

A committee of judges and lawyers has power to make rules for the procedure in the High Court. In exercising this power they are genuinely legislating. They are not bound by precedent, but make such rules as they think proper.

2 Common law and equity

1. EQUITY AND MORALITY. Apart from Common Law and Statute Law, the most important department of our legal system is Equity. We sometimes use the term 'equity', or words corresponding to it, in popular language as if it was something altogether outside law. We speak of a judgement in a particular case or of a rule laid down in a judgement as being undoubtedly according to law, but as being 'unfair', or 'unjust', or 'inequitable'. In cases of this sort we are really passing a moral judgement upon the law. Such a moral judgement in no way affects the law. It may be a reason why the law should be altered by statute; it does not prevent it from being law, or affect its operation, as long as no alteration in the law is made by statute. But when a modern lawyer uses the terms 'law' and 'equity' he does not mean to say that equity is not law. He is speaking really of two different kinds of law—the Common Law on the one side, the rules of Equity on the other—which are equally law. They are rules which are not merely morally but legally binding: they are enforced by the courts.

2. THE RELATION BETWEEN LAW AND EQUITY. (1) The distinction between law and equity occurs in other systems. Thus the *ius honorarium*, developed by the praetor's edict, played a vital part in the development of Roman Law. But while in Rome *ius honorarium* was administered in the same courts as the *ius civile*, in England law and equity, until the Judicature Act 1873 came into effect in 1875, were administered in different courts.

(2) These two sets of rules, though distinct, must not be looked upon as two co-ordinate and independent systems. On the contrary, the rules of Equity are only a sort of supplement or appendix to the Common Law; they assume its existence but they add something further. In this way Equity is an *addendum* to the Common Law.

(3) Further, the rules of Equity, though they did not contradict the rules of Common Law, in effect and in practice produced a result opposed to that which would have been produced if the Common Law rules had remained alone. A Common Law right was practically, though not theoretically, nullified by the existence of a countervailing equitable right. In this sense we may speak of a 'conflict or variance' between the rules of Law and the rules of Equity, in the language of section 25 (sub-section 11) of the Judicature Act 1873 (now replaced by section 49 of the Supreme Court Act 1981).

(4) Though since the Judicature Act came into force in 1875 the rules of Common Law and Equity are recognized and administered in the same court, yet they still remain distinct bodies of law, governed largely by different principles. In order to ascertain the rights to which any given set of facts give rise, we must always ask (i) what is the rule of Common Law? (ii) what difference (if any) is made in the working of this rule by the existence of some rule of Equity applying to the case?

(5) Like the Common Law, the rules of Equity are judicial law, i.e. to find them we must look in the first instances to the decisions of the judges who have administered Equity. But some branches of Equity, like some branches of the Common Law, have been restated with amendments and additions in codifying Acts, such as the Partnership Act 1890.

3. HISTORY. At the end of the thirteenth century we find three great courts definitely established: King's Bench, Common Pleas, Exchequer. All are King's Courts, as opposed to the Communal Courts of counties and hundreds, Lord's Courts, or Ecclesiastical Courts. Each has its proper sphere, but in course of time each of them extends its jurisdiction, so that the same matters may often be dealt with indifferently by any one of them. All these three administer substantially the same law, which, by the time of Edward I, is already called Common Law, because it is a law common to the whole of England; and it is becoming a fairly definite body of rules, capable of growth and expansion in various directions, but still with well-marked boundaries which cannot be transgressed. These courts continued to exist till 1875, and are known as the Common Law Courts.

Standing outside these courts is the Chancellor. He is not originally a judge, nor has he a court. He is the head of a great

Government office—what may be called the secretarial office; he is 'the King's Secretary of State for all departments';¹ whatever writing has to be done in the King's name is done by the Chancellor or through him and his officers.

In one way the Chancellor is already brought into relation with the administration of justice, though not so as to enable him to modify the law at his pleasure. The writs, i.e. the King's commands that a person shall appear in one of the King's Courts in answer to a claim, are issued in his name, as they still are today, and are issued from his office. Many writs are already framed and well recognized to meet the cases that usually arise; you can have them for the asking, if you pay the fee.

