PATTERNS OF FUSION

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Imagine a system of mathematics where there were blue numbers and red numbers, descended from two historically distinct sources of arithmetic. The red numbers were developed chiefly in order to supplement and vary functions performed with blue numbers. Blue and red numbers could be combined validly in some functions and operations, but not in others. The rules for permissible combinations were complicated and arcane. Mathematicians differed over which combinations were permissible: some insisted on traditional compartmentalizations; others favoured increased blending of the two number systems; others still wanted the historical distinction abolished and replaced with one unified set of black numbers. Traditionalists damned the integrationist black integer theory as the `fusion fallacy'. Meanwhile the higher number theorists, who were devoted to orderly classification and analysis of the fundamental structure of mathematics, despaired of progress. If `law' and `equity' are substitued for blue and red number systems, then we have an approximation to the problem of fusion in Anglo-Commonwealth law. The parable suggests that a clear analysis of the place of equity in ancient and modern law is necessary work if we are to assess the prospects for a rational classificatory system of private-law obligations.

1 *Fusion or Convergence?*

Law and equity today are not fused, but they are rapidly converging.[1] A final union of legal and equitable doctrine in the one body of law may yet be impossible, simply because the historical and conceptual bases of legal and equitable actions are too distinct. The sticking point has always been the continued existence of the trust -- indeed, it was regard for the trust that prevented full fusion being attempted when the Judicature Acts of 1873-1875 were first drafted and debated.[2] Jessel M.R. suggested that in the wake of the Judicature Acts trusts could be equated with legal estates, and thus recognized as conveyancing devices. His idea that `legal and equitable estates are now one'[3] has not

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[1] A note on terminology: by `law' and `legal rights' I generally mean doctrines of the common law, originating from the royal courts of justice. By `equity' and `equitable rights' I generally mean the family of doctrines and remedies that were originally formulated and administered by the English courts of Chancery. The notion of equity also embraces the broader concept of particular or fact-sensitive justice, identified by Aristotle in the Nichomachean Ethics, 1137a-b. Beyond these meanings, equity can also mean simple fairness or aequum et bonum. Common law is usually contrasted with the first type of equity; occasionally with the second; with the third only in extremis. For a fuller analysis see F. Tudsbery, `Equity and the Common Law' (1913) 29 L.Q.R. 154; J. Hackney, `More than a touch of the old philosophy', in this volume.

[2] Lord Selborne L.C. in his first reading of the Supreme Court of Judicature bill to Parliament affirmed that no substantive fusion of law and equity could be contemplated because of the sanctity of the trust: `If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate... The distinction, within certain limits, between law and equity, is real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded'. See further Sir Raymond Evershed, `Reflections on the Fusion of Law and Equity After 75 Years' (1954) 70 L.Q.R. 326; R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, Equity: Doctrines and Remedies (3rd ed., Sydney, 1992) 36-46; Salt v. Cooper (1880) 16 Ch.D. 544 at 549 per Jessel M.R.; Joseph v. Lyons (1884) 15 Q.B.D. 280 at 285-286 per Cotton L.J. and 287 per Lindley L.J. (C.A.); P.M. Perell, The Fusion of Law and Equity (Toronto, 1990) 1-33.

[3] Walsh v. Lonsdale (1882) 21 Ch.D. 9 at 14-15 per Jessel M.R.

been accepted; Walsh v. Lonsdale has not been a latter-day Statute of Uses.[4] Trust law with its distinctly equitable foundations cannot easily be confined as the equitable branch of property law; good conscience doctrines cannot be quarantined and kept out of the rest of private law including obligations; the implication of constructive and resulting trusts and fiduciary doctrine make sure of that.[5]

In recent times the efforts of Lord Denning and Lord Diplock to fuse equity and common law were not notably fruitful. They did not address the doctrinal autonomy of trust institutions, and the fusion they called for therefore lacked a programme. Perhaps their motivations were diametrically opposed: Diplock might have liked equitable glosses to have vanished from the law, and Denning for equitable techniques to take over the common law.[6] Now the wind blows the other way, with courts favouring the continued distinction of legal and equitable doctrine. In the Westdeutsche case,[7] the Law Lords strongly affirmed the importance of the trust and its roots in the unique Chancery jurisdiction to restrain an unconscionable insistence on a legal right. The lead majority speech by Lord Browne-Wilkinson stressed the `uncontroversial' equitable theory that a trust arises whenever the legal owner becomes `aware...of the factors which are alleged to affect his conscience'.[8] The dissentients Lord Goff and Lord Woolf argued further that the jurisdiction of conscience in Chancery provided a special source of legitimacy for modern judges to do equity or `practical justice' when the existing law was inadequate,[9] going beyond Lord Browne-Wilkinson's limited project of remoulding existing legal property rights.[10] A separate equity consciousness

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[4] See the discussion in Chan v. Cresdon Pty. Ltd. (1989) 168 C.L.R. 242, 250-256 per Mason C.J., Brennan, Deane and McHugh JJ. (H.C.A.); and Sir Anthony Mason, `The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 L.Q.R. 238 at 241-242; Meagher, Gummow and Lehane, op. cit., 55-59. Some commentators have argued that Jessel M.R.'s Walsh v. Lonsdale doctrine was a legitimate development of the equitable doctrines of specific performance and estate contracts quite apart from any questionable fusionary intent: see S. Gardner, `Equity, Estate Contracts and the Judicature Acts: Walsh v Lonsdale Revisited' (1987) 7 O.J.L.S. 60; cf. P. Sparkes, `Walsh v Lonsdale: The Non-Fusion Fallacy' (1988) 8 O.J.L.S. 350.

[5] S.J. Stoljar, `Unjust Enrichment and Unjust Sacrifice' (1987) 50 M.L.R. 603, 609-610; W.M.C. Gummow in `Unjust Enrichment, Restitution and Proprietary Remedies', in P.D. Finn, ed., Essays on Restitution (Sydney, 1990) 78-80.

[6] See e.g. United Scientific Holdings Ltd. v. Burnley B.C. [1978] A.C. 904 at 924-925 per Lord Diplock (`to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is...conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years... The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery...were fused'); Bridge v. Campbell Discount Ltd. [1962] A.C. 600 at 632 per Lord Denning (`Now...equity and law are one'); Federal Commerce and Navigation Ltd. v. Molena Alpha Inc. [1978] Q.B. 927 at 974 per Lord Denning M.R. (`Over 100 years have passed since the Judicature Act 1873. During that time the streams of common law and equity have flowed together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Judicature Act? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?'). For criticism see P.V. Baker, `The Future of Equity' (1977) 93 L.Q.R. 529; Meagher, Gummow and Lehane, op. cit., 46-59, 64-70; J.E. Martin, Hanbury and Martin's Modern Equity (14th ed., London, 1993) 13-25.

[7] Westdeutsche Landesbanke Girozentrale v. Islington L.B.C. [1996] 2 All E.R. 961.

[8] [1996] 2 All E.R. 961 at 988.

[9] [1996] 2 All E.R. 961, 979-981 per Lord Goff; 1003-1005 per Lord Woolf. Cf. Harsant v. Blaine, MacDonald & Co. (1888) 56 L.J.Q.B. 511, where the Court of Appeal allowed the interest awards of equity to be applied to a common-law quasi-contractual money claim as a direct and simple result of the Judicature Acts.

[10] [1996] 2 All E.R. 961 at 988-989, 998-999.

is alive and functioning in English law.

A classical defence of equity's special role in the enforcement of good faith and conscience was given in Canson Enterprises Ltd. v. Boughton and Co.,[11] a case in the Supreme Court of Canada concerning the availability of equitable compensation for breach of a solicitor's fiduciary obligation to a client. McLachlin J. in her dissenting speech affirmed the separate quality of trusts and equity doctrine, and she sought to restrain the enthusiasm of her colleagues to build up fiduciary duties into an equitable shadow of tort:

> My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken... In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.[12]

McLachlin J.'s language of a morally-sanctified, separatist role for equity and trust law is edifying. In her view, good conscience as a doctrine of equity grows beyond a mere requirement to eschew fraud and deceit, and becomes a positive obligation to offer good faith and to make generous efforts in favour of the trusting and the vulnerable. However, a fair number of counter-citations could be adduced from judges in the common-law world today who see nothing special about equity's concept of conscience, and who would gladly mix or collapse equitable doctrine into the common law.[13] In New Zealand, Cooke P. (as he then was) flatly denied the importance of attributing any special qualities to distinctly equitable or common-law remedies. In his view the important thing was to give a remedy when justice required it, choosing from whichever concurrent liabilities were on offer.[14] It remains to be seen whether Lord

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[11] (1991) 85 D.L.R. (4th) 129.

[12] (1991) 85 DLR (4th) 129, 154 and ff. The locus classicus of this approach is P.D. Finn's paper `The Fiduciary Principle', in T.G. Youdan, Equity, Fiduciaries and Trusts (Toronto, 1989) 1-56.

[13] See e.g. Canson Enterprises Ltd. v. Boughton and Co. (1991) 85 D.L.R. (4th) 129, 150-153 per La Forest J.; L.C.H. Hoyano, `The Flight to the Fiduciary Haven', in this volume; citations at n. 6, above.

[14] Mouat v. Clark Boyce [1992] 2 N.Z.L.R. 559 at 565-566 (`How far the remedies or causes of action should be kept discrete is debatable, but it would seem excessively legalistic to insist on concurrent duties. What is important is the substance of the duty falling on the particular defendant in the particular circumstances, to ascertain which it may be necessary to consider various possible sources -- tort, contract, equity, statute... For breach of these duties, now that common law and equity are mingled, the Court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is most appropriate to the particular facts may be granted'). See further Aquaculture Corp. v. New Zealand Green Mussel Co. Ltd. [1990] 3 N.Z.L.R. 299 at 301 (`For all purposes now material, equity and commmon law are mingled or merged... [A] full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute'); Day v. Mead [1987] 2 N.Z.L.R. 443 at 450-451, 460-462. For criticism: W.M.C. Gummow, `Equitable Damages for Breach of Fiduciary Duty' in Youdan, op. cit., 57-91, esp. 82 ff.; P.W. Michalik, `The Availability of Compensatory and Exemplary Damages in Equity: A Note on the Aquaculture decision' (1991) 21 V.U.W.L.R. 391-416; L. Aitken, `Developments in Equitable Compensation: Opportunity or Danger?' (1993) 67 A.L.J. 596; C. Rickett and T. Gardner, `Compensating for Loss in Equity: The Evolution of a Remedy' (1994) 24 V.U.W.L.R. 19.

Cooke's fusing or melting down of the causes of action will take hold in other parts of the common-law world.[15]

Australian judges have used the rhetoric of fusion more temperately than their counterparts in other common-law jurisdictions. A pure Chancery concept of equity as a conscientious gloss on the law is often propounded in the case-law; but the language of convergence is also well represented, with judges noting how equitable standards are matched by analogous concepts of `fairness' and `justice' and flexible standards of reasonableness in common-law fields such as tort and quantum meruit.[16]

In Hawkins v. Clayton[17] Deane J. sketched a cautious approach to fusion of the extant categories of action, speaking this time of the contract-tort divide:

> The rationalisation and principled development of the law cannot but be prejudiced and impeded for so long as the law of contract and the law of tort are, on the basis of past distinctions between different causes of action, seen as operating upon the same set of circumstances to impose, independently of actual intention, consequences which a legal theorist might describe as concurrent but which any ordinary person would describe as conflicting. The law of contract and the law of tort are, in modern context, properly to be seen as but two of a number of imprecise divisions, for the purpose of classification, of a general body of rules constituting one coherent system of law. Where rules classified in different divisions would otherwise conflict or compete, an essential function of the whole system is to avoid, resolve or rationalise such conflict, not to induce or preserve it.

It has been equity in the High Court that has been the principal instrument of this rationalisation. Many of the insights of academic writings on Contract, Restitution and Trusts, notably the doctrines of the American Restatements, have been absorbed into Australian law through the medium of equitable language and ideas.[18] This suggests that what is distinct about Australian equity jurisprudence is the belief that a separate equity is not just a ready means to get around legal technicality, but that equity with its long history of intellectual experimentation provides an extremely articulate range of juridical techniques for the elaboration of the general law. Such a belief shines out of the formidable text Equity: Doctrines and Remedies by Meagher, Gummow and Lehane, which demonstrates equity as a

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[15] Cf. J.E. Martin, `Fusion, Fallacy and Confusion: A Comparative Study' [1994] The Conveyancer and Property Lawyer 13 at 15-22; J.D. Heydon (1994) 110 L.Q.R. 328; (1995) 111 L.Q.R. 1.

