CHAPTER 2

THE DEVELOPMENT OF LAW

INTRODUCTION

The law of England and Wales has been built up very gradually over the centuries. There is not just one way of creating or developing law; there have been, and still are, a number of different ways. These methods of developing law are usually referred to as sources of law. Historically, the most important ways were custom and decisions of judges. Then, as Parliament became more powerful in the 18th and early 19th centuries, Acts of Parliament were the main source of new laws, although judicial decisions were still important as they interpreted the Parliamentary law and filled in gaps where there was no statute law (statute law is explained in Chapter 4). During the 20th century, statute law and judicial decisions continued to be the major sources of law but, in addition, two new sources of law became increasingly important: these were delegated legislation and European law. All these sources of law have combined to make our present-day law as indicated by Figure 2.1.

All these sources of law are examined in turn in this chapter and Chapters 3, 4, 5 and 6.

2.1 Customs

These are rules of behaviour which develop in a community without being deliberately invented. There are two main types of custom: general customs and local customs.

2.1.1 General customs

Historically these are believed to have been very important in that they were, effectively, the basis of our common law (see section 2.2). It is thought that following the Norman conquest (as the country was gradually brought under centralised government) the judges appointed by the kings to travel around the land making decisions in the king's name based at least some of their decisions on the common customs. This idea caused Lord Justice Coke in the 17th century to describe these customs as being 'one of the main triangles of the laws of England'. However, other commentators dispute this theory.

Michael Zander has written that probably a high proportion of the so-called customs were almost certainly invented by the judges. In any event, it is accepted that general customs have long since been absorbed into legislation or case law and are no longer a creative source of law.

2.1.2 Local customs

This is the term used where a person claims that he is entitled to some local right, such as a right of way or a right to use land in a particular way, because

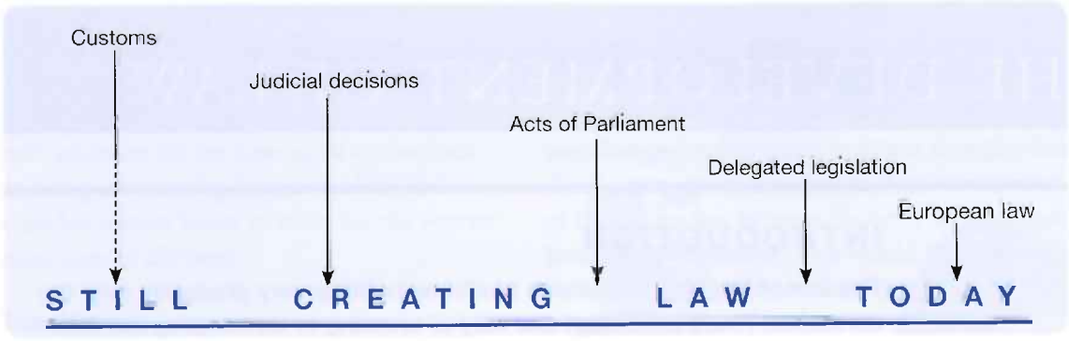

Figure 2.1 *Historical development of sources of law*

this is what has always happened locally. Such customs are an exception to the general law of the land, and will operate only in that particular area.

Since there were (or still are) exceptions to the general common law, the judges, from the earliest times, established a series of rigorous tests or hurdles that had to be passed before they recognised any local custom. These tests still exist today and are used on the rare occasions that a claim to a right comes before the courts because of a local custom. The tests are as follows:

- The custom must have existed since 'time immemorial'.
- The custom must have been exercised peaceably, openly and as of right.
- The custom must be definite as to locality, nature and scope.
- The custom must be reasonable.

