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HAS EQUITY HAD ITS DAY?

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A. The development of equitable rights and remedies

1) This evening, I should like to focus on the role of equity – at first sight, an unusual subject for a common law lecture[1]. But as one of my predecessors as Master of the Rolls, in fact the last Chancery Master of the Rolls before me, Lord Evershed, put it, '*The function of equity was . . . to fulfil the common law: not so much to correct it as to perfect it*'[2]. Without Equity, and its famous maxims (like Equity regards as done that which ought to be done, Equity will not aid a volunteer, Equity abhors a forfeiture), the common law would be an incomplete means to achieve justice. As John Wyatt, Attorney-General of the North Wales Circuit, put it in his evidence to the Common Law Commissioners 180 years ago,

[1] I would like to express my thanks to John Sorabji for all his help in preparing this lecture.
[2] Evershed, *Reflections on the Fusion of Law and Equity after 75 years*, 70 L.Q.R. (1954) 326 at 328, paraphrasing Maitland.

"*The jurisdiction of equity must always arise from the defect of the common law to do substantial justice between the parties; the necessity of an equity jurisdiction in England arises from the same cause.*[3]"

2) In light of this, I hope it is not inappropriate for me to stray from the common law to its complement. In doing so, I want to take as my starting point something else said by Lord Evershed. In 1953, he wrote an article for the first edition of the Sydney Law Review, which took as its title a comment made, he believed, by Mr Justice Harman during the course of an interlocutory application. Two years earlier, Sir Robert Megarry in an article, entitled *The Rent Acts and the Invention of New Doctrines*, attributed the same statement to Harman J[4]. But Harman J attributed it to Lord Mansfield some 200 years earlier. What was the comment? It was that "*Equity is not to be presumed to be past the age of child-bearing*"[5].

3) While Lord Mansfield and Harman J unequivocally supported the presumption, Lord Evershed's view was more qualified. He thought that, while equity was not past childbearing; it was limited in the nature of its progeny, and only extended to refinement and development, not to the invention of new principles, doctrines or remedies. He wrote that Equity was no longer an inventive force – no new principles or remedies, basing his view on the contention that "*. . . the terms of Sec. 25(11) of the Judicature Act [1873] – the fact, indeed, of the enactment itself – seem . . . inevitably to have put a stop to invention.*"[6] Section 25(11) lives on today in the form of section 49(1) of the depressingly renamed Senior Courts Act 1981. It is in these terms,

"*Subject to the provisions of this or any other Act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.*"

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[3] First Report of the Common Law Commissioners into the Practice and Proceedings of the Superior Courts of Common Law (House of Commons) (1829) (1829 Report) at 465.
[4] Megarry, *The Rent Act and the Invention of New Doctrines*, (1951) 67 L.Q.R. 505 at 506.
[5] Harman J cited in Evershed, *Equity is not to be presumed to be past the age of child-bearing*, Sydney Law Rev. Vol 1, No. 1 (1953) 1 at 1.
[6] Evershed (1953) at 4.

So Lord Evershed thought that the age of invention disappeared in 1873, the same year as the Court of Chancery disappeared and with it the Rolls of Chancery of which he was, and I am, Master. So if he is right, we live in an age of refinement only - and his view of refinement was pretty restricted.

4) This restrictive view has been endorsed on a number of occasions: in 1972, for instance, Bagnall J in *Cowcher v Cowcher*, a case about the beneficial interest in a matrimonial home, had this to say,

"*I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate — by precedent out of principle. It is well that this should be so; otherwise, no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.*[7]"

As Lord Evershed had put it, Equity was capable of no more than the '*refinement*' of existing principles through the development of precedent[8].

5) Three years later, in 1975 another, and more famous, Master of the Rolls, Lord Denning took a characteristically more robust view that equity could develop its remedies pretty radically. As he famously put it in *Eves v Eves*,

"*a few years ago even equity would not have helped [the plaintiff]. But things have altered now. Equity is not past the age of child bearing. One of her latest progeny is a constructive*

[7] [1972] 1 W.L.R. 425 at 430.
[8] Evershed (1953) at 7.

trust of a new model. Lord Diplock brought it into the world [in *Gissing v Gissing* [1971] A.C. 886 at 905] *and we have nourished it. . .*[9]"

In fact, Lord Denning's attempt to justify his extension of the constructive trust doctrine in reliance on Lord Diplock s opinion would bite the dust[10].