[16] See Mason, op. cit., 242; P. Parkinson, ed., The Principles of Equity (Sydney, 1996); J. Getzler, `Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 Monash University Law Review 283.

[17] (1988) 164 C.L.R. 539 at 584.

[18] The list of significant reformist cases of recent years is formidable: Commonwealth v. John Fairfax & Sons Pty. Ltd. (1980) 147 C.L.R. 39; Taylor v. Johnson (1983) 151 C.L.R. 422; Hewett v. Court (1983) 149 C.L.R. 639; Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447; Legione v. Hately (1983) 152 C.L.R. 406; O'Dea v. Allstates Leasing Systems (W.A.) Pty. Ltd. (1983) 152 C.L.R. 359; Heid v. Reliance Finance Corp. (1983) 154 C.L.R. 326; Calverley v. Green (1984) 155 C.L.R. 242; Chan v. Zacharia (1984) 154 C.L.R. 178; Hospital Products Ltd. v. United States Surgical Corp. (1984) 156 C.L.R. 41; Moorgate Tobacco Co. Ltd. v. Phillip Morris Ltd (No. 2) (1984) 156 C.L.R. 414; United Dominions Corp. v. Brian Pty. Ltd. (1985) 157 C.L.R. 1; Muschinski v. Dodds (1985) 160 C.L.R. 447; A.M.E.V-U.D.C. v. Austin (1986) 162 C.L.R. 583; Baumgartner v. Baumgartner (1987) 164 C.L.R. 137; Waltons Stores (Interstate) Ltd. v. Maher (1988) 164 C.L.R. 387; Stern v. McArthur (1988) 165 C.L.R. 489; Trident General Insurance Co. Ltd. v. McNeice Bros. Pty. Ltd. (1988) 165 C.L.R. 107; A.N.Z. Bank v. Westpac Bank (1988) 164 C.L.R. 662; Esanda Finance Corp. v. Plessnig (1989) 166 C.L.R. 131; Foran v. Wright (1989) 168 C.L.R. 385; Pavey and Matthews v. Paul (1987) 162 C.L.R. 221; Commonwealth v. Verwayen (1990) 170 C.L.R. 387; David Securities Pty. Ltd. v. Commonwealth Bank (1992) 175 C.L.R. 353; Louth v. Diprose (1992) 175 C.L.R. 621; Baltic Shipping Co. v. Dillon (1993) 176 C.L.R. 344. For survey see Parkinson, op. cit..

set of subtle juristic ideas bringing great intellectual rigour to the common law. Pace Denning, equity is not regarded by them as a charter for discretionary justice; they would prefer to look back to the principled, rule-bound equity of Hardwicke and Eldon. Meagher et al. attack `fusion fallacies', or novel combinations of legal and equitable principle, not on any overt moral ground but purely as issues of correct juridical technique and respect for the separate intellectual traditions of law and equity. The fusion experiments of English judges are dismissed as the work of `one epigonous generation...succeed[ing] another'. For them, much even of the High Court's recent work is suspect.[19]

Other Australian jurists take a somewhat different view, and assert a special moral role for equity, quite apart from its technical and remedial advantages. Equity is commonly identified with the progressive democratic spirit of modern Australian society; or even with a higher morality of altruism expressed in equity's broad principles and standards, norms which judges can usefully oppose to the self-interested, individualistic spirit of the English common law with its bright-line rules.[20] This is to promote equity as particular justice and aequum et bonum as well as mere Chancery jurisprudence. Sir Anthony Mason in a recent address was quite clear on this point:

> [T]he ecclesiastical natural law foundations of equity, its concerns with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the the type of liberal democratic society which has evolved in the twentieth century.[21]

Sir Anthony Mason concluded by expressing a hope that through the continuing convergence of law and equity, the equitable spirit would infuse the law, whilst the rules and distinctions generated by repeated decision-making would bring some of law's certainty to equity. But the dominance of a moralising equity was not left in doubt: `The recent decade might be regarded as a period of legal transition in which we have been moving from an era of strict law to one which gives greater emphasis to equity and natural law... the endeavour to make morals and law coincide will be an important future goal'.[22] He has since elaborated these claims, stating recently that:

> equity is flourishing in Australia...it has captured the minds and hearts of a number of Australia's finest lawyers... [E]quity judges were not subscribers to the quaint common law fiction that the rules of the land had survived from time immemorial and that the judges merely find and declare the pre-existing law, [but] were "established from time to time, altered, improved and refined from time to time".[23] Why the paramountcy of equity over the common law, established by the Judicature Acts, did not prevail also in this matter of how principles of law come to be shaped, continues to astonish me.
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> Not that I seek to downplay the virtues of the common law. But I cannot refrain from observing that the initiatives of Lord Mansfield, England's greatest common lawyer, were not always followed by his common law brethren. Curiously enough, his approach to good faith and to restitution have always seemed to me to reflect the spirit of equity rather than what its admirers

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[19] See Meagher, Gummow and Lehane, op. cit., chs. 1 & 2, passim, esp. 64 ff.; see also I.C.F. Spry, The Principles of Equitable Remedies (4th ed., Sydney, 1990).

[20] See A.J. Duggan, `Is Equity Efficient?' (Paper for the European Association of Law and Economics Conference, Haifa, August 1996) 1-10.

[21] Mason, op. cit., 239; see also idem, `Themes and Prospects' in P.D. Finn, ed., Essays on Equity (Sydney, 1985) 242-251; P. Parkinson, `Preface', in idem, op.cit., vii: `The resurgence of equity reflects changes in community values'.

[22] Ibid. at 258-259.

[23] Re Hallett's Estate (1879) 13 Ch.D. 696 per Jessel M.R.

refer to as the genius of the common law.[24]

On other occasions Australian judges (including Mason C.J.) have been at pains to distance themselves from the idea that equity gives a charter for moralistic judicial activism freed from established rules;[25] the protestations perhaps reveal a perception of danger.

We may conclude that Commonwealth judges' attitudes to the relationship of law and equity cross a spectrum, both across and within different national jurisdictions. Very few judges are out-and-out fusionists; most believe in some kind of evolutionary convergence; many see equity perching somewhere between law and morals.

Academic jurists, by contrast, have been more impatient with the continuing split between law and equity and the latent moralism of equity. As early as the 1760s, Blackstone argued that equity had no real distinction from law save that it descended from the Civilian and Canonist jurisprudence of the early chancellors rather than feudal custom of the common law. Like law, equity worked up a system of precedents; and it could work hardship by rigorous rule application. And law, like equity, looked for the spirit of the rules and not just the letter, and was concerned to alleviate fraud, accident and trust, though it did not always use those names.[26] Another still more fierce critic of separate equity was John Austin. `Equity...is not the name of a species of law', he argued. Its origins as a body of distinct legal rules lay in the singular histories of Roman law with its ius praetorium and English law with its Chancery doctrine. The distinction of law and equity in those jurisdictions was `purely anomalous [and] peculiar to the particular community'; moreover `the distinction is utterly senseless, when tried by general principles; and is one prolific source of the needless and vicious complexness which disgraces the systems of jurisprudence wherein the distinction obtains'. If Bentham was the enemy of the common law, Austin was the enemy of equity.[27]

Austin elaborated his criticism by resort to historical jurisprudence.[28] He observed that the Praetorian law was a type of Roman equity whereby new actions were added to the old formulae in order to vary and extend the law.[29] It was a type of judicial legislation by stealth -- of saying that a law signified A when what was meant was really B. All dualist systems of law-glossed-by-equity were built of such fictions, and the interesting question to ask was what were the reasons justifying this system of evasion. One was respect for the principles of law that were abrogated by the equity. Another reason was politesse, respect for convention and appearances. To use an equity instead of changing the law was like offering `those conventional, and not incommodious lies, through which much of the intercourse of polished society is carried out'.[30] Another motive was formal deference to the legislature as the chief law-making body and to the courts of common law as the arbitrators of evolving custom. Chancery judges had to make law while legislatures and common-law courts slept or were indifferent, and to preserve appearances they

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[24] Sir Anthony Mason, `Foreword' in Parkinson, op. cit., v-vi.

[25] See e.g. Muschinski v. Dodds (1985) 160 C.L.R. 583 at 612-619 per Deane J., Stern v. McArthur (1988) 165 C.L.R. 489 at 502-505 per Mason C.J. (dissenting).

[26] Blackstone, iii, 429 ff; see further W.S. Holdsworth, `Blackstone's Treatment of Equity' (1929) 43 Harvard Law Rev. 1.

[27] J. Austin, Lectures on Jurisprudence (1st ed., London, 1863; 5th ed., 1885) i, 38-39.

[28] Ibid., ii, 591-620.

[29] Cf. H.F. Jolowicz and B. Nicholas, Historical Introduction to the Study of Roman Law (3rd ed., Cambridge, 1972) 97-101.

[30] Cf. L.L. Fuller, Legal Fictions (Stanford, 1967).

called their legislation equity.[31] Austin thus echoed Sir Henry Maine's theory that law could be changed and adapted by the devices of fiction, equity or legislation; and in the Austinian view Roman and English equity encompassed both fiction and legislation.[32]

The distinction of equity was also deprecated by Maitland. He defined equity as nothing more than `that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by...Courts of Equity'. There was no substantive alternative to this purely jurisdictional definition, save to list all the equitable rules compendiously. No other definition was possible, `for if we were to inquire what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity'. The fusion of the administration of law and equity in 1873-1875 did not end the distinction between the two systems of rules, but this was only because of the intellectual conservatism of the judges; Maitland predicted that `the day will come when lawyers will cease to enquire whether a given rule be a rule of equity or a rule of common law: suffice it to say that it is a well-established rule administered by the High Court of Justice'.[33]

Maitland is well-known for his statement that the trust idea as a managerial device for the fund or the shifting portfolio of assets was `the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence';[34] but in other writings he described the trust as inherently contractual, and downplayed the theory of good conscience and the distinctive managerial and fiduciary functions of the trust.[35] In Maitland's view, equity acted in personam chiefly in order to avoid direct conflict with the law of estates, but he took the personal nature of the trust seriously as a substantive as well as an adjectival quality. His overall conception of the trust was of a contract to benefit third parties which had to be enforced through equity simply because of the limitations of the common-law contract writs before the evolution of assumpsit. For Maitland duties of conscience formed no special category and made for no separate department of jurisprudence; the enforcement of the trust as an in personam right was properly to be seen as `a right which in truth is a contractual right, a right created by a promise', though the equity judges preferred to speak of reliance and confidence as the cause of action rather than the promise itself.[36] Conscience could be rejected as a legal category; it clearly was not comparable to promises, wrongs or unjust enrichments as a singular source of rights. It was therefore correct in modern times to teach equity intermingled with

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[31] Cf. W.W. Buckland and A. McNair, Roman Law and Common Law (2nd ed. by F.H. Lawson, Cambridge, 1952) 4-6.

[32] Sir Henry S. Maine's own definition of equity was curiously vague: `principles entitled by their intrinsic superiority to supersede the older law': Ancient Law (reprinted London, 1917) 24-26. See further P.G. Stein, `Equitable Principles in Roman Law', in R.A. Newman, ed., Equity in the World's Legal Systems (London, 1973) 75 ff.

[33] F.W. Maitland, Equity. A Course of Lectures (ed. A.H. Chaytor and W.J. Whittaker, Cambridge, 1909; 2nd ed. rev. by J. Brunyate, Cambridge, 1936) 12-22.

[34] F.W. Maitland, `The Unincorporate Body', in Collected Essays (ed. H.A.L. Fisher, Cambridge, 1911) 271, 272 and 277. See further B. Rudden, `Things as Things and Things as Wealth' (1994) 14 O.J.L.S. 81, analysing the managerial and proprietary nature of trusts.

[35] Maitland, Equity, op. cit., 23-56, 106 ff; idem, `Trust and Corporation', in idem, Collected Papers, op. cit., iii, 321-404. Maitland's contractual view of the trust is pursued by J. Langbein, `The Contractarian Basis of Trust' (1995) 105 Yale L.J. 625. As in other fields of law, Maitland's trust ideas were so subtle and multi-faceted that he can validly be invoked as authority for a set of opposing ideas.

