Historical perspective—the law / equity divide—England and the USA

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A. England—origins and up to the late 18th century

1. The central "superior courts" of England stemmed from the King's Council. During the medieval period, the various courts essentially spun off the Council via delegation.

2. Two Main Types of Superior Courts Hearing Civil Cases

   a) Law courts, a.k.a. common-law courts:

      (1) King's/Queen's Bench—most cited in the US*
      (2) Common Pleas—most cited in the US*
      (3) Exchequer—law side
      (4) Chancery—law side—relatively little litigation

   b) Equity courts:

      (1) Chancery—equity side—most cited in the US*
      (2) Exchequer—equity side
      (3) Star Chamber—abolished 1641

3. Common-Law Courts

   a) Substantive law applied:

      (1) Legislation enacted by Parliament.

      (2) Common law (*i.e.*, custom of the entire realm of England).

         (a) "Legal" rights/claims
         (b) "Legal" defenses

      (3) Local custom (*e.g.*, custom of the City of London).

(a) Rights/claims
(b) Defenses

b) Evidence allowed:

(1) Oral testimony from people who were not parties to the litigation or otherwise interested in the litigation. In other words, parties and other persons with "an interest" in the litigation could *not* testify.

(2) Testimony obtained in other courts that was memorialized in writing (but this was limited).

(3) Documentary and physical evidence of various types.

c) Adjudicator:

(1) Jury (of 12) determines the facts, verdict must be unanimous.

(2) Judge(s) determine the law.

(a) Typically, a single judge presided over a jury trial—called a trial at *nisi prius*.

(i) If tried at *nisi prius* then the jury of the venue (some county or city in England) stayed put and the judge came to them.

(ii) The judges eventually fell into a routine of traveling around England twice a year on various "circuits"—during the Lent Assize and Summer Assize. These were the country circuits. A few remote locations only saw visits during the Summer Assize.

(iii) In the City of London proper and in the nearby County of Middlesex the judges tried cases during four sittings a year.

(iv) When cases were tried at the Assizes, the judge who presided over the trial might not be from the court where the action was filed. So a judge from the Court of the Common Pleas, for example, might preside over a trial in an action filed in the King's Bench.

(b) Sometimes the whole court presided during a jury trial in Westminster, typically 4 judges in the late 18th century—called a "trial at bar."

(i) In a trial at bar, the jurors of the venue in England travelled to Westminster, an expensive proposition if the case was venued in the country, which is why most jury trials were not trials at bar.

(ii) The judges that presided in these cases were from the court in which the action was filed. So if the action was filed in the King's Bench, the 4 judges of the King's Bench presided at trial.

(c) Post-trial motions in jury trials were handled by all the judges of the court *en banc* in which the action was filed—again, typically 4 judges in the 18th century. The whole court also ruled on demurrers during the pleading stage, meaning where there was no jury trial.

d) Remedies and Enforcement

(1) Actual damages (plaintiff's loss).

(a) For certain types of claims you could recover the defendant's gains.

(2) Punitive, a.k.a. exemplary or vindictive damages.

(3) Nominal damages (damages in name only, 1 shilling).

(4) Statutory penalties.

(5) Some special remedies like replevin.

(6) Very, very early on, might even grant injunctive relief but that fell into disuse in the medieval period.

(7) *In rem* enforcement of judgments but some *in personam* enforcement too.

(a) The debtors' prison wrinkle—In most types of cases, a plaintiff could choose to enforce a judgment against a defendant's property *or* against the defendant himself. In the latter scenario, the defendant would be committed to prison until the judgment was paid or the defendant used other procedures in place to discharge himself from prison.

4. The justice administered in the law courts was sometimes inadequate in several ways:

a) *Substantive* common law was inadequate—*i.e.*, there were limited common-law ("legal") rights/claims and defenses.

b) *Procedural* common law was inadequate—*i.e.*, the procedure of the common-law courts was inadequate.

(1) Cases filed at law could descend to only a single "issue" of law or fact, meaning for example that one could not challenge the legal sufficiency of a claim at the same time as challenging the facts. In later years, this became less of a difficulty.

(2) Strict and different rules of procedure associated with different causes of action (the "forms of action"), though this became less of an issue with the introduction of an action on the case.

(3) Generally, no compulsory discovery. This remained a deficiency throughout the 18th century.

(4) Parties and other persons with "an interest" in the litigation could not testify (until the law changed in 1851).

