Course Name- LL.B 4th sem
Subject- Equity
Teacher- Mrs. Aakanksha
Concept- The Judicature Act (Equity)

Equity

Before 1066 all laws were local and enforced in the manorial, shire and hundred courts. Under the Normans, Royal Courts began to emerge from the King's Council (Curia Regis). These did not take over the jurisdiction of the local courts immediately, but over a long period of time the local courts lost jurisdiction over cases and thus lost income. A practice was started of sending judges around the country to hold assizes (or sittings) to hear cases locally.

This enabled the judges, over a period of roughly 200 years, to take the best local laws and apply them throughout the land, thus creating law which was `common to the whole country ie, common law.

Originally the King's Council carried out the three functions of state, namely legislative, executive and judicial. It dealt with all cases in which the King had a direct interest, like breaches of the peace. Eventually the courts split off from the Council and formed the main common law courts. The Court of

Exchequer, which dealt with the collection of revenues, was the first to separate, in the reign of Henry I (1100-1135). The Court of Common Pleas stayed in Westminster Hall to deal with disputes between individuals, while the King's Council travelled round the country. The Court of King's Bench separated sometime after 1230. Justices of the Peace (or magistrates) originated from a Royal Proclamation of 1195 creating 'Knights of the Peace' to assist the Sheriff in enforcing the law. They were later given judicial functions and dealt with minor crimes.

COMMON LAW PROCEDURES

Precedent

As the work of the common law courts grew, the judges began to use previous decisions as a guide for later cases. This was the beginning of the doctrine of precedent.

The writ system

The judges also developed the writ system. A writ is simply a document setting out the details of a claim. Writs were issued to create new rights not recognised by the local courts and this helped to attract business. Over a period of time the writ system became extremely formal and beset with technicalities and claims would only be allowed if they could fit into an existing writ. The rule was 'no writ, no remedy'. For example, certain writs of trespass would only be issued for those acts done with force and arms against the King's Peace. If the two requirements were not met, a person had no claim.

Even if a writ was obtained, the judges would often spend more time examining the validity of the writ than the merits of the claim. Writs were issued by the clerks in the Chancellor's Office and they began to issue new writs to overcome these difficulties, in effect creating new legal rights.

In 1258 the Provisions of Oxford forbade the issue of new writs without the permission of the King in Council. As a result the common law became rigid and the rules operated unjustly. In 1285 the Statute of Westminster II authorized the clerks to issue new writs but only if claims were in 'like cases' to those before 1258. This was restrictive and made further development of the common law very technical.

Other defects in the common law

There were also other faults with the common law courts, for example:

* the common law courts used juries which could be intimidated and corrupted.

* the common law had only one remedy, damages, which was often inadequate.

* the common law paid too much attention to formalities, eg if a contract was made which required written evidence for its enforcement, then lack of such evidence meant that the common law courts would grant no remedy.

* the common law courts did not recognise the trust.

THE DEVELOPMENT OF EQUITY

Meaning
The word "equity" means fair or just in its wider sense, but its legal meaning is the rules developed to mitigate the severity of the common law.

Petitioning the King
Disappointed litigants began to petition the King as the "Fountain of Justice", the procedure being to present a petition (or bill) asking him to do justice in respect of some complaint. For a time the King in Council determined these petitions himself, but as the work increased he passed them to the Chancellor as the "Keeper of the King's Conscience".

The Chancellor was usually a clergyman, generally a bishop, and learned in the civil and canon law. The King, through his Chancellor, eventually set up a special court, the Court of Chancery, to deal with these petitions. The Chancellor supervised the Chancery where clerks (who originally worked behind a wooden screen – cancelleria – hence Chancery) issued writs, commissions and other legal documents.

The Chancellor dealt with these petitions on the basis of what was morally right. The Chancellor would give or withhold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him.

In 1474 the Chancellor issued the first decree in his own name, which began the independence of the Court of Chancery from the King's Council.

New Procedures
Equity was not bound by the writ system and cases were heard in English instead of Latin. The Chancellor did not use juries and he concerned himself with questions of fact. He could order

a party to disclose documents. The Chancellor issued subpoenas compelling the attendance of the defendant or witnesses whom he could examine on oath.

New Rights
Equity created new rights by recognising trusts and giving beneficiaries rights against trustees. (A trust arises if one party gives property to trustees to hold for the use of beneficiaries.) The common law did not recognise such a device and regarded the trustees as owners.

