Equity and Trusts

Third Edition

Sukhninder Panesar

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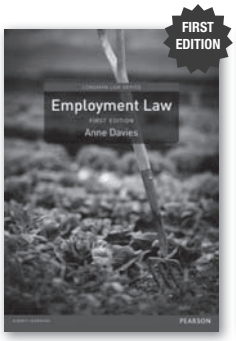

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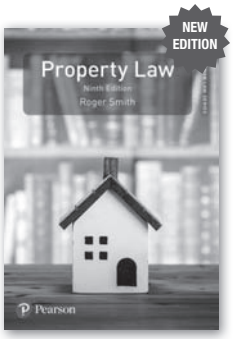

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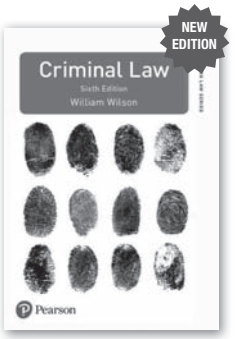

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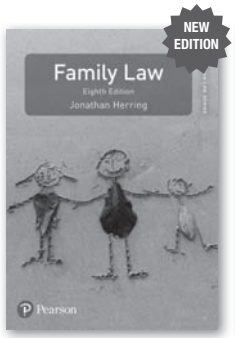

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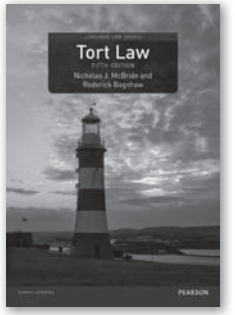

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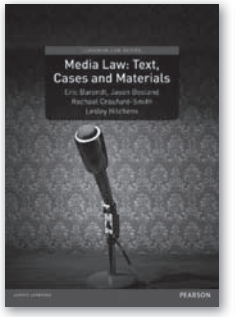

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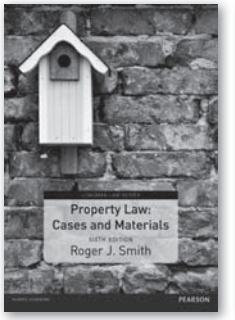

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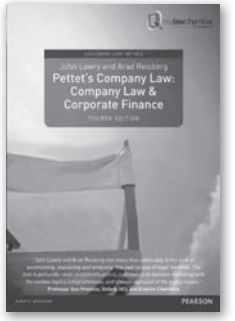

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Equity and Trusts

Third edition

Sukhninder Panesar

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Preface

Ask anyone who has studied law which topic they found particularly tricky during their undergraduate degree and the chances are they'll tell you it was equity and trusts. This area of English law is seen to be notoriously difficult and often students are filled with trepidation before they've even started the module. Why should this be? I think there are two main reasons. The first is that students tend to have little by way of a general inclination or understanding of the subject matter of equity and trusts. For example, if we consider an area such as criminal law, we would expect that the student probably already understands that the subject of enquiry relates to the legal rules governing criminal wrongdoing, along with a working knowledge of what such wrongdoing might entail (murder, manslaughter, theft, etc.). With equity and trusts, however, even if the student already has some broad ideas of the nature and principle of equitable relief, they will generally not relate to the trust concept. As such, they are often approaching entirely uncharted territory, and so face the inevitable challenges that delving into any new area brings.

Secondly, the subject matter is, by its nature, broad and complex. We can see this when we consider the diverse contexts in which the trust has operated. In the social context, the trust has historically operated to deal with the rights of various groups, for example, the rights of women or the rights of illegitimate children. More recently, the trust has had an important role to play in protecting the rights of individuals in the family home (particularly in the context of increased non-marital cohabitation). The trust has also been a key factor in the world of commerce, dealing with the rights, for example, of pension fund beneficiaries or the rights of beneficiaries against commercial agents who have intermeddled with trust property. It might initially appear a little daunting, but neither the student learning the law, nor the lecturer teaching, it should shy away from the elaborate nature of trusts – to do so will not only short-change the student but will also hamper the effective understanding of the law. Indeed, if we embrace this fact now then I believe we can make studying equity and trusts a rich and deeply rewarding experience. This is where, I hope, this book comes in.

