

UNIT 02

CUSTOMS, COMMON LAW AND EQUITY

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INTRODUCTION

In this chapter you will learn about:

- Different types of customs
- Introduction to common law
- Defects of common law
- Reasons for the growth of equity
- Contributions of equity
- Doctrine of promissory estoppel

2.1 CUSTOMS

1. Customs are rules of behaviour that develop in a community without being deliberately invented. They can broadly be divided into general customs and local customs.
2. General customs are effectively the basis of the common law. It is thought that after the Norman Conquest, judges who travelled around the land making decisions in the King's name based at least some of their decisions on the common customs. General customs are no longer an important source of law as most general customs have long since been absorbed into legislation or case law.
3. Local customs only operate in a particular area. For example, when a person claims that he is entitled to some local right, such as a right of way. For the court to recognise any local custom the following had to be satisfied:
 - the custom must have existed since 'time immemorial'
 - the custom must have been exercised peaceably, openly and as of right
 - the custom must be definite as to locality, nature and scope
 - the custom must be reasonable

Time in the past that was so long ago that people have no memory / know nothing of it.
4. Ultimately, customs will only be part of the law if it is recognised by the courts and enforceable at law.

2.2 COMMON LAW

1. The legal system in England and Wales could not rely merely on customs.
2. After the **Norman Conquest in 1066**, a more organised system of courts emerged. The idea was to standardise the law. **William the Conqueror** set up the Curia Regis (the King's Courts) and appointed his own judges.
3. Other than the central court, judges were sent to major towns to decide any important cases. Later **Henry II (1154-89)** divided the country up into 'circuits' or areas for the judges to visit.

4. Over time judges selected the best customs which were to be used by judges throughout the country. The result was law which applied to the whole country which became known as the common law, since it was common to the whole country.
5. By 1250, a common law had developed from the cases heard in the King's Courts (Curia Regis) which applied to the whole country.
6. However the common law gradually changed from a dynamic and adaptable system to one that was excessively formalised, inflexible and inadequate.
7. Among the defects of the common law were that:
 - The common law was inflexible as actions had to be begun by writ but there were only a limited range of writs. Hence, only certain cases were recognised.
 - The only remedy at common law was damages (monetary compensation) which were often inadequate.
 - Under the common law, legitimate grievances were often lost owing to procedural defects and technicalities.
 - The common law was rigid as a result of binding precedent. The tools now available to avoid the effects of precedent such as distinguishing and overruling were not available then.
 - The common law was expensive.
8. The term 'common law' also has different meanings depending on the context in which it is used:
 - The law developed by the early judges to form a common law in the country as opposed to local laws used prior to the Norman conquest.
 - Law developed by judges through the doctrine of precedent as opposed to laws made by the legislative body such as Acts of Parliament or delegated legislation.
 - The law operated in the common law courts as opposed to the Court of Chancery before the reorganisation of the courts in 1873-75.

Reasonable grounds to be found in case

2.3 EQUITY

Equity refers to the specific set of legal principles which came into existence to complement and fill gaps in the common law.

2.3.1 The Growth of Equity

1. Before the **Norman Conquest in 1066**, different areas of England were governed by different systems of law. When **William the Conqueror** gained the English throne in 1066, he established a strong central government and began to standardise the law. By about 1250 a 'common law' had developed that ruled the whole country. The common law gradually changed from a dynamic and adaptable system to one that was expensive, inflexible and inadequate.
2. Among the defects of the common law were that:
 - The common law was **inflexible** as actions had to be begun by writ but there were only a **limited range of writs**.
 - The **only remedy** at common law was **damages** (monetary compensation) which were often inadequate.
 - Under the common law, cases were often lost owing to **procedural defects and technicalities**.