[36] Cf. Coke C.J.'s proprietary definition of the trust as a ius in re aliena emanating from a confidence reposed in the owner: Co.Litt., 272 b.

property and contract, rather than as a subject with its own intellectual identity. Trusts were to be taught separately only because they were so elaborate a set of doctrines, not because they were really distant from common-law property. So in Maitland's view there was little distinctive about equity jurisprudence that could not be absorbed into an integrated law of property, contract and tort. For example Maitland preferred to call the doctrine of notice a standard of diligence, an objective standard, rather than a subjective test of good faith with outgrowths.[37] His most telling conclusion was that `[t]o have acknowledged the existence of equity as a system distinct from law would...have been a belated, a reactionary measure'.[38] Thus Maitland was not a `great equity lawyer', as we are often told, but perhaps the most sophisticated of the great anti-equity lawyers. He casts a long shadow across the whole subject.

Many academic commentators today have come to agree with Maitland's anti-equitable analysis of trusts. Definitions of trust and fiduciary obligation stressing the unique equitable qualities of those institutions, such as the representative opinion of McLachlin J. quoted above, can be demonstrated to be equally applicable to the common-law institution of the contract[39] and even to many relationships regulated by tort.[40] On the political level, commentators have doubted if unelected judges should arrogate to themselves the legislative power implied by a strong equity. If judges administering equity are simply tracking contemporary social morality, should the law be responsive to changes in politics and society? Is it legitimate that judges should use equity to articulate social morality or to moralise at a market-driven society?[41] Trust doctrines in a free society are used as often as not for self-interested and dubious goals such as the evasion of tax and familial responsibilities;[42] and even if equitable duties of conscience in theory aim to confine parties to virtuous paths, that should not be confused with the promulgation of altruistic behaviour; the `trust at the heart' of equity can only ever be a product of legalistic sanction and fear of punishment.[43]

Discontents with the conventional equitable wisdom have led to quite radical proposals to promote a final fusion of law and equity, and the proposals often entail the elimination of a separate body of equitable rules and principles. Some of the schemes now on offer are: that trusts and fiduciary duties should be reshaped into contracts for third parties with proprietary tracing remedies bolted on;[44] that trusts should be seen as a form of custody and assimilated

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[37] Maitland, Equity, op. cit., 29 ff.

[38] Ibid., 21.

[39] Duggan, op. cit.; Langbein, op. cit..

[40] P.D. Finn, `Good Faith and Non-Disclosure', in idem, ed., Essays on Torts (Sydney, 1989) 150-182; P. Birks, `Civil Wrongs: A New World' (Butterworths Lectures, London, 1991) 55-112. Recent examples of trust-flavoured tort include Smith v. Eric S. Bush (A Firm) [1990] A.C. 831; White v. Jones [1995] 1 All E.R. 691 and Henderson v. Merrett Syndicates Ltd. [1994] 3 All E.R. 506.

[41] Duggan, op. cit., 8-10. For example: should the flood of Australian equity, with its deep concern for the protection of the vulnerable, now abate with the recent election of the most conservative federal and state governments in generations?

[42] G. Moffat, Trusts Law (2nd ed., 1994) 47-87.

[43] Cf. D. Kennedy, `Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Rev. 1685, which argues that enforced altruism is still a form of other-regarding and virtuous behaviour, if a less valuable form. Cf. Duggan, op. cit., 4-8; R.P. George, Making Men Moral: Civil Liberties and Public Morality (Oxford, 1993).

[44] Langbein, op. cit.; F. Easterbrook and D. Fischel, `Contract and Fiduciary Duty' (1993) 36 J. of Law and Economics 425.

to property law;[45] that confidences and other fiduciary obligations be recast as torts;[46] that equities arising from contract such as estoppels[47] and unfair bargaining[48] should be recast as doctrines of unjust enrichment and contract; that resulting trusts are really an aspect of restitution.[49] This academic ferment or intellectual restlessness has so far had little impact on judicial thinking; in Barclays Bank plc v. O'Brien[50] and Westdeutsche[51] for example, the House of Lords flatly affirmed the primacy of traditional equity thinking built on the concepts of knowledge of wrongdoing, good conscience and trust.

There may be quite defensible meta-principles for taking a conservative approach and maintaining the old conceptual language of law and equity. For Holmes J., continuity with the legal ideas of the past was almost axiomatic to the project of a rule-governed society:

> A system of law at any time is the resultant of present notions of what is wise and right on the one hand, and, on the other, of rules handed down from earlier states of society and embodying needs and notions which more or less have passed away.[52]

This may be granted; but any dynamic system must also have a sense for which historical matter is essential to be preserved, and which may profitably be discarded. A good knowledge of our legal history and the evolution of our concepts might help us to make such choices. The rest of this paper therefore proposes to do three things: to examine how English common law has characteristically developed its remedies and doctrines; to understand why English jurisprudence divided into legal and equitable streams; and to judge whether the historical underpinnings of the law-equity bifurcation are still in place. I am here concerned chiefly with the history of jurisdictions and procedures, and those looking for fresh analytical distinctions between property, trust, contract, tort and unjust enrichment may be disappointed.

2 *The Growth and Rationalisation of Remedial Law*

The Romans thought of obligation as a two-way street, a relationship between persons. An obligation was most simply a personal tie, a binding together of persons at law; `obligatio est iuris vinculum'.[53] The word for obligation

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[45] Rudden, op. cit.; F.H. Lawson and B. Rudden, The Law of Property (2nd ed., Oxford, 1982) 138-140.

[46] P.M. North, `Breach of Confidence: Is There a New Tort?' (1972) 12 Legal Studies (J.S.P.T.L.) 149; F. Gurry, Breach of Confidence (Oxford, 1984); Meagher, Gummow and Lehane, op. cit., 864-889.

[47] P. Birks, Introduction to the Law of Restitution (Oxford, 1985) 277-293.

[48] Birks, op. cit., 65-67, 162-164, 170-173; P. Birks and N.Y. Chin, `On the Nature of Undue Influence', in J. Beatson and D. Friedmann, eds., Good Faith and Fault in Contract Law (Oxford, 1995) 57-97; cf. R. Bigwood, `Undue Influence: `Impaired Consent' or `Wicked Exploitation'?' (1996) 16 O.J.L.S. 503.

[49] P. Birks, `Restitution and Resulting Trusts', in S. Goldstein, ed., Equity and Contemporary Legal Developments (Jerusalem, 1990) 335-373; R. Chambers, Resulting Trusts (Oxford, 1997).

[50] [1994] 1 A.C. 180.

[51] [1996] 2 All E.R. 961.

[52] O.W. Holmes, `The Bar as a Profession', in idem, Collected Legal Papers (New York, 1920) 156, cited by Gummow, `Unjust Enrichment, Restitution and Proprietary Remedies', op. cit., 47.

[53] J.3.13.pr.

derives literally from `ligare', to tie. On the Roman model, an obligation could be perceived from the one side as a right of the obligor, from the other as a duty of the obligee, though it is easiest to view the relationship positivistically from the viewpoint of sanctioned duty.[54] By contrast, at English law to have an obligation can only mean to owe a duty to another.[55] Rights are characteristically perceived as the resultant or by-product of others' duties, as if traced in silhouette. I enjoy the equivalent of a right to physical, emotional and economic integrity based on the duty of others not to commit torts against me; I have contractual rights due to the duty of others to keep their bargained-for promises, a duty enforced by damages actions for breach not so very different from actions in tort protecting non-bargained interests.[56] Sometimes the true source or cause of obligation lies outside the law of obligations altogether, in some independent primary right such as property or trust. The obligation is then employed as a secondary remedy protecting the primary right, as in nuisance where a tort action is used to protect the appurtenances of land ownership.[57]

The dominance of the remedial idiom for describing rights or obligations, focusing on the actions available to the claimant for breach rather than the claimant's rights or position within a bilateral relationship, is a product of the pragmatic development of the common law. There has been relatively little codification or institutionalism or realism -- no strong jurisprudential movement intent on reducing the results of remedial experiment to a rational system of legally-regulated relationships. Instead the common law conjures with an historical inheritance of unwieldy overlapping and concurrent liabilities. This is it was that drove the great legal reformer Sir James Stephen to observe that `the only thing which prevents English people from seeing that law is one of the most interesting and instructive studies is that English lawyers have thrown it into a shape which can only be described as studiously repulsive'.[58]

Judges have periodically sought to rationalise the law and clear away the historical undergrowth in order to expose or impose general principles. The nineteenth-century elaborations of contract doctrine are one example.[59] Lord Atkin's recombination of many heads of tort liability under the rubric of negligence is another, though this experiment has perhaps been spoiled by runaway success.[60] The recasting of quasi-contract as an independent category of liability

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[54] See e.g. D.44.7.3.pr. (Paul): `The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do or perform something for us'.

[55] For a comparison of the right/duty duality in Roman and English law see P. Birks, `Obligations: One Tier or Two?', in A.D.E. Lewis and P. Stein, eds., Studies in Justinian's Institutes in memory of J.A.C. Thomas (London, 1983) 19-38; R. Zimmerman, The Law of Obligations: Roman Foundations of the Civilian Tradition (Cape Town, 1990, reissued Oxford, 1996) 1, 24-31.

[56] P. Birks, `The Concept of a Civil Wrong', in D.G. Owen, ed., Philosophical Foundations of Tort Law (Oxford, 1995) 31-51. The origins of modern contract remedies in trespassory actions would reinforce this view; see e.g. S.F.C. Milsom, `Trespass from Henry III to Edward III', in idem, Studies in the History of the Common Law (London, 1985) 1-90; idem, `Not Doing is No Trespass: A View of the Boundaries of Case', ibid., 91-103.

[57] The primary/secondary distinction of rights and duties lies at the core of John Austin's positivism and has been deeply influential ever since; see his Lectures on Jurisprudence (1st ed., London, 1863; 5th ed., 1885) ii, 760-770, esp. at 762.

[58] Sir James Fitzjames Stephen, quoted in F. Pollock, A Digest of the Law of Partnership (1st ed., London, 1877) xxiv.

[59] See A.W.B. Simpson, `Innovation in Nineteenth Century Contract Law', in idem, Legal Theory and Legal History. Essays on the Common Law (London, 1987) 171-202; P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford, 1979) 359-570, 660-680.

[60] Donoghue v. Stevenson [1932] A.C. 562.

for unjust enrichment, begun by Lord Wright[61] and now almost complete,[62] is a more recent exercise in effective doctrinal reformation. Sir Owen Dixon, certainly no radical, regarded it as a judicial duty to rationalise the products of legal history, to eliminate fictions, and thereby to clarify the true nature of relationships regulated by law. He believed that rationalisation was a never-ending task. In a case where the law imposed an occupier's liability sounding in tort, he observed that:

> by precluding the denial of a [legally-binding consent by the occupier], the law has surely reached the use of fiction, and if we now boldly look at the facts which give rise to the imposition in this manner of the liability it will be but to complete the course of development by a process for which the history of the law furnishes many precedents. It is but to attribute the liability to be constituent elements of the title to the correlative right and to explain why they create it. No doubt there is some conscious acceleration of the process and an open ackowledgement of the course pursued it. But it is evident that for want of some rationalisation of the kind great confusion, not to say dissatisfaction, as to the state of the law exists.[63]

The priority of remedial thinking in the common law is the major historical reason for the problem of confusion that Dixon C.J. identified. It is a difficult, recurring problem, for remedial formalism is a central feature of the common law.

A *Law-Making as the Multiplication of Remedies*

In the search for speedy redress of grievances medieval litigants would go forum-shopping for justice, be it in leet court or hundred, assize or eyre, royal court or chancery. Each jurisdiction developed a distinct body of custom and law to cater to the needs of their customers. The superior royal courts, the courts of common law, began in the twelfth century by supervising and reviewing the work of inferior feudal jurisdictions, especially in the crucial area of land titles. In due course the common law evolved its own independent remedies, which multiplied as different divisions of the royal courts -- Common Pleas, King's Bench, Exchequer -- generated a succession of writs, each overcoming the limitations of past actions. Maitland applied a startling economic analysis to the phenomenon:

> [B]efore the end of Henry [II]'s reign we must already begin to think of royal justice -- and this is becoming by far the most important kind of justice -- as consisting of many various commodities each of which is kept in a different receptacle. Between these the would-be litigant must make his choice; he must chose the appropriate writ and with it an appropriate form of action. These wares are exposed for sale; perhaps some of them may already be had at fixed prices, for others a bargain must be struck. As yet the king is no mere vendor, he is a manufacturer and can make the goods to order... No doubt he sold his aid; he would take gifts with both hands; he expected to be paid for his trouble. He sold justice; but it was a better article than was to be had elsewhere.[64]

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[61] Fibrosa Spolka Akcynja v. Fairbairn Lawson Combe Barbour [1943] A.C. 32; Brook's Wharf and Bull Wharf Ltd. v.Goodman Bros. [1937] 1 K.B. 534.