The question whether a man who considers himself wronged has a claim which he can make good will depend on the answer to the question: Is there a writ to meet his case, or if there is not one, can one be framed which the King's Courts will hold good? The Chancery, i.e. the Chancellor's office, has a power (Statute of Westminster II 1285) of framing new writs *in consimili casu*—i.e. to meet new cases sufficiently like those for which writs already exist—and new writs are from time to time framed. But here the Common Law Courts manage to get the last word; for they acquired the power, in the fifteenth century, to decide whether the writ is good or not,² and if not, the fact that the plaintiff has got the writ will not help him. In deciding whether a writ is good or not the judges will be guided by the already accepted Common Law principles. Now it will sometimes happen that the working of the law and procedure of the Common Law Courts will result in particular cases in injustice and hardship. We might feel inclined to say: Well, that is a pity, but it would be a greater evil to interfere; it would be worse to make the law uncertain than to leave a particular hardship unredressed. That was not the way that our ancestors looked at the matter. Law and morality were not yet clearly distinguished, nor could one even say that the whole of law or justice was to be found in any one court; the Ecclesiastical Courts, and Local Courts of many different kinds, administered a justice which was not the justice of the Common Law Courts; so the thought was natural that even the King's justice was not exhausted in the power conferred on his courts. A reserve of justice remained with the King, and so those who could not get relief in the King's ordinary courts might, with some hope

of success, petition the King and his Council for redress, if not as a matter of right at least as a favour. These petitions in practice were referred to the Chancellor, who was the chief minister and secretary and the most learned member of the King's Council. In course of time these petitions came to be addressed direct to the Chancellor himself.

Putting aside what does not concern us here, cases where the petitioner asked for redress against the King himself, we may note two kinds of cases where this extraordinary relief is asked for: (1) where the petitioner has suffered an undoubted legal wrong—been assaulted and beaten, or turned out of his property, but for some reason cannot get redress, because he is poor and his opponent is rich and powerful, because juries are corrupt or timid. In this class of cases redress was given in the Middle Ages sometimes by the King's Council and sometimes by the Chancellor. In the sixteenth and early seventeenth centuries this jurisdiction was abandoned by the Chancellor and passed to the Court of Star Chamber. When the Court was abolished in 1641 the Common Law Courts had become strong enough to give adequate redress. (2) Cases of transactions which give, at any rate, a moral right, but a right which the Common Law Courts cannot or will not protect. In particular we find the cases of what are called 'uses' or trusts—transactions whereby a man legally transfers land to another, but with an understanding that the transferee will hold it for the benefit of the former, or for the benefit of those whom he will name in his will. The Common Law has already very strict notions as to the kinds of rights in land which it will protect, and the methods of transfer which it will allow. Uses and trusts the Common Law will not recognize; wills of land, it has decided, are void (unless established by local custom—it was not till 1540 that a statute was passed giving power to leave land by will). But the practice of creating these uses and trusts was popular and was growing, and the absence of all legal protection for them was a great hardship. So we find, by the end of the fourteenth century, that persons are directing petitions to the Chancellor, claiming that they have at least a moral right to the benefit of these uses, and begging him to give them help against the legal owner who is setting up his Common Law rights against them.

Now the Chancellor is at this time usually an ecclesiastic, commonly a bishop, and, as such, interested in, and, at least in

his own opinion, a good judge of questions of morality or 'conscience'. He is commonly spoken of as the keeper of the King's conscience. What can he do to help the humble suppliant? He cannot interfere directly with the proceedings of the Common Law Courts; he cannot issue a new writ which will have much chance of being held good by those courts. But he can do this: he considers the petition, or Bill, as it is called; if he thinks there is anything in the case, he issues a writ which requires the person complained against to appear, not in a Common Law Court, but before himself, and answer the petition on oath. The writ is called a *subpoena*, because it requires him to appear upon pain of forfeiting a sum of money.

When the defendant comes before the Chancellor, he will have to answer the Bill on oath. This is very different from the Common Law procedure, which will never compel, or even allow (at that time), one of the parties to an action to give evidence; but it is a procedure, and the only procedure, which is suitable for trying such questions as uses and trusts, for which no open public acts, no formal documents may be available as evidence. So, too, the Chancellor tries the whole case himself; he does not—as must be done in Common Law cases—send it to be tried by a jury. It is true that in later times particular questions arising in a case before him, suitable for trial by jury, are sometimes directed by the Chancellor to be so tried.

