CHAPTER I

THE ORIGIN AND DEVELOPMENT OF EQUITY

§ 1. The definition of Equity.

1. Equity literally means fairness. As a part of the English system of jurisprudence, however, its definition presupposes a reference to history.

2. In England, the *original* law was the common law,—the law based on the common custom of the country which was developed and administered by the Common Law Courts. But in course of time the common law became a definite body of rules which was not capable of growth in various directions and even caused hardship and injustice in particular cases owing to the inflexibility of its procedure and modes of redress.[1] Equity originated in the hands of the Chancellor who sat in the Chancery, as the 'Keeper of the King's conscience', to give relief in these cases of hardship, by the application of the principles of morality or conscience. But equity should not be identified with morality. A Court of Equity will not interfere on points of morals except when they are mixed up with the administration of civil rights in property. It cannot enforce the observance of obligations which rest upon only moral grounds; there must be some wrong or injury to the party complaining to the court.

3. Equity, thus, is—**"that portion of natural justice which, though of *such a nature as to admit of being judicially enforced*, was omitted to be enforced by the Common Law Courts,—an omission which was supplied by the Court of Chancery".** (*Snell*). But since the Judicature Acts have amalgamated the two separate systems of Courts for the administration of Common Law and Equity into one,—to define Equity as a body of rules administered by the Courts of Equity would, now, be unsatisfactory. Thus, we are driven to say,"*Equity now is that body of rules administered by the English Courts of Justice which, were it not for the operation of the Judicature Acts, would be administered to only by those Courts which would be known as Courts of Equity.*" (*Maitland*).

§ 2. A short history of Equity Jurisdiction.

1. At the end of the 13th Century, we find three great Courts definitely established: the King's Bench, the Court of Common Pleas, and the Exchequer. All of these administered the Common Law. The Exchequer was, however, something more than a Court—it was also an administrative

1. *See*, further, under §3, *post*.

department of the Government with the Chancery as its secretarial office. At the head of the Chancery stood the Chancellor, who was then not a judge, but "the King's Secretary of State for all the Departments". Whatever *writing* had to be done in the King's name was done under the Chancellor's supervision. Thus, the writs whereby actions were begun in the courts of law were issued from his office. The Chancellor was brought into a closer contact with the administration of justice in another way. Persons who could not get relief in the Courts petitioned the King for redress, as a matter of grace. These petitions were referred to the Chancellor, and in course of time they were addressed direct to him.

II. In the 14th Century, the Chancery entertained petitions where the petitioner has a moral right, which the common law Courts would not protect, or were not competent to protect, due to the peculiar system of procedure obtaining there. Thus, the Chancery undertook to enforce fiduciary obligations known as *uses*. By that time an ordinance was passed (1349), referring all matters of grace to the Chancellor, and by the end of the 14th Century, the Chancery became a permanent judicial tribunal having regular sittings.

III. In the 15th Century, uses became very popular and thus "one great field of substantive law fell into the hands of the Chancellor".

IV. Meanwhile, the Chancery had extended its jurisdiction considerably, and its extent was popularly indicated by the words 'Fraud, Accident and Breach of Confidence'. In the course of the 16th Century, equity developed the rules by which it would administer justice in the field thus assigned to it. They are known as the rules of 'equity and good conscience'.

V. In the 17th Century, the Chancery had to struggle, for its life against the Common Law Courts, until James I finally decided that the Chancery could prevent men from going to Courts of Law, by injunction. From the time of the Restoration, equity is recognised as a part of the law of the land.

VI. By the end of the 18th Century, equity became a definite system and at last made its way into the textbooks. It was a century of great Chancellors, with the last of whom, Lord Eldon, equity ceased to expand, and the period of 'legislative interference' began.

VII. At last came the Judicature Acts of 1873 and 1875 which abolished the old Courts of Common Law and the Court of Chancery, and established instead, a High Court of Justice, divided into five divisions. Since 1881 it has only three divisions—the Chancery, the King's Bench, and Probate and Admiralty Division. Each of the divisions has to administer both sets of rules—of Law and Equity; and in matters where there is a conflict between them, "the rules of equity shall prevail" (*see* §9, *post*).

To sum up: Whatever may have been the origin of 'equity' as a supplement to the laws of England, aimed at preventing hardship and securing justice, it has now become a definite system of rules as exact and binding as any other part of those laws.

§ 3. The nature of Equity and the foundation of Equity Jurisdiction.