Equity also developed the equity of redemption. At common law, under a mortgage, if the mortgagor had not repaid the loan once the legal redemption date had passed, he would lose the property but remain liable to repay the loan. Equity allowed him to keep the property if he repaid the loan with interest.

This right to redeem the property is known as the equity of redemption.

New Remedies
Equity created new remedies:

(a) **Specific performance**, which is an order telling a party to perform their part of a contract. This was useful where damages were not adequate, eg, in the sale of land. Thus if the seller refused to sell after signing a contract, the buyer could obtain an order of specific performance making the seller sell the house.

(b) Rectification, which allowed a written document to be changed if it did not represent the actual agreement made by the parties.

(c) Rescission, which allowed parties to a contract to be put back in their original position in the case of a contract induced by a misrepresentation.

(d) Injunctions, usually an order to stop a person doing a particular act, like acting in breach of contract (a prohibitory injunction).

EQUITY AND THE COMMON LAW

Rivalry between the Courts
The Court of Equity (or Chancery) became very popular because of its flexibility; its superior procedures; and its more appropriate remedies. Problems arose as to the issue of injunctions: the common law courts objected to the Chancellor issuing injunctions restraining the parties to an action at common law either from proceeding with it or, having obtained judgement, from entering it in cases where, in the Chancellor's opinion, injustice would result.

Consequently, a certain rivalry developed between the two courts and this came to a head in which the common law court gave a verdict in favour of one party and the Court of Equity then issued an injunction to prevent that party enforcing that judgement. The dispute was referred to the King who asked the Attorney-General to make a ruling. It was decided that in cases of conflict between common law and equity, equity was to prevail. From that time on the common law and equity worked together, side by side.

As equity was developing, it had no fixed rules of its own and each Chancellor gave judgement according to his own conscience. This led to criticism about the outcome of cases and John

Selden, an eminent seventeenth century jurist, declared, “Equity varies with the length of the Chancellor’s foot”. To combat this criticism Lord Nottingham (Lord Chancellor 1673-82) started to introduce a more systematic approach to cases and by the nineteenth century, equity had become as rigid as the common law. Delays were caused by aninadequate number of judges and the officials depended on fees paid by the litigants so that there was every incentive to prolong litigation for individual tasks and mulitply these tasks.

Some attempt was made to assimilate the remedies granted by the Court of Chancery and the common law courts. Thus under the Common Law Procedure Act 1854 the common law courts were given some power to award equitable remedies and the Chancery Amendment Act 1858 gave the Chancellor the power to grant damages in addition to, or in substitution for, an injunction or a decree of specific performance.

The Judicature Acts 1873-75

The Judicature Acts 1873-75 rationalised the position. They created one system of courts by amalgamating the common law courts and the court of equity to form the Supreme Court of Judicature which would administer common law and equity.

The Supreme Court of Judicature consists of the High Court divided into divisions known as the Queen’s Bench Division, Chancery Division, and the Probate, Divorce and Admiralty Division (re-named the Family Division in 1970 and the work reassigned); the Court of Appeal; and, since the Supreme Court Act 1981, the Crown Court. Each Division exercises both legal and equitable jurisdiction. Thus any issue can be adjudicated in any Division; and any point of law or equity can be raised and determined in any Division; but, for the sake of administrative convenience, cases are allocated to the Divisions according to their general subject-matter. Thus the court “is now not a Court of Law or a Court of Equity, it is a Court of complete jurisdiction.” (Pugh v Heath (1882), per Lord Cairns.)

It was forseen that a court which applied the rules both of common law and of equity would face a conflict where the common law rules would produce one result, and equity another. Section 25 of the Judicature Act 1873 provided that if there was any conflict between these principles, then equity was to prevail.

However, this did not fuse the principles of common law and equity, which still remain as separate bodies of rules. “The two streams have met and still run in the same channel, but their waters do not mix” (Maitland).

The Judicature Acts are a series of Acts of Parliament, beginning in the 1870s, which aimed to fuse the hitherto split system of courts in England and Wales. The first two Acts were the Supreme Court of Judicature Act 1873 (36 & 37 Vict c. 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vict c. 77), with a further series of amending acts (12 in all by 1899).

By the Act of 1873 (ss. 3, 4), the Court of Chancery, the Court of Queen's Bench (known as the King's Bench when there is a male Sovereign), the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, and the Court of Divorce and Matrimonial Causes were consolidated into the Supreme Court of Judicature, subdivided into two courts: the "High Court of Justice" ("High Court"), with (broadly speaking) original

jurisdiction, and the "Court of Appeal". Besides this restructuring, the objects of the act were threefold:

- to combine the historically separate courts of common law and equity;
- to establish for all divisions of the new Supreme Court a uniform system of pleading and procedure; and
- to provide for the enforcement of the same rule of law in those cases where equity and common law recognised different rules.