Suppose now that the Chancellor has decided in favour of the petitioner, and has held that the land which legally belongs to the defendant ought to belong, or, 'in conscience', in equity, morally, does belong to the petitioner. What will he do? He cannot reverse the rule of Common Law; he cannot interfere—at least directly—with proceedings in the Common Law Court; he cannot say that the legal owner is *not* the legal owner. What he can do is to say that the legal owner cannot in conscience, in equity, make use of his Common Law right for his own benefit; he must use it for the benefit of the man for whom he holds it in trust. He does not stop at saying so. He can, if the legal owner will not act as equity and conscience dictate, punish him, if necessary, by putting him in prison. He can even indirectly, but effectively, interfere with the legal owner's attempts to enforce his legal rights by action in the Common Law Courts. He cannot forbid the Common Law Courts to try an action; but he can forbid a man to bring it, or to

go on with it, or to take advantage of the judgement which he has got, and can put him in prison if he does not obey. He has the less scruple in issuing such orders because he can say that he is really doing what is in the man's own highest interest. If he is doing what is against conscience, he is injuring his soul—remember that the Chancellor is an ecclesiastic—and it is better that he should be prevented from inflicting such injury on himself.

This sort of interference, which had started as a matter of special favour in special cases, gradually becomes a regular practice. It becomes popular; uses and trusts become part of the ordinary machinery by which people deal with their property; they even lend themselves to abuse, which has to be checked by Acts of Parliament in the fourteenth, fifteenth, and sixteenth centuries. The Chancellor develops what in effect is, and comes to be known as, a court—the Court of Chancery. And then that general principle of Equity, which began as the mere application of moral sense to particular cases, develops into more and more definite rules. If a Chancellor has decided that certain conduct in one case is against conscience, he is likely to decide that similar conduct is against conscience in another: the chances are that another Chancellor will decide the same. You get what in reality is a new set of rules of law—rules which you can rely on as likely or certain to be applied uniformly in the future. And you get a new set of rights—rights which can be enforced in the Chancellor's Court side by side with the Common Law rights, which alone can be enforced in the Common Law Courts, the former in effect, though not in theory, overriding the latter. You even get to think of two sorts of ownership. From saying that a thing ought to belong to a man, that it ought to be used for his benefit, you come to saying that it actually is his, 'in equity' or 'in conscience'.

A few points in the development of Equity may be here noted.

In 1535 Henry VIII struck a blow at uses in the Statute of Uses. The King's main object in forcing the Act through Parliament was to regain the revenue from the perquisites enjoyed by a feudal lord and paid or owed by his tenants, known as the incidents of feudal tenure³ which had been depleted by the practice of conveying land to uses (see below, Chapter 5). The statute enacted that where A was seised (i.e. possessed) of a freehold interest in land, to the passive use that he allow B to enjoy the land, B's equitable interest should be turned into a legal interest.

The result was that in these cases the separation between legal and equitable ownership ceased. But this separation still continued in the cases to which the statute did not apply—e.g. if the trustee had active duties to perform, or if he was possessed, not of a freehold, but of chattels real or personal to another's use. Moreover, the effect of the statute, in preventing the separation between legal and equitable estates in the cases to which it applied, was nullified in the latter half of the seventeenth century, by the decision of the Chancery to protect trusts declared upon the uses which the statute had turned into legal estates. If X gave land to A to the use of B, B got the legal estate by the Statute of Uses; but if X gave land unto and to the use of B in trust for C, B was the legal owner of the land and C the equitable owner. Thus, under the name of trusts, equitable rights in land grew up again and flourished.

From the Reformation onwards the Chancellor was usually a layman: Bishop Williams under James I and Charles I was the last clerical Chancellor. Again the Chancellor comes to be usually a lawyer: Lord Shaftesbury under Charles II was the last Chancellor who had never been a practising lawyer. All this tends to create a more definitely legal character for the rules of Equity.

Meanwhile Equity is adding new fields of jurisdiction. In the sixteenth century and the beginning of the seventeenth, *fraud* and *accident*—especially the accidental loss of a document—are regarded as matters peculiarly appropriate for relief in a Court of Equity—matters which a Common Law Court cannot sufficiently deal with. Mortgages form a special subject which the Chancellor deals with. A man borrows money and transfers his land to the creditor, making the creditor legally owner. He promises to pay on a definite date. If he keeps his promise, his land is to be returned to him; if not, it is to belong to the creditor for ever. Suppose by mistake or accident he fails to repay on the day named, is it fair that he should be held to the terms of the deed? Equity says no, and soon goes so far as to lay down a rule that a mortgage is a mere security for money, and something quite different from a genuine transfer of the ownership. The debtor remains in a sense owner; he has a new sort of equitable ownership, 'an equity of redemption', which he is only to lose after the court has given him ample opportunity to repay, and it becomes plain to the court that he cannot or will not pay.