1. The history traced above shows clearly that Equity was essentially an *addendum* to the Common Law. It provided a distinct set of rules, no doubt, but those were *not meant to supersede* the Common Law. As *Maitland* remarks,

"Equity had come not to destroy the law, but to fulfil it."[2]

2. Historically, the jurisdiction of equity may be traced to the following:

(a) Inflexible procedure in Common Law;

(b) Inadequacy or remedy at Common Law;

(c) Absence of relief in certain cases at Common Law, owing to its defective procedure.[2]

3. As *Maitland* observes, **"Equity is not a self-sufficient system."**

Equity presupposed the existence of common law at every point. It accepted the common law rule on any question that might arise, but added that something more was necessary, either because the common law rule was inadequate, or because it caused hardship. There was no inherent conflict between the doctrines of Equity and Law, and save for the temporary conflict between them during the period of the Commonwealth, their practical working has also been harmonious. A brief analysis of some of the equitable doctrines will show that

"the relation between Law and Equity is not that between two conflicting systems; it is the relation between code and supplement, between text and gloss".

4. The dependence of Equity on common law was so evident that "if the common law had been abolished, equity must have disappeared also, for at every point it presupposed a great body of common law". Equity was not, indeed, a

2. At common law, there were a fixed number of forms of actions and a suitor could expect relief only if he could come in within any of these forms. Now, every such action started by a *writ*, i.e., a written document issued in the name of the King. The writ was framed with reference to the particular facts of the case and the different forms of actions. If no writ could be framed to meet the facts of his case, the plaintiff could get no remedy. We have seen that these writs were issued from the Chancery. The inadequacy of remedy was sought to be removed by passing the Statute of Westminster II, 1285,—which empowered the Chancery to issue new writs in *consimili casu*. But this Statute proved unsuccessful, for two reasons: (*i*) The Common Law Judges had the last word in deciding the validity of the adopted writs; but they were conservative and jealous of innovations. They were guided by the already accepted principles of common law and would quash a writ if contrary to these principles. (*ii*) The progress of society and civilisation necessitated the recognition of new rights and remedies, for which a more elastic system was required. This led to the introduction of a separate jurisdiction for Equity. *Lord Talbot* summed up the relation between law and equity nicely in *Dudley* v. *Dudley*, (1705) 94 E.R. 118, thus—"Now equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the vigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. *Equity, therefore, does not destroy the law, nor create it, but assists it.*"

system at all, it was rather a collection of additional rules. That is why Lord Talbot[2] said that "Equity does not destroy the law, nor create it, but assists it".[2]

In another context, *Maitland* has observed—

"Equity without Common Law would have been a castle in the air, an impossibility."

(*a*) Common Law did not recognise a *trust*, and regarded the trustee as the owner of the land. Equity did not say that the *cestui que trust* was the owner of land,—it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust.*

(*b*) Similarly, the equitable remedies like *Specific Performance or Injunction* did not destroy the Common Law remedy of damages, but were either additional or alternative. As *Maitland* says,

"We ought not to think of law and equity as two rival systems":—"No, we ought to think of Equity as supplementary law, a sort of appendix added to our code."

5. Equity is, thus, *a collection of appendices.* While some chapters of law have been copiously glossed by it, others are quite free from equitable gloss. Thus, equity keeps clear of the province of the Law of Crimes, and large portions of the Law of Torts as well, e.g.,—*assault, battery, malicious prosecution.*

6. The spheres in which equity has supplemented the law may be enumerated as follows:

(*i*) The law of property has profited most. Equity enabled people to make trusts and settlements of property, and facilitated transactions with realty by the equitable doctrines about mortgages.

(*ii*) Next in importance has been its influence on the law of contract. The equitable doctrines of undue influence, part performance, the rules about time and penalties, and the equitable remedies of specific performance, injunction, cancellation or rectification of agreements profoundly enriched this branch of the law.

Of the acheivements of equity, *Maitland* gives this illuminating summary—

"Equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution, namely, the trust; and three novel and fertile remedies, namely, the decree for specific performance, the injunction and the judicial administration of assets."

The contribution of Equity in the matter of remedies has been highlighted by *Snell*, in these words:

"Equity supplemented the limited range of legal remedies by providing a wide range of new remedies."

These equitable remedies will be fully discussed in subsequent Chapters on Specific Performance, Injunction, Receiver, Recission, Rec-

tification. While the common law remedy was primarily confined to damages, for breach of contract, Equity invented these novel remedies by virtue of which the aggrieved party might obtain a performance of the contract by the other side, or enjoin the other party from committing a breach of the contract or to have the contract rectified according to the real intention of the parties: all such reliefs were not available at common law.