It is very unusual for a new custom to be considered by the courts today and even rarer for the courts to decide that it will be recognised as a valid custom, but there have been some such cases. For example in *Egerton v Harding* (1974) the court decided that there was a customary duty to fence land against cattle straying from the common. Another case was *New Windsor Corporation v Mellor* (1974) where a local authority was prevented from building on land because the local people proved there was a custom that they had the right to use the land for lawful sports. Although customs may develop, they are not part of the law until recognised by the courts; it is the judges who decide which customs will be recognised as enforceable at law.

2.2 Common law

Clearly the legal system in England and Wales could not rely only on customs. Even in Anglo-Saxon times there were local courts which decided disputes, but it was not until after the Norman conquest in 1066 that a more organised system of courts emerged. This was because the Norman kings realised that control of the country would be easier if they controlled, among other things, the legal system. The first Norman king, William the Conqueror, set up the Curia Regis (the King's Court) and appointed his own judges. The nobles who had a dispute were encouraged to apply to have the king (or his judges) decide the matter.

2.2.1 Development of common law

As well as this central court, the judges were sent to major towns to decide any important cases. This meant that judges travelled from London all round the country that was under the control of the king. In the time of Henry II (1154–89) these

tours became more regular and Henry divided up the country into 'circuits' or areas for the judges to visit. Initially the judges would use the local customs or the old Anglo-Saxon laws to decide cases, but over a period of time it is believed that the judges on their return to Westminster in London would discuss the laws or customs they had used, and the decisions they had made, with each other. Gradually, the judges selected the best customs and these were then used by all the judges throughout the country. This had the effect that the law became uniform or 'common' through the whole country, and it is from here that the phrase 'common law' seems to have developed.

2.2.2 Definitions of common law

Common law is the basis of our law today: it is unwritten law that developed from customs and judicial decisions. The phrase 'common law' is still used to distinguish laws that have been developed by judicial decisions from laws that have been created by statute or other legislation (see Figure 2.2). For example, murder is a common law crime while theft is a statutory crime. This means that murder has never been defined in any Act of Parliament, but theft is now defined by the Theft Act 1968.

Common law also has another meaning, in that it is used to distinguish between rules that were developed by the common law courts (the King's Courts) and the rules of equity which were developed by the Lord Chancellor and the Chancery courts.

A common law system can also be contrasted with 'civil law' or 'code' system. In countries with a common law system, decisions by the judges are considered law and have the same force of law as statutes. In countries with a civil law (code) system, the courts follow the code and decisions by the judges have less importance.

COMMON LAW	
Different meanings	Distinguishes it from:
The law developed by the early judges to form a 'common' law for the whole country	The local laws used prior to the Norman conquest
Judge-made law – that is the law which has continued to be developed by the judges through the doctrine of judicial precedent	Laws made by a legislative body, such as Acts of Parliament or delegated legislation
The law operated in the common law courts before the re-organisation of the courts in 1873–5	Equity – the decisions made in the Chancery courts
Common law system of law – decisions by the judges have the same force of law as statutes	Civil law (code) system – courts follow the code – decisions by the judges have less importance

Figure 2.2 *Different meanings of the term 'common law'*

2.3 Equity

Historically this was an important source and it still plays a part today with many of our legal concepts having developed from equitable principles. The word 'equity' has a meaning of 'fairness', and this is the basis on which it operates, when adding to our law.

2.3.1 The development of equity

Equity developed because of problems in the common law. Only certain types of case were recognised. The law was also very technical; if there was an error in the formalities the person making the claim would lose the case.

Another major problem was the fact that the only remedy the common law courts could give was

'damages' – that is an order that the defendant pay a sum of money to the plaintiff (now claimant) by way of compensation. In some cases this would not be the best method of putting matters right between the parties. For example, in a case of trespass to land, where perhaps the defendant had built on his neighbour's land, the building would still be there and the plaintiff would have lost the use of that part of his land. In such a situation the plaintiff would probably prefer to have the building removed, rather than be given money in compensation.

