LAWS217

Introductory Lecture:

- Annotated Bibliography
  - Concise exposition
  - Analysis
  - Informed library research
  - Provide detailed analysis on the source you have cited
  - Typed – max. 1000 words
- Take home
  - Covers all topics
  - One problem question
  - One essay question
- Quiz
  - Week 4 (Wk 1-4) + 10 (Wk 1-9 or 10)
  - Based on work covered any work prior to the quiz
- Participation
  - Group presentation + Seminar engagement
  - Presentation time will be determined by your tutor
- Lectures are online and found on ilearn
  - Lecture does not have power point slides
  - There are additional lectures on Echo 360 – these are seen as summaries and are highly advised to be listened to
    - Disregard what has been said on these lectures about assessments and exams
    - Focus only on content

Week 1:

History of Equity

- The genius of equity as a curative to the unyielding rigors of the common law is one of the great triumphs of the past millennium … Whilst originally confined to trusts of land and management of the estates of lunatics and minors, this once nascent and inconspicuous appendage of legal thought has since burgeoned into one of the predominant intellectual forces underpinning modern civil law
- Origins of the work 'equity' can be traced to the Ancient Greek word *epeikeia* as used by Aristotle in his *Nichomachean Ethics* where he said:
  - Equity … Is a rectification of law in so far as law is defective on account of its generality … Equitable man … is one who choses and does equitable acts and is not unduly insistent upon his rights, but accepts less than his share, although he has the law on his side. Such a disposition is equity: it is a kind of justice, and not a distinct state of character.
- The orthodox view of the history of equitable principles is that is arose due to common laws failures
- Equity in England

- The orthodox view of equities origins is that it arose out of the various defects in medieval common law
- The initial reference point in the orthodox account of equity's historical development in English law is the Middle Ages and, in particular, the reign of the Norman king, Henry II (1154–1189), who centralised the administration of justice in England into the hands of the Curia Regis or King's Council
  - This council was responsible for all three branches of government (legislature, executive and judicature)
- By the reign of Edward I (1272–1307) the administration of justice began to be distributed between the three courts that developed out of, and eventually separated from, the King's Council
  - These three courts developed what is known as 'the common law'
    - The part of the law that was unenacted, non-statutory, that was common to the whole land and to all Englishmen and was borrowed from the canonists – who used "*jus commune"* to denote the general law of the Catholic Church
  - The three courts were:
    - King's Bench, which dealt with civil and criminal cases involving the Crown;
    - Common Pleas, which dealt with civil suits between subjects of the Crown; and
    - Exchequer, which dealt with taxation disputes
- Common law was developed by the judges sitting in the common law courts
  - Characterised by innovation and flexibility
  - Legal system was in its infancy
  - Common law courts granted relieve on the basis of abstract judgements
  - **However**, as time progressed the interests of precision in the legal system began to outweigh the concern for the universal redress of wrongs.
    - By the end of the 14th century the common law had become static and ceased to respond to changed social conditions
- The static common law lead to the early Courts of Chancery
  - Developed and administered the principle of equity
  - Initially, litigants who were dissatisfied with the common law courts began to petition the king directly
  - the king swore 'to do equal and right justice and discretion in mercy and truth'
  - By the middle of the 14th century the increasing number of petitions saw the king delegating his authority to deal with them to the Lord Chancellor, the king's principal legal officer and 'keeper of the king's conscience'
    - Until the end of the 15th century Chancery was the principal bureaucratic institution in England
  - **However**, the increasing volume of legal cases to be resolved by the chancellor himself transformed the medieval Chancery