6) This was of course not the first time that Lord Denning had tried and failed in his bold attempts to develop equity. An earlier and similarly gallant failure was his attempt to sire, or at least to be midwife to, an entirely new equitable right, namely the famous deserted wife's equity – arguably inventive rather than refining. His attempt to do this was a wonderful example of his judicial advocacy. In 1952, in the Court of Appeal, as Denning LJ, he was in the minority[11] in holding that there the judges should develop an equitable right into a fully fledged new real property right, enforceable against third parties, in order to protect wives who had no apparent interest in the matrimonial home, after their husbands had left them, but before any divorce or ancillary relief protection could bite. But, ten years later as Lord Denning MR back in the Court of Appeal, he persuaded another colleague to join him in following his earlier minority view. Attractive though this baby was, it was decisively murdered on appeal by the House of Lords - see *National Provincial Bank v Ainsworth*[12]. However, while defeated as an effective equity, a deserted wife's proprietary right came back in statutory clothes as it was created three years later by the Matrimonial Homes Act 1967.

7) Lord Denning had much greater success when he developed traditional equitable remedies to deal with contemporary commercial problems – and a pretty radical development it was: extending equity's procedural remedies to the freezing injunction and the search order. In

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[9] [1975] 1 W.L.R. 1338 at 1341.
[10] Cf *Grant v Edwards* [1986] Ch 638 at 647. Bagnall J's narrower interpretation of the matter was closer to Lord Diplock's view that Lord Denning MR's more selective, free flowing interpretation.
[11] *Bendall v. McWhirter* [1952] 2 Q.B. 466
[12] [1965] AC 1175

May 1975, without any analysis of the issue, and apparently without realising that they were making history, the Court of Appeal led by Lord Denning in *Nippon Yusen Kaisha v Karageorgis*, gave birth to the freezing injunction, i.e. an order freezing a defendant's assets to protect them from being dissipated or hidden in anticipation of the plaintiff's damages claim succeeding. This was an injunction of a type which the Court was rightly told had '*never been granted before.*[13]' A month later in *Mareva Compania Naveiera SA v International Bulkcarriers SA*, the Court of Appeal, again led by Lord Denning, after a little more analysis, affirmed that the jurisdiction to grant such an injunction existed[14]. And so one of the oldest equitable remedies was extended – or refined – to give birth to a new form, but one born of a long-established jurisdiction.

8) 1975 was a particularly fertile year for Lord Denning's development of equity. In *Anton Pillar KG v Manufacturing Processes Ltd & Others*, he also radically extended a remedial equitable measure recognised by the House of Lords in 1821. In *United Company of Merchants of England, Trading To The East Indies -v- Kynaston*[15], Lord Redesdale LC had accepted that it was open to a court to order a person to permit inspection of premises in order to value them, as it was an application of equity's jurisdiction to order discovery. Lord Denning extended that equitable principle to an order for entry and inspection of papers or things, in circumstances ahead of proceedings, where there was good reason to think that if matters took their normal course the defendant would destroy or hide them.[16]. And so the search order was born, by refinement and the extension of principle by precedent, of a 174 year old equitable power.

9) More recently, in 1998, a certain Mr Justice Neuberger got in on the act, albeit in a far more modest way, and in an area which was very much equity's own. In *Murphy v Murphy*, the

[13] [1975] 1 W.L.R. 1093 at 1094 – 1095.
[14] [1975] 2 Lloyd's Rep 509, [1980] 1 All ER 213.
[15] [1821] EngR 243; (1821) 3 Bligh PC 153; (1821) 4 ER 561
[16] [1976] Ch 55 at 60.

plaintiff sought disclosure of the names and addresses of the trustees of a number of discretionary settlements from his father. Thus, he was not a present beneficiary, merely a potential beneficiary. The issue was whether as a potential beneficiary the plaintiff could require a third party (his father) to provide the relevant information. There was, at that time, no prior authority on this particular issue. In the course of the judgment, I had this to say,

"*[Although] no previous case has been found to show that the court has granted the relief of the sort claimed here to a potential beneficiary under a discretionary trust, no previous case has been cited, and no principle of equity has been invoked, to suggest that the court has no jurisdiction to grant such relief. Equity, it has been said, is not to be presumed to be of an age beyond child bearing.*[17]"

In support of this I cited Megarry's 1951 article rather than Evershed's. I granted the relief sought.

10) I refined rather than invented – or at least I thought I refined, as I said this:

"*In so far as this case involves (as I accept that it does) extending the principle identified in A. v. C., I think that it is perhaps more a case of an existing child developing rather than a new child being born.*[18]"

The principle identified in *A. v. C. (Note)* [1981] Q.B. 956 was that a court of equity could use its powers to protect a trust fund in interlocutory to protect the trust pending the determination of an action at trial. In *A v C* the principle was relied on to require a bank to give what in other circumstances would be called *Norwich Pharmacal* relief[19], which had itself been a child of equity born in 1972 through the refinement or extension of discovery[20].