In the seventeenth century the Chancery had to struggle for its independence against the Common Law Courts. They resented the way in which the Chancellor interfered—in effect though not in theory—with their judgements, by prohibiting the man who was successful at Common Law from putting them into force. A great quarrel broke out between Chief Justice Coke and Lord Ellesmere, the Chancellor: it was decided by King James I in favour of the latter. Under the Commonwealth there were proposals for reforming, and even abolishing, the Chancery. Its extraordinary jurisdiction in civil matters was compared with the extraordinary jurisdiction of the now defunct Star Chamber in criminal matters. These proposals came to nothing. Somewhat similar proposals at the time of the Revolution of 1688, for subjecting the Chancery to the control of the Common Law Courts, were rejected. It was clear that Chancery was doing work which the Common Law Courts could not or would not do, and without which men's rights could not be sufficiently protected. Equity had come to stay as part of the law of the land.

The work increases. The Master of the Rolls, who is originally a very subordinate officer, with charge of the documents of the court, comes to be at the end of the seventeenth century a judge who can hear Equity cases, though there is an appeal from him to the Chancellor. For a long time these two between them do most of the Equity work, though the Court of Exchequer has also developed an Equity jurisdiction, an 'Equity side', which, however, is handed over to Chancery in 1842: it is now administered by the King's Bench Division of the High Court. The work of the court was too much for the judges; and this cause of delay was aggravated by the dilatory character of the procedure, and by the time which some of the Chancellors took to consider their decisions. At the beginning of the nineteenth century we find Lord Eldon sometimes keeping a case for ten years to think over, and not delivering judgement till perhaps most of the parties were dead and most of the property had gone in costs. Early in the nineteenth century additional judges, called Vice-Chancellors, were appointed—first one, later three; and a Court of Appeal in Chancery, intermediate between the Vice-Chancellors and the House of Lords, was established in 1851. The old dilatory procedure was reformed in 1852. The Chancellor gradually retired from acting as judge of first instance, and

reserved himself for the Court of Appeal in Chancery and for the House of Lords.

Finally, the Judicature Acts in 1873–5 abolish the old Court of Chancery, as they abolish the Common Law Courts and certain other courts, and establish a new court—the High Court of Justice—which has all the powers of a Court of Common Law and a Court of Equity, and in which both sets of rules, the rules of Law and the rules of Equity, are administered; but in which, if there is 'conflict or variance' between them, the rules of Equity are to prevail. The court has now three divisions: a King's Bench Division, a Chancery Division, and a Family Division (successor to the Probate, Divorce, and Admiralty Division, of which something will be said in Chapter 3). The King's Bench and Chancery Divisions are no longer distinct courts, though, as a matter of working convenience, matters which involve mainly the Common Law come before the King's Bench; those which largely involve Equity come before the Chancery Division. But there is no hard and fast line: a plaintiff will often have a choice in which division he will start his action, and the rules of Law and Equity are equally applied in both.

4. THE MAIN SPHERES OF MODERN EQUITY. Before discussing the effect which the Judicature Acts have had in combining Law and Equity in one court, it will be convenient to note some of the branches of Law in which Equity has made important additions to the Common Law and done work which the Common Law could or did not do.

First in the law of property. The trust is still with us. We make settlements by which we provide that property shall devolve from one person to another within the limits which the law allows, e.g. to a man, then to his wife, then to be divided among his children. Before 1926, if we were dealing with *real* property in the strict sense, i.e. freeholds and copyholds, it is true that the trust was not necessary. Common Law allowed us to cut up a freehold estate into successive estates, each recognized by Common Law. But we shall see that, since 1925, this is not possible (see p. 83), so that the only way in which future interests in any kind of property can be created is through the machinery of a trust. So with mortgages. Till 1926 we had not invented a way of mortgaging property without creating equitable interests. Before 1926, either the debtor conveyed the legal right to a mortgagee,

and retained an equitable interest—the ‘Equity of Redemption’—or else he retained the legal right himself, and gave an equitable interest to the lender, as by a deposit of title-deeds. The latter form of mortgage is still possible; but, instead of the former, a form of mortgage has been invented under which both mortgagor and mortgagee take legal estates (see pp. 92–4).