This book has two primary objectives. Firstly, it seeks to convey the principles of equity and trusts in a manner which the reader will find engaging and easy to understand. To achieve this, the book is divided into six parts. This fragmentation will allow the reader to understand the relevant chapters under a common theme first and then, much like a jigsaw, put all the pieces together to reveal the bigger picture. Part I of the book explores the nature of equity and the grounds for invoking equitable relief. It then examines the nature of the trust concept and the reasons for creating trusts in the contemporary world. Part II explores the substantive and formal requirements needed for the creation of express trusts. Part III looks to those trusts which are implied by law rather than created by a deliberate act on the part of an individual. Part IV looks at the law relating to the administration of trusts, in particular, the powers and duties of trustees. Part V examines the remedies available to a beneficiary for breaches of trust by a trustee. The final part of the book looks at trusts which are created in favour of the public at large, otherwise known as

charitable trusts. The law relating to charitable trusts has recently undergone changes as a result of the enactment of the Charities Act 2011. Part VI explores some of the fundamental changes introduced by the Charities Act 2011 and the future direction of charitable trusts. The book also uses a number of features to help cement knowledge of the concepts and apply it at regular intervals, such as the 'Applying the law' boxes throughout each chapter, and the 'Case studies' and 'Moot points' which are at the end of each chapter. These features encourage the reader to apply the law to factual questions and think further about some of the nuances that exist within the law.

The second objective is to give the reader as much context as possible. I have tried to illustrate the significance of the trust in its modern context and also some of the older rules within the framework in which they were decided. This approach seeks to show the law 'in action,' and to help the reader understand not just what the law is, but also some of the reasons as to *why* it is so. To this end, each chapter opens with a 'Setting the scene' section which will introduce the reader to interesting cases that bring to light the subject matter of each chapter, and offer a frame of reference for what is to follow. Each chapter also examines the relevant cases and rulings pertinent to that area of trusts law, further reinforcing the reader's understanding of how the law has evolved.

The third edition of this book contains key case law and statutory developments since the second edition. The book covers a number of decisions of the Supreme Court and the Court of Appeal that are significant in re-shaping and re-confirming important principles of equity and trusts. For example: in the context of trusts of the family home, the decisions in *Curran* v *Collins* (2015), *Graham* v *York* (2015) and *Barnes* v *Phillips* (2015); in the context of commercial trusts, the significant decision of the Supreme Court in *FHR European Ventures LLP and Others* v *Cedar Capital Partners LLC* (2014), holding that a bribe or secret profit can be held on constructive trust irrespective of whether the bribe or profit originally formed the principal's property; the decision of the Court of Appeal in *Novoship (UK) Limited* v *Nikitin & Ors* (2014) on the availability of an account of profits against a dishonest assistant, as well as the decision of the Supreme Court in *AIB Group (UK)* v *Redler & Co Solicitors* (2014) confirming the principle of equitable compensation as formulated in *Target Holdings* v *Redferns* (1996); and, finally, the decision of the Court of Appeal in *Clydesdale Bank Plc* v *Workman* (2015) on the meaning of dishonesty in the context of knowing assistance in a breach of trust.

Other key cases analysed include: *Bieber* v *Teathers Ltd* (2012), *Chiang* v *Mishcon de Reya* (2015) and *Challinor* v *Juliet Bellis* (2015) on the nature and requirements of a Quistclose trust; the decisions in *Vallee* v *Birchwood* (2013) and *King* v *The Chiltern Dog Rescue* (2015) on the contemporary application of the doctrine of *donatio mortis causa*; and *O'Kelly* v *Davies* (2014) on the role of illegality in establishing a common intention constructive trust. The Supreme Court re-confirmation of the proper application of the rule in *Re Hastings-Bass* in *Pitt* v *Holt* and *Futter* v *Futter* (2013) is examined, as are the cases of *Lloyds TSB Bank Plc* v *Markandan & Uddin* (2012), *Davisons Solicitors (A Firm)* v *Nationwide Building Society* (2012), and *Ikbal* v *Sterling* (2013) on the application of s. 61 of the Trustee Act 1925; and *Lilleyman* v *Lilleyman* (2013) and *Illot* v *Mitson* (2015) on the Inheritance (Provision for Family and Dependents) Act 1975.

In the context of the law of charities, the decision of the Supreme Court in *Khaira* v *Shergill* (2014) on the question of whether English courts can determine matters of religious doctrine is analysed, as is the important ruling of the Charity Tribunal in 2012 in *Independent Schools Council* on the public benefit requirement under the Charities Act 2011.

Amongst key legislative changes, the third edition covers the Inheritance and Trustees' Powers Act 2014, as well as the Charities Act 2011.

I am indebted to my colleague Dan Bansal for his comments and suggestions throughout the writing of this third edition.

