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THE ENGLISH COURTS AND THE RISE OF EQUITY

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Where did the Australian courts come from? On what system were they modelled? The answer is that the Australian courts were modelled on the English common law courts. They retain many of the English system's characteristics. And what about this term "equity"? Equity (meaning fairness) was the name given to a "rival" or parallel court to the common law courts. This court and the system of law it spawned - also called Equity - began in England, springing from the office of the Lord Chancellor, the highest judicial figure in England.

English courts of common law: Common Pleas, Exchequer and King's Bench

In England, from the earliest times, justice resided in the monarch. The people looked to the monarch as the forum for their complaints and as the dispenser of justice. The king, who usually wanted peace and good order in the realm, jealously guarded this role as law maker and justice dispenser. It is a powerful thing - to hand out justice. It was a major role of the leader. But the monarch could not hear all disputes himself. There were too many complaints; too many calls on the monarch's time. He needed justice forums - courts - and other trusted and capable judges than himself. And this justice had to be consistent and predictable. Otherwise there would be no confidence in it and you could not plan business and social interaction.

The three common law courts - Common Pleas, Exchequer and King's Bench - evolved from the king's old court, the *Curia Regis,* where he had sat with his feudal barons. Dating from William The Conqueror (1066 AD and all that), the Curia Regis was England's first central court, and its first central government body. The inner "household" (leaders and churchmen) sat there.

In the busy and popular *Court of Common Pleas,* lawyers found their most lucrative living. Cases of contract and land issues - civil matters (disputes between citizen and citizen) - were fought out here. If you wished to recover money from another citizen, you went to this court. "Here came suitors in private property. Here were adjudged quarrels of *meum* and *tuum,* mine and thine. And here the fees were high, the judicial perquisites delicious. 'judges were often the recipients of great gifts and other perquisites in those times'."[1]

The *Court of King's Bench* heard actions by the Crown over things affecting the king, notably breaches of the king's peace - that is, crimes. Crimes such as murders and felonies were tried here. Whereas the Common Pleas court stayed put in London, the King's Bench would travel all over the realm "on circuit" with the king, and later without him.

The *Court of Exchequer* dealt with money and administrative matters that bothered the king, taxation in particular.

The courts kept records of their proceedings on rolls of parchment - known as the Rolls. The keeper of the Rolls for the *Court of Chancery* was called the *Master of the Rolls.*[2]

If injustices could not be dealt with in the three common law courts, subjects would still petition the King direct. Overworked or unwilling, he started to pass these petitions on to the Lord Chancellor. In due course, the petitions were addressed to the Chancellor directly. His separate jurisdiction grew. His office at the Chancery developed its own name - the Court of Chancery - in the 15th century.

These courts' cases formed the nucleus of the common law system. It was a national system for England. There was one body of judges. They either sat at Westminster or travelled to the counties. In common, too, was the procedure of these courts.

The Star Chamber

The Star Chamber (founded in the 15th century and abolished in 1641) was the monarch's Privy Council. It was made up of his private and principal counsellors' sitting as a court. The Star Chamber, built in Westminster, London in 1347, heard cases for which the common law provided no remedy. Five to 15 "Grandees of the Realm" (including the Chief Justices), sat beneath the ceiling "garnished with golden stars". Tudor-Stuart lawyer Sir Edward Coke called it, "the most honourable court (our parliament excepted) that is in the Christian world". Others came to despise it. It used an inquisitorial style (led by the Attorney-General, the court would interrogate the accused) and would resort to torture to loosen tongues. High officials and nobles would be prosecuted in the Star Chamber and kings came to use it to repress them. Punishments could be violent. On occasion, they were tailored to the crimes:[3]

Because Star Chamber covered cases for which the common law provided no remedy, the judges were hard put to invent punishments. There was a grim suitableness to [presiding] Lord Egerton's devices. A man who beat his grandfather was sentenced to be whipped "before the old man's portrait," the old man being unable to leave his bed and enjoy the spectacle in public. When two rascals broke into Fleet Street lodgings and cruelly beat a woman and her maid, Egerton ordered a pillory set up before the house and the culprits flogged there, "gagged with the same gags, each with his own gag, that they had used to the said Mrs Whitingham and her maid".