[62] Lipkin Gorman v. Karpnale Ltd. [1991] 2 A.C. 548; Woolwich Equitable Building Society v. I.R.C. [1993] A.C. 507; A.N.Z. Banking Group Ltd. v. Westpac Banking Corporation (1988) 164 C.L.R. 662; Pavey and Matthews v. Paul (1987) 162 C.L.R. 221; David Securities Pty. Ltd. v. Commonwealth Bank (1992) 175 C.L.R. 353.

[63] Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 C.L.R. 274 at 285 per Dixon C.J. For elaboration see Sir Owen Dixon's essay `Concerning Judicial Method' (1955-56) 29 A.L.J. 468.

[64] F. Pollock and F.W. Maitland, The History of English Law Before the Time of Edward I (2nd. ed., Cambridge, 1898, reprinted 1968) i, 151, 159. See further J.C. Holt, `The Writs of Henry II', in J. Hudson, ed., The History of English Law: Centenary Essays on `Pollock and Maitland' Proceedings of the British Academy 89 (Oxford, 1996) 47-64.

The competition of local and central justice-purveyors, the expansion of royal justice as a useful commodity, and the differentiation of the royal product, gave rise to the multiple liabilities that are such a strong feature of English law, whereby a single act can found many different forms of action.[65] Eventually some organizational technique had to be found; and that technique was to list actions, not to rationalise them.

In the sweep of European legal history, the peculiarity of the English was to launch their own formulary system with its own body of case law in the twelfth century, and to maintain that native system intact into modern times, refusing the gift of Roman and Civilian jurisprudence as a transplanted source of structuring ideas for the multiplicity of remedies. Gaius's division of private law between property, contract and delict, with a residuum of obligations including unjust enrichment, hardly influenced the thinking of the early common lawyer; the classical Roman division of the substantive law was known and admired, but it could not be matched to the Gothic system of the forms of action. In Maine's words, `So great is the ascendancy of the law of actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms'.[66] The learning of the forms of action reached a pinnacle in Fitzherbert's Natura Brevium (1534), of which Maitland observed: `the theme of the expounder is not the nature of rights but the nature of writs... This dependence of right upon remedy it is that has given English law that close texture to which it owes its continuous existence despite the temptations of Romanism'.[67]

B *Actions for Rights and Wrongs*

The chief practical distinction within the early English forms of action was that between claims asserting rights, and actions for the remedying of wrongs. In the first category the plaintiff claimed some interest by a demand of right projected into the future -- for example a real right to an asset, a proprietary right to descending land, or a solemn covenant creating a specialty right, a special law between persons. In the second category the plaintiff sought protection of his interests from some past wrong, by bringing a plaint alleging an injury to the person or to property or an incident of possession, or some wrongful breach of obligation. A writ directed to the prospective vindication and maintenance of solemn proprietary and personal rights was generally more formal, ceremonial and unwieldy than a writ remedying an executed invasion of interest, a past infliction of loss.[68]

Both types of action -- whether for rights or wrongs -- can be seen to involve protection of economic or other interests; but there was a crucial theoretical distinction between these categories in the eyes of the medieval law. A continuing right, typically a proprietary right, defined the status of its holder in medieval society, whether as lord of a manor with seigneurial jurisdiction, or as tenant with customary familial claim to landholding by free or unfree tenure. Property rights in this sense had a public, governmental or constitutional aspect as well as a private resource

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[65] R.C. van Caenegem, The Birth of the English Common Law (Cambridge, 2nd. ed., 1985) 29-61; C.H.S. Fifoot, History and Sources of the Common Law: Tort and Contract (London, 1949).

[66] H.S. Maine, Early Law and Custom (1891) 389.

[67] F.W. Maitland, The Forms of Action at Common Law (1st ed., 1909), ed. A.H. Chaytor and S.J. Whittaker (Cambridge, 1965) 52 n. 1, and see 1-11, 78; Pollock and Maitland, op. cit., i, ch. 5; ii, ch. 9; S.F.C. Milsom, Historical Foundations of the Common Law (2nd. ed., 1981) 37-81. The distinction of the common law was noted by Savigny in 1831, who wrote to his English translator: `your country...in jurisprudence alone, [has] remained divided from the rest of the world, as if by a Chinese wall', quoted in P.G. Stein, Legal Evolution (Cambridge, 1980) 69.

[68] J.H. Baker, An Introduction to English Legal History (3rd ed., 1990) 67-75.

allocation function.[69] The real actions were not simply writs for the recovery or claiming of property, but claims of permanent right and position within a feudal jurisdiction. Personal rights such as covenants were litigable in the early common law chiefly because they dealt with property; by a later theory covenants were deemed important as `specialities', solemn pacts creating a new `constitution' or private law between individuals `against common right' or outside the feudal common law, but enforced by the common law.[70] In contrast to these rights asserted by highly formal actions, an action for some past wrong or trespass formally had no continuing implications for the distribution of land, status and power in society: the public interest in remedying wrongs was rather to remove the threat to public peace posed by individuals seeking private redress, restitution or revenge against the wrongdoer. Hence wrongs actions were more summary and informal than actions for the assertion of rights.

The early common law's broad categories of right (concerned with property and status in the feudal hierarchy and solemn promises -- aspects of distributive justice) and wrong (concerned with harms, breach of the peace -- aspects of corrective justice) were combined over a period of centuries as a function of the decline of feudal governance and the rise of central state power under the Crown. Royal justice gradually developed from a limited system of regulation and policing -- even judicial review -- of decentralized feudal and local jurisdictions, into a fully-fledged common law of the land. The medieval law of property-rights was reformed by the development of actions for executed wrongs, notably Novel Disseisin and trespass, into swift means of vindicating the continuing rights of plaintiffs. Thus property rights (rights of seisin and tenure) in the localized feudal system were subsumed within a centrally-administered system of ranked possessory rights protected by remedies (actions for wrongs) in the royal courts. The emergence of a system of relative title based on remedies for wrongdoing rather than vindication of right was complete by the early thirteenth century, and was plain to Bracton who could write:

> [O]ne may have a firm seisin against some persons, as against non-lords, at once, and a tenuous and weak seisin against true lords, and thus a free tenement against some and not against others.[71]

By an analogous process of evolution the assumpsit writs for contract sprang from trespass on the case, a swift form of litigation allowing ready pleading of the significant facts of loss to the jury. The new writs with their tort-like procedure came to replace the unwieldy writs of covenant, debt and account as a means of sanctioning harms resulting from breach of positive contractual rights.[72] By the technique of expanding the most useful trespassory writs and stretching them by fictions, the common law came to fill the space of judicial power in feudal society, distributing and enforcing individual rights and correlative duties as if directly ordained from a single point of sovereignty. Milsom has argued that this transformation was not engineered by the intentional agency of an expansive royal government of Parliament and courts; it just grew, driven by the centripetal pressure of litigants seeking individual justice where best they could find it.[73]

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[69] Pollock and Maitland, op. cit., ii, 1-6.

[70] J.W. Salmond, `The History of the Law of Prescription', in idem, Essays in Jurisprudence and Legal History (London, 1891) 73-120.

[71] Henry de Bracton, De Legibus et Consuetudinibus Angliae (4 vols., ed. G.E. Woodbine, translated S.E. Thorne, Cambridge, Massachusetts, 1977) f. 159-160b, iii, 13-14; f. 208b, iii, 131.

[72] Baker, op. cit., 360-426; Milsom, op. cit.; idem, Historical Foundations of the Common Law (2nd ed., London, 1981) 243-282, 314-360.

[73] Milsom, Historical Foundations, op. cit., 99-165; idem, Legal Framework of English Feudalism (Cambridge, 1976); idem, `The Real Actions', introduction to Pollock and Maitland, op. cit., i, xxvii-xlix. Cf. Maitland, Forms of Action, op. cit., 10-11, 21-24; R.C. Palmer, `The Origins of Property in England' (1985) 3 Law and History Review 1, 1-12; P. Brand, `The Origins of English Land Law: Milsom and After', in idem, The Making of the Common Law (London, 1993) 203-226; J. Hudson, Land, Law, and Lordship in Anglo-Norman England (Oxford, 1994) 253-281; idem, `Anglo-Norman Land Law and the Origins of Property', in G. Garnett and J. Hudson, eds., Law and Government in Medieval England and Normandy. Essays in Honour of Sir James Holt (Cambridge,

The result of this legal evolution was a series of overlapping remedies enforced in a range of common-law courts. Plaintiffs might have to choose between the more `droitural' or formal right-asserting actions and the swifter trespassory actions. It was a serious choice, since election between remedies stated in the initial issue of writs and pleadings could be irreversible. Litigation became an anxious business involving the translation of the facts of the claim into the correct legal language: selection of the wrong remedial language in a pleading was fatal to the cause. For the common lawyer of the Year Book period, legal justice came to mean the enterprise of proving the ingredients of a sound writ of action in the correct form, nothing more or less. The simpler, newer actions were in due course infected with this spirit of legalism; thus an action on the case would fail if the wrongful conduct was shown to involve direct or immediate rather than indirect or consequential harm.[74]

Eventually the courts, prompted by the legislature,[75] ceased to require parties to select the one correct cause of action in order to mount a claim.[76] Nonetheless the invention of new forms of concurrent and auxiliary liability remained as an essential tool for reforming the law wherever doctrinal paths becomes blocked or otiose. If an action covered one case but could not be stretched or adapted to fit an analogous case, then some other remedy nearby might be developed to do the work. The recognition of analogous actions is indeed the characteristic justice of the common law. Lord Wilberforce noted just such a process at work within tort doctrine in Hedley Byrne v. Heller, where he stated that:

> [i]f it were possible in English law to construct a contract without consideration...the question would be, not whether on the facts of the case there was a special relationship [sc.: giving rise to a duty of care in tort], but whether on the facts of the case there was a contract.[77]

The narrow doctrines of consideration and privity, both the products of a complex history of actions unique to English law,[78] can be said to have indirectly promoted the rise of the modern torts for economic loss,[79] the exuberant

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1994) 198-222. For Milsom's latest word on this large debate see his essay `"Pollock and Maitland": A Lawyer's Retrospect', in Hudson, ed., The History of English Law, op. cit., 243-259.

[74] `We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion', per Raymond C.J. in Reynolds v. Clerke (1725) 1 Strange 634; 93 E.R. 747; 2 Ld. Raym. 1399; 92 E.R. 40 (K.B.); Viner's Abdgt., xxii, 524. For the history of the divisions of trespass, case and assumpsit, see Fifoot, op. cit., 201-282; Baker, op. cit., 374-494.

[75] E.g. Uniformity of Process Act 1832; Real Property Limitation Act 1833.

[76] The story is tangled. In Williams v. Holland (1833) 10 Bing. 112; 131 E.R. 848 (C.P.) a long step was taken towards the burying of the forms of action; Tindal C.J. there held that a plaintiff could elect between suing in trespass for direct damage and in case for consequential loss in all cases of unintentional immediate tort whether direct or not. See Fifoot, op. cit., 184-195, 209-211. Conservatives of the Bench and Bar pushed the other way in 1834 with the retrograde `Hilary Rules' for pleading, which cut back the availability of the general issue and thereby effected a revival of special pleading. Eventually the Common Law Procedure Act of 1852 and the Trinity Rules of 1853 had to be introduced to repair the damage.

[77] [1964] A.C. 465 at 525-526 (H.L.). Lord Devlin in the same case (at 530) described the action for negligent advice as `equivalent to contract'.

[78] For the history of consideration, see Baker, op. cit., 386-400; for privity, see A.W.B. Simpson, A History of the Common Law of Contract (Oxford, 1975) 153-160, 475-480.

[79] Junior Books v. Veitchi [1983] 1 A.C. 520; Smith v. Eric S. Bush [1990] 1 A.C. 831; Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145.

growth of equitable and common-law estoppels,[80] and many of the doctrines of unconscionable bargaining.[81] Each are outflanking operations that help the law to refine its rules and give justice to litigants. The cost of such a boilerplate approach to growth and reform is a private law that defies orderly classification. No-one can now describe the doctrine of consideration because its operation is so riddled with exceptions, fictions and counter-rules.