(5) Joinder limitations, *i.e.*, there were limits on who could be joined as a party in an action.

(6) And other miscellaneous problems.

c) *Remedial* common law was inadequate—*i.e.*, the remedies available at law were limited.

(1) Most causes of action allowed damages as the only remedy.

(2) For the most part, damages in personal actions covered past wrongs (*i.e.*, torts) only.

(a) To be clear, you could recover future damages for past wrongs. You just could not recover damages for wrongs that had yet to occur. So

if you battered me and I suffered a serious personal injury, the jury could give me damages that I have already incurred and damages I am likely to incur after judgment. *Both* types of damage are for a tort that occurred in the past, before I sued. Contrast this with a continuing tort, like copyright infringement or patent infringement. Each new infringement is a new tort.

(3) For the most part, no interlocutory or final injunctive relief.

5. During the medieval period, the common-law courts were especially reluctant to correct or reduce their substantive, procedural, and remedial shortcomings without Parliamentary legislation. And Parliament typically did not engage with these shortcomings by reforming substantive or procedural laws.

6. When a person felt they could not receive justice in the common-law courts, because of a substantive, procedural, or remedial shortcoming, they began to petition the King in Council in the 14th century for relief. The idea being that the King could fix all.

7. The King and his Council referred those petitions to the Lord Chancellor.

a) The Lord Chancellor ran the secretariat of the Crown (the Chancery) and along with his clerks issued and authenticated most correspondence from the King. Think of this as a department of state and not a court. The Lord Chancellor also served as a top advisor in the King's Council and held many other administrative responsibilities.

8. The Chancery began to take on the appearance of a court as soon as (1) people began petitioning it directly for relief; (2) it issued its orders and decrees under its own power; and (3) it began keeping

its own court records (separate from the Council records). The Chancellor thus began sitting as a judge in the Court of Chancery.

9. The system of substantive law, procedure, and remedies administered in the Chancery became known as "equity."

10. The key facets of equity in the Court of Chancery were:

    a) Substantive law applied:

        (1) Same as the common-law courts (see above) +

        (2) "Equity" law (which supplemented and sometimes contradicted the common law). Of course, the Chancery did not always recognize/create new "equitable" rights/claims, meaning that someone without a claim at law, who went to equity in the hope the Chancery would recognize a new right/claim, might end up being disappointed.

            (a) "Equitable" rights/claims
            (b) "Equitable" defenses

    b) Evidence allowed:

        (1) Written testimony (sworn answers + depositions).

        (2) Documentary and physical evidence of various types.

        (3) With very few exceptions no oral testimony was allowed.

    c) Adjudicator:

        (1) Judge in equity determines facts and law:

            (a) There were basically two judges in Chancery. The Lord Chancellor (sometimes called Lord

Keeper if he had not attained the higher rank of Chancellor) and the Master of the Rolls.

(b) The judge noted above sometimes sought help on factual or procedural issues by employing an assistant called a master. The judge would basically refer the issue to a master for a report and recommendation.

(i) There were 11 masters employed in London—the masters in ordinary.

(c) A presiding judge might also ask some of the masters in ordinary to sit with him in court to assist him on the fly on various points.

(2) Notably, the judge in equity sometimes referred a case to a law court (sometimes as a matter of discretion and sometimes compulsory):

(a) For a jury trial of facts; and/or

(b) For the law judges to help determine the scope of the common law or a statute.

d) Remedies and Enforcement:

(1) Very early on, actual damages was available (plaintiff's loss) but this mostly fell into disuse.

(a) Something like it could still sometimes be awarded under different labels.

(2) Disgorgement of profits (defendant's gain)—called an "accounting" at the time.

(3) Injunctions:

(a) Timing:

(i) Interlocutory

(a) Injunctions until answer.

(b) Injunctions until the hearing of the cause in Chancery.

(c) Injunctions while a case was being heard / tried at law.

(ii) Final (called "perpetual" at the time)

(b) Types:

(i) "Common"—enjoining a party from proceeding with a lawsuit in a common-law court.

(ii) "Special"—enjoining a party from committing some wrong, like a violation of someone's rights, whether the right was equitable or legal, and whether it stemmed from a statute or not.

(4) Specific performance.

(5) Discovery (which sometimes was the whole objective of the suit in equity—a "bill for discovery")—this is not a remedy in the technical sense. This discovery was often used in aid of an action at law, even if the discovery was not always directly admissible at law.

