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Topic 1 – Introduction and History:

Origin of Equity:

Equity can be seen as a higher law or a higher authority, which is based on good conscious. The foundations of equity began in England in the 13th Century in the Court of Chancery. This Court arose out of difficulties individuals faced in pursuing justice under the common law system. Before a Chancellor was appointed the petitions were dealt with by the King's Council. The chancellor was a member of the Church who sought to determine, based on individual merits, whether the common law had produced an unjust or unfair ruling.

The Chancellors role was:

- To ensure that the "fair and just" application of the law was applied in a Court of Equity
- To protect a plaintiff from an unconscionable or misapplication of the law in the Chancellors view.

- To develop a system of "equity maxims" which would ensure that equity would uphold the "fair and just" application of the law.
- To disregard "precedent" and completely ignore the need for consistency and homogeny in favour of ad hoc decisions based on individual merit.
- Correct defects in the common law, providing remedies such as injunctions and Specific Performance unavailable at the common law (rather than damages from common law).
- Recognise and enforce contracts unenforceable at law.

Before the enactment of the *Judicature Acts of 1873-1875 (UK)* equitable cases were heard in a separate Court from their common law counterparts, the ideology being that a separate Court would provide a distinct and unique application of equity principles on the case. However, once the *Judicature Acts of 1873-1875 (UK)* was passed, this changed significantly since the number of disputes and legal proceedings rapidly increased requiring the Courts to administer both equitable doctrines and common law rulings

Dispute between common law and equity:

The famous and primary dispute between common law and chancery can be seen in Sir Edward Coke (common law) vs Lord Ellesmere (chancery) in 1613-16. The dispute settled in favour of Equity by James 1, concluding that where principles of equity conflict with rules of common law, equity prevails.

Common Law Courts	Chancery
• **Damages**	• **Injunction** • **Specific reform** • **Justice – duress etc.** • **Temp relief**

Relationship between law and Equity prior to the Judicature Acts:

Prior to the enactment of the Judicature Acts the common law did not recognise any equitable rights, titles and interests. This can be seen in Castlereagh Motels v Davies-Roe (1976) 67 SR (NSW) 279. Equity also had no power to decide disputed legal rights and titles. However the Equity Act 1880, s 4 (Equity Act 1901 s 8) abolishes this notion. Equity had no power to award damages which is explored in Goldsborough Mort v Quinn (1910) 11 CLR 674. The common law was also restricted in many senses, the court lacked power to give interlocutory relief or to decree specific performance or grant injunctions. They also lacked the authority to make declarations and no power existed to transfer cases from one jurisdiction to the other. (Mines Royal Societies v Magnay (1854) 10 Ex 489; 156 ER 53).

Now, in present day all branches of the court have the power to administer equitable remedies and equitable defences can be pleaded in all branches of the court and the appropriate relief given. Additionally, all branches of the court must recognise equitable rights, titles and interests and they have a general power to determine legal rights and titles.

Fusion Fallacies:

After the enactment of the Judicature Acts erroneous assumptions were made stating that the Act had united the common law and equity into one bundle of principles. Fear arose in NSW that by merging the courts, merging the admin of equity – it'll create legal confusion.

The idea of a 'fusion fallacy' is where methods or remedies available in one path are utilised in the other part, or modification along the same lines. It is known as a 'fallacy' because many have stated that it is wrong to conclude that the rules of common law and equity have been amalgamated, it is only their administration, which has been unified.

In the future development of the common law and equity, these two systems of law may borrow from each other and there may be a mingling of principles. The primary case in this instance is Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298.

Maxims of Equity:

The 'Maxims of Equity' are a series of guiding principles developed throughout time which can be applied to assist the determination of a claim. These principles were commented on in *Corin v Patton (1990) 169 CLR 540* by Mason CJ and the core maxims are listed below:

- Equity is equality
- Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy
- Equity looks to the intent rather than the form22
- Where the equities are equal, the first in time shall prevail.
- He or she who seeks equity must do equity
- Equity regards as done that which ought to be done
- Equity imputes an intention to fulfil an obligation
- Where there is equal equity, the law shall prevail.
- Equity acts in personam
- Equity does not assist a volunteer
- Equity follows the law

- He or she who comes into equity must come with clean hands
- Equity assists the diligent and not the tardy

From these maxims, a long list of important contributions by equity can be established. This list provides some insight in the modern application of equity principles but by no means is a complete and authoritative list:

- Equity may recognize property rights in situations where the common law would, or perhaps, could not;
- Equity has developed the important doctrines of contribution, marshalling and documented a range of equitable securities;
- Equity is more far reactive to mistake, fraud (including unconscientious behaviour) and breaches of confidence;
- Equity is more lenient than the common law when considering a failure to comply with the requirements of formality;
- Equity has been regarded as a more adequate function to be able to trace through substitutions of one asset for another;
- Equity has a highly important role to play in the consideration of the institution of the trust and with it the fiduciary obligations of trustees;

Use of the Maxims:

The use of equitable maxims is entirely in the hands of the litigating parties to determine whether there use is beneficial or harmful to the arguments of their respective cases. For example, if a plaintiff has a history of unconscionable or 'bad faith' behaviour (and assuming that this evidence is admissible) then a defendant may attempt to defeat the plaintiff's case by simply arguing that the plaintiff does not come to Court with clean hands.

Most relevant is the use of the maxims is the concept outlined in *Black Uhlans Inc v NSW Crime Commission (2002)* 12 BPR 22,421 where it was stated by Campbell J that 2 preconditions must apply in order to rely on equitable maxims. The conduct of the plaintiff must:

> *'have an immediate and necessary relation to the equity sued for'* and must;
> *'constitute a depravity in a legal as well as in a moral sense*'.

Topic 2 - Equitable rights titles and interests:

What are equitable interests?

- The equitable interests (being considered a proprietary interest) are the strongest estate one can have in equity
    - The proprietary interest gives the holder rights that can be exercised directly against the property which is the subject of the interest.
- The best example is the trust:
    - Existence is premised on the separation of legal and equitable interests in property.
    - Trust – A proprietary equitable interest is the strongest estate that someone can have in equity.