Chapter III
Maxims of Equity

"स्वल्पाक्षरमसंदिग्धं
सारवद्विधतोमुखम्।
अस्तोभमनवधं च
सूत्रं सूत्रविदो विदुः।।"

A sutra is a pithy statement, being unambiguous, substantial, universal and logically sound—so say the pundits or (Sutravid).

Maxims are short, pithy formulations of broad and general principles of common sense and justice.

Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 818

"These are not to be taken as positive laws of equity which will be applied literally and relentlessly in their full width, but rather as trends or principles which can be discerned in many of the detailed rules which equity has established."

—Snell's Principles of Equity, p. 27

SYNOPSIS

(*b*) Application: Doctrine of Laches
(*c*) Cases
Allcard v. *Skinner*
(*d*) Delay when fatal
(*e*) Limitations or Exceptions to the maxim
(*f*) Laches and Acquiescence
(*g*) Recognition in India

Maxim (6): *Equality is equity*
(*a*) Meaning
(*b*) Application and Cases
(*i*) Dislike for Joint Tenancy
(1) Joint purchase in unequal shares
(2) Joint loan on mortgage
(3) Purchase by partners
(*ii*) Equal Distribution of Joint Funds or Joint Purchases
(*iii*) Contribution between Co-trustees, Co-sureties and Co-contractors
(*iv*) Rateable Distribution of Legacies
(*v*) Power to Appoint
(*vi*) Marshalling of Assets
(*c*) Recognition in India

Maxim (7): *Equity looks to the intent rather than the form*
(*a*) Meaning
(*b*) Application and Cases
(*i*) Relief against Penalties and Forfeitures
(*ii*) Precatory Trusts
(*iii*) Relief in Regard to Mortgages
(*iv*) Attitude in regard to Statute of Frauds
(*c*) Recognition under Indian Law

Maxim (8): *Equity looks on that as done which ought to be done*
(*a*) Meaning
(*b*) Application and Cases
(*i*) Doctrine of Conversion
(*ii*) Executory Contracts
(1) Assignment of Future Property
(2) Agreement for a Transfer
(*iii*) Doctrine of Part Performance
(*c*) Limitation of the maxim
(*d*) Recognition in India

Maxim (9): *Equity imputes an intention to fulfil an obligation*
(*a*) Meaning
(*b*) Application and Cases
(*i*) Doctrine of Performance and Satisfaction
(*ii*) Ademption
(*iii*) Presumption of Advancement
(*iv*) Relief against Defective Execution of Power of Appointment
(*c*) Recognition in India
(1) Law as to Benami Transaction in India
(2) Benami Transactions in India: Their rise and decline

Maxim (10): *Where there is equal equity, the law shall prevail*
See Chapter on Priorities and Assignments, Chapter IV

Maxim (11): *Where the equities are equal, the first in time shall prevail*
See Chapter on Priorities and Assignments, Chapter IV

Maxim (12): *Equity acts in personam*
(*a*) Meaning
(*b*) Application and Cases
(*c*) Limitations of the maxim
(*d*) Recognition and Application in India

Working Principles of Equity.—As seen before equity has a haphazard origin and is not a complete system. Its working principles are embodied in the so-called maxims of equity. These principles do not cover the whole of the ground of equity and tend to overlap. There can be no logical division of these maxims. Therefore, these maxims are short or concise technical sentences used as memorial rules (V.S. Apte: Sanskrit English Dictionary, p. 610, 1963 Edn.).

They represent the nectar of the experience of judicial administration of five centuries by equity courts. They did not come into existence all of a sudden and at the very outset. They are the outcome of the zeal and sincerity of the Chancellors' conscience striving to do justice. As pointed out by Salmond: "Maxims are the proverbs of the law. They have the same merits and defects as other proverbs, being brief and pithy statements of partial truths. They express general principles without the necessary qualifications and exceptions, and they are therefore much too absolute to be taken as trustworthy guides to the law. Yet they are not without their uses. False and misleading when literally read, these established formulae provide useful means for the expression of leading doctrines of the law in a form which is at the same time brief and intelligible." According to Justice Stephen: "They are rather minims than maxims, for they give not a particularly great, but a particularly small amount of information. As often as not the exceptions and qualifications are more important than the so-called rules, which while they mostly serve as good indexes to the law, are mostly bad abstracts of it." There are twelve such maxims but the overlapping is so much so that "it would not be difficult to reduce them all under the first and the last".[1]

The maxims give a clue to just and reasonable interpretation. Equity, as observed by the Apex Court, is an integral part of Article 14. Interpretation of service law should be made in such a way that justice is done to the parties.[2]

One must, however, note that Tax and Equity are strangers. Equity cannot be relied on by the Revenue to tax an amount which is not taxable under the Statute. In short, tax cannot be levied on the basis of Equity.[3]

The Synopsis to this chapter lists the twelve maxims which have been individually discussed hereunder:

(1) EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY

(*a*) *Meaning.*—Where there is a right, there is a remedy. This idea is expressed in the Latin maxim *ubi jus ibi remedium*. It means that no wrong should go unredressed if it is capable of being remedied by courts. This maxim indicates the width of the scope and the basis on which the structure of equity rests. Thus it is responsible for the entire equitable jurisdiction of the court of Chancery to prevent failure of justice. But the meaning of the maxim should not be understood to embrace every moral wrong. The maxim imports that where the common law confers a right, it gives also a remedy or right of action for interference with or infringement of that right.[4] The maxim therefore must be taken as referring to rights which are suitable for judicial enforcement but which were not enforced at common law owing to some technical defect. The following cases can best illustrate the maxim.

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1. *Snell's Principles of Equity*, 27th Edn., p. 27.
2. *K.C. Joshi* v. *Union of India*, 1992 Supp (1) SCC 272; *Union of India* v. *Kishorilal Bablani*, (1999) 1 SCC 729 (service law); *Delhi Development Authority* v. *Ravindra Mohan Aggarwal & Anr.*, (1999) 3 SCC 172 (providing plot against public interest by a public authority).
3. *Kapil Mohan* v. *CIT*, (1999) 1 SCC 430.
4. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 1246.

(b) *Application and Cases.*—In *Ashby* v. *White*[5], wherein a qualified voter was not allowed to vote and who therefore sued the returning officer, it was held that if the law gives a man a right, he must have "a means to vindicate and maintain it, and a remedy, if he is injured in the exercise of and enjoyment of it. It is, indeed, a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal". It was argued that the candidate for whom the plaintiff wanted to vote was elected and that there was no precedent for such an action; and if it was allowed, that would lead to multiplicity of proceedings but the same were rejected and Lord Holt observed that "*if man will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense*".[6]

As noted by Snell, it was on this maxim that the court of Chancery based its interference to enforce uses and trusts. Where *A* conveyed land to *B* for the use of and in trust for *C*, and *B* claimed to keep the benefit of the land to himself, *C* had no remedy at law. But this was an abuse of confidence, which was a wrong capable of redress in a Chancery Court.

In cases where some document was with the defendant and it was necessary for the plaintiff to obtain its discovery or production, a recourse to the Chancery Courts had to be made for the Common Law courts had no such power; consequently the wrongs at Common Law becoming "wrongs without remedies". This situation was remedied by equity courts. This jurisdiction was extended to appointment of a receiver by way of equitable execution,[7] and to action for ejectment too, excepting discovery in case of penalties and forfeitures, for equity is against these two. The Judicature Acts have now made the discovery automatic. Similarly a mortgager was allowed in equity to sue the mortgagee for land and for the rent thereof even though the latter was possessed of the legal estate. A trustee for the breach of a trust could be sued in equity because it was a wrong and no wrong should go unredressed. Where a defamatory matter is published or where a document is not produced or where there is a breach of right regarding water, light or air, there also the equity courts ordered either for arrest or granted an injunction as was suitable.

(c) *Limitations of the maxim.*—Equity courts supplemented the Common Law courts wherever they afforded no remedy at all or afforded incomplete remedy or had insufficient procedure to collect evidence. But to this there were certain limitations that:—

(*a*) the equity courts could not help where there was breach of a moral right only. Thus only the breaches of legal rights and equitable rights were capable of being redressed;

(*b*) the equity courts afforded no relief where the right and its remedy both were within the jurisdiction of the Common Law courts;

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5. *Smith's Leading Cases*, 13th Edn., p. 253.
6. *Ibid.*
7. *Lloyds Bank Ltd.* v. *Medway U.N. Co.*, (1905) 2 KB 359, cited in *Snell's Principles of Equity*, p. 663.

(*c*) the equity courts afforded no relief, where due to his own negligence a party either destroyed or allowed to be destroyed, the evidence in his own favour or waived his right to an equitable remedy.

(*d*) *Recognition in India.*—The Indian Trusts Act, Section 9 of the Civil Procedure Code and the Specific Relief Act in India have incorporated the above principles. The Civil Procedure Code entitles a civil court to entertain all kinds of suits unless they are prohibited. The Specific Relief Act provides for equitable remedies like specific performance of contracts, rectification of instruments, injunctions and declaratory suits.

It can be said that the writ provisions in the Constitution, the Administrative Law and the Public Interest Litigation devices have now extended the scope and effective working of this maxim.

(2) EQUITY FOLLOWS THE LAW

(*a*) *Meaning.*—The maxim indicates the discipline which the Chancery Courts observed while administering justice according to conscience. As has been observed by Jekyll, M.R.[8]: "The discretion of the court is governed by the rules of law and equity, which are not to oppose, but each, in turn, to be subservient to the other; this discretion in some cases follows the law implicitly, in others assists it, and advances the remedy; in others again it relieves against the abuse or allays the rigour of it; but in no case does it contradict or *overturn* the grounds or principles thereof."[9] *Thus equity came not to destroy the law but to fulfil it, to supplement it, to explain it.* "Every jot and every title of the law was to be obeyed, but when all this had been done, something might yet be needful, something that equity would require"[10], and that was added by equity. Their goal was the same but by their nature and due to historical accident they chose different paths. Equity respected every word of law and every right at law but where the law was defective, in those instances, these Common Law rights were controlled by recognition of equitable rights and in other cases they were rendered more effective (than they were at Common Law) by throwing open equitable remedies to their holders. In the words of Story[11] "where a rule either of the common or statute law is direct and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law and can as little justify a departure from it". It is only, as Snell puts it, when there is some important circumstance disregarded by the Common Law rules that equity interferes. Thus "*equity follows the law, but not slavishly, nor always*".[12]

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8. *Lloyds Bank Ltd.* v. *Medway U.N. Co.*, (1905) 2 KB 359, cited in *Snell's Principles of Equity*, p. 663.
9. *Cowper* v. *Cowper*, (1734) 2 PWms 720: 24 ER 930. *See also* Story: *Equity Jurisprudence*, 3rd Edn., (1920) p. 34.
10. Maitland: *Lectures on Equity*, p. 17.
11. Story: *Equity Jurisprudence*, p. 34.
12. *Per* Cardozo, C.J. in *Graf* v. *Hope Bldg. Corpn.*, 254 NY 1, cited in *Snell's Principles of Equity*.

(b) *Application and Cases.*—A case on the point is *Stickland* v. *Aldridge*[13]. As regards legal estates, rights and interests, equity was and is strictly bound by the rules of law and it has no discretion to deviate therefrom. At Common Law, where a person died intestate who owned an estate in fee-simple, leaving sons and daughters, the eldest son (according to the rules of primogeniture) was entitled to the whole of the land to the exclusion of his younger brothers and sisters. This was unfair, yet no relief was granted by Equity Courts. But in this case it was held that if the son had induced his father not to make a will by agreeing to divide the estate with his brothers and sisters, equity would have interfered and compelled him to carry out his promise, because it would have been against conscience to allow the son to keep the benefit of a legal estate which he obtained by reason of his promise. Equity recognised and respected legal rules but the circumstance of giving a promise by the son to the father had added an element of conscience to the rule which equity must consider, because it acts on the conscience of a person. It was held therefore that the son must take it as a trustee for himself and his brothers and sisters. Thus where a court of law missed an important point, equity corrected the law and followed it on the simple principle of conscience. Provisions of law cannot be allowed to be misused or abused or made an instrument of fraud or to perpetuate injustice by creating a breach of trust and a breach of contract.

Where the law was based on feudal tenure, equity refused to follow it. Equity thus rejected the technical doctrines of seisin and escheat and recognised a wide range of future interest in land. Such exceptions are not many and therefore the rule that equity follows the law.[14] As regards equitable estates and interests, equity though not strictly bound by the rules of law, has acted and still acts in analogy to those rules where analogy exists.[15] For example where *R* gives his property in trust to *M*, *H* being the beneficiary; *H*'s interest though equitable will be governed by a legal rule in the following situation and not by any equitable rule. If the trustee *M* by a mistake of fact pays somebody a particular amount from trust property, *H* can file an action and this he will have to do within a period of six years. *H*'s interest being equitable, equity cannot help him in this respect, because, provisions of law in this regard are very definite and specific. There being analogy[16] here rules of law will apply. Thus when deciding titles to equitable estates, regarding construing of covenants and in construing words of limitation equity follows the rules of law. All these go to lead to one explanation of the maxim that *equity though going far ahead of law, never goes in opposition to established principles, and in that sense it is controlled by law.*[17]

(c) *Limitations of the maxim.*—(*i*) Where a rule of law did not specifically and clearly apply, or (*ii*) where even by analogy the rule of law did not apply,

13. (1804) 9 Ves 516.
14. *Snell's Principles of Equity*, p. 30
15. *Paget* v. *Gee*, (1753) Amb 198.
16. *Alderson* v. *Madison*, 8 AC 497. *See also* Law of Property Act, 1925.
17. *Ibid.*

equity formulated and applied its own rules, on the reason that injustice must be remedied.

(*d*) *Position in India.*—India has not recognised the well-known distinction between legal and equitable interests. Equity rules in India, therefore, cannot override the specific provisions of law. As for example, every suit in India has to be brought within the limitation period and no judge can create an exception to this or can prolong the time-limit or stop the rule from taking effect on principles of equity.[18] Similarly no court can confer rights which can be acquired only by registration of a document, on a party, without getting the document registered.

In *Appa Narsappa Magdum case*[19], it was contended that the provisions of Land Reform Acts being welfare legislation enacted for the benefits of tenants should be construed in a liberal manner. This was rejected by the Supreme Court of India holding that, the provisions of law regarding the period within which tenant must exercise right to purchase land of widow landlady being clear, relief cannot be granted on the basis of Equity. Where law is clear no equitable relief is warranted.

3. HE WHO SEEKS EQUITY MUST DO EQUITY

(*a*) *Meaning.*—The maxim means that to obtain an equitable relief the plaintiff must himself be prepared to do "equity", that is, a plaintiff must recognise and submit to the right of his adversary, because, you must do unto your neighbour what you wish him to do unto you. There must be reciprocity. Scriptures of Islam also inform us to be conscientious:[20]

> "Woe to those who stint the measure:
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> who when they take by measure from others, exact the full;
>
> But when they mete to them or weigh to them,
>
> minish... ."

If you want to exact the full measure, your must also be prepared to reciprocate. As said by Ashhurst, J., in *Deeks* v. *Strutt*[21], a court of law cannot impose terms on the party suing. If he is entitled to a decision, the law must take its own course; but the practice of the Chancery Court was different in that while giving equitable relief it imposed such terms on the applicant which are agreeable to the conscience, because equity acts on the conscience of the party. In fact, the maxim lays down a bare abstract principle. What those terms could be was left to the discretion of the court. Snell[22] therefore points out that: "This is a rule of 'unquestionable justice', which, however, 'decides nothing in itself', for you must first inquire what are the equities which the defendant must do, and what the plaintiff ought to have."

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18. *Yaswant* v. *Walcahnd*, AIR 1951 SC 16.
19. *Appa Narsappa Magdum (D) through LRS* v. *Akubai Ganpati Nimbalkar*, (1999) 4 SCC 443.
20. Titus and Keeton: *The Range of Ethics*, 1972 Edn., p. 379.
21. (1794) 3 TR 690, 693: 101 ER 384.
22. *Snell's Principles of Equity*, p. 30.

(b) *Application and Cases.*—This rule has many applications, *e.g.*:—

(*i*) Illegal loans

(*ii*) Doctrine of Election

(*iii*) Consolidation of mortgages.

(*iv*) Notice to redeem mortgage

(*v*) Wife's equity to settlement

(*vi*) Equitable estoppel

(*vii*) Restitution of benefits on cancellation of transaction

(*viii*) Set-off (conflicting claims in one proceeding).

(*i*) *Illegal Loans.*—In *Lodge* v. *National Union Investment Co. Ltd.*[23], the facts were as follows. One *B* borrowed money from *M* by mortgaging certain securities to him. *M* was an unregistered money-lender. Under the Money-lenders' Act, 1900, the contract was illegal and therefore void. *B* sued *M* for return of the securities. The court refused to make an order except upon the terms that B should repay the money which had been advanced to him. This decision was based on the principle of this maxim.

The criticism levelled against this case is that it does not lay down any wide general principle; and it has been distinguished on certain points which have been discussed hereunder.

If *B* had asked merely for a declaration that the mortgage was void, he could have obtained the relief without repayment of the amount, because that is not an equitable relief but a legal one, being available under the Act. Moreover *B* by suing *M* in detinue or trover could have also recovered the securities without repayment. Comparing this case with *Chapman case*[24] one can easily find out the difference between a legal and an equitable remedy. In both the cases the plaintiff had borrowed money from the defendants who were not registered under the Money-lenders' Act. In the case of Lodge, the plaintiff did ask for a declaration (legal relief) to the effect that the loan was void and could not be recovered. Chapman also demanded the same legal relief but the difference is that in the former case, Lodge besides declaration asked for return of securities which was an equitable relief, and this was refused, except on his fulfilling a condition attached by the court, which it was competent to impose. In *Lewis* v. *Plunkett*[25], it was also held that when a mortgagor is in possession of mortgaged property and the mortgagee's right is time-barred, the mortgagor can recover the title deeds from the mortgagee without repaying the loan. This is a new dimension added to the position as it stands at present which goes to support the pronouncement of the decision in *Kasumus' case*[26] that *Lodge case* does not lay down any wide and general principle.

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23. (1907) 1 Ch 300.
24. *Chapman* v. *Michaelson*, (1909) 1 Ch 238.
25. 1937 Ch 306.
26. 1956 AC 539.

(ii) *Doctrine of Election.*—Stating the gist of the doctrine succinctly it may be said that where a donor *A* gives his own property to *B* and in the same instrument purports to give *B*'s property to *C*, *B* will be put to an election, either to retain his own property and reject the benefit under the instrument or to accept the benefit granted to him by the donor, and allow the gift of his own property made by *A* to *C* to take effect. But in no case can *B* choose to keep the benefit granted to himself and at the same time retain his property referred to in the instrument. As Maitland puts it, "he who accepts a benefit under a deed or will or other instrument must adopt the whole content of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it". This position is expressed as "one cannot both approbate and reprobate;"[27] benefits and burdens go together; one cannot blow hot and cold in the same breath; and that one cannot have a cake and eat it too. As Snell puts it "equity fastens on the conscience of a person who is put to election and refuses to allow him to take the benefit of a disposition contained in the will, the validity of which is not in question, except on certain conditions."[28]

(*iii*) *Consolidation of mortgages.*—Where a person has become entitled to two mortgages from the same mortgagor, he may consolidate these mortgages and refuse to permit the mortgagee to exercise his equitable right to redeem one mortgage unless and until the other is redeemed, i.e., unless there is simultaneous redemption of all. This is called equity of consolidation. This is naturally on the principle that he who comes into equity must do equity. It is to be noted that if the mortgagor exercises his legal right to redeem within the time mentioned in the deed this doctrine does not apply but when this time has passed, only the equitable right to redeem remains to which this maxim will apply.[29] This right of consolidation now exists in England but after the enactment of the Law of Property Act, 1925, it can exist only by express reservation in one of the mortgage deeds.[30]

(*iv*) *Notice to redeem mortgage.*—Notice to a mortgagee to redeem one's mortgage is an equitable right of the mortgagor.

(*v*) *Wife's equity to a settlement.*—There was a time when in England at Common Law the wife could not hold independently any property. This was the effect of marriage. Legal existence of the wife so to say merged into that of her husband, the husband consequently becoming the absolute owner of her moneys, goods and chattles, things in action and estates.[31] But equity saw injustice in this situation and therefore departed from the Common Law principle in three cases—by recognising the wife's equity to a settlement, recognising the wife's right to a separate estate in certain circumstances, and by putting fetters on the wife's right to alienate that separate property or

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27. *See* Maitland: *Lectures on Equity*, p. 287.
28. *Snell's Principles of Equity*, p. 484.
29. See *Jennings* v. *Jordon*, (1882) 6 AC 698. The doctrine was affirmed by the House of Lords in *Pledge* v. *White*, 1896 AC 187 on the principle of *stare decisis*.
30. *See* Section 93 of the Law of Property Act, 1925.
31. *See* for details *Snell's Principles of Equity*, pp. 513-514.

disabling her to anticipate future income called "the restraint on anticipation". When, therefore, a husband sought the aid of the Chancery Court to obtain possession of his wife's equitable property to which he was entitled in right of his wife, the courts refused to assist him unless he accepted the terms and conditions imposed by the equity courts in order to compel him to make a reasonable provision for her and her children. Thus in securing his equitable right the husband had to do equity. But now, as Snell notes, under the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman's property is no longer her "separate property" but is simply her "property"; and it belongs to her in all respects as if she were a *feme sole*, with the same rights of ownership and disposition, whether *inter vivos* or by will, as an unmarried woman or man.[32] This illustration has therefore become obsolete and of academic interest only.

(vi) Equitable estoppel:[33] *Meaning, Nature and Purpose.*—This concept at Common Law, which was confined in the beginning to various formal matters, was later on expanded by equity courts which covered in its sweep any representation of existing facts, whether by words or by conduct which was acted upon by a person before whom it was made and the maker of the representation was not allowed to go back upon it. Later on this doctrine of "equitable estoppel" was expressed in two forms called "promissory estoppel" and "proprietary estoppel".

Estoppel is a principle which precludes a party from alleging or proving in legal proceedings that a fact is otherwise than it has appeared to be from the circumstances. Apart from estoppel from record and estoppel by deed, a promissory estoppel arises where a party has expressly or impliedly, by conduct or by negligence, made a statement of fact, or so conducted himself, that another would reasonably understand that he might act in reliance thereon, and has so acted, that the party who made the representation is not allowed to allege that the fact is otherwise than he has represented it to be.[34] The doctrine has been known by various names: promissory estoppel, equitable estoppel, quasi-estoppel and new estoppel or estoppel *in pais* (by conduct).

It is a principle evolved by equity to avoid injustice and though commonly named as promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel.[35] It has, as a matter of fact, transcended these limits and gained new dimensions in recent years. The full implications of this new kind of estoppel are yet to be spelled out. It is a principle that advances the cause of justice.[36]

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32. *Rees* v. *Huges*, 1946 KB 517 cited in *Snell's Principles of Equity*, p. 515.
33. B.M. Gandhi: "*The Proper Place for Promissory Estoppel*", (1986) 3 SCC (Jour) 45 to 54.
34. Bhagwati, J., in *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409, 425; Walker: *The Oxford Companion to Law*, (1980), pp. 432-33; *Sardar Vallabhbhai Patel Memorial Society* v. *State*, (1983) 2 GLR 1329: AIR 1984 NOC 16 (Guj).
35. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409, 422.
36. Hedge J., in *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.*, (1972) 1 SCC 857.

It was Mr Justice Denning, in England, who first rescued the doctrine from obscurity in *Central London Property Trust Ltd.*[37] , and laid the foundation for its applicability in *Robertson* v. *Minister of Pensions*[38], reiterating and expanding the scope of its application even to the Crown in *Howell* v. *Falmouth Boat Construction Co.*[39], in the following words:—

(1) that the assurances intended to be acted upon and in fact acted upon were binding, and

(2) that where a government department wrongfully assumed authority to perform some legal act, the citizen is entitled to assume that it had that authority.

Essentials & Basis

The essential factors[40] giving rise to an estoppel *in pais* are:

(*a*) a representation intended to induce a course of conduct on the part of the person to whom the representation was made;[41]

(*b*) resulting from the representation, an act by the person to whom it was made;[42]

(*c*) detriment to such person from the act.[43]

There must be a necessary factual foundation for the application of the doctrine. It depends upon the facts of each case whether there was a representation or not. The representation must be unambiguous and clear and there must be a nexus or a connection between the representation and action whereby the plaintiff alters his position. It should be noted that the doctrine is *limited* to public law area[44] and the petitioner praying for relief must have his

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37. *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, (1956) 1 All ER 256; *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369 at 383.
38. LR (1949) 1 KB 227; *Express Newspapers (P) Ltd.* v. *Union of India*, (1986) 1 SCC 133 at 248.
39. LR 1951 AC 837: (1986) 1 SCC 133 at 249, *supra*.
40. *Greenwood* v. *Martin's Bank*, 1933 AC 51; *Territorial & Auxiliary Forces Association* v. *Nichols & Parker*, (1949) 1 KB 35, 49; *Muni. Corpn. of Bom.* v. *Secy. of State*, ILR (1905) 29 Bom 580 (the Government may be bound by a representation made by it).
41. *Evenden* v. *Guildford City Association Football Club Ltd.*, (1975) 3 All ER 269 quoted with approval in *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409, 424; *Jatinder Kumar* v. *State of Punjab*, (1985) 1 SCC 122 (invitation to apply for service is not to hold out any promise to select or appoint); *S.N. Yadav* v. *Bihar State Electricity Board*, (1985) 3 SCC 38; *Bakul Cahsew Co.* v. *STO, Quilon*, (1986) 2 SCC 365; *Delhi Cloth & Gen. Mills Co. Ltd.* v. *Rajasthan State Electricity Board*, (1986) 2 SCC 431.
42. *D.R. Kohli* v. *Atul Products Ltd.*, (1985) 2 SCC 77; *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369; *Express Newspapers (P) Ltd.* v. *Union of India*, (1986) 1 SCC 133; *Bakul Cashew Co.* v. *STO, Quilon*, supra; *Delhi Cloth & Gen. Mills Co. Ltd.* v. *Rajasthan S.E.B.*, supra.
43. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409, 452; *S.N. Yadav* v. *Bihar State Electricity Board*, supra; (1985) 4 SCC 369 and (1986) 1 SCC 133, supra; *Satish Sabharwal* v. *State of Marharashtra*, (1986) 2 SCC 362.
44. *Jasjeet Films (P) Ltd.* v. *D.D.A.*, AIR 1980 Del 83:ILR (1979) 2 Del 742; *Union of India* v. *Anglo-Afghan Agencies*, AIR 1968 SC 718: (1968) 2 SCR 366; see also *Express Newspapers*, supra, p. 133, paras 178, 179.

hands clear and must prove that equity is in his favour.[45] *The doctrine has its basis in justice to an individual and though often described as a rule of evidence, more correctly it is a principle of law.*[46] Justice here prevails over truth.

Application in India

Originated in equity, first pressed into service by Calcutta High Court[47] in 1880 and thereafter by the Supreme Court[48] in 1951 and onwards till today the doctrine has been applied in various cases and fields, especially in the field of public law. The starting-point of such application may be considered to be the case of *Collector of Bombay* v. *Municipal Corpn., Bombay*[49], wherein the view was expressed by Chandra Shekhar Aiyar, J., that holding out of the promise by the Government was binding on the Government and that a court of equity must prevent the perpetration of a legal fraud. *Anglo-Afghan case*[50], a leading case on the point accepted this view in 1968. It was in this case that Shah, J., applying the principle against the Government exploded the doctrine of executive necessity as a defence. He observed:[51]

> "Under our jurisprudence the government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."

Had this defence been allowed it would have been very easy for the executive to take away the constitutional rights of the people. In other words to allow such powers to the executive would be to strike at the very root of the rule of law. Justice to an individual has been the underlying principle of this doctrine and the *Aglo-Afghan case*[52] balances the administrative flexibility against justice to an individual.

Public bodies are as much bound by the principle as private individuals. In *Century Spinning & Manufacturing Co. Ltd.* v. *Ulhasnagar Municipal*

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45. *Ibid.*
46. *Express Newspapers (P) Ltd.* v. *Union of India*, (1986) 1 SCC 133. For meaning, nature and purpose of the doctrine *see also* the following cases: *R.K. Kwatra* v. *D.S.I.D.C.*, AIR 1992 Del 28 (doctrine used, both as a shield and a sword); *State of H.P.* v. *Ganesh Wood Products*, (1995) 6 SCC 363 (Govt. industry); *Amrit Banaspati Co. Ltd.* v. *State of Punjab*, (1992) 2 SCC 411: (1992) 59 ELT 13 (furnishes a cause of action to a citizen); *Kasinka Trading* v. *Union of India*, (1995) 1 SCC 274: AIR 1995 SC 874 (when the doctrine is not applicable to Government).
47. *Ganges Mfg. Co.* v. *Sourujmull*, ILR (1880) 5 Cal 669.
48. *Collector of Bombay* v. *Municipal Corpn. of the city of Bombay*, AIR 1951 SC 469: 1952 SCR 43: 54 Bom LR 122.
49. *Collector of Bombay* v. *Municipal Corpn. of the city of Bombay*, AIR 1951 SC 469: 1952 SCR 43: 54 Bom LR 122.
50. *Union of India* v. *Anglo-Afghan Agencies*, AIR 1968 SC 718: (1968) 2 SCR 366.
51. AIR 1968 SC 718, 728; *Union of India* v. *Anglo-Afghan Agencies*; see *Vasantkumar Radhakishan Vora* v. *Bd. of Trustees of the Port of Bomby*, (1991) 1 SCC 761.
52. *Union of India* v. *Anglo-Afghan Agencies*, AIR 1968 SC 718: (1968) 2 SCR 366.