- The common law was **rigid** as a result of **binding precedent**. The tools now available to avoid the effects of precedent such as distinguishing and overruling were not available then.
 - The common law was **expensive**.
3. Dissatisfied parties petitioned the King, who later passed these petitions to the Lord Chancellor who as the number of petitions rose, established the Court of Chancery.
 4. Among the reasons for the growth of equity were that:
 - Equity ensured justice as the court could grant **remedies other than damages**. Discretionary remedies granted include specific performance, injunctions, rectification and rescission.
 - Decisions were based on **good sense and fairness**.
 - Equity **adapted and expanded to meet new needs**.
 - The Court of Chancery was **less formal and cheaper** than the common law court.
 5. Equity was **initially unpredictable** as the court was not bound by precedent. The quality of decisions also varied from Chancellor to Chancellor as fairness was a subjective quality. However, by the 19th century equity too became ruled by precedent and standard principles.
 6. Equity also created **maxims** (designed to ensure that decisions were morally fair) which had to be satisfied before equitable rules could be applied. Some examples of these maxims include:

He who comes to equity must come with clean hands

D&C Builders v Rees – Lord Denning. A small building firm did some work on the house of a couple named Rees. The bill came to £732, of which the Rees had already paid £250. When the builders asked for the balance of £482, the Rees announced that the work was defective, and they were only prepared to pay £300. As the builders were in serious financial difficulties (as the Rees knew), they reluctantly accepted the £300 'in completion of the account'. The decision to accept the money would not normally be binding in contract law, and afterwards the builders sued the Rees for the outstanding amount. The Rees claimed that the court should apply the doctrine of equitable estoppel, which can make promises binding when they would normally not be. However, Lord Denning refused to apply the doctrine, on the grounds that the Rees had taken unfair advantage of the builders' financial difficulties, and therefore had not come 'with clean hands'.

Equity will not suffer a wrong without a remedy

This maxim indicates that equity will not allow the technical defects of the common law to prevent worthy plaintiffs from obtaining redress. It could be seen, therefore, as the opposite of the maxim that equity follows the law. There are numerous examples of the development of equitable doctrines and remedies intended to override the unjust result arising from the enforcement of legal rights. Perhaps the most obvious is the trust itself: the enforcement of the rights of the legal owner as against the person for whose benefit he had agreed to hold the property would clearly lead to injustice and so equity recognised the rights of that beneficial owner. Other examples include the use of specific performance to enforce contracts not enforceable at law and the use of injunctions to restrain threatened wrongs or to protect the plaintiff's interests pending trial.

An equitable
Principle or
remedy will be
granted to a
claimant who
has acted fairly.

This allows
equity to create
new remedies
where otherwise
the plaintiff (claimant)
would not be able to
enforce a remedy
such as freezing
orders and
search orders.

- **Equity follows the law**

This is an attempt to indicate the relationship between common law and equity, which is a complex one. The traditional role of equity, as stated in 'Doctor and Student' 1523 by Christopher St German was 'to temper and mitigate the rigour of the law', which implies that equity would intervene and overrule the common law if justice required it. It was stressed, even at that time; however, that it did not attempt to overrule common law judgments, but rather to act in personam on the parties to prevent injustice (as explained below, it is also a maxim of equity that it acts in personam). This maxim indicates that, where possible, equity will ensure that its own rules are in line with the common law ones. Examples of equity overcoming the effect of the common law are frequent enough, but it should be noted that in most cases the principle is that equity supplements but does not contradict the common law. Thus, in the case of the trust, the interests of the beneficiary are recognised, but so too, of course, is the status of the trustee as legal owner. The trust exists, as it were, behind the legal ownership.

- **Where there is equal equity, the law shall prevail**

These two maxims are concerned with priorities that are to say which of various interests prevails in the event of a conflict. The general rule, as one might expect, is that interests take effect in order of their creation, but, as regards equitable interests, these may be defeated if a bona fide purchaser acquires a subsequent legal estate without notice of the equitable one. This in turn raises the issue of notice, and to that extent the maxims have been affected by legislation on the question of what constitutes notice. For the purchaser of the legal estate to gain priority, however, it will be necessary for him to show that he is bona fide. If there is fraud then the equities (of the legal owner and the equitable one) will not be equal and the equitable one will prevail

- **Where the equities are equal, the first in time shall prevail**

This maxim operates where there are two or more competing equitable interests; when two equities are equal the original interest will succeed.