        - Its administrative and judicial functions separated, with the latter becoming, by the 1430s, one of the central courts of the realm
    - It was this court that developed and administered the principles of equity
    - Chancery was a one-man court, in that the chancellor was responsible for its decision
    - The emergence of Chancery as an increasingly important court coincided with the long period of war between England and France, commonly referred to as the Hundred Years War (1337–1453). Whereas French and Latin had, until then, been the languages of politics and the law, Chancery, from its inception, conducted most of its proceedings in English
    - It was not until 1557 that the first reports of Chancery cases were published
    - The emphasis on conscience in the exercise of the chancellor's jurisdiction was such that, by the middle of the 15th century, Chancery was known as the court of conscience
- Chancery was not the only court that administered equitable principles. For a time during the Tudor period the Court of Requests operated a form of 'poor man's Chancery' and the Court of Exchequer entertained a relatively small number of equity cases from the time of the English Civil War in the mid-17th century until its equity jurisdiction was abolished by statute and transferred to Chancery in 1841
- Equity was a gloss on the common law
    - Chancery developed specific performance – forcing one to carry out obligations
    - Misrepresentation (Innocent) – permitted rescission where common law did not
- The common injunction
    - The effect of such an injunction was to order a plaintiff at common law to discontinue proceedings or, if a verdict at common law had already been obtained, to prevent it being enforced. Disobedience to a common injunction resulted in imprisonment
    - A defendant to common law proceedings could obtain a common injunction if it could be established that the plaintiff's enforcement of common law rights was such as to amount to having acted unconscientiously. Two important features were implicit in this procedure
        - First, the remedy was characterised as *in personam* in that it attached to the person of the common law plaintiff
        - Second, the common injunction (and indeed all equitable remedies) was discretionary
    - The common injunction effectively challenged the authority and, in a restricted sense, the validity of the decisions of the common law courts.

    - A response, as demonstrated in *Russel's Case* in 1482, was to release any person imprisoned for failing to obey a common injunction upon an application for a writ of *habeas corpus*.
    - The extent of the conflict between Chancery and the common law courts depended very much upon the personal relationship that existed at any time between the chancellor and the leaders of the common law courts
    - *Earl of Oxford's Case*
        - This case was concerned with protracted litigation relating to the entitlement to certain land in London's Covent Garden. In the case, Lord Ellesmere declared
        - 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 … [W]hen a Judgment is obtained by Oppression, Wrong and a hard 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
    - Following the decision in this case, the dispute between the common law courts and Chancery was referred to James I
        - Ruled in favour of Ellesmere's approach, thereby upholding the validity of the common injunction and establishing the supremacy of equity over the common law
- Systemisation of equity
    - Although the restoration of the monarchy in 1660 signalled the reassertion of Chancery's importance as a court of the realm it was also recognised that the critiques of the court were not entirely without foundation.
        - Thereafter, Chancery started to transform itself. This process led Chancery to increasingly function in much the same way as did the courts of common law
    - Lord Nottingham is often referred to as 'the father of modern equity' for his systematising work.
        - first of a long line of chancellors whose decisions laid down the general principles of equitable jurisdiction
    - In this context, particular mention must also be made of the chancellorship of Lord Eldon (1801–1827). The exceptional length of his tenure in office, combined with his high intellectual standing and capacity for work, resulted in 32 volumes of reports of his decided cases. These cases are really the basis of modern equity
- The Supreme Court of Judicature Act Reforms
    - While equitable principles were being systematised by Lord Nottingham and his successors, great procedural deficiencies continued to impact negatively on Chancery
    - The deficiencies, most conspicuously on display during the chancellorship of Lord Eldon, meant that excessive delays were not