Council[53], the principle was applied to a public body because the court ordinarily would not allow different standards of conduct for the people and the public bodies. Similarly in case of purely executive functions of the State,[54] in regard to schemes of administrative nature and administrative directions and orders[55] the doctrine has been applied. Even in case of Universities,[56] municipality,[57] a trust[58] and in cases where there is manifest injustice[59] the doctrine has been pressed into service. The decision in *Anglo-Afghan case*[60] thus came to be followed in many areas. The principle, however, found its powerful exponent in Bhagwati, J., in *Motilal Sugar*[61]. At this juncture it should be noted that the authority of the *Motilal Sugar*[62] was sought to be shaken by *Jit Ram case*[63] wherein it was observed that *Motilal decision*[64] was "not in accordance with the view consistently taken by the Supreme Court in some respects".[65] However the conflict was resolved by the Supreme Court in *Godfrey Philips*[66]. Regarding *Jit Ram*[67] which "takes a slightly different view and holds that the doctrine of promissory estoppel is not available against the exercise of executive functions of the State and the State cannot be prevented from exercising its functions under the law",[68] the Court said that considering both the decisions "we are clearly of the view that what has been laid down in *Motilal Sugar*[69] represents the correct law in regard to the doctrine of promissory estoppel and we express our disagreement with the observations in *Jit Ram case*[70] to the extent that they conflict with the statement of the law in *Motilal Sugar*[71] and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case".[72] *Motilal Sugar*[73] thus overruled *Jit*

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53. (1970) 1 SCC 582; *Prakash Warehousing Co.* v. *Muni. Corporation of Greater Bombay*, (1991) 2 SCC 304 (eviction from corporation premises).
54. *Bhim Singh* v. *State of Haryana*, (1981) 2 SCC 673.
55. AIR 1968 SC 718, supra; *Kothari Oil Products Co., Rajkot* v. *Govt of Gujarat*, AIR 1982 Guj 107; *Amratlal Ramanlal* v. *State of Gujarat*, AIR 1972 Guj 260; *Sardar Vallabhbhai Patel Memorial Society* v. *State of Gurjarat*, (1983) 2 GLR 1329; *Satish Sabharwal* v. *State of Maharashtra*, supra.
56. *Sangeeta Srivastava* v. *Prof U.N. Singh*, AIR 1980 Del 27; *Hardwari Lal* v. *G.D. Tapase*, AIR 1982 P&H 439: ILR (1982) 1 P&H 223.
57. *Century Spng. & Mfg. Co. Ltd.* v. *Ulhasnagar Municipal Council*, (1970) 1 SCC 582.
58. *Atam Nagar Co-operative House Bldg. Society Ltd.* v. *State of Punjab*, AIR 1979 P&H 196.
59. *Ramanatha Pillai* v. *State of Kerala*, (1973) 2 SCC 650.
60. *Union of India* v. *Anglo-Afghan Agencies*, AIR 1968 SC 718: (1968) 2 SCR 366.
61. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
62. *Ibid.*
63. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11, 37.
64. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
65. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11, 37.
66. *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369.
67. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11, 37.
68. *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369, at p. 387.
69. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
70. *Jit Ram Shiv Kumar* v. *State of Haruyana*, (1981) 1 SCC 11, 37.
71. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
72. *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369.
73. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.

Ram[74] and put the law of promissory estoppel on sound basis, establishing that the application of the principle is a necessary instrument in the hands of the court to control arbitrary exercise of discretion by government departments. This view was fully endorsed in a recent case of *Gujarat State Financial Corpn.* v. *Lotus Hotels (P) Ltd.*[75]. The Corporation first sanctioned a loan of Rs 29.93 lacs to Lotus Hotels for construction of a hotel by creating an equitable mortgage. The plaintiff relying thereon proceeded to act and execute the project, but subsequently the Corporation changed its mind and refused to disburse it. Relying upon the decision in *Motilal Sugar*[76] the Supreme Court ruled that the Corporation was bound by its promise and must discharge its statutory duty; the decision in *Jit Ram*[77] could not save the Corporation. This is because "when the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position".[78] Similarly in *Tapti Oil Industries* v. *State of Maharashtra*[79], the State Government was compelled to provide incentives to an industrial concern and fulfil its promise; in *Kothari Oil Proaucts*[80] it was made to act on its promise of granting sales tax free loan for five years to a firm and in *Sardar Vallabhbhai Patel Memorial Society*[81] it was estopped from going back upon its promise where the applicants had altered their position due to representation. Besides, in a number of cases[82] the principle has been affirmed

74. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11, 37.
75. (1983) 3 SCC 379.
76. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
77. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11, 37.
78. *Ibid.*
79. AIR 1984 Bom 161: (1984) 56 STC 193.
80. *Kothari Oil Products Co., Rajkot* v. *Govt of Gujarat*, AIR 1982 Guj 107.
81. (1983) 2 GLR 1329.
82. *Century Spng. & Mfg. Co. Ltd.* v. *Ulhasnagar Municipal Council*, (1970) 1 SCC 582 (principle applied to public body); *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.*, (1972) 1 SCC 857 (principle affirmed); *Radhakrishna Agrawal* v. *State of Bihar*, (1977) 3 SCC 457 (lease for collection of Sal seeds—principle approved); *Kusheshwar Singh* v. *State of Bihar*, AIR 1974 Pat 267; *Khunnoo Lall and Sons* v. *Union of India*, AIR 1974 All 170; *Laghu Udyog Karmachari Co-operative Housing Society Ltd.* v. *State of M.P.*, AIR 1975 MP 93; *S.K.G. Sugar Ltd.* v. *State of Bihar*, AIR 1975 Pat 123; *M.P. Sugar Mills* v. *State of U.P.*, (1979) 2 SCC 409 (principle affirmed and explained. Exceptions carved out. Prinicple refined laying down that it is a weapon of offence too, i.e., can found a cause of action); *Kothari Oil Products Co., Rajkot* v. *Govt. of Gujarat*, AIR 1982 Guj 107 (State compelled to fulfil its promise of S.T. free loan); *Bhim Singh* v. *State of Haryana*, (1981) 2 SCC 673 (assurance by Govt. to its employees); *S.V. Patel Memorial Society* v. *State of Gujarat*, (1983) 2 GLR 1329 (principle applied to administrative orders of the Government); *Satish Sabharwal* v. *State of Maharashtra*, (1986) 2 SCC 362 (principle applied in land case, compensation & interest on investment granted); *Garment International Pvt. Ltd.* v. *Union of India*, AIR 1991 Kant 52 (principle applied in export assistance scheme announced by Central Government).

and applied in areas of grant of largesse[83] and policy making.[84]

Very recently the doctrine moved into the area of service jurisprudence. In *Surya Narain*[85], the question was about the absorption of trainee engineers and the State Electricity Board of Bihar failed to stand up to its representations to absorb them. The engineers had foregone opportunities to seek employments and in the process had become age-barred for any public employment. Reversing the High Court's judgment by applying the doctrine Misra, J., of the Supreme Court upheld the claim of State Electricity Board engineers and directed the Board to absorb them. In *Jatinder Kumar*[86], it was held that selection and recommendation of candidates by the Selection Board to the government by a notification issued, was only an invitation to the candidates to apply for selection for recruitment. It was not any promise held out that the selection would be made or the selected candidates would be appointed. This therefore did not create any right in the candidates and consequently the doctrine would not apply. Similarly the doctrine was not applied where the facts indicated that the Central Excise Department was inveigled into a trap by the respondent, the *Atul Products Ltd.*[87] and at the same time it did not do anything prejudicial to its interest relying upon the representation made on behalf of the department. After 1979, the year 1985 is memorable for two important decisions by the Supreme Court in this area: *Godfrey Philips*[88] and *Express Newspapers*[89].

In the first case the question was about charging excise duty on secondary or final packing. The Central Board of Excise and Customs, as a result of representations by cigarette manufacturers to exempt them from charge of excise duty on secondary packing, replied that no tax would be charged on secondary packing but subsequently on November 2, 1982 on reconsideration the secondary packing was sought to be charged to excise. The Court applied the principle of promissory estoppel and no excise was chargeable during May 24, 1976 and November 1, 1982 as the representation which was within the powers of the department to make and which was not contrary to law was binding on the government. This case bears great importance for it not only applied the doctrine but also reiterated that *besides a weapon of defence, it is a weapon*

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83. *Chowgule & Co. Pvt. Ltd.* v. *Union of India*, AIR 1972 Goa 33; *Amratlal Ramanlal* v. *State of Gujarat*, AIR 1972 Guj 260; *S.K.G. Sugar Ltd.*v. *State of Bihar*, AIR 1978 Pat 157; *K.C. Rout* v. *State of Orissa*, AIR 1979 Ori 120:ILR (1979) 1 Cut 412; *Hrudananda* v. *Revenue Divisional Commr., Cuttack*, AIR 1979 Ori 13.
84. *Abodha Kumar Mohapatra* v. *State of Orissa*, AIR 1969 Ori 80: ILR 1968 Cut 587; *State of Punjab* v. *Amrit Banaspati Co. Ltd.*, AIR 1977 P&H 268; *J.S. Vanaspati Ltd.* v. *Union of India*, AIR 1979 Del 122: ILR (1978) 2 Del 722; *Atam Nagar Co-op. House Bldg. Society Ltd.* v. *State of Punjab*, AIR 1979 P&H 196; (1986) 2 SCC 365; (1986) 2 SCC 431, *supra*.
85. *Surya Narain Yadav* v. *Bihar State Electricity Board*, (1985) 3 SCC 38; see also *C. Chenga Reddy* v. *State of A.P.* (1996) 10 SCC 193: 1996 SCC (Cri) 1205: 1996 Cri LJ 3461.
86. *Jatinder Kumar* v. *State of Punjab*, (1985) 1 SCC 122.
87. *D.R. Kohli* v. *Atul Products Ltd.*, (1985) 2 SCC 77.
88. *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369.
89. *Express Newspapers Pvt. Ltd.* v. *Union of India*, (1986) 1 SCC 133.

of offence, the law laid down in *Motilal Sugar case*[1] is the correct law and the decision in *Jit Ram case*[2] was overruled to the extent it conflicted with the statement of law in *Motilal Sugar*[3]. In the second case A.P. Sen, J., of the Supreme Court estopped the Governor of Delhi from acting arbitrarily and ruled that the successor government was clearly bound by the decision taken by the Minister particularly when it had been acted upon. In other words the government was precluded by promissory estoppel from questioning the Minister for granting the approval as the Minister had acted within the scope of his authority in granting permission of the lessor to the lessee, the Express Newspapers to build. Here the principle was used to stop fraud on power. The principle has thus moved in a wide area in Administrative Law for doing justice to an individual and to control arbitrary action of the government.[4]

Limitations

Limitations of the doctrine, however, cannot be overlooked. The doctrine obviously (1) cannot apply against the State legislature[5]; and (2) to Acts of Parliament because they are no representations;[6] (3) no one can be compelled to act against the statute.[7] The government or public authority cannot be compelled to carry out a representation or promise[8] which is contrary to law or which was outside the authority or power of the officer of the government or of the public authority to make.[9] (4) Even where the liability or obligation is imposed by statute[10] or (5) where there is statutory prohibition[11] or (6) where there is no representation or promise made out by government the principle does not apply.[12] (7) In public law the most obvious limitation on the doctrine is that it cannot be evoked so as to give an overriding power which it does not possess.

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1. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
2. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11, 37.
3. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409.
4. *Arun Kumar*, (1988) 21 R (J&K) 491; *Sureshlal*, (1987) 2 SCC 445 (education); *Delhi Cloth & General Mills* v. *Union of India*, (1988) 1 SCC 86 (Railway department); *R.K. Deka* v. *Union of India*, AIR 1992 Del 53; *Amrit Banaspati Co. Ltd.* v. *State of Punjab*, (1992) 2 SCC 411: AIR 1992 SC 1075: (1992) 59 ELT 13 (representation when binding on Govt.); *N.A. Mohammed Kasim* v. *Sulochana*, 1995 Supp (3) SCC 128: AIR 1995 SC 1624 (applicable against private party); *C. Chenga Reddy* v. *State of A.P.*, (1996) 10 SCC 193: 1996 SCC (Cri) 1205: 1996 Cri LJ 3461 (in field of service law).
5. *N. Ramanatha Pillai* v. *State of Kerala*, (1973) 2 SCC 650; *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369.
6. *Godfrey Philips*, supra; *Jasjeet Films Pvt. Ltd.* v. *D.D.A.*, AIR 1980 Del 83.
7. *Kedar Lal Verma* v. *Secretary, Board of High School and Intermediate Education*, AIR 1980 All 32; *Paradise Printers* v. *Union Territory, Chandigarh*, (1988) 21 R (SC) 223.
8. *Vidyaranyanagar Petty Shop-Keepers' Association* v. *Corporation of City of Bangalore*, (1986) 4 R (Kcr) 13 (SP); *Vasantkumar R. Vohra* v. *Bd. of Trustees of the Port of Bombay*, (1991) 1 SCC 761.
9. (1985) 4 SCC 369, *supra*.
10. (1979) 2 SCC 409, supra; *Kedarlal*, supra; *CIT* v. *B.N. Bhattacharjee*, (1979) 4 SCC 121.
11. (1985) 4 SCC 369, *supra*.
12. *Jatinder Kumar* v. *State of Punjab*, (1985) 1 SCC 122; *Excise Commr.* v. *Ram Kumar*, (1976) 3 SCC 540.

That is, no estoppel can legitimate action which is ultra vires.[13] (8) The doctrine does not operate at the level of government policy[14], however, it operates against public authority in minor matters of formality where no question of ultra vires arises.[15] Similarly (9) the advice given by a negligent officer cannot change the legal position and hence the doctrine has no application.[16] (10) Lastly, where there is fraud or collusion[17], (11) where the public interest suffers[18] and where (12) it would be inequitable[19] to endorse the doctrine[20], it will not be applied.

Conclusion

The soul and "basis of the doctrine is the interposition of equity" which "always true to form has stepped in to mitigate the rigours of strict law".[21] The Principle stands on honesty and good faith of public bodies. Also in *Express Newspapers*[22] (relying on Prof Smith and Prof Wade) A.P. Sen, J., observed that:

> "Estoppel is often described as a rule of evidence, but more correctly it is a principle of law. As a principle of law it applies only to representations

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13. *Express Newspapers Pvt. Ltd.* v. *Union of India*, (1986) 1 SCC 133; *Vasantkumar Vohra case*, (1985) 4 SCC 369.
14. *LIC of India* v. *Bangalore LIC Employees' Housing Co-op. Society Ltd.*, (1988) 23 R (Karn) 113.
15. *Ibid.*
16. *Assistant Custodian, Evacuee Property* v. *B.K. Agarwala*, (1975) 1 SCC 21; *see also* (1985) 4 SCC 369, *supra.*
17. *D.R. Kohli* v. *Atul Products Ltd.*, (1985) 2 SCC 77; *Haripada Das* v. *Utkal University*, AIR 1978 Ori 68; *Satish Kumar Rao* v. *Gorakhpur University*, 1981 All 377.
18. (1979) 2 SCC 409, *supra*: *Kedarlal*, supra; *CIT* v. *B.N. Bhattacharjee*, supra; (1981) 1 SCC 11, supra; see also *Delhi Development Authority* v. *Ravindra Mohan Aggarwal & Aur.*, (1999) 3 SCC 172 according to which estoppel does not operate where considerations of public interest are involved.
19. (1979) 2 SCC 409, *supra.*
20. *Asstt. Commr. of Commercial Taxes* v. *Dharnendra Trading Co.*, (1988) 3 SCC 570: (1988) 25 R (SC) 355. See also *State of M.P* v. *G.S. Dall & Flour Mills*, 1992 Supp (1) SCC 150: (1991) 187 ITR 487 (revocation of exemption); *Indian Aluminium Co. Ltd* v. *Karnataka Electricity Board*, (1992) 3 SCC 580, 607 (in area of statutory power); *Pine Chemicals Ltd.* v. *Assessing Authority*, (1992) 2 SCC 683, 703 (no right derived from Minister's speech); *Amrit Banaspati Co. Ltd.* v. *State of Punjab*, (1992) 2 SCC 411: AIR 1992 SC 1075; *Asstt. Excise Commissioner* v. *Issac Peter*, (1994) 4 SCC 104, 123: (1994) 1 KLT 698: (1994) KLJ 645; *Home Secretary, U.T. of Chandigarh* v. *Darasjit Singh Grewal*, (1993) 4 SCC 25 (acts contrary to law or ultra vires the Govt. power); *Shabi Construction Co.* v. *City & Industrial Development Corporation*, (1995) 4 SCC 301 (acts contrary to law); *Kumari Madhuri Patil* v. *Addl. Commr. Tribal Development*, (1994) 6 SCC 241, 257: 1994 SCC (L&S) 1349: (1994) 28 ATC 259: (1994) 5 SLR 206 (social status certificate obtained fraudulently); *S.V.R. Mudaliar* v. *Rajabu F. Buhari*, (1995) 4 SCC 15: AIR 1995 SC 1607 (persons playing foul with equity); *Ester Industries Ltd.* v. *U.P. State Electricty Bd.*, (1996) 11 SCC 199 (where there is a duly executed contract); *ITC Bhadrachalam Paper Boards* v. *Mandal Revenue Officer*, (1996) 6 SCC 634 (no estoppel against statute); *Union Territory, Chandigarh Admn.* v. *Managing Society, Goswami GDSDC*, (1996) 7 SCC 665: AIR 1996 SC 1759; *D.C.M. Ltd.* v. *Union of India*, (1996) 5 SCC 468 (doctrine not limited to its application only to defence but it can also find a cause of action).
21. *Ibid.*, p. 630.
22. *Express Newspapers (P) Ltd.* v. *Union of India*, (1986) 1 SCC 133; *Vasantkumar Vohra case*, (1985) 4 SCC 369.

about past or present facts. But there is also an equitable principle of "promissory estoppel" which can apply to public authorities."

Furthermore in words of Hedge, J.:

"The principle has gained new dimensions in recent years. A new class of estoppel, i.e., promissory estoppel has come to be recognised by the courts in this country... . The full implication of promissory estoppel is yet to be spelled out. The rule advances the cause of justice.[23] The Delhi High Court echoed this very idea in *Jasjeet*[24] and signalled that the equitable remedies must be adjusted according to circumstances and genuine public interest."

This doctrine which was born in equity, was married to contract in the field of consideration and which is now flirting with administrative law to have its due place is now *not only a weapon of defence but also a weapon of offence* and consequently the law laid down in *Low* v. *Bouverie*[25] that estoppel is not a cause of action is no longer applicable in India. The doctrine exists for controlling a legal fraud and that it can found a cause of action. This is the refinement of the doctrine.

However, its proper place is now well established in Administrative Law, it must be noted.[26]

(*vii*) *Restitution of benefits on cancellation of transaction.*—It is but proper justice to return the benefits of a contract which was voidable, and, equity enforced this principles in cases where it granted relief of recission of a contract. If *A* induces *B* by fraud to enter into a contract and when the same is set aside at the instance of *B*, *B* has to restore any benefit he may have received from *A* and to make compensation to *A* as the justice of the case may require. A party cannot be allowed to take advantage of his own wrong.[27]

So far as the infants' contracts are concerned, the position is peculiar. At Common Law all contracts, barring contracts of necessaries and contracts of beneficial services made by an infant were voidable at his option. This attitude of the Common Law landed the other party to such contracts into difficulties. Besides, a cloak of protection was thrown round the infants so that a contract could not be converted into a tort and vice versa. This position generated a number of cases of fraud by infants and equity had to intervene because infancy is no license to commit a fraud. Equity therefore obliged them to make restitution where the things procured by contract were in the infant's possession. But in cases of goods procured and consumed, moneys obtained and spent, what is to be done? In *Leslie* v. *Sheill*[28], the defendant by misrepresenting his age

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23. Hegde, J., in *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.*, (1972) 1 SCC 857.
24. AIR 1980 Del 83.
25. (1891) 3 Ch 82.
26. *See* Bhagwati. C.J., in *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369; *see* (1986) 3 SCC (Jour) 45.
27. *Priyanka Overseas Pvt. Ltd.* v. *Union of India*, 1991 Supp (1) SCC 102.
28. (1914) 3 KB 607.

obtained money of which the lender claimed repayment. Lord Summer held that the action was not maintainable because the moment the identity of the goods in the infant's hands was lost, there was no means of tracing them and therefore restitution was made impossible. To force him to pay for such goods would amount to enforcing a contract which was quite improper. Therefore "restitution stopped where repayment began". This is, then, the limit of this doctrine that no compensation can be ordered where the contract is void.[29]

(viii) *Set-off.*—Where there have been mutual credits, mutual debts or other natural dealings between the debtor and any creditor, the sum due from one party is to be set-off against any sum due from the other party, and only the balance of the account is to be claimed or paid on either side respectively.[30]

Formerly the defence of cross-claim was not available at Common Law while according to natural equity cross-demands should compensate each other and the difference was the only sum due.[31] At Common Law each party was left to his own, to sue separately for their sums.[32]

Under Queen Anne's reign only mutually connected debts were allowed to be set-off at law. In 1705 set-off was allowed in bankruptcy cases and during the reign of George II the "statute of set-off" was passed but it did not apply to goods or specific things detained. But equity allowed the defendant to resist a claim on the ground of his countervailing claim. This was done on the grounds of justice and prevention of multiplicity of actions. For this purpose equity evolved a principle that the plaintiff would be allowed the remedies of investigation and enforcement of his right on the condition that he should be prepared to allow the defendant's claim together with his own.

Equity courts exercised this jurisdiction independently and even before the existence of the statutes of set-off and exercised it even beyond the law. There is now no difference between set-off at law and in equity.

The following are the salient features for a set-off claim:—

(1) that the claim should not be a time-barred one,
(2) that it should be of a liquidated sum.
(3) that the claim was to be enforceable by action,
(4) that the parties must be the same,
(5) that the claim should exist in the same right,
(6) that the assignee of the defendant may claim set-off, and
(7) that a third party's equity must not be affected or prejudiced thereby and if the demand for set-off arose out of the same transaction even

29. *Thurston* v. *Nottingham P.B. Building Society*, (1902) 1 Ch 1.
30. *Snell's Principles of Equity*, p. 313. For details on set-off in bankruptcy see *Williams on Bankruptcy*, 18th Edn., 1968, p. 207 and *N.W. Bank Ltd.* v. *Halesowen Press Work and Assemblies Ltd.*, 1972 AC 785.
31. Bhagwati, J., in *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, (1979) 2 SCC 409, 425; Walker: *The Oxford Companion to Law*, (1980), pp. 432-33; *Sardar Vallabhbhai Patel Memorial Society* v. *State*, (1983) 2 GLR 1329: AIR 1984 Noc 16 (Guj).
32. *Green* v. *Farmer*, 1 Burr 2220 *per* Lord Mansfield.

unascertained sums were allowed. Provided equitable grounds for protection of defendant's right existed, the Equity Courts went beyond the law and gave relief on the principle that he who seeks equity must do equity.

(8) The cross-demands must arise out of the same transaction or the demands must be so connected in their nature and circumstances that they can be looked upon as part of one transaction. In *Laximchand and Balchand case* the amount claimed by the State Government under a separate contract on the ground that the contractor had committed a breach of that contract could not be allowed to be adjusted against the decretal amount. This was so because there was no evidence bringing the Government's claim to adjustment within the operation of the doctrine as the amount sought to be adjusted had yet to be determined as a liability against the contractor[33] (*see* Order 21, Rules 18 and 2).

(*c*) *Limitations of the maxim.*—(*i*) In order that Equity courts can stretch their helping hands to a defendant by applying this maxim, the demand for an equitable relief must arise from a suit that is pending. That is to say, it should arise from the same transaction, or the same subject-matter. To cases wherein it arose from two different suits, the maxim will not apply.

(*ii*) This maxim is applicable to a party who seeks an equitable relief. Those who wish to prosecute and exercise their legal rights and ask for legal relief from a court of equity will not be allowed to avail the benefit of this maxim.

(*d*) *Recognition in India.*—(*i*) *Indian Contract Act.* Under Section 19-A of the Indian Contract Act contracts entered into under undue influence are voidable and therefore a party to a contract who has the option of getting the contract declared void will have to return the benefits so obtained to the party from whom he obtained it under such contract. This is but proper, because one cannot benefit twice.[34] One cannot opt out of the liabilities of a contract and at the same time retain the benefits which he obtained from such contract.[35]

In *Mohoribibi* v. *Dharmadas Ghose*[36], as an infant's contract was void, no directions for repayment were made because as decided in *Tahal Singh* v. *Bisseswar Lal*[37], "it is not every case in which a man has benefited by the money of another, that an obligation to repay the money arises... . To raise an equity of that kind there must be an obligation express or implied to repay". Thus the maxim works here satisfactorily. In *Allcard* v. *Skinner*, Lindley, L.J., said: "The equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."

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33. *Laxmichand and Balchand* v. *State of A.P.*, (1987) 1 SCC 19, 21, 22: AIR 1987 SC 20.
34. *Subhash Chandra Das* v. *Gangaprasad*, AIR 1967 SC 878; *Allcard* v. *Skinner*, (1887) 36 Ch D 145.
35. Sections 64 and 65, Indian Contract Act.
36. (1903) 30 Cal 539 (PC).
37. (1875) 2 IA 131, 143.

(*ii*) *Transfer of Property Act.*—Under the Transfer of Property Act, Section 35 embodies the principle of election which rests on the principle of "approbate and reprobate" as is known in Scotland[38], meaning thereby that a man shall not be allowed to approbate and reprobate. This principle in India rest on forfeiture while in England it rests on compensation. A party who elects against the document has to compensate the disappointed donee and the rest he can retain; while in India the refractory donee's interest is forfeited.

In *Devan case*[39], which was under Section 54 of the Transfer of Property Act, where land was purchased under genuine sale deeds by different persons from a common vendor, out of a large plot of land and where there were allegations of encroachment by one against the other, the Supreme Court directed that the shortfall of land was to be suffered by both the parties in equal proportions in order to safeguard their interests. And this was on equitable considerations arising under the maxim.

Section 51 of the Transfer of Property Act is also based on this maxim and enjoins that he who seeks equity must do equity. It explains the position of a person with a defective title who makes improvements on the land in his possession, believing that he is absolutely entitled to it. But when the rightful owner who has a better title, evicts such a person from the property, he will have to pay for the improvements as on the date of eviction[40] on the principle that he did not stop the person in possession from making improvements. Thus the owner is estopped by his conduct. It will be interesting to note here the difference between Section 115 of the Indian Evidence Act and Section 51 of the Transfer of Property Act. In the former it is based on the true owner's conduct, while the latter is based on the belief of the person making improvements. Section 51 requires the true owner to do equity by paying for improvements.

For this section to apply the following conditions must be satisfied:[41]

(1) The person claiming compensation should not be a trespasser, but a transferee.

(2) He should believe in good faith that he was absolutely entitled to property either as a donee or as a purchaser.

(3) He should have made improvements.

(4) The person attempting to evict must have a better title.

(*iii*) *Specific Relief Act and Indian Trusts Act.*—The maxim is illustrated also in Sections 30 and 33 of the Specific Relief Act and Sections 62 and 86 of the Trusts Act.

Under Section 30 of the Specific Relief Act a court may require parties rescinding a contract to do equity by restoring, so far as may be, any benefit

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38. *Snell's Principles of Equity*, 484; *Pitman* v. *Chum Ewing*, 1911 AC 217.
39. *G.N. Devan* v. *Habibunnisa*, 1987 Supp SCC 688.
40. *Narayanrao* v. *Basavarayappa*, AIR 1956 SC 727.
41. See *Ramsden* v. *Dyson*, (1866) LR 1 HL 129.

which he may have received from the other party, and to make any compensation to him which justice may require.[42] Under Section 33, a court has power to require benefit to be restored or compensation to be made when an instrument is cancelled or is successfully resisted as being void or voidable.

Moreover, it is perfectly open to a court in control of a suit for specific performance to extend the time for deposit. The specific performance, said the Supreme Court, is an equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief. The final end of law is justice, and so, the means to it too should be informed by equity. That is why he who seeks equity shall do equity. In this case the assignment of the mortgage is not a quietless discharge of the vendor's debt as implied in the agreement to sell but a disingenious disguise to arm herself with a mortgage decree to swallow up the property in case the specific performance litigation misfires. To sterilise this decree is necessary equity to which the appellant must submit himself before she can enjoy the fruits of specific performance.[43]

In a recent case of *V.S. Palanichamy Chettiar Firm*, a decree to enforce a contract for sale was granted. The decree was confirmed by High Court without extending time limit for depositing the balance amount. No explanation was given by the decree-holder for omission to deposit the amount within time granted by the trial court. It was held that, equity required that the discretion of the court under Section 28, of the Specific Relief Act, 1963 to extend the time for payment should not be exercised in favour of the respondent decree-holder on the principle that "He who seeks equity must do equity".[44]

Similarly, under Section 62 of the Indian Trusts Act, where a beneficiary seeks a declaration of trust or retransfer of trust property wrongfully bought by the trustee, the court will impose upon him an equitable condition to repay the trustee the purchase money with interest plus other legitimate expenses, if any. And Section 86 also imposes an equitable condition to repay to the transferor the consideration received by the transferee under a rescindable contract.