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[17] [1999] 1 W.L.R. 282 at 291.
[18] *Ibid.*
[19] *Norwich Pharmacal Co & Others v Customs & Excise Commissioners* [1974] A.C. 133.
[20] Discovery is, of course, a quintessential feature of what US Supreme Court Justice and pre-eminent equity scholar, Joseph Story, described as equity's auxiliary jurisdiction: Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, (Little Brown & Co) (1886) (4th Edition) at 25ff. For recent criticism of Story's categorisation of equity as having three jurisdictions (exclusive, concurrent and auxiliary) see the equally

11) It is interesting to note that the United States has not, at least as yet, followed most of these developments, adopting a decidedly more conservative view, which even Lord Evershed would have rejected. The freezing order and the search order were described as "nuclear weapons" by Justice Scalia in a characteristic judgment in the US Supreme Court[21], which concluded that US Federal courts have no jurisdiction to make such orders, as their equitable powers stopped developing at 1789, when their law ceased to be tied to that of England, and in 1789 the English Chancery Court had no power to grant freezing orders (except perhaps in support of proprietary claims).

12) This approach to the development of the law, characterised as originalist by some, but is less politely described by others, means that equity became barren, incapable of bearing children, when it crossed the Atlantic. At least to British eyes, this timidity on the part of the US Supreme Court when it comes to developing the court's own powers to deal with the modern world contrasts oddly with the preparedness of that court to make controversial rulings on political and moral issues, such as gun control, equal rights and abortion, to the extent of overruling the elected legislature. Having said that, it is only fair to add that the freezing and search order jurisdiction has been the subject of stinging criticism in Australia in that magisterial work, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies*[22].

13) Despite the unadventurous American judges and some Australian writers (some of whom were and are judges), the examples and dicta I have been discussing show that, at least when it stays at home in England, and also I hope when it comes to enlightened jurisdictions like Hong Kong, equity continues, when necessary, to develop, to extend. There is plenty of

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formidable account given in *Meagher, Gummow & Lehane's Equity Doctrines & Remedies*, (Meagher, Heydon & Leeming eds), (Butterworths, 4th ed) (2002) at 10 – 11.

[21] ***Grupo Mexicano de Desarrollo*** *SA v. Alliance Bond* 527 U.S. 308 at 332-3.

[22] (Meagher, Heydon & Leeming eds), (Butterworths, 4th ed) (2002)

evidence of what, as Sir Anthony Mason, the former Chief Justice of Australia, called '*the onward march of equity*'[23]: an onward march of refinement, if not invention. The development of the law relating to undue influence is one such example[24]. Equitable compensation is also perhaps another area ripe for development. In this onward march though it would appear that the English courts have acted consistently with the view expressed by Lord Evershed and have refined rather than invented, although they have been more radical in their concept of refinement, and concomitantly more restrictive in their concept of invention, than I suspect he would have been.

14) This raises a question: is it correct to say that the English courts, like US courts, are no longer permitted to invent new doctrines, principles or remedies? Indeed, as I have mentioned, the US courts do not even seem to countenance developing the existing role of equity. But the question is whether the English judicial role is now absolutely confined, as Lord Evershed said it was, by the 1873 Act and its statutory successors, to refining what is already established? And, if not, then we have to face what is an aspect of a wider and more fundamental question concerning judicial activism or judicial legislation.

B. Did the Judicature Act bar equity from inventing as opposed to developing?

15) The first question then is whether, as Lord Evershed thought, the 1873 Judicature Act bars equity from inventing new remedies. The answer requires a little legal archaeology. The Act was the culmination of over 50 years of reform. For the Victorians, wiser than us in many ways, it was never a case of reform in haste repent at leisure. The aim of their reforms was simple, and it was an aim with which we are familiar: to improve the civil justice system so as to deliver justice more efficiently and more cost-effectively. In the words of Ecclesiastes (1:9), '*What has*

[23] Mason, *The place of equity and equitable remedies in the contemporary common law world*, (1994) 110 L.Q.R. 238 at 239.
[24] See e.g. *National Westminster Bank Ltd v Morgan* [1985] AC 686, *Barclays Bank plc v O'Brien* [1994] 1 AC 180, *Royal Bank of Scotland v Etridge* [2002] 2AC 773

been is what will be, and what has been done is what will be done, and there is nothing new under the sun.'

16) Unlike the more recent Woolf reforms, the focus of the Victorian reforms was structural as well as procedural. No longer would there be a plethora of superior common law and equity courts (Exchequer, Queen's Bench, Common Pleas, Chancery for example) each with its own substantive jurisdiction (sometimes overlapping, sometimes not) and its own procedure. No longer would litigants have to flit between those courts to secure a complete remedy for their dispute. Secondly, the civil process was simplified. No longer would you need to plough through over 150 pages of the practice guides to work out how to issue a claim[25]. A party was no longer to see, for instance, their claims struck out on ridiculously technical grounds –for instance, as in one case, because the word 'garden' was misspelled 'gardens'[26]. Reform ensured that claims were decided on their substantive merits. '*Procedural despotism*', as Professor Sunderland put it, passed into history[27].