These remedies were called 'equitable' since they were founded on some equitable principles, e.g., Equity acts on the conscience of the parties or *in personam*; the equitable remedies were discretionary, i.e., would be awarded by the Court, having regard to the conduct of the parties.

7. According to *Maitland*, the bond which kept together these various disconnected appendices under the head of equity was the *jurisdictional* and *procedural* bond—that these matters were within the cognizance of the Courts of Equity and not within the cognizance of the Courts of Common Law.

The conclusions reached above may be further illustrated with reference to the three assumptions on which the authority of Equity was based.

§ 4. The assumptions on which the authority of Equity was based.

A Court of Equity exercised its jurisdiction, on the foundation of '*three assumptions*,' as follows:

(I) *That equity was a matter of grace.* Equity in granting relief was exercising the King's prerogative to give, when he thought fit, relief to his people outside the ordinary powers of law. While, therefore, a 'plaintiff' in a Court of Law could claim the relief to which he was by law entitled as a matter of *right*, a Court of Equity might refuse to grant relief to a 'petitioner' or 'applicant' whenever the Court thought proper to do so. Thus "equitable relief was *ex debito justitiae*". Secondly, a Court of Equity could interfere only in individual cases of hardship, for the King could not by prerogative lay down general principles of justice differing from the law.

(II) *That equity was a matter of conscience.* The primary notion of Equity in granting relief was to keep persons from doing anything which would soil their conscience—a notion due to the fact that the earlier Chancellors were all ecclesiastics, and also to the assumption that the Court of Equity was acting as the King's conscience. (a) While, therefore, the common law principle was *compensation*, the equitable principle was *restitution*. Equity merely insisted that the wrongdoer should not retain any profit arising through his interference with other's right which it was contrary to conscience he should retain, whether that was more or less than the damage sustained by the injured party. (b) While the rule of law was that no action lies until there was an actual wrongful act or omission, equity would interfere to prevent an unlawful act being done where such act, if completed, must injure the plaintiff. It was on these principles that the remedies by injunction and

specific performance were based. (c) Thirdly, Equity would, in granting relief, take into consideration whether the person applying for equity had himself acted conscientiously in the matter. It would enquire into the personal conduct of the plaintiff, according to the maxims,—(*i*) He who comes to equity must come with clean hands; (*ii*) He who seeks equity must do equity; (*iii*) Delay defeats equity.

(III) *That equity was enforceable by process of contempt.* While a Court of Law could enforce its judgment by process of execution against the defendant's *property*, originally the only mode of enforcing a decree of the Court of Chancery was by a process of contempt against the defendant's *person*. The defendant was directed by the Court to purge his conscience by doing what is right, and if he did not obey the order of the Court, he was committed to prison for contempt. *Equity acts in personam.* It was by virtue of this maxim, as we shall see, that the Court of Chancery could grant relief in respect of property situated outside the jurisdiction of the Court, which the Courts of Common Law could not.[3]

§ 5. Equity and Natural Justice.

1. Natural justice means principles of fairness which follow from natural law which are antecedent to society. Some of them have been adopted in common law or incorporated in statutes and only a fraction of the whole are rules of equity!

2. *Snell* observes that, *in a popular sense*, "Equity is practically equivalent to natural justice or morality; yet *it would be a mistake* to suppose that the principles of equity as administered in the courts . . . are *co-extensive* with the principles of natural justice". This observation is justified by the following:

(*i*) Natural justice is a vague expression and its principles are not fixed, and some of its contents have a moral sanction and cannot be enforced by any Court at all.

(*ii*) In so far as the Court of Equity acted on a person's conscience (*see* p. 7, *ante*), it sought to enforce the legally enforceable principles of natural justice (p. 3, *ante*), but only where common law did not give relief in such cases.

(*iii*) On the other hand, as Blackstone demonstrated, *every* injustice at common law could not be remedied by equity, because in exercising equity jurisdiction, too, the Courts in England had acted according to certain principles which had been *historically* evolved, and, later, these principles, too, were crystallised.

(*iv*) Hence, it is not correct to say that common law did not apply the principles of natural justice at all or that equity applied all the principles of natural justice. The true view, as has already been shown, is to regard equity

3. For a fuller discussion of the present topic, *read* Chapter III on "The Maxims of Equity".

as an appendage to the common law, in certain spheres, such as trusts, mortgages, equitable remedies, and that some of the principles enforced by a Court of Equity in these spheres were shaped by the rules of natural justice.