People who could not obtain justice in the common law courts appealed directly to the king. Most of these cases were referred to the King's Chancellor, who was both a lawyer and a priest, and who became known as the keeper of the king's conscience. This was because the Chancellor based his decisions on principles of natural justice and fairness, making a decision on what seemed 'right' in the particular case rather than on the strict following of previous precedents. He was also prepared to look beyond legal documents, which were considered legally binding by the common law courts, and to take account of what the parties had intended to do.

To ensure that the decisions were 'fair' the Chancellor used new procedures such as subpoenas, which ordered a witness to attend court or risk imprisonment for refusing to obey the Chancellor's order. He also developed new remedies which were able to compensate plaintiffs more fully than the common law remedy of damages. The main equitable remedies were: injunctions; specific performance; rescission; and rectification. These are all still used today and are explained more fully in section 2.3.3 of this chapter.

Eventually a Court of Chancery under the control of the Chancellor came into being which operated these rules of fairness or equity. Equity was not a complete system of law; it merely filled the gaps in the common law and softened the strict rules of the common law.

Conflict between equity and common law

The two systems of common law and equity operated quite separately, so it was not surprising that this overlapping of the two systems led to conflict between them. One of the main problems was that the common law courts would make an order in favour of one party and the Court of Chancery an order in favour of the other party. The conflict was finally resolved in the *Earl of Oxford's case* (1615) when the king ruled that equity should prevail; in other words, the decision made in the Chancery court was the one which must be followed by the parties. This ruling made the position of equity stronger and the same rule was subsequently included in s 25 of the Judicature Act 1873.

2.3.2 The operation of equity

Initially, as already stated, there were few guidelines for Chancellors to use. However, as time went on a series of maxims were developed which formed the basis of the rules on which equity operated. As equity became more formal, judges became more likely to follow past decisions. Today the doctrine of judicial precedent (explained in Chapter 3) applies to cases involving equity, just as it applies to cases involving the common law.

Equitable maxims

Many of the rules on which equity is based are expressed in a series of sayings. The most important of these maxims are as follows.

- **Equity looks to the intention and not the form** – this was applied in the case of *Berry v Berry* (1929) where a deed was held to have been altered by a simple contract. Under common law rules a deed could only be altered by another deed, but equity decided that as the parties had intended to alter the deed, it would be fair to look at that intention rather than the fact that they got the formalities wrong.

- **He who comes to equity must come with clean hands** – in other words an equitable principle or remedy will not be granted to a claimant who has not acted fairly. This is shown in *D & C Builders Ltd v Rees* (1965) where a small building firm had done work for Mr and Mrs Rees. The total bill was £732 of which Mr and Mrs Rees had paid £250 in advance. When the builders asked for the remaining £482, the Reeses, who knew the builders were in financial difficulties and needed money urgently, claimed that the work had not been done properly and they were only prepared to pay £300. The builders reluctantly agreed to accept the £300 'in completion of the account', but afterwards sued the Reeses for the remaining £182. At common law, part payment of a debt is not considered as satisfying the debt and the builders could claim the extra. Equity, however, has a doctrine of equitable estoppel (see section 2.3.4) under which the courts can declare that the claimant is prevented (estopped) from asking for the rest. Lord Denning, in the Court of Appeal, refused to apply the doctrine of equitable estoppel because the Reeses had taken unfair advantage of the fact that they knew the builders were in financial difficulties. So far as equity was concerned the Reeses had not come to court with 'clean hands'.
- **Delay defeats equity** – this means that a claimant must not wait too long before making a claim as this might lead to unfairness to the other party. In *Leaf v International Galleries* (1950) a plaintiff (the term then used for claimant) was sold a painting which both parties mistakenly believed was by Constable. The court did not award the equitable remedy of rescission, since there had been a delay of five years between the contract and the discovery that the painting was not by Constable.
- **Equity will not suffer a wrong to be without a remedy** – this allows equity to create new remedies where otherwise the claimant would not have an adequate remedy for the case and would only be able to claim the common law remedy of damages. This maxim allows equity to continue to develop new remedies when they are needed, such as freezing orders and search orders, which are discussed at the end of section 2.3.4.

