

Common Law: General Description, History and Recent Developments

Lecture 2

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Outline

- 1) Definition of Common Law
- 2) Historical Background;
- 4) Common Law and Equity;
- 6) Recent Developments;
- 7) Conclusions

What Common Law Means in Brief

- Common law – the system of law that emerged in England beginning in the Middle Ages and is based on case law and precedent rather than codified law.

What Common Law Means in Full

- A body of English law which originated with an oral tradition of tribal justice in Britain thousands of years ago and which developed into a unique, cohesive national body of law (the *realm*) developed and set to writing by English judges over time, and which was eventually imported as the law of British colonies throughout the world such as the United States of America (except Louisiana), Canada (except Quebec) and India. Common law applies only to civil cases.

Historical Background: before the Norman conquest

- **Time period:** from 8th to 11th centuries (over a 400-year period);
- **Place:** medieval England;
- **Background:** the transformation of England from a number of proto-states (tribal chiefdoms) to a centrally governed country;
- **Economic reasons:** former tribal land became owned and controlled by powerful lords;
- **Social reasons:** the responsibility of an individual to his kinsmen was replaced by the responsibility of a person to his lord;
- **Reasons of justice:** it became the prerogative of feudal lords to see that justice was done;
- **Political reasons:** To consolidate power, feudal lords required that disputes be submitted to a local "court" for settlement

Political Organization & Territorial Division

- 8 independent kingdoms;



- Counties (shires)



- hundreds (owned by landlords & abbeys)



System of Feudal Justice

- 1) The hundreds courts = meetings of important hundred residents resolving local disputes (as future lower courts);
- 2) The right to hold court and to profit from it belonged to the lord of a “hundred”;
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- 3) The county courts held by the overlords of counties prevailing over the lords of hundreds (as future higher courts).
- Thus, by 1066, England was in-between tribalism and feudalism, between rule by custom and rule by state law

The Norman Conquest

- Key Figure = William the First;
- Results:
 - 1) local courts came under the administration of Norman rule;
 - 2) judicial decision-making was being transformed into a bureaucratic system of justice;
 - 3) the king's interest in a flow of justice-profits into the royal treasury brought about the institution of the **eyre** (выездная сессия суда);
 - 4) the eyre provided the structural basis for the development of a common law for England