§ 5A. Equity jurisdiction in India.

1. In India, there was never any *separate* Court for administering equity. The greater part of the law to be applied by the Court has been codified. But *in the absence of specific law or usage in any matter*, the Court has to act according to the principles of 'equity, justice and good conscience'.[4] Every Court thus combines law and equity jurisdictions.

2. But all the rules of English equity are not applicable in India. The expression 'equity and good conscience' has been interpreted to mean rules of English law (equity), so far as they are applicable to Indian society and circumstances. Thus, many rules of English equity have either not been followed in India or imported only in a modified form in view of the special circumstances of this country.

For example—

(1) It is now well-established that in India there is no such thing as equitable title. "The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England[5]." Title to immovable property can be transferred only in the manner provided for in the Transfer of Property Act read with the Indian Registration Act.[6]

(2) The distinction between legal and equitable rights and interests does not exist since the passing of the Transfer of Property Act. Thus, the right of redemption of a mortgagor is not an equitable right in India, but a legal right conferred by statute. The Indian mortgagor retains a legal interest before and after the expiry of the date of payment, and a transferee from him by way of sale or mortgage gets a legal interest.[7] For the same reason, there is no privity of estate or of contract between the mortgagee of a leasehold and its lessor even though the former enters into possession, and the English rule in *Williams* v. *Bosanquet* [(1819) 1 B. & B. 238] does not apply.[8] Further, in India, the rights of redemption and subrogation are not equitable forms of relief to be given on such terms as the Court considers equitable, but are rights conferred and defined by *statute*, viz., the Transfer

4. Cf. s. 37(2), Bengal, Agra & Assam Civil Courts Act, 1887, *also Watson* v. *Ramchand*, (1890) 18 Cal. 10 P.C.; *Waghela* v. *Masluddin*, (1887) 11 Bom. 551 P.C.; *Mehrban* v. *Makhana*, A.I.R. 1930 P.C. 142.

5. *Webb* v. *Macpherson*, (1903) 8 C.W.N. 41 P.C.

6. *Probodh* v. *Dantmara Tea Co. Ltd.*, (1940) 45 C.W.N. 132 P.C. (*See* Ch. XVIII, *post*).

7. *Ramkinkar* v. *Satyacharan*, (1938) 43 C.W.N. 281 P.C. (*See* Ch. XIV, *post*).

8. *Jagadamba Loan Co.* v. *Shibaprasad*, (1940) 45 C.W.N. 644 P.C.

of Property Act, available only upon terms stated therein.[9] Again, a mortgage by deposit of title-deeds is as good a form of mortgage as any other, and does not create a mere agreement giving rise to an equitable interest, as in England.[10]

(3) By the law of India, there can be only one owner of a property. When property is vested in a trustee, the owner of the property is the trustee and the Indian beneficiary cannot be said to have an equitable ownership. His right is, in a proper case, to call upon the trustee to convey to him [see *post*]. For the same reason, it has been held that, in India, the *cestui que trust* cannot maintain as owner a suit for possession against a trespasser, the ownership being vested in the trustee.[5]

(4) Similarly, the doctrine of 'advancement' has been held to be inapplicable as the nature of *benami transactions* is quite different from conditions obtaining in England [see *post*].

(5) The English equitable doctrine of part performance, similarly, has been adopted (now by statute) only in part in s. 53A of the Transfer of Property Act in view of the nature and effect of the pre-existing statute law as to transfer which is different from the English Statute of Frauds. Nor does the doctrine in *Walsh* v. *Lonsdale* [(1882) 21 Ch. D. 243] apply [see *post*].

(6) Again, in India there is no room for the application of the English equitable doctrine that "a contract for sale of real property makes the purchaser the owner in equity of the estate". S. 54 of the Transfer of Property Act expressly enacts that a "contract for the sale of immovable property does not of itself create any interest in or charge on the property" [see *post*].

(7) The charge which the vendor has, for his unpaid purchase money under s. 55(4)(b) of the Transfer of Property Act, differs in its origin and nature from the vendor's lien in English Equity [see *post*].