Some good innovations came from the Star Chamber, notably the action for defamation and refinements on the law of perjury and forgery. But, "[i]t was this court which sought to control lawlessness that was itself to become lawless ... An apocryphal joke relates how people with limbs stitched back on or slung over their shoulder were congratulated by passers-by for winning their appeal."[4]

Writs

As the royal courts became more organised (in the 13th century), the royal judges and legal officers wrote down the common law forms of action in standard form documents called "writs". Technically, a writ was an order or letter from the King under his Great Seal, addressed to the county's sheriff: "The King to the Sheriff of Nottingham, Greetings, We command thee..." It set out the cause of action or complaint. It commanded the defendant to appear in the King's Court.

Each writ was based on some principle of law. The facts were stated in the writ. The writs developed their special names. These writs became a set of pigeonholes. Into them you had to fit your complaint.

For example, a Writ of Replevin was a writ to recover personal property which had been illegally taken. The Writ of Certiorari was an order, issued by the appellate court, whereby if a right of appeal were granted, the lower court had to send the record of the matter up to the higher court. The Writ of Habeas Corpus was used to get a person out of gaol and before a judge or a court. It did not deal with the person's innocence or guilt, only with whether or not a person was legally held. The Writ of Naifty allowed landowners to get runaway serfs (that is, servants) back. Landowners needed their serfs. The Writ of Attachment was an order to seize a debtor's property, and assert the claim of a creditor. The Writ of Ejectment was used to recover land.

The workings of these writs is shown in this letter, sent by the English Attorney General Philip Yorke (later Lord Hardwicke LC), who wanted John Sheppard, a famous gaol-breaker, brought before the Court of Kings Bench: "Mr Paxton, ... Goe forthwith ... and bring me instructions at Westminster, that, if possible, I may move the Court [of King's Bench] this morning for a certiorari and habeas corpus." Thief Sheppard's time had run out. He hanged at Tyburn in London, and "died with much difficulty, and with uncommon pity from all the spectators."

By the time of great law maker, soldier and founder of parliament, Edward I (1239-1307 AD)5 there were more than 400 writs. There was a list or Register of Writs. The writ pigeonholes became too restrictive. Procedures were too rigid. New writs did not develop, for the senior barons resisted this steady growth of the king's power through the courts. No new writs were created after 1285. The judges began to read the existing ones strictly. Only if you could find a suitable writ could you bring an action. Every legal action had to begin with one of these writs. A "precedent" writ could not always be found to suit your grievance. And if your lawyer selected the wrong writ for your action, it might lose you your case.

Each writ was the foundation of a separate form of action and each form of action had its own rules. The proper court, the proper method of pleading and mode or trial, the kind of execution which might be had, or varied with the form of action. To know the rules relating to the various writs, and the circumstances in which different writs were available, was to know the law of England. On the initial choice of the correct writ depended the whole success of an action.[6]

By the end of the 13th century, the writ system had ossified. New, more flexible law - called equity - developed to fill the holes. The rigid medieval writ system was abolished piecemeal in the 19th century, by English legislation. Actions are no longer stated in writ form.

The rise of Equity

When the writ system became too encrusted, litigants complained to the monarch. As we have seen, he passed such matters on to the Lord High Chancellor, the highest judicial functionary in England. (He or she is still the Speaker of the House of Lords and a member of the Cabinet). His Court of Chancery7 developed, where judges tried to do justice or "do equity" in individual cases. This Court adopted principles of good conscience and reason used in canon or church law.

Equity enforced upright, fair and honourable behaviour. You could not go along and get a remedy at these courts unless you had been yourself upright, fair and honourable: "You must do equity to get equity". Equity sidestepped rigidities. It applied where people were not well-versed in the technicalities of the law, but had a reasonable complaint: "God acts as attorney to foolish people", said Paul Vinogradoff.[8] Where the common law had given no remedies to bolster the rights of married women and infants, equity did.