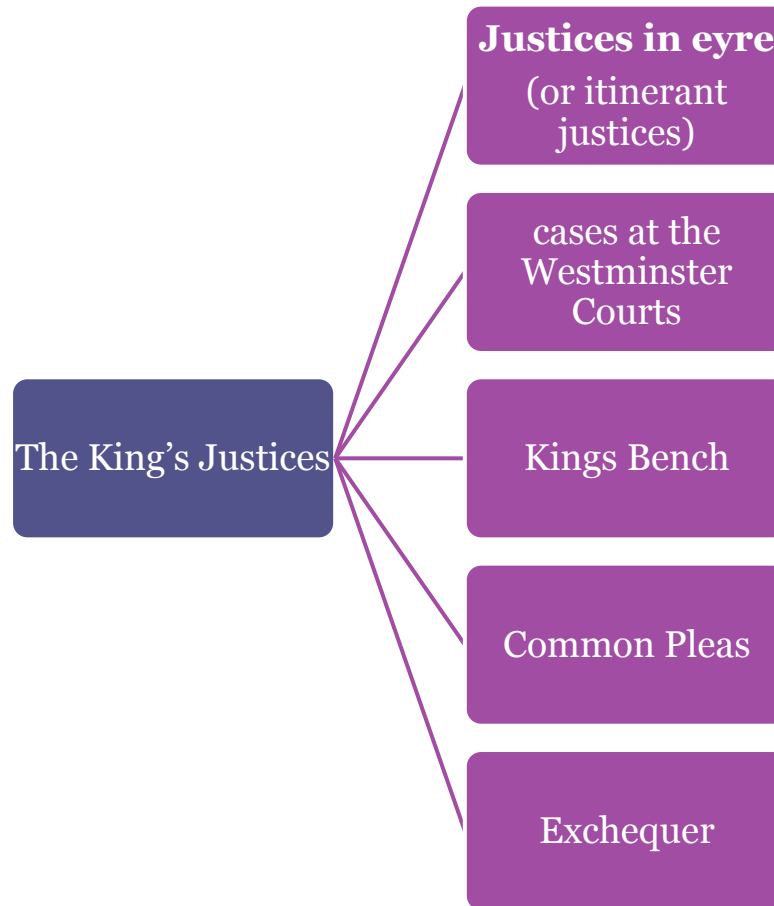
Henry II and Common Law

- In a series of **Assizes** (meetings with barons that issued binding decrees), many of common law basic principles were established;
- only royal courts (not the courts of local lords) could try criminal cases, or cases involving the ownership of freehold property;
- In criminal cases juries named suspects who were then tried before the King's judges (called "Justices".);
- Established the system of primogeniture;
- **Justices in eyre** (or itinerant justices) were sent from the center to tour the counties on a regular basis. They toured the whole country every seven years or so. Other justices heard cases at the Westminster Courts - which became the courts of Kings Bench, Common Pleas and Exchequer
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What is Eyre?

- - consisted of four judges representing the king who would periodically examine the activities of the county and hundred courts;
- - principal goal = to enforce forfeiture laws & ensure that revenues were transferred to the king;
- - as the itinerant judges in eyre, settled common-plea cases they established precedents to be followed in similar cases

How the Whole System Worked



Conclusion

- 1) CL served as institutionalization of traditional English customs & the means of English government centralization;
- 2) common law gave rise to a concept of justice that emphasized the uniform application of standardized laws and procedures (the doctrine of *stare decisis* meaning the importance of legal precedents established in previously settled cases);
- 3) common law was aimed not at protecting individuals from ordinary threats to person and property –but maintaining social peace by regulating the economic arrangements between the king & feudal landlords

Meanings of Term “Equity”

- 1) body of rules administered by court of equity;
- 2) fairness;
- 3) share or participatory interest in a limited liability company;
- 4) value of property over and above encumbrances;
- 5) an equitable right or claim (equity of redemption)

Rise of Equity: reasons for creation

- Defects in Common Law:
 - The writ system having become too formal and rigid;
 - Corrupted judges in common law courts;
 - Only one remedy (damages) that often was inadequate;
 - Common law courts did not recognize the trust.

What is Writ?

(a piece of clarification)

- = a document setting out the details of a claim;
- = “no writ, no remedy” rule;
- = the validity of the writ prevailed over the merits of the claim;

- 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.

Development of Equity

- - petitioning the King as the "Fountain of Justice";
- - petitions passed to the Chancellor as the "Keeper of the King's Conscience";
- - establishment of the Court of Chancery to deal with petitions;
- **NB!**
- 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.

Novelties Introduced by Equity

- **New Procedures:**
 - cases were heard in English instead of Latin;
 - the Chancellor did not use juries and he concerned himself with questions of fact;
 - the Chancellor could order a party to disclose documents;
- **New Rights:**
 - recognition of trusts;
 - development of the equity of redemption

Novelties: 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, *e.g.* in the sale of land.;
- **(b)** Rectification, which allowed a written document to be changed if it did not represent the actual agreement 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).

Further Developments: Rivalry between the Courts

- in the *Earl of Oxford's Case* (1616) 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.

Further Developments

- "Equity varies with the length of the Chancellor's foot" by John Selden
- 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;
- 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

Further Developments: Fusion Reform

- **The Judicature Acts 1873-75**

- Amalgamation of the common law courts and the court of equity to form the Supreme Court of Judicature administering common law and equity;
- 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.)

Maxims of Equity

- **Equity sees that as done what ought to be done;**
- **Equity will not suffer a wrong to be without a remedy;**
- **Equality is Equity;**
- **One who seeks equity must do equity;**
- **He who comes into equity must come with clean hands;**
- **Equity follows the law**

Equity sees that as done what ought to be done

- The judges look at this contract from the enforceable side and the situation they would be in had the contract been completed

Equity will not suffer a wrong to be without a remedy

- This maxim developed as common law had no new remedies only monetary damages. Maxim can be used by the beneficiary of a trust whose rights were not recognised by the common law. Equitable remedies such as injunctions or specific performance may be given