(6) *In personam* enforcement of decrees—contempt.

11. Jurisdictional Limitations of the Courts—the Basics

a) Common-law courts

(1) Legal right/claim involved.
(2) Legal remedy administered.

b) Equity courts

(1) Primary jurisdiction

(a) Equitable right/claim involved.
(b) Equitable remedy administered.

(2) Ancillary jurisdiction

(a) Legal right/claim involved.
(b) Equitable remedy administered.

c) The test for whether equity courts had jurisdiction over a case was: there must be no remedy at law (*e.g.*, because there is no substantive right at law) or no adequate remedy at law (*e.g.*, there is a substantive right at law, but something about the remedy or procedure is inadequate). When we say "at law" here we mean in the common-law courts. If this test was not met, then the equity court would dismiss the bill in its court and "leave the plaintiff to her remedy at law," meaning leave the plaintiff to file in a law court. Reasons:

(1) Respect the jurisdiction of the common-law courts.

(2) Respect the right to a jury trial.

(3) The notion that equity could sometimes appear to be arbitrary, particularly when it contravened an outcome at law, so inclined to limit equity's reach.

B. Law and Equity in the U.S. *federal* system before and after 1938

1. The Judiciary Act of 1789 created the lower federal courts, which Article III of the Constitution authorized Congress to do.

2. The Act adopted a split system of law and equity like England, albeit without physically separate courts with different judges.

   a) Federal trial courts kept separate law and equity dockets or "sides."

   b) If a case was filed on the law side of the court, the judge would wear his "law hat" and follow the substantive law, procedures, and remedies of a law court.

   c) If the case was filed on the equity side of the court, the same judge would wear his "equity hat" and follow the substantive law, procedures, and remedies of an equity court. Keep in mind, though, that a judge sitting in equity still had to apply federal statutes, just as the Chancellor had to apply Parliamentary legislation. Moreover, in some instances the judge sitting in equity would be hearing a "legal claim," with the suit having been brought in equity principally or solely for an equitable remedy.

      (1) Additionally, in a mid-19th century doctrine that became known as "equity clean-up," or the "complete relief" doctrine, a federal court sitting properly in equity could, without any need to send the case to the law side of the court, adjudicate "legal" rights that otherwise would be resolved at law, and even dispense remedies that were otherwise "legal."

      (2) The Supreme Court rejected equity clean-up in 1959, at least insofar as it affected jury-trial rights.

   d) The *equity*-side rules of *procedure* in federal courts early on followed the procedures of the English Court of Chancery.

In 1822, a set of Federal Equity Rules (FERs) were created that set forth many procedural rules for the equity side of our *federal* courts, but the FERs also continued (for many years) to refer to English Chancery procedure as the source to use to fill in any gaps in the FERs. The FERs were amended many times, eventually phasing out express reliance on English Chancery rules of procedure. The FERs remained in place until 1938. These FERs might of course differ from the procedural rules of the *state* courts in the forum state. The idea behind the FERs was to have a uniform set of equity rules in federal trial courts that applied across the USA, regardless of where the court sat.

e) The *law*-side rules of *procedure* in federal courts largely followed the rules of procedure of the *state* courts of the forum state. This meant that, with some important exceptions, procedural rules on the law side were not uniform across the federal trial courts of the USA. The purported benefit was that a lawyer who practiced in state court and federal court (on the law side) in state X would largely use the same rules of civil procedure. This approach remained in place until 1938.

3. The Judiciary Act of 1789 enshrined the "inadequate remedy at law" jurisdictional test (IRAL) for equity. If a plaintiff filed a bill on the equity side, and there was an adequate remedy at law for the wrong, the court would either dismiss the case so that it could be refiled on the law side of the same federal trial court or (starting in 1912) simply transfer it to the law side of the court.

4. In 1938, legislation (the Rules Enabling Act (REA) of 1934) and the newly created Federal Rules of Civil Procedure (effective Sept. 1938) merged the *procedural* aspects of the law and equity sides.

a) There no longer was a law and equity side or separate dockets. Litigants no longer filed an action "at law" or a "suit in equity," but instead filed a "civil action." Fed. R. Civ. P. 2.

b) The Federal Rules of Civil Procedure combined the best rules of the equity and law sides of the courts—mostly borrowing from the Federal Equity Rules.

c) The merger was of *procedure* and not necessarily *substantive or remedial* law. The Supreme Court has said that the "substantive and remedial" principles applicable prior to the advent of the federal rules have not changed. The differences between law and equity remain very relevant today, with respect to:

(1) Remedies, including:

(a) The default substantive requirements for particular remedies.