The enactment was bold and revolutionary. By one section, the Queen's Bench, the Common Pleas (in which only serjeants formerly had the right of audience), and the Exchequer, and all their jurisdiction, whether criminal, legal, or equitable, were vested in the new court. The fusion of the systems of law and equity was not complete, however, as the Chancery (equity) division retained a distinct existence within the new court from the Queen's Bench (common law) division, having a certain range of legal questions under its exclusive control, and possessing to a certain extent a peculiar machinery of its own for carrying its decrees into execution. Nevertheless, all actions could now for the first time be initiated in a single High Court, and (subject to such special assignments of business as mentioned) could be tried in any of its divisions.

Common law and equity

The procedure of the common law courts had developed along highly technical and stylised lines. For example, to bring an action in the common law courts a litigant had to file a "writ" chosen from a set of standard forms. The court would only recognise certain "forms of action", and this led to the widespread use of legal fictions, with litigants disguising their claims when they did not fit into a standard recognised "form". The emphasis on rigid adherence to established forms led to substantial injustice.

On the other hand, the Court of Chancery (a court of equity) ran separately and parallel to the common law courts, and emphasised the need to "do justice" on the basis of the Lord Chancellor's conscience, softening the blunt instrument of the common law. However, by the nineteenth century proceedings before the Court of Chancery often dragged on and on, with cases not being decided for years at a time (a problem that was parodied by Charles Dickens in the fictional case of Jarndyce and Jarndyce in Bleak House). Also, the practice of the court departed from the original principle of the Lord Chancellor's conscience, wary of its legal superiority, clarified for once and for all 1615, wherever it conflicted with the common law.[1] The court undertook self-restraint to safeguard its position. It elaborated the maxims of equity, many centuries old, that restrict its jurisdiction to certain fields of law, impose preconditions for suits/applications and curtail its remedies (particularly damages) which equity might award if there were no common law courts or statute.

The existence of these two separate systems in some of the more common areas of law enabled each party to go "forum shopping", selecting whichever of the two systems would most likely give judgment in his or her favour. A wealthy loser in one court would often try a court in the other system, for good measure.

The solution adopted by the Judicature Acts of 1873 and 1875 was to amalgamate the courts into one Supreme Court of Judicature which was directed to administer both law and equity.[2]. Pleadings became more relaxed, with the emphasis shifting from the 'form' of action to the 'cause' (or a set of causes) of action. Writs for action were filled out for a litigant stating facts,

without any necessity of pigeonholing them into specific forms. The same court was now able to apply rules of the common law and the rules of equity, depending on what the substantial justice of a case required, and depending on what specific area of law the pleadings involved. The result was that, when the issues arising from the causes of action were decided in favour of one party, that party got relief.

Overview

Sir Fitzroy Kelly was the last leading Lord Chief Baron of the Exchequer.
There were originally three common law divisions of the High Court corresponding with the three former courts of common law. However, after the deaths of Lord Chief Baron Kelly (on 17 September 1880), and Lord Chief Justice Cockburn (on 10 November 1880), the Common Pleas and Exchequer divisions were consolidated (by an Order in Council of 10 December 1880) with the Queen's Bench division into a single division, under the presidency of the Lord Chief Justice of England, to whom, by the Judicature Act 1881 s. 25, all the statutory jurisdiction of the Chief Baron and the Chief Justice of the Common Pleas was transferred. The High Court, therefore, came to consist of the Chancery division, the common law division (known as the Queen's Bench division), and the Probate, Divorce and Admiralty division. To the Queen's Bench division was also attached, by an order of the Lord Chancellor dated 1 January 1884, the business of the London Court of Bankruptcy.

The keystone of the structure created by the Judicature Acts was a strong court of appeal. The House of Lords remained the last court of appeal, as before the Acts, but its judicial functions were transferred in practice to an appellate committee, consisting of the lord chancellor and other peers who had held high judicial office, and certain Lords of Appeal in Ordinary created by the Appellate Jurisdiction Act 1876.

The High Court and Court of Appeal were formerly referred to as comprising the Supreme Court of Judicature,[3] a concept wholly distinct from the current Supreme Court of the United Kingdom

Pleading

The most important matter dealt with by the rules is the mode of pleading. The authors of the Judicature Act had before them two systems of pleading, both of which were open to criticism. The common law pleadings (it was said) did not state the facts on which the pleader relied, but only the legal aspect of the facts or the inferences from them, while the chancery pleadings were lengthy, tedious and to a large extent irrelevant and useless.