- **He who seeks equity must do equity**

Though the previous maxim indicates equity's willingness to intervene where the common law will not, it should not be thought that equity will automatically intervene whenever a certain situation arises. In general, one can say that wherever certain facts are found and a common law right or interest has been established, common law remedies will be available whether that produces a fair result or not. By contrast, equitable remedies are discretionary and the court will not grant them if it feels that the plaintiff is unworthy, notwithstanding that prima facie he has established an equitable right or interest. The maxim that he who seeks equity must do equity, together with the next two maxims, concerning 'clean hands' and delay, are aspects of this discretionary quality. It should not be supposed that the discretion is entirely unfettered.

- **He who comes into equity must come with clean hands**

The rather picturesque language of this maxim means that a party seeking an equitable remedy must not himself be guilty of unconscionable conduct. The court may therefore consider the past conduct of the claimant. Most cases concern illegal or fraudulent behaviour on the part of the claimant and it is not clear to what extent the maxim is applicable outside such behaviour.

- **Delay defeats equities**

Delay may be evidence of acquiescence, so the two issues cannot be separated. A failure to bring an action may tend to confirm other slight

evidence that the innocent party has accepted or agreed to the breach of contract or other ground for seeking relief, thus preventing him from enforcing his right to remedies for that breach.

- **Equality is equity**

In the absence of any evidence to the contrary, equity will tend towards the adoption of equal division of any fund to which several persons are entitled.

- **Equity looks to the intent rather than the form**

Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it inequitable to allow a person to insist on such form, and thereby defeat the substance.

- **Equity looks on that as done which ought to be done**

This relates most obviously to specific performance. If vendor and purchaser have entered into a specifically enforceable contract (for example, for the sale of land), in equity, the purchaser acquires a beneficial interest and the vendor holds the land on constructive trust for the purchaser. However, it should be noted that the duty of the constructive trustee is simply to convey the land to the purchaser in accordance with the terms of the contract. The trustee does not take on all the other duties normal to trusteeship, nor, for example, is the purchaser entitled to rents from the property until sale.

- **Equity imputes an intention to fulfil an obligation**

Generally speaking, near performance of a general obligation will be treated as sufficient unless the law requires perfect performance, such as in the exercise of an option. Text writers give an example of a debtor leaving a legacy to his creditor equal or greater to his obligation. Equity regards such a gift as performance of the obligation so the creditor cannot claim both the legacy and payment of the debt.

- **Equity acts in personam**

It is in the nature of equitable remedies that they generally operate against the person of the defendant, being enforceable by imprisonment for contempt. It is in this way that, as discussed above, equity could claim not to be interfering with the common law. The judgment at law in effect was binding on the whole world and equity intervened only against the individual defendant, who was prevented from enforcing his legal rights. Another feature of this principle is that equitable rights were not enforceable against everybody but could be defeated by the interest of the bona fide purchaser. The in personam nature of the operation of equity also has specific relevance in relation to property and interests abroad. As a general rule, English courts will not entertain actions concerning title to foreign land.

- **Equity will not assist a volunteer**

Where a person voluntarily submits to a request or performs an act for another without any form of consideration in return he is regarded as a volunteer. A volunteer has no rights against the person he assists.

7. The conflict between common law and equity reached a climax in the *Earl of Oxford's case* where the defendant forcefully ejected the plaintiff from a land he (i.e. the plaintiff) had built and in an action for wrongful ejection, the court found in favour of the defendant. The plaintiff brought the action in the court of Chancery and it granted an injunction restraining the defendant from ejecting the plaintiff from the house he had built upon. According to

Lord Ellesmere, he that builds a house must live in it and argued that equity and good conscience found in favour of the plaintiff. This did not enjoy the pleasure of Coke, the then Chief Justice of the King's Bench, who protested that the Chancellor should stop frustrating the rules of common law.