(*iv*) *Civil Procedure Code.*—In *Clerk* v. *Ruthnavaloo*[45], it was decided that equitable set-off can be pleaded in India. Conditions for a legal set-off are considered in Order 8, Rule 6 of the Civil Procedure Code.

(4) HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS

(*a*) *Meaning.*—Equity, as it was based on good faith and conscience, demanded fairness, uprightness and good faith not only from the defendant but also from the plaintiff. It is therefore aptly said that "he that hath committed an inequity, shall not have equity". This very idea is expressed in this maxim but in a different terminology. It is well known that *ex turpi causa non oritur actio*,

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42. *Allcard* v. *Skinner*, (1887) 36 Ch 45; *Pether Perumal* v. *Muniandi*, 35 Cal 551 (PC).
43. *K. Kalpana Saraswathi* v. *P.S.S. Soma Sundaram Chettiar*, (1980) 1 SCC 630 at 633; see also *V.S. Palanichamy Chettiar Firm* v. *C. Alagappan & Aur.*, (1999) 4 SCC 702.
44. *V.S. Palanichamy Chettiar Firm* v. *C. Alagappan & Aur.*, (1999) 4 SCC 702, 709-710, para 17.
45. (1865) 2 Mad HCR 296.

no cause of action arises from a base cause. As said in the previous maxim, he who seeks equity must do equity, that is, one must be prepared and willing to behave and to do what, according to the principles of morality, justice and reason, is fair and just. While applying this maxim the court believed that the behaviour of the plaintiff was not against conscience before he came to the court for its assistance. The previous maxim related to the plaintiff's *conduct inside the court and thereafter*. But this maxim goes a step ahead and expects the plaintiff's conduct above reproach, just and fair *before he comes to the court*. The conduct complained of must have an immediate and necessary connection to the equity sued for. It must be depravity in the legal as well as the moral sense and not a general *depravity*.[46] That is to say, he must be clear of any participation in fraud or similar inequitable conduct.[47] To impose injustice upon another and then to seek the court's assistance smacks like Satan preaching the Bible to his adversaries. It is therefore certain that one who has not acted equitably[48] is not entitled to it, and the doors of the equity courts will be shut against him in the sense that the court will refuse to interfere on his behalf to acknowledge his right or to grant him any relief.

(*b*) *Application and Cases.*—The maxim is very clear when it talks about equitable misconduct, for those who act within the limits of their legal rights are free from any blemish and this has been shown very strikingly by the cases of *Chasemore* v. *Richards*[49] *and the Gloucester* v. *Grammar School case*[50], which go to explain that a legal act does not become illegal merely because of the improper motives of its doer. The misconduct under this maxim is not necessarily that one which constitutes a basis of legal action or punishable as crime. The maxim as has been pronounced in *Mason* v. *Clarke*[51] is so good and active as it might have been in its inception, that even a reprehensible conduct in *a suit matter* is enough to invoke the assistance of the court in applying this maxim. This explains that to bar one's claim, the depravity must have an immediate and necessary relation to the equity sued for.[52]

An early illustration in this regard is the *Highwaymen case*[53]. Two robbers were partners in their own way. Due to a disagreement in shares one of them filed a bill against another for accounts of the profits of robbery. Courts of equity do grant such a relief in case of partnership but here was a case where the cause of action arose from an illegal engagement or occupation. The maxim is *ex turpi causa non oritur actio*, and according to that the Equity Court refused to help them. Not only this, but their solicitors also were taken into custody, fined £ 50 and imprisonment till payment and the counsel who signed the bill was made to pay the costs.

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46. *Moody* v. *Cox*, (1917) 2 Ch 71 cited in *Snell's Principles of Equity*.
47. *Abdul Kadar Alibhoy* v. *Mohomedally Hyderally*, 3 Bom LR 220.
48. *Baban* v. *Vishvanath*, AIR 1934 Pat 681.
49. 7 HLC 349.
50. (1410) YB 11 Hen IV FO 47 PL 21.
51. 1955 AC 778.
52. *Moody* v. *Cox*, (1917) 2 Ch 71.
53. 9 LQR 197.

In the case of *R.V. Patel* v. *A'BAD Municipal Corpn.*[54], as the petitioner was guilty of suppression of a material fact of his second employer his Special Leave Petition was dismissed. The petitioner in this case was removed from service on ground of proved misconduct, getting employment in another service by stating in his application that he had voluntarily left the previous service because of transfer. Even though such conduct did not fall within the specified misconduct, the second employer removed him from service considering his act as a misconduct. The petitioner went to the Labour Court and High Court of Gujarat but failed. He therefore filed Special Leave Petition under Article 136, Constitution of India before the Supreme Court which also failed. It was expressly stated by the Court here that persons seeking relief must come before the Court with clean hands.[55]

Similarly, a person who uses the plaintiff's registered label with a view to represent his own wares and manufactures goods resembling those of others does a deliberate wrong. He therefore cannot be allowed to take out an injunction against others restraining them from imitating his label.[56]

Where a minor fraudulently concealing his age induced his trustees to commit a breach of trust and deliver a certain amount, he cannot get assistance from Equity Courts to recover that amount again from them. The basis of this decision was the infant's inequitable conduct.[57]

The maxim is applicable to a plaintiff as well as a defendant.[58] It is applicable to cases of benami transactions. In such transactions property is conveyed in the name of a benamidar but the real person who purchases the property is another. Such transactions are concocted with a particular purpose of fraud and therefore when the purpose has been achieved, the real owner will not be allowed to recover the property.[59]

The working of the maxim could be seen while giving the reliefs of specific performance, injunction, rescission or cancellation. Persons invoking an equitable extraordinary jurisdiction under Article 226 should come with clean hands and should not conceal the material facts.[60] Clean hands is thus a pre-condition to invoke aid of equity.[61] Similarly one cannot abuse the process of Court and yet claim its protection. In the instant case, once the SLP was dismissed for abuse of the process of the Court. However, this fact was not disclosed and a second petition was made which was dismissed for want of clean hands.[62] But in *Ahmed Siddiqui case*[63] it has been held by the Supreme

54. *Rasiklal Vaghajibhai Patel* v. *Ahmedabad Municipal Corporation*, (1985) 2 SCC 35.
55. See also *M. Mohmedali* v. *Chief Conservator of Forests, Trivandrum*, AIR 1990 NOC 145 (Ker).
56. *Abdulkadar Alibhoy* v. *M.H.*, 3 BLR 220.
57. *Overton* v. *Banister*, (1844) 3 Hare 503.
58. *Eastern Mortgage and Agency Co. Ltd.* v. *Raboti Kumar*, 3 CLJ 260.
59. *Guddappa* v. *Balaj*, ILR 1941 Bom 575; *Pitt* v. *Pitt* cited by Wills, A.G.
60. *Ramjas Foundation* v. *Union of India*, 1993 Supp (2) SCC 20, 24: AIR 1993 SC 852.
61. *J.H. Patel* v. *Subhan Khan*, (1996) 5 SCC 312.
62. *S.B. Noronah* v. *Union of India*, (1994) 1 SCC 372.
63. *Ahmed Siddiqui* v. *Prem Nath Kapoor*, (1993) 4 SCC 406, 409: AIR 1993 SC 2525.

Court that appeal could not be dismissed only on ground that appellant had not approached the court with clean hands.[64]

Moreover it is not necessary that the defence of the plaintiff's unclean hands must proceed from the defendant. If the court is satisfied otherwise than through the defendant of the plaintiff's misconduct or depravity in relation to the claim litigated, it is bound to take notice of it and refuse its assistance to the plaintiff.[65]

(*c*) *Limitation of the maxim.*—While applying this maxim, as it is pointed out before, general or total conduct of the plaintiff is not to be considered. His general conduct may not be satisfactory or praiseworthy but if that has nothing to do with the matter of the suit or if that has no immediate and necessary connection with the equity sued for, the court should not take it into account. In the words of Brandies, J., in *Loughran* v. *Loughran*[66], "equity does not demand that its suitors shall have led blameless lives".

> "What bars a claim is not a general depravity but one which has an immediate and necessary relation to the equity sued for."[67]

(*d*) *Exceptions to the maxim.*—There are two exceptions to the maxim where the requirement of clean hands has been dispensed with:

(*i*) Where a transaction is against public policy and the plaintiff's hands are tainted, still, however, for the sake of the public, justice has to be given to uphold the policy or the moral values[68] and the parties thereto may be relieved.

(*ii*) Where a party with unclean hands repents for his conduct before his unjust plans are carried out, the court will not stick to the letter of the maxim and will extend its assistance for doing justice.[69]

(*e*) *Recognition in India.*—The principle established in *Overton* v. *Banister* discussed earlier that an infant's receipt for money though ineffectual to discharge a debt, albeit as he obtained the same by misrepresentation, he cannot set up a defence of the invalidity of the receipt given by him, has been incorporated in Section 23 of the Indian Trusts Act.

Similarly, a plaintiff's unfair conduct will disentitle him to an equitable relief of specific performance of the contract under Sections 17, 18 and 20 of the Specific Relief Act, 1963. Where the plaintiff is guilty of sharp practices, fraud and undue influence as detailed under Section 18 or where there is a contract to sell or let property by a plaintiff who has no title as specified under Section 17, specific performance will not be granted to the plaintiff. The jurisdiction to specific performance under Section 20 is discretionary and the court is not bound to grant such a relief merely because it is lawful to do so. The court's

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64. See also *Prakashwati* v. *R.L. Kapoor*, 1995 Supp (3) SCC 709.
65. *Gedge* v. *R.E. Assurance Corpn.*, (1900) 2 QB 214.
66. (1934) 292 US 216, 229.
67. *Dering* v. *Earl of W.*, (1787) 1 Cox Eq 378; *Moody* v. *Cox*, (1917) 2 Ch 77 cited by *Snell's Principles of Equity*, p. 32. See also *Duchess of A.* v. *Duke of A*, 1967 Ch 302, 332.
68. See *Drury* v. *Hooke*, (1636) 2 Ch Cas 176.
69. (1755) 1 Amb 264.

discretion is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction, by a court of appeal.

The principle of coming with clean hands has been reiterated by the Allahabad High Court in *Suraj Kumari case*[70]. The Court observed that the High Court should take care of the situation that extraordinary jurisdiction under Article 226 should not be allowed to be misused and in cases where it comes to the conclusion that the petitioner has approached the Court with unclean hands, or has filed a writ petition stating facts, which are false, the petitioner must be visited with penal consequences.

On the same principle, injunctions are granted. But no injunction can be granted for continuance of a legal wrong, or continuance of fraud, invasion of copyright, and continuance of immoral or libellous acts. Reliefs of rescission and cancellation of instruments are also instances of equitable reliefs.

(f) *Distinction.*—There is a difference between the present maxim and the previous one in that:

(*i*) The previous maxim does not proceed on the assumption of *existence of any unconscionable conduct* of the plaintiff. Where both the parties have claims to equitable relief against each other, equity courts would grant relief to the plaintiff only on the condition that he should also recognise the defendant's equitable right to relief, instead of driving him to file a separate suit for the same. That is, the plaintiff seeking equity must do it to the defendant. But where the defendant has no separate claim to relief and the plaintiff's conduct is unfair, this maxim of coming with clean hands would apply and that will disentitle the plaintiff to relief requested by him.

(*ii*) Both the maxims purport to regulate equitable relief and both seem at first sight to be expressing the same thing, but the present maxim is a condition precedent to seeking equitable relief while the preceding maxim exposes the condition subsequent to the relief sought.

(*iii*) The present maxim refers to the plaintiff's conduct before he approaches the court while the preceding maxim refers to the plaintiff's conduct as the court thinks it ought to be, after he comes to the court.

(*iv*) According to the present maxim, if the plaintiff's conduct is unfair and unconscionable, it would not entitle him to the relief sought, while according to the preceding maxim the plaintiff has to mould his behaviour according to the impositions by the court and thus to pay the price to the court in this form for enforcing his equitable claim.

(*v*) Consequently in the preceding maxim the plaintiff has an option or a choice before him either to submit to the conditions put by the court or to get out of the court, while in the present maxim his previous

70. *Suraj Kumari* v. *District Judge, Mirzapur*, AIR 1991 All 75.

inequitable conduct has taken away and snatched that choice from him. His equitable right therefore can neither be recongised nor enforced.

(*vi*) The present maxim looks to the past, while the preceding one looks to the future.

5. DELAY DEFEATS EQUITIES

"Vigilantibus, non dormentibus, jura subvenient"

(Equity aids the vigilant and not the indolent)

(*a*) *Meaning.*—It is an undisputed axiom that eternal vigilance is the price of liberty. If one sleeps upon his rights, his rights will slip away from him and therefore this maxim has been expressed in a rather different form, shouting to the passive, otiose and the slothful that: "Equity aids the vigilant and not the indolent." Where an injured party has been slow to demand a remedy for a wrong which he has for a long time regarded with apparent indifference, the court will decline to give him that remedy on grounds[71] of public policy. In the famous words of Lord Camden, L.C., "a court of equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing." Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches".[72] Thus legal claims are barred by statutes of limitation and equitable claims may be barred not only by limitation law but also by unreasonable delay, called laches.

Therefore there should be some time-limit for prosecution of a claim in a court of justice because it is dangerous and impracticable to leave it to the sweet will of a person entitled to it. This idea has been accepted by every legal system and this maxim is an indicator for the time-limit though in a crude form.

This maxim applies only when a claim is made to equitable relief.[73]

(*b*) *Application.*—To cases which are governed by statutes of limitation[74] (in England) either expressly or by analogy the maxim will not apply. Such cases fall into three categories as noted by Snell:[75]

(*i*) firstly those equitable claims to which the statute applies expressly, and

(*ii*) secondly to which the statute applies by analogy.

(*iii*) In the third instance there are equitable claims to which the statute does not apply and hence they are covered by ordinary rules of laches. Dr Hanbury[76] puts the idea in this way: In cases of *purely*

71. *Smith* v. *Clay*, (1767) 3 Bro CC 639.
72. *Snell's Principles of Equity*, p. 33.
73. Lord Chelmsford in *Clarke and Chapman* v. *Hart*, (1858) 6 HL Cas 633.
74. Limitation Act, 1939.
75. *Snell's Principles of Equity*, p. 33.
76. *Modern Equity*, pp. 50-51.

equitable claims, equity courts have a discretion either to grant or to refuse the equitable relief, unless the equitable claim is expressly covered by a statute. In case of legal claims or equitable claims closely analogus to legal claims the limitation period prescribed by the statute will be followed. But in cases of fraud of the defendant, where it could not be discovered by the plaintiff even up to and after the limitation period was over, equity resolved that time against the plaintiff will begin to run only on and from the date when the fraud was first discovered.

Doctrine of laches: Plaintiff's unreasonable delay is a weapon of defence by the defendant against the plaintiff. If the plaintiff is passive and apathetic to his rights for a considerably longer time than prescribed, his delay does not remain *a mere delay* but *a delay that has worked to his disadvantage*. Where a long time has elapsed, even beyond the statutes of limitation, and the plaintiff has never insisted upon his rights and therefore neither the statute applies nor can the analogy be invoked, one has to look to the delay and the surrounding circumstances which provide an explanation for the delay and a basis of interference for the court. If the inference that can be reasonably drawn is that the plaintiff agreed to abandon or release his rights or acted in a manner as to induce other parties to alter their position[77] on the reasonable faith that he has done so, the matter is over, because, the plaintiff's claim will be treated as abandoned.[78] In such cases the lapse of time and delay are most material. But apart from such circumstances delay will be immaterial. But for deciding whether there is inexcusable delay or not there is no readymade rule or formula because so many facts have to be considered, *e.g.*, the nature of the claim, the character of the claimant (whether he is an individual or a corporation), and the subject-matter of litigation. Moreover, ignorance of the rights, undue influence and disability would form a satisfactory explanation for delay. It should be noted that laches is a personal disqualification and will not bind successors-in-title.[79]

(c) *Cases.*—In a *Bombay case*[80], the plaintiff allowed his land to be occupied by the defendant and this was acquiesced by him even beyond the period of limitation. On a suit by the plaintiff for possession of the land it was decided that as the period of limitation to recover possession had expired, no relief could be granted.

In the same way where *A* seeks to set aside a contract of purchase he must apply for relief within the limitation period. But where he makes unreasonable delay and during that time other parties have acquired rights or where the property in question has deteriorated in value or where conditions are changed, the court will refuse rescission.

77. *Allcard* v. *Skinner*, (1887) 36 Ch D 145.
78. *Lindsay Petroleum Co.* v. *Hurd*, (1874) LR 5 PC; *Black* v. *Gale*, (1886) 32 Ch D 571; cf. Hanbury: *Modern Equity*, 1969 Edn., p. 37; *Snell's Principles of Equity*, p. 35.
79. *Nwakobi* v. *Nzekwu*, 1964 WLR 1019.
80. *Chatrabhuj* v. *Mansukhram*, AIR 1925 Bom 183.

Allcard v. *Skinner*[81]: When Miss Allcard was about 35 years of age she felt a desire to devote her life to good works. She became associated with the Sisters of the Poor and after a few years became a professed member of that Sisterhood and bound herself to observe the rules of poverty, chastity and obedience. The rule as to poverty required a member to surrender all her property either to her relatives, the poor or to the Sisterhood itself. The rules also provided that no sister should seek advice from anyone outside the order without the consent of the Lady Superior. Within a few days of becoming a member Miss Allcard made a will bequeathing all her property to Miss Skinner, Lady Superior, and in succeeding years made gifts to the value of about £ 7000 to the same person. When Miss Allcard left the Sisterhood about eight years later she immediately revoked her will but waited a further six years before commencing an action to recover what was left of the money given to Miss Skinner.

The questions of law which arose on these facts were: (*i*) whether the gift is vitiated by the circumstance that it was in favour of the religious superior by a person under her religious influence; (*ii*) what are the circumstances in which such a gift can be set aside.

The trial court dismissed the action. Justices Colton, Lindley and Bowen, L., JJ., considered the appeal. All these three judges were of the opinion that at the time of the gift the relationship between the donor and the donee was such that in the absence of competent advice from others interested in the donee, the gift cannot stand. She was not a free agent in making a gift of her property. When she left the Sisterhood in 1879, she was entitled to set aside the transfer.

On the question, however, whether the plaintiff was entitled to set aside the transfer there was a difference of opinion between Colton, L.J., and Lindley. Justice Colton was of the opinion that in regard to the property which was still in the hands of the donee, the plaintiff could recover it. Justice Lindley was of the opinion that the plaintiff's inaction for six years after she left the Sisterhood indicated her intention to confirm the gift. Laches and acquiescence thus disentitled her from claiming back the property. Justice Bowen agreed with Justice Lindley.

It was held that if she had sued to recover the amount of her gifts which had not been expended on the fulfilment of the purposes of the Sisterhood at an earlier date she would have succeeded on the ground of undue influence, but it was her acquiescence that rendered her claim barred by laches.

In England, cases of equitable claims are now controlled by the Limitation Act, 1939. Before that the claims were controlled by the Real Property Limitation Act, 1833[82] and the Trustee Act, 1888[83]. Claims by a beneficiary to recover trust property or in respect of any breach of trust, claims to the personal estate of a deceased person, claims to redeem mortgaged land and claims to

81. (1987) 36 Ch D 145 (Court of Appeal).
82. Section 24.
83. Section 8.

foreclose mortgages of real or personal property are now controlled by express application of the Limitation Act, 1939.[84]

As noted by Snell, the class of cases to which the statute is applied by analogy is extremely small and the court normally retains a discretion governed by the doctrine of laches, to refuse or to grant an equitable remedy in aid of a legal right even though the right is subject to an express statutory period which has not expired.[85]

In *Bablani case*[86], the maxim was applied to service law area. The respondent, in this case, successfully passed IAS and Allied Services Examination in 1974. Due to error in computation of vacancies by the department, he was placed in Class II post in 1976 instead of Class I post. The respondent represented in 1983. His representation was rejected in 1985. He therefore moved the court. Contention of the department was that it was not possible to reopen the issue after several years. The Tribunal in 1994 allowed respondent's application. Against this the Union of India came in appeal. It also granted benefit of Class I post to the respondent. Other persons claimed similar benefit.

Denying relief to other persons, the Supreme Court held that delay defeats equity, is a well known principle of jurisprudence. Delay of 15 and 20 years cannot be overlooked when an applicant before the court seeks equity. During all these years, the respondent had no legal right to any particular post. After more than 10 years, the process of selection and notification of vacancies cannot be and ought not to be reopened in the interest of proper functioning and morale of the concerned services. It would also jeopardise existing positions of a large member of members of that service.

The relief already granted to the respondent is therefore maintained, but it cannot be granted to anyone else.

(d) *Delay when fatal*: In the following three cases delay is fatal for a party desirous of enforcing his right:

(*i*) As a result of delay when the available evidence is lost or destroyed.

(*ii*) When the other party is induced to assume or draw an inference from one's conduct that one has waived his rights.[87]

(*iii*) Delay provides a ground to the other party and leads him to believe that one has agreed to abandon or release his rights.

(e) *Limitations or exceptions to the maxim.*—Delay is not fatal in the following circumstances and they form the exceptions to the maxim so that the maxim does not apply to them—

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84. Sections 19, 20, 12 and 4 respectively.
85. *Poole Corporation* v. *Moody*, 1945 KB 250.
86. *Union of India* v. *Kishorilal Bablani*, (1999) 1 SCC 729; see also *Delhi Development Authority* v. *Ravindra Mohan Aggarwal & Aur.*, (1999) 3 SCC 172 (a case of providing a plot, against public interest, to the aggrieved party after 14 years.)
87. *Sach Deo Jha* v. *Union of India*, (1992) 3 SCC 190: 1992 SCC (L&S) 368: (1992) 20 ATC 207: (1992) 1 CLR 592 (appellants claim rejected due to laches. Service law).

(i) where the law of limitation expressly applies,

(ii) where it applies by analogy, and

(iii) where the law of limitation does not apply but the cases are governed by ordinary rules of laches.

Similarly where the respondents have neither pleaded nor shown any prejudice caused to them by the alleged time-lag, where the Court has acted without jurisdiction and on the misconception of the question... it cannot be said that the petitioners are guilty of delay or laches in approaching the court for relief.[88] A claim cannot be rejected merely on ground of delay or laches.[89] Delay, it must be remembered, destroys the remedy but not the right,[90] however, in certain cases it defeats the right as well as the remedy.[91]

(*f*) *Laches and Acquiescence.*—Acquiescence is an assent to an infringement of rights, either express or implied from conduct, by which right to equitable relief is normally lost. One may acquiesce in that which does not meet his views but which he does not care to contest. It is different from agreement, concurrence or from coinciding. It takes place when a person with full knowledge of his own rights and of any acts which infringe them, has, either at the time or after infringement, by his conduct led the person responsible for the infringement to believe that he has waived or abandoned his rights. It is frequently associated with the word laches (i.e. slackness) in the phrase "laches and acquiescence".[92] As decided acquiescence sometimes denotes a conduct which is evidence of an intention by a party conducting himself to abandon an equitable right, sometimes it denotes a conduct from which another party would be justified in inferring such an intention.[93] As Snell puts it,[94] "acquiescence primarily means conduct from which it can be inferred that a party has waived his rights.[95] Thus an injunction to restrain the use of a house as a shop was refused on proof that the plaintiff had himself brought goods there; but acquiescence in a small breach will not bar proceedings to restrain a wider breach". A time-lag that can be explained does not spell laches. "Laches is such negligence or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."[96] Laches is a passive state, while acquiescence connotes an active permission or connivance. Therefore such a permission by conduct amounts to an estoppel or a bar against

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88. *Thakuri Bai* v. *Laxmi Chand*, AIR 1990 Del 223.
89. *Mahadev Kalekar* v. *State Bank of Hyderabad*, (1990) 4 SCC 174.
90. *Gauri Shankar Gour* v. *State of U. P.*, (1994) 1 SCC 92, 125: 1993 All LJ 1207: AIR 1994 SC 169.
91. *Sanat Pakhira* v. *Union of India*, AIR 1993 SC 2276.
92. Fernald J.C.: *Frunk and Wagnalls Standard Hand Book*, 1973, p. 31; Burke: *Jowitt's Dictionary of English Law*, Vol. 1, 1977 Edn., p. 31: cited in Gandhi: *Law of Tort*, 1987 Edn., p. 290.
93. AIR 1964 HP 34, 37; AIR 1926 Nag 416; AIR 1956 Punj 143; AIR 1960 Punj 494.
94. *Snell's Principles of Equity*, pp. 632-633.
95. *Duke of Leeds* v. *Earl of Amherst*, (1846) 2 PH 117.
96. Per Menon J., in *P.R. Raghavan Nair* v. *State*, AIR 1956 Trav. Co. 77 referring to Ferris: *Extraordinary Legal Remedies* quoted in: *Thakuri Bai* v. *Laxmichand*, AIR 1990 Del 223.

oneself. As decided in *Hall* v. *Otter*[1], laches is a state wherein there is passivity or lethargy to take further steps. When you see a party occupying and using your property but no timely steps are taken to stop him from doing so, you will not be heard later on in a court of justice against the defendant's acts. Your conduct here results in acquiescence.[2] Therefore Snell explains that "lapse of time is an important factor in considering whether there has been acquiescence, but there may be acquiescence even without any delay. It is to be noted that laches may exist as a defence even in circumstances not amounting to acquiescence, *e.g.*, where the defendant's witnesses have died. The areas of acquiescence and laches thus overlap, yet neither is wholly included in the other".

(g) *Recognition in India.*—As declared by Suhrawardy, J., in *Jadunath case*[3], "The English doctine of delay and laches showing negligence in seeking relief in a court of equity cannot be imported into the Indian law in view of Article 113 of the Limitation Act, which fixes a period of three years within which a suit for specific performance should be brought." The law of limitation may harshly affect a particular party, but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. Thus equity cannot be the basis for extending the period of limitation.[4]

The doctrine has therefore no general application to India but has only a limited scope. Where there is a long lapse of time in challenging the defendant's title the presumption would be that it had a lawful origin and the court would fill in the details obliterated by time. In case of costs, laches may be a ground for a refusal.

The Doctrine of Acquiescence that was first propounded in *Ramsden* v. *Dyson*[5] and reiterated in *Willmot* v. *Barber*[6] and *A.G. to Prince of Wales* v. *Collom*[7] and has been followed in India by the Privy Council in *Forbes* v. *Ralf*[8] is known as Equitable Estoppel.[9] This doctrine aids a bona fide holder under a defective title. As explained before, acquiescence is a state of affairs where a person abstains from interfering while a violation of his legal rights is in progress. Lord Cranworth[10] has explained it thus: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right and leave him to persevere his error, a court of equity will not allow me afterwards to assert my title to the land on which he has expended

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1. (1695) 3 Lev 411.
2. *Ibid.*; *Tannu Singh* v. *State of U.P.*, AIR 1992 NOC 9 (All) (meaning of laches explained).
3. *Jadunath* v. *Chandra Bhushan*, (1858) 6 HL Cas 633.
4. *P.K. Ramachandran* v. *State of Kerala*, (1997) 7 SCC 556.
5. (1866) 1 HL 129.
6. (1880) 15 Ch 96.
7. (1916) 2 KB 193.
8. AIR 1925 PC 146. This case does not exclude the wider principle laid down in *Ramsden case*.
9. *See* Section 51 of the Transfer of Property Act.
10. In *Ramsden case*.

money on the supposition that the land was his own." Thus this doctrine operates by way of estoppel against the true owner.

Section 51 of the Transfer of Property Act in India embodies this doctrine but with a difference. The difference between the doctrine as laid down in *Ramsden case* and that incorporated in the Transfer of Property Act can be summarised as follows:

(*i*) The former arises out of a presumption of a contract while the latter (Section 51, Transfer of Property Act) rests on the maxim "He who seeks equity must do equity".

(*ii*) The former principle is wider than the latter one.

(*iii*) Where the former is invoked there is no question of eviction at all and the estoppel party has not to pay compensation while the latter does not prevent eviction but puts the evictor on equitable terms as regards compensation with an option to sell his interest to the person sought to be evicted.

(*iv*) The former considers the conduct of the estopper—the plaintiff, while the latter looks to the conduct of the defendant—whether he has made improvements in the bona fide belief that he had an undisputed title to the property.

6. EQUALITY IS EQUITY

Acqualitas est quasi acquitas

(*a*) *Meaning.*—Plato defines equality as "*a sort of justice*" and further points out that "If you cannot find any other, equality is the proper basis".[11] This maxim is explained also as "equity delighteth in equality", which means that as far as possible equity would put the litigating parties on an equal level so far as their rights and responsibilities are concerned. The maxim expresses the object of both law and equity in order to effectuate a distribution of property and losses, proportionate to several claims and liabilities of the parties concerned. Equality therefore means proportionate equality. In interpreting the words and enforcing the rules of law, equity so acts that no party gets an undue advantage over the other or is put to unjustified loss. By its very nature common law courts zealously preferred and protected individual interests to common interests. But equity regarded and maintained the rights of all those who were connected by any common bond of interest and obligation. Benefits and burdens of common interests and obligations cannot be imposed upon and pressed against any one individual but should be spread equally over all, following the principle of equality contained in this maxim. In *Steel* v. *Dixon*[12], Justice Fry said: "When I say equality, I do not mean necessarily equality in its simplest form, but which has been sometimes called *proportionate equity*."