Some jurists have thought that exceptions and fictions are simply the obeisances contemporary lawyers must make to legal history and legal form, the price paid in order to maintain a seeming continuity.[82] Other jurists have used more malignant descriptions of the haphazard multiplication of actions designed to get around the inadequacies of established law. Thus we have the buried forms of action that `rule us from their graves';[83] the `horrid' and `misleading' historical accidents, which are nothing but `artificial barriers' to a more rationally organized law;[84] the `alibis' or pretexts for failure to engage in principled reform,[85] and so on. Perhaps the greatest alibi of all has been equity.

3 *The Nature of the Law-Equity Split*

Equity with its drive to restrain unconscionable conduct was inherently a wrongs-driven system. Thus `[e]quity jurisdiction is a branch of the law of remedies'.[86] Equity is a large example of the phenomenon of legal evolution whereby remedies for wrongs stand as a surrogate for rights. Because of equity's political history it could not directly award discretionary remedies akin to tort and contract damages nor could it directly set up positive rights of property; it could only restrain the wrongful application of a legal right. The Judicature Acts of 1873-1875 were by no means the first historical attempt to rationalise and integrate this inelegant double system of law. The nature of these attempts and the reasons for their limited success are instructive.

A *Two Concepts of Evidence*

Sometime in the early 1530s, two centuries after the inception of Chancery's jurisdiction in equity, the Lord Chancellor of England invited the common law judges to dinner. Sir Thomas More's purpose in throwing this entertainment was to discuss the judges' vehement objections to the Chancery's practice of issuing common

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[80] Starting with Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K.B. 130 and culminating in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84 and Waltons Stores (Interstate) Ltd. v. Maher (1988) 164 C.L.R. 385.

[81] Barclays Bank plc v. O'Brien [1994] 1 A.C. 180; cf. Commercial Bank of Australia v. Amadio (1983) 151 C.L.R. 447.

[82] See above, text accompanying n. 17, nn. 30-32, n. 52, n. 63.

[83] Maitland, Forms of Action, op. cit., 2.

[84] G.H. Jones, Goff and Jones' The Law of Restitution (4th ed., London, 1993) 4-5; Birks, Introduction, op. cit., 34, 39; for P. Birks' most recent assault on the equity tradition see his `Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U.W.A.L.Rev. 1.

[85] B. Rudden, `Equity as Alibi', in Goldstein, op. cit., 30-32 ff.; cf. J. Beatson, `Unfinished Business: Integrating Equity', in The Use and Abuse of Unjust Enrichment (Oxford, 1991) 244-258.

[86] C.C. Langdell, A Brief Survey of Equity Jurisdiction (2nd ed., Cambridge, Massachusetts, 1908) 1.

injunctions, which forbade plaintiffs from pursuing unconscionable claims in the common-law courts. Sir Thomas, himself a skilled common lawyer and the first such to sit on the Woolsack, suggested that Chancery would desist from intervening if only the law courts would exercise their discretion to `mitigate and reform the rigour of the law'. But the judges refused, as More later recounted, because `they may by the verdict of the jury cast off all quarrels from themselves upon them, which they account their chief defence'.[87] At this time came perhaps the fateful step towards the splitting of legal and equitable jurisdictions in England.[88] When the common lawyers refused to admit the broadest range of factual evidence into curial deliberations, and then to develop legal tests and principles to sift such an expanded admission of evidence and guide the jury, they thereby ensured the survival and growth of the ameliorating Chancery jurisdiction. For the rest of the sixteenth century litigants flocked to Chancery and the other prerogative courts of equity, and their business came to rival that of the common law courts, whose business relatively declined.

In the seventeenth and eighteenth centuries equity emerged as a fully-fledged auxiliary jurisprudence, a grand gloss on the common law.[89] But equity did not purport to be a separate source of rights and duties; it was not an independent legal system.[90] It did not even have an articulate theory as to when it would and when it would not intervene in order to correct an unsatisfactory legal process, but grew piecemeal. `[C]onsequently it has not been possible to erect a general theory of equity' as Plucknett noted. `[i]n the last resort, we are always reduced to a more or less disguised enunciation of the historical heads of equity jurisdiction'.[91] If there was a unifying principle in equity that distinguished it from the customary or common law, it was that of conscience, discovered by Chancery's penetrating inquisitorial system of evidence and enforced by a powerful array of interlocutory remedies. But the overarching idea of conscience was really only code for the fullest awareness of the situation of the parties; it was not a theory of wrongs or rights. The rise of the use and trust was only the larger portion of that infinitely greater project of the Chancellors to remedy the inability of common-law procedures to get at the fine detail of fact explaining parties' minds and actions. The secret trust is a strong example: equity would go behind the lack of due formality and come close to over-ruling statutory evidentiary requirements in order to hold parties to their informal but serious understandings concerning the beneficial ownership of property. Through freedom from the rigidities of forms, writs and pleadings, and above all by heightened access to fact, the Court of Chancery claimed it could better determine the parties' `equities' than could the procedure-bound, legalist justice of the common law.

It is therefore a vast over-simplification to decry as `historical accident' the emergence of a new equitable jurisdiction from the king's personal prerogative of justice. There were profound procedural and evidential causes for great division of English law into two branches. With two separate fori trying issues, each with distinct judicial personnel and procedures, it was inevitable that significant moral and political differences about the nature of rights would emerge, yielding two bodies of jurisprudence. For example, common law knows no concept that delay defeats rights; that a person seeking justice must have clean hands; that stipulated penalties can be reformed for hardship; that non-publicized undertakings regarding land can be enforced; that rights cannot be claimed unjustly. Yet these are central ideas of equity.

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[87] W. Roper, The Lyfe of Sir Thomas More (E.V. Hitchcock, ed., 1935) 44-45, cited in T.F.T. Plucknett, A Concise History of the Common Law (4th ed., London, 1948) 649. See further J. Guy, The Public Career of Sir Thomas More (Brighton, 1980).

[88] Baker, op. cit., 124.

[89] H. Horwitz, Chancery Equity Records and Proceedings, 1600-1800 (London, 1995).

[90] Maitland, Equity, op. cit., 153-155.

[91] Plucknett, op. cit., 635.

B *The Complementarity of Law and Equity*

We should be wary of too sharp and deterministic a characterization of the divergence between law and equity. For long periods of history the two courts systems worked together amicably, with complementarity. Because each system sought different ends and played upon different bodies of evidence, their jurisdictions rarely came into contact. That is why it was possible to accord equity priority in cases of conflict over the law with minimum friction, both before and after the Judicature Acts.[92]

A good case can be made that the medieval Chancery court, administering an Aristotelian equity based on close fact-scrutiny and assessment of individual merits, and with no great pretensions to any rule-making or precedential authority, was always accepted by the common lawyers as a necessary adjunct to the more formal and general justice of the law. Chancery jurisdiction was already more than two centuries old when Sir Thomas More made his dinner with the judges; and relations between law and equity had been more-or-less harmonious and would continue so for nearly another century before Lord Ellesmere's great fight with Chief Justice Coke over common-law review of Chancery decrees. At stake for Sir Thomas More was the justice of procedures and decisions; but for later protagonists the issue was one of political power and monopoly profits. The common lawyers led by Coke were wedded to their ancient forms and procedures and jealous of rival jurisdictions. They could argue that, by long-established constitutional theory, the king was bound to render his prerogative powers of legal justice exclusively through his royal courts, by the decisions of his royal judges. This was an old theory, stretching back to the due process clauses of Magna Carta. In 1406 in Cheddar v. Savage, for example, Gascoigne C.J. stated that `the king has committed all his judicial powers to various courts',[93] adumbrating Coke C.J.'s celebrated opinion in 1608 in the Prohibition del Roy[94] that -

> the King in his own person cannot adjudge any case, either criminal...or betwixt a party and party, concerning his inheritance, chattels or goods, etc, but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England... [C]auses...are not to be decided by natural reason, but by the artifical reason and judgment of law.

Notwithstanding the simple power of this theory, the ancient prerogative of the king to render justice to his subjects as well as executive government could not easily be wished away; indeed it took two revolutions to establish Coke's vision of the constitutional separation of powers. In James I's time, the conciliar and prerogative courts continued to administer the king's personal justice, with Star Chamber serving as a court of criminal equity, and the Court of Requests and the Chancery deciding a broad range of private matters by equitable procedure. The theoretical defence for these jurisdictions was that there was no real derogation from the common-law courts, since the extraordinary courts were not determining subjects' legal rights and entitlements but were governing or regulating society extra-legally on a case-by-case footing -- administration rather than law. Thus the common injunctions from Chancery did not formally review and vary common-law judgments, but were only designed to hold defendants to their conscience in light of the fullest evidence, so preventing oppression and fraud by means of law. Only the person of the litigant was bound, literally his body which was subject to imprisonment for contempt if he disobeyed the Chancellor's order. This is the chief sense in which classical equity acts in personam, for it does not directly award personal damages nor does it strive to enforce directly a legal tie between persons. In that sense it is reminiscent of the earliest Roman civil procedures which likewise levied execution against the body in order to induce performance

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[92] Supreme Court of Judicature Act 1873, s. 25(11); Meagher, Gummow and Lehane, op. cit., 22-44.

[93] Y.B. Mich. 8 Hen. IV, f. 13, pl. 13.

[94] (1608) 12 Co. Rep. 63.

of obligations.[95] It may be that this intense in personam-ness of obligations is a hallmark of legal systems in their first development.

The theory that early Chancellors were clerics seeking to bind the consciences of parties as their confessors is not unsupported; but it is really peripheral to the way in which equity worked. Equity jurisprudence very rarely if ever referred to canonist or religious ideas, and only rarely to the natural law tradition. Christopher St German's Doctor and Student, which propounds the canonist concept of conscience as the foundation of the discretion to vary legal justice in equitable cases, may have had the purpose of giving intellectual structure to practice rather than reflecting the way in which equity lawyers actually thought.[96] Like Bracton and Blackstone's treatises, Doctor and Student is the abstracting treatise of an intellectual, not a professional textbook. English equity's doctrines at this time were unique and could not be formalised; they were a customary law of Chancery expressing a stylised morality.

There is much evidence that the common lawyers accepted the equity of the early Chancery court as an adjunct and not a rival.[97] Judges of the royal courts were commonly invited to sit in early Chancery hearings, to advise from their special legal knowledge and even to give their judgment on the equity of cases -- so much so that the 1400 Parliament requested the judges to put more time into their common-law duties in banc and less time at Chancery.[98] On other occasions Parliamentary lawyers expressed their resentment at the rise of a strong Chancery jurisdiction emanating from the crown and outside the ambit of the historical common law, and asked for the dismantling of all the extraordinary royal courts. However, by the mid-fifteenth century those courts had become essential to the ordering of England, and the vaunted monopoly of the common law as the law of the land had become a fiction.[99] Through all this, relationships between the common-law elite and the officials of Chancery remained close. There was only one bar, and lawyers practised easily on both sides of the law-equity divide. It sometimes seemed that the two jurisdictions would coalesce, as in 1464 when the Court of Common Pleas came close to recognizing and enforcing a use.[100] Judges became used to the equitable style through their secondments to Chancery; in 1452 Fortescue C.J. stopped dead a technical legal argument he was hearing together with the Chancellor, stating `We are to argue conscience here, not the law'.[101] And when common-law judges were sitting in their own courts they did not eschew

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[95] Zimmerman, op. cit., 2-10.

[96] Christopher St German, Doctor and Student (London, 1528-32; ed. T. Plucknett and J.L. Barton, Selden Society vol. 91, 1974); P. Vinogradoff `Reason and Conscience in Sixteenth Century Jurisprudence' (1908) 24 L.Q.R. 373 and Collected Papers (ed. H.A.L. Fisher, Oxford, 1928) ii, 190-204; cf. Bractonian jurisprudence as an academic construct of the thirteenth century: Thorne, op. cit., i; iii at pp. xiii-lii. One of Lord Ellesmere's sins in the eyes of the common lawyers was to adopt in his published writings St Germain's views on conscience as the backbone of equity: see his essay A Discourse upon Statutes (ed. S.E. Thorne, 1942); Plucknett, op. cit., 660-661; Christopher St German on Chancery and Statute (ed. J.A. Guy, Selden Society, Supplementary vol. 6, 1985).

[97] The common lawyers were immensely hostile to the Star Chamber and Court of Requests, and neither survived the Civil War: Baker, op. cit., 135-139. There were proposals to abolish the Court of Chancery during the Commonwealth, but a law reform commission decided on reform rather than abolition as a separate equity jurisdiction was essential: B. Worden, The Rump Parliament 1648-1653 (Cambridge, 1974) 111; W.S. Holdsworth, A History of English Law, vi (London, 1924) 417-418.