Equality is Equity

- Where more than one person is involved in owning a property the courts prefer to divide property equally. Prefer to treat all involved as equals. In the case of a business any funds left over from dissolution should be divided equally

One who seeks equity must do equity

- A remedy will only be provided where you have acted equitable in the transaction. This maxim is discretionary in nature and is concerned with the future conduct of the plaintiff

He who comes into equity must come with clean hands

- This maxim is linked to the previous maxim and relates to the past conduct of parties. They must not have had any involvement in fraud or misrepresentation or they will not succeed in equity

Equity follows the law

- Courts will firstly apply common law and if this is not fair then an equitable remedy will be provided. This maxim sets out that equity is not in place to overrule judgements in common law but rather to make sure that parties don't suffer an injustice

THE SUBJECT-MATTER OF EQUITY

- The sale, exchange or partition of land, or the raising of charges on land;
 - * The redemption or foreclosure of mortgages;
 - * The execution of trusts;
 - * The administration of the estates of deceased persons;
 - * Bankruptcy;
 - * The dissolution of partnerships or the taking of partnership or other accounts;
 - * The rectification, setting aside or cancellation of deeds or other instruments in writing;
 - * Patents, trade marks, registered designs or copyright;
 - * The appointment of a guardian of a minor's estate;
 - * All causes and matters involving the exercise of the High Court's jurisdiction under the enactments relating to companies.

Basic Distinctions Between Common Law & Equity

Common Law

- 1) decisions are made by reference to precedents: *stare decisis* (to stand by decision);
- 2) the only remedy is damages (money);
- 3) Operates *in rem*;
- 4) establishes general rules which provide certainty;

Equity

- 1) the emphasis is laid on fairness and flexibility: maxims of equity;
- 2) Remedies as orders to do or not to do something:
 - - specific performance;
 - - injunction;
 - - rescission;
 - - rectification;
- 3) Operates *in personam*;
- 4) acts as a check and balance of common law

KEYS

Key Features of Common Law

- - based on case law (*stare decisis*) = precedents;
- - adversarial trial (judge acts as arbitrator);
- - jury trial as a fundamental part of litigation;
- the jury is limited to the determination of facts;
- - appellate courts are limited to rectification of errors in law

Key Persons in Common Law History

Person	What is he famous for
William the Conqueror (1028-1087)	Laid the foundation for common law development by (1) establishing the institution of eyre and jury; (2) consolidating justice in England
Henry II (1133 – 1189)	Considered to be “the father of English Common Law” because of: the use of writs; passed the Assize of Clarendon which linked royal justices to the shire courts; the quarterly sessions held by the justices in eyre. They would discuss the hard cases and write down the judgments they had made

Key Persons in Equity Evolvment

Person	What is he famous for
Sir Thomas More (1478 – 1535)	Lord High Chancellor of England, the first lawyer in this position, started developing main doctrines of equity
Sir Francis Bacon (1561 –1626)	Attorney General and Chancellor of England who stated that in the event of any conflict between the common law and equity, equity would prevail

Key Dates

Date	Event
1066	victory at Hastings following which common law started evolving in medieval England
1166	Assize of Clarendon//Established the grand jury system for investigating recent crimes
1176	Assize of Northampton//Established a jury of presentment to decide which cases should be tried
1181	Assize of Arms//Ordered that all free men should keep arms and be prepared to defend the country
1215	Trial by ordeal was cancelled
1258	the Provisions of Oxford forbade the issue of new writs , thus common law became too rigid
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

Key Dates (Cont-d)

Date	Event
1616	the <i>Earl of Oxford's Case</i> gave rise to rivalry between common law court and court of equity. Thus, it was decided that in cases of conflict between common law and equity, equity was to prevail
1854	the Common Law Procedure Act gave common law power to award equitable remedies
1858	the Chancery Amendment Act gave the Chancellor the power to grant damages in addition to, or in substitution for, an injunction or a decree of specific performance
1873-75	The Judicature Acts caused the fusion of common law and equity courts into the Supreme Court of Judicature

Key Terms & Concepts

- **Eyre** = a court held by itinerant royal justices in medieval England;
- **Assizes** = meetings with barons that issued binding decrees;
- **Writ** = a document setting out the details of a claim;
- **Equity** = body of rules administered by court of equity;
- **Remedy** = The way a right is enforced by a court of law or equity

Now Test Your Knowledge





Part I. Choose the Right Answer

#1. What is Common Law?

