grant an injunction to restrain an act which does not constitute an infringement of any right legal or equitable.[4] To this rule there is a minor exception in

[1] This is the scope of the present day order of prohibition.

[2] The common injunction was abolished by the Judicature Act 1873 but there is still power to restrain litigants from proceeding in inferior or foreign courts: see *Ellerman Lines, Ltd.* v. *Read*, [1928] 2 K.B. 144.

[3] *Miller* v. *Jackson*, [1977] Q.B. 966; [1977] 3 All E.R. 338.

[4] *Day* v. *Brownrigg* (1878), 10 Ch.D. 294; *Paton* v. *Trustees of British Pregnancy Advisory Service*, [1979] Q.B. 276; [1978] 2 All E.R. 987 (husband refused injunction to restrain

that the court can grant an injunction to restrain an act which would constitute an abuse of its own process for example by impeding the conduct of a pending action. Nevertheless the scope of injunctions is wider than the scope of common law remedies in that, while the latter could only be granted after the wrongful act had been performed, an injunction can issue to restrain an apprehended wrong, such an injunction being termed a *quia timet* injunction.[1] In addition, interlocutory injunctions are an invaluable means of preserving the *status quo* pending the trial of an action.[2]

Specific performance—A decree of specific performance is an order of the court compelling a person to perform an obligation existing under either a contract or a trust. The remedy is particularly appropriate to actions in contract. It shares the characteristics of injunction and other equitable remedies in that its grant is discretionary and it will not be awarded either where the plaintiff has not behaved equitably (for example has given inadequate consideration) or where damages would be an adequate remedy. For this reason specific performance is only available to redress breaches of certain contracts, for example where the subject matter of a contract of sale is a chattel of a rare or personal nature[3] or, more usually, land.[4]

The Chancery Amendment Act 1858 enabled the Court of Chancery to award damages in lieu of, or in addition to, specific performance.[5]

Rectification—The common law has always attached a peculiar sanctity to obligations under seal. It would enforce an obligation merely because it was under seal even though there was no consideration. Equity would not.

wife from having an abortion, he having no legal right to control the destiny of the foetus conceived by him).

1 The effect of Lord Cairns' Act in this respect is that a plaintiff may be awarded damages for proprietary loss even though no common law or proprietary right has been infringed: *Leeds Industrial Co-operative Society, Ltd.* v. *Slack*, [1924] A.C. 851. In *Seager* v. *Copydex, Ltd.*, [1967] 2 All E.R. 415; [1967] 1 W.L.R. 923 the plaintiff, an inventor, was awarded damages against a company that made use of confidential information supplied to them by the plaintiff, on the basis of the equitable doctrine of breach of confidence. Virtually the only distinction between the plaintiff's cause of action and an action in tort seems to be that the damages were not recoverable as a matter of right, but only as a matter of discretion.

2 See p. 309, *post*. In recent years the courts have developed two new forms of interlocutory injunction which have achieved considerable practical importance; the first is the *Mareva* injunction by which a plaintiff may restrain an alleged debtor from disposing of or removing from the jurisdiction his assets (*Mareva Compania Naviera S.A. of Panama* v. *International Bulkcarriers S.A.*, [1980] 1 All E.R. 213; see p. 310, *post*); the second is the *Anton Piller* order which permits a plaintiff to enter a defendant's premises to inspect, remove or make copies of documents belonging to the plaintiff, usually in breach of copyright cases (*Anton Piller K.G.* v. *Manufacturing Processes, Ltd.*, [1976] Ch. 55; [1976] 1 All E.R. 779; see p. 277, *post*).

3 *Pusey* v. *Pusey* (1684), 1 Vern. 273.

4 Specific performance may be ordered of an obligation to pay money where the payee is not the plaintiff so that damages would not be an adequate remedy: *Beswick* v. *Beswick*, [1968] A.C. 58; [1967] 2 All E.R. 1197.