17) These reforms were the product of nineteen or so Commission reports and practically the same number of Acts of Parliament. As I said, the Victorians took their time with reform. The culmination was in 1873, when Parliament created an omnicompetent Supreme Court by way of the Supreme Court of Judicature Act in 1873. This was to administer both Common Law and Equity, whereas Common Law had been the province of the superior common law courts and Equity the province of the High Court of Chancery. As it was the reforms of the 1873 Act which were said by Lord Evershed to be the bar on equity developing, one must investigate the purpose of these reforms, and for that one must go back a further 20 years or so.

[25] See *Tidd's Practice* (1821) at 104ff.
[26] See, 1829 Report at 641.
[27] Sunderland, *Joinder of Actions*, (18) Michigan Law Review (1919 – 1920) 571 at 573.

18) The 1850s saw the first attempt to ameliorate the problems that stemmed from having separate superior courts, each with their own substantive jurisdiction. It saw the first attempt to bridge the existential divide between the Common Law and Equity. It did not so, at least initially, by seeking to bridge the divide between the substantive Common Law and substantive Equity. There was, for instance, no intention or desire to fuse the two or even to enable the common law courts to administer substantive Equity (e.g., the law of trusts or equitable obligations) or to enable the Chancery Court to improve the substantive Common Law by enabling it to administer, for instance, the law of obligations. Such an approach was clearly rejected at the time[28].

19) What was proposed and implemented however was a limited overlap between the jurisdictions of the courts of common law and of equity. The common law courts were provided with part of the Chancery court's jurisdiction - to issue injunctions and order discovery, for instance[29] - while the Chancery court was provided with part of the common law courts' jurisdiction: to award damages, for example[30]. This had the aim of ensuring that parties no longer had to resort to two distinct judicial systems in order to resolve their claims by providing the common law and equity courts with comparable forms of procedure. This was achieved through blending, to a degree, the adjectival law of England's two systems of law. Following the 1850 reforms there remained two civil justice systems, one administering the substantive Common Law, the other administering substantive Equity. Those systems continued to be operated by distinct courts, each with its own procedure. But now both systems were able to utilise aspects of adjectival law, of remedies, which had previously been the sole province of the other system. This, of course, was a compromise solution. As history would have suggested, this

[28] First Report of Her Majesty's Commissioners into the Process, Practice and System of Pleading in the Court of Chancery (HMSO) (1852) at 2 – 3.
[29] Common Law Procedure Act 1854 ss50, 68 – 70, 78 – 79 & 83 – 85.
[30] Chancery Amendment Act 1858, s2.

compromise turned out to be unsatisfactory and short-lived, but it enabled the right solution to be identified.

20) So, by 1868, reformers were once more considering what needed to be done in order to ensure that the justice could be delivered efficiently and economically. Reforming the rules of the several courts had been tried, and had failed. Blending the jurisdiction of the courts had been tried, and had also failed. As the Judicature Commissioners put it in their 1868 report:

"*. . . we are of the opinion 'the transfer or blending of jurisdiction' attempted to be carried out by recent Acts of Parliament . . . is not a sufficient or adequate remedy for the evils complained of [complexity, cost and delay] . . .*[31]"

Those problems prevailed because, again as the Commissioners put it, '*the evils of the double procedure*[32]'; the continued existence of two types of court, each administering differing substantive law and each operating according to distinct practice and procedure.

21) The remedy to this continuing problem was to '*put an end to all conflicts of jurisdiction*[33]', as it was put by the Judicature Commissioners whose proposals were adopted in the 1873 Act. This could have been done in a number of ways. First, substantive Common Law and Equity could have been fused (substantive fusion) and administered by multiple courts, with a single court of appeal to ensure the creation of a common line of jurisprudence. That would not have solved a conflict of jurisdiction. It would simply have enabled equivalent superior courts to administer a single, fused, form of substantive law. Secondly, substantive fusion could have been accompanied by adjectival fusion. In other words the successor to the substantive Common Law and substantive Equity could have been administered by a single

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[31] The First Report of the Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division of Jurisdiction between the Courts (No 4130; 1868 – 1869) (1868 Report) at 6.
[32] 1868 Report at 7.
[33] 1868 Report at 9.

omnicompetent court and a single procedural code. That would have resolved the conflict of jurisdiction. Thirdly, substantive law and equity could have remained separate from each other but administered by a single omnicompetent court and single procedural code. The first option could obviously be ruled out. The question is did the Commissioners opt for the second or the third option? They opted for adjectival fusion, but did they also opt for or against substantive fusion?