8. The dispute finally came to a head under **James I**, when Coke was Chief Justice and Ellesmere Lord Chancellor. It was implicit in the ruling that if in any situation, there was a direct clash between the two systems; the rules of equity would prevail.
9. This was subsequently incorporated into the **Judicatures Act of 1873-75** which fused the administration of the common law courts and the Court of Chancery and created a unified system of courts and procedures. There were no longer different courts and procedures for those seeking equitable and common law remedies.
10. Although one of the divisions of the High Court is still called the Chancery Division, all courts now deal with both common law and equitable principles and remedies. The Chancery Division of the High Court deals with company law, conveyancing, property, wills and probate, all of which are heavily influenced by equity. Equity has added new principles to the body of common law and remedies for those who have suffered an injustice.

2.3.2

Contributions of Equity

New rights

A right beneficiary under the law of trusts

1. While the common law only recognises legal ownership, the **law of trust** recognises dual ownership. The legal and equitable ownership in the same property may vest in different people in different ways at the same time. Hence equity recognised the **rights of the beneficiary** under the law of trusts. Trusts are used in setting up pension funds and settling property on younger members of the family.
2. The common law only recognised the legal owner of property. Equity recognised the rights of the mortgagor to redeem his property. The equity of redemption allows the mortgagor to redeem his property from the mortgagee upon payment of the principal and interest outstanding. The majority of homeowners buy their property with the aid of a mortgage thus highlighting the importance of a mortgage.

New remedies

1. An injunction is an order of the court compelling the defendant to do or not to do something. A mandatory injunction is an order of the court compelling the defendant to do something whereas a prohibitory order is an order of the court prohibiting or preventing the defendant from doing something. Injunctions are often ordered in cases of domestic violence as a protection for the abused partner. Injunctions are also used to prevent nuisances or even in cases of domestic violence as a protection to the abused partner.
2. **Specific performance** refers to an order of the court compelling a party to perform his part of an agreement that he had promised to fulfil.
3. **Rectification** is an order which alters the words of a document, which does not express the true intention of the parties to it.
4. **Rescission** refers to an order that restores the parties to a contract to the position that they were in before the contract was entered into.
In the '1970s, two important new remedies were created extending the scope of injunctions.
5. A **mareva injunction (freezing order)** is a court order to a third party to freeze the assets of a party to a dispute where there is a danger that they may be removed from the court's jurisdiction.

6. An *anton pillar order* (search order) provides that the court can order defendants to allow their premises to be searched and for relevant documents to be removed.

2.4 THE DOCTRINE OF PROMISSORY ESTOPPEL

The doctrine of promissory estoppel which originated from Lord Denning's obiter statements in *Central London Property Trust v High Trees House* is another contribution of equity. In 1937, High Trees House Ltd leased a block of flats in Balham, London, for a rate £2,500/year from Central London Property Trust Ltd. Due to the conditions during the beginning of World War II occupancy rates were drastically lower than normal. In January 1940, to ease the situation the parties made an agreement in writing to reduce rent by half. However, neither party stipulated the period for which this reduced rental was to apply. Over the next five years, High Trees paid the reduced rate while the flats began to fill, and by 1945, the flats were back at full occupancy. Central London sued for payment of the full rental costs from June 1945 onwards (i.e. for last two quarters of 1945). Based on previous judgments such as *Hughes v Metropolitan Railway Co*, Denning J held that the full rent was payable from the time that the flats became fully occupied in mid-1945. However, he continued in an obiter statement that if Central London had tried to claim for the full rent from 1940 onwards, they would not have been able to. This was reasoned on the basis that if a party leads another party to believe that he will not enforce his strict legal rights, then the Courts will prevent him from doing so at a later stage. This obiter remark was not actually a binding precedent, yet it essentially created the doctrine of promissory estoppel. While the doctrine of promissory estoppel is no doubt a powerful shield to prevent hardship that may be caused by common law (*Pinnel's Case*), most debtor-creditor relationships are now governed by statute and banking law.