I would like to thank Pearson Education for publishing this book. In particular, Owen Knight and Victoria Tubb for their invaluable support and patience during the writing process. I have been very fortunate to have worked with such a dedicated and professional editorial team and a lot of credit for this book belongs to them.

Most importantly, I would like to thank my wife, Sandeep, and my son, Lakhdeep, for their incredible support without which the book would not have been possible.

I have attempted to state the law up to and as at April 2016.

Finally, this book is dedicated to the memory of my father who sadly passed away on 16 November 2015.

Sukhninder Panesar
Head of Law
University of Wolverhampton Law School

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Part I

Introduction to equity and trusts

Part I of this book explores the nature of equity and the trust concept.
It is important to have a sound understanding of the nature of equity and the trust concept before moving on to a more detailed study of the law relating to trusts. Chapter 1 explores the nature of equity and its relationship with the common law. The chapter explores the historical development of equitable jurisdiction and explains the modern grounds for the application of equitable relief. The reader is encouraged to appreciate the role of unconscionability as the fundamental ground for invoking equitable relief. Chapter 2 moves on to explore the nature of the trust concept. The chapter explores the nature of the trust, the reasons why people create trusts and the key players in the trust relationship. The purpose of this chapter is to put into context the modern social and economic significance of the trust so as to allow the reader to appreciate the concerns which form the subject matter of the remaining parts of the book. Chapter 3 looks at how the trust concept differs from other legal concepts, including powers of appointment, contracts and the rights of individuals receiving under a will or on intestacy.

1 Introduction to equity

Learning objectives

After completing this chapter you should be able to:

- understand the origins of equity
- understand the idea and nature of equity
- understand the relationship between law and equity
- understand the nature of rights in law and rights in equity
- understand the maxims of equity
- understand the nature of equitable relief
- understand the contemporary role of equity.

SETTING THE SCENE

Equity and role of unconscionability

What is equity and why does the English legal system recognise a body of rules known as equity are two frequently asked questions in an undergraduate study in law. In attempting to answer these questions it is, perhaps some, apt to begin with a look at two statements made some 400 years apart which provide explanation of the touchstone for the application of equity and equitable doctrines to given factual situations.

The first statement is that of Lord Ellesmere who commented in the famous ***Earl of Oxford's Case*** (1615) 1 Rep Ch 1 at page 6 that 'men's actions are so diverse and infinite that it is impossible to make any general law which will aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for fraud, breaches of trust, wrongs and oppressions of what nature so ever they be, and so soften and mollify the extremity of the law.'

The idea that equity is essentially conscience driven was of reaffirmed by the House of Lords in ***Westdeutsche*** **v** ***Islington London Borough Council*** [1996] AC 699 (HL) (at p. 705) where Lord Browne-Wilkinson commented in the context of trusts that 'equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied) or which the law imposes on him by reason of his unconscionable conduct.'

The word 'equity' is susceptible to a number of different meanings. In one sense the word means what is 'fair and just' and is, therefore, undistinguishable from the general concern of any system of laws, which is that all laws should be fair and just. However, another somewhat narrower sense of the word is that equity is that specific body of law which supplements the common law and is invoked in circumstances where the conduct of a defendant is deemed unconscionable. The 'unconscionable behaviour' of the defendant may arise in a number of different contexts and for a number of different reasons. Additionally, the defendant's unconscionable conduct will have resulted in the defendant acquiring some advantage, whether personal or proprietary, which cannot be rightfully retained by the defendant. In most cases the defendant's unconscionability will have arisen from the strict and rigid application of a rule of the common law. Where such unconscionable conduct has arisen, the role of equity is to temper the rigour of the common law by the award of an appropriate equitable remedy. Throughout this book there will be many examples where equity has intervened to prevent unconscionable conduct on the part of a defendant.

This chapter explores the nature and function of equity in the English legal system. In particular, the chapter explores the grounds for the intervention of equitable relief and the relationship between equity and the common law. It examines the role of unconscionability in equity and examines some of the important maxims of equity.

Introduction

One of the unique features of the English legal system is the duality of rights that can exist at common law and in equity. English law, like many other systems of law, allows the courts to administer two separate principles of law, which are not necessarily in conflict with each other but which seek to achieve justice on any given set of facts. The central feature of the common law is that it is based on the principle of precedent and looks to matters of form rather than substance. For example, any potential claimant wishing to pursue a remedy in the common law courts must satisfy that his complaint is a complaint which is recognised as being capable of being remedied in the common law courts, in most cases through the award of damages for loss caused to the claimant. Additionally, the common law requires that the claimant comply with all the necessary formal requirements that apply to the facts which give rise to his cause of action. This is better explained with reference to the following question.

