

Essay question

“Common law and equity are working in different ways towards the same ends, and it is therefore as wrong to assert the independence of one from the other as it is to assert that there is no difference between them”.

Critically discuss the above statement.

Guidance

Introduction

What immediately strikes one about the quote is that there are two distinct parts to it. The first asserts that, despite a shared aim, the common law and equity work in different ways, which is to say that they are methodologically distinct. With particular reference to equity, we will question whether or not it is strictly accurate to distinguish its aims from the means it uses to achieve those aims. It may be that this inquiry will lead us to conclude that the common law and equity are not trying to achieve the same things at all. The second part of the question asserts that the shared aims of common law and equity necessitate mutual dependence. Let us consider these two key assertions in turn.

Common law and equity are working in different ways towards the same ends.

The first thing to ask is whether common law and equity are, indeed, ‘working in different ways’. In other words, are they methodologically distinct. The first thing to state is that the Judicature Acts 1873–5 did not entirely do away with the historical distinction between law and equity. Professor J.H. Baker (*An Introduction to English Legal History*) observed that:

If, for reasons of history, equity had become the law peculiar to the Court of Chancery, nevertheless in broad theory equity was an approach to justice which give more weight than did the law to particular circumstances and hard cases.

Professor Baker is suggesting that equity is a distinctive type of legal methodology, a particular form of legal reasoning and practice. I would agree. Equity is typified by an

attention to justice in individual 'hard' cases or *in personam* justice, based on the desire to ensure that legal powers and rights available to society at large are exercised in good conscience in individual cases. This does not mean that equity is a form of morality, but it does mean that whereas the common law seeks to establish a form of law common to all citizens, by way of rights that are enforceable against all-comers, equity seeks to restrain the unconscionable exercise of those rights in the particular case.

A classic illustration is equity's concern for substance over form. Thus, whereas the common law requires that all transfers of legal title to land must be made by a formal deed (Law of Property Act 1925, s. 52), equity does not always require formal documentation before it will acknowledge that an equitable interest has been created in land. Thus where a legal freeholder invites a stranger to enter and build upon his land, and the stranger does so at his own expense in the reasonable expectation encouraged by the freeholder that he will thereby acquire a right in the land itself. Equity (by virtue of the doctrine or proprietary *estoppel*) stops the freeholder from asserting his one hundred per cent legal ownership against the stranger. In short, the legal owner will not be permitted to exercise his legal right to evict the stranger as he might a common trespasser. This example illustrates equity's concern to ensure the conscionable use of legal rights, and to achieve *in personam* justice, even though the political interest in ensuring certainty through legal formalities might thereby be sacrificed to some extent.

This example also illustrates another distinct feature of equitable methodology, namely recourse to maxims ('equity looks to substance not form') to dispose of hard cases. The common law does not appear to use maxims in quite the same way.

The second issue is whether the common law and equity are working towards the same ends. As the discussion so far suggests, the short-term, immediate aims of equity are quite different to the short-term immediate aims of the common law. We have seen that equity acts in competition with, or as a check upon, the operation of the common law. However, leaving aside this first-level distinction, it is clear that the common law and equity share the same ultimate aim. Namely, to establish a legal system that balances the need for certainty in the law, and hence a just scheme for regulating relations between members of society at large, with the need for justice in individual cases.

It is wrong to assert the independence of the common law from equity.

According to the way in which we have just outlined the methodology and function of equity, it is clear that equity has no existence or utility apart from the law. As the equitable maxim puts it: *equity follows the law*. It is therefore by its very nature dependent upon the law. Although not every jurist would agree with this 'dependent' conception of equity. In fact, Sir Anthony Mason has commented extra-judicially that: 'by providing for the administration of the two systems of law by the one system of courts and by prescribing the paramountcy of equity, the Judicature Acts freed equity from its position on the coat-tails of the common law and positioned it for advances beyond its old frontiers' ('The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, 239).

Conclusion

Whilst the common law and equity do work in different ways, and have quite different immediate aims, they certainly agree upon their ultimate aim of setting in place a system of law that achieves the correct balance between certainty and justice. To this end it is obvious that the common law and equity are dependent upon one another. However, this is because the English system has tended largely to equate the common law with certainty, and to equate equity with justice in individual cases (*in personam* justice). To the extent that this equation is a proper one, the quotation is accurate. But if it is accurate it is also something of a truism. Namely, that in order to achieve a legal system that comprises both law and equity, equity and law must be dependent upon one another.