There was some exaggeration in both statements. In pursuing the fusion of law and equity which was the dominant legal idea of law reformers of that period, the framers of the first set of rules devised a system which they thought would meet the defects of both systems, and be appropriate for both the common-law and the chancery divisions. In a normal case, the plaintiff delivered his statement of claim, in which he was to set forth concisely the facts on which he relied, and the relief which he asked. The defendant then delivered his statement of defence, in which he was to say whether he admitted or denied the plaintiff's facts (every averment not traversed being taken to be admitted),[jargon] and any additional facts and legal defences on which he relied. The plaintiff might then reply, and the defendant rejoin, and so on until the pleaders had exhausted themselves. This system of pleading was not a bad one if accompanied by the right of either party to demur to his opponent's pleading, i.e. to say, "admitting all your

averments of fact to be true, you still have no cause of action", or "defence" (as the case may be).

It may be, however, that the authors of the new system were too intent on uniformity when they abolished the common-law pleading, which, shorn of its abuses (as it had been by the Common Law Procedure Acts), was an admirable instrument for defining the issue between the parties though unsuited for the more complicated cases which are tried in chancery, and it might possibly have been better to try the new system in the first instance in the chancery division only.

It should be added that the rules contain provisions for actions being tried without pleadings if the defendant does not require a statement of claim, and for the plaintiff in an action of debt obtaining immediate judgment unless the defendant gets leave to defend. In the chancery division there are of course no pleadings in those matters which by the rules can be disposed of by summons in chambers instead of by ordinary suit as formerly.

The judges seem to have been dissatisfied with the effect of their former rules, for in 1883 they issued a fresh set of consolidated rules, which, with subsequent amendments, are those now in force. By these rules a further attempt was made to prune the exuberance of pleading. Concise forms of statement of claim and defence were given in the appendix for adoption by the pleader. It is true that these forms do not display a high standard of excellence in draftsmanship, and it was said that many of them were undoubtedly demurrable, but that was not of much importance.

Demurrers were abolished, and instead it was provided that any point of law raised by the pleadings should be disposed of at or after the trial, provided that by consent or order of the court they might be set down and disposed of before the trial (Order xxv. rules I, 2). This, in the opinion of Lord Davey in 1902,[4] was a disastrous change. The right of either party to challenge his opponent in limine, either where the question between them was purely one of law, or where even the view of the facts taken and alleged by his opponent did not constitute a cause of action or defence, was a most valuable one, and tended to the curtailment of both the delay and the expense of litigation. Any possibility of abuse by frivolous or technical demurrers (as undoubtedly was formerly the case) had been met by powers of amendment and the infliction of costs.

Many of the most important questions of law had been decided on demurrer both in common law and chancery. Lord Davey considered that demurrer was a useful and satisfactory mode of trying questions in chancery (on bill and demurrer), and it was frequently adopted in preference to a special case, which requires the statement of facts to be agreed to by both parties and was consequently more difficult and expensive. It is obvious that a rule which makes the normal time for decision of questions at law the trial or subsequently, and a preliminary decision the exception, and such exception dependent on the consent of both parties or an order of the court, is a poor substitute for a demurrer as of right, and it has proved so in practice. The editors of the Yearly Practice for 1901 (Muir Mackenzie, Lushington and Fox) said (p. 272): "Points of law raised by the pleadings are usually disposed of at the trial or on further consideration after the trial of the issues of fact," that is to say, after the delay, worry and expense of a trial of disputed questions of fact which after all may turn out to be unnecessary.

The abolition of demurrers has also (it is believed) had a prejudicial effect on the standard of legal accuracy and knowledge required in practitioners. Formerly the pleader had the fear of a

demurrer before him. Nowadays, he need not stop to think whether his cause of action or defense will hold water or not, and anything which is not obviously frivolous or vexatious will do by way of pleading for the purpose of the trial and for getting the opposite party into the box.