2.5 CONCLUSION

Equity refers to a specific set of legal principles which came into existence to fill gaps in and supplement the common law by providing just and practical remedies where the common law was not adequate. Equity is not and was never intended to be a complete system of law. The equitable rights, interests and remedies discussed above remain relevant and important today. The discretionary nature of the remedies and the equitable maxims ensure that the remedies are granted where they are felt to be genuinely and justly deserved.

LEARNING OUTCOME

By now you should know:

- ✓ Laws were initially customs i.e. general customs and local customs
- ✓ The history leading to the introduction to common law
- ✓ The benefits of the standardization of law
- ✓ The defects of the common law
- ✓ The definition of equity
- ✓ The reasons for the growth of equity
- ✓ The equitable rights and remedies
- ✓ The application of the doctrine of promissory estoppel
- ✓ Whether equity is still relevant

SELF-ASSESSMENT

1. What are the benefits of the standardization of the law?
2. What is defined as general customs?
3. List the equitable remedies.
4. State the new equitable rights recognized by the law.
5. When equity and common law conflict does equity prevail?
6. What are the various definitions of common law?
7. Which case states he who comes to equity must come with clean hands?
8. What are the reasons for the growth of equity?
9. What were the defects of equity?
10. Name the classic case on the doctrine of promissory estoppel.

FURTHER READING

Jacqueline Martin, *The English Legal System*, 6th Edition, pgs. 15-21

APPENDIX A – RELEVANCE OF EQUITY TODAY

REMEDIES

Injunction

Parbulk II AS v PT Humpuss Intermoda Transportasi TBK and others [2011] EWHC 3143 (Comm)

In circumstances where a cause of action defendant, against whom it was appropriate to make a freezing order at the suit of a claimant, had a debt, or other receivable owing to it by a third party, or a claim or potential claim against a third party, the English court had jurisdiction to grant a freezing order against the third party, in appropriate circumstances, to restrain the third party from dissipating its assets up to the amount of its debt to, or the claim by, the judgment debtor. Whether the court would grant a freezing order with respect to a third party would be a matter for the exercise of its discretion.

If, for example, the circumstances showed collusion, or impropriety, or some participation on the part of the third party, in attempts by the defendant to render itself judgment proof, then it might be appropriate for a freezing order to be granted against the third party itself.

Lakatamia Shipping Co Ltd v Su [2014] EWCA Civ 636

The Court of Appeal has clarified the definition of "assets" for the purpose of the standard form freezing injunction, confirming that assets belonging beneficially to a wholly owned company are not directly caught by an injunction against that company's sole shareholder.

Rescission

Howard-Jones v Tate [2011] EWCA Civ 1330

The case concerned a contract for the purchase of an outbuilding on the defendant's farm, which the claimant intended to use for his business. Since the property did not have its own independent utility supplies, it was agreed (as a condition of the contract) that the defendant would arrange for utility supplies to be provided no later than six months from the date of completion of the contract. The defendant failed to provide the utility supplies, so the claimant served notice indicating that he intended to rescind the contract if the utility supplies were not provided by a certain date. When they were

still not provided, he issued proceedings seeking (i) an order for rescission of the contract and (ii) damages.

At first instance, the court held that although the breach went to the heart of the contract, the claimant was not entitled to rescind. Instead, the court awarded damages equivalent to a return of the purchase price plus all the incidental costs which the claimant had incurred as a result of entering into the contract (such as stamp duty, professional fees, plus his expenses during the period that he had owned the property, such as mortgage interest and business rates).