(b) The default equitable remedies available to federal courts.

(c) When interpreting federal statutes that refer to "legal" or "equitable" relief.

(2) The availability of certain affirmative defenses—some equitable defenses only work with requests for equitable relief;

(3) The constitutional right to a jury trial, which depends on whether the right being enforced is legal or equitable and whether the relief sought is legal or equitable; and

(4) The enforcement of *judgments*.

(a) Legal relief typically requires the prevailing party to enforce the judgment *in rem*.

(i) We no longer use debtor's prisons in the federal system to enforce judgments for legal damages.

(b) Equitable relief permits the prevailing party to enforce that part of the judgment *in personam*, meaning with the power of contempt.

5. In 1948, Congress repealed the provision of the Judiciary Act of 1789 that embraced the IRAL requirement, as part of a belated statutory clean up after the merger of law and equity procedure in 1938. But the repeal did not eliminate the IRAL requirement. The 1789 Act was merely declaratory of the equitable principles that preceded it. What this means today is that federal courts continue to hold that before one is entitled to an equitable remedy, like an injunction, you must demonstrate that the remedies available at law, like damages, are inadequate compensation for the wrong.

a) Congress can alter traditional principles of equity and thereby eliminate some traditional rules. For example, Congress could legislate either directly or by implication that a plaintiff is entitled to a form of equitable relief without having to show that legal damages are inadequate.

(1) So when Congress states in the Copyright Act of 1976 that a plaintiff is "entitled" to an infringer's profits, a traditionally equitable remedy in copyright cases, the plaintiff does not need to first show that legal damages are inadequate.

6. The FRCP, which merged the rules of procedure and can only regulate procedure (per the REA), did not eliminate the IRAL requirement either. The IRAL requirement is substantive, and thus something that only Congress can alter in *legislation*.

C. Here is some terminology used when discussing cases touching the law / equity divide in England and the United States. It is best practices to

follow this when talking about the period before 1938—though not everyone did, even before 1938, and not everyone does now when looking back at the pre-1938 period. Things can get particularly loose when it comes to speaking about a), b), and e).

1. Common-law courts:

    a) Cases were brought "*at* law." You can say "brought in law courts." But don't say that a case was brought "in law."

    b) Cases were filed as "actions."

    c) Complaints were called "declarations."

    d) Jury trials were called "trials."

    e) Ended in a "judgment."

    f) Appeals to a higher court were called "writs of error."

2. Equity courts:

    a) Cases were brought "*in* equity." Never say "at equity," that's like nails on a chalkboard to legal historians.

    b) As "suits."

    c) Complaints were called "bills."

    d) Bench trials were called "hearings."

    e) Ended in a "decree," not a judgment.

    f) Appeals to a higher court were called "appeals."[1]

[1] Note that the Judiciary Act of 1789 provided for appeals from the equity side of a federal court to be via a "writ of error," a more limited form of review traditionally limited to law-side cases. But the Supreme Court tweaked the writ procedure in equity cases to make it operate more like the traditional "appeal" available from equity cases. Congress later made clear that a "writ of error" was to be used in appeals from law cases, and an "appeal" to be used in equity cases.

3. "Common law" vs. "equity"—pay attention to context.

a) "Common law" can refer to:

(1) Decisional or judge-made law, generally, regardless of whether that law originally came from a judge sitting in a law court or in an equity court; as distinguished from law stemming from legislation; or

(2) The law and practice of the common-law courts only, as distinguished from the law and practice of the equity courts; or

(3) The law of England alone before the founding of the United States, regardless of whether it stems from law or equity, and often regardless of whether statutory or judge-made in origin.

b) "Equity" or "equitable" can refer to:

(1) What is fair or equitable under the circumstances of a case, totally or mostly divorced from the historical law/equity divide; or

(2) The law and practice of the equity courts only, as distinguished from the law and practice of the common-law courts.

c) "Legal" vs. "equitable" claim, right, or remedy typically refers to the historical divide between the law and equity system. For example, when you see a court state that a claim, right, or remedy is "legal," they often are referring to the notion that it was a claim, right, or remedy cognizable in the law courts. And if they state that a claim, right, or remedy is "equitable," they usually mean it originated or at least was applied in traditional courts of equity.