22) Different views have been expressed as to whether the Commissioners, or, strictly, Parliament, opted for substantive fusion. Lord Denning, took the view that the 1873 Act effected substantive fusion, when, as Denning J, he said in the famous *Central London Property Trust Ltd v High Trees House Ltd*:

'*At this time of day it is not helpful to try and draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense.*[34]'

In 1977, Lord Diplock expressed the view even more robustly, in a passage in *United Scientific Holdings Ltd v Burnley Borough Council*, which, I well remember as being initially received as the last and most authoritative word on the subject, coming as it did from an acknowledged master of English law sitting with four other Law Lords, of whom three unreservedly agreed with him. Lord Diplock said:

'*. . . if by the 'rule of equity' is meant the body of substantive and adjectival law that, prior to 1875, was administered by the Court of Chancery but not by the courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak of the Statutes of Uses or of Quia Emptores. . . .but to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years.*[35]'

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[34] [1956] 1 ALL ER 256 at 259.
[35] [1978] AC 904 at 924 – 925.

23) Despite the characteristic confidence with which that view was expressed, and the very high authority it appeared to carry, it was simply wrong. It is not a good start for the credibility of that passage that *Quia Emptores* still formed a part of English law at the time[36]. Perhaps the most outspoken critics of the Diplock approach have been the authors of *Meagher, Gummow and Lehane*[37]. For them substantive fusion is a fallacy, which has done untold damage to English Equity. They caustically described Lord Diplock's judgment in *United Scientific* as '*the low water-mark of modern English jurisprudence*[38]' Lord Diplock's egregious error has not only been noted in Australia. Lord Brandon in the House of Lords noted how, '*the principle that the Judicature Acts, while making important changes in procedure, did not alter and were not intended to alter the rights of parties.*[39]' In other words the intention was not to alter the substantive Common law or Equity. More recently, Mummery LJ in *MCC Proceeds Inc v Lehman Bros International (Europe)* observed how the Judicature Acts were simply intended to effect '*procedural improvements in the administration of law and equity in all courts, not to transform equitable interests into legal titles or to sweep away altogether the rules of the common law.*[40]' Unsurprisingly, *Meagher, Gummow and Lehane* rely on these, amongst other decisions, to highlight the force of their anti-fusion stance[41]. Equity's unlikely darling in this story is Lord Dilhorne, the one Law Lord in *United Scientific* to have real doubts about the Diplockian heresy – and, having appeared in front of him more than once, I can tell you that disagreeing with Lord Diplock had all the hallmarks of a life-threatening experience.

24) As I say, the correct analysis is that propounded by Meagher et al. The Judicature Acts (1873 and 1875) did not, nor where they intended, to effect substantive fusion. They were Acts,

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[36] See e.g. Kirby, *Equity's Australian Isolationism*, (2008) Vol. 8 No. 2 QUTLJJ 445 at 448.
[37] Op. cit.
[38] *Meagher, Gummow and Lehane,* (Preface to the 2nd Edition) at xv
[39] [1989] AC 1056 at 1109.
[40] [1998] 4 ALL ER 675 at 691.
[41] *Meagher, Gummow and Lehane* at 52ff.

as Sir George Jessel MR put it in *Salt v Cooper* in 1880, that '*the main object of [which] was to assimilate the transaction of Equity business and Common Law business by different Courts of Judicature . . . [this, he went on to say] was not any fusion, or anything or the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action or dispute.*' Sir George then went on to observe, and this is perhaps the fundamental point in despatching the Denning-Diplock view: '*[in] that very small number of cases where there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity would prevail.*[42]' It is difficult to conceive how the rules of Equity could prevail over those of Law, if there were no longer any rules of Equity or Law; if the Judicature Acts had assimilated the two in order to create the successor to Equity and Law what conflict could there be?

25) Of course where such conflict arose, as it could if the substantive Common Law and Equity continued their separate existences, it would be resolved, as required by s25(11) of the 1873 Act, in Equity's favour. But this simply means that following such resolution one rule, Equity's rule, would remain, whereas before there had been two; one Common Law, one Equity. Post-such resolution the substantive common law would be diminished as one of its rules would have been cast aside. The substantive Common Law would continue to exist insofar as it did not conflict with Equity. The twin streams of English substantive law were thus intended to continue to flow separately, even though the common law stream would narrow at those points where it overlapped, but did not mingle, with flowing waters of Equity.

26) We need not simply look to Sir George Jessel MR for the contemporaneous view. The Judicature Commissioners themselves made it clear in their 1868 Report that their intention

[42] (1880) 16 ChD 544 at 549. This view can, of course, be contrasted to Jessel MR's judgment in *Walsh v Lonsdale* (1882) 21 ChD 9, which can be read as supporting substantive fusion; although the view he takes in that case has been subject to robust criticism: see, for instance, *Meagher, Gummow and Lehane* op. cit. at 64ff or Mason, *The place of equity and equitable remedies in the contemporary common law world*, (1994) L.Q.R (110) 238.

was to consolidate the jurisdiction of the various superior courts into one court, with all the power and jurisdiction of each of those several courts[43]. That their reforms were intended to reform the administration of justice not the substantive law was echoed by Sir Arthur Wilson, one of the draftsmen of the Judicature Act[44]. A point further emphasised by the Court of Appeal in *Joseph v Lyon* in 1884[45]. So Lord Evershed was wrong in his view that s25(11) of the 1873 Act, and the Act itself, had put an end to Equity's inventiveness.