Very characteristic in connexion with these equitable interests is the doctrine of notice, or, more fully, the doctrine that an equitable interest is good against everyone who gets hold of the property, unless he has the legal ownership and acquired the property for value without notice, i.e. without knowledge of, and without reason to suspect, the existence of the equitable interest. At the present day, however, the rights of the purchaser of the legal estate for value without notice are diminished by the Land Charges Act 1972, which has in certain cases prevented such a purchaser from defeating the rights of the equitable owners, by enabling certain rights in the land to be registered, and providing that registration is equivalent to notice. Common Law knows next to nothing of notice. At Common Law either you have got no rights at all, or you have rights which are good against everyone, notice or no notice. That doctrine of notice has got into the Common Law in one or two places, e.g. in the law about the sale of goods in market overt, and in the law of negotiable instruments; but, broadly speaking, whenever you have got rights which depend upon notice, you may be pretty sure that you are in the sphere of Equity.

Then as regards contracts. Notice, first, the doctrine of undue influence. Common Law treated a contract as voidable if made under duress, i.e. threats of violence to life or limb; it took no account of more subtle forms of pressure—the unfair advantage taken of a man in distressed circumstances, the influence exercised in certain relations, such as that of a guardian and his former ward, or solicitor and client. But Equity treated such pressure as a ground for holding the transaction voidable. It would not allow it to be enforced against the promisor; and if property had been transferred, the recipient was treated as holding it for the benefit of the person who had parted with it, and as bound to restore it. So in the case of fraud and misrepresentation Equity interfered, though Common Law took account of them too. It is not clear that the rules in Common Law

and Equity were quite the same on these subjects; but, at any rate, Equity had a special protection for the party who had suffered. Common Law might enable the defrauded party to resist an action brought against him on the contract; Equity could order the document to be handed up and destroyed or cancelled. That might be a necessary protection in order, e.g., to prevent a cheque obtained by fraud from getting into the hands of an innocent holder, who would be in a better position than the original party to the fraud. So, too, Equity might order a document executed under a mistake to be rectified; Common Law would at most treat it as void.

Then there are the rules about time and penalties. Common Law would treat a provision in a contract as to time as being ‘of the essence of the contract’, meaning that if a certain act was not done by one party within a certain stipulated time, he should lose all rights under the contract; Equity treated such a provision in general as not being of the essence of the contract, but as giving a right only to damages. Again, where a contract provides, e.g., that A shall pay £100 on 1 January next, and if he does not do so, shall pay £200, Equity would not allow the £200 to be claimed, but treated it only as a security for the £100 with interest. The equitable rules about penalties were, however, to a large extent already introduced into the Common Law Courts by statutes passed at the end of the seventeenth and early in the eighteenth century.

Again, we have the rules about the assignment of rights under contract. A owes money to B. Common Law regards this as purely a relation between A and B. B agrees with C that C shall have the right to claim the debt from A. Common Law pays no attention, C cannot claim the debt. The most that can be done is that B may allow C to use his name to claim the money. But Equity treats the debt as transferable. It will compel B to let C make the legal claim in his name; in the last resort it might allow C to take proceedings in Equity in his own name against A. Thus it came to be said that ‘in Equity debts and choses in action are assignable’.

Further, we must notice the law about married women. Common Law put the wife, both as regards rights and liabilities, in a very subordinate position to her husband. Her tangible movable goods simply became her husband’s property. Debts