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11. *Jones* v. *Maynard*, 1951 Ch 572; *Dickens, re*, 1935 Ch 267.
12. (1881) 17 Ch D 825.

Where, therefore, interpretation of words caused inequality and hardship or unequal treatment, it was relieved by equity by construing the words equitably. As Snell puts it succinctly, "in absence of any sufficient reasons for any other basis of division, those who are entitled to property should have the certainty and fairness of equal decision; for equity did delight in equality".[13]

(*b*) *Application and Cases.*—Application of this maxim can be discerned from the following:

(*i*) Equity's dislike for joint tenancy and presumption of tenancy-in-common.

(*ii*) Equal distribution of joint funds and joint purchases.

(*iii*) Contribution between co-trustees, co-sureties, and co-contractors.

(*iv*) Rateable distribution of legacies.

(*v*) Power to appoint.

(*vi*) Marshalling of assets.

(*i*) *Equity's dislike for joint tenancy and presumption of tenancy-in-common.*—Just as one person can hold property, so two, three or several persons can hold it, and that is called co-ownership or ownership in community. Three types of such ownership are recognised under English law, (1) joint tenancy, (2) tenancy-in-common, and (3) coparcenary (arising out of custom).

When property is given to two or more persons without words of severance, *i.e.*, to *A* and *B*, or to *A* and *B* jointly, it is held concurrently with the other. Against strangers all such holders are regarded as one individual.

Common Law favoured this type of tenancy because of certain peculiar incidents that were attached to this system. As the title was vested ultimately in a single individual, it facilitated investigation and conveyance of title, it rendered easy the performance of feudal services like paying of rents, services at war times and working in Lord's fields, etc., and it prevented the burden on the land which would have increased otherwise.

The main incidents of joint tenancy can be laid down as (1) unity of possession, (2) unity of interests, (3) unity of time, and (4) unity of title. Every joint tenant is (*seisin per my et per tout*) 'possessed of the joint property by every part and by the whole', they have a single title and their possession is not advese *inter se*. The interest of each joint tenant originates from the same act, the estate of each begins at the same time and the extent and nature of interest of each joint tenant is the same as that of the other.

But the most damaging and notoriously inglorious incidence attached to this system was the principle of *jus accrescendi* or the right of survivorship resulting in the right of joint tenants to have their interests in the joint property increased by inheriting the interests of deceased joint tenants until the last survivor inherits the entire property. For example, where property is given to *A*, *B* and *C* jointly, and where *A* dies, his interest goes to *B* and *C*, and where *B* dies, his entire

3. *Petit* v. *Smith*, 1965 1 PWms 7, cited in *Snell's Principles of Equity*, p. 36.

interest goes to *C*, who becomes the absolute owner. Thus common law and the feudal lords had to deal with only one person and one title.

Insofar as tenancy-in-common is concerned, there is no principle of survivorship; each tenant is an exclusive owner of his share; their shares also need not be equal and the only unity is the unity of possession; the rest of the unities being absent. In the foregoing example, therefore, when any tenant (*A* or *B* or *C*) dies, his interest will not increase his co-sharer's interest, but it would go to the heirs of the deceased.

In the former system one who lived longer became the absolute owner. This element of living longer is an element of chance, accident or risk. But equity was concerned with the present; and certainty and equality cannot be preserved and protected by the otherwise imperfect and speculative measure of chance introduced by the doctrine of *jus accrescendi*. Tenancy-in-common was devoid of such a fluctuating future element. In the former, therefore, what was branded as equality was merely an equality of chance. This attitude of the Common Law, though generated by history, was improper and productive of injustice and inequality. Equity therefore disliked joint tenancy and severed it on the slightest pretext by putting such construction on the words as to avoid the principle of survivorship. Thus tenancy in common in equity existed not only at Common Law but also in certain other cases where intention to create the same could be inferred or discerned. In the following instances it was held to exist.

(1) *Joint purchase in unequal shares.*—Where property is jointly purchased with co-purchasers, *A* and *B* providing money in *unequal shares* and *A* dies, *B* becomes entitled to the whole of the property at law. But in equity *B* was treated as holding *A*'s share in trust for *A*'s representative proportionately to the purchase money advanced. But we have to note that in case of *equal advancement* of purchase money the principle of survivorship still holds the field[14] on the ground that the co-purchasers intended to benefit by the rule of survivorship. Here there is joint tenancy both at law and in equity.

(2) *Joint loan on mortgage.*—In case of loan on mortgage, advanced by *A* and *B* jointly to *C*, either in equal or in unequal shares, the surviving mortgagee is to hold the same in trust for the representative of the deceased mortgagee proportionately to the money advanced. Here also the presumption of joint tenancy at law was repelled.[15]

(3) *Purchase by partners.*—The principle of joint tenancy does not apply as between partners in a business and this is for the benefit of business so that the growth of commerce may be fostered. The Latin expression for this is *inter mercatores locum non habet pro beneficio commercili*[16], which explains that the right of survivorship has no place among merchants. As has been said before, on the slightest pretext in cases of joint tenancy at law and in equity, equity came

14. *Lake* v. *Craddock*, (1732) 3 PWms 158.
15. *Jackson* v. *Sibthorpe*, (1887) 34 Ch D 732.
16. *Buckley* v. *Barber*, (1851) 6 Exch 164.

forth to sever it and avoided the incident of survivorship.[17] This it did in various ways *e.g.*, in case of alienation by one of the joint tenants, in case of acquisition of a, greater interest by one co-tenant than that of the other, in case of partition and in case of an application to the court for an order for sale.[18] By the Law of Property Act, 1925 where a legal estate (not being settled land) is vested in joint tenants beneficially, any tenant may sever the joint tenancy in equity, either by giving a written notice to others or by doing some such acts or things as would have been effectual to sever it. But no severance of the legal joint tenancy in land is now possible after 1925.

(*ii*) *Equal distribution of joint funds or joint purchases.*—In *Gower* v. *Mainwarning*[19], where the trustees were to divide real and personal estate among the settlor's relations, where it was "most necessary", it was held by Lord Hardwicke that the trustees must distribute the same according to the rule, but as observed by Sir J. Jekyll in *Doyle* v. *A.G.*[20], where no intention of the settlor for distribution of the estate could be gathered from the instrument, the court "would prefer an equal division to any other mode of division".

Moreover where a husband and his wife operated a joint bank account, wherein they both paid their income and upon which they both drew, the court, after there had been a divorce declined to dissect the account meticulously but divided the balance equally between them.[21] But between a husband and his wife when they are living together, their bank account is not subjected to this principle because then their rights in a joint bank account are not meant to be attended by legal consequences and each will be the sole beneficial owner of any property which he or she buys with money drawn from the joint bank account, subject to any contrary intention.[22] Between a man and his mistress also this principle has been rejected.

A very interesting example is cited by Snell[23] in connection with the copyright of Charles Dickens' work (*Life of Christ*) wherein this maxim is applied. In this case the author bequeathed the manuscript of a work to *A* and the copyright to *B*. The publication was possible only by using the manuscript. *Prima facie*, the proceeds of the sale of the copyright will be divided equally between *A* and *B*.

(*iii*) *Contribution between co-trustees, co-sureties and co-contractors.*[24]— Where a creditor has a simple claim against several debtors, he may realise his claim from any one of them. The debtor who was thus compelled to pay the whole of the claim had no remedy against the others at Common Law. This

17. *Brown* v. *Raindle*, (1796) 3 Ves 256.
18. *Williams* v. *Hensman*, (1861) 1 J&H 546; *Hawkesley* v. *May*, (1956) 1 QB 304, followed *Draper's Conveyance, In re*, (1969) 1 Ch 486: (1968) 84 LQR 462.
19. 28 ER 57.
20. 22 ER 67.
21. *Jones* v. *Maynard*, 1951 Ch 572; *Rimmer* v. *Rimmer*, (1953) 1 QB 63.
22. *Gage* v. *King*, (1961) 1 QB 188; *Bishop, re*, 1965 Ch 450. Doubted *Warm & Warm, In re*, (1969) 8 DLR (3d) 466.
23. *Snell's Principles of Equity*, p. 39, *Dickens, re*, 1935 Ch 267 (Charles Dickens: *Life of Christ*).
24. *Lowe & Sons* v. *Dixon & Sons*, (1885) 16 QBD 455.

provided an undesired impetus to the creditor to select his own victim and upon motives of mere caprice and partialism to make a common or a joint burden a gross personal oppression. But equity, in order to set right the injustice and in order to treat all the debtors on the basis of equality, gave the debtor a right to contribution from the rest, thus pressing the burden equally on all. With co-sureties and co-contractors, the same rule is applied.

As cited by Story[25], this principle of Rhodian Jurisprudence was borrowed by the Romans, and the English borrowed from the Romans, its commonest example being contribution between co-sureties.

Some important points in this regard may be noted:

(1) In case of co-sureties where one of them became insolvent, according to Common Law their liabilities remained unaffected and the insolvent had nothing to pay, but equity abolished this position and decided that the remaining solvent sureties should pay proportionately.

(2) In other cases until the sureties paid more than their shares they could not take any action for contribution at Common Law but this position was also relieved by equity courts by allowing action even before payment (called *quia timet* action).

(3) As decided in *Craythorne* v. *Swinburne*[26], right to contribution though not based on contract may be modified by a contract, as, where *A* and *B* were co-sureties, according to their agreement only in the event of *B* defaulting, *A* would be liable. In such a case, therefore, *A* could not call upon *B* to contribute.

(4) There is no right to contribution where the trustee who has made good the loss is also a beneficiary.[27]

In case of insolvency of a debtor, Common Law allowed priority to some creditors leaving others to their luck, unprotected. But equity ended this preferential treatment and brought all the creditors under a common list and on equal footing. Thus all were allowed to share the debtor's estate according to the amount of their credit, on a *pro rata* basis, because it was equity's cardinal principle that no wrong should remain unredressed and that equals should be treated equally.

(*iv*) *Rateable distribution of legacies.*—By the end of the 18th century suits for legacies came within the exclusive jurisdiction of the court of Chancery.

The principle is that while the testator bequeaths, he presumes that he has sufficient assets to answer all the legacies, but in cases where in fact it is not so, he is presumed to have meant that the deficiency must be borne by all the legatees *pari passu* or on an equal footing. In such cases, where a legatee whose

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25. *Story on Equity*, 3rd Edn., p. 202.
26. (1807) 14 Ves 160.
27. *Chillingworth* v. *Chambers*, (1896) 1 Ch 685 (Court of Appeal) (*Cracknell's Case Book*, C. No. 64, 1974 Edn.).

legacy was liable to abate is paid in full, he must return the excess payment, for the benefit of all. This rule of abatement applies to the legatees of the same class.

(*v*) *Power to appoint.—Powers are of two types.*—(1) general power of appointment, and (2) special power of appointment. A power given by deed or will which empowers the donee of the power to appoint *any person* (*including himself*) to take an interest in property is a general power of appointment; and a power which empowers the donee to appoint *any member of a specified class of persons* to take an interest in property is a special power of appointment.

In cases where the donee of a power, in the nature of a trust fails to exercise his power, the court of equity on the principle of equality will carry the same into effect, so that it may not fail, and distribute the property equally among the persons concerned.

(*vi*) *Marshalling of assets.*—Insofar as marshalling is concerned, equity, on the principle of equal treatment to equals, so marshalled (or arranged) funds that no cause of injustice could arise.

Thus in *Well* v. *Smith*[28], it has been explained that "where there are two creditors of the same debtor, one creditor having a right to resort to two funds of the debtor for payment of his debt and the other, a right to resort to one fund only, the court will so 'marshal' or arrange the funds that both creditors are paid as far as possible". This arrangement has been made on the principle of *Aldrich* v. *Cooper*[29] which states that "it shall not depend upon the will of one creditor to disappoint another".[30]

(*c*) *Recognition in India.*—All these four doctrines resulting from the application of the maxim "equality is equity" have been recognised in India under various enactments:

(*i*) Indian Contract Act, Section 42, illustrates tenancy in common as regards devolution of liabilities.

(*ii*) Section 43 illustrates that one of a number of joint promisors who has performed the promise is entitled to compel the other promisors to contribute equally with himself.

(*iii*) Sections 69 and 70 illustrate the doctrine of marshalling.

(*iv*) Sections 146 and 147 explain that co-surieties are liable to contribute equally.

(*v*) Under the Transfer of Property Act, Section 56 illustrates the doctrine of marshalling.

(*vi*) Section 82 speaks about contribution to mortgage debt by co-mortgagors.

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28. (1885) 30 Ch D 192.
29. (1803) 32 ER 4022.
30. *Lenoy* v. *Duke of Athole*, (1742) 2 At K per Lord Hardwicke.

(*vii*) Section 330 of the Indian Succession Act incorporates and illustrates the principle of rateable distribution of assets explaining that the legacies abate rateably.

(*viii*) Under the Indian Trusts Act, Section 27, there is contribution also as between co-trustees.

(*ix*) Section 73 of the Civil Procedure Code.

(*x*) Section 45 of the Transfer of Property Act also illustrates the incorporation and application of this principle.

7. EQUITY LOOKS TO THE INTENT RATHER THAN THE FORM

(*a*) *Meaning.*—As is seen before, Common Law was very rigid and inflexible.[31] It could not respond favourably to the demands of time. In respect of acquisition and transfer of property, it regarded the form of a transaction to be more important than its substance. Moreover it expected the contracting parties to rigidly observe their agreements and to perform their stipulations to the very letter (*litera scripta*) of every promise or agreement.[32] Common Law thus was fond of mere technicalities. But, as expressed by Romily, M.R. in *Parkin case*[33], "courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if they found that by insisting on the form, the substance will be defeated, they hold it to be inequitable to allow a person to insist on such form, and thereby defeat the substance". Equity thus looks to the spirit and not to the letter, it looks to the intention of parties and not to the words, and it looks to the realities rather than to mere appearances. Instead of swimming on the surface of mere form, it penetrates through the external form of a transaction to discern and decide the real intention of the parties, because the external form of a transaction cannot be allowed to conceal or throw a cloak on the real object, purpose and consequences of a transaction.

(*b*) *Application and Cases.*—In case of sale of land, if a party fails to complete it within the time fixed for it, he is at Common Law, in breach of the contract, but equity did not take this rigid attitude. It allowed a reasonable time to the party concerned to complete it.[34] Moreover, in case of construction and enforcement of an agreement equity did not give undue importance to its negative side but looked through the document to find out its real substance and intent.

Unlike Common Law, equity was not impressed by mere form and technicalities and avoided circuitry of action. Thus a transaction which could lawfully have been effected by two or more separate transactions was held by equity to be valid, though it was unauthorised.[35] The maxim therefore contains in itself the equitable rule of construction of documents.

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31. *Paradine* v. *Jane*, 1647 Aleyn 26; *Thiis* v. *Byres*, (1876) 1 QBD 244.
32. *Ibid.*
33. *Parkin* v. *Thorold*, (1852) 16 Beav 59, 66.
34. *Ibid.*
35. *Collard's W.T., re*, 1961 Ch 293.

The application and working of this maxim can well be examined from the following instances:

(*i*) Relief against penalties and forfeitures.

(*ii*) Relief in regard to precatory trusts.

(*iii*) Relief in regard to mortgages, the doctrine of equity of redemption and the doctrine of clogs on redemptions.

(*iv*) Attitude in regard to statute of frauds.

(*i*) *Relief against penalties and forfeitures.*—Common Law courts insisted on the rigid and *litera scripta* performance of all agreements and promises. In cases of contracts when there was a provision to forfeit a certain amount or to charge penalty in case of breach of contract, Common Law imposed these on the party in default. It may be that the actual damage sustained was less. This unjust situation was relieved by equity by interpreting the purpose and intent of the contract itself. The principal object of the contract lies in its performance and not in imposition of penalty. The damage sustained may be therefore compensated, imposition of penalty and forfeiture being subsidiary. This it did by applying the maxim.

(*ii*) *Precatory trusts.*—A trust is created when the author of the trust indicates with reasonable certainty by any words or acts (1) an intention on his part to create a trust thereby, (2) the purpose of the trust, (3) the beneficiary, and (4) the trust property. In case of precatory trusts, the author of the trust in raising the trust does not use express and unequivocal words but expresses his desire by such words as 'I hope', 'I request' or 'I recommend', giving thereby a latitude to the trustee so as to ignore the request of the author. All the certainties are present here except number one. The intention is there, but its expression is not proper and compulsive. Equity in such cases ignored the form and looked to the intention which can easily be found out by having a reference to other ingredients of the trust and the conduct of its author. The document as a whole was taken into consideration and not its part. The principles that govern such cases are expressed in *Knight* v. *Knight*[36] by Lord Langdale, M.R., as follows: "As a general rule it has been laid down that when property is given absolutely to any person and the same person is, by the giver who has power to command, recommended or entreated or wished to dispose of that property in favour of another, the recommendation, entreaty or wish shall be held to create a trust, first, if the words are so used that upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

But this cruel kindness of the equity courts to construe and interpose a trust where in many cases none was intended was questioned in *Lombe* v. *Eames*[37],

36. (1840) 49 ER 58.
37. (1871) 6 Ch App 597.

R. Adams and Kensington Vestry[38] and in *Re Atkinson*[39] by Sir William James, L.J., Lindley, L.J., and James, L.J., respectively. But it should not be taken that the doctrine is abolished; the liberty of "cruel kindness" is now used but not so liberally as before.[40]

(*iii*) *Relief in regard to mortgages.*—A mortgage is a conveyance of property whereby one person (mortgagor) secures to another (mortgagee) the payment of money whether already owing or advanced at the time or to be advanced (called mortgage debt). This he does by vesting in him some property or interest in property.

Being thus a security for a debt a mortgage differs from a sale. The mortgagor has a right to obtain his property back by payment of the debt and that is his *right of redemption*. The mortgagee has a right to repayment of his advance and in case of default by the mortgagor the mortgagee can exercise his right of recovery of his amount by foreclosure or by getting the property sold. The mortgagor's right of redemption is guarded by courts and this has been expressed in a well-known legal maxim, "once a mortgage, always a mortgage, and nothing but a mortgage". If the mortgagor cannot redeem his property within the time set in the mortgage deed (a contract), his legal right is gone but he can still have, in equity, his right to redeem the property on the principle of this maxim. As expressed by Lord Davey in *Noakes & Co.* v. *Rice*[41], "a mortgage cannot be made irredeemable and a provision to that effect is void".

The extension of this principle of right to redeem has found further expression in the well-known doctrine of clog on redemption. A clog is a check, an impediment or an obstruction which makes the release of security impossible. It was therefore expressed by Lindley, M.R.[42], that any provision inserted in a mortgage deed preventing redemption is meant to be a clog or fetter on the equity of redemption, and is void. A leading case on this point is *Salt* v. *Marquess of Northampton*[43], wherein on the death of his son (mortgagor), the father was allowed to redeem the mortgage even though there was a deliberate contract by the son that the securities should belong absolutely to the mortgagee. Thus any craft, contrivance or design bypassing this right is void as it amounts to a clog.

(*iv*) *Attitude in regard to statute of frauds.*—The statute of frauds always insisted upon writing and signature of the party sought to be bound in regard to land transactions. At the same time equity courts saw that these very contrivance could not help any party to create or to cover a fraud. For this purpose it created two exceptions. Where a contract which though required to be in writing, was, due to the defendant's fraud, not reduced to writing, equity granted relief and

38. (1884) 27 Ch D 394.
39. (1911) 80 LJ Ch 370.
40. *Comiskey* v. *Bowring*, 1905 AC 84.
41. 1902 AC 24.
42. *Stanley* v. *Wilde*, (1899) 2 Ch 474.
43. 1892 AC 1. See also *Howard* v. *Harris*, (1683) 1 Vern 190; *Trimbak* v. *Sakharam*, 16 Bom 599; *Vernor* v. *Bethell*, (1672) 2 Eden 110, 113.

the statute was not allowed to be pleaded as a defence against specific performance. Similarly contracts wherein equity usually granted specific performance but which were covered by the statute, were not allowed to remain unenforced because part performance of the contract by the plaintiff took it out of the statute

In regard to covenants in respect of land positive covenants (to do something) never pass. They may be enforced between the contracting parties, but they are not ordinarily binding on subsequent transferees or assigns. Negative covenants restraining the use of one land for the benefit of another are binding even on subsequent transferees if they have notice of them. *Tulk* v. *Moxhay*[44] is a leading case on this point. Of course, the above principle has its own limitations; that it applies to negative covenants only and not to affirmative covenants. Also, where its application makes the transferee put his hand into his pocket, the principle does not apply. At the same time equity will look to the substance and intent of the covenant; thus, if it is in substance a negative covenant, the court will restrain its violation but if it is a positive one which actively enforces a party to spend, it will not enforce it.

With regard to contracts under seal at Common Law, presence of seal could not produce any effect in equity on the rights and duties of the parties concerned.

(c) *Recognition under Indian Law.*—The principle contained in the maxim has been recognised under Indian law in Sections 55 and 74, Indian Contract Act and Sections 114 and 114-A, Transfer of Property Act.

As provided by Section 55, if time is the essence of the contract, and it is not performed within the stipulated time, the contract or a part of it which is unperformed would be voidable at the instance of the promisee. If time is not of the essence of the contract, it will not become voidable but entitles the promisee to damages. Moreover, when performance is accepted at a time other than the stipulated one in the contract, the promisee is not entitled to damages.

Under Section 74 of the Indian Contract Act, only a reasonable compensation can be claimed by the party complaining of a breach of contract, in spite of their agreement to the contrary. Where no actual damage is proved to have been caused by the breach, there also this right of reasonable compensation is given.

As observed by Justice Sundara Aiyar in *Muthu Krishna case*[45]: "The doctrine... is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract, to come into operation if the primary contract is broken." Since the secondary contract is for securing the fulfilment of the primary one, "the courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness".[46] The test to be applied in such cases is to consider whether

44. (1848) 11 B 571.
45. *Muthu Krishna Iyer* v. *S. Pillay*, (1912) 36 Mad 229.
46. *Ibid.*

the amount represents a genuine and a reasonable pre-estimate of the probable damage. If it is so, it would be liquidated damages, but if not so, it would be a penalty.[47] Thus the section incorporates the principle of reasonableness of damages and looks to the primary intent of the parties rather than to the form.[48]

Forfeiture clauses in a lease are similarly disregarded in some cases where they are inserted only for securing or ensuring the prompt payment of the rent. These provisions, based on this maxim, are incorporated in Sections 114 and 114-A of the Transfer of Property Act.

It is within the competence of the parties to enter into any reasonable agreement regarding mortgage and its redemption right, but where their agreement makes it impossible or indefinite for the mortgagor to redeem his mortgaged property, equity will not allow such provisions to prevail and will give relief. Thus clogs on the right of redemption are not tolerated by Section 91 of the law of property.

8. EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE

(*a*) *Meaning.*—As between two persons, where one of them has incurred an obligation and undertaken upon himself to do something for the other, the equity courts look on it as done and as producing the same results as if the obligation or undertaking had been actually performed.[49] Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce the contract specifically and not in favour of volunteers.[50] In other words, as to the consequences and incidents of the subject matter of contract, it will be treated as if the final acts anticipated and contemplated by the parties have been carried out in the same manner as they *ought to have been* and not as they *might have been* carried out. Equity acts on the conscience of a person. What one has undertaken to do, binding his conscience, ought to be done and equity courts therefore look to the acts of the person bound by his conscience and interpret and construe them in such a way that they amount to what ought to be done.

(*b*) *Application and Cases.*—A person who enters into possession of land under a specifically enforceable agreement for a lease, is regarded in any court having jurisdiction to enforce it as being in the same position as between himself and the other party to the agreement as if the lease had actually been granted to him.[51] In the same way, *A* by his will leaves Rs 50,000 to *T* upon trust to purchase land for the use of *P*. *T* does not purchase land and *P* by the time dies, leaving all immovables to *X* and the rest of his property to *Y*. Who should get the amount of Rs 50,000, *X* or *Y*? *Y* says he is entitled to the money as it has

47. *Kemble* v. *Farren*, (1829) 130 LR 1234; c.f. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*, 1915 AC 79.
48. *Wallingford* v. *Mutual Society*, (1850) 5 AC 685.
49. Story: *Equity Jurisprudence*, 3rd Edn., pp. 37-38 and Pomeroy: *Equity Jurisprudence*, Vol. II, 5th Edn., pp. 16-17.
50. *Snell's Principles of Equity*, p. 40.
51. *Walsh* v. *Lonsdale*, (1882) 21 Ch D 9; John Tilley: *Case Book of Equity & Succession*, 1968 Edn., p. 13.

remained so. *X* says he is entitled to the amount because it was earmarked for the purchase of land. Had *T* not omitted his duty of purchasing the land, the money would have been in the form of land. Equity in such cases would definitely regard the purchase of land which ought to have been made as made, and earmark and impress upon the fund the character and all the incidents of land. The money would thus go to *X* and not to *Y*, as they would be treated as land.

The working of this maxim can be seen in (*i*) the doctrine of conversion, (*ii*) executory contracts, and (*iii*) doctrine of part performance.

(*i*) *Doctrine of Conversion.*—The notional change in the nature of property whereby realty is considered to be personalty and personalty as realty, is known as the doctrine of conversion. The leading case on the point is *Lachmere* v. *Lady Lachmere*[52], wherein Jekyll, M.R., observed that "what ought to have been done shall be taken as done" is the rule in such cases, and "a rule so powerful it is as to alter the very nature of things; to make money land, and on the contrary, to turn land into money; thus money agreed to be laid out in land shall be taken as land and descend to the heir, and on the other hand, land agreed to be sold shall be considered as personal estate".

The facts of *Lachmere case* may be succinctly stated as follows. In 1719, Lord Lachmere upon his marriage covenanted to lay out £ 30,000 within one year of the marriage in the purchase of freehold land. The land was to be settled for the benefit of the husband and his wife for life, remainder to their sons in tail male, and remainder to the husband and his heirs. On the husband dying issueless and intestate, the question arose whether his heir (who was entitled only to real estate) could take the money. It was held that the freehold lands in fee-simple in possession purchased and contracted to be purchased by Lord Lachmere after the marriage were to be taken to have been purchased towards performance of the covenant, and their value deducted from £ 30,000. In short, the money should be taken as land, that is real estate. It therefore went to the heir and not to the personal representatives.[53]

By the Administration of Estates Act, 1925, in England, the two systems of intestate succession [whereby personal property devolved upon the nearest in relationship (next of kin) and real property (land) to the heir] are now no longer in force. All the property now vests in the administrator, who would distribute it according to new rules brought in line with modern needs. This doctrine of equitable conversion has therefore lost much of its importance and is no longer pressed into service for the purpose of altering the course of devolution of estate.

(*ii*) *Executory Contracts.*—(1) *Assignment of future property.* When an assignment of property was made for consideration equity treated it as a contract

52. (1735) Cas Temp Talb 80; (1735) 25 ER 673.

53. J.G. Ridall: *Cracknell's Law Students' Companion*, 1974 Edn., Case No. 176. To this effect see *Ackroyd* v. *Smithson*, (1780) 1 Bro CC 503; *Fletcher* v. *Ashburner*, (1779) 1 Bro CC 497; *Lawes* v. *Bennet*, (1785) 1 Cox Ch Cas 167.

to assign. When the property came into existence in such a contract it was treated as a complete assignment. As expressed in *Collyer* v. *Issacs*[54], it was not possible at Common Law[55] to assign property to be acquired in future, because it had no existence. But in equity this could be done. When the property has come into existence, equity on the principle of the maxim fastened upon the property and the contract to assign[56] becomes a complete assignment.[57] As a leading case on this point, *Holroyd* v. *Marshall*[58] can be cited.

In this case, *A* transferred his machinery to one *P*, who should hold it in trust for *H*. Machinery which was the subject of transfer included the machinery in the mill and also the one that would be purchased and added thereto or substituted for the present one. New machinery was added thereafter. The point of dispute was whether *H* could claim it, or the execution creditor of *A* could claim it. It was held that *H*'s claim would prevail over that of the execution creditor, as *H* obtained an equitable title as soon as the new machinery was added to the old.

Thus future property may be transferred for consideration in equity.[59]

(2) *Agreement for a transfer.*—As seen before in the doctrine of conversion, equity changed the very nature of things; it turned money into land and land into money to give effect to the intention of the parties which ought to have been done. For example, where *A* validly agrees to sell his house to *B* for Rs 50,000 according to the doctrine of conversion for the purpose of devolution of property of *A*, the house would be treated as money and for the purpose of devolution of *B*'s fund of Rs 50,000 it would be treated as a house. Under English Common Law no legal right or interest was lost or obtained by mere agreement unless certain formalities were gone through. Under the circumstances, *A* was still the owner at Common Law and could convey the house to a third person free from any claim. At the most he could be made to pay damages for non-performance of the contract, but nothing further. Now let us look at *B*'s position at Common Law. *B* has acquired no interest or proprietory rights in the house. He cannot therefore take possessory action for its recovery. At the most he can recover damages from *A* for breach of the agreement. Thus it is very clear that unless and until a deed of conveyance is not executed between *A* and *B*, no legal estate is lost or obtained between the two. In other words an agreement for a transfer did not by itself create any legal title at Common Law. But equity could not tolerate this unjust position. It therefore conferred an equitable title upon the person having the agreement in his favour. This stand of equity is made clear in the well-known case of *Walsh* v. *Lonsdale*[60], wherein it was decided that an agreement for lease could be treated

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54. (1881) 19 Ch D 342 *per* Jessel, M.R., *followed* in *Gaya Din* v. *Kashi Gir*, (1907) 29 All 163.
55. *Snell's Principles of Equity*, p. 81.
56. *Holroyd* v. *Marshall*, (1862) 10 HLC 191.
57. *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.*, (1924) AC 1.
58. (1862) 10 HLC 191.
59. *Tailby* v. *Official Receiver*, (1883) 13 AC 523.
60. (1882) 21 Ch D 9.

as a lease in equity. In order that the doctrine may operate with full force, the following conditions must be fulfilled:

(1) *A contract to transfer* a legal title must exist.