27) Furthermore, s25 of the 1873 Act was quite explicit in its ambit. First, it provided that the Act affected the union of the several superior courts. Second, it specified how their jurisdiction was transferred to the new High Court of Justice. Thirdly, it declared how '*the Law of England to be hereafter administered.*', and then went on to elaborate specific instances where substantive rules of Common Law and Equity would, prior to the Act, have given rise to conflicting results. In each instance, Equity's rule was to prevail: the Common Law stream was thus narrowed. Section 25(11) was itself a necessary general saving provision effecting the same result as s25(1) – (9) provided for specific cases. In this it did not provide for substantive fusion. Nor did it provide that once enacted either the Common Law or Equity's rules were pickled in aspic, as Lord Evershed seems to have thought. It simply provided a principle to resolve conflicts between their substantive rules, just as s24 of the Act provided rules to resolve conflicts between equity and the common law's procedural remedies. And it so by presupposing the continued existence of legal and equitable rights and obligations.

[43] 1868 Report at 9.
[44] Wilson in (1875) Sol Jo 633 – 634, cited in *Meagher, Gummow and Lehane* at 51.
[45] 15 QBD 280 cited in support of this point in Evershed, *Reflections on the Fusion of Law and Equity after 75 Years*, (1954) L.Q.R. (70) 326 at 330.

28) As to the specific question as to whether equity had lost the right to invent as a result of the 1873-5 legislation, Sir George Jessel MR said this in *Re Hallett's Estate* in 1879, with the Judicature Act reforms still freshly minted:

'*It must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time.*[46]'

Thus, a mere six years after s25(11) of the 1873 Act passed onto the statute book, Sir George was making it clear that the rules of Equity have been not just altered, improved and invented from time to time but also established from time to time. There was no suggestion there that anything had changed and that, in the brave new post-Judicature Act world, innovation was a fact of history only. On the contrary, the tenor of his remarks are that all options remain available to Equity and that it was perfectly capable of bringing forth any manner of child and not simply ones born of alteration, improvement or refinement of rules and principles that already exist.

29) If this is the case and the jurisdiction to invent new doctrines and principles continues to exist, the second question I identified earlier arises: ought Equity to invent?

C. Inventing Equity?

30) The same question could be posed of the Common Law, indeed of any system of law involving judges: to what extent should judges legislate? The invention of new legal doctrines, remedies or principles can fairly be described as judicial legislation. So to what extent should the judiciary in the 21st Century exercise their jurisdiction to invent?

[46] (1879) 13 ChD 696 at 710.

31) There are a number of ways in which judges can be understood to legislate; some less problematic than others. Richard Posner in his recent book *How Judges Think* highlights one instance of what some might see as judicial legislation. He says this,

"*When, for example, Congress passes a vague statute, thus leaving it to judges enforcing the statute to fill in the details, in effect the judges are enlisted in the legislative process.*[47]"

This situation is not unusual. In England and Wales, on Posner's analysis, the judiciary have been enlisted in the legislative process insofar as the Human Rights Act 1998 is concerned. That Act incorporates the European Convention on Human Rights into English law. It incorporates rights which are expressed as high level principles, or as Posner might put it, it incorporates rights which are relatively vague.

32) The judiciary has been left to fill in the gaps; to bring those high principles down to earth and give them concrete application. In some contexts, such as the controversy over the approach taken by the judiciary to the right to respect for privacy, contained in Article 8, and the right to free speech, contained in Article 10, of the Convention, this is not unproblematic, particularly when the two rights are in conflict. When judges take policy decisions that more naturally fall within the province of the legislature both the public and the legislature can become rightly concerned, but that proposition begs the fundamental question, on which views inevitably differ: what precise decisions fall within the ambit of the judiciary?

33) In the case of Article 8 and 10, the legislature was fully aware that it was leaving it to the judiciary to 'fill in the gaps': a point more than hinted at by the then Lord Chancellor, Lord Irvine, when noted that while the government did not intend to introduce legislation providing for a right to privacy it was "*expected that the judges would develop the law appropriately*

[47] Posner, *How Judges Think*, (Harvard) (2010) at 177 – 178.

having regard to the requirements of the Convention"[48] once the Human Rights Bill become law. The concerns which have arisen in England and Wales regarding the approach taken by the judiciary, an approach which is entirely consistent with the expectation that Lord Irvine expressed on behalf of the government and Parliament did not demur from in enacting the 1998 Act, is a straightforward one.