APPLYING THE LAW

Thomas orally agreed with Victor that he would sell his house to Victor for a sum of £400,000. Victor was very pleased with the selling price and told Thomas that he would need a few months to raise the purchase price. Thomas did not hear from Victor for several months and Thomas sold his house to Betty for £500,000. Victor is not happy with the sale to Betty and wants to bring an action against Thomas for going back on his word.

Can he do this?

The above, admittedly rather simplistic set of facts, is a good starting point to illustrate whether a claimant can pursue a remedy in the common law courts. Whilst the reader may or may not be exposed to the common law rules governing contracts for the sale of land, it is a basic principle of modern land law that a contract for the sale of land is put in writing and that the written contract incorporates all the terms agreed between the parties.[1] This formal requirement is found in s. 2(1) of the Law of Property (Miscellaneous) Provisions Act 1989. Whilst it is true that Victor may feel aggrieved by the fact that Thomas did not sell his house to him, Victor would have no remedy at common law on the grounds that a contract for the sale of an interest in land is ineffective at common law if it is not in writing and incorporating all the terms and conditions of the sale.

Equity, on the other hand, is a system of law historically developed in the Court of Chancery correcting unconscionable conduct on the part of a defendant. Unlike the common law, equity is not defeated by failure to comply with form. It is often said that equity looks to matters of substance rather than form. So where there has been a failure to comply with form, equitable relief is not necessarily prevented from being given if, as a matter of substance, the court decides that equitable relief should be given. As to what matters of substance will persuade a court to grant equitable relief, the court will look to the underlying question of conscience. In particular, equity's concern is over the unconscionable conduct of a defendant. If the defendant, despite an absence of formality, has conducted himself in a manner in which he has acted unconscionably, the court will grant

[1] For more detail, M. Dixon, *Modern Land Law* (9th edn, 2014) Chapter 1.

equitable relief even where to do so would be in the face of an absence of legal formality. It will be observed in this chapter that in the early days of the administration of equitable relief, the Court of Chancery was not necessarily restricted by precedent. The Lord Chancellors of the early Court of Chancery exercised equitable principles on a case-by-case analysis, the only common thread being the proof of unconscionable conduct on the part of the defendant.

A proper understanding of modern equity requires an appreciation of the common law and its shortcomings, particularly in the twelfth and thirteenth centuries. Before that, however, it is worth revisiting the question posed above regarding the sale of Thomas's house to Victor. Whilst it is established that the contract would be void at common law for failure to comply with the formal requirements of s. 2(1) of the Law of Property (Miscellaneous) Provisions Act 1989, would Victor have any relief in equity, based on what has been said so far about equity and the role of unconscionability? At this stage of the book the reader will not have been exposed to the very specific rules of equity governing oral contracts for the sale of land, but it is nevertheless useful to think whether the Thomas and Victor-type of scenario is one which is within equity's jurisdiction to give some remedy.[2]

The common law

The origins of the common law go as far back as 1066 when the Norman Conquest introduced a new system of law for England. Towards the end of the thirteenth century two main types of courts were responsible for administering law in the country. First, there were the local courts, which were courts set up within the feudal structure and administered by the feudal lords.[3] Secondly, there were the royal courts, also known as the Courts of Common Pleas consisting of the King's Bench, Court of Common Pleas and the Exchequer. A potential litigant who felt that he had not received justice in the local courts had a right to petition the King and ask for his case to be heard in one of the royal courts. The right of an individual to petition the King arose out of the fact that the right to justice was a royal prerogative. Maitland once explained that each of the royal courts at one time had separate spheres of interest, but soon the claimant had a choice as to which court heard his case simply because each court began to administer the same law and in the same manner.[4] The Exchequer, however, was more than just a court of law; it had responsibility for fiscal matters as well as legal. Alongside the Exchequer was the Chancery Department headed by the Chancellor (who was normally a bishop). The Chancery Department at this stage was not a court of equity; that developed much later

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[2] The detailed equitable rules relating to the enforcement of oral contracts for the sale of land are considered in Chapter 13.