(2) It should be *capable of being proved*, either by some acts of part-performance or by writing.

(3) It should be *capable of specific performance.*

(4) The suit should be *filed within prescribed time.*

(5) The title so sought to be acquired must have *support at law.*

(6) *The relief* must be obtainable in the same court in which the legality of the act is questioned. (The principle contained in this case is not accepted in India, as Indian law does not recognise equitable estates.)

(*iii*) *Doctrine of Part Performance.*—The working of the maxim can also be seen in the doctrine of part-performance. We have seen earlier that the Statute of Frauds in England always insisted upon writing and the party's signature in so far as land transactions were concerned. But equity did not allow these provisions of the Statute of Frauds to be used as an instrument or an engine for generating or covering frauds. As observed by Lord Westbury:[61] "The courts of equity had, from a very early period, decided that any Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the court of equity does not set aside the Act of Parliament but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation because he applies the Act as an instrument for accomplishing a fraud." Viewing it from this angle the doctrine of part-performance was a very bold step by the Equity Courts. When agreements which could not be relied on in a court of law due to want of writing were brought before equity courts they were specifically enforced where sufficient evidence in regard to part-performance was satisfactorily adduced. Thus under the equitable doctrine of part-performance contracts pertaining to land were allowed to be formed by oral evidence where one of the parties did acts of part-performance. *Maddison* v. *Alderson*[62], is a leading case on the point. *A* agreed to remain in *B*'s service in consideration of an oral agreement whereby *B* was to leave *A*, by will, a life estate in certain land. The estate was bequeathed by will. The will failed for want of due attestation. The heir-at-law brought an action to recover the land. Can *A* raise the defence of part-performance? Relying on the dictum of *O'Reilly case*[63], it was held that *A* should fail because the act of part-performance must be referable to the contract, and the act should not precede the contract. Equity is very active in such cases. To lay down the difference between this doctrine and the principle enunciated in *Walsh* v. *Lonsdale*[64], it can be said that two main

61. *McCormick* v. *Grogan*, (1856) 6 HL Cas 633.
62. (1888) 8 AC 467.
63. *O'Reilly* v. *Thompson*, (1791) 30 ER 126.
64. (1882) 21 Ch D 9.

conditions for the enforcement of equity in *Walsh* v. *Lonsdale*[65] are a must: (1) evidence of a contract, and (2) suit for specific performance to be within time-limit. To invoke the equity in respect of specific performance on the basis of part-performance on the other hand, it is not necessary that the contract must be admissible in evidence and that it should be within the time-limit.

(*c*) *Limitations of the Maxim.*—As the maxim goes, "it looks on that as done which *ought to be done*", but it does not treat as done what might be done or what could have been done. It thus touches upon a very soft and sensitive chord of human conscience. Again, this maxim does not work in favour of every person. It can help those and only those who hold some equitable right or who have performed some act against those on whom the duty with reference to such right or performance has devolved. That is to say, equity treats a contract to do a thing as if the thing were already done, though only in favour of those entitled to enforce the contract specifically and not in favour of volunteers.[66]

In so far as applicability of the maxim to tax statutes is concerned it is not possible to look upon a thing as done which ought to have been done for which Legislature has separately featured differently in a fiscal statute.[67]

(*d*) *Recognition in India.*—The principle contained in the maxim has been recognised in Indian law under the following enactments:

(1) Section 40 of the Transfer of Property Act.

(2) Section 12 of the Specific Relief Act.

(3) Section 53-A of the Transfer of Property Act.

(4) Section 91 of the Indian Trusts Act.

The English doctrine of conversion of realty into personality cannot be bodily lifted from its native English soil and transplanted into statute-bound Indian law. However, many of the doctrines of English equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes (such as Indian Trusts Act, the Specific Relief Act, the Transfer of Property Act, etc.) and where a question of interpretation of such equity-based statutory provisions arises, aid from the equity source can be justifiably sought.[68]

Where property is transferred absolutely with the direction that it should be enjoyed in a particular manner by the transferee, he is entitled to ignore the directions under Section 11 of the Transfer of Property Act. But where such directions are made in regard to a piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of immovable property, they can be enforced. This special saving in case of a direction affecting another piece of property is developed in Section 40. Thus restrictive and negative

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65. (1882) 21 Ch D 9.
66. *Snell's Principles of Equity*, p. 40; *Anstis, re*, (1886) 31 Ch D 596.
67. *State of U.P.* v. *Kasturilal Harlal*, (1987) 67 STC 154.
68. *Bai Dosabai* v. *Mathuradas*, (1980) 3 SCC 545.

covenants can be used by a third party against the transferee as laid down in Section 40.

The Illustration to Section 40 runs as follows: *A* contracts to sell Sultanpur to *B*. While the contract is still in force, he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

It should be remembered that under English law such contract passes the ownership of land from *A* to *B* in equity on the principle of this maxim. But under Indian law as contained in Section 54 of the Transfer of Property Act, a contract to purchase land does not pass any interest in the land at all and therefore such a contract does not come under the rule of perpetuities and as such would not be regarded as invalid.[69] On the contrary such a contract comes within para 2 of Section 40 and as such it is enforceable on the principle of the maxim.[70]

Section 12 of the Specific Relief Act relating to the specific performance of part of a contract also illustrates the application of the maxim.

Section 53-A of the Transfer of Property Act illustrates the doctrine of part-performance as based on this maxim. This doctrine was first recognised in *Mohomed Musa case*[71] and was referred to in *Ariff case*[72]. It was decided later on, in *Pir Bux case*[73] that the English doctrine of part performance is not available in India by way of defence to an action of ejectment.[74] If conditions laid down in Section 53-A are not satisfied, the benefit of the section is not available. Thus, the equity recognised in this section is a passive one which is available to protect the transferee's possession. The equity recognised under English law is an active one capable of supporting a suit for specific performance or for injunction to restrain eviction. In short, the doctrine recognised in India can be used as a shield for protection but cannot be used as a sword to inflict injury.

Insofar as equitable assignments are concerned no equitable estate is recognised in India. A transfer of future property for consideration, however, operates as a contract to be performed in future. As soon as such property comes into existence, the contract may be specifically enforced.[75] In *Jugalkishore* v. *Raw Cotton Co.*[76], *X* transferred his book debts to *Y*. At the date of transfer *X* had sued for one such debt. A decree was passed by the court in favour of *X*. Though *Y* had not applied to the court to put his name on record in place of *X*, his claim that he could execute the decree was allowed by the Supreme Court on

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69. *Munuswami Naidu* v. *S. Naidu*, 49 Mad 387; *Alud Ali* v. *Syed Ali*, 49 All 527.
70. *Rambaran Prasad* v. *Ram Mohit Hazara*, (1967) 1 SCR 293: AIR 1967 SCC 744; *Narandas Karasandas* v. *S.A. Kamtam*, (1977) 3 SCC 247: (1977) 2 SCR 341.
71. 42 Cal 801 (PC).
72. 58 Cal 1235.
73. 51 Bom 650.
74. *Ramchandraiyya* v. *Satyanarayan*, AIR 1964 SC 876.
75. *Baldeo* v. *Miller*, 31 Cal 667.
76. AIR 1955 SC 376.

the ground that he was the real owner of the debt. The principle contained in *Walsh* v. *Lonsdale* is not applicable in India as decided by the Privy Council in *Currimbhoy & Co.* v. *Creet*[77]. Section 91 of the Indian Trusts Act dealing with property acquired with notice of existing contract is also illustrative of the application of this maxim. It explains that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

9. EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION

(*a*) *Meaning.*—Equity courts came into existence to do justice. They firmly believed that a person must be prepared to do what is right and fair. As the old saying goes, one must be just before one professes to be generous. It is on this accepted dictum that equity considered, estimated and construed acts of parties. Thus where a person is under an obligation to do a certain act, and he does some other act which is capable of being regarded as an act in fulfilment of his obligation, the latter will prima facie be so regarded for "it is right to put the most favourable construction on a man's acts, and to presume that he intends to be just before he affects to be generous".[78] Equity in such cases presumes and imputes an intention that the latter act was intended to be in performance of the former. In other words a person is presumed to do what he is bound to do.

In *Sowden* v. *Sowden*[79], a husband covenanted with the trustees of his marriage settlement to pay to them £ 50,000 to be laid out by them in purchase of land in a particular area *D*. He, in fact, never paid the sum, but after marriage purchased land at *D* in his own name, for £ 50,000. He died and could not bring the land into settlement. Equity courts construed that he purchased land to fulfil his obligation created by the covenant. On principle, the act done may not be exactly the same as agreed upon, but if it bears so much resemblance to it that it may fairly be taken to have been his design to satisfy the obligation, equity will impute to such an act an intention to fulfil one's obligation.

(*b*) *Application and Cases.*—The following doctrines and concepts rest on the application of this maxim:

(*i*) Doctrine of performance and satisfaction.

(*ii*) Ademption.

(*iii*) Doctrine of presumption of advancement.

(*iv*) Relief against defective execution of power of appointment.

(*i*) *Doctrine of performance and satisfaction.*—As explained before, *Sowden* v. *Sowden* and *Lachmere* v. *Lady Lachmere* are examples of performance. If a man has convenanted to purchase land and settle it on his wife and issue, and he

77. 60 Cal 980 (PC).
78. *Snell's Principles of Equity*, p. 40.
79. (1785) 1 Bro CC 582: 29 ER 1111.

fully carries it out, he has, of course, performed his covenant but the doctrine of performance in equity is connected with notional performance rather than actual. "The whole doctrine proceeds upon the ground that a person is presumed to do that which he is bound to do; and if he has done anything, that he has done it in pursuance of his obligation."[80]

As we shall see afterwards, the question of performance arises in these cases: one, where there is a statutory obligation or a covenant to purchase and settle lands and a purchase is in fact made, and second, where there is a covenant to leave personally to *A*, and property in fact comes to *A* under the covenantor's will or intestacy.[81]

Satisfaction is "the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of donee".[82]

For example, where a donor who is already in obligation to the donee, effects a donation under circumstances which indicate an intention that this shall be taken in satisfaction of a prior obligation, equity in such cases applies the principle by construing his words in such a way as to extinguish the prior claim of the donee. Thus the doctrine of satisfaction is pressed into service in construing instruments. In *George Will Trusts case*[83], *G*, a farmer, in his will left two-thirds of his residue to his son *E* and one-third to his son *R*. The will further provided that if *E* within one month of the testator's death notified the trustees of his wish to carry on the farm, the residue was to be valued and that one-third should constitute the share of *R* and two-thirds the share of *E*, and that *R* should allow his share to remain invested in the farm for three years. *G* later made a gift to *E* of the live and dead stock which was valued at £ 2060. After *G*'s death a summon was taken out to determine whether (under the rule against double portions) the gift to *E* was in satisfaction of the legacy. Held, the gift to *E*, which put him in immediate possession of his intended inheritance, was deemed to be in satisfaction of the legacy. In any case, the same was sufficiently *ejusdem generis* with the option conferred on *E* to carry on the farm to satisfy this requirement.

But as observed in *Talbot* v. *Shrewsbury*[84]: "If a debtor without taking notice of the debt, bequeaths a sum as great as or greater than the debt, to his creditor, this is to be deemed a satisfaction of the debt; but the legacy of less amount than the debt is not regarded as a satisfaction *pro tanto*, nor will a contingent legacy ever operate as a satisfaction."

Thus this maxim is helpful where the presumed intention of the testator is to be found out; where the intention is express the maxim has no application.[85]

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80. *Per* Lord Brougham, L.C., in *Tubbs* v. *Broadwood*, (1831) 2 Russ & M 487; *Blandy* v. *Widemore*, 2 W&T 47.
81. *Snell's Principles of Equity*, p. 495.
82. *Per* Lord Romilly, M.R., in *Chichester (Lord)* v. *Coventry*, (1867) LR 2 HL 71.
83. (1948) 2 All ER 1004.
84. (1714) 24 ER 177 *per* Sir John Trevor, M.R.
85. *Chancey's case*, (1725) 24 ER 448.

(*ii*) *Ademption.*—Ademption is a transfer of property which is irrespective of the donor's wish, in law, operates as a complete or pro tanto (proportionately) substitution for a gift previously made by the will of the donor which is unrevoked at his death e.g., *X* by his will leaves his daughter *Y* one-third of his residuary estate. Thereafter on *Y*'s marriage *X* gives *Y* Rs 20,000. *X* dies. The will was neither revoked nor altered by him. Rs 20,000 is an ademption—complete or proportionately to the gift of one-third share of the residuary estate of *X*. The question of *Y*'s option in the case need not arise.

(*iii*) *Presumption of advancement.*—As the word "advancement" suggests it is the establishing of a beneficiary in an early period of life.[86] When a transfer or a purchase of property without consideration is made by a father or a person in *loco parentis*[87], to or in the name of a child, a presumption arises. And the presumption is that it was for the benefit of the child. Such presumption, which in law is known by the terminology of "advancement", is made in order to rebut an ordinary presumption of a "resulting trust", in favour of the father or the *loco parentis* who paid the consideration. As decided in *Tollet* v. *Tollet*[88] "it is the duty of every man to pay his debts and a husband or a father to provide for child".

Advances for the purchase of a house or for a settlement on marriage are the ordinary instances. The doctrine applies to cases of parent and child[89], husband and wife[90], of mother and child[91] and even to illegitimate child[92], but not to a man and his mistress[93]. Thus, the presumption of advancement applies to all cases in which the person providing the purchase money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed, i.e., where the former is the husband or father of, or stands in *loco parentis* to, the latter.

This presumption can also be rebutted in certain appropriate cases.[94]

The power of advancement authorising a trustee to apply the income or capital of the trust for the beneficiary is contained in a settlement. The trustees so advancing must have a good cause and must see that its purpose is carried out.

Compared with the word "benefit", advancement is a word of limited connotation. The exercise of this power is however subject to certain limitations.

(*iv*) *Relief against defective execution of power of appointment.*—A power is an authority vested in a person to deal with or dispose of property not his

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86. *Snell's Principles of Equity*, pp. 262-271.
87. *Currant* v. *Jago*, 1 Coll 261.
88. (1728) 2 P Wms 494.
89. *Dyer* v. *Dyer*, (1788) 2 Cox 92.
90. *Moate* v. *Moate*, (1948) 2 All ER 486.
91. *Sayre* v. *Hughes*, (1868) LR 5 Eq 376.
92. *Beckford* v. *Beckford*, Lofft's R 490.
93. *Soar* v. *Foster*, (1858) 4 K&J 152.
94. *Snell's Principles of Equity*, pp. 262-271.

own.[95] A power may be legal or equitable but after 1925 all powers of appointment are necessarily equitable. A mere power is discretionary, while a trust is imperative e.g. *A* holds Rs 50,000 upon trust to divide among a certain class of persons.

A has no option in this matter. He is bound to carry out the trust. On his failing to do so, the court will see that the property is duly divided.

But if *A* is given a mere power to appoint among a certain class, he is not bound to exercise them. If he fails to exercise the power either by design or by accident the members will have no claim to money and the amount will pass on to the persons entitled in default of appointment.[96]

In marginal cases where the distinction between a power and a trust is blurred, equity will not allow an injustice to the intended objects and will take upon itself the duties of the donee of the power.

Where the holder of a power of appointment fails to exercise it or exercises it in an unauthorised way, the objects of the power take nothing; of course there are some statutory relaxations in this regard. In case of total non-execution of a mere power, equity will not aid, but in three cases such relief is granted:

(1) *In case of favoured persons.*—Where the execution is defective by reason of some accident or mistake, equity will grant relief against such formal defects.[97] Such equitable relief would be available in respect of certain favoured persons who are regarded to have supplied good consideration. Thus a purchaser, i.e. a mortgagee, or a lessee, a creditor, a wife, a legitimate child and a charity are favoured persons, but a husband, an illegitimate child, a grandchild or remote relations, generally, or a volunteer are not favoured persons.

(2) *Where defects are not of the essence and substance of the power.*—Defects of form of power is excused or relieved.[98]

(3) *Where there is covenant.*—Where it has been provided by the donee that in (default of appointment) *A* shall not take less amount or some smaller amount, his hands are tied and he cannot appoint in a way which is prejudicial to *A*.

Thus "a defective execution will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or a father to provide for child".[99]

(c) *Recognition in India.*—Sections 177, 178 and 179 of the Indian Succession Act make a deliberate departure from the English doctrine of satisfaction. As the first section goes: "Where a debtor bequeaths a legacy to his creditor and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as the debt."

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95. *Freme* v. *Clement*, (1881) 18 Ch D 499.
96. *McPhail* v. *Doulton*, 1971 AC 424; *Brown* v. *Higgs*, (1803) 8 Ves 581.
97. *Tollet* v. *Tollet*, (1728) 2 P Wms 494.
98. *Ibid.*
99. *Ibid.*

This departure is on grounds suggested by the Law Commissioners in their report that presumptions recognised in England are objectionable in themselves or specifically inapplicable to India.

Presumption against satisfaction as indicated in the section, it may be noted, is not displaced by a mere equality of the legacy and the debts. In one case[1] a testator, who had a sum of Rs 9000 as deposit from his brother, gave to his brother a legacy of Rs 9000 and it was held that the brother was entitled to both, the legacy and his deposit. But as decided in *Rajmanuar case*[2] where a will contained a clear indication that the legacy was meant as a satisfaction of the debt due to *X*, *X* could not claim both as the section explains.

One should note that there is a difference between performance and satisfaction and that is, that in the former the question is whether a notional act (rather than actual) or an identical act (to that which he contracted to do) has been performed; while in the latter the question is whether the thing done was intended as a substitute for the thing covenanted.

Section 92 of the Indian Trusts Act puts into practice the principle of this maxim. It explains that "where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract". Equity thus imputes an intention to fulfil an obligation.

The doctrine of advancement does not apply in India. The reasons given in this regard are usages and practice prevailing among the Hindus and Mahomedans to purchase property and make grants in benami without any intention of vesting the property in the donee.[3]

(1) Law as to Benami Transaction in India

In a recent *Supreme Court case*[4] the question before the court was whether a transaction was *benami*. The facts may be summarised as under:

B acquired a house from *MB* and granted its patta (in 1940) to his brother (Plaintiff 1) and his nephew (Plaintiff 2) on passing BSc examination by Plaintiff 2. The defendant, another brother to *B*, lived in that house along with *B*. *B* had made several statements of his intention to make plaintiff 2 the absolute owner of the house. *B* died thereafter in September 1955. The plaintiffs filed a suit for recovery of possession of the house. The defendants pleaded that the house was theirs due to rights of survivorship and their joint purchase along with *B*. The plaintiffs were at the most holding property as benamidars, the defendants said. The trial court decreed the suit in favour of the plaintiffs. The High Court however decided that the house was purchased by *B* out of his own money in the names of the plaintiffs without any intention to confer any

1. *Hasanali* v. *Popatal*, 37 Bom 211.
2. 25 Mad 361.
3. Lord Atkin in *Kerwick* v. *Kerwick*, (1921) 47 IA 275; *Gopikrist* v. *Gangaprasad*, 6 MIA 53 and *Sayed Uzurali* v. *Musammat Altaf Fatima*, 13 MIA 232.
4. *Thakur Bhim Singh (dead)* v. *Thakur Kan Singh*, (1980) 3 SCC 72, 81-84.

beneficial interest on them and that the house belonged to *B*, and on his death to his surviving brothers including the plaintiff, and the defendant succeeded to his estate which included the suit house in equal shares. In appeal to the Supreme Court it was held that under the English law, when real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser. It is however open to the transferee to rebut that presumption by showing that the intention of the person who contributed the purchase money was that the transferee should himself require the beneficial interest in the property. There is however an exception to the above rule of presumption made by the English law when the person who gets the legal title under the conveyance is either a child or the wife of the person who contributes the purchase money to his grandchild, whose father is dead. The rule applicable in such cases in known as the Doctrine of Advancement which requires the court to presume that the purchase is for the benefit of the person in whose favour the legal title is transferred even though the purchase money may have been contributed by the father or the husband or the grandfather, as the case may be, unless such presumption is rebutted by evidence showing that it was the intention of the person who paid the purchase money that the transferee should not become the real owner of the property in question The doctrine of advancement is not in vogue in India. The *counterpart* of the English law of resulting trust referred to above is the Indian law of benami transaction.

(2) Benami Transactions in India: Their rise and decline

(*a*) *Position up to 18-5-1988.*—(*i*) *General.*—Since the Equity courts came into existence to do justice they firmly believed that a person must be prepared to do what is right and fair and that one must be just before one professes to be generous. This it did by imputing an intention to fulfil an obligation.

On this principle benami transactions were statutorily recognised in India. As expressed by Sir George Farewell in 1915, such transactions were proper and "quite unobjectionable".[5] Hindus and Mahomedans used this device alike and made grants in benami without any intention of vesting the property in the donee.[6] Benami transactions had thus a very strong footing in the Indian Legal system and their judicial recognition came from very early time, the first case being *Calcutta case*[7] wherein a purchase in wife's name was held to be *Farzi* (fictitious). In this and other cases[8] it was held that the property vested in the person to whom the grant was made and not necessarily in the person whose name was made use of.

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5. *Bilas Kunwar* v. *Desraj Ranjit*, (1915) ILR 37 All 557: AIR 1915 PC 96.
6. Lord Atkin in *Kerwick* v. *Kerwick*, (1921) 47 IA 275; *Gopikrist* v. *Gangaprasad*, 6 MIA and *Syed Uzurali* v. *Musammat Altaf Fatima*, 13 MIA 232.
7. *Sheikh Bahadur Ali* v. *Sheikh Dhomu*, 1 Cal Sud R Diw Rep 250 cited in Tyabji: *Muslim Law*, 1968, p. 396, fn 1: 57th Report L.C. of India, August 7, 1973, Chap. 1.
8. *Balanjyappa Chetty* v. *Arumugam Chetty*, (1864) 2 MHCR 26; *Bipin Bihari Chowdhary* v. *Ram Chunder Roy*, (1870) 14 WR 12; *Tagore* v. *Tagore*, (1872) IA Supp 47 (Tagore Case).

(*ii*) *What is Benami Transaction.*—As observed in *Pitchayya case*[9] "where a person acquires an interest in property with his funds in the name of another for his own benefit, the latter is called *benamidar*. A benamidar is not a trustee in the strict sense of term. He has the *ostensible title* to the property standing in his name, but the property does not vest in him, but is vested in the real owner. He is only a *name-lender* or *an alias* for the real owner. The cardinal distinction between a trustee known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the *cestui que trust* is only a beneficial owner, whereas in the case of benami transaction the real owner has got the legal title though the property is in the name of benamidar".

In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England.

The word benami means without name.

(*iii*) *Characteristics.*—(*a*) Use of an alias in respect of holding of property, and (*b*) concealment of the real owner's name are the two main characteristics of a benami transaction.

The essential point is this that there is no intention to benefit the person in whose name the transaction stands, i.e., a benamidar. This benamidar as pointed out by the Privy Council[10] is simply an alias for that of the person beneficially interested. He has the ostensible title to the property standing in his name; but the benefical ownership of the property does not vest in him, but in the real owner. The person in whose favour the transaction is effected is called the *benamidar* and the transaction is a *benami* transaction. The real owner in a benami transaction keeps in the background under a secret trust and allows the ostensible owner to appear as true owner. As between benamidar and the real owner the former is not the real owner, but the latter is the real owner. However as between third parties and the benamidar, the benamidar is the real owner. The benamidar can pass a good title to *bona fide* transferee.[11]

All benami transfers are not necessarily fraudulent, though all fraudulent transfers are necessarily benami. Once it is proved that the consideration for a sale in favour of wife flowed from her husband, the sale is *benami* and the wife is merely benamidar.

(*iv*) *Essentials of a benami transaction.*—The following are the essentials of a benami transaction:

(*i*) Custody of the title deed.

(*ii*) Source from which the purchase money flows.[12]

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9. *Pitchayya* v. *Ratamma*, AIR 1929 Mad 268, 269.
10. Note the wordings of S. 81 in this regard; *Pether Perumal* v. *Muniandy*, 1908 ILR 35 Cal 551, 558, PC; *Gurunarain* v. *Sheolal*, AIR 1918 PC 140.
11. *See* S. 41, Transfer of Property Act.
12. 1931 Lah 419: 6 MIA 53; *Thakur Bhim Singh* v. *Thakur Kan Singh*, (1980) 3 SCC 72.

(*iii*) The motive of the purchaser of property.

(*iv*) The possession of property.

(*v*) Relationship between the parties.[13]

(*v*) *Types of Benami Transactions in India.*—Two types of benami transactions are generally recognised in India:

(*a*) Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person the transaction is called benami: *See* Section 82 of the Indian Trusts Act.[14] In such a case the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner.

(*b*) In the second case, which is loosely termed as a benami transaction, a person who is the owner of the property executes a conveyance in the favour of another without the intention of transferring the title to the property thereunder. Here also the transferor continues to be the real owner: *See* Section 81, the Indian Trusts Act and the comment thereunder. The difference between cases under Sections 82 and 81 is this, that in the former there is an operative transfer, from the transferor to the transferee, though the transferee holds the property for the benefit of the person who has contributed the purchase money; in the latter case there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons.

(*vi*) *Principles for determination of Benami Transactions.*—These principles may be summed up as follows:

(*i*) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction.[15] Mere suspicious character of the grantor is not enough.[16] The surrounding circumstances, the position of the parties, their relations to each other and their subsequent conduct are factors which go to decide the benami nature of a transaction.[17]

(*ii*) If it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is *prima facie* assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary.

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13. AIR 1980 SC 1040; AIR 1974 SC 171; *Manmohandas*, AIR 1931 PC 175.
14. *See* Comment to S. 82 in Light of the Benami Transactions (Prohibition) Act, 1988.
15. 1931 Nag 91: 130 IC 817.
16. (1962) BLJR 314 (SC); AIR 1937 Cal 203: 171 IC 522.
17. *Jaydalal Poddar* v. *Bibi Hazra* (*Mst.*), (1974) 1 SCC 3 following *Manmohandas case*, AIR 1931 PC 175: 134 IC 669.

(*iii*) The true character of the transaction is governed by the intention of the person who has contributed the purchase money.

(*iv*) The question whether a transaction is benami or not mainly depends upon the intention of the person who has contributed money as explained in Section 82 of the Trusts Act[18] and upon the intention of the person who has executed the conveyance as explained in Section 81 of the Trusts Act.

(*v*) A benami transaction is not necessarily a sham transaction, it may be a gift as has been recognised by the Privy Council in *Mohmad Sadik case*[19].

(*vii*) *Distinction between a sham transaction and a benami transaction.*— The distinction between these two types of transactions is that in a sham transaction the title does not pass and, as a matter of fact, is not intended to pass whereas in the benami transaction it does pass until it is questioned by the real owner.[20]

In the former there is no transfer at all while in fraudulent benami transaction there is a transfer. Consequently it is plain that the former is a nullity and therefore there is nothing to be set aside while in the latter the transaction is to be set aside.

A sham transaction being a pretence or a ruse has no legal existence at all and is therefore not intended to have any legal effect. On the other hand a benami transaction was legal up to 18-5-1991, after 18-5-1991 it is illegal.

In the former no money is given or taken by either the purchaser or the seller while in the latter the purchase money is paid by the real owner.

The important difference between the two is one of intention. This distinction between the two is discussed in *Meenakshi Mills* v. *CIT*[21].

(*viii*) *Causes of origin.*—A question may be posesd as to why this practice of holding property in this way arose though it is risky to do so. To this question the, possible answer may be made, that to avoid the following greater risks the benami transactions were resorted to:

(*i*) To avoid certain political and social risks.

(*ii*) To avoid appreciable risk from one generation to another.

(*iii*) To avoid loss of property on hostile conquest or confiscation of property.

(*iv*) Besides this, love of secrecy is also a possible reason.

(*v*) Lastly as Pollock[22] says it is quite natural for ingenious persons to discover that the means of concealment which formerly were a shelter

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18. This is explained in *Meenakshi Mills* v. *CIT*, AIR 1957 SC 49.
19. *Mohmad Sadik Ali Khan* v. *Fakr Jahan Begum*, AIR 1932 PC 13, 20: 59 IA 1.
20. *Rangappa* v. *Rangaswami*, AIR 1925 Mad 1005: 1925 MWN 232.
21. 1956 SCR 691.
22. Pollock: *Law of Fraud, Misrepresentation and Mistake*, 1894, pp. 83, 84.

from the strong hands of princes and adventurers can be turned into peaceful times to the less ambitious but not less lucrative end of baffling the creditors.