2.3.3 Equitable remedies

As already stated, one of the important aspects of equity was that it created new remedies to supplement the common law remedy of damages. However, these remedies are discretionary, so that the court does not have to grant them even if the claimant wins the case. This is in contrast to the common law remedy of damages which will be awarded to a winning claimant as of right. An equitable remedy will only be granted where the court thinks it is fair in all the circumstances. If a party ignores an equitable remedy this is considered contempt of court and the court can fine that party or even send them to prison. The following are the most important equitable remedies.

1 Injunctions

An injunction is an order to one of the people involved in the case to do something or not to do something. Where the court orders one of the parties to do something it is called a mandatory injunction; where the order is to refrain from doing something it is called a prohibitory injunction.

Injunctions are used today in all sorts of situations; for example, in *Kennaway v Thompson* (1980) the court granted an injunction restricting the times when power boats could be raced on a lake. In *Warner Brothers v Nelson* (1937) an injunction was issued ordering the actress Bette Davis not to make a film with another film company as that would have been a breach of her contract with Warner Brothers.

A claimant may be awarded both damages and an injunction. The damages will be as

compensation for the past problems, for example the noise and nuisance of the racing boats in *Kennaway v Thompson,* and an injunction to prevent (or limit) the event occurring in the future.

An injunction can also be granted to protect one party's rights while waiting for the case to be heard. This is called an interlocutory injunction. Since the case has not been tried the courts have strict guidelines on when an interlocutory injunction should be granted. Basically such an injunction will only be ordered if it is felt that, during the time that the parties have to wait for the case to be heard, one party would suffer irreparable harm which could not be put right by an award of damages at the end of the case.

2 Specific performance

This is an order that a contract should be carried out as agreed. It is granted only in exceptional circumstances where the court feels the common law remedy of damages could not adequately compensate the plaintiff, for example in a contract to purchase land. Specific performance is never granted to order someone to carry out personal services, such as singing at a concert; nor is it granted for a breach of contract where one of the parties is a minor.

3 Rescission

This is another remedy in contract cases and it aims to return the parties as far as possible to their pre-contractual position. So, if a contract involved in buying goods was rescinded, the buyer would have to return the goods to the seller and the seller would have to return the purchase price to the buyer.

4 Rectification

Under this the court will order that, where a mistake has accidentally been made in a document so that it is not a true version of what the parties agreed, that document should be altered to reflect the parties' intention.

Recent remedies

Even in the 20th century the courts were still developing new equitable remedies. These were the freezing order (formerly known as a Mareva injunction) and the search order (formerly known as an Anton Piller Order). The freezing order can be made where there is a risk that one party in a case will move all their assets out of the United Kingdom before the case against them is tried. The effect of the order is that third parties (such as banks) who have assets owned by the party in their control must freeze those assets so that they cannot be removed from the account.

The search order allows the claimant to search the defendant's premises and remove any documents or other material which could help the claimant to prove his case.

2.3.4 The relevance of equity today

Equitable rights, interests and remedies remain important in the law today. Concepts such as mortgages and trusts are founded on the idea that one person owns the legal interest in property but has to use that property for the benefit of another. This other person is said to have an equitable interest in the property. It is difficult to imagine life today without mortgages – the vast majority of homeowners buy their property with the aid of a mortgage. Trusts are widely used in setting up such matters as pension funds, as well as within families when property is settled on younger members of the family or between husband and wife.