(8) In *England*, in the absence of a statutory law of limitation, equitable relief like specific performance is refused by a Court of Equity on the ground of laches or delay. But, in *India*, mere *delay* is no ground for refusing specific performance, for Art. 54 of the Limitation Act, 1963, provides a period of limitation of three years (from the date fixed for performance or, if no such date is fixed, from the date when the plaintiff has notice that performance is refused).[11]

(9) The equitable presumptions of satisfaction and ademption are not applicable to India, and under ss. 177-79 of the Indian Succession Act, 1925, the gifts are construed according to the express words used in the will.

(10) Again, though in India the same Court administers both law and equity and there is no distinction between legal and equitable rights as such, yet the origin of the various rights and remedies as in England is not overlooked and equitable defences are of no avail to statutory rights.[12] Thus,

9. *Ramchand* v. *Prabhu*, (1942) 47 C.W.N. 1 P.C.
10. *Imperial Bank* v. *U. Rai*, (1923) Rang. 637 P.C.
11. *Satyanarayana* v. *Yellogi*, A.I.R. 1965 S.C. 1405 (1409).
12. *Ram Singh* v. *Ramchand*, (1923) 40 C.L.J. 276 (P.C.).

the right to repayment of money paid under mistake or coercion is a statutory right in India under s. 72 of the Indian Contract Act, and the right cannot be defeated by an equitable defence.[13]

3. On the other hand, in enacting many statutes, the Indian Legislature has substantially adopted the English rules of equity, and in interpreting[14] those statutes, a reference to the English principles and cases becomes useful, unless, of course, there are any Indian pronouncements to the contrary. The Indian Trusts Act and the Specific Relief Act are instances on the point.

Thus, as regards the Specific Relief Act, Banerjee in his *Tagore Law Lectures* observes, "The Specific Relief Act is admittedly based on doctrines of equity jurisprudence which were originally developed in England. The guidance afforded by the decisions of the foreign Courts in interpreting and applying the provisions of the Indian Act is, therefore, of peculiarly valuable character." And so did the Privy Council observe in *Ardeshir* v. *Flora Sassoon*[14]—"It will be useful, in the interpretation of the relevant sections, to have in mind what the English system on which the Act is based was in its origin and in its fullness at the date of codification."

Again in matters where the Act is *silent* or the Act does not apply, the English principles may be resorted to in so far as they are consonant with the principles of 'justice, equity and good consicence'.[15]

But in matters which are dealt with by the Act, the provisions of the Act will prevail in case of any divergence between the provisions of the Act and the principles of English equity. Thus—

(*a*) When the title of the person agreeing to sell or lease is defective, s.12 of the Specific Relief Act, 1963, provides that only in one case will specific performance with abatement or compensation be granted, viz., where the part of the agreement which must be left unperformed bears only a small proportion to the whole in value. The complicated rules of English law relating to the subject are thus avoided.

(*b*) The rule embodied in s. 12(3)(*ii*) of the Specific Relief Act, 1963, also differs from the English rule. Where the deficiency is so serious that the Court will not allow the vendor to claim specific performance, in *India,* the purchaser will not be entitled to specific performance, in respect of the property as is capable of being conveyed, unless he gives up his claim to compensation for the deficiency.

(*c*) Since in this country, it is possible to have all the remedies for breach of an agreement in one Court, s. 24 of the Act provides that if a suit for specific performance is dismissed, no suit for compensation for breach of that agreement shall lie.

13. *Kanhaya Lal* v. *National Bank of India*, (1930) 40 C.L.J.1 (P.C.).

14. *Ardeshir* v. *Flora Sassoon*, A.I.R. 1928 P.C. 208.

15 *Akshyalingam* v. *Avayambala*, A.I.R. 1933 Mad. 386; *Kishorechand* v. *Badaun E.S.C.*, A.I.R. 1944 All. 66 (77); *Namdeo* v. *Narmadabai*, A.I.R. 1953 S.C. 228; *Murarilal* v. *Devkaran*, A.I.R. 1965 S.C. 225; *Ganeshilal* v. *Joti*, A.I.R. 1953 S.C. 1; *Valliama* v. *Sivathanu*, A.I.R. 1979 S.C. 1937 (paras. 29, 31).

CHAPTER II

EQUITY AND ITS RELATION TO LAW

§ 6. Blackstone's view of Equity Jurisprudence.

1. *Blackstone* in his *Commentaries on the Law of England* (writing in 1765) states that the so-called equity of the Court of Chancery was in reality law and that the so-called law of the three old Courts was in a sense equity. In other words, *Blackstone's* view is that Equity and Common Law are not two opposing systems, and that there is little to distinguish them except their historical origin and modes of procedure.