- A) body of English law which originated with an oral tradition of tribal justice in Britain thousands of years ago and which developed into a unique federal body of law;
- B) common law was “to be found in the records of our several courts of justice in books of reports and judicial decisions, prescribed and handed down to us from the times of ancient antiquity. They are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of *common law*.”
- C) law developed after the equity law to offset the rigid interpretations medieval English judges were giving the equity

#2. What statement relates to the political & territorial division of England before the Norman conquest?

- A) Royal courts – shires – hundreds;
- B) counties – shires – hundreds;
- C) kingdom – shires - hundreds

#3. What courts could try criminal cases following the reign of Henry II?

- A) royal courts;
- B) landlord courts;
- C) courts of “hundreds”

#4. What is Eyre?

- A) judiciary of four itinerant judges representing the king;
- B) court decision;
- C) maxim of equity

#5. Eventually Westminster Courts became:

- A) the courts of Kings Bench, Common Pleas and Assizes;
- B) the courts of Kings Bench, Exchequer and the court of Chancery;
- C) the courts of Kings Bench, Common Pleas and Exchequer

#6. What does “equity” mean?

- A) preferred shares in a joint stock company;
- B) the branch of Anglo-American law;
- C) a remedy awarded by courts of law

#7. Basic reasons for Equity evolvment are:

- A) rivalry between royal and county courts started;
- B) judges were corrupted;
- C) system of common law became too rigid and formal

#8. What is writ?

- A) a letter, or command, from the King, usually written in Latin. At a very early stage in the English common law, a writ became necessary, in most cases to have a case heard in one of the Royal Courts;
- B) a meeting of landlords by which disputes were resolved in medieval England;
- C) a document determining what was right or wrong in criminal cases

#9. New remedies introduced by equity include:

- A) Rescission, injunction, damages, rectification;
- B) rescission, injunction, specific performance and rectification;
- C) injunction, specific performance, liquidated damages and writ

#10. “Equity follows the law” is

- A) maxim of Equity;
- B) ruling made by the king;
- C) citation from the speech of Lord Chancellor

#11. Why is *Earl of Oxford's Case* (1616) important?

- A) it gave rise to equity evolution;
- B) it caused the conflict of interests between common law and equity;
- C) Sir Thomas More was executed because of this case

#12. The Judicature Acts 1873-75

- A) caused amalgamation of common law courts and courts of equity;
- B) divided the Supreme Court of England into the Commercial Court and the Court of Justice;
- C) attached criminal cases to the jurisdiction of royal courts

#13. Assize of Clarendon was held in

- A)1616;
- B)1066;
- C) 1166

#14. What happened in 1854 ?

- A) Trial by ordeal was cancelled;
- B) the Common Law Procedure Act gave common law power to award equitable remedies;
- C) the Chancellor issued the first decree in his own name

#15. The basic effect of the Judicature Acts 1873-75 was:

- A) establishment of the Supreme Court of Judicature;
- B) cross-cutting powers of common law courts and courts of equity;
- C) the fusion of common law and equity courts into the Supreme Court of Judicature

Keys to Part I

- 1 = b;
- 2 = c;
- 3 = a;
- 4 = a;
- 5 = c;
- 6 = b;
- 7 = c;
- 8 = a;
- 9 = b;
- 10 = a;
- 11 = b;
- 12 = a;
- 13 = c;
- 14 = b;
- 15 = c

Part II. True or False?