(*vi*) Besides this, a benami transaction was resorted to with a view to avoid claims of other members of one's own family.

(*vii*) Sometimes to escape restrictions imposed upon by Government Servants' Conduct Rules, was a good device.

(*viii*) To this list one may add, as the report of the Commission says,[23] one more convincing reason— a desire to evade taxes like income tax, wealth tax etc.

(*b*) *Position from 19-5-1988.*—Experience has shown that such transactions sometimes become fraudulent and create legal and factual controversies[24] and consequently complexity and uncertainty in law is generated. On account of benami transactions not only an individual but the State is also a loser. This problem therefore caused great concern to the taxing authorities and consequently the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 was passed on May 19, 1988, to come into force at once. The Benami Transactions (Prohibitions) Act, 1988 has replaced the Ordinance.

(*i*) *Benami Transactions (Prohibition) Act, 1988.*—The Act received President's assent on 5-9-1988. It has 9 sections. It extends to the whole of India except the State of Jammu and Kashmir (Section 1). Sections 3, 5 and 8 came into force at once and the rest of the provisions were deemed to have come into force on 19-5-1988 (Section 1). Section 2 relates to definitions and Section 3 prohibits all types of benami transactions except purchases of property made in name of one's wife or unmarried daughter. Section 3(*i*) raises a presumption that unless the contrary is proved the property so purchased shall be presumed to have been purchased for the benefit of the wife or the unmarried daughter. Such presumption, which in law is known by the terminology of "advancement" is made in order to rebut an ordinary presumption of a "resulting trust" in favour of the person purchasing the property. Section 3(3) makes it an offence to enter into benami transaction and the offence would be punishable with imprisonment up to 3 years or fine or both. The offence is non-cognizable and bailable. Section 4 prohibits recovery of the property held benami and according to Section 5 benami properties are liable to acquisition by Government without payment of any amount. Section 7 repeals the following provisions:

(*a*) Sections 81, 82 and 94 of the Indian Trusts Act, 1882,

(*b*) Section 66 of the Civil Procedure Code, 1908, and

(*c*) Section 281-A of the Income Tax Act, 1961.

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23. Ch 1.

24. Cf. observations of JJ. Patel and Wagle in *Hasman Gani Ahmed Sahib* v. *Vidyadhar Krishna Rao Mung*, Appeal No. 533 of 1968 decided on 17-1-1969.

(*ii*) *Constitutional validity of the Act.*—The Benami Transactions (Prohibition) Act, 1988 cannot be treated as an enactment relating to transfer of property. The Act does not deal with land. The enactment is referable to Entry 10 of List III in Seventh Schedule to the Constitution. It can, in no sense, be related to the legislative head "Transfer of Property" in Entry 6 of List III. Any trenching upon Entry 18 in List II is only incidental, and it does not affect the validity of the Act or the competence of Parliament[25]. In *Velayudhan Ramkrishnan* v. *Rajeev*[26], it was held that the Benami Transactions (Prohibition of Right to Recover Property) Ordinance, 1988 is not violative of Article 19 of the Constitution.

(*iii*) *Scope of Section 4.*—Section 4 of the Act prohibits the filing of a suit by the real owner against the benamidar on the ground that the latter was holding the property benami. Similarly, a defence cannot be raised in a suit that the defendant was holding the property benami. However, a mere allegation that the property is held benami by the plaintiff will not attract the provisions of Section 4 of the Act. Defendant must lead proof to substantiate the plea.[27] A suit for specific performance by a purchaser of land does not lie on the ground that the land was held benami.[28]

The court is bound to consider at every stage, to find out whether there is a defence of benami put forward before it. The court has necessarily to say to the persons who project such a plea that it will not be allowed. The court is duty-bound to be on the alert in the discharge of this statutory duty; to find out whether any benami defence has been put forward. If it notices one, it has firmly to disallow it.[29]

Section 4 of the Benami Transactions (Prohibition) Act prohibits the filing of the suit by the real owner against another on the ground that the latter was holding the property benami. Similarly, the defence cannot be raised in a suit that the defendant was holding the property benami. In the instant case, apart from the indirect assertion in the pleadings that the property in suit was purchased in the name of the plaintiff from the vendors benami, no proof was led to substantiate the pleas. Merely an allegation that the property is held benami by the plaintiff will not attract the provisions of Section 4 of the Benami Transactions (Prohibition) Act.[30]

(*iv*) *Retroactive operation of the Act.*—In its sweep Section 4 envisages past benami transactions also within its retroactivity. In this sense the Act is both a penal and a disqualifying statute. The expression "any property held benami" in Section 4 is not limited to any particular time, date or duration. All the real owners are equally affected by the disability provision irrespective of the time of creation of the right. A right is a legally protected interest. The real owner's

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25. *S. Mohammad Anwaruddin* v. *Sabina Sultana*, (1987) 179 ITR 442 (AP).
26. AIR 1989 Ker 12: (1988) 174 ITR 31.
27. *Kesho Ram* v. *Chetan Dass*, (1991) 192 ITR 446 (P&H).
28. *P. Ramchandra Rao* v. *G. Jangaiah*, (1989) 179 ITR 438 (AP).
29. *Velayudhan Ramakrishnan* v. *Rajeev*, AIR 1989 Ker 12: (1988) 174 ITR 31.
30. *Kesho Ram* v. *Chetan Dass*, (1991-1) XCIX Punj LR 511.

right was hitherto protected and the Act has resulted in removal of that protection.[31]

When Section 4(2) nullifies the defences avialable to the real owner in recovering the benami property from the benamidar the law must apply irrespective of the time of the benami transactions. The expressions "shall lie" in Section 4(1) and "shall be allowed" in Section 4(2) are prospective and shall apply to present (future stages) and future suits, claims or actions only.[32]

The Law Commission has also taken the view that the legislation replacing the Ordinance (2 of 1988) should be retroactive in operation and that no *locus penitentia* need be given to the persons who had entered in the benami transactions in the past.[33]

The Act, even though retroactive in operation cannot create a bar against the legal owner of the property to reinforce his right against the legal representatives of the benamidar in respect of property which ceased to be benami before the Act came into force as a consequence of execution of a relinquishment deed in favour of legal owner. The legal owner was, therefore, entitled to recover possession from the legal representatives of the benamidar.[34]

(*v*) *Pending suits.*—The word "suit" includes an appeal from the judgment in suit. The prohibition on pending suit, claim or action under Section 4(2) includes pending appeals against decree passed on such suit, claim or action. Section 4 of the Act is retroactive in nature and applies to pending suits and appeal arising out of such suits.[35] The deprivation of a defence is not confined to a suit hereafter to be filed; it extends to the projected areas of a claim, or an already initiated action. The Act takes in transactions entered into long ago and litigations instituted and already pending whatever be the age and stage of the

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31. *Mithilesh Kumari* v. *Prem Bihari Khare*, (1989) 2 SCC 95: AIR 1989 SC 1247: (1989) 177 ITR 97; *Prem Vati Bhandari* v. *Ved Prakash*, (1991) 191 ITR 47 (P&H); *Narinder Kumar Jain* v. *Munieubrat Dass*, (1989-2) XCVI PLR 453: (1990) 181 ITR 305 (P&H); *Vishan Devi* v. *Sun Beam Rubber Mills*, (1991) 192 ITR 611 (P&H): (1991-2) C PLR 144; *S. Mohammad Anwaruddin* v. *Sabina Sultana*, (1989) 179 ITR 442 (AP); *Rajan Ammal* v. *P.K. Pillai*, AIR 1991 Mad 310; *Champa Devi* v. *Kaushalaya Devi*, (1991) 1 PLJR 38.

32. *Mithilesh Kumari* v. *Prem Bihari Khare*, (1989) 2 SCC 95: AIR 1989 SC 1247: (1989) 177 ITR 97; *Prem Vati Bhandari* v. *Ved Prakash*, (1991) 191 ITR 47 (P&H); *Narinder Kumar Jain* v. *Munieubrat Dass*, (1989-2) XCVI PLR 453: (1990) 181 ITR 305 (P&H); *Vishan Devi* v. *Sun Beam Rubber Mills*, (1991) 192 ITR 611 (P&H): (1991-2) C PLR 144; *S. Mohammad Anwaruddin* v. *Sabina Sultana*, (1989) 179 ITR 442 (AP); *Rajan Ammal* v. *P.K. Pillai*, AIR 1991 Mad 310; *Champa Devi* v. *Kaushalaya Devi*, (1991) 1 PLJR 38.

33. *Mithilesh Kumari* v. *Prem Bihari Khare*, (1989) 2 SCC 95: AIR 1989 SC 1247: (1989) 177 ITR 97; *Prem Vati Bhandari* v. *Ved Prakash*, (1991) 191 ITR 47 (P&H); *Narinder Kumar Jain* v. *Munieubrat Dass*, (1989-2) XCVI PLR 453: (1990) 181 ITR 305 (P&H); *Vishan Devi* v. *Sun Beam Rubber Mills*, (1991) 192 ITR 611 (P&H): (1991-2) C PLR 144; *S. Mohammad Anwaruddin* v. *Sabina Sultana*, (1989) 179 ITR 442 (AP); *Rajan Ammal* v. *P.K. Pillai*, AIR 1991 Mad 310; *Champa Devi* v. *Kaushalaya Devi*, (1991) 1 PLJR 38.

34. *Satyabhamabai Balaji Kitey* v. *Pandurang Marotrao Pawar*, (1990) 183 ITR 290: AIR 1990 Bom 134.

35. *Mithilesh Kumari* v. *Prem Bihari Khare*, (1989) 2 SCC 95: AIR 1989 SC 1247: (1989) 177 ITR 97.

legal proceedings.[36] Execution of decree for possession by the real owner is also barred.[37]

See also "Retrospective operation of the Act" *supra.*

(vi) Expressions "claim or action" and "shall lie" in Section 4(1): Meaning of.—The words 'claim or action' are general in nature and of wide import and are not to be given time-bound or stage-bound or forum-bound meaning. Coming to the expression 'shall lie' it is not possible to annexe to it a stringent meaning so as to say it will apply only to proceedings of the nature of a suit, claim or action to enforce any right spoken to in Section 4(1) to be initiated after the provisions of the Act came into force, and not to proceedings initiated anterior to it, but which have not been put an end to once and for all in the eyes of the law. It will take in also a case where the suit, claim or action already laid is being prosecuted stage after stage until finally disposed of, as permitted by law and wherein no finality or conclusiveness has been reached. Until and unless a finality or conclusiveness therein is reached in the eyes of the law, the case will come within the expression 'shall lie'. Two of the ordinary dictionary meanings given to the expression 'lie' are—'to press' and 'to have a position' the expression, in the context in which it appears and giving due significance to the subjects and reasons behind the statute, in which it is found, must be given the meaning that the plea shall not be advanced, prosecuted, pressed forth or placed in any suit, claim or action whatever be the stage of the suit, claim or action.[38]

(vii) Property purchased in the name of wife or unmarried daughter.—Section 3 provides for a prohibition in relation to a benami transaction. Section 4, *inter alia*, prohibits a contention or a defence either by the plaintiff or the defendant based on any right in respect of any property held benami.[39]

It is true that sub-section (3) of Section 4 of the said Act does not bring within its fold the expressions provided for under sub-section (2) of Section 3 expressly, but as the law itself, which was enacted for the purpose of suppressing a mischief it will lead to an absurdity if such an exception is denied to a person in a suit where a past benami transaction is in question. Thus Sections 3 and 4 of the said Act will have to be read together and it must be held that Section 4 derives its colour from Section 3 in relation to such transactions which have been saved in a limited way by reason of sub-section (2) of Section 3 of the said Act. As Section 3 is prospective in nature, a transaction contemplated under sub-section (2) of Section 3 of the said Act, on its own force, shall exclude the applicability of Section 4 of the Act in relation to the transaction which had already taken place.[40]

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36. *Velayudhan Ramakrishnan* v. *Rajeev*, AIR 1989 Ker 12: (1988) 174 482 (Ker); *C.T. Mohanan* v. *C. Yesoda*, (1990) 185 ITR 31 (Ker).
37. *Urmila Bala Dasi* v. *Probodh Chandra Ghosh*, (1990) 184 ITR 604 (Cal): AIR 1989 Cal 283; *C. Narayanan* v. *Gangadharan*, AIR 1989 Ker 256.
38. *Minor Habib Rahman* v. *Ramu Pandaram*, (1991) 1 Mad LJ 254.
39. *Najmam Bibi* v. *Jamila Khatoon*, (1991) 87 ITR 548 (Pat).
40. *Ibid.*

It is now well-settled that in India, acquisition of a property by a husband in the name of his wife has become a common feature. However, such type of acquisition of property by the husband in the name of his wife could have been for the purpose of entering into a benami transaction or for the purpose of making a grant of such a property to his wife. It is now well-settled that if a person raises a plea that an apparent state of affairs is not the real state of affairs or the apparent owner is not the real owner, the onus of proof to prove the necessary ingredients of a benami transaction lies upon the person who sets up such a plea. However, in a case where a plea is raised that such an acquisition was made by the husband for the benefit of his wife, i.e., by way of gift or grant, the burden of proof shifts to the other side. Therefore, where a husband has purchased a property in the name of his wife and raised substantial structure thereupon, Parliament did not intend to bar a remedy or a defence.[41]

When a property is purchased by a person in the name of his wife, there is a rebuttable presumption that the property had been purchased for the benefit of the wife.[42]

(*viii*) In *Premvati Bhandari* v. *Ved Prakash*[43], the Punjab and Haryana High Court has taken the view that sub-section (2) of Section 3 of the Act, no doubt, creates an exception to the effect that property can be purchased by any person in the name of his wife or unmarried daughter but this does not mean that the rigour of Section 4(1) of the Act which bars the filing of a suit, claim or action to recover such a property is taken away. What is saved by sub-section (2) of Section 3 of the Act is that a person can buy the property benami in the name of his wife or unmarried daughter but he shall not be punishable under sub-section (3) of the Act, but this does not mean that the plaintiff retains the right to recover the property from the benami holder by filing a suit. A person can purchase the property under sub-section (2) of Section 3 of the Act benami in the name of his wife or unmarried daughter but the right of the real owner to recover the property from the benami holder has been eliminated by Section 4 of the Act. Earlier, there was a right to recover or resist the claim of the real owner against the benamidar but now that remedy stands barred and the right rendered unenforceable.[44]

Acquisition of property in the name of the wife of a coparcener by the joint family will constitute a benami transaction and will not be saved under Section 3(2) of the said Act.[45]

(*ix*) *Suit by third party.*—Under Section 4(1) the real owner cannot bring any suit, claim or action to enforce his right as the real owner on the plea that ostensible owner is a benamidar. Section 4(1) of the Act prohibits the right of the real owner to enforce the same through court against the benamidar and

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41. *Ibid.*
42. *Mithilesh Kumari* v. *Prem Bihari Khare*, (1989) 2 SCC 95: AIR 1989 SC 1247: (1989) 177 ITR 97; *Rajan Ammal* v. *P.K. Pillai*, AIR 1991 Mad 310.
43. (1991) 191 ITR 47 (P&H): (1991-1) XCIX Punj LR 490.
44. *Premvati Bhandari* v. *Ved Prakash*, (1991) 191 ITR 47 (P&H): (1991-1) XCIX Punj LR 490.
45. *Rameshwar Mistry* v. *Babulal Mistry*, AIR 1991 Pat 53.

Section 4(2) destroys the right of defence of the owner to claim that he is real transferee when the benamidar brings a suit of enforce his right. Hence Section 4 takes into its ambit the right of a real owner vis-a-vis ostensible owner. The prohibition, under Section 4(1) and (2) does not prohibit the right of a third party to get such a declaration. Therefore, a third party has a right to get a declaration that the transferee was a benamidar.[46]

(*x*) *Nominal transactions.*—Generally benami transacions are cases where property is purchased by a person in the name of another after paying consideration by himself. In the case of nominal transactions, no title is passed and the title is never intended to be passed. In *Bathula Anasuya* v. *Bathula Rayudu*[47], the Andhra Pradesh High Court laid down that the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 (which has been replaced by Act 45 of 1988) does not affect nominal transactions. The court can examine the question on merits and find out whether the transaction in question is a nominal transaction or not.

The above view was taken on ground that Section 82 of the Indian Trusts Act, 1882 alone was repealed by the Ordinance keeping Section 81 of the said Act on the statute book. But the Act which replaces the Ordinance repeals Sections 81, 82 and 94 of the Indian Trusts Act, 1882. Therefore in view of the fact that Sections 81 and 82 of the Indian Trusts Act, 1881 were repealed by Section 7(1) of the Benami Prohibition Act sham and nominal transactions are also hit by the provisions of the Benami Transactions (Prohibition) Act, 1988.[48]

(*xi*) *Fraudulent transfer.*—The plaintiff, a financial company, filed a suit against Defendants 1 to 5. It was alleged that the Defendant 1 took some loan from the plaintiff and fraudulently diverted the loan amount to Defendants 2, 3 and 5 and acquired assets in their names. The defendants claimed that the suit was barred by Section 4 of the Act. It was laid down that exception provided in Section 6 saves actions covered by Section 53 of the T.P. Act as well as transfers for an illegal purpose. If it is ultimately found that Defendant 1 fraudulently diverted the amount of the loans raised by him from the plaintiff, in favour of the other defendants and out of such diverted funds immovable properties were purchased fraudulently by other defendants, then certainly the plaintiff is entitled to follow such properties in the hands of other defendants also.[49]

(*xii*) *Property.*—As per the definition, property would include any right or interest in such property and hence the right to purchase under hire-purchase agreement shall certainly come within the ambit of property.[50]

(*xiii*) *Amendment of plaint.*—In 1983 the plaintiff filed a suit for declaration of title and some other consequential reliefs. After commencement of the Act he

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46. *Gopal Bariha* v. *Satyanarayanan Das*, AIR 1991 Ori 131.
47. (1990) 182 ITR 45 (AP): AIR 1989 AP 290.
48. *Kathoon Bivi Ammal* v. *S. Mohamad*, (1990) 2 Mad LJ 42.
49. *P.N.B. Finance Ltd.* v. *Shital Prasad Jain*, AIR 1991 Del 213: (1990) 185 ITR 298 (Del).
50. *R. Rajagopal Reddy* v. *Padmini Chandrasekaran*, (1990) 1 Mad LJ 234.

filed an application praying for amendment of the plaint. As per the proposed amendment the case of the plaintiff was that his case was covered by Section 4(3)(*b*) of the Act. Before the commencement of the Act, there was no need for the plaintiff to specifically mention whether the benami transaction was of a category coming under Section 4(3)(*b*) of the Act. It was laid down that there was no inconsistency in the stand of the plaintiff. By the proposed amendment, the plaintiff pleads that this is a particular type of benami transaction which comes under Section 4(3)(*b*). It does not amount to a new case.[51]

(*xiv*) *Drawbacks of the Act.*—The Benami Transactions (Prohibition) Act, 1988 has however certain inherent drawbacks which are required to be remedied.

(*a*) The Act is silent on the legality or otherwise of the benami transactions entered into prior to 19-5-1988, i.e., before the operation of the new law.

(*b*) A male or female who purchases benami property for the benefit of his or her minor sons, minor grandsons and granddaughters or for her husband would be in hot water because Section 3(3) and (4) make it a non-cognizable and bailable offence to purchase property by a benami transaction. This provision is therefore quite impracticable and oppressive.

(*c*) By this Act a benamidar is not benefited at all since the property in question is normally retained by the real owner. It is possible on the part of a real owner to create a lease deed or tenancy deed of the benami property and thus occupy the property in a practical sense. Consequently what is protected is the right of the real owner and not the right of a benamidar.

(*d*) Under this Act property can be held in a fictitious name and the Act would not apply to such a transaction.

(*e*) Section 4 of the Act prohibits the right to recover property held benami. This provision which is intended to deter the real owners behind the curtain, of the benami property, from recovering the property through court is and would be hardly effective and would be hardly resorted to by the real owners because political patronage and muscle power of the mafia gangs are speedy and more powerful instruments than the power of a court to regain the property. Justice is dear and the law's delays are now a regular feature of lawcourts. This is enough to undermine the confidence of people in justice given by a lawcourt after many years. Instances of such gangs forcing a tenant to vacate the premises and murdering him if he refuses to vacate are many. This is the product of our civilization. Somebody has rightly said that—society prepares the crime and the criminal commits it. One may say, therefore, that the present situation in society makes the provision merely a symbolic one, ineffective and redundant.

(*f*) From the wordings of the provisions it seems that the Act would not apply to holding of property in the name of a coparcener of a Hindu Undivided

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51. *A. Kodandachari* v. *Radhamma*, (1991) 167 ITR 616 (AP). See also *Tara Devi* v. *Kailash Chand Joshi*, (1989) 1 Raj LR 844.

Family, and holding property as a trustee in any other fiduciary capacity for another's benefit.

(*g*) Similarly Section 53 of the Transfer of Property Act i.e. transfer for an illegal purpose, is not affected.

(*h*) A question may arise here, as to whether this Act affects property purchased by the real owner in joint names, i.e. by putting his name along with other names of close relatives like wife, minor son, etc. Whether this can be called a benami transaction? Unfortunately the Act is silent on this point too.

As the Report of the Law Commission[52] goes there were 3 alternatives available to check tax evasion, fraud, etc. The first alternative was that entering into a benami transaction should be made an offence. This is implemented by prohibiting all types of benami transactions and making it an offence to enter into any benami transaction. The second alternative was that a provision should be made to the effect that in a civil suit a right shall not be enforced against the benamidar or against a third person, by or on behalf of the person claming to be the real owner of the property on the ground of benami. A similar provision could be made to bar defences on the ground of benami. Section 4 of the Act does this. The third alternative was that the present presumption of resulting trust (Section 82 of the Trusts Act) may be displaced (as in England) by the presumption of advancement in cases where the person to whom the property is transferred is a near relative. This is done by Section 3(2) but the provision is half-heartedly made.

(*i*) The Act would create difficulties in regard to property transferred under the power of attorney (POA). In result the POA who is considered to be an owner of property for income tax purposes would not be able to enforce his rights in respect of the property against the real owner who may not fulfil his obligations and retain or pocket the money obtained by sale of such property.

(*j*) By Section 7 of the Act, Section 281-A of the Income Tax Act, 1961 has been repealed. According to the present positon there are persons who have declared their benami transactions in the income tax department and pay taxes accordingly. These persons now, on and from 19-5-1988 cannot hold property in benami. They are liable to be punished under the present Act. It is not understandable at all, what benefit the government is going to get by disturbing the position of assesses in the income tax and wealth tax departments. This will increase litigation and the government revenue would be reduced as a result of injunctions granted in litigation against the government as is the case with customs department where duty unpaid due to injunctions obtained amounts to crores of rupees.

(*k*) The provision of Section 5 regarding acquisition of benami property without any payment is really harsh, unjust and oppressive to the extent of naming it as draconian. Due to this provision those who have declared their benami transactions in the past genuinely, would be under difficulties, so much so that they would not only be punished under Section 3 but their properties are

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52. 57th Report of the L.C. of India, August 7, 1973, Ch 6.

liable to be acquired under Section 5 without any payment. This is nothing short of legal robbery and atrocity which generate the use of muscle power and reduce the faith of people in the administration of law and the rule of law.

Thus the Act creates more problems[53] than it solves.

10. WHERE THERE IS EQUAL EQUITY, THE LAW SHALL PREVAIL

11. WHERE THE EQUITIES ARE EQUAL, THE FIRST IN TIME SHALL PREVAIL

These two maxims relate to the question of priority and they have been separately dealt with therefore.[54]

12. EQUITY ACTS IN PERSONAM

(*a*) *Meaning.*—Courts of equity, described as courts of conscience, operate primarily *in personam* binding the conscience of a person and thus bringing an individual's conscience under its sway. Its decrees were regarded not merely as decisions concerning the rights and properties in dispute but as decrees, decisions, and directions, positive or negative, addressed to the individual party or parties. Thus on one side an individual's conscience was sought to be bound, and on the other, the Chancellor exercised his jurisdiction guided according to his own conscience. This maxim being descriptive of the Equity Courts' procedure covers a large portion of its procedural and remedial action. So much so that "*in a sense it comprises the whole of the equity*".[55] The extent of its application initiated Mukherjea, J.[56] to remark that "the rule of acting *in personam* was really the weapon with which the early chancellors sought to establish their jurisdiction in opposition to that of the Common Law courts". But this very extent and exercise of jurisdiction impelled Lord Esher to remark in the last quarter of the nineteenth century in *Mocambic case*[57] that such an exercise of jurisdiction amounted to doing indirectly what the court dared not to have done directly. As this amounted to overriding the jurisdiction of foreign courts, the significance of the maxim is now decreasing. It can be explained better with regard to methods of enforcing judgments, and jurisdiction over property abroad.

(*b*) *Application and Cases.*—A judgment of the Common Law courts was enforced by one of the writs of execution as a result of which forcible possession of the goods or property of the defendant was obtained and given to the plaintiff. But equity did not follow this method. It issued orders against the defendant personally and made him act accordingly, failing which he was punished for disobedience by attachment of his property or committal for

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53. Dhodi & Sarin: *Law of Fraud, Benami Transactions and Fraudulent Tranfers in India*, 3rd Edn., 1989.
54. *See* Chapter IV, Priorities and Assignments.
55. Hanbury: *Modern Equity*, 2nd Edn., p. 89.
56. *Moolji Jetha & Co.* v. *K.S. & W. Mills & Co.*, AIR 1950 FC 83.
57. *Companhia Mocambic* v. *British South Africa Co.*, (1892) 2 QB 358: 1893 AC 602.

contempt. The decrees of Equity Courts thus addressed the defendant in terms of personal command and he either obeyed it willingly or was made to obey in spite of his dissent, either through sequestration of his property or imprisonment. This execution *in personam* was peculiar to equity courts.[58] When imprisonment became ineffective to compel obedience equity courts invented and applied a writ of sequestration whereunder property in dispute was taken possession of by sequestrators appointed for the purpose and that was retained until the defendant acted as ordered. This also did not prove to be as effective as was intended. These powers were supplemented by statute by making vesting orders and appointing a person to execute a transfer. Where this was ignored by the defendant equity nominated a person to do the act for him. Equity thus purged the corrupt conscience of the defendant to bring him round and to compel him to carry out its orders. Since the Judicature Acts the orders of the Chancery Division could be enforced by way of legal writs of execution. Thus conveyances, contracts and documents were executed, or negotiable instruments were indorsed and trust funds were administered by equity.[59] But as observed by Lord Campbell, no jurisdiction was conferred on equity courts by the mere fact that an equitable remedy was claimed.[60] Moreover Equity Courts in suitable cases restrained unconscientious proceedings initiated in the Common Law courts, issued injunctions against execution of a foreign judgment and stayed proceedings in a foreign court if the same matter was pending in England.[61]

As equity's jurisdiction is primarily over the defendant personally, it is immaterial whether the property in dispute is within the jurisdiction of the court or otherwise. It may be situated abroad or may not be within the reach of the court, but if the defendant was within its jurisdiction or was capable of being served with the proceedings outside the jurisdiction, equity courts made orders against him personally. Accordingly in exercise of its jurisdiction *in personam* a court of equity could compel the performance of contracts and trusts[62] relating to property not locally situated but situated outside its jurisdiction. *Penn* v. *Lord Baltimore*[63] and *Ewing* v. *Orr Ewing*[64] are the leading examples on the point.

In the first case specific performance of an agreement was sought. The agreement was entered into between two parties for settling the boundaries of land situated in America, then a British colony. The agreement which otherwise could not be enforced *in rem* was enforced by a process of contempt *in personam*, as the defendant was within the court's jurisdiction. Lord Harwicke, C., observed in this case that the conscience of the party was bound by an agreement and being within the jurisdiction of the court which acts *in personam*

58. *Lever Bros.* v. *Kneale*, (1937) 2 KB 84.
59. *United States of America* v. *Dollfus*, 1952 AC 582; *Sultan of Johore* v. *Abubakar Tunku*, 1952 AC 318.
60. *Duke of Brunswick* v. *King of Hanover*, (1848) 2 HLC 1.
61. *C.F. Ewing case and North Carolina Estate Co. Ltd., re*, (1889) 5 TLR 328.
62. *Ewing* v. *Orr Ewing*, (1883) 9 AC 34.
63. (1750) 1 Res Sen 444: 27 ER 1132.
64. (1883) 9 AC 34.

the court may properly decree it as an agreement.[65] The courts have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the Colonies and in foreign countries.[66]

In *Ewing case*[67], the House of Lords held that where some of the executors and trustees of a will were in England, the English court had jurisdiction to administer the real and personal assets of a testator who died domiciled in Scotland, even though the greater part of the personalty and all the realty were situated in Scotland. Eventually however an administrative action was started in Scotland and the House of Lords stayed the English administration on the ground of convenience.[68]

In other circumstances even a defendant may be restrained from taking proceedings in a foreign country.[69]

This maxim was applied and the jurisdiction was exercised by equity courts in the following matters affecting land outside England—

(i) for the redemption and foreclosure[70] of a mortgage of it,

(ii) for specific performance[71] of an agreement to create a mortgage of it, or

(iii) for sale[72], or

(iv) its rent[73], or

(v) for an account of the rents and profits of it, or

(vi) for the appointment of a receiver[74] thereof if necessary.