uncommon and that many litigants had to settle disputes out of court rather than proceed to litigation
    - Spence, in 1839, in his Preface to Equitable Jurisdiction of the Courts of Chancery, wrote that '[n]o man, as things now stand, can enter into a Chancery suit with any reasonable hope of being alive at its termination if he has a determined adversary'
    - A significant step in this process of fusion was the *Common Law Procedure Act 1854* (UK), which gave the common law courts some power to grant injunctions and specific performance as well as to hear and consider some equitable pleas
    - This legislation was followed by the *Chancery Amendment Act* 1858 (UK), more popularly known as *Lord Cairns'* Act, which enabled Chancery to order damages in favour of a plaintiff in lieu of, or in addition to, a decree of specific performance or an injunction.105 Prior to this legislation, a plaintiff who had been denied equitable relief by Chancery had no option but to commence fresh proceedings before the common law courts for an award of damages.
    - These reforms did no address the existence of separate courts of common law and equity
    - The question of reform was eventually addressed with the enactment of the *Supreme Court of Judicature Act 1873* (UK), which abolished the historic courts of common law and equity and, in s 3, provided for the establishment of 'one supreme court of judicature in England
        - The new court has two parts
            - The first was the High Court of Justice, which was divided into a number of divisions, the main ones being the Queen's (or King's) Bench Division and the Chancery Division
            - The second was the Court of Appeal, which heard appeals from the High Court of Justice
    - The right of a further appeal to the House of Lords was confirmed by the *Appellate Jurisdiction Act 1876* (UK)
    - *Supreme Court of Judicature Act 1873* (UK) did deal with some issues relating to legal principle
        - Significantly, s 25(11) stipulated that, if there were any substantive differences between the rules of common law and equity that were not dealt with elsewhere in s 25, the equitable rule would prevail. In effect, s 25(11) gave statutory force to, and reaffirmed, the Royal Decree of 1616 issued by James I in the wake of the Earl of Oxford's Case
- Equity in the post-Supreme Court of Judicature Act era
    - The enactment of s 25(11) of the *Supreme Court of Judicature Act 1873* (UK) symbolised a formal supremacy of the principles of equity over those of the common law
        - However, the opposite was the case

        - The relative dominance of common law over equity in the post-*Supreme Court of Judicature* Act era was partly attributable to the impact that common lawyers had in administering the principles of equity, there being more of them than equity judges in the new unified court
        - Illustrations of the post-World War II renaissance of equity have been particularly noticeable in relation to confidential information, fiduciary obligations, and estoppel
- Equity in Australia
    - First phase
        - *New South Wales Court Act 1787* (UK) (27 Geo III c 2), which created the legislative basis for the establishment of the Colony of New South Wales, this Act only empowered the Crown to create a criminal court in New South Wales
        - By creating the Court of Civil Jurisdiction it was claimed by some people, including Jeremy Bentham, that the First Charter of Justice was illegal
        - It had power to deal in a summary fashion with 'all pleas concerning interests in lands, houses, tenements, and hereditaments, and all manner of interests therein, and all pleas of debt, account, or other contracts, trespasses, and all manner of other personal pleas whatsoever'
        - importantly, the power given under the First Charter of Justice was purely based in common law and did not include an express power to decide equitable claims or defence
    - Second phase
        - Arguably, the exponential increase in the court's work led to calls for a reformed legal system and for a Second Charter of Justice
        - 1814, NSW abolished the Court of Civil Jurisdiction and replaced it with a Supreme Court. The Second Charter of Justice (like the first) was based solely on the royal prerogative but, unlike the First Charter of Justice, this version included an express recognition of the new Supreme Court having full power to 'administer Justice in a summary manner according or as near as may be to the Rules of our High Court of Chancery in Great Britain
    - Third phase
        - The *New South Wales Act of 1823* (UK) (4 Geo IV c 96) almost completed the process of bringing the creative child of Australian law into line with its British forebear. The Act separated New South Wales and Van Diemen's Land and created a new Supreme Court and Legislative Council for each colony
        - The Act also authorised new Charters of Justice to be issued
        - Third Charter of Justice granted the new Supreme Court power 'to do, exercise and perform all such Acts Matters, and things necessary for the due execution of such Equitable jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within England'. The

question of whether the Australian Supreme Courts had equitable jurisdiction was therefore forever resolved in the affirmative.