#1

- Common law is totally uncodified. This means that there is no compilation of legal rules and statutes. It is only based on precedent, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge.
- **A) TRUE**
- **B) FALSE**

#2

- English common law emerged from the changing and centralizing powers of the king during the Middle Ages. After the Norman Conquest in 1066, medieval kings began to consolidate power and establish new institutions of royal authority and justice. New forms of legal action established by the crown functioned through a system of writs, or royal orders, each of which provided a specific remedy for a specific wrong
- **A) TRUE**
- **B) FALSE**

#3

- Birth of equity came about when the writ system through the twelfth and the thirteenth centuries failed to develop further remedies. Disappointed litigants began petitioning their landlords to do justice in their particular case, as they were “the fountain of all justice”. As the petitions increased, the lords asked the King to delegate the duty to the Chancellor, his most senior official. On receiving the petitions, the Chancellor would adjudicate them, according to principles of fairness and justice.
- **A) TRUE**
- **B) FALSE**

#4

- By the nineteenth century, equity became well established and was seen as the rival system of common law. The increasing popularity of the Court of Chancery soon led to conflict with the common law courts. When there was a conflict between the two, equity would use a remedy which had the effect of preventing common law action from proceeding or prevent the common law judgement from being enforced.
- **A) TRUE**
- **B) FALSE**

#5

- Equity has been important in supplementing many new remedies to the common law. Some of the most important are those of specific performance, injunction, rescission and rectification. A decree of specific performance compels the defendant to perform his side of the bargain while an injunction prevents someone from performing a certain act. The remedies developed by equity, are, distinct from the common law remedy of damages, subject to the discretion of the judge. Thus a judge will decide that, for claimants to be granted equitable remedies they must come to court with clean hands, they must have behaved equitably and must not have delayed in seeking the intervention of equity.
- **A) TRUE**
- **B) FALSE**

#6

- Equitable rights acts in personam. This means that equity remedies are personal in that they exercise against specific persons. For example, where someone build a home on someone else's land, with the understanding that the ownership of the land would be transferred to them on completion. If the land owner refused to perform this duty, the builder of the home would have no action under common law; however equity will act against the person and order him to do something such as specific performance.
- **A) TRUE**
- **B) FALSE**

#7

- A breach of contract is a common type of civil claim. When a court considers a breach of contract case, the court will almost always award money damages to the innocent party. This means that the breaching party is ordered to pay money to the innocent party to make up for the innocent party's losses caused by the breach.
- Money damages are an equitable remedy. A remedy is any court order that imposes a penalty or enforces a right. Though not common, there are remedies other than legal remedies available for breach of contract.
- **A) TRUE**
- **B) FALSE**

#8

- Equitable remedies are those that are based on what is fair, or seems right, in a particular situation. These remedies were historically designed so that they don't have to follow precedent, or established common laws. Instead, they are purposely intended to be a more flexible option that is used to ensure justice in a particular situation.
- These remedies were developed through the old English laws of equity, as used in the historic courts of equity. These courts exclusively granted equitable remedies, and the courts of law granted legal remedies. Eventually, these courts were merged, and legal courts had the authority to grant both types of remedies.
- **A) TRUE**
- **B) FALSE**

#9

- The maxims of equity are the general legal principles that have been adopted through following precedent in regard to equity. These maxims are rulings made by judges in relation to equity and help to govern the way equity operates. All maxims are discretionary in nature and courts may choose whether they wish to apply these principles.
- **A) TRUE**
- **B) FALSE**

#10

- The Judicature Acts 1873-75 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.
- **A) TRUE**
- **B) FALSE**

Keys to Part II

- 1 = b;
- 2 = a;
- 3 = b;
- 4 = b;
- 5 = a;
- 6 = a;
- 7 = b;
- 8 = a;
- 9 = b;
- 10 = a



Part III. Questions to Answer

Questions to Answer - 1

- **1)** What is Common Law? Why is it called Anglo-American Law?
- **2)** What are the basic sources of Common Law?
- **3)** What early medieval courts gave rise to the later bicameral (two-house) legislatures of England house of commons and house of the lords and the U.S. Senate and House of Representatives?

Questions to Answer -2

- 4) What is a writ? What role did it play in the evolution of Common Law?
- 5) What reasons entailed Equity as a branch of law?
- 6) What case triggered rivalry between courts of law and courts of equity? What were the implications of that case?

Questions to Answer -3

- 7) Describe the main effect of the Judicature Acts 1873-75 from perspective of Anglo-American law.
- 8) What is the origin and nature of the maxims of equity?
- 9) Comment on the statement describing common law and equity as “The two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters”.
- 10) What are distinctive features of common law and equity?