

1. It does not matter what the effect of the Judicature Acts are. What is indisputable today is that equity has passed the age of childbearing. In light of the above chapter, would you agree with this assertion?
2. How do you deal with issues or questions concerning the effects of the Judicature Acts?

Suggested Answer

1. The student should, as much as possible, explain the rationale for the Judicature Acts of 1873–75. It will be useful to refer to the specific provisions of the Act that deals with the fusion in question. After this, one can consider the nature of the controversy on the actual effect of the Judicature Act. However, a student need not necessarily take sides or join the issue since the question really has more to do with the fate of equity after the Act. Hence, the short exposé of the Judicature Act is by way of introducing the answer.

At first, it was thought that the Act was merely an administrative reform. It would enable the same court to deal with both common law and equitable matters, rather than those issues going to two separate courts as in the past: *Salt v Cooper* (1880) 16 Ch. D 544. The two systems of law remained apart with their own different doctrines and principles. As late as 1954, this was still the majority view. Ashburner famously wrote that: "...the two streams of jurisdiction, though they run in the same channel run side by side and do not mingle their waters."

The student should then consider why it is said that equity is past child-bearing. The basis for this view derives from those who think that since the Judicature Acts and development in statutes, equity can no longer generate new principles. For those in support of this view, see Lord Evershed's observation in 1953 (1953) 6 CLP 11 at 12; the Court of Appeal in *Re Diplock* [1948] 2 All ER 204 at 218; see Meagher et al and Megaw LJ in *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204. All these, and many more references to support that equity is past child-bearing, are contained in this chapter.

The more modern view is that there has been a fusion of law and equity, as Lord Diplock said in *United Scientific Holdings Ltd v Burnley Borough Council* [1972] 2 All ER 62. Some judges, such as Lord Denning used this idea to considerably develop the law, as with his revival of the principle of proprietary estoppel in *Errington v Errington & Woods* [1952] 1 KB 290. Other judges were a little more cautious, holding that there must be a clear precedent for the development: see Bagnall J in *Cowcher v Cowcher* [1972] 1 All ER 943. ; Glass JA in *Allen v Snyder* [1977] 2 NSWLR 685 took a similar line, noting that "It is inevitable that judge made law will alter to meet the changing conditions of society. The students should also consider what specific new principles equity has generated or developed after the fusion. Although they are now binding on English courts, judicial approaches in other commonwealth countries such as Australia, Canada and New Zealand, can strengthen the answer.

2. If confronted by a set of facts that involve the application of rules of common law and equity, first, analyse the case to separate legal and equitable issues. Then proceed to determine which rules are most applicable. To achieve that, ask the questions: where do the facts lean more heavily towards? Would it be absurd if one were to apply the rules of common law and equity simultaneously or does it make more sense simply to treat the rules as interchangeable in the circumstances? Consider section 49 of the Supreme Court Act 1981.

The various opinions of judges concerning the effect of the Judicature Acts would appear to lean towards a commonsensical interpretation of the Judicature Acts. For certainly there seems to be little reason in the continuous perpetuation of the distinction in the form of establishing substantive ownership claims in law and in equity. Why should one who has tarnished his claim by illegal conduct be allowed to proceed in law but not in equity? This was questioned by Lord Browne-Wilkinson in *Tinsley v Milligan* [1993] 3 All ER 65, where he decided to try to apply the same principles of illegality in common law and equity. That case concerned resulting trusts. Recently, the “new approach” to illegality has also been applied to constructive trusts in *O’Kelly v Davies* [2014] EWCA Civ 1606.

A practical way of resolving this is probably to take each case on its own merit rather than attempting to establish a rule of general application since it is certain that in most cases a clinical distinction between the rules of common law and equity cannot be sustained nor in many cases can they be entirely precluded.

If the issue in question is a claim for a remedy, what kind of remedy is it? If the remedy sought is a common law one, did equity know the remedy before the Judicature Acts? If equity did, was it one of those remedies that common law regularly denies because the plaintiff or claimants have not complied with certain formalities? If that were the case, there is a higher probability that the Chancery Division of the High Court (which hears equity matters) can easily deal with it without problems.