- Further constitutional reform came with the passing of the *Australian Courts Act 1828* (UK) (9 Geo IV c 83), which cemented many of the principles of the New South Wales Act 1823 (UK), but clearly stated explicitly that the laws of England at 25 July 1828, both statute and judge-made, were to be applied as far as possible in New South Wales and Van Diemen's Land
- *Administration of Justice Act 1840* (UK) (4 Vic No 22). This Act gave statutory recognition to the separate operation of law and equity within the Supreme Court but it did not create any separate tribunal. The *Administration of Justice Act 1840* (UK) created the office of the Primary Judge in Equity who was to sit alone on equitable matters

- Fourth phase
  - In 1853, the *Supreme Court Procedure Amendment Act 1853* (SA) was enacted and included provisions aimed at fusing the administration of law and equity in South Australia
  - In 1876, Queensland became the first Australian colony to adopt the judicature system, modelled on the system introduced in the United Kingdom earlier in that decade.159 Most other colonies followed soon after — South Australia in 1878, Western Australia in 1880, Victoria in 1883 and Tasmania in 1932. The notable exception was New South Wales, which finally passed the relevant legislation in 1970 and which came into effect in 1972

- Uses and trusts
  - Important to the growth of the Chancery's jurisdiction was the recognition and enforcement of the 'use', a term derived from the corruption of the Latin expression ad opus which means 'on behalf of
    - The system of uses related to transfers of land for the benefit of others and pre-dates their enforcement by Chancery
    - Over time the use was transformed into the modern trust
  - Origins
    - Blackstone claims that the use was a clerical adaptation of the Roman *fidei commissium*. 41 The *fidei commissium* was a device invented to pass benefits to an heir through the medium of a trusted friend in circumstances where some legal impediment precluded the heir from taking the benefit directly. Maitland doubts there is any connection between the development of the use/ trust and *fidei commissium*
    - The waqf developed in Islamic society 'for exactly the same purposes as English trusts'. These were, as is discussed below, 'to avoid taxes, to avoid confiscation of property by the sovereign and to avoid the strictures of the laws of bequest and inheritance
  - At the time when uses began to be enforced by Chancery a transfer of land was called a *feoffment*.
    - A transferee of land for the use of some other person was called a *feoffee to use*.

        - The *feoffee to use* was required to hold the title to land for the benefit of that other person, the *cestui que use*. A conveyance of land to a *feoffee to use* would direct the transferee to hold the land for the benefit of the *cestui que use*
        - The common law did not recognise the rights of the *cestui que use*, holding that the *feoffee to use* was the owner of the land. However, the chancellors, by focusing upon the conscience of the *feoffee to use*, recognised the claim of the cestui que use and enforced the use against the *feoffee to use*
    - The popularity of uses and Chancery's enforcement of them was driven by two major circumstances
        - First, the use provided men with more sophisticated ways of dealing with their assets than was permitted by the ancient rights of primogeniture and dower that were recognised by the common law.
        - The second factor behind the popularity of the use was its important role in facilitating the avoidance of feudal incidents in land ownership
    - The diminution of the king's coffers that was a consequence of the system of uses eventually triggered a royal response during the reign of Henry VIII in the form of the *Statute of Uses*, which was enacted in 1535 and came into effect in 1536. The statute effectively turned the use into a legal estate to which was attached the liability for payment of feudal dues
        - With the abolition of feudal dues by the *Tenures Abolition Act* of 1660 there was no major reason not to recognise and enforce the use upon a use. The importance of the use — or trust as it was now increasingly being called — as a means of minimising tax liabilities declined
    - An important and more private application of the trust was as a device to preserve and protect the property, and hence the political, economic and social power, of England's landed aristocracy
        - Confined to land – a source of power
    - A related application of the law of trusts was the institution of the marriage settlement. At common law, 'the very being or legal existence of [a] woman [was] suspended during the marriage' to her husband — the wife's legal personality was merged with that of her husband. In practical terms this meant that, upon marriage, a woman's property was irrevocably transferred to her husband
    - Another example of the ways in which trusts were utilised arose in the context of English rule in Ireland, where legislation enacted in the early 18th century restricted the ownership of land by Catholics. By conveying land to trusted Protestants to be held on trust for them, Catholics could effectively undermine the legislation's stated purpose