(c) *Limitations of the Maxim.*—The main principle underlying the application of the maxim is that the plaintiff must have an equitable right of remedy in his favour to enforce; if it is not, there the maxim cannot be availed of, the action in regard to it being "local" where the land or property is situate.[75] The Judicature Act, 1873 has not conferred any new jurisdiction on courts and therefore no action to obtain damages for trespass to land outside England or to recover a rent charged on such land can be brought in England.[76]

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65. *Penn* v. *Lord Baltimore*, (1750) 1 Res Sen 444: 27 ER 1132.
66. *Ewing* v. *Orr Ewing*, (1883) 9 AC 34.
67. *Ibid.*
68. *Snell's Principles of Equity*, p. 42.
69. *North Carolina Estate Co. Ltd., re*, (1889) 5 TLR 328.
70. *Paget* v. *Ede*, 43 LJ Ch 571.
71. *Smith, Lawrence* v. *Kitson, re*, (1916) 2 Ch 206.
72. *Richard West & Ptns. Ltd.* v. *Dick*, (1969) 2 Ch 424.
73. *Ibid.*
74. *St. Pierre* v. *S.A. Stores Ltd.*, (1936) 1 KB 382.
75. *Hawthorne, re*, (1883) 23 Ch D 743.
76. (1892) 2 QB 358, *supra*.

Thus where the remedy requested for is not equitable, where the decree granted could not be effectively executed, and when the dispute is not one of the conscience, equity courts would not act under this maxim.

(d) *Recognition and Application in India.*—According to opinions of many learned text writers[77] no such jurisdiction is recognised by Indian courts while according to some, the courts in India have but *limited powers* of making a decree *in personam*.[78] The opinions are thus divided. The Civil Procedure Code, Section 16 does not deal with this problem; it explains the division of jurisdiction of the municipal courts only.[79] Till now we have no such decisions bearing directly on this issue. Clause 12 of the Letters Patent Act is also not so clear about this.[80] But as noted by Mulla[81], the court of equity in England will entertain such suits if the contract is made in England and the defendant resides or carries on business in England though the land may be situated abroad. Similarly where lands abroad have been acquired by fraud of a party residing in England, a suit to set aside the transaction will be entertained by the court of equity in England.[82] It will also entertain a suit to enforce express trusts affecting land situate in a foreign country or for preservation or protection of the trust fund situate in a foreign country if the trustee resides in England, but has no jurisdiction to interfere with administration of a trust which has to be conducted in a foreign territory.[83] It has also no jurisdiction to entertain suits for recovery[84], or for partition of land[85], or for damages for trespass to land.[86]

If neither the person of the defendant nor his personal property is within jurisdiction, the court will not entertain a suit for a relief respecting immovable property situate beyond its jurisdiction, for the court cannot in that event execute its decree either *in rem* or *in personam* and a court does not entertain a suit if it cannot enforce its decree in the suit.[87] Consequently, though courts in India have but limited powers of making a decree *in personam*, Equity may act *in personam* in India too. The proviso to Section 16 of the Civil Procedure Code is thus an application, though in a highly modified form, of the maxim "*equity acts in personam*".[88]

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77. Collett (Specific Relief Act), Nelson (Indian Contract Act), Dr Banerjee (Specific Relief Act) and *Shree Nath* v. *Kally Das*, (1879) 5 Cal 82.
78. *Stokes Anglo Indian Codes*, Vol. I, p. 684; *Holker* v. *Dadabhai*, (1890) 14 Bom 353.
79. *Moolji Jetha & Co.* v. *K. S. & W. Mills & Co.*, AIR 1950 FC 83; *Krishnaji Gajanan, re*, (1909) 33 Bom 373.
80. *Ibid.*
81. *Civil Procedure Code*, 13th Edn., 1965, pp. 133-36.
82. *Lord Cranstown* v. *Johnston*, (1796) 3 Ves 170.
83. *Bilasrai Joharmul* v. *Shivanarayan S.*, 71 IA 47; *Nelson* v. *Bridport*, (1628) 8 Bear 547.
84. *Hawthrone, In re*, (1883) 23 Ch 748.
85. *Cartwright* v. *Pettus*, (1675) 2 Ch Ca 214.
86. *British South Africa Co.* v. *Companhia de Mocambique*, 1893 AC 602: (1892) 2 QB 358.
87. See *Trimbak* v. *Laxman*, (1896) 20 Bom 495 cited in Mulla: *Civil Procedure Code*.
88. Mulla: *Civil Porcedure Code*, 13th Edn., 1965, pp. 133-136.

Chapter IV
Priorities and Assignments

"Equitable estate is not as strong as a legal estate. It is liable to be defeated by a claim of bona fide purchase for value without notice. It then meets its Waterloo. Such a purchaser is Equity's darling and in his presence the poor owner of his equitable estate is forgotten."

"It warns us... that legal estates and equitable estates are not rights of one and the same order; they belong to different orders; the one is a right in rem, the other, the outcome of an obligation, a trust, and of the rule that trusts can be enforced against those who when they obtain ownership know or ought to know of those trusts."

—Maitland: *Lectures on Equity*, p. 130

SYNOPSIS

A. Priorities
1. Two maxims
2. Priority: Definition and meaning
3. Conditions for getting priority
4. Application and cases
5. Working of the maxims
   - (*i*) Rule 1: The Fundamental Rule of "First Made, First Paid"
     - (*a*) Prior Legal and Subsequent Equitable: *Cave* v. *Cave*
     - (*b*) Both having equitable rights: *Re Samuel Allen & Sons Ltd.*
     - (*c*) Modification
     - (*d*) Prior Equitable and Subsequent Legal: *Pilcher* v. *Rawlins*
   - (*ii*) Characteristics of *bona fide* purchaser for value without notice
   - (*iii*) Doctrine of Notice
   - (*iv*) Fraud, Estoppel and Gross Negligence: *Northern Counties of England Fire Insurance Co.* v. *Whipp*
   - (*v*) Registration
     - In India
   - (*vi*) Overreaching
   - (*vii*) Valuation of working of the maxims
     - (*a*) In England
     - (*b*) In India
6. Rule 2: Rule of Notice: *Dearle* v. *Hall*
   - (*i*) The Rule stated
   - (*ii*) Exception
   - (*iii*) Facts of *Dearle* v. *Hall*
   - (*iv*) Valuation and Criticism
   - (*v*) In India

B. Assignments of Choses-in-Action
1. Meaning
2. Definition
3. Attitude of the Common Law
4. Kinds of assignments
5. Requirements of a statutory assignment
6. Benefits of giving notice
7. Equitable assignment
8. Assignment of future benefits
9. Position in India
10. Difference between Indian and English law

A. PRIORITIES

Maxims number 10 and 11 which are not dealt with in the previous chapter are now discussed here. These two maxims, taken together, express the principle regarding priority. In this chapter we shall discuss the idea of priority; how it arises, how it works and the doctrine of notice connected therewith.

1. TWO MAXIMS

(1) Where the equities are equal, the first in time shall prevail.

(2) Where there is equal equity, the law shall prevail.

Questions of priority or precedence may arise where there are rival conveyances of land or assignments of beneficial interests in trust funds. Usually such questions arise in connection with mortgages.

2. PRIORITY: DEFINITION AND MEANING

By Priority we mean precedence, that which pre-exists, foregoes or is first in rank. As expressed in *Rice* v. *Rice*[1], priority is the right of a party to satisfy its own claim of interest first in comparison to others.

In the preceding chapter we have discussed the nature of an equitable interest and its distinction with a legal interest.

The first maxim lays down that "as between persons having only equitable interests, if their equities are *in all other respects equal*, priority of time gives the better equity; or *qui prior est tempore potior est jure*".[2] When all other tests give way and are not able to decide whose equitable interest came into being first, the test of time is the deciding factor. Let us take a concrete case.

A mortgages his property to *B*. He again mortgages it to *C*. The market price of the property is Rs 20,000. *A* has obtained Rs 15,000 from *B* and Rs10,000 from *C*. If *B* and *C* both desire to satisfy their claims from the property, at the same time, which is insufficient to satisfy both, the question arises as to whose claim should be satisfied first, or who should be paid first. This question is then the question of priority. The answer to simple question like this would also be simple if we press into service the first maxim which explains that if the interests of the contestants are in all other respects equal the first in time shall prevail.

It may be that both the mortgages are legal or both equitable, or the one legal and the other equitable, or vice versa. It may also be that the estate mortgaged is legal but the mortgages made are merely equitable; or that there are successive mortgages of an equitable interest. In such cases, the rules regarding precedence or priority, as discussed below, are to be applied to the facts of the case.

3. CONDITIONS FOR GETTING PRIORITY

The first condition is (*i*) that prior existence in point of time is not the sole criterion to decide priority between two competing equities. Other factors, which are no less important than pre-existence, are also to be taken into account. Moreover, (*ii*) this rule applies only to those cases where the equities are equal; where they are unequal the rule cannot be enforced. In cases of unequal equities it is a foregone conclusion that one is stronger than the other.

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1. (1853) 2 Drew 73: (1854) 23 LJ 289.
2. Vice Chancellor Kindersley in *Rice* v. *Rice*, *ibid.*

The principle that follows from the above has, no doubt, certain exceptions which would be considered when both the maxims are taken up together. But one thing is obvious and certain, that a plaintiff claiming priority according to this principle will lose it on account of his misdemeanour, or where he is grossly negligent or commits a fraud. *Rice* v. *Rice*[3] is an apt example of this situation.

4. APPLICATION AND CASES

A vendor conveyed land to a purchaser without receiving the purchase money. The deed of conveyance contained a receipt for the money by the vendor, who delivered the title deeds to the purchaser. The purchaser created an equitable mortgage by deposit of title deeds with a mortgagee. He then absconded with the money advanced to him without paying the vendor or the mortgagee. A question arose as to which should take priority, the vendor's equitable lien for the unpaid purchase money or the equitable mortgage. Held, "as between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure*". Although the vendor's lien was prior in time, owing to the negligence of the vendor in giving a receipt when the money had not been paid, the equities were not equal. Therefore, the mortgagee's equitable interest took priority over the vendors.[4]

With this maxim is connected the doctrine of notice, which we shall shortly discuss.

In India, Section 48 of the Transfer of Property Act (priority of rights created by transfer) incorporates this principle. Section 78 of the same Act explains the first exception when a prior mortgage is postponed and Section 79 enumerates the second exception regarding a subsequent mortgage made with notice of a prior mortgage.

The other maxim is a different sort of measure which goes to explain as under. When both the contestants are equally entitled to obtain help from courts of equity (because their equities are equal), the party who has law in his favour will succeed. For example, *A* agrees with *B* to sell his property for Rs 5000. Thereafter in breach of the above agreement, *A* sells the property to *C* for Rs 6000 and making a document hands over the possession of the property to *C*. As a result of the agreement *B* did not get any legal interest in the property. He is therefore not entitled to take possession of the property. *B* has only an equitable interest in his favour binding *A's* conscience. *C*, on the contrary, as a result of his agreement with *A*, gets the legal interest and has executed a document and obtained possession of the property. *B's* interest is an equitable interest, whereas *C's* interest is equitable with law in his favour. Naturally, therefore, in a conflict between *B* and *C*, *C* has a superior interest as compared to that of *B*. Thus equitable interest is not as strong as a legal interest and so, according to the maxim, the law shall prevail.

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3. Cracknell: *Law Students' Companion*, 1974 Edn., Case 251, p. 76.
4. *Ibid.*

On this maxim are based the doctrines of Election, Marshalling and Set-off. In India, Sections 35, 48, 78, 79 and 81 of the Transfer of Property Act and Order 8, Rule 6 of the Civil Procedure Code illustrate the principle.

Both the above maxims are intimately connected and taken together they expose the well-known doctrine of priority from which flows the doctrine of "purchaser for valuable consideration and without notice".

5. WORKING OF THE MAXIMS

The rules, wherein the working of these two maxims can be observed, are expressed by Snell[5] as resolving into two broad categories: one—the general body of rules governing priorities, and second—the rule in *Dearle* v. *Hall*[6] or the rule as to notice. He has summarised them as follows:[7]

(1) In determining questions of priority, it is usually best to consider first whether the rule in *Dearle* v. *Hall*[8] applies, i.e. whether or not the conflict is between successive dealings with an equitable interest in real or personal property.

(2) If the rule in *Dearle* v. *Hall*[9] does not apply, the question will have to be settled according to the basic rule of order of creation, except so far as the operation of this rule is modified by the rules relating to—

(*a*) the purchaser without notice;

(*b*) fraud, estoppel and gross negligence;

(*c*) registration; and

(*d*) overreaching.

(3) If interests in land are concerned, registration and overreaching cover most of the grounds and usually make it unnecessary to look further. These two heads have reduced the doctrine of purchaser without notice to a position of relative unimportance.[10]

We shall consider these doctrines in turn.

(*i*) Rule 1: The Fundamental Rule of "First Made, First Paid".—The basic rule is that estates and interests primarily rank in order of creation. This is expressed in the maxim, *"qui prior est tempore potior est jure"*, he who is earlier in time is stronger in law, or the older is better.

In case of two legal mortgages of a legal estate in land created by grant of successive leases, the second would *prima facie* be postponed to the first. Between two competing equitable interests, the general rule is that he whose equity is fastened to the property earlier will get priority over the other. In other

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5. *Snell's Principles of Equity*, pp. 44, 68.
6. (1828) 3 Russ 1.
7. *Ibid.*, p. 68.
8. (1828) 3 Russ 1.
9. *Ibid.*
10. (1828) 3 Russ 1, p. 68.

words, where neither claimant has a legal estate and both have equal equities, the first in time prevails over the other.

This can be illustrated better by considering the case of *Cave* v. *Cave*[11].

(*a*) *Prior Legal and Subsequent Equitable: Cave* v. *Cave:* Charles Cave was the sole trustee of a marriage settlement. In 1872 he used the funds, in breach of trust, to purchase land in the name of his brother Frederick Cave. In 1873, Frederick Cave created a legal mortgage in favour of Philip Chaplin and subsequently created an equitable mortgage in favour of John White. In 1879, Frederick became bankrupt and the beneficiaries under the marriage settlement, the plaintiffs in the action, claimed priority over the mortgages created in favour of Philip and John, the defendants.

(1) It was held that as Philip Chaplin did not have notice that the land was trust property, as a *bona fide* purchaser of a legal estate without notice, his legal mortgage took priority over the interests of the beneficiaries.[12]

(2) As between the equitable interests of the beneficiaries and the equitable mortgage of John, under the principle *qui prior est tempore potior est jure*, the interests of the beneficiaries took priority over the equitable mortgage held by John White.[13]

It happens with unfortunate frequency that a man having title to land, contrives by means of fraudulent concealment to get money from a number of different persons on the security of the land, then disappears, and the lenders are left to dispute among themselves as to the order in which they are to be paid out of the value of land which is insufficient to pay all of them. In such cases two rules have to be kept in mind. First: as between merely equitable rights, the oldest prevails. Secondly: no merely equitable right can be enforced against one who has acquired a legal right *bona fide*, for value and without notice. If these two rules be remembered, such cases will become easy of solution. If we start thinking of equitable interests as rights in land (proprietory rights), much will be incomprehensible.[14]

(*b*) *Both having equitable rights*: *Samuel Allen & Sons Ltd.*[15], *In Re*, a company hired machinery from *A* under a hire purchase agreement. The condition was that the machinery would not pass to the company until all the instalments were paid up. In case of the company's failure to pay an instalment, *A* was given a right to remove the same. The machinery was fixed on the business premises of the company of which it was the legal owner. The legal interest in the machinery therefore vested in the company. The company

11. (1880) 15 Ch D 539.
12. But see *Northern Counties of E.F.I*, case, (1884) 26 Ch D 482 (wherein legal estate was postponed due to its connivance at the fraud which led to the creation of a subsequent equitable estate).
13. Cracknell: *Law Students' Companion*, 1974 Edn. Case 56, p. 18.
14. Maitland: *Lectures on Equity*, 1969 Edn., Chap. X, pp. 125-126.
15. (1907) 1 Ch 575.

thereafter created an equitable mortgage of the business premises in favour of *B*, who had no notice of the hire-purchase agreement between *A* and the company.

In a dispute between *A* and *B*, who should be given precedence ? It was held that *A*'s right to remove the fixtures (machinery) was an equitable interest in the land and that as it had attached before *B*'s equitable mortgage was created, it had priority over *B*'s rights.[16]

(*c*) *Modification*: This basic rule of order of creation is qualified by the doctrine of purchaser without notice. And the doctrine demonstrates a fundamental distinction between legal estates and equitable interests.

A legal right being a right *in rem* can be enforced against any person, whether or not he has notice of it. Except where it is overreached or is void for want of registration, it is a *jus in rem*. Where a purchaser's conscience is in no way affected by the equitable right, equity follows the law. This is well illustrated by the case of *Pilcher* v. *Rawlins*[17].

(*d*) *Prior Equitable and Subsequent Legal: Pilcher* v. *Rawlins*[18]: In 1851, *P* and his co-trustees lent money, which they held on trust, to *R* on security of the mortgage of certain property. The documents of title to the property were delivered to *P*. By 1856, by which time he had become the sole surviving trustee, *P* reconveyed the property to *R*, in consideration of a payment to him by *R*. The deed of reconveyance discharged the mortgage on the property and *P* and *R*, who were both solicitors, made out an abstract of title which showed *R* as a fee-simple owner and omitted a reference to the mortgage and reconveyance. *R* then created a legal mortgage on the property to *S* and *L*. The money advanced to *S* and *L* on the security of the mortgage was shared by *P* and *R*. The beneficiaries under the trust, on discovering the fraud, claimed priority over *S* and *L*. Held, *S* and *L* as *bona fide* purchasers of the legal estate for value, without notice of the equitable interests of the beneficiaries, took free of those interests.[19]

James, L.J. stated in this case[20]:"I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and according to my view of the established law of this court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence and an unanswerable plea to the jurisdiction of this court. Such a purchaser may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and

16. Followed in *Morrison, Jones & Taylor, Ltd., Re*, (1914) 1 Ch 50. See *Hawks* v. *McArthur*, (1951) 1 All ER 22. But under Land Charges Act, 1925 and 1972, perhaps these may be registered as general equitable charges or equitable easements. (*Snell's Principles of Equity*, p. 46, note 8 and p. 58, note 93).
17. (1872) 7 Ch App 259: (1872) 11 Eq 53 (Court of Appeal in Chancery).
18. *Ibid*. See also *Shamlal* v. *Banna*, (1882) 4 All 296.
19. Cracknell: *Law Students' Companion*, 1974 Edn., Case 234, p. 72.
20. (1872) 7 Ch App 259, 268.

also the presence or absence of notice; but when once he has got through that ordeal and has satisfied the terms of the plea of purchase for valuable consideration without notice, then this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage, which he has obtained. In such a case the purchaser is entitled to hold that which, without breach of duty, he had had conveyed to him."[21]

Maitland remarks, how could it be otherwise? A purchaser in good faith has obtained a legal right. In a court of law that right is his: the law of the land gives it to him. On what ground of equity is it going to be taken from him ? He has not himself undertaken any obligation, he has not succeeded by voluntary (gratuitous) title to any obligation, he has done no wrong, he has acted honestly and with diligence. Equity cannot touch him, because, to use the old phrase, his conscience is unaffected by the trust.[22]

Cave v. *Cave*[23] is illustrative of both, the fundamental rule and its qualifications. It is the purchaser of a legal estate without notice, one has to note, on whom lies the burden of its proof. [24]

(*ii*) Characteristics of a bona fide purchaser for value without notice.— It is necessary for the purchaser that he must have acquired the property *bona fide*, that is, honestly, without deception, fraud or collusion. If not, he loses priority. An equitable estate is not as strong as a legal estate. As mentioned by Maitland in his discussion on the subject, it is liable to be defeated by a claim of *bona fide* purchaser for value without notice. It then meets its Waterloo. Such a purchaser is equity's darling and in his presence the poor owner of his equitable estate is forgotten. The purchaser for value and without notice is the bogey that scares away equitable titles.

(1) The purchaser must have given value for the property. It is not necessary to show that the consideration was adequate. An existing debt is sufficient value.[25] But the consideration must be real, not a pretence. If no consideration is given, the person getting property is a volunteer. And equity does not help a volunteer. Such a person takes an estate subject to equities attaching to it, *e.g. A* gifts his land to *P*. *P* gets a legal estate but in case an equitable interest is attached to the land, *P* will take the estate subject to it as he is a volunteer.

(2) The purchaser must have obtained a legal estate. If he obtains an equitable estate, he has nothing superior to equity from which he claims to be free. Therefore if he takes a legal estate he will be protected by the doctrine, even though his title is defective.

There are three qualifications to the second rule above. They are as follows:

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21. Cited by Maitland: *Lectures on Equity*, 1969 Edn., p. 114.
22. *Ibid.*, pp. 114-115.
23. (1880) 15 Ch D 639.
24. *Nisbet & Pott's Contract, Re*, (1906) 1 Ch 386.
25. *Thorndike* v. *Hunt*, (1859) 13 De G&J 563: 28 LJ Ch 417.

(*a*) better right to a legal estate,

(*b*) subsequent acquisition of legal estate, and

(*c*) mere equities.

In *Thorndike* v. *Hunt*[26], one *T* had some money in trust for *A*, which he was ordered to deposit in court. He paid the amount and the money was treated as belonging to *A's* estate. It thereafter appeared that *A* was also a trustee for *B* and by misappropriating *B's* fund with him, he had paid the money into court. The question was whether *B* could follow the money into court. It was held that *B* could not, because *A* had thereby obtained a legal title. The Accountant-General held the money on *A*'s behalf. Thus, *B*'s right to follow the money was not greater than *A*'s right to retain it.

If a purchaser at the time of purchase comes into property without notice of prior encumbrance, and thus fails to get a better title than the former, he will nevertheless prevail over a prior equity if he subsequently gets in a legal estate without being a party to a breach of trust. Between him and the owner of prior equity, the equities are equal and there is no reason to deprive the purchaser of the advantage he reaps at law by his diligence.[27]

A purchaser of an equitable interest without notice takes it free from mere equities but subject to prior equitable interests.

(*iii*) **Doctrine of Notice.**—Notice means the "knowledge" of a fact which would make a rational man act in the light of the knowledge so acquired.[28]

The doctrine states that a person who purchases an estate, though for value, after notice of a prior equitable claim, becomes a *mala fide* purchaser and takes subject to that right. He cannot beget in the legal estate and defeat such prior claim. Fraud or *mala fides* is the proper ground on which the court is governed in the case of notice.[29]

A purchaser must have had no notice of the equitable interest at the time of purchase. If he has and he purchases, he will hold subject to the charge. One who relies upon the seller's assurances that there is no charge on the property acts at his own peril. A purchaser is affected by notice of an equity in the following three cases:[30]

(*a*) *Actual notice*: where the equity is within his own knowledge.[31] In actual notice knowledge of a fact is brought home directly to a party.

(*b*) *Constructive notice*: where the equity would have come to his own knowledge if proper inquiries had been made.[32] Here the knowledge is imparted by the courts on presumption.

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26. *Thorndike* v. *Hunt*, (1859) 13 De G&J 563: 28 LJ Ch 417.
27. *Bailey* v. *Barnes*, (1894) 1 Ch 25.
28. *See* Section 3, Transfer of Property Act, 1882.
29. *Le Neve* v. *Le Neve*, (1937) 1 Amb 436.
30. *Snell's Principles of Equity*, p. 50.
31. *Barnhart* v. *Greenshields*, (1853) Moo PC 18.
32. *Bailey* v. *Barnes*, (1894) 1 Ch 25.

(c) *Imputed notice*: where his agent as such in the course of the transaction has actual or constructive notice of the equity.

As can be seen from the foregoing examples, one has to note that a legal owner must have no notice *at the time of vesting* of the legal estate in him. His earlier ignorance of the notice is incapable of protecting him. At the same time, his subsequent knowledge of the notice cannot defeat his claim.

Rules as to notice.—Notice is an important information which sets a man thinking. On it rests the starting point of a legal action as contemplated by the legislature. It must be given to an interested person and should be clear, distinct and unambiguous. It should include important information and must be signed, dated and served on the proper person.

Notice to be actual must be given by the person interested in the property to a purchaser, clearly and distinctly, and in the course of negotiations. Vague reports do not bind a purchaser's conscience.

Constructive notice is "no more than evidence of notice". Presumptions regarding it are "so violent that the court will not allow even of its being controverted".

Bank of Bombay v. *Suleiman*[33], is an appropriate case illustrating this point. One *S* made a will and gave his immovable property to his son *A*. He appointed *A* as executor of his will too. By the same will, *S* gave Rs 30,000 to his second wife's son *B* and charged *A*'s property for this. This charge was exactly of the nature of an equitable estate in England and was binding on all, except a bona fide purchaser for value and without notice, as if it was an equitable interest.

A now mortgaged the property to Bank of Bombay. The bank in trying to recover the mortgaged amount argued that as they were unaware of the equitable charge upon the property when it was given in mortgage, the charge was not and could not be binding on them. The bank in fact did not know it, but had they inquired as to how *A* got in the estate (and it was their duty to do so which they did not discharge) they would have come to know of the charge of *B* on *A*'s property. But as they did not do so knowingly, they were held to have constructive notice of *B*'s charge and therefore their mortgage was subject to *B*'s charge upon the mortgaged property in their hands. In cases where the purchaser has actual notice and in cases where he had deliberately or carelessly abstained from making those inquiries that a prudent purchaser would have made, he is fastened with the constructive notice of a thing. Thus a purchaser with notice of a mortgage will have constructive notice of the encumbrances referred to in the mortgage deed.[34]

In *Birch* v. *Ellames*[35], a mortgagee lent money on land. He knew that the title deeds were deposited with some other person but he abstained from making those inquiries that a prudent purchaser would have made. He was held to have

33. 33 Bom 1 (PC).
34. *Bisco* v. *Earl of Banbury*, (1676) 1 Ch Ca 287.
35. (1794) 2 Anstr 427.

notice of the charge that was in fact secured by the deposit. Registration of a charge under the Land Charges Act, 1972 is a notice. Moreover, a purchaser should not be satisfied with an abstract of the vendor's title but require him to produce them and he must verify them. If he fails to do so, again the notice will fasten upon him,[36] unless a reasonable excuse for non-production is given which did not involve the purchaser either in fraud or negligence. Not only must land deeds be investigated but the land itself must also be inspected, because if it is occupied by a third party, occupation amounts to constructive notice.

Imputed notice is a notice, actual or constructive to an agent. But the notice obtained by the agent must be in the capacity as an agent as such, in the same transaction, and it must be a material one. If a solicitor acting for both the parties in a transaction receives notice, it is imputed to each party unless there is fraud. Where there is a fraud by the agent his knowledge cannot be imputed to the principal.

Protection of this doctrine extends not only to the purchaser but also to any person claiming through him. The doctrine of notice is, therefore, not applicable in case of subsequent transferees from the *bona fide* purchaser for value without notice. The priority is therefore not lost as such purchasers are allowed shelter under the title of the first purchaser. Thus, where *A* is a purchaser with notice, if he has purchased the property from *B* who had obtained it without notice of an equitable interest, the doctrine does not affect *A*.[37] If it was otherwise, it would amount to clogging or stagnation of property which the law abhors. At the same time, trustees cannot misuse their position (by selling trust property to a *bona fide* purchaser for value without notice and then repurchasing the same having passed it through other hands) and benefit out of it.[38]

***(iv)* Fraud, Estoppel and Gross Negligence.**—Prima facie claims to priority are postponed where one assists illegally through fraud, estoppel or gross negligence. In other words, one who assists illegally must suffer. A prior legal interest may be postponed to a subsequent equitable interest, because here the equities are not equal, and the law prevails only where equities are equal. Similarly, a prior equitable interest may be postponed to a subsequent equitable interest because of the inequitable or negligent conduct of the former. An apt example of unequal equity is *Rice* v. *Rice*[39]. Other leading examples are *Grierson* v. *National Provincial Bank of England*[40] and *Northern Counties of England Fire Insurance Co.* v. *Whipp*[41]. In *Walker* v. *Linom*[42], due to the mortgagee's gross negligence, the mortgagor got a chance to create a subsequent mortgage and he was therefore postponed to a subsequent equitable owner.[43]

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36. *Spencer* v. *Clarke*, (1878) 9 Ch D 137.
37. *Wilkes* v. *Spooner*, (1911) 2 KB 473; *Harrison* v. *Forth*, (1695) Prec Ch 51; *Shamlal* v. *Banna*, (1882) 4 All 296.
38. *Barrow case*, (1880) 14 Ch 432.
39. (1853) 2 Drew 73.
40. (1913) 2 Ch 18. See *Coleman* v. *L.C.&W. Bk. Ltd.*, (1916) 2 Ch 353.
41. (1884) 26 Ch D 482.
42. (1907) 2 Ch 104.
43. For Indian Law see *Imperial Bank of India* v. *Rai Gyo Thu & Co.*, 51 Cal 86 (PC).

The facts of the *Northern Counties cases* were as under. *C*, the manager of a company, executed a legal mortgage of his own land to the company and handed over the title deeds to them which were placed in a safe of which a duplicate key was held by *C*, who later on removed the title deeds and executed a second mortgage to *W* by depositing the same with her. *W* was unaware of the first mortgage. Held:

(1) *The court will postpone the prior legal estate to a subsequent equitable estate.*—(*a*) Where the owner of the legal estate has assisted in or connived at the fraud which led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which assistance or connivance, the omission to use ordinary care in the inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained; and (*b*) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

(2) But the court *will not postpone the prior legal estate to the subsequent equitable estate on the ground of mere carelessness or want of prudence on the part of the legal owner.* (Per Fry, L.J.)