due to her might be collected by the husband; and if that was done, of course the money was his. If he did not collect it, and the wife survived him, the claim for the debt remained hers. Her freehold and copyhold land, it is true, remained her own; but the husband had the enjoyment of it at least during the continuance of the marriage. Neither could dispose of the inheritance without the consent of the other. Leaseholds were in a position very much like debts. The husband had a right to dispose of them for his own benefit while he lived, and his wife had no power of disposition during that time, though, if she survived him, and they had not been disposed of, they would be hers again. Further, no married woman could make a will without her husband's consent, nor (with trifling exceptions) make any contract, except as agent either for her husband or for some other person: it would have been absurd to let her contract when she had no free property out of which she could pay. But then about the end of the seventeenth century Equity invented the separate use for married women. Property might be given to a trustee upon trust for the separate use of the married woman, free from the control and liabilities of her husband. Now, if it had simply been given to the woman, Common Law would have said, 'We can pay no attention to this separate use. If it is the woman's, it comes under the husband's control, in spite of anything you say to the contrary.' But then the property was not given to her; it was given on the face of it to the trustee. Common Law could not prevent the trustee employing it for the wife's benefit, and Equity would compel him to do so. And then Equity went one step further. Suppose a man who knows nothing of trusts and trustees, but has heard something of the separate use, leaves property—say £1,000—to his married daughter 'for her separate use'. The husband pounces on it; the Common Law makes it his. But Equity will not be baulked. True, the £1,000 belongs to the husband at law—there is no denying it; but Equity will compel him to apply it for the wife's benefit. Has not the testator, in fact, declared a trust in saying 'for her separate use'? Nothing easier than to turn the husband into a trustee for his own wife. And so this property held for the wife's separate use comes to be her 'separate estate' in Equity. Equity treats her as if she was the unmarried owner of it; it lets her dispose of it as she pleases in her lifetime, it lets her leave it by will, it even lets her make contracts

which can be enforced against it, and against it only. And then Equity gets afraid of what it has done. If the wife can so easily dispose of this property, it may be that her husband will coax or bully her into parting with it to him or to his creditors, and so it allows her a privilege which no other grown-up person of sound mind in the country can enjoy. The will or settlement may impose the restraint on anticipation. In that case, no act of the married woman is to affect her right to the capital or future income of the property. It is just because the whole of this institution of married women's property existed in Equity only that Equity could mould the institution just as it pleased. Thus it was through Equity that a married woman acquired a limited and special capacity to own property and to make contracts. We shall see that in the nineteenth century this limited and special capacity was extended with some modifications to all married women (see pp. 48–52); but that in 1935 it was swept away, and married women were given the same capacity to own property and make contracts as a man.

And then, finally, look at what Equity can do for the successful plaintiff—the 'remedy', the 'relief' which it can give him. With few exceptions the only thing that Common Law can do is to give him *money* compensation. If you have been wrongfully turned out of your land, then, it is true, Common Law will put you back into possession; but this is practically the only exception from the rule that the Common Law remedy for every wrong and every breach of contract is *damages*. With the one exception mentioned, Common Law will not order a defendant to do anything except pay money. It is a much easier order to enforce. It is easier to say whether a man has paid the money or not than to say whether he has complied with other orders; and if he fails to pay, it is easy to get the money by selling his goods, if he has any. But it is not always satisfactory to the plaintiff. It may not be money that he wants; and even if he would be satisfied with money, it may be very hard to say what would be a fair compensation for his loss, and a jury may not be the most suitable body for assessing it. Suppose a contract for the sale of land; the seller refuses to perform it. In the eye of the Common Law there is plenty of land as good elsewhere; but the purchaser has set his heart on just this piece of land, and damages (even if liberally assessed, which is not always the case) are not what he wants. Or suppose the purchaser

backs out. It may be of vital importance to the seller to get the money instead of the land; but he will rarely succeed in getting more than his out-of-pocket expenses. Or suppose, again, that your neighbour has agreed with you that he will not open a public house or carry on a school of music next door, and does and threatens to continue doing one or the other; or that you have a right to light for your windows, and he threatens to erect a building within three feet of them. In all such cases you may not be satisfied to receive even large damages for the wrong done; and what the amount of damages is to be may be very uncertain. At any rate, if damages are the only thing to be got, your wealthy neighbour might buy the right to annoy you. It was to meet cases of this kind that Equity invented the great remedies of *specific performance* and *injunction*: specific performance to compel a man actually to do what he has promised—to give you the land in return for the money, to pay you the purchase money in return for the land; injunction to forbid him to do what he has promised not to do or what he has no right to do—to forbid him to open the public house or the music-school, to forbid him to build so as to block up your light, even to compel him to pull down the objectionable wall; the last sort of injunction is called *mandatory*.

5. THE EFFECT OF THE JUDICATURE ACTS. Now, what have the Judicature Acts 1873 and 1875 done?

(1) It may be noted that these acts were replaced by the Supreme Court of Judicature (Consolidation) Act 1925, which has itself now been replaced by the Supreme Court Act 1981, and by certain provisions in the Limitation Act 1980 (consolidating earlier Limitation Acts).