[3] The feudal structure of England involved a system where the Crown acquired ownership of all land in the country, sometimes also referred to as the radical title of the Crown. Under this feudal structure, the Crown's radical title served as a means by which smaller rights or ownership could vest in other persons; notably, the most powerful Lords and Knights at the top of the feudal ladder and less powerful individuals at the bottom. These smaller rights did not grant absolute ownership but limited forms of ownership. The limitation of ownership was defined by time; that is, ownership of land for defined periods of time, otherwise known as the concept of estates and tenures in land. For a detailed examination of feudal tenure see F. Barlow, *The Feudal Kingdom of England 1042–1216* (4th edn, 1988) and A.W.B. Simpson, *A History of the Land Law* (2nd edn, 1986).

[4] F.W. Maitland, *Equity: A Course of Lectures* (J. Brunyate (ed.), 1936), p. 2.

in the sixteenth and seventeenth centuries administering equitable principles and doctrines on the basis of unconscionable conduct. Rather, it was a secretarial office answerable to the King's Permanent Council. The Chancellor, by way of delegation from the King, dealt with many of the petitions made to the King for justice to be given in individual cases.

The inadequacy of the writ system

The law administered by the medieval courts was partly traditional and partly statute. Traditional law was based on precedent and was termed the common law in that it was common to all areas of England and all its subjects.[5] A claimant wishing to commence an action in the Court of Common Pleas or the Kings Bench required a royal writ. A royal writ consisted of a sealed authorisation to commence proceedings in the royal courts. The office of issuing writs was given to the Chancellor who had at his disposal a number of established writs, but also had a limited power to issue new ones. It is important to note that at this point in history the Chancellor did not act in a judicial manner; his role was simply to hear the claimant's application and issue the appropriate writ. The grant of a writ did not mean that the claimant was successful, since the courts could quash the writ as being contrary to the law of the land. The power to invent new writs presented a real threat to the feudal lords and barons since new writs meant new remedies, which in turn created new rights and duties. In recognition of this problem faced by the feudal lords and barons, the Provisions of Oxford 1258 disallowed the issuing of new writs without the permission of the King's Council. In one sense this was the power of the feudal lords and barons sitting in the King's Council preventing new law, which was primarily directed at them. The net effect of the Provisions of Oxford was that a number of new cases requiring new remedies remained unresolved in the common law. The common law became rigid and incapable of dealing with the changes taking place in society requiring the recognition of new rights and remedies.

The inadequacy of an appropriate remedy

Apart from the fact that the common law was not able to redress new legal problems, there was also the fact the common law lacked an appropriate remedy in many cases. The predominant remedy at common law was, and still is today, the award of monetary damages. Thus, in the case of typical civil wrongs – for example, a breach of contract or the commission of tort such as negligence – the injured party was and still is entitled to compensation in the form of monetary damages reflecting the loss suffered by that injured party. Whilst the award of damages is appropriate in some cases it is not appropriate in all, particularly where the subject matter of the dispute involves some property: for example, land. A good example of the inappropriateness of damages is illustrated by the example of a persistent trespasser of land. In the case of a persistent trespasser a landowner can sue for damages: however, a more appropriate remedy would be an injunction preventing the commission of the trespass. The problem with the common law is that it does not recognise a remedy in the form of an injunction. It will be seen later that one of the reasons for the development of equity was primarily in response to the inadequacy of the common law remedy.

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[5] See, generally, S.F.C. Milsom, *A Historical Foundation of the Common Law* (2nd edn); Holdsworth, *A History of English law* (7th edn, 1956) Vol I and also J. Baker, *An Introduction to English Legal History* (2nd edn, 1979).

Another good example is the sale of a valuable painting to a purchaser. It is trite law that in the event of a breach of such a contract, the purchaser has a right to sue for damages for failure to deliver the painting. However, given the fact that special significance is attached to the painting in that it is something that is not readily available on the open market, a more appropriate remedy would be a decree of specific performance compelling the seller to perform the contract. Again, a primary shortcoming of the common law is that it does not recognise the remedy of specific performance. Seen in this way, one of the fundamental contributions of equity to the English legal system was the diverse range of remedies available to a claimant to enforce his rights.

The origins and development of equity

Most legal systems, whether based on common law or civil law, have had to entertain the notion of equity.[6] The term equity is susceptible to a number of different meanings. In one sense the word equity means what is fair and just, and in this sense equity is a theme that runs through most legal systems in that all laws should strive for fairness and justice. Another sense of the word is that equity consists of a distinct body of rules that seeks to introduce ethical values into the legal norms. In this respect one commentator once explained that equity consists of 'a set of legal principles entitled by their extrinsic superiority to supersede the older law'.[7] It is this latter definition which properly explains the idea of equity in the English legal system. It will be observed in this chapter that equity in the English legal system is not a system of law based on what is necessarily fair on any given set of facts. As one judge once commented, English law does not possess a jurisdiction to administer 'palm tree justice'.[8] Modern equitable jurisdiction is exercised in well-defined circumstances which involve unconscionable conduct on the part of a defendant.