So equity courts softened the rigidities or "black letter law" of the common law or statutes. Lord Denning gives an example.[9] Under a statute of King Edward III, you could not give alms to a beggar who was able-bodied. The Chancellor, however, ruled that you could, if the weather were cold and the beggar's clothing so light that he was likely to die.

The Court of Chancery brought in new remedies, remedies that were unknown to the writs system of the common law courts. Most controversial were injunctions - orders of the court requiring you, under pain of imprisonment, to do something (mandatory injunctions) or not do something (prohibitive injunctions). The common law courts did not issue injunctions. Indeed the Court of Chancery often ordered injunctions to stop someone who had been successful in the common law courts from enforcing his favourable but unconscionable order. Denis Ong comments: "This regular frustration of the common law courts' jurisdiction not unnaturally caused resentment towards the Lord Chancellor by the judges who adjudicated in the common law courts".[10] Nor did the common law courts order specific performance of contracts, another invention from the equity courts. The common law courts could only order damages for a breach of contract.

A third and greatest innovation was the Court of Chancery's preparedness to recognise trusts. Someone might agree to hold, and become the owner of, land and administer it in favour of someone else (say, a child). The common law saw the holder of the land as the owner for all purposes. At common law the holder could simply ignore the "trust" relationship he had accepted. But the Court of Chancery was prepared to look behind the legal ownership of the holder (the trustee) and enforce the rights of the person intended to have the land (the beneficiary). The trustee had to hold the land not for himself, but instead for the benefit of the beneficiary.

Great Lord Chancellors develop the law of equity

Thomas Wolsey and Thomas More were famous Lord Chancellors in Henry VIII's time (early 16th century). Both met untimely ends. But not before they had pushed the law of equity to new frontiers.

Lord Chancellor Wolsey: Under Wolsey, also a Cardinal and founder of Christ Church College, Oxford, the work of the Chancery expanded greatly. The Chancery's court, with an undefined jurisdiction, heard a variety of matters, including criminal issues dealing with good order in the realm. It used an inquisitorial not an adversarial style. It could not sentence anyone to death, but it could order mutilation. For example, in 1637 William Prynne, a barrister, for writing a book which insulted the Queen, was fined heavily, put in the pillory (stocks), degraded, imprisoned and had his ears lopped.

Lord Chancellor Wolsey, of humble stock but high aspirations, ran the Court of Chancery for 14 years. Regarded as high-handed by some, in Shakespeare's King Henry VIII he fared well. "He was a scholar, and a ripe and good one; Exceeding wise, fair-spoken, and persuading."[11] The Chancery Court's conscience-led decision making and new remedies were roundly criticised. Wolsey, who had not come from the ranks of senior barristers (known as serjeants), was scolded for being, "farre from the understandinge and the knowledge of the lawe of the realme and the goodness thereof".[12]

Despite his talents, Wolsey did not last. Amorous King Henry VIII was anxious to divorce Queen Catherine and marry Anne Boleyn. Wolsey, imprudently, opposed this. He was soon ousted as Lord Chancellor, then charged with high treason. He died while on his way to the Tower in London to stand trial in 1530.

Lord Chancellor More Thomas More came next. He lasted but two and a half years. Thomas More issued injunctions freely, to do justice in individual cases; as More put it, "awardinge out Injunctions to relive [relieve] the peopl's injurie..." He would even conduct court business over his evening meal at home.[13] Anne Boleyn was his downfall, also. He compounded the insult of refusing to attend her coronation as Queen by refusing to take an oath acknowledging Henry VIII as Head of the Church of England and renouncing the Pope. On the scaffold More would die, in his last words, "the King's good servant, but God's first." He told the executioner;

> *the law, my honest friend, lyes in thy hands now; here's thy fee; and my good fellowe, let my suite be dispatched presently; for tis all one payne, to die a lingering death, to live in the continual mill of a lawe suite.*