[98] B. Wilkinson, The Chancery Under Edward III (Manchester, 1929); Meagher, Gummow and Lehane, op. cit., 5-6.

[99] Plucknett, op. cit., 162-188.

[100] Ibid., 178-179; Anon. Y.B. 22 Edw. IV, Pasch. 9.

[101] Mich. 31 Hen VI, A. Fitzherbert, La Graunde Abridgement (1514-16 & 1577), Subpena, pl. 23.

an equitable approach; in 1550 the King's Bench stated that `conscience is aequum et bonum, which is the basis of every law'; and at a meeting of all the judges to install a new Chief Justice of Common Pleas in 1582, Bromley C. spoke of `aequum et bonum, which are the life of the law'.[102] Lord Mansfield's high affirmation of the equity of the common law within the action of money had and received in Moses v. Macferlan in 1760 was in that same tradition,[103] as were attempts by King's Bench to create trust-like doctrines for the ordering of priorities in bankruptcy.[104] The common law's equity worked by a different theory, perhaps: not treat to treat unique cases uniquely, as in equity, but to search for fair analogies between cases in order to treat like cases alike. The chief vehicle for this equity of the common law was the massive extension of action on the case to new areas of contract, tort, commercial dealings and property in the sixteenth and seventeenth centuries.[105]

C *The Outbreak of Conflict*

When hostilities did erupt between law and equity, the source could usually be traced to particular personalities and peculiar circumstances, giving edge to hidden tensions between the two systems. In the run-up to the Statute of Uses of 1536, the Crown jostled with the commmon lawyers, the Parliament and the Chancery, seeking to prevent evasion of feudal dues through trusteeship and secret wills. Equity was subjected to some strong criticism by lawyers, ideological attacks that helped establish lasting fault lines. A leading text in this conflict was the Reading on Uses by Thomas Audley, delivered to the Inner Temple in 1526, and including a litany of complaint against Chancery jurisdiction.

> Next, although these uses were at first contrived for a good purpose, namely for a power to make wills of land in this realm, whereas inheritance in old times were ruled and governed by the common law (which for the most part consists of ordinary and certain rules): nevertheless to a great extent they have been pursued by collusion for the evil purpose of destroying the good laws of the realm, which now by reason of these trusts and confidences is turned into a law called `conscience', which is always uncertain and depends for the greater part on the whim (arbitrement) of the judge in conscience. And by reason of this no man can know his title to any land with certainty; for now land passes by words and bare proofs in the Chancery, whereas by the common law it could only pass by solemn livery on the land or something equivalent, or by matter of record or in writing. Also, the trial to title to land in this realm was never by proofs but by verdict, whereas now it is contrary.[106]

Here we have the original of all lawyers' objections to equity: the uncertainty of conscience; the vagaries of the Chancellor's discretion; the undermining of clear and accepted common-law rules; the substitution of security-making formality and neutral jury trial with the vexatious informality of judicial inquisition. At another level it is the protest of the common lawyer with his belief in formal justice against the pretensions of centralising monarchy -- a fight being played out across the Channel in France at the same time as the Crown extended its rule

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[102] Baker, op. cit., 124.

[103] (1760) 2 Burr. 1005; 97 E.R. 676 (K.B.). Cf. P.B.H. Birks, `English and Roman Learning in Moses v. Macferlan' (1984) 37 C.L.P. 1.

[104] See L.D. Smith, `Tracing in Taylor v. Plumer: Equity in the Court of King's Bench' [1995] L.M.C.L.Q. 240, 241-248, 258-259.

[105] A.K. Kiralfy, The Action on the Case (London, 1951).

[106] Translation from J.H. Baker and S.F.C. Milsom, eds., Sources of English Legal History. Private Law to 1750 (London, 1986) 104.

over the courts and nobility by the promulgation of equitable justice.[107] At another level still the common lawyer's objection was the plaint of the rule-utilitarian against the act-utilitarian: if you are tempted to abandon rules in the search for good, then you will likely produce less good than if you stuck to the rules. That is the sense in which `hard cases make bad law' -- not `when a particular law-suit cannot be brought under a clear rule of law, laid down by some institution in advance', which is Ronald Dworkin's idiosyncratic usage,[108] but rather where the application of a legal rule is quite clear but the rule is nonetheless suspended or evaded out of unprincipled compassion for the individuals who would suffer hardship from the correct application of the strict rule.[109] There is therefore a sense in which Aristotelian equity must be incompatible with the rule of law, that is if law is conceived as a system of rules.[110] Early English lawyers seemed to be quite aware of these subtleties. Maitland recounts a case in the court of the great fourteenth-century judge Bereford C.J., who was trying an unconscionable action brought by a corrupt bishop. `Once in the name of good faith he [the judge] urged the defendant's counsel to admit a fact that had not been proved. Back came the retort: "You must not allow conscience to prevent your doing law".'[111] It was in such a climate of high legalism in the fifteenth century that the Common Pleas missed its chance to recognize the use as a conditional feoffment at common law, and King's Bench failed to open up contracts proved by deed to equitable scrutiny for instrument fraud -- two of the great lacunae of the common law that equity was called upon to fill.[112] It could be that a conservative bar adhering to the narrowest legalism was pulling back progressive and broad-minded judges from effecting an early infusion of equitable procedure and technique into the law. Had this ocurred, the need for a bifurcated law and equity might never have arisen.

Relationships between the two sides of Westminster Hall went further into decline during the tenure of the imperious Cardinal Wolsey, and his indictment in 1529 listed Chancery interference in common-law judgments as one of his vices, a `subversion of [the] lawes'.[113] Another Chancellor, Sir Thomas Wriothesley, was removed in 1546 for abuses `to the great prejudice and utter decay of the common laws'.[114] In 1598 the common-law judges assembled in the Exchequer Chamber held that law cases could not be re-opened in Chancery:

> It would be perilous to permit men after judgment and trial on law to surmise matter in equity and by this to put him who recovered to excessive charges. And by these means suits would be infinite

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[107] See further J.P. Dawson, Equity and the Royal Prerogative in French Law During the Sixteenth and Early Seventeenth Centuries (D.Phil thesis, Faculty of Law, University of Oxford, 1930).

[108] `Hard Cases', in R.M. Dworkin, Taking Rights Seriously (London, 1977) 81.

[109] See A.W.B. Simpson, Leading Cases in the Common Law (Oxford, 1995) 3.

[110] The literature pursuing this theme is considerable; see e.g. R.A. Wassersstrom, The Judicial Decision: Toward A Theory of Legal Justification (Stanford and Oxford, 1961); D.H. Hodgson, Consequences of Utilitarianism: A Study in Normative Ethics and Legal Theory (Oxford, 1967); P.S. Atiyah, `From Principles to Pragmatism' (Oxford, 1978); idem, Pragmatism and Theory in English Law (Hamlyn Lectures, London, 1987); F. Schauer, Playing By the Rules (Oxford, 1991); cf. R.A. Posner, Overcoming Law (Cambridge, Massachusetts, 1995); A. Scalia, `The Rule of Law as a Law of Rules' (1989) 56 U. of Chicago Law Rev. 1175.

[111] F.W. Maitland, `Introduction' to Year Books of Edward II, Vol. I: 1 & 2 Edw. II (Selden Society vol. 17, 1903) xix. We may compare this with Fortescue C.J.'s raising of conscience above the law one hundred and fifty years later in Chancery : above, text accompanying n. 101.

[112] W.T. Barbour, The History of Contract in Early English Equity (Oxford, 1914).

[113] Wolsey's Star Chamber activities did not reflect well on his Chancery jurisdiction either: see J. Guy, The Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber (Brighton, 1977).

[114] Baker, op. cit., 124-125.

> and no one could be in peace for anything that the law had given him by judgment. But a contentious person, who had an unquiet spirit, might continually surmise matters in equity and so vex him who recovered endlessly; which would be great inconvenience.[115]

The relationship between common law and Chancery only really reached the stage of crisis when Thomas Egerton, Lord Ellesmere, a skilled lawyer but also a cantankerous, tardy and arrogant man, became Lord Chancellor in 1603, three years before the equally cantankerous but energetic Sir Edward Coke became Chief Justice of the Court of Common Pleas. Coke C.J. moved to King's Bench in 1613, and used the armoury of writs of that court to wage war against the Chancellor's jurisdiction. Matters came to a head in the Earl of Oxford's Case (1615), where a careful common-law judgement on a lease was set aside by Lord Ellesmere in Chancery. Ellesmere claimed that he was not overruling a judgment but `that when a judgment is obtained by oppression, wrong and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party'. According to Ellesemere,

> Equity did not conflict with common law because it took common law as it found it; it never disputed that he whom the common law recognized as being entitled to a legal interest was entitled to it; it merely insisted that he should not exercise his legal title in an unconscionable manner.[116]

Ellesmere formally embraced the Aristotelian conception of equity or exceptional justice as a method of modifying legal rules:

> The Cause why there is a Chancery is, for that Men's Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.
>
> The Office of the Chancellor is to correct Men's Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called summum jus.[117]

The common lawyers were not persuaded by any of this. They were affronted because equitable restraint of the plaintiff in the Earl of Oxford's Case had only been sought after the judgment at law was entire and complete rather than as a stay of mesne process; and this seemed to them to be a new and illicit avenue of appeal against common-law judgments. Coke C.J. and the King's Bench showed lack of acumen in registering their protest, becoming embroiled in a scheme to indict Lord Ellesemere by writ of praemunire for subverting the common law. After much public controversy the matter was finally referred to James I, who on the advice of his council decreed from Star Chamber that the Chancellor should not exceed his bounds and his commission to do justice given him by the king; but that the Chancellor could restrain completed common law judgments without committing any contempt of a court of law. The coexistence and cooperation of law and equity were now strained to breaking point, but the situation was saved by Ellesmere's death and Coke's dismissal the next year. `When the men were gone, the matter was gone', as Francis Bacon later observed. It would seem that the fight was personal and political as much as ideological, based on a jealousy of jurisdictions and greed for the emoluments of office rather than the clash of principles. In 1616 Anthony Ben of the Middle Temple had published a defence of Chancery which summed up the feelings of many bystanders to the conflict:

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[115] Finch v. Throgmorton, BM MS. Harl. 6686, ff. 226v-220, at f. 228, trans. J.H. Baker in `The Common Lawyers and the Chancery: 1616', in idem, The Legal Profession and the Common Law. Historical Essays (London, 1986) 205 at 209.

[116] Meagher, Gummow and Lehane, op. cit., 96.

[117] Earl of Oxford's Case (1615) 1 Ch. Rep. 1 at 6; 21 E.R. 485 at 486.

> God forbid that we should think all justice is tyed to the common law, or that all that is done in equity is done against justice, because it is done in a diverse manner from law... Justice is the soule of the law and equity is the life of justice... why then should law and equity become now of a sodaine incompetible to the state, why should they now be presented to the world like Essau and Jacob wrastling for birthright?[118]

D *The Restoration of Comity*

In the wake of the Restoration, the common law courts came close to declaring James I's 1616 decree in favour of the Chancery as unconstitutional. In the 1670 case of R. v. Standish before a conference of the judges, Twisden J. noted that `Ellesemere had great power, and did much prevail in his time', and that the king's Star Chamber decree was not safe. The king had consulted only Chancery counsel and members of his personal entourage before making his decree against Coke and Exchequer Chamber, and this was an excessive use of royal prerogative power against the judicial arm, a patent breach of the separation of powers:

> [T]hose persons [the advising counsel] were no court. The reason Ellesmere gave, that they would not undo the judgment but only examine the corrupt conscience of the party, is an eluding of the statute,

Here Twisden J. probably meant the statute of 4. Hen. IV., c. 23 (1403) which forbade interference with a judgment at law, following the Magna Carta tradition protecting due judicial process in the determination of subjects' rights.[119] The other judges assembled agreed that equity's supremacy over the common law was probably unconstitutional; but they also indicated that they had no stomach to rekindle the law-equity conflict and preferred to leave intact the status quo. Discontent with equity continued; in 1671 Hale C.J. sitting as a Chancery judge unburdened himself of the sentiment that:

> By the Growth of Equity on Equity, the Heart of the Common Law is eaten out, and legal Settlements are destroyed.[120]

After the Glorious Revolution some of the less eirenic common lawyers in the 1690 Parliament brought a statute to repeal the Earl of Oxford's Case and cut down equity's spreading juridiction; but they could not interest a majority of the Commons. Sleeping dogs were left to lie.