2. He shows this by examining the current views which drew a line between them, setting one in opposition to the other:—

(1) It is said that 'it is the business of a Court of Equity to abate the rigour of Common Law'. But equity never claimed such a general power,—this being evident from the fact that it did not interfere with many Common Law rules which involved great hardship, e.g.,—

(*a*) When the debtor devised away his real estate, the bond creditors could not follow the estate in the hands of the devisee. (*b*) The heir was not liable for the simple-contract debts of the deceased. (*c*) The father could not immediately succeed to the real estate of the son.

(2) Secondly, it is said that 'a Court of Equity determines according to the spirit of the rules and not according to the strictness of the letter'. But in fact both equity and law equally profess to interpret statutes according to the true intent of the legislature.

(3) Thirdly, it is said that 'fraud, accident and trust are the proper and peculiar objects of a Court of Equity'. But frauds and accidents are equally cognizable by Courts of Law, and though trusts are not recognised by them, still they take notice of bailments, which are in the nature of trusts. [As to bailment, *Maitland differs.* See *post.*]

(4) Lastly, it is said that 'a Court of Equity is not bound by precedents'. But this holds good no more.[1]

1. It is no longer true to say that "**the standard of equity is as variable as the measure of the Chancellor's foot**". The scope of precedents in equity was best explained in *Bond* v. *Hopkins* (1 S. & L. 428), thus "There are certain principles, on which Courts of Equity act, which are very well-settled. The cases which occur are various but they are decided on *fixed principles.* The Courts of Equity have, in this respect, no more discretionary power than the Courts of Common Law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus *enlarge* the operation of those principles, but the principles are as fixed and certain as the principles on which the Courts of Common Law proceed."

3. *Blackstone sums up—Both law and equity are now equally artificial systems, founded on the same principles of justice and mode of their proceedings*: the one being originally derived from the feudal customs, the other from the Roman formularies, introduced by the clerical Chancellors.

4. *Maitland* supports *Blackstone's* view by saying that though *Blackstone* overrates the importance of Roman influence, we cannot, in general terms distinguish the two systems except by a historical explanation. We ought not to think of common law and equity as two rival systems. Equity is not a single, self-sufficient system like Common Law, which it supplements. It is a collection of appendices between which there is no close connection.

§ 6A. Story's classification of Equity Jurisdiction.

1. It has been customary to classify the jurisdiction of equity in relation to that of law, after the scheme set up by *Story*,—that equity is (a) exclusive, (b) concurrent, and (c) auxiliary.

(*a*) The *exclusive jurisdiction* comprised matters where there was no relief at common law,—**equitable rights** were enforced by equitable remedies, e.g., trusts. The Court of Chancery had a cognizance of such matters exclusive of the Court of Law. In matters within the exclusive jurisdiction, the nature and extent of the rights given depended exclusively on equitable principles, and they could be enforced only by equitable remedies.[2]

(*b*) The *concurrent jurisdiction* comprised cases in which the common law remedy was inadequate. Here **legal rights** were enforced by equitable remedy, e.g., specific performance of contracts. In these cases, the suitor had a choice between the remedies granted by the two Courts. But the equitable remedies were granted only on proof of violation of legal rights. The existence of the right and whether it has been infringed were ascertained

2. The importance of the distinction between the exclusive and other jurisdiction of equity is illustrated by the House of Lords' decision in *Nocton* v. *Ashburton* (1914) A.C. 932, where a mortgagee sued his solicitor for fraud, alleging that the solicitor had by *improper* advice induced him to release a part of his security, whereby the security had become insufficient. Now, at common law, as explained in *Derry* v. *Peek*, a *fraudulent intention* of the person making the representation must be proved in order to maintain the action; but such fraudulent intention could not be proved in this case. But it was *held* that there had been negligence, and a breach of duty imposed on the solicitor by the *confidential relationship* in which he stood to the client. So, it was a *fraud in equity*, which was within the exclusive jurisdiction of equity. Where one person who is *under a fiduciary duty* to take care makes a misrepresentation to the person to whom he owes that duty, with the intention that that person shall act on it, then whether he does so because he has a wicked mind or because of mere negligence, he is guilty of fraud in equity, though not at common law; and so the defendant was liable. When fraud is referred to in the wider sense used in the Chancery in describing cases which are within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposed on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case.

upon legal principles, and then equitable principles were applied to ascertain on what condition an equitable remedy would be granted. Within this sphere, before an equitable remedy could be given, it had to be shown that the right had been or was about to be violated in such a way as would compel a Court of Law to grant the legal remedy, if the complainant had applied for it.[3]

(*c*) The *auxiliary jurisdiction* was where Common Law litigants required *the aid of equity* in the assertion of legal rights. No cases were tried here. Equity intervened merely to supply the defects of the legal process so as to enable the Courts of Law to give effectively the legal remedies. Thus, the plaintiff in an action at law went to the Chancery in order that he might obtain discovery of the documents on which his opponent will rely.