(2) They have established a single court with all the powers both of a Court of Law and a Court of Equity. The distribution of work between the divisions of that court is only a matter of convenience; the King's Bench Division can never say 'here a matter of Equity is involved; we cannot decide it', or the Chancery Division 'this is a question of Common Law; you ought to have gone to a Common Law Court'. At the worst the plaintiff who starts in the wrong division will be removed to another division, and may have to pay the expenses, if any, incurred by his mistake; but he cannot fail altogether for his mistake.

(3) Multiplicity of proceedings is avoided. Suppose a dispute about a piece of land. A is the legal owner; B has an equitable

claim. Under the old system A takes proceedings in the Common Law Courts to establish his rights; B has no legal defence; he must go to the Court of Chancery to get, among other things, an injunction to forbid A to go on. Under the Judicature Acts no injunction can be granted by one division of the court against proceedings in another division; but in every branch of the court an equitable right may be directly asserted and may be pleaded as a defence to a legal claim. So, again, suppose A is blocking up B's light. Under the old system B might have had to bring two actions against A: in the Common Law Courts to get damages, in the Chancery to get an injunction to forbid the continuance of the building. He can now get both in the same action, because the same court can both give damages and also grant an injunction. Or suppose that A has broken his contract to sell land to B; here, again, B might have had to bring one action in a Common Law Court for damages, and another in the Chancery to compel specific performance. Or, again, A has a purely legal claim against B; but in order to prove his case he wants to make B disclose facts or documents which support A's claims. There A would have had to take proceedings for 'discovery' against B in Chancery to get the disclosure, and another action in the Common Law Courts for his actual claim. He now brings an action in the High Court, in the course of which he gets an order for discovery, B is compelled to disclose the documents which he has that support A's case, and A may be allowed to administer interrogatories to B—questions in writing which B must answer also in writing but upon oath.

(4) On the other hand, the old Chancery practice which compelled B to go through the whole of A's story and give an answer upon oath to everything said in it has disappeared; the evidence in the ordinary course is given *viva voce* in court when the trial comes on.

(5) The Acts introduced a whole code of procedure, the Rules of the Supreme Court, which in various ways assimilated the Common Law and the Equity procedure, taking the good points of both.

(6) The 25th section of the Act of 1873 dealt specially with a number of points in which there was a difference between Law and Equity, of which the following may here be mentioned:

(a) Mortgages. Common Law treated the mortgagee as the owner of the land in case of the ordinary legal mortgage; Equity

treated the mortgagor as still being in a sense owner. It is true that it would not prevent the mortgagee taking possession, though it made his position in some degree uncomfortable if he did take possession. But suppose that, as usually happens, the mortgagor is left in possession, and that a stranger turns him out, or tries to do so. Common Law found a difficulty in protecting him against the stranger. The mortgagee would have to be joined as plaintiff. The Judicature Act decided that as against a stranger the mortgagor in possession must be treated as owner. He can sue in his own name. We shall see that the Law of Property Act 1925 has changed the form of the ordinary legal mortgage (see pp. 92-4). But the same rules as before are applicable to a mortgagee who takes possession, and to a mortgagor who is in possession.

(b) Assignment of debts and choses in action. Here you remember that Common Law would not recognize the assignment; Equity in effect would, by compelling the assignor to lend the use of his name to the assignee for the purpose of suing the debtor, or, in the last resort, allowing the assignee to sue directly against the debtor, but requiring him, as a rule, to make the assignor a defendant. Here the Judicature Act made a definite alteration in the law. It left the old equitable assignment untouched, and it may be used still. But it created a new kind of assignment, which was a legal assignment in the sense that the assignee might sue directly in his own name without making the assignor a party; but it made certain special requirements: (1) the assignment must be absolute, (2) it must be in writing, (3) notice in writing to the debtor is required. (This series of provisions in the Judicature Act is repealed and substantially re-enacted in section 136 of the Law of Property Act 1925.) None of these requirements applies to an equitable assignment, but priority as between two assignees of the same debt depends on priority of notice to the debtor, and for this purpose an unwritten notice is unavailing. On the other hand, the new kind of assignment resembles the equitable assignment in being subject to equities, i.e. to claims or defences which the debtor or other person might have set up against the assignor.

(c) The rules of Equity as to stipulations about time and other provisions which would not be held by Equity to be of the essence of the contract, are to prevail in all cases.