Other Lord Chancellors

Brilliant writer and silken advocate - "the eloquentist that was born in this isle" wrote James Howell[14] - Lord Chancellor Francis Bacon accepted bribes from litigants who were to appear before him. Awbrey gave him 100 pounds "to help Awbrey in his cause". Egerton gave 400 pounds in gold sovereigns. "It is too much. I will not take it," protested Bacon, but he did. Many other bribes he accepted, too. His glittering career ended in 1621 with his confession, trial and judgment for corruption: "after all his height of abundance [he] was reduced to so low an ebb, as to be denied beer to quench his thirst".[15] Nothing undermines justice quite like corrupt judges. Said the Magna Carta (Chapter 29): "Nulli vendemus: to no man shall we sell justice or right." To argue, as Bacon's supporters did, that taking "perquisites" was "customary" did not save him. Good thing, too, and a contrite Bacon recognised this. He took to his sick bed and wrote, "I do plainly and ingenuously confess that I am guilty of corruption; and so renounce all defence, and put myself upon the grace and mercy of your lordships [in parliament]".[16]

But Bacon had presided when the courts of equity triumphed over the common law courts. Said King James I's decree of 1616: "We do will and command that our Chancellor ... shall ... give unto our subjects ... such relief in Equity (notwithstanding any former proceedings at the Common Law against them) as shall stand with the true merits and justice of their cases, and with the former ancient and

continued practice and precedency of our Chancery." This confirmed Chancery's right to issue the remedy of the injunction.

Judge Jeffreys was the least popular of all Lord Chancellors. Rewarding Jeffreys' zealotry in the terror trials of what became known as the Bloody Assizes (suppressing the rebellious west of England), the ill-fated Roman Catholic King James II[17] appointed Jeffreys Lord Chancellor. Jeffreys became too involved in the religious and political struggles of the time, biased in his judging, and violent in his sentences. He sentenced Lady Hisle of Hampshire, who was over 70, to be "conveyed from hence to the place from where you came, and from thence you are to be drawn on a hurdle to the place of execution where your body is to be burnt alive till you are dead". Lady Lisle escaped death by an Act of Parliament, after James II had gone from the throne, because the verdict, "was injuriously extorted by menaces and violence and other illegal practices of George Lord Jeffreys, Baron of Wem...".

In 1688, when King James II fled London, symbolically tossing the Great Seal into the Thames River as he left, Jeffreys planned to flee too. A resentful lawyer spotted him in an ale-house and spread the word. Only the arrival of two militia regiments saved the 41 year old Jeffreys from a well-deserved lynching.[18]

The Chancellor's foot: Not all holders of the office were as brilliant or courageous as Wolsey and More. Justice was only as wise as the incumbent Chancellor's ability allowed. Justice was seen to vary, according to the length of "the Chancellor's foot". So said John Selden in his Table-Talk of 1617, when criticising the variability of the offerings of the Court of Equity: "Equity is a roguish thing ... Equity is according to the conscience of him that is Chancellor: and as that is larger or narrower, so is Equity."

"In Chancery" came to mean that you had no escape without great waste of money and time.[19] In wrestling parlance there is a hold called the "chancery hold", where your head is trapped under an opponent's arm and can be punched heavily. Many litigants know what that is like.

Lord Hardwicke became Lord Chancellor in 1737. He was one of the 18th century's finest lawyers. Lord Campbell in Lives of the Lord Chancellors of England claimed Lord Hardwicke perfected "English Equity into a symmetrical science." Rather too symmetrical, Lord Denning thinks.[20] Lord Eldon was a lacklustre Lord Chancellor in the early 19th century. Unlike today's judges, he wrote dreadfully, delayed interminably in giving judgments, was bigoted and dithered about.

Fusion of common law and equity

To solve, at last, the persistent and unnecessary problems caused by the overlap of common law and equity, the UK legislature enacted the Judicature Acts of 1873 and 1875. They fused common law and equity. They abolished the old separate courts of common law and equity, too. Out went the Courts of Common Pleas, King's Bench, Exchequer and Chancery. In came the High Court of Justice (and its several divisions), with jurisdiction in both common law and equity. Further, if there were conflict between the rules of common law and the rules of equity, equity was to prevail.