2. According to *Maitland*, such a classification is inaccurate in two respects,—(*i*) *firstly*, it presupposes a logical scheme; but equity does not deal with such a single connected system that may be subjected to classification. **"Equity is a collection of appendices between which there is no very close connection."** (*ii*) *Secondly*, such classification is no longer useful. It presupposes that there is one set of Courts administering law, another set administering equity. But, as we have seen, the Judicature Acts have abolished the independent system of Courts; and since then every Division of the High Court is capable of administering what rules are applicable to the case that is before it, whether they be rules of common law or rules of equity. Thus, the auxiliary jurisdiction exists no more; all such aid can be obtained in the King's Bench Division itself. Again, though the business assigned to the present Chancery Division is practically the same as that formerly done by the Court of Chancery in its exclusive jurisdiction, it has been expressly provided by the Judicature Acts that each division shall have jurisdiction of the other divisions in addition to its own.

3. It must not, however, be supposed that the distinction between legal and equitable rights and remedies has also been abolished, for, **"the fusion of law and equity is merely in administration; the principles of equity remain as before".** In the words of *Snell*, *"the two streams have met, and now run in the same channel, but their waters do not mix"*. Thus, in matters coming within the old exclusive jurisdiction of Equity, the High Court decides the nature and extent of the rights solely by equitable principles and enforces them solely by equitable remedies; and in matters coming within the old concurrent jurisdiction of Equity, it decides the nature and extent of rights solely by legal principles and enforces them by equitable remedies only where the old Courts of Law would have granted legal remedies. The object of the

3. Thus, the right to 'ancient light' was a legal right which was enforced by the equitable remedy of injunction. Now, at common law, an action for damages for interference with such right could not be maintained for any interference which was not so grave as to amount to a *nuisance*. Now, in *Colls* v. *Home and Colonial Stores Ltd.*, (1904) A.C. 179, it was held that as the obstruction complained of did not amount to a 'nuisance', the plaintiff could not obtain an injunction in equity, as he could not recover damages at common law.

Act was neither to fuse nor to confuse the principles, which govern equitable rights and remedies, with those which govern legal rights and remedies.

"The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they were entitled, so as to avoid multiplicity of actions."[4]

The nature of the fusion was also nicely expressed by Jessel, M.R., in *Salt* v. *Cooper* [(1880)16 Ch. D. 544] thus—

"The main object of the Judicature Act, 1873, was to assimilate the transaction of equity business and common law business by different courts of judicature. It has been sometimes inaccurately called 'the fusion of law and equity': but it was not any fusion or anything of the kind; it was vesting in one tribunal the administration of law and equity in every cause, action, or dispute which should come before the tribunal. That was the meaning of the Act. Then as to that very small number of cases in which there is an actual conflict, it was decided that the rules of equity should prevail. That was to be the mode of administering the combined jurisdiction."

§ 7. The fusion of Law and Equity—Effects of the Judicature Acts of 1873 and 1875.

(*i*) We have already seen (p. 4, *ante*) that the Judicature Acts abolished the separate Courts of Criminal Law and Equity and conferred upon one and the same tribunal the jurisdiction which hitherto had been exercised separately by them. Though the High Court was divided into divisions, and certain particular business was assigned to each division, the distribution of work between them is only a matter of convenience, and may be changed without an Act of Parliament.

(*ii*) Multiplicity of proceedings was avoided. Any judge, in whatever division he may be sitting, is bound to apply every rule applicable to the case before him whether of common law or of equity and the parties to a suit may obtain in that suit all the remedies to which they are entitled, without resorting to another Court. Again, a judgment of the High Court given in an action in any division may be enforced by any legal or equitable mode of execution which is in the circumstances appropriate.

(*iii*) The Acts unified procedure. They introduced a whole code of civil procedure, comprising the rules of the Supreme Court which assimilated the Common Law and Equity procedures, combining the best features of both.