The nature of equity in the early days

In its early development, equity was developed by the Court of Chancery in the medieval ages to iron out the deficiencies of the common law and correct unconscionable conduct. The need for a separate court to administer equitable relief arose from the deficiencies of the common law in the Middle Ages, which have already been outlined above. In particular, the common law failed to address new legal problems simply because of the rigidity of the writ system; that is, the unavailability of a writ to initiate proceedings because of the lack of a recognised cause of action. Even where a recognised action existed, there was the problem of an appropriate remedy to resolve the dispute between defendant and claimant. However, it was not simply the fact that a remedy was inappropriate; in many cases even though a remedy existed, it was simply not forthcoming for the claimant. The principal reason for this was that in many cases rich and powerful individuals could influence both the court and the jury, resulting in the situation that justice was simply not forthcoming for the very weak and vulnerable. Equity, as administered by the early Lord Chancellors, was not defeated by these constraints. The Lord

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[6] For an excellent discussion of equity in the context of different legal systems, see R.A. Newman, *Equity in the World's Legal Systems: A Comparative Study* (1973).

[7] Sir Henry Sumner Maine, *Ancient Law* (1905) at p. 44.

[8] *Springette* v *Defoe* [1992] 2 FLR 388 at 393 per Dillon LJ.

Chancellor attempted to correct abuses of fraud and unconscionable conduct by looking at each case on its merits rather than at the question of whether an appropriate course of action existed in the first place.

The Lord Chancellor

In the early development of equity the Lord Chancellor administered equitable relief. It will be recalled that when a potential litigant wished to commence proceedings against a defendant, he was required to obtain a royal writ from the Chancellor's office. Where the Lord Chancellor was unable to issue a writ because of the lack of a precedent, he could demand that the defendant appear before him and answer the charges made against him. The process by which this could happen required the complainant to issue the Lord Chancellor with a bill outlining the nature of his grievance. Having considered the bill, the Chancellor ordered the potential defendant to appear before him and answer the grievances raised by the complainant. In order to compel the defendant to appear before the Chancellor, the Chancellor issued a writ, called a *subpoena,* ordering the defendant to appear upon pain of forfeiting a sum of money, otherwise known as *subpoena centum librarum.*[9] This writ was very different from the types of writs available to commence proceedings in the common law courts, since it simply required the person against whom the complaint was made to answer to the Lord Chancellor the complaints made against him.

What started out as a mere secretarial office of government answerable to the King's Council now took on the shape of a court administering law in its own right. What law did the Chancellor administer? The Chancellor did not introduce any novelty in the law-making process and neither did he introduce laws so different in their juridical nature to the ordinary laws of the land. However, what the Chancellor did recognise was the inability of the common law to deal with the social and economic changes taking place in society. Given the fact that the Chancellor was an ecclesiastic, a man of the Church and learned in civil and canon law, he was ideally placed to deal with the legal problems put to him. The basis upon which he exercised his power was on the simple premise of what was right in any given case. If there is one word that describes how the Chancellor exercised his power to relieve aggrieved parties, that word is conscience.

The early court of equity was essentially a court of conscience. Every case was decided on its merits rather than on the question whether there existed a precedent to deal with the complaint brought by the claimant. Given the fact that the Lord Chancellor would change from time to time, each Chancellor would exercise greater or lesser power depending on his own notions of justice. In this respect most accounts of equity refer to the 'length of the Chancellor's foot', which was another way of saying that some Chancellors went further in the exercise of equitable relief than others. Later in the development of equity, lawyers rather than ecclesiastics were appointed to the office of Chancellor. Lord Nottingham (1673–82), Lord Hardwicke (1736–56) and Lord Eldon (1801–27) were pioneers of modern equity as we know it today. They developed a set of principles and doctrines which were to become as fixed and rigid as the common law. In more recent times, a question that has been frequently asked is whether equity has passed childbearing and is now as established and rigid as the common law. This is a question to which this chapter will return later.

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[9] See, F.W. Maitland, *Equity: A Course of Lectures* (J. Brunyate (ed.), 1936), p. 2.