New concepts

Equity can still create new concepts in the law. This happened on a number of occasions in the 20th century. One development was equitable or promissory estoppel. This was first suggested by Lord Denning in *Central London Property Ltd v High Trees House Ltd* (1947) (more usually referred to as the *High Trees* case). In that case

a block of flats in South London was leased to a company for a period of 99 years, and the company then sublet individual flats to residents. During the Second World War many people moved out of London because of the bombing, so that it was difficult to let the flats. The main landlord agreed that while the war lasted, the company leasing the block of flats need only pay half the normal rent. After the war the landlord claimed the full rent again. Denning (at that time a High Court judge) decided that they were entitled to it but, in his judgment, he also considered what the legal position would have been if the landlord had tried to claim for the full rent during the war. Strictly speaking the original contract for the 99-year lease would have allowed the landlord to make such a claim. However, Denning said that the landlord would have been estopped from claiming. Since this case the law has recognised that in some situations it would be inequitable (or unfair) to allow one party to rely on the strict terms of the contract when they had led the other party to believe that they would not do so.

Another equitable concept developed in the 20th century was the 'deserted wife's equity'. This was the idea that where a husband deserted his wife and children, the wife had an equitable interest in the matrimonial home, even if it was solely owned by the husband. This allowed the wife to remain in the home while the children were dependent. This right for partners was eventually put into an Act of Parliament in the Matrimonial Homes Act 1967.

Modern use of equitable remedies

Equitable remedies are still important and used in a variety of circumstances. Two examples of the use of injunctions have already been given in 2.3.3. In one an injunction was used to limit the number of times power boats could race in order to prevent the plaintiff from having to suffer too much noise and inconvenience. In the other an injunction was granted to prevent an actress from breaking her contract with a film company.

Injunctions are often used today. They can be ordered in cases of domestic violence as a protection for the abused partner. Such an injunction often forbids the violent partner from entering the premises where the other partner is living or even going within a certain distance of the place. Injunctions are also used to prevent trespass to land or to prevent excessive noise, or smoke or other nuisances. They are used in employment law in various situations. For example, a former employee can be prevented from disclosing trade secrets to anyone, or an injunction may be granted against a trade union to prevent unlawful industrial action.

If you look back to the newspaper article in Source A in Chapter 1 on page 4 there is an example of an injunction being served via the internet, showing that it is a remedy that can adapt to modern life.

Modern equitable remedies

The courts have been prepared to expand equitable remedies, though the principle that they are discretionary still remains. Two 20th-century expansions were Mareva injunctions and Anton Piller orders. The Mareva injunction came from the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* (1975) and is used where there is a risk that the assets of one of the parties will be removed out of the United Kingdom before the case comes to trial. It allows the courts to order that third parties, such as banks, must freeze any assets in their control. This is important as, at the end of the case, it means there will be assets available to pay any damages or costs that the court awards.

The Anton Piller order was first used in *Anton Piller KG v Manufacturing Processes Ltd* (1976) and it ordered the defendant to allow the plaintiff to search his premises and take away any documents

Key Facts

Thirteenth century Especially after 1258	Common law fails to provide adequately for complainants Provisions of Oxford restrict issue of new writs
Fourteenth and fifteenth centuries	Successive chancellors hear petitions and decide on the basis of fairness Court of Chancery set up
1616	Earl of Oxford's case establishes that equity prevails over the common law
Eighteenth and nineteenth centuries	Equity becomes slow and more rigid
1873–5	Judicature Acts restructure the court system and allow equity and common law to be used in all courts The rules of equity are to prevail
Modern day use of equity	• In mortgages and trusts • Equitable remedies still used and two new ones created in the 20th century • Equitable maxims still apply

Figure 2.3 *Key facts chart on equity*

or other material that could be relevant to the case. The thought behind it is to prevent the defendant destroying any goods or documents which could be used as evidence in the case.

Both these equitable remedies have been absorbed into the civil court procedure rules. The Mareva injunction is now known as a freezing order and the Anton Piller order as a search order.

From all of this it can be seen that equity still has a role to play in the modern legal system and that it can still create new concepts and remedies to fit the justice of particular cases.

EXTENSION ESSAY

Critically discuss the need for equity in the development of our law.