34) In some areas, it is almost inevitable that Parliament will set the general principles, and the judges will then develop the law, or if you prefer, make the law. After some time of judicial policy-making, it may be possible for the Parliament to refine the legislative principles, after seeing how the law develops in practice. Balancing the right to privacy against freedom of speech is an obvious example of such an area. Every time a newspaper wishes to publish a story which relates to an individual's private life, the decision will involve analysis to identify the relevant facts and then balancing of the particular facts which support, against the particular facts which oppose, publication, and deciding which side the scales fall. It is obviously impossible for Parliament to decide each case; it is almost as impossible for Parliament to set out all the relevant factors, which anyway would also be pointless as the courts know, or to say what weight they should be given, which would be fatuous, as it would depend on the precise facts of the case as to the eight to be given to a particular fact. Of course, guidelines can be given by the legislature: it can set out the principles, but experience suggests that the more detailed the principles, the more unsatisfactory the result. Now that we have ten years' experience of the courts balancing freedom of speech against the right to privacy, it may be appropriate to see if parliament can be more precise in the statutory guidance, but I must admit to some scepticism as to whether very much can be done.

[48] Lord Irvine, 583 House of Lords Official Reports (5th Series) col 771 cited in Errera, *The Twisted Road from Prince Albert to Campbell, and Beyond: Towards a Right of Privacy?*, in Andenas & Fairgrieve (ed), *Tom Bingham and the Transformation of the Law* (2009) (OUP) at 385.

35) It is true that Parliament's decision in this instance has created some public unease – at least according to sections of the press. Judges are not elected. They are not democratically accountable to the public in the same way as governments and legislatures – and quite rightly. They are accountable in different ways: through the appellate process; through the public nature of the judicial process; through the requirement to give reasoned judgments and to adhere to precedent. And ultimately, as I mentioned, if they are seen to have developed the law – to have filled in the gaps in a way unacceptable to Parliament or the public – the democratic process provides the remedy through elections and through the legislative process.

36) The essential point here is that Parliament decided that it would leave some aspects of policy-making to the judiciary. And it provided the means by which the judiciary were to be guided in making that decision through requiring it to take account of jurisprudence emanating from the European Court of Human Rights, and indeed by emphasising the importance of free speech in section 12 of the Human Rights Act 1998.. The judiciary is however in a rather different position where questions such as whether Equity or the Common Law invent, are concerned. Again we can turn to Posner to illustrate the point. In a discussion of the political nature of the US Supreme Court and its approach to constitutional law, Posner draws a distinction between what he terms the '*aggressive judge*' and the '*modest judge*'. The former believes in judicial activism. The latter does not. By judicial activism, Posner means the '*enlargement of judicial power at the expense of the power of the other branches of the state.*[49]'

37) One obvious way in which the judiciary could seek to enlarge their power at the expense of other branches of the state is, as Posner sets out, is through deciding constitutional issues, through striking down legislation as unconstitutional or through their interpretations of constitutional rights. In reaching such decisions questions of policy inevitably arise. The same

[49] Posner (2010) at 286 – 287.

can be said of a court or judge who decided to rely on Equity, or the Common Law's inventiveness to create a new legal principle or doctrine. They too would be intruding into the policy-making arena. In the case of the US Supreme Court it is their constitutional role to resolve policy questions. That is provided for through its power to carry out constitutional judicial review. The English courts do not, of course, have an equivalent power. But if they retain the power to invent new equitable doctrines or principles, then they retain an equivalent power to enter into the policy-making arena.

38) However, it is important that the judiciary maintains sufficient self-confidence and sense of responsibility which justifies it developing the law in a significant manner, while avoiding the over-confidence and arrogance which would lead the judges to be too interventionist, even legislationist. At least in the UK, it seems to me that the legislature suffers from two complementary, but apparently inconsistent, problems, which renders a degree of judicial activism arguably necessary and certainly beneficial. The first problem is that of too much ill thought-out legislation; the second is avoidance of failing to legislate in controversial and sensitive areas.

39) An obvious example of too much legislation is in the field of crime, where we have had a plethora of criminal justice legislation, many aspects of it so poorly thought out that, although enacted, they have been repealed before being brought into force. When other poorly drafted aspects have been brought into force, the judiciary has had to go further than merely interpreting it in order to produce sensible results. Although that can be said to amount to judicial legislating – and to be a particularly bad example as it involves actually contradicting what the legislature appears to have done, nobody has complained. A much more technical example of poorly drafted legislation requiring "imaginative" judicial interpretation, closer to

[50].

40) An example of Parliament failing to grasp the nettle, at least so far, and the courts stepping in is in the field of the rights to the home of unmarried co-habitees. In *Stack v Dowden*[51], my very first case as a Law Lord, the House of Lords split 4:1 on the question of whether we should effectively re-write the law of resulting trust when it came to the ownership of a house or apartment bought in the names of a cohabiting unmarried couple who had reached no agreement, indeed had had no discussions, as to how the beneficial ownership of the property should be held. I was the dissenting conservative, who said that, in the absence of any other evidence, it was pro rata to their respective contributions (subject to ordinary equitable accounting principles in relation to payments after purchase), saying that, if the law should be changed that was a matter for Parliament. My four colleagues, led by Brenda Hale, thought that Parliament would continue to duck the issue, and the time had come to adopt a more modern approach: the starting point was not the pro rata assumption, but a 50:50 assumption. I have talked elsewhere on the topic, and will content myself with saying that the English and Welsh Law Commission has fully reported on the issue with sensible recommendations which I hope Parliament will take up – not merely to prove that I was right.