This reform spread slowly to the Australian Colonies. For example, the Queensland Judicature Act 1876 provided that equity and common law could both be administered in Queensland courts. But NSW clung on to its separate equity jurisdiction until, unbelievably, 1970. Nowadays, equitable and common law rights and remedies are seamlessly administered in the one court with concurrent jurisdiction.

But principles of equity arise often. Injunctions and specific performance orders are commonplace. So, too, are arguments based on equitable doctrines such as promissory estoppel, constructive trusts and licences of land. In the last 50 years, our "common law" courts have discovered what Lord Denning calls, "the new equity. It is fair and just and flexible, but not as variable as 'the Chancellor's foot'. It is a great achievement."[21]

[1] Bowen, Bacon at 125

[2] The Master of the Rolls presides in the civil division of the English Court of Appeal. Lord Denning is the best known MR. A student once wrote to him saying, -I will ever remain grateful to you if you would kindly help me to begin my professional career with your Company, the Rolls Royce Motor Company

[3] Catherine Drinker Bowen, The Lion and the Throne: the Life and Times of Sir Edward Coke (1552-1634) (Little, Brown and Company 1956) at 112.

[4] Justin Fleming, Barbarism To Verdict: A History of the Common Law (HarperCollins 1994) at 122.

[5] Edward I and predecessor Simon de Montfort, another great soldier and lawmaker, were the founders of the modern parliament. They started the notion of governing with the consent of the people who, after all, had to fund the wars and other schemes of state. (Edward I captured then hanged and quartered - Braveheart Sir William Wallace, the Scottish patriot leader and warrior.)

[6] Windeyer, Lectures in Legal History (2nd ed) at 53.

[7] -Chancery comes from -chancel meaning screen. A chancel separated off the work of the court from the day-to-day activities of the royal household. Apparently, the Chancellor wrote his loftiest documents there behind the chancel, issued writs commencing actions, and used the Great Seal of England to sign or authenticate the documents of state.

[8] -Reasons and Conscience (1908) 24 LQR 375.

[9] In Landmarks in the Law (Butterworths 1984) at 63.

[10] See Denis Ong, Trusts Law in Australia (The Federation Press 1999) at 1.

[11] King Henry VIII (Act IV, sc 2).

[12] See RJ Schoeck in (1960) 76 LQR 500 at 502.

[13] He once settled a dispute between his wife Lady More and a beggar woman over ownership of a runaway dog Lady More had befriended. He placed the dog between the two women and asked them both to call it. Lady More lost in this Solomon-like test. Generous in defeat, she then gave the beggar woman a gold coin to atone.

[14] See Bowen Bacon at 227

[15] (1620) 2 State Tr 1114; see Lord Denning, Landmarks in the Law (Butterworths 1984) at 49.

[16] Bowen Bacon at 199-202

[17] King James II lost his throne in the Glorious Revolution of 1688 to the Protestant William of Orange.

[18] Lord Russell of Liverpool's The Royal Conscience (Cassel London 1961) gives a lively account of the lives of Jeffreys and other Lord Chancellors.

[19] JES Simon, (1960) 76 LQR 429 at 432.

[20] In Landmarks in the Law (Butterworths 1984) at 81. See also Heuston, Lives of the Lord Chancellors 1885-1940 (Clarendon Press 1964) at 72-74.

[21] Landmarks in the Law (Butterworths 1984) at 86.

The Law Society of New South Wales Inter-School Mock Trial Competition

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The Law Society of NSW is developing links with Bond University School of Law. The Law School is currently providing all editorial material and discussion questions for publication in Legal Eagle; providing two scholarships to study law at Bond University to the outstanding advocates in tbe Law Society's popular Mock Trial competition for secondary school students; and also participating in the annual Legal Studies Teachers Conference.

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