CHAPTER I

HISTORICAL OUTLINES OF EQUITY

INTRODUCTION

Equity, unlike the common law, was never intended to be an independent system of law. It presupposed the existence of the common law, which it supplemented and modified. The history of equity is intimately connected with the common law writ system, the rigidity of the common law, the Lord Chancellor and the Court of Chancery. Petitions to the King in Council to do justice were made as a consequence of the inflexibility of the common law system of justice. Originally, an action in the King’s Courts commenced only with a writ, but this was only available in a limited number of cases. In addition, changing social conditions gave rise to novel disputes, including the ‘use’ (the forerunner to the trust). The effect was that aggrieved parties petitioned the King in Council to do justice. These petitions were transferred to the Lord Chancellor who, after a period of reflection, made his decision. Ultimately, the Court of Chancery was set up to deal with such cases. The rulings by the Court of Chancery formed a body of law called equity.

Before the Judicature Acts 1873 and 1875, there were in effect two systems of law: rules of law applied in the common law courts; and rules of equity created in the Chancery Court. One of the policies of the Judicature Acts was to fuse the administration of law and equity. Thus, today, rules of equity are recognised and may be applied in any court of law.

CONTRIBUTIONS OF EQUITY

The contributions of equity in the development of the law may be classified into three categories:

(a) Exclusive jurisdiction (new rights). This category refers to the rights that the Court of Chancery had created and which the common law courts had failed to enforce, for example trusts, mortgages, partnerships, administration of estates, bankruptcy, company law, etc.

(b) Concurrent jurisdiction (new remedies). Equity developed a wide range of remedies for the enforcement of rights both at law and in equity. They are all discretionary. Examples are:

(i) specific performance – an order to force the defendant to fulfil his bargain;
(ii) injunctions – an order to restrain a party from committing a wrong;
(iii) rectification – an order requiring the defendant to modify a document to reflect the agreement made with the claimant;
(iv) account – an order requiring a party who has control of money belonging to the claimant to report on the way in which the funds have been spent.

(c) Auxiliary jurisdiction (new procedures). Procedural rules created by the Court of Chancery were discovery of documents, testimony on oath, subpoena of witnesses and interrogatories (now ‘disclosure’; witness summons; requests for further information).

Court of Appeal in Chancery

The eighteenth and nineteenth centuries witnessed great strides forward in the development of equity. However, the personnel of the Court of Chancery proved to be corrupt. Frequently, such personnel were bribed in order to issue the common injunction. In addition, the court became overloaded with petitions, which resulted in delays. Until 1813, there were only two judges in the Court of Chancery, namely, the Lord Chancellor and the Master of the Rolls. They were unhurried in arriving at their decisions.
In 1813, a Vice-Chancellor was appointed. In 1841, two more Vice-Chancellors were appointed. In 1851, two Lord Justices of Appeal in Chancery were appointed. By the early nineteenth century, the Lord Chancellor had ceased to hear petitions at first instance. In 1851, the Court of Appeal in Chancery was created to hear appeals from decisions of Vice-Chancellors and the Master of the Rolls. This court consisted of the Lord Chancellor and two Lord Justices of Appeal. There was a further appeal to the House of Lords.

**Question**

How would you classify the major contributions of equity in the development of the law?

**Nineteenth century reforms**

Before Parliament intervened, the Court of Chancery was capable of granting only equitable remedies. Likewise, common law courts could have granted only the legal remedy of damages. This inconvenience was overcome by two statutory provisions:

(a) the Common Law Procedure Act 1854. This Act permitted the common law courts to grant equitable remedies;

(b) the Chancery Procedure Amendment Act 1858 (Lord Cairns' Act). This Act gave the Court of Chancery power to award damages in addition to or in substitution for an injunction or specific performance.

However, what was needed was a more radical change, which fused the administration of law and equity. It was an unnecessary waste of time and resources to require claimants entitled to common law and equitable rights or remedies to go to the respective court to redress their wrongs.