The survival of Chancery jurisdiction can be ascribed to the palm branches offered up by the equity lawyers after the 1616 crisis. Sir Francis Bacon L.C. succeeded Ellesmere in 1617/18 and immediately made a number of gestures to the common law judges. He stated on entry into office that he would supply and not subvert the law, both in jurisdiction and substance. He proposed a detailed reform programme to carry out this intention, including the requirement of bonds to penalize suitors seeking to restrain completed judgments at law without cause. Moreover he promised that decrees `upon suites brought after judgment shall containe no words to make voyd or weaken the judgment, but shall onely correct the corrupt conscience of the party'. Equity would not issue injunctions without completed evidence to support them, especially if property rights were at stake. Parties would always be given a hearing before an injunction issued against them. And Bacon L.C. would always consult common law judges in hard

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[118] `Mr. Antony Ben his discourse touching the premunire brought against Serjeant More and others for prosecution of a cause in Chancery after judgment given thereof at common lawe', Brit. Mus. MSS. Lansd. 174 ff, 210v-215, cited in Baker, `The Common Lawyers and the Chancery: 1616', op. cit., 219-220.

[119] Cited in J.H. Baker, `The Dark Age of English Legal History, 1500-1700', in op. cit., 435, 438. Baker cites numerous nominate reports of the case, and relies on Treby's MS. Reports, Middle Temple Library, 458-461, 602-603.

[120] Roscarrick v. Barton (1671) 1 Ch. Cas. 217, 219; 22 E.R. 769, 770 (Ch.).

cases, and not be `so sovereign or abundant in mine own sense' as to neglect their opinions. The Baconian settlement was cemented at another dinner of the judges with the Chancellor, where he asked to be accepted by them as their judicial `foreman'. Bacon L.C. ascribed past discords of law and equity to the personalities of the antagonists and promised a new start, asking that in cases where the judges feared a clash of jurisdictions, they should `freely and friendly acquaint him with it, and they would soon agree'. His final stroke was to appoint two fine common law judges, Dodderidge and Hutton JJ., as his assistants; and he allowed them soon to overrule Ellesmere's decrees and hold that equity could not contradict any rule of the common law or statute, but should only relieve in particular cases of mischief caused by application of the rule.[121]

Later Jacobean and Carolingian Chancellors continued to mark their respect for the law of the land and their confined view of equity. After the convulsion of the Civil War, Chancery jurisdiction was regarded as so lacking in threat that the common lawyers acquiesced in its continuation, unlike the other prerogative and conciliar courts which were nearly all abolished. The scene was now set for the development of a rule-bound body of equity jurisprudence, a new world of equitable rigor juris, led by the chancellors Nottingham and Hardwicke, Thurlow and Eldon.[122] The Baconian settlement proved to be a kind of seventeenth-century Judicature reform, permitting smooth development of the two jurisdictions, sometimes overlapping, sometimes concurrent, occasionally in tension or contradiction, but generally covering different spheres of legal work and avoiding waste of energy in jurisdictional battles over turf.

E *Changing Places?*

It was in this later era of equity that a notable conversion occurred. By 1800 Chancery had won a new renown, not for its fair and informal justice, but the very reverse. Equity's procedures for taking detailed evidence were corrupted as a cartel of clerks, masters and assistants gouged litigants and stretched out every process in order to maximize their fees. Chancery became the court of the very rich, its business being dominated by family trusts and settlements. The concepts of conscience and inquisitorial justice now dictated that every effort should be taken to discover family documents and family intentions in order to determine rights to land. Lord Eldon could take over thirty years to conclude his inquiries and give judgment, for he saw his role as determining group rights to family dynastic property, and in such struggles the fortunes of individual litigants were a by-product.[123]

Equity's augmentation of remedies in other areas of the law was more creative: specific performance, rescission and injunction were applied to contract; some limited injunctive relief was added to tort; and relief against penalties and forfeiture was granted in debt and mortgage transactions. Most of this activity took place as an auxiliary jurisdiction assisting the common law, or as a concurrent jurisdiction adding to the law's existing armoury. The common law too knew of relief against penal bonds from the latter part of the seventeenth century, for one example.[124] For another

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[121] Baker, `The Common Lawyers and the Chancery: 1616', op. cit., 224-229.

[122] See, for example, the `celebrated judgment' of Lord Nottingham in Cook v. Fountain (1676) 3 Swans. 585; 36 E.R. 984, which he himself counted his `greatest case in court', where the nature of the express trust is anatomized with serene power and certainty. Lord Nottingham there stated that the conscience of equity was no longer personal or ecclesiastical morality: `the conscience by which I am to proceed is merely civilis et politica, and tied to certain measures': ibid., at 600; 990; D.E.C. Yale, Lord Nottingham's Chancery Cases Vol. I (Selden Society, lxxiii, 1957) xlvi-xlviii.

[123] Baker, Introduction, op. cit., 126-131; M. Lobban, `Contractual Fraud in Law and Equity, c.1750-c.1850' (MS., 1996, forthcoming O.J.L.S.) at 9-20.

[124] The practice of substituting damages for penalties was confirmed by the Administration of Justice Act 1696; equity's relief against penalties was a separate development. See further A.W.B. Simpson, `The Penal Bond

example, the common law had early invented concepts of agency and fiduciary account, well before the equitable use or trust were invented.[125] Where common law had no substantive remedies, equity's exclusive doctrines were quite constrained, leaving aside the institution of the express trust. Equity's distinctive jurisdiction to relieve against fraud and undue influence in contractual dealings was more limited in practice than has sometimes been portrayed.[126] Much of it was a quite narrow paternalistic protection of vulnerable groups who were considered incapable of looking after their own interests, notably expectant heirs. Much else was simply a widening of the evidence that could be taken into account in judging whether a true consent to a bargain had been freely given. The Chancellors sincerely stated that they would not mend a bad bargain, and that they would respect the narrow legal doctrine of consideration.[127]

Equity was disabled from further doctrinal expansion by its powerful inhibition against the granting of compensatory damages. Prophylactic account remedies were ordered against erring trustees;[128] but a general jurisdiction to order restitutionary awards or compensatory damages against tortfeasors was eschewed lest Chancery resemble a civil Star Chamber engaging in discretionary retribution or deterrence. That is why there were so few equitable torts, the doctrine of equitable waste being exceptional.[129] Derry v. Peek in 1889 affirmed this approach, confining damages remedies to the common-law side for deceit or contractual breach, not for equitable fraud.[130] This left equity with only injunction, specific performance and rescission, powerful remedies for land dealings which nonetheless could be mute remedies for much commercial wrongdoing. The remedies of equitable lien, account and constructive trust were available for breaches of fiduciary duty and confidence; but these doctrines only emerged from general trusteeship doctrine around 1850 and were hardly designed to provide an equitable emulation of tort.[131] Lord Cairns' Act recognised the deficiency of compensatory remedy, and allowed equitable compensatory damages in lieu of a clear right to specific performance; but so great were equity's inhibitions that the Act was rarely used. If specific performance was clearly available, damages were unnecessary anyway.[132]

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with Conditional Defeasance' (1966) 82 L.Q.R. 392, also in Legal Theory and Legal History, ibid., 111-142; D.J. Ibbetson, `Absolute Liability in Contract: The Antecedents of Paradine v. Jayne', in F.D. Rose, ed., Consensus Ad Idem: Essays on the Law of Contract In Honour of Guenter Treitel (London, 1996) 3-37; A.M.E.V-U.D.C. v. Austin (1986) 162 C.L.R. 583 at 186-191 per Mason and Wilson JJ.

[125] See Hackney, op. cit..

[126] Lobban, op. cit.; cf. Atiyah, Rise and Fall of Freedom of Contract, op. cit., 388-397, 671-680.

[127] See Lobban, op. cit.; L.A. Sheridan, Fraud in Equity (London, 1957) 125-132; A.W.B. Simpson, `The Horwitz Thesis and the History of Contracts', in Legal Theory and Legal History. Essays on the Common Law (London, 1987) 203 at 209-236, 250-258.

[128] Famously in Keech v. Sanford (1726) Sel. Cas. t. King 61; 25 E.R. 223 (L.C.).

[129] The equitable tort of breach of confidence is a very modern doctrine, usually counted to begin with Prince Albert v. Strange (1849) 18 L.J. Ch. 120; 1 Mac. & G. 24; 41 E.R. 1171; and is something of an anomaly, a doctrinal enigma; see references at n. 46, above.

[130] (1889) 14 App. Cas. 337 (H.L.); see further M. Lobban, `Nineteenth Century Frauds in Company Formation: Derry v. Peek in Context' (1996) 112 L.Q.R. 287; Gummow, `Equitable Damages for Breach of Fiduciary Duty', op. cit., 57-61.

[131] L.S. Sealey, `Fiduciary Relationships' [1962] C.L.J. 69.

[132] J.A. Jolowicz, `Damages in Equity -- A Study of Lord Cairn's Act' (1977) 34 C.L.J. 224, 246; Meagher, Gummow and Lehane, op. cit., 630-650; P.M. McDermott, Equitable Damages (Sydney, 1994) 5-49.

Modern equity's readiness to intervene can thus be exaggerated; and conversely the common law's techniques for intervention can easily be underestimated. The common law too had doctrines for the policing of contractual consent, notably deceit, duress, non est factum, estoppel in pais, and rules as to formalities and offer and acceptance. The gates for active common-law regulation of contract were narrower chiefly because the evidence was less available. With time the common-law bottleneck on `equitable' admission of evidence was opened up. King's Bench under Lord Mansfield and his successors instituted a superior bills procedure modelled on equity and used special juries extensively to elicit common-knowledge fact. Means of receiving the witness of parties were invented. There was a relaxation of the formality of pleading, especially through the wide deployment of action on the case procedures which allowed the facts to be presented to the jury more simply. Arguably there was by Lord Mansfield's time more equity or aequum et bonum to be had in King's Bench than in Chancery.[133] In 1834 Richard Wooddeson could still detect a difference between the two jurisdictions, but only just:

> our courts of equity at present differ from those of law more in exterior matters of practice than in principle, and more in the mode of relief than in determining the essential merits of the cause, as to the naked question of who shall prevail in the litigation.[134]

F *The Decline of the Jury and the Rise of Doctrine*

In the nineteenth century common-law procedure and the style of common-law reasoning was further transformed, this time by the deposition of the jury. In the older common law, formalistic legal rules left a wide power of fact-finding and fact-determination to juries and to the litigants themselves through their pleadings; we have seen how sixteenth-century judges counted this as a strength of the system.[135] Nineteenth-century judges came to hold the reverse opinion.[136] The common jury's strong fact-finding discretion was a black box of decision-making many shades too dark for the rationalizing judges of the Victorian age. The Common Law Commissioners of 1852-1853 may have been expressing the opinion of many judges when they reported to Parliament on the perceived inadequacies of the civil jury:

> [W]e are not at all blind to the fact that in many instances juries are not so constituted as to ensure such an average amount of intelligence as might be desired;...in the agricultural districts the common juries are sometimes composed of a class of persons whose intelligence by no means qualifies them for the due discharge of judicial functions. Such persons, unaccustomed to severe

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[133] Holdsworth, `Blackstone's Treatment of Equity', op. cit., 6-13 and ff.; Oldham, op. cit..

[134] Lectures on the Laws of England (2nd ed., W.R. Williams ed., London, 1834), cited in Lobban, op. cit., 6.

[135] Above, text accompanying nn. 87-88.

[136] On the history of the jury see Sir William Blackstone, Commentaries on the Law of England (4 vols., 1st ed., Oxford, 1765-9; ed. E. Christian, 15th ed., London, 1809) iii, 349-85, and note Blackstone's `eulogium' to the excellence of the jury system, ibid., at 378-81; W. Forsyth, History of Trial By Jury (London, 1852) 93-191, 259-298, 415-50; Pollock and Maitland, op. cit., i, 138-50; ii, 617-50; J.B. Thayer, Preliminary Treatise on Evidence at the Common Law (London, 1898) 47-262; J.P. Dawson, A History of Lay Judges (Cambridge, Massachusetts, 1962) 118-29; S.F.C. Milsom, Historical Foundations of the Common Law (2nd. ed., 1981) 33-50, 58-9, 66-81, 243-6, 410-28; idem, `Law and Fact in Legal Development', in idem, Studies in the History of the Common Law, (London, 1985) 171-89; idem, `Reason in the Development of the Common Law', ibid., 149-70; Baker, Introduction, op. cit., 84-111; J. Stone and W.A.N. Wells, Evidence: Its History and Policies (Sydney, 1991) 16-23, 55-9; R.M. Jackson, `The Incidence of Jury Trial During the Past Century' (1937) 1 M.L.R. 132; W.S. Holdsworth, A History of English Law (13 vols., London, 1922-52) i, 312-50; iii, 639-56; ix, 126-39, 167-72, 298-315; W.R. Cornish, The Jury (London, 1968) 10-14; Atiyah, op. cit., 151, 210-11, 424-31; Simpson, `The Horwitz Thesis and the History of Contracts', op. cit., 203-271, 270-271.