5 These are assessed in the same manner as damages at common law. Furthermore the effect of an order for specific performance of a contract is simply to continue the contract under the court's control so that, if the order is not complied with, the party in whose favour it was made may then ask the court to discharge the order and terminate the contract, whereupon he may be awarded damages at common law for breach of contract: *Johnson* v. *Agnew*, [1979] 1 All E.R. 883; [1979] 2 W.L.R. 487.

Unfortunately the common law provided very few defences to an action on the defendant's seal. It was no defence at common law that the instrument did not accurately reflect the true intention of the parties. However equity did provide a defence. Where the instrument did not reflect the true intention of the parties, through a mistake in transcribing, the Court of Chancery claimed jurisdiction to rectify the document. Rectification lay only for mistake and did not allow contracts to be rectified but only documents. Nevertheless rectification was (and, in general, still is) only possible where the mistake was mutual. Rectification was apparently first used in respect of marriage settlements but was later extended to voluntary settlements and to written contracts.

Rescission—This remedy, like rectification, grew out of the inability of the common law to prevent a party from suing on a contract or covenant where it was obviously unjust for him to do so because of some collateral matter. In certain circumstances the Court of Chancery would rescind a contract where it was possible to restore the *status quo* between the parties. There were several grounds for applying for rescission, the most important being fraud and innocent misrepresentation.

Fraud in equity is a much wider concept than common law fraud. Fraud only gave rise to an action at common law in the action for deceit, in which case the fraud had to be a false representation of existing fact.[1] The equitable doctrine of fraud certainly encompassed this and went much further. It extended to virtually all circumstances which the layman would describe as instances of fraudulent conduct, such as taking unfair advantage of the weakness or ignorance of another, abusing a fiduciary relationship or disposing of property to defraud creditors.[2] In all such cases the offended party might do nothing and resist a suit for specific performance. However if he had already parted with property this would be inadequate. In such a case he could apply to the court to rescind the contract.

A second ground for ordering rescission was innocent misrepresentation. Innocent misrepresentation at common law was confined to terms of the contract and gave rise only to an action for damages. Misrepresentation in equity extended to representations which did not form part of the contract. Such a representation gave no right to damages but did give a right in equity to rescind, thus filling a gap in the common law.[3]

The remaining equitable remedies are account,[4] appointment of a receiver,[5] delivery up and cancellation of documents[6] and discovery.[7]

1 *Derry* v. *Peek* (1889), 14 App. Cas. 337.

2 For a classification of the various aspects of equitable fraud, see *Snell's Principles of Equity* (27th Edn.), pp. 543–560 and for a recent illustration of the extension of the doctrine and its adaptation to new circumstances, see *Lloyds Bank, Ltd.* v. *Bundy*, [1975] Q.B. 326; [1974] 3 All E.R. 757.

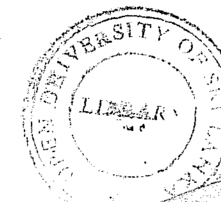
3 See now the Misrepresentation Act 1967.

4 See p. 304, *post* for details of the procedure for obtaining this remedy.

5 See p. 370, *post* for the use of this remedy as a method of enforcing judgments.

6 See *Snell's Principles of Equity* (27th Edn.), p. 608.

7 Cf. *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners*, [1974] A.C. 133; [1973] 2 All E.R. 943; for a discussion of this case, see p. 335, *post*.