Juries

Another change was made by the rules of 1883, which was regarded by some common law lawyers as revolutionary. Formerly every issue of fact in a common law action, including the amount of damage, had to be decided by the verdict of a jury. "The effect of the rules of 1883," said Lord Lindley, who was a member of the rule committee, "was to make trial without a jury the normal mode of trial, except where trial with a jury is ordered under rules 6 or 7a, or may be had without an order under rule 2".[5] The effect of the rules may be thus summarized:

In the Chancery division no trial by jury unless ordered by the judge.
Generally, the judge could order trial without a jury of any cause or issue, which before the Judicature Act might have been so tried without consent of parties, or which involves prolonged investigation of documents or accounts, or scientific or local investigation.
Either party had a right to a jury in actions of slander, libel, false imprisonment, malicious prosecution, seduction or breach of promise of marriage, upon notice without order;
or in any other action, by order.
Subject as above, actions were to be tried without a jury unless the judge, of his own motion, otherwise orders.

Abandonment

Main article: Abandonment (legal)

Among the specific changes to procedure that occurred as a result of enactment of the Judicature Acts was one impacting on the matter of "abandonment of an action". Such an abandonment involves the discontinuance of proceedings commenced in the High Court, typically emerging because a plaintiff is convinced that he will not succeed in a civil action. Prior to the 1875 Act, considerable latitude was allowed as to the time when a suitor might abandon his action, and yet preserve his right to bring another action on the same suit (see nonsuit); but since 1875 this right has been considerably curtailed, and a plaintiff who has delivered his reply (see pleading), and afterwards wishes to abandon his action, can generally obtain leave so to do only on condition of bringing no further proceedings in the matter.

Other changes

Further steps have been taken with a view to simplification of procedure. By Order xxx. rule i (as amended in 1897), a summons, called a summons for directions, has to be taken out by a plaintiff immediately after the appearance of the defendant, and upon such summons an order is to be made respecting pleadings, and a number of interlocutory proceedings. To make such an order at that early stage would seem to demand a prescience and intelligent anticipation of future events which can hardly be expected of a master, or even a judge in chambers, except in simple cases, involving a single issue of law or fact which the parties are agreed in presenting to the court. The effect of the rule is that the plaintiff cannot deliver his statement of claim, or take any step in the action without the leave of the judge. In Chancery cases the order usually made is that the plaintiff deliver his .statement of claim, and the rest of the summons stand over, and the practical effect is merely to add a few pounds to the costs. It may be doubted whether, as applied to the majority of actions, the rule does not proceed on wrong lines, and whether it would not be better to leave the parties, who know the exigencies of their case better even than a judge in chambers, to proceed in their own way, subject to stringent provisions for

immediate payment of the costs occasioned by unnecessary, vexatious, or dilatory proceedings. The order does not apply to admiralty cases or to proceedings under the order next mentioned.

The Supreme Court of Judicature Act (Ireland) 1877 followed the same lines as the English Acts: the pre-existing courts were consolidated into a Supreme Court of Judicature, consisting of a High Court of Justice and a Court of Appeal. The Judicature Acts did not affect the Scottish judicial system, but the Appellate Jurisdiction Act included the Court of Session among the courts from which an appeal would lie to the House of Lords.

NEW REMEDIES
In recent times the courts have used their equitable jurisdiction to develop new remedies:

Mareva Injunctions
In 1975 the Court of Appeal recognised the Mareva injunction for the first time. This is a court order freezing the assets of a party to an action or stopping that party moving the assets out of the country.

In Mareva v International Bulkcarriers [1975] 2 Lloyd's Rep 509, a shipowner let the 'Mareva' to a foreign charterer, with payment half monthly in advance.

The charterer defaulted on a payment. The shipowner found out that the charterers had money in an English bank and sought an injunction freezing the account. It was held that an order would be granted to stop the charterers from moving the money abroad before the case was heard. Normally the application will be ex parte, which means that one party applies without giving notice to the other side for if the other party did have notice, they could move the assets.

In The Due Process of Law (1980) Lord Denning described the Mareva injunction as "The greatest piece of judicial law reform in my time".

Anton Piller Orders
In 1974 the High Court started to grant what later became known as Anton Piller orders. This is an order to a defendant to allow the plaintiff on to the defendant's premises to inspect, copy or remove documents or other objects relating to the plaintiff's property. The aim is to stop the defendant removing or destroying vital evidence. The defendant may refuse entry, but such action would be regarded as contempt of court, for which the defendant could be sent to prison. Once again it is an ex parte application. The use of such orders was confirmed in the following case.

In Anton Piller v Manufacturing Processes Ltd [1976] Ch 55, the plaintiffs made electrical equipment and employed the defendants as their agent in the UK. They suspected that he was selling their technical drawings to competitors and so applied for an order. The court held that an ex parte mandatory injunction would be granted, to the effect that the plaintiff could enter the defendant's premises and inspect relevant documents.

These orders have been used for breach of copyright, passing off and matrimonial disputes.