> intellectual exercise or to protracted thought...sometimes pronounce verdicts which bring the institution of juries into disrespect.[137]

Driven by sentiments such as these, judges sought to replace the breadth of jury discretion with more and more elaborate adjectival and substantive law. For most of the nineteenth century, judges were forced to do this gradually by evolving new doctrinal and procedural methods limiting the jury's role. It was not until 1883 that formal rules explicitly permitted judges to exclude the jury from civil trials at discretion, wherever matters were formerly dealt with in Chancery or Admiralty without the assistance of a jury, or in matters where a jury could not conveniently make investigation.[138] Even after that important reform, common lawyers could still assail the unintelligent and unguided populism of jury trial. Dicey, for example, wrote a celebrated attack in 1885:

> Trial by jury is open to much criticism...the habit of submitting difficult problems of fact to twelve men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle... Juries are often biassed against the Government. A technical question is referred for decision, from persons who know something about the subject, and are impartial, to persons who are both ignorant and prejudiced.[139]

Jackson has estimated that until the 1883 reform, ninety percent of common-law civil trials were heard before juries; after the reform, the proportion dipped to fifty percent and then continued to decline. The Juries Acts of 1918-1925 finally decreed that civil trials be conducted without juries unless ordered by the court; civil jury trials became the exception rather than the rule.[140] Before these late reforms, however, and throughout the formative period of the classical common law, juries sat on almost all civil hearings; and judges strove to find methods to hem the jury in and curb its decisional power. The chief method employed was to engage in more and more judicial fact-finding, in the guise of testing the propriety of pleadings and then applying formal legal doctrine to the established facts. Juries were reduced to deciding narrow questions of fact as determined by the judges, with a seemingly automatic legal result following from the factual findings. Once the judges could decide which narrow factual questions for the jury were relevant by means of fine-grained legal tests, they had won control of the adjudicative process.

There were important exceptions to this general trend, notably the use of special juries to advise the court on some special area of expertise and help the court determine which business norms and practices to absorb into legal principle. The best known instance was Lord Mansfield's liberal use of special juries of merchants to help develop new doctrines of insurance, bills of exchange, promissory notes and other areas of commercial law.[141] However, the traditional use of the special jury with its valued non-legal expertise did not contradict the wider swing away from the ideal of the untutored citizen jury as a sure fount of justice.[142]

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[137] (1852-3) H.C. Parliamentary Papers, xl. 701, 708, quoted in Atiyah, op. cit., 390. Reform came with the Juries Acts of 1825 and 1918-1925, and the Rules of the Supreme Court (1883) Order XXXVI.

[138] Rules of the Supreme Court (1883) Order XXXVI.

[139] A.V. Dicey, An Introduction to the Study of the Law of the Constitution (1st ed., London, 1885; 10th ed., 1959) 394, 398. Dicey also preferred the judge-made law of the elitist professional courts to the legislation of an untutored and short-sighted Parliament: see idem, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century (London, 1905) 361-398.

[140] Jackson, op. cit.. Reasons for the resilience of jury trials on the criminal side are anatomized in A.A.S. Zuckerman, The Principles of Criminal Evidence (Oxford, 1989) 29-46.

[141] See J.C. Oldham, `Special Juries in England: Nineteenth Century Usage and Reform' (1987) 8 Journal of Legal History 148; idem, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century (2 vols., Chapel Hill, 1992) i, 82-99.

[142] For the history of the special jury and judicial concerns with common jury quality, see J.C. Oldham, `The Origins of the Special Jury' (1983) 50 U. of Chicago Law Rev. 137.

In order to apply the more elaborate and discriminating judicial tests to legal facts in the course of determining rights, modern courts were required to sift through evidence of the parties' conduct to discover who had acted, at which times, with which state of knowledge. The detailed investigations of evidence undertaken are demonstrated by the immense statements of facts and elaborate pleadings recorded in the early- and mid-nineteenth-century law reports. For example in Arkwright v. Gell, Abinger C.B. began his discussion of the case by observing:

> A special case was reserved on the trial, for the opinion of the Court, stating a great number of documents and facts, upon which the Court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of fact only, which inference may have been varied by a very slight circumstance.[143]

This was a special case where the judges formally sat as fact-finding jury; but the judges' experience of adjudication was not dissimilar where a standard jury did participate. Abinger C.B. revealed a growing sense that the courts had bitten off more than they could chew in the field of fact-finding and evidence. Intense pressures on court time, with the heightened litigation of a burgeoning industrial and commercial economy, soon demanded a different style of adjudication and definition of rights.[144]

One solution to this problem was to preserve the common law's concepts of action and intention as the basis of rights, but to simplify them -- even transform them -- by `objectification' of the operative intention or consent.[145] The final simplification of the law was to emphasize the objectivity of rights, superimposed upon any actual intent or agreement of the parties -- a shift exemplified by tests such as `reasonableness'. This allows adjudication to proceed in a more peremptory or summary mode, directly enforcing broad, discretionary policy standards; and in tandem, discouraging parties from litigating chiefly on the basis of instance-specific, detailed factual pleading.[146] Atiyah and Gilmore have identified such trends in nineteenth-century contract doctrine, with Gilmore observing: `At the height of the classical period it seemed that it was hardly possible to phrase any contract issue other than as a question of law.'[147] The result of these transformations was a new type of equity in the common law -- particular justice and aequum et bonum achieved not through fact discretions, but through the working up of every factual nuance of a case into a discriminating point of law. The Judicature Acts marked a further change by arming the common law with extended interlocutory remedies, enabling courts to process still more fact into law; special pleading no longer served to reduce the wash of significant fact going into the courtroom to a single issue or tightly circumscribed set of issues. But the Judicature Acts did not initiate these changes; the common-law courts were reaching for a peculiarly

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[143] (1839) 5 M. & W. 227, 227-8; 151 E.R. 87, 97 (Ex.). For a later example of a court functioning as a tribunal of fact and law, with resulting expansions of legal doctrine, see Carlill v. Carbolic Smoke Ball Co. [1892] 2 Q.B. 484; affd. [1893] 1 Q.B. 256; discussed in A.W.B. Simpson, Leading Cases in the Common Law (Oxford, 1995) 259-291.

[144] Cf. Atiyah, op. cit., 390-391.

[145] `Objectification' of consent in English legal history is perhaps the leading theme of Holmes, The Common Law , op. cit.: see M. De W. Howe, `Introduction', ibid., xx-xxvii; H.L.A. Hart, `Diamonds and String: Holmes and the Common Law' in Essays in Jurisprudence and Philosophy (Oxford, 1983) 278, 279-283; M.J. Horwitz, `The Legacy of 1776 in Legal and Economic Thought' (1976) 19 Journal of Law and Economics 621, 626 ff.

[146] A similar interpretation of the evolution of nineteenth-century contract law can perhaps be found in Atiyah, op. cit., 388 ff., especially 405-408.

[147] G. Gilmore, The Death of Contract (Columbus, Ohio, 1974) 99.

doctrinal style of equity long before 1873.[148]

Conclusions

What are the lessons from these historical investigations of the nature of law and equity? I would suggest three main conclusions.

First, the theoretical case for a separate tradition of equity jurisprudence is not supported by truly convincing historical arguments. The historical uniqueness of equity issues from evidence and procedure, not distinct principles. Nonetheless it is a waste of critical energies to assail the historical existence of the separate equity stream; Anglo-Commonwealth lawyers have been used to thinking in those terms for centuries and show every sign of continuing. Modern partisans of separate equity on the one hand and of out-and-out fusion on the other are only echoing the acrimonies of the 1616 crisis between Ellesmere and Coke, `like Essau and Jacob wrastling for birthright'.[149]

Secondly, law and equity were successfully fused at the remedial and procedural level by reforms stretching back at least a century before the Judicature Acts. Those statutes were a consolidating exercise focusing on the administration of justice; they were not really a new departure even at the level of procedure, bearing in mind the cross-breeding of equitable styles of procedure into the common law since the time of Lord Mansfield and the slow elimination of significant jury discretions. At one level, then, the anti-fusionists are correct to say that the Judicature Acts did not fuse law and equity or vary them in any real way. But this does not mean that the two bodies of doctrine continued with separate lives after 1873; the drive to fusion came from within law and equity themselves.

The final point is that we have a new form of `equity' in the post-jury common law, with its blend of broad principles of reasonableness and fairness, its fine-spun rules evolved from attention to legally-significant fact, and its anxiety to promote a perfect justice.[150] But this has not all been gain. The new `equitable' law is not necessarily superior to the practices of the ancients with their formalism and writs of action supplemented by a discretionary equity. The system of legal precedent that emerges from modern private law is so baroque and elaborate that judges now typically decide cases by distinguishing over-specified rationes decidendi of past cases as much as by seeking to apply general principle. The saga of tort remedies for economic loss is a prime example, with the special facts of Anns v. Merton L.B.C.[151] becoming a new principle of law, extended to cover the very different special facts of Junior Books Ltd. v. Veitchi Co. Ltd.,[152] the results then being sanctified as core legal principles, which finally must be over-ruled because their containment by distinguishing has become a farce.[153]

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[148] Cf. M.S. Arnold, `Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind' (1974) 18 American Journal of Legal History 267; Milsom, `Law and Fact in Legal Development', op. cit., 171-89.

[149] Above, text accompanying n. 118.

[150] Cf. Lord Denning M.R., `it is the common lawyers who do equity now': Hill v. A.C. Parsons Ltd. [1971] 3 All E.R. 1345 at 1359.

[151] [1978] A.C. 728.

[152] [1983] 1 A.C. 520.

[153] D. & F. Estates Ltd. v. Church Commissioners for England [1988] 2 All E.R. 992; Murphy v. Brentwood D.C. [1990] 2 All E.R. 908.

Twenty years ago P.V. Baker argued that the new style of `equitable' common law, with its mixture of vague standards and open-quarry approach to evidence, was creating a monstrously slow and incoherent civil justice system.

> A comparison of the headnotes of reports of cases decided in say 1906 with those of 1976 is revealing, the former being distinguished by propositional brevity, the latter by factual comprehensiveness. Pleadings are coming to read more like affidavits. Further, the originating summons and motion with supporting affidavits have been replacing the writ with pleadings as a mode of trial which whatever their undoubted merits do not produce a careful definition of issues. In all actions facts are gone into meticulously aided by the ubiquitous copying machine. As a consequence hearings last longer, and more judges than ever are sitting in the Supreme Court of Judicature.[154]

If we examine law reports produced before the 1860s, the compression and elegance of judgments is even more remarkable. It is a different style of adjudication, with elaborate statements of fact in the pleadings which are then probed and tested by judge, jury and counsel, followed by the most concise narration of fact and discussion of principle in the judgments themselves. That type of concise judgment, with its supporting procedure of formalistic fact determination, and with equity brought in to correct any shortcomings in the style of an articulate arbitration, is now long gone. We cannot easily say that our new system of private law, based on broad standards joined to a multiplicity of detailed rules apt for legal argument and judicial distinguishing, is the more just or efficient. To sum up with another scientific metaphor: in any legal system there might seem to operate a principle of conservation of aggregate discretion. If fact-finding discretion is converted into an array of complex doctrinal solutions, then discretion yet remains; the irreducible quantum of discretion has only been translated into a new language, but not eliminated. The patterns of law-equity fusion suggest that strenuous efforts to classify and reclassify the law of obligations cannot cast broad discretion out of the common-law system, and all attempts to do so are foredoomed.

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[154] P.V. Baker, op. cit., 538-539; cf. J.H. Baker, Introduction, op. cit., 107-110, 131-133. Sir Owen Dixon was said to regret that `the reforms of the 1870s had been carried out by Chancery lawyers who had destroyed the Common Law Procedure Acts and had poured the common law into an equitable bottle': see (1972) 46 A.L.J. 429 at 434.