In this case the conduct of the company, although careless, was not evidence of fraud. The mortgage to the company therefore took priority over the mortgage to *W*.

(*v*) **Registration.**—Due to uncertainty and risk involved in the equitable doctrine of purchaser without notice, in England, it is replaced by provisions for the registration of rights. It is provided therefore that for certain transfer of properties, registered instruments are necessary and the registration amounts to a notice from the date of registration.[44] In the words of Snell, therefore, "the question is no longer the state of the purchaser's mind but the state of the register".[45] He whose charge is first registered has priority over the other. Notice actual or constructive is no bar to registration. Registration itself is a public notice.[46]

In India.—Under the Indian Registration Act, 1908, from April 1, 1930 registration of a document regarding immovable property is considered to be a constructive notice to all concerned.[47] When once a right in respect of property is duly registered, the subsequent charges and interests created thereon are subject to the right registered. But the following conditions must be fulfilled before this can so happen:

(1) The instrument must be compulsorily registrable, e.g. *A* promises *B* to sell him certain property. He prepares an instrument for this and

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44. Law of Property Act, 1969; Land Charges Act, 1972.
45. *Snell's Principles of Equity*, p. 57.
46. Land Charges Act, 1972.
47. *See* Section 3, Transfer of Property Act and its explanations.

gets it registered. Thereafter *A* sells the property to *C*. If the instrument between *A* and *B* is not compulsorily registrable it cannot be inferred that *A* had constructive notice. It may be that *C* may have that type of notice due to other reasons but here no such inference can be drawn.

(2) The instrument must have been registered in an appointed manner. Thus, though it is registered, if the details of registration are not duly entered in the register meant for it, such incomplete details cannot be as effective as a constructive notice. If after making proper inquiries into the registration office regarding prior charges upon the property, no details are forthcoming so as to give correct information, such incomplete details do not constitute notice. But if no inquiry is made at all, that conduct constitutes and results in having constructive notice.

(3) The purchase must have been made after having such notice.

Due to the Land Charges Act, 1952 the following are registrable:

(1) Suits pending before 1925.

(2) Writs.

(3) Instruments regarding disposal of property.

(4) Land Charges.

(*vi*) **Overreaching.**—Overreaching is a device (a conveyance) whereby the rights overreached are transferred from the land to the purchase money. They do not become valueless. Overreachable rights may be equitable as well as legal.

The object of this device is merely to prevent purchasers of property from being affected by notice of equitable interests relating to money lent on mortgage of the property; it does not affect the priority of such equitable interests *inter se*.[48]

(*vii*) **Valuation of working of the maxims.**—*In England*[49]: In view of the above it will thus be seen that the maxim "where there is equal equity, the law shall prevail" has not been able to retain its earlier value and importance. Moreover, due to the Property Act, 1969 and the Land Charges Act, 1972 perplexing questions of priority are reduced to the minimum. Regarding the foregoing discussion about the two maxims and its rules, as expressed by Snell, we may say that before 1926 the rule of "first made, first paid" prevailed. But this rule has often been displaced by "where there is equal equity, the law shall prevail". If the subsequent legal mortgagee knows about the prior equitable mortgage, the rule of "first made, first paid" would be applied; but if the subsequent legal mortgagee has no actual or constructive notice, he will receive priority.

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48. *Snell's Principles of Equity*, p. 62.
49. Hanbury: *Modern Equity*, Chap. 29; *Snell's Principles of Equity*, Chap. 4.

This so-called second rule is in fact no rule; it is the converse of the first or an exception to it. These maxims and the rules are unable to inform us as to when equities become equal and when they become unequal. There is no clear guidance as to what rule is to be applied and the strange fact is that it is only after the issues are drawn by the courts, does one come to know what rule has been applied.

Instances may be quoted wherein no maxim out of these two applies, e.g. if the prior legal mortgage falls outside the ambit of these two rules and its priority is postponed to a subsequent equitable mortgage, then what is the remedy ? The question remains unanswered by these maxims.

Before 1926 there was no question of conflict between two legal mortgages, as, what remained after the first legal mortgage was an equitable right of redemption of which only an equitable mortgage could be made. The competition was therefore limited between (1) successive equitable mortgages, or (2) between prior equitable and subsequent legal mortgage, or (3) between first legal and subsequent equitable mortgage. Questions of priority ordinarily seem to be simple at first sight but are actually not so. A number of complications may arise therein, e.g. there are two successive mortgages of a property made, No. 1 and No. 2. The following questions may be posed:

A. If the subsequent mortgagee (No. 2) does not know about prior mortgage (No.1), can the rule first made, first paid be changed?

B. If the above situation has arisen due to negligence of No. 1 or No. 2, what difference does it make? or

C. If No. 1 has assisted the mortgagor in keeping mortgage No. 1 secret from No. 2, what would happen?

D. If one is a legal mortgage and the other is an equitable mortgage, what is the position?

Till 1925 the above questions were disposed of by applying the two maxims and the exceptions. But in the changed circumstances and the soaring land prices questions of priority need not arise, because prices have multiplied far beyond ordinary imagination and it is possible that competing interests may be simultaneously satisfied.

In India: In India the principle contained in the maxim has been incorporated in Sections 40 and 78 of the Transfer of Property Act, 1882. Section 40 explains the case of prior equitable and subsequent legal estate and Section 70, the case of a prior legal and subsequent equitable estate. The provisions of the Transfer of Property Act, Section 40(2), Trusts Act, Sections 91 and 95 and Specific Relief Act, Section 27(*b*) when read together do protect a transferee who got the document executed and paid the amount in good faith and without notice. Under the Indian Registration Act, Section 47, when a person gets the document registered, the registration relates back to the date of its execution. Even though he had notice of the pre-existing contract after its

presentation for registration but it was actually registered his position remains uneffected.[50] Section 40 runs thus:

> 40. *...Or of obligation annexed to ownership but not amounting to interest or easement.*
>
> Where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands.

The illustration to the section runs thus:

A contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract.

B may enforce the contract against *C* to the same extent as against *A*.

"The ultimate para of Section 54 of the Transfer of Property Act expressly enunciates that a contract for the sale of immovable property *does not, of itself create any interest in, or charge on such property* but the ultimate and penultimate paras of Section 40 of the Transfer of Property Act make it clear that such a contract creates *an obligation annexed to the ownership of immovable property, not amounting to an interest in the property* but which obligation may be enforced against a transferee with notice of the contract or gratuitous transferee of the property." This is an instance of "the equitable ownership in property recognised....(and)....translated into Indian law—as an obligation annexed to.....property".[51]

The illustration to Section 40 explains the scope of para (2) of the section. Many of the doctrines of English Equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes such as the Trusts Act the Specific Relief Act and the Transfer of Property Act. Under the Trusts Act, it is an obligation in the nature of trust and there the subsequent transferee is bound by the obligation as a constructive trustee.

In *London and S.W. Rly. Co.* v. *Gomm*[52], a railway company conveyed land and the transferee covenanted to reconvey the same to the railway company at any *future time*, receiving back the purchase money. The covenant bound himself, his heirs and assigns. The covenant, though it created an equitable contingent interest, was found to be void as it contravened the rule against prepetuity of English law. But in India such agreements do not create any interest legal or equitable in property; *they only create obligations of fiduciary character,* which are enforceable. Further, they are not hit by the rule against perpetuity. The rule of perpetuity as laid down in the case of *Ram Baran* v. *Ram*

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50. *Satyamandalini* v. *Shahadur Mondal*, AIR 1962 Cal 49.
51. *Bai Dosabai* v. *M.G.*, (1980) 3 SCC 545.
52. (1882) 20 Ch D 562.

Mohit[53], "concerns rights of property only and does not affect the making of contracts which do not create rights of property, even though the contract may have reference to land.[54]

On the maxim "where there are equal equities the first in time prevails" is based on the doctrine of notice, and Sections 48, 78 and 79 are instances of its expression. And, on the maxim "where there is equal equity, the law shall prevail" are based the doctrines of election, marshalling and set-off which are incorporated in Sections 35, 81 and 108 of the Transfer of Property Act.

Section 78 of the Transfer of Property Act runs thus:

> 78. *Postponement of prior mortgagee.*—Where through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

These provisions have been discussed before. Briefly stating, there is no distinction between legal and equitable estates in India. There is no question of any conflict therefore. The general rule *qui prior est tempore potior est jure*—"where the equities are equal, the first in time prevails", governs the priorities. It is expressed in Section 48 of the Transfer of Property Act. Reading these provisions along with the provisions of the Registration Act, 1908, the following propositions can safely be enumerated in this regard:

(1) In case of successive transfers of the same property, the first in time prevails over the later *i.e.* the later in time must give way to the earlier. But in case of written transfers their priority is determined by the date of execution of the document and not by the date of registration of the document.

(2) According to Section 17 registration of certain documents is compulsory; while there are certain documents registration of which is optional (Section 18). When the registration is optional, questions of priorities arise, but when it is compulsory such questions do not arise.

(3) According to Section 50 of the Registration Act certain registered documents relating to land take effect against unregistered documents. When registration is optional a registered document though registered subsequently must take precedence over an unregistered document which is executed prior in time. Thus, a subsequent registered deed will have priority over a prior unregistered one. Of course, this is subject to the doctrine of notice.

(4) Where property under a prior unregistered document is delivered, the doctrine of notice (Section 3 of the Transfer of Property Act) will come into play and the subsequent transferee will lose his priority. This is because delivery of actual possession to the former transferee amounts to a notice to the subsequent transferee.

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53. AIR 1967 SC 744 .

54. *S.W. Rly. Co.* v. *Associated Portland Cement Manufacturers*, (1910) 11 Ch 12

(5) Suppose for example that a subsequent transfer is made by a registered instrument and such a transferee has actual notice of the prior unregistered transaction. In such a case, the registered transferee will lose his priority, which position is very clear.

(6) A legal mortgage prevails over an equitable one in England, unless the holder of a legal mortgage has done or omitted to do something which disqualifies and therefore prevents him from asserting his priority. In India, as explained in Section 78 of the Transfer of Property Act, where a subsequent mortgage has been created through the fraud, misrepresentation or gross neglect of a prior mortgagee, the prior mortgagee shall be postponed to the subsequent mortgagee. *Northern Counties of England Fire Insurance Co.* v. *Whipp*, discussed above, is a leading decision on this point.

(7) Insofar as a mortgage by deposit of title deeds is concerned, in India it is considered as at par with other mortgages. If we look to Section 48 of the Registration Act, it will be found that special treatment has been given to such mortgages. The section says that such a mortgage under Section 58 of the Transfer of Property Act shall take effect against any mortgage deed subsequently executed and registered which relates to the same property. The apparent reason for this is that according to Section 58 (*f*) of the Act such a mortgage is a completed transfer and not a mere agreement to transfer. As laid down in *Imperial Bank* v. *Rai Gyaw*[55], there is no distinction between a legal and an equitable mortgage in India. The provisions of Sections 78 to 80 of the Transfer of Property Act are therefore equally applicable to such a mortgage.

6. RULE 2: RULE OF NOTICE: DEARLE v. HALL[56]

This rule applies to successive dealings with equitable interest in any property, real or personal.

(*i*) **The Rule stated**: The rule is that "priority depends upon the order in which notice of the dealings was received by the person by whom the fund is distributable, or in the case of settled land, by the trustees of the settlement. Equitable titles have priority according to the priority of notice. If the notices are received substantially simultaneously, the dealings rank in the order in which they were made".[57]

(*ii*) **Exception**: Knowledge of prior assignment by the person advancing money results in the loss of his priority even if he gives notice first, but knowledge acquired after advancing is no bar to gaining priority.

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55. (1923) 1 Rang 617 (PC).
56. (1828) 3 Russ 1.
57. *Stocks* v. *Dobson*, (1853) 4 De GM&G 11, 17; *Calisher* v. *Jorbes*, (1871) 7 Ch App 109; *Johnstone* v. *Cox*, (1880) 16 Ch D 571; *Dallas, Re*, (1904) 2 Ch 385; *Snell's Principles Equity*, p. 63.

(*iii*) **Facts of Dearle** v. **Hall**[58]: In his will, made in 1794, *PB* bequeathed his residuary estate to his executor on trust for sale and conversion for his son *ZB*. The interest payable to *ZB* amounted to £ 93 a year. In 1808, *ZB* assigned to Dearle an annuity of £ 37 a year, payable during *ZB*'s life and secured on *ZB*'s annuity of £ 93, *ZB* retaining his right to the same. If *ZB* failed to pay to *D*, his annuity of £ 93 was to be paid to *D* who was to take his £ 37 from the annuity charged and return the balance to *ZB*. Mr Unthank, the executor was unaware of this.

In 1812, *ZB* sold his life interest to *H* who had no notice of the earlier assignment to *D*. *H* gave written notice of his assignment to Unthank. Held, the assignment to *H* took priority over *D's* assignment as *H* had been the first to give notice.

The idea underlying the rule, as it seems to be, is that by not giving notice the first assignee helps the assignor to make a subsequent assignment. The first assignee, therefore, becomes a party to a fraud to be practised upon the subsequent assignee. It is therefore just that his conscience is not pure and that he should be postponed. Here again, as stated before, a gratuitous assignee will not get priority because he, "though disappointed, is not defrauded". A volunteer can get no more than what the assignor was able to give.[59]

(*iv*) **Valuation and Criticism.**—The rule regulates priorities and does not create them, and it applies to equitable interests already created in any form of property, real or personal, but does not apply to shares in a company governed by the Companies Act. According to Snell, the principle behind the rule is lost sight of and at the present day its application has become absolute as was done in the case of *Dallas Re*[60] wherein the creation of *B*'s subsequent charge was not due to the fault of the prior assignee *A* in giving notice earlier.

The criticism levelled against this rule is that Justice Plumer, M.R. while giving his decision in *Dearle* v. *Hall*, should have based it on the diligence or negligence of one or the other mortgagee. Had he based it on the negligence of the other party, negligence would have been the reason for losing priority, but unfortunately he stressed upon the diligence of the mortgagee, which gave rise to this rule. Consequently the trustees sought refuge therein. This situation has been compared to "grabbing a plank in a shipwreck" i.e. *tabula in naufragio*.

The rule in *Dearle* v. *Hall* applies to interests already created but it does not apply to future interests. It applies to equitable assignments also,[61] but it does not apply to shares in a company.

The Law of Property Act, 1925 in England has made appropriate arrangements so that a mortgagee can know of prior charges. For this purpose, the land charges register must be examined and titles must be inspected. If no

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58. Cracknell: *Law Students' Companion*, 1974 Edn., Case No. 40, p. 25.
59. *Snell's Principles of Equity*, p. 63; *Fraser* v. *Imperial Bank*, (1912). 10 DLR 232; *Justice* v. *Wynne*, (1860) 12 Ir Ch R 289.
60. (1904) 2 Ch 385.
61. Discussed in the following chapter.

prior encumbrances or charges come to light he can proceed further. Of course, this arrangement also is not without its faults. [62]

(*v*) **In India.**—The rule in *Dearle* v. *Hall* does not apply in India and the priority of the assignee of an interest in property does not depend upon the principle of giving notice first, but is governed by the order of successive interests.

B. ASSIGNMENTS OF CHOSES-IN-ACTION

1. MEANING

A "chose" means a thing, and "action" is the right of a party to file a suit in a court of law to recover money or things.

A chose may be one in possession or one in action. Again, it may be legal because it is enforceable in a court of law, or it may be equitable because it is enforceable in a Court of Chancery only.

In the literal sense the expression means a thing recoverable by action, as contrasted with a chose in possession, i.e., a thing of which a person has not only ownership but also actual physical possession. The meaning of the expression has varied from time to time but it is now used to describe all personal rights of property which can be claimed or enforced only by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession. Subject to exceptions, a chose-in-action may be bought, sold, given away, settled or left by will or become the subject of proceedings under the Married Women's Property Act, 1882, Section 17, just like any other interest in property.[63]

2. DEFINITION

Channel, J.,[64] defines chose-in-action as "a well-known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession".

Debts due to specialty or by simple contract, whether debts of record or of judgment debts, mortgage debts, debentures and dividends, negotiable instruments including bills of exchange, promissory notes and cheques, stocks, shares in joint stock banks, policies of assurance of every kind, pensions, patents and copyrights, bills of lading, shares in partnership, right of action arising under contract and out of tort, lessee's right to be relieved against forfeiture, the right of re-entry for non-payment of rent and several others are included within this term.

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62. For details *see* Hanbury: *Modern Equity*, 9th Edn., (1969), pp. 573-596.
63. *Halsbury's Laws of England*, p. 636.
64. In *Torkington* v. *Magee*, (1902) 2 KB 427. *See also* Hanbury: *Modern Equity*, 9th Edn., (1969), p. 636 and *Snell's Principles of Equity*, p. 69.

3. ATTITUDE OF THE COMMON LAW

The Common Law rule made a chose-in-action unassignable, but it could be assigned by or to the king. This was possible if the debtor assented to the assignment. Reasons for this unassignability were twofold. According to Snell[65] assignment would be "the occasion of multiplying of contentions and suits, of great oppression of the people...and the subversion of the due and equal execution of justice".[66] Hanbury explains that this was "partly due to the fact that they were regarded as strictly personal and partly due to the fear of maintenance; any attempted assignment was viewed as an intrusion by a third party into a dispute between two others".[67]

One has to note at the outset that assignment of a bare right to sue is bad at law and at equity too; but there is "no rule of law which prevents the assignment of the fruits of an action".[68]

Balfour v. *Sea Fire Life Insurance Co.*[69] explains the situation succinctly and very clearly thus: "At Common Law, choses-in-action were not assignable and an assignee had to go to Equity to enforce his claims. If the thing in action was a legal claim, he had to file a bill to compel the assignor to permit him to sue in the name of the assignor, and equity would help him only if he had given valuable consideration for the assignment. But even before the Supreme Court of Judicature Act, 1873, the doctrine that there could not be an assignment at law of an existing debt had long been exploded". The words of Buller, J., in *Master* v. *Miller*[70] can be cited in support of this proposition. He said that "the good sense of the Common Law rule seemed to be very questionable to him". Equity, therefore, taking a less extreme view of the situation and considering each case on its merits gave effect to assignments not only of equitable things-in-action but also to legal things-in-action.

Thus in course of time strictness of the Common Law rule had to give way to the mercantile practice and statute-created exceptions and finally by the Judicature Act, 1873 and now by Section 136 of the Law of Property Act, 1925, "any debt or other legal thing in action" was made assignable at law. This provision was extended to legal as well as equitable choses.[71]

4. KINDS OF ASSIGNMENTS

By way of useful contract Snell gives four categories of assignments: (*i*) statutory assignment of legal choses, (*ii*) statutory assignment of equitable choses, (*iii*) equitable assignment of legal choses, and (*iv*) equitable assignment of equitable choses.

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65. *Snell's Principles of Equity*, p. 69.
66. *Lampet case*, (1612) 10 Co Rep 46 b.
67. Hanbury: *Modern Equity*, p. 637.
68. *Glegg* v. *Bromley*, (1912) 3 KB 474. See also *Dawson* v. *G.N.R.*, (1905) 1 KB 260.
69. (1857) 3 CB (NS) 300.
70. (1791) 4 TR 320, 340; *Jowitt's Dictionary of Engligh Law*, p. 367.
71. See also *Fitzroy* v. *Cave*, 21 TLR 612.

5. REQUIREMENTS OF A STATUTORY ASSIGNMENT

The Law of Property Act, 1925, Section 136(1) provides that: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action,[72] of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law...".

To analyse the section, (*i*) there must be a document in writing, (*ii*) it must be an absolute and complete assignment, (*iii*) the assignment should not be by way of charge only, and (*iv*) an express notice to this effect should be given to the debtor.

Thus a mere direction to the debtor is no assignment. A cheque is no assignment because it is but an order to a bank to pay and not an absolute assignment. Similarly, a charge is not an absolute assignment.[73] No consideration is required[74] and no particular document is necessary.

A notice of assignment to the debtor is a statutory requirement and the assignment is effective from the date of the notice received by the debtor. The consequences of an absolute assignment would be to pass on all the legal powers, rights and legal remedies to the assignee. Vexatious assignments and those in the nature of maintenance are not recognised at law. Such an assignment is subject to all prior equities. Notice given by the assignor or assignee, however, must be clear, express and unambiguous with date of assignment and the amount assigned. Even if the debtor is illiterate, a written notice is a must. If debtors are more than one, notice to all is necessary. If any of them if insolvent, notice must be given to the solvent debtors. The section is silent[75] as to who and at what time should give notice, but either the assignor or the assignee may give it. There is no time-limit fixed for giving it, but if it is not given the whole transaction becomes an equitable assignment. The effect of a statutory assignment would be that the assignee, now being the owner of the chose at law can sue the debtor in his own name without joining the assignor. The benefits of giving a notice are discussed below.

6. BENEFITS OF GIVING NOTICE

Notice is the very basis of a right to sue. By giving it one gets a right *in rem* (without notice one gets a right *in personam*), and the assignment becomes effective and priority is obtained.[76] Moreover, it stops new equities from being created between the original creditor and debtor that become binding on the assignee. It also stops subsequent assignments from taking priority. In the absence of a notice it is very likely that the debtor may pay the amount to the

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72. Including equitable: see *Pain, Re*, (1919) 1 Ch 38, cited in Hanbury: *Modern Equity*, p. 638.
73. *Bank of Liverpool & M. Ltd. Holland*, (1926) 42 TLR 29; *Jones* v. *Humphreys*, (1902) 1 KB 10.
74. *Fitzroy* v. *Cave*, 21 TLR 612.
75. *Ibid.*
76. According to the rule in *Dearle* v. *Hall*, (1823) 3 Russ 1.

original creditor; by notice this consequence is avoided. In case of insolvency of the original creditor it saves the assigned debt from being affected by it. It should be noted that an assignor cannot grant a better right than what he has and therefore a legal assignment is subject to all equitable rights, i.e., an assignee takes subject to all equities existing against the assignor up to the date of notice.[77] By notice, invalidity is cured and what is invalid becomes valid.

7. EQUITABLE ASSIGNMENT

An assignment not legally made is not void or ineffectual, but is an equitable one. As expressed by Lord Macnaghten in *Brandts* v. *Dunlop and Co.*[78]: "It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person." If the debtor ignores the notice, he will do so at his own peril. Since equity looks to the intent rather than the form, the form and mode of assignment are of no consequence. But the intention to assign must be explicit and direct because "you can have no charge in equity without an intention to charge".[79]

The consequence of assignment was that the assignee could sue in his own name in all the divisions of the High Court without joining the assignor as a party on either side.

The essentials of such an assignment are: (*i*) existence of some transaction exhibiting an assignment, (*ii*) an intention to assign, (*iii*) chose or thing to be an assigned must be certain, (*iv*) mode of assignment is immaterial, (*v*) it may not be in writing, (*vi*) the assignee must consent to the transaction, (*vii*) value is necessary, if the assignment is to take place in future or if it is for creation of a mere charge (as distinct from a complete transfer), but there is no reason why a man should not be able to give away an equitable interest as freely as he can give away a legal interest.

William Brandt's Sons and Co. v. *Dunlop Rubber Company Ltd.*[80] is a leading case on equitable assignment. The facts were that Dunlop Rubber Co., the defendants, owed money to K & Co., a firm of merchants. K & Co. in turn owed money to William Brandt's Sons & Co. bankers (hereinafter named W. Co.) K & Co. agreed with W. Co. that the money owing to K & Co. by the Dunlop Rubber Co. should be paid direct to W. Co. W. Co. forwarded to Dunlop Co. a notice in writing that K & Co. had assigned to them the right to receive the money owed by Dunlop Co. to K & Co., and requested Dunlop Co. to sign an undertaking to remit the money. Later, when K & Co. had become bankrupt, Dunlop Co. through inadvertence paid the money to someone other than W. Co.

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77. *Knapman, Re*, (1881) 18 Ch D 300.
78. 1905 AC 462.
79. *Hopkinson* v. *Forester*, 19 Eq 74.
80. 1905 AC 454; *Kent & Sussex Saw Mill Ltd., Re*, 1947 Ch 177.

Held, although the language of a formal assignment had not been used, it was immaterial if the meaning was plain. There was a valid equitable assignment of the debt to W. Co. Therefore Dunlop Co. "must pay the money over again, and pay it to the right person" (per Lord Macnaghten), i.e. W. Co.[81]

8. ASSIGNMENT OF FUTURE BENEFITS

In England assignment of future benefits is possible but consideration must be given in such cases or the interest must have been delivered in fact. If not, such assignments are ineffective. Formerly, the Common Law did not allow such assignments, but now it has been made possible.[82]

However, on principles of public policy equity did not allow certain assignments to be effective, as for example assigning the whole of a man's future and present income was ineffective. Public pay, alimony and maintenance and champerty are some of the important heads in respect of which such assignments were barred.

9. POSITION IN INDIA

An actionable claim has been defined in Section 3 of the Transfer of Property Act thus:

> "Actionable claim" means,
>
> (*a*) "a claim to any debt, other than a debt secured by mortgage of immovable property, or by hypothecation or pledge of moveable property", or
>
> (*b*) a claim to "any beneficial interest in moveable property not in possession, either actual or constructive, of the claimant",
>
> (*c*) "which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

A debt is a certain, definite or a liquidated sum actually due and therefore *payable now* (termed as *existent debt*) or a sum that will become *payable in future* by reason of a present obligation (termed as an *accruing debt*).[83] By "actually due" we mean "not actually payable until a later date".[84] This is termed as an accruing debt.[85] Thus all debts according to the definition can be assigned because they are actionable claims.

Insofar as beneficial interest is concerned all or "any beneficial interest in moveable property not in possession..." can be the subject of assignment. Thus, benefit of an executory contract for the purchase of goods[86] is a beneficial

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81. Cracknell: *Law Students' Companion*, 2nd Edn., 1974, Case 346.
82. For a list of such interests see *Snell's Principles of Equity*, pp. 81-82.
83. *Bhupati* v. *Fanindra*, 40 CWN 104.
84. *Haridas* v. *Baroda Kishore*, 27 Cal 38.
85. *Ibid.*
86. *Jafar Meher Ali* v. *Budge Jute Mill Co.*, 34 Cal 289.

interest capable of assignment. But copyright,[87] right to recover damages for breach of contract, a claim to mesne profits, a mortgage debt, debentures, negotiable instruments and mercantile documents, a right of action arising out of a tort, a right to unliquidated damages, pensions and salaries, judgment debt and a decree are not actionable claims.[88] It should be noted that negotiable instruments and bills of exchange and insurance policies are included in the definition but since special statutes govern them, rules regarding actionable claims do not apply to them. They may be said, therefore, to form a special class or caste by themselves.

Looking to the above list, it can be noticed that in comparison to the scope and extent according to the English definition, the Indian definition is narrower.

The modes of assignment are contained in Sections 130 to 132 of the Transfer of Property Act and they combine features of legal as well as equitable assignment. Accordingly a transfer of actionable claim should be (*i*) in writing, (*ii*) signed by the transferor or his agent, (*iii*) the assignment may be with or without consideration, and (*iv*) it is complete on the execution of the instrument. It invests the assignee of all the rights and remedies of the transferor and at the same time, the claims which the debtor had against the transferor will now be available to him against the transferee. In short no particular words are necessary to make an assignment, provided the intention is clear.

As Section 132 explains, the transferee shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

10. DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW

(*i*) English law recognises a distinction between legal and equitable assignment; Indian law does not.

(*ii*) Indian law allows conditional assignment; according to English law it should be absolute.

(*iii*) An assignment in India is complete and operates from the date of the transfer or from the moment of the execution of the deed. Notice to the debtor in India is given for the protection of the assignee (Section 131, Transfer of Property Act). Under English law, notice is the starting point of priority and the rule that until notice is given assignment can only be equitable, prevails there. It does not prevail in India. This rule is known as the rule in *Dearle* v. *Hall*[89].

(*iv*) Under English law, priority is determined by notice; under Indian law the date of execution of the instrument determines it.[90]

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87. *Dwarkaprasad Bhatia*, 1939 All LJ 71.
88. *Afzal* v. *Ram Kumar*, 12 Cal 610; *Dagdu* v. *Vanji*, 24 Bom 502; *Govindrajulu* v. *Ranga Rao*, 40 MLJ 124.
89. 3 Russ 12, 27.
90. *Subramaniya Iyer* v. *Ramsuba Iyer*, 59 Mad 141.

(*v*) The assignment, as the section says, may be with or without consideration in India; under English law, consideration is not essential for the assignment of an equitable or a legal[91] chose. This has not always been so in cases of legal choses. [92] Moreover, under our law actionable claim can be assigned only in the manner provided by the Transfer of Property Act, Section 130. [93]

Section 6 of the Transfer of Property Act, 1882 lays down what cannot be transferred. This is on principles of public policy.

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91. *Holt* v. *Heatherfield Trust*, (1942) 2 KB 1: 58 TLR 274.
92. Hanbury: *Modern Equity*, p. 641.
93. *Holt* v. *Heatherfield Trust*, (1942) 2 KB 1: 58 TLR 274.

PART II

SPECIFIC EQUITIES, EQUITABLE DOCTRINES AND EQUITABLE RIGHTS