41) I find it difficult however to envisage circumstances in which the English courts could properly utilise its jurisdiction to invent entirely new species of equitable rights and thereby engage in judicial legislation. It was acceptable for the court to invent new Common Law and Equitable rights, remedies and principles in earlier times, when Parliament sat infrequently and

[50] See e.g. Cadogan & Ors v 26 Cadogan Square Ltd [2008] UKHL 44; 2009] 1 AC 39
[51] [2007] UKHL 17, [2007] 2 AC 432

for short periods[52], and when England had not yet moved from monarchy to democracy. In such earlier times there was less of a clear dividing line between the various branches of the state: separation of powers had not yet crossed the mind of either John Locke or Montesquieu. In the 1770s, the Lord Chief Justice was a member of the Cabinet.

42) But, as L.P. Hartley put it in *The Go-Between*, '*The past is a foreign country: they do things differently there.*' What was right and proper in the past, in a much changed present is not necessarily a right and proper thing to do. What was a legitimate use of power in earlier times when the State, the common law and equity were still in their embryonic phase is not necessarily a proper use of power in fully-mature 21st Century liberal democracy. In some, limited, exceptional circumstances it might be. But as Evershed MR noted in 1953, echoing the House of Lords' (in its judicial capacity) warning: '*judicial legislation is apt to be a dangerous usurpation of Parliamentary functions.*[53]' Dangerous because it is inconsistent with the proper separation of powers and with our commitment to the rule of law.

43) Where then does this leave Equity? Has it had its day?

D Conclusion

44) It seems to me that we are left in an interesting position; one more interesting than that which Lord Evershed envisaged. For him Equity had had its day as a source of invention. It was limited to developing in a principled way through the doctrine of precedent pre-existing principles and doctrines. Old principles could be adapted to novel circumstances, to the needs of today's society. But adaptation presupposed the existence of that which was to be adapted.

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[52] See Evershed (1951) at 10, '
'*I have . . . referred to the duty of Judges to avoid usurpation of Parliament's exclusive right of legislation – and (as Chief Judge Cardozo also observed) there is in any case less need to indulge in judicial legislation in modern times when the legislature is in more or less continuous session, Undue enthusiasm must no doubt, then, be restrained.*'

[53] Evershed (1953) at 7.

Equity was limited. And, by analogy, so was the Common Law. The scope for judicial intrusion into the policy-making arena was thus, he thought, very limited.

45) The picture is more interesting however. The Judicature Act did not introduce a statutory bar on invention. Nor have its successors. The jurisdiction still exists. But simply because the power to do something exists, we should not draw the conclusion that we should exercise that power. Equity can therefore adapt and refine with little difficulty in appropriate circumstances and insofar as principle justifies such developments. But invention is a road which should not, as an almost absolute rule, be travelled even though the road lies open. On this point perhaps Lord Evershed noted how the House of Lords (in its judicial capacity) had on more than once '*emphasised that judicial legislation is apt to be a dangerous usurpation of Parliamentary functions.*[54]' A wise judge is apt not to engage in such usurpation. And I am glad to say that I know of no judge in England and Wales who has attempted, or even considered, such a dangerous usurpation.

46) In these circumstances, I suppose that the orthodox conclusion must be that Equity as a source of invention has in practice, if not in strict principle, apparently had its day. But that is as far as the question posed by the title to this talk can be answered "yes". First, Equity itself has most certainly not had its day. Not only is it alive and kicking, but it is still independent, and has not been subsumed into the common law, despite Lord Diplock's misconceived view to the contrary. Secondly, as Lord Evershed accepted, and pace Justice Scalia, equity is not ossified: it can develop, and it is developing, by judges refining, extending and fashioning its characteristics, so as to accord with modern requirements and demands. Thirdly, as the development of freezing and search orders show, refinement is a pretty extensive concept. Some might even say that the difference between refinement and development, on the one hand, and

[54] Evershed (1953) at 7.

invention, on the other hand, is more a matter of degree than principle. Lawyers, like academics, journalists, politicians and philosophers, are very keen to turn every issue into one of principle when in truth it normally involves a question of degree. Fourthly, I am acutely conscious that we cannot foretell the future, and for that reason alone I am reluctant to say that equity will never see fit to create a wholly new principle or remedy. Law mirrors life, and one rule of life is "never say never". As the singing prodigy Justin Bieber put it, "I will never say never! (I will fight) I will fight till forever! (make it right)". Now there's a new maxim of equity - created in 2008 by a 14-year old Canadian.

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