

1. The Judicature Acts do nothing that fuse the administration of equity and common law. Both still retain their distinctive rules and although they now run side by side, they do not mingle. Discuss.

Suggested Answer:

One of the consequences of the *Earl of Oxford* (1615) 1 Rep Ch 1 case was that equity was made to prevail over the common law whenever the rules of both were in conflict. However, the Judicature Act 1873–75 fused equity and common law. Controversy has raged since then whether it is the rules of these two erstwhile systems that are fused or their administration. Those who claim that only the procedures are fused rely on section 49 of the Supreme Court Act 1981 (see 1.5.). See Ashburner's statement to the fact that the waters of equity and common law do not mingle at 1.5.1. See also JS Baker's statement at 1.5.1 and cases such as *Salt v Cooper* (1880) 16 Ch D 544 at 549, *MCC Proceeds Inc v Lehman Bros International (Europe)* (1998) 4 All ER 675 (CA) at 691, and Anthony Mason's article (1.5.1). Discuss also those who argue that the fusion is about rules not just administrations (1.5.2). See for instance Lord Denning in *Errington v Errington and Woods* [1952] 1 KB 290 at 298, and in *Boyer v Warbey* [1953] 1 QB 234, and Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* [1977] 2 All ER 62 at 68. The question that then needs to be asked is whether this debate really matters given that the same court now applies the two rules. Conclusions depend on individuals but it does seem that the controversy is now of more academic than practical significance.

2. The fact that equity was besieged by serious problems before the Judicature Acts is a clear indication that it should never have been introduced into the English legal system in the first place. It is nothing but an avoidable waste of time. Do you agree?

Suggested Answer:

The history of equity in this chapter shows that equity prided itself on being very amenable, quick and responsive to different situations (1.2). This was what led the king to decide in favour of equity in the *Earl of Oxford case* (1615) 1 Rep Ch 1. But before that case, equity's popularity had soared (see 1.3). Equity became a victim of its own success. Overload of cases led to severe delays, unsatisfactory decisions, and loose practices, such that led equity to be viewed as a roguish thing and a system that was as wide as the Chancellor's foot. Not everyone, however, agreed with this assessment. Lord Eldon, for instance, rejected that characterisation in *Gee v Pritchard* (1818) 2 Swans 402 at 414. Jessel MR also rejected the characterisation in *Re National Funds Assurance Co* (1878) 10 Ch D 118. However, after the *Earl of Oxford case*, equity became systematised, rigid and even reported. Students should discuss the fact that despite all its weaknesses before the Judicature Act, equity did meet the need for quick and flexible justice; it was used in situations that prevented rich people from continuing to buy the right to commit wrongs against the poor by issuing injunctions; it granted specific performance in respect of property outside England once the

defendant is within the English jurisdiction. Equity recorded many significant achievements. These were the very reasons why equity was introduced in this first place; therefore, its introduction into the English legal system was justified and remains justifiable. The shortcomings must be put in context of a developing system and, after the Judicature Act came into force, equity became much more effective.

3. There is no distinction between trusts and contract. It is the chancellor's lust for power, and nothing more, which led to the development of trusts as a distinct category. To what extent do you think this statement represents the rationale and use of trusts?

Suggested Answer:

Define trust as it has been variously defined in this chapter (1.7). But note the various criticisms of definitions cited, e.g. for not specifically explaining what trust is (see 1.7). Mention the fact that trusts resemble some other types of transactions, especially contract and agency. Influential writers note that it is difficult to distinguish trust from contract (see Langbein, cited in 1.9.1), although several others disagree, e.g. Hanbury & Martin, Hudson (1.9.1), as emphasised by *Saunders v Vautier* (1841) 4 Beav 115 (1.9.1). Consult the various reasons given by those authors and the cases including *In Re Schebsman* [1944] Ch 83 (CA) and *Re Stapleton-Bretherton* [1938] Ch 799 to develop your points. Then address circumstances which make trusts more beneficial than contract in justification of its invention. These can be found in this chapter, particularly in 1.9.1.

4. Is it true that once a person has been named as a trustee, he can deal with the property as he likes?

Suggested Answer:

A trustee has certain powers either prescribed by the trust agreement or by the Trust Act 2000. Generally, a trustee must act in the best interest of the trust and often enjoys some latitude to decide on the type of investment to invest in. However, a trustee is subject to several controls such as the terms set by the testator/testatrix or settlor in the trust instrument, statutory controls in line with the 2000 Trustee Act and is liable to make good losses incurred by him in the execution of his duties (see Chapter 14). Thus, the best approach to this question is to discuss the general powers of a trustee and the various forms of control exercised by different bodies over such powers. The conclusion surely will tend toward establishing that trustees are subject to serious regulation and accountability despite their considerable powers (especially under TA 2000) once they are appointed.

See Chapter 10, which deals with the Trustee Act 2000 and some trustee duties, particularly those relating to investment.

5. Equity is so flexible it can apply to anything; it is so powerful it can revoke or nullify a judgement given by a common law court. Is this true?

Suggested Answer:

See 1.2 and 1.6.

Equity is a powerful tool in the hand of the court to meet situations where, due to formality and strictness, common law will be inapplicable. So wide was the sphere of application of equity that it was thought to be as wide as the Chancellor's foot (see 1.2). Equity applies nationally and internationally and over a broad range of activities from contract to agency. Discuss the fact that it used to override common law when in conflict with the latter—an effect of the decision in the *Earl of Oxford* case. But the reorganisation of equity after that case brought some discipline and curtailed its erstwhile overwhelming powers. Discuss the fact that equity is yet not past the age of child-bearing, meaning equity can still apply to different areas not previously covered. Examples of these include 'search orders' and 'freezing injunctions' (see Chapter 18 for a detailed discussion). So, equity now must only beget legitimate children (1.6.1). Also, see Lord Denning in (1952) 5 CLP 8. It is no longer just a court of conscience but also of law; it is no more a roguish thing. Injunctions, for instance, now have clear cut principles, just as specific performance does (see Chapter 18). Conclusions must reflect the fact that although equity is still capable of different application even after unification with the common law, it is however subject to various limitations (as discussed in Chapter 18) such as delay, laches and acquiescence (see 14.7.5, apart from the fact that it complements rather than contradicts the common law.