(7) Finally, the 25th section (now substantially re-enacted by section 49 of the Supreme Court Act 1981) contains a general provision that in all other matters where there is a conflict or variance between the rules of Law and the rules of Equity the latter are to prevail. This last provision looks so sweeping that there is a danger of supposing that it has swept away all difference between legal and equitable rights. That would be a great mistake. One might imagine, for instance, that it has turned equitable estates and rights into legal estates and rights. That is not so. The great characteristic of equitable estates, namely that they will be destroyed if the legal estate gets into the hands of a purchaser for value without notice, still holds good. A is a trustee of property for B, i.e. A has a legal right which he is bound to use for B's benefit; B is said to have an equitable right to it or an equitable estate in it. Since the Judicature Act, just as much as before it, if A sells the property to C, who knows nothing of the trust, and transfers the legal ownership to him, B's rights to the property are destroyed; he can only look to A for compensation for the breach of trust. Or, again, one might suppose that this section has extended equitable doctrines to cases to which Equity did not apply them, because they formerly never came into a Court of Equity. One might suppose that since they now come into a court with an equitable jurisdiction, the equitable doctrine must be applied. We shall see that Law drew a clear distinction between innocent and fraudulent misrepresentation. The latter was regarded as a tort, for which an action for damages was available. But damages could not normally be obtained for an innocent misrepresentation. Equity regarded the distinction as of less importance, in the sense that if a representation were untrue, whether to the knowledge of its maker or not, and were a material factor in inducing another party to enter into a contract with him, that party was entitled to rescind the contract if he were plaintiff, or resist specific performance if he were defendant. The passage of the Judicature Act tempted some people to think that damages might now be obtained for innocent misrepresentation. But the impression was soon shown to be erroneous. Apart from fraud, and certain exceptional cases, damages could be obtained only if the representation were fundamental, so as to constitute a condition, or must be ranked as a warranty, collateral to the main contract, such as a statement concerning the soundness of a horse.

However, the Law Reform Committee in 1962 recommended that courts should be permitted to award damages, at their discretion, in all cases involving innocent misrepresentation. This was substantially enacted by the Misrepresentation Act 1967 (see also pp. 119–20), and now the court may treat a contract as still subsisting despite the existence of innocent misrepresentation, and award damages to the injured party, instead of rescinding the contract.

The general result of the fusion of Law and Equity has been, then, not to alter substantive law, but rather to alter and simplify the procedure. In order to find out what the substantive law is, we must still go back to the time when Law and Equity were administered in different courts; we may still have to picture to ourselves distinct proceedings taken about the same matter in those courts, and work out the result of those separate proceedings. Yet signs are not wanting that the mental effort of doing so is one which will become more and more difficult as the memory of the distinct courts of Law and Equity dies out; and perhaps already the unified jurisdiction of the High Court, and the statutes which have codified certain branches of Common Law and Equity, have produced some results which could hardly have been given by any combination of proceedings in the separate courts, or by the development of the law solely by means of cases decided in them.

3 Other bodies of English law

There are three other main bodies of English law: Probate, Divorce, and Admiralty, which were developed in jurisdictions distinct from the Common Law Courts and the Court of Chancery. (It is not intended in this book to deal specially with the law administered in the modern Restrictive Practices Court, Employment Appeal Tribunal, or other specialist tribunals.) In these other bodies of law we see more influence of foreign law than elsewhere in our legal system.

1. THE CHURCH COURTS. From William the Conqueror onwards the Church Courts are separated from the Lay Courts: the Bishop has his court; the Archbishop a superior or prerogative court; from him before the Reformation there is an appeal to the Pope. The law of these courts is the Church or Canon Law—the Common Law of the Western Church. That law was formed by ecclesiastical lawyers who knew the Roman Law. It was first systematized by Gratian of Bologna in the twelfth century. It was the law of the Church in England, as in other parts of Western Europe, though within limits local and provincial variations were possible. Though these courts were in no sense treated as subordinate by the King's Courts, the latter would issue prohibitions to prevent them from dealing with matters that did not concern them. But the scope of their actual and proper jurisdiction was large. With a great part of the matters with which they dealt we have not much concern. Their exclusive claim to punish clergymen for ordinary offences has long since disappeared; the power to try and punish laymen for immorality has become practically obsolete; their jurisdiction over the matters of ritual, and ecclesiastical offences of clergymen, such as heresy, still remains and is still exercised by them. In the struggle between them and the King's Courts for jurisdiction over ecclesiastical property—the right to present a clergyman to a living, for instance—the King's Courts were successful at an early time in getting and keeping the jurisdiction