D RELATIONSHIP BETWEEN COMMON LAW AND EQUITY

1 Prior to 1875

By the very nature of the jurisdiction it exercised the Court of Chancery was bound to come into conflict with the courts of the common law. Equity both supplemented the common law and corrected its deficiencies. Where equity supplemented the common law, as by the recognition of uses and the grant of equitable remedies for the infringement of legal rights, it was not particularly repugnant to common lawyers because it did not countermand their authority. However this was not the case where equity corrected the common law. In these instances there was a direct conflict between the common law courts and the Chancellor. Thus the Chancellor would rescind a contract or rectify a deed where the common law courts would enforce it in accordance with its original terms. Equity would allow a mortgagor to redeem where the common law would recognise no fetter on the mortgagee's legal estate. In such a case equity would have to prevail or be of no effect. Consequently, in order to assert its prevalence, the Court of Chancery began to issue common injunctions which, although directed at the litigant personally rather than at the common law courts, had the effect of limiting common law jurisdiction. This practice became particularly prevalent during Wolsey's term of office, so much so that the practice was incorporated in the articles of his impeachment. To smooth over the conflict a common lawyer, Sir Thomas More, was appointed as Chancellor. This had no lasting effect and by the end of the sixteenth century the common injunction was once again a well established weapon in the Chancellor's armoury. In 1598 the common lawyers denounced the Court of Requests as an illegal court as a protest against the use of prerogative powers. The conflict with the Chancery itself came soon afterwards with the appointment of Coke as Chief Justice of the Common Pleas in 1606. Coke, a bitter opponent of prerogative power, attacked vigorously the jurisdiction of all the courts exercising this jurisdiction. In 1613 he was transferred to the King's Bench in which court he held in a case in 1615[1] that where a common law court had decided a case the Court of Chancery had no power to intervene between the parties, and that any parties who appealed from a common law decision to the Chancellor would be imprisoned under the Statute of Praemunire. Lord Ellesmere, the Lord Chancellor, brought the dispute to a head in the same year by declaring, in the *Earl of Oxford's Case*,[2] the power of the Chancery to set aside common law judgments "not for any error or defect in the judgment, but for the hard conscience of the party". The dispute was referred to the King, James I. James I, after consulting his Attorney-General, Sir Francis Bacon (Coke's bitterest opponent and destined to be Ellesmere's successor as Chancellor), decided in favour of the Court of Chancery and upheld the validity of the common injunction. Thus the supremacy of equity was established though in the next eighty years this supremacy was by no means unchallenged. As late as 1690 a bill was introduced into Parliament to give the common law courts power to issue writs of prohibition to prohibit the Chancery from encroaching upon their jurisdiction. The bill never became law and the efforts of the common lawyers to evade the consequences of the *Earl of Oxford's Case* thereafter petered out. Nonetheless, by this time most of the rules and principles of equity had become as firmly established as those of the common law and equity had virtually ceased to evolve as a corrective to the common law. The evolution of the doctrine of binding precedent must be blamed for this, though the conservatism of the judges doubtless played a part. LORD ELDON's attitude is epitomised in the following famous extract from one of his judgments:[1]

> "The doctrines of this court ought to be as well settled, and made as uniform almost, as those of the Common Law.... Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot."

By the time of the Judicature Acts even as imaginative a lawyer as SIR GEORGE JESSEL, M.R. could observe:[2]

> "This Court is not, as I have often said, a Court of Conscience, but a Court of Law."

2 Equity after the Judicature Acts 1873–1875

The major reforms effected by these Acts are considered in detail below.[3] The Acts abolished the conflict between the common law courts and the Court of Chancery by abolishing these courts themselves and transferring their jurisdiction to the new Supreme Court of Judicature. Consequently the common injunction was abolished and an injunction cannot now issue out of one Division of the High Court to restrain proceedings in any other Division.

However the Judicature Acts fused only the administration of common law and equity. They did not fuse the substantive rules. Thus an award of damages is still a legal remedy and available as of right for infringement of a legal right whereas equitable remedies are still discretionary. There is no longer any duality of jurisdiction since the Supreme Court must give effect to both legal and equitable rights and remedies. Where there is conflict between the rules of common law and equity with reference to the same matter, the rules of equity prevail.[4] The effect of this provision is that certain rules of common law have been extinguished. With respect to interests in land most possible sources of conflict were removed by the property legislation of 1925.

Footnotes (p. 54):

1 *Courtney* v. *Glanvil* (1615), Cro. Jac. 343.
2 (1615), 1 Rep. Ch. 1.

P 532

Footnotes (p. 55):

1 *Gee* v. *Pritchard* (1818), 2 Swan. 402, at p. 414.
2 *Re National Funds Assurance Co.* (1878), 10 Ch.D. 118, at p. 128.
3 See p. 78, *post*.
4 Judicature Act 1873, s. 25; see p. 82, *post*.