This change was effected by the Judicature Acts 1873 and 1875, which adopted the following policies:

(a) the abolition of the separate courts of Queen's Bench, Exchequer, Common Pleas, Chancery, Probate, the Divorce Court and the Court of Admiralty. Instead, the Supreme Court of the Judicature was created. The High Court was divided into divisions known as the Queen's Bench, Chancery, and Probate, Divorce and Admiralty (the last was renamed the Family Division, the admiralty jurisdiction being transferred to the Queen's Bench Division and the probate business transferred to the Chancery Division under the Administration of Justice Act 1970);

(b) each division of the High Court exercises both legal and equitable jurisdiction. Thus, any point of law or equity may be raised in and determined by any division;

(c) it was foreseen that a court which applied rules of common law and equity would face a conflict where the common law rules produce one result and equity rules another; for example, s 4 of the Statute of Frauds 1677 (now repealed) enacted that contracts for the sale or other disposition of land must be evidenced in writing. The strict common law rule was rigidly adhered to whether this produced unjust results or not. Equity adopted a notion of part performance which entitled the court to intervene in order to prevent fraud even though all the terms of the contract were not in writing.

**Juzidacture Act 1873, s 25(11)**

Generally, in all matters not hereinbefore mentioned in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.

The effect of the Acts is therefore procedural in the sense that the administration of law and equity, as distinct from the rules of law and equity, has been fused.
**MCC Proceeds Inc v Lehman Bros International [1998] 4 All ER 675, CA**

Mummery LJ: The position is that an equitable owner had no title at common law to sue in conversion, unless he could also show that he had actual possession or an immediate right to possession of the goods claimed; this substantive rule of law was not altered by the Supreme Court of Judicature Acts, which were intended to achieve procedural improvements in the administration of law and equity in all courts, not to transform equitable interests into legal titles or to sweep away altogether the rules of the common law.

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**Maxims of equity**

The intervention of the court of equity over the centuries may be reduced into a number of maxims. The importance of the maxims ought not to be overstated. They are far from being rigid principles, but exist as terse sentences which only illustrate the policy underlying specific principles.

*Equity will not suffer a wrong to be without a remedy*

This maxim illustrates the intervention of the Court of Chancery to provide a remedy if none was obtainable at common law. At the same time it must not be supposed that every infringement of a right was capable of being remedied. The 'wrongs' which equity was prepared to invent new remedies to redress were those subject to judicial enforcement in the first place.

*Equity follows the law*

The view originally taken by the court of equity was that deliberate and carefully considered rules of common law would be followed. Equity intervened only when some important factor became ignored by the law.

*Where there is equal equity, the law prevails*

Equity did not intervene when, according to equitable principles, no injustice resulted in adopting the solution imposed by law.

Thus, the bona fide purchaser of the legal estate for value without notice is capable of acquiring an equitable interest both at law and in equity.

*Where the equities are equal, the first in time prevails*

Where two persons have conflicting interests in the same property, the rule is that the first in time has priority at law and in equity: *qui prior est tempore potior est jure*.

*He who seeks equity must do equity*

A party who claims equitable relief is required to act fairly towards his opponent, for example, a tracing order would not be obtained in equity if the effect would be to promote injustice.

*He who comes to equity must come with clean hands*

The assumption here is that the claimant or party claiming an equitable relief must demonstrate that he has not acted with impropriety in respect of the claim.
Delay defeats equity (equity aids the vigilant and not the indolent)

Where a party has slept on his rights and has given the defendant the impression that he has waived his rights, a court of equity may refuse its assistance to the claimant. This is known as the doctrine of laches.

Equality is equity

Where two or more parties have an interest in the same property but their respective interests have not been quantified, equity as a last resort may divide the interest equally.

Equity looks at the intent rather than the form

The court looks at the substance of an arrangement rather than its appearance in order to ascertain the intention of the parties, for example a deed is not treated in equity as a substitute for consideration.

Equity imputes an intention to fulfil an obligation

The principle here is based on the premise that if a party is under an obligation to perform an act and he performs an alternative but similar act, equity assumes that the second act was done with the intention of fulfilling the obligation.

Equity regards as done that which ought to be done

If a person is under an obligation to perform an act that is specifically enforceable, the parties acquire the same rights and liabilities in equity as though the act had been performed.

Equity acts in personam

Originally, equitable orders were enforced against the person of the defendant with the ultimate sanction of imprisonment. A later equitable invention permitted an order to be attached to the defendant’s property, that is, in rem. Today this maxim has lost much of its importance.

Question
What is the significance today of the maxims of equity?

FURTHER READING

Pettit, P, 'He who comes into equity must come with clean hands' [1990] Conv 416.
Winder, W, 'Precedent in equity' (1941) 57 LQR 245.