(*iv*) As to substantive law, the Judicature Act of 1873 made a few changes by s. 25, e.g.,—

(1) No claim of a *cestui que trust* against his trustee for any property held on an express trust shall be barred by any statute of limitations.

(2) A legal assignment of debts and choses in action may be made subject to certain requirements.

(3) The rules as to stipulations in contracts, which would not be held by equity to be of the essence of the contracts, are to prevail in all cases.

4. *Ind. Cooper & Co.* v. *Emmerson,* (1887) 12 A.C. 300.

(*v*) Of far greater moment, however, was the general rule laid down in sub-section (11) of s. 25, viz., that—

"Generally, in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of common law which have reference to the same matter, the rules of equity shall prevail."

Does this section provide that there should no longer remain any distinction between the principles of law and equity? It speaks of a conflict. But we have shown that in its origin equity served as a supplement to common law rather than as its rival (*see* p. 6, *ante*). Was the relation altered by the Judicature Acts? Let us deal with it separately.

§ 8. The present relation of Law and Equity.

We need not repeat that before the Judicature Acts the relation was normally not one of conflict (*see* pp. 5, 6, *ante*). Was there any conflict after the Acts,—and how did s. 25(11) of the Act of 1873 deal with it? *Maitland* demonstrates this by referring to the cases decided since the Act was passed. (*i*) The great majority of cases show that what was apparently a conflict was no conflict at all; (*ii*) but there were a few rare cases in which the joint operation of law and equity produced so capricious a result that they might be regarded as at variance with each other.

It is in regard to these few cases of divergent rules at law and in equity that s. 25(11) of the Judicature Act could have any operation, resulting in the predominance of the rules in equity. That is why *Snell* says that "it has not often been necessary to resort to this general enactment." As an instance of such variance, *Maitland* mentions the case of *Walsh* v. *Lonsdale*,[5] relating to 'equitable lease', which may be of interest in India:

By a written agreement *L agreed* to let to *W* a cotton mill for 7 years at a rent which was to be payable in advance if demanded. *W* entered and occupied the mill, and for some time paid the rent, but not in advance. Then *L* demanded a year's rent in advance, and this demand not being complied with, he distrained. *W* then brought this action against *L* claiming damages for an unlawful distraint.[5]

This was a mere *agreement for a lease.*

(I) *Before* the Judicature Acts, the position of the parties in law and equity would be this:

(*a*) *At law*, an agreement for lease did not operate as a lease. But the fact of paying rent showed that *W* was holding the land of *L* as tenant from year to year. Therefore, *L* had no power to distrain for rent in advance from a tenant from year to year.

(*b*) Equity would enforce specific performance of the agreement for lease, and would compel *L* to perform his contract by accepting a lease in accordance with the agreement.

(II) It was held that, *since* the Judicature Act had effected a fusion between the rules of equity and law, a person holding land under an

5. *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9 (14).

agreement of lease of which specific performance would be granted, held under the same terms as if a valid lease had been made according to law. The judgment[5] is instructive—"There are not two estates as there were formerly, one estate at common law, by reason of the payment of rent from year to year, and one estate in equity under the agreement. There is only one Court, and the *rules of equity prevail in it.* The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted, e.g., the right of distress, merely because the parchment has not been signed ad sealed."[5] In short, if *A* agrees to let land to *B* on lease, and *B* goes into possession, and the agreement is one of which specific performance would be granted, *A* and *B* have the same rights as between themselves and are subject to the same liabilities, as if a lease under seal had been already made on the terms of the agreement.

This decision seems to imply that since the Judicature Act an agreement for a lease is in all respects as good as a lease. But that this is not so would appear from the following limitations of the Rule in *Walsh* v. *Lonsdale*, as explained in later cases:

The Judicature Act has not abolished the difference between a lease and an agreement for a lease. An equitable right is not equivalent to a legal right. An agreement for a lease is not enforceable against a purchaser for value without notice.[6]

(*a*) The equitable right does not affect the rights of third parties, though as between the contracting parties, an agreement for a lease may be as good as a lease, just as an agreement for sale of land may serve as a completed sale as between the contracting parties; and (b) the rule applies only where there is a contract to transfer a *legal title*, and an act has to be justified or an action maintained by force of the legal title to which such contract relates.[7,8]

It is thus clear that the net effect of the Judicature Acts is "not to create two courts—a court of law and a court of equity.[9]" It is now one Court which is a Court of complete jurisdiction, legal and equitable, and, in case of any possible conflict, the rules of equity will prevail in it.[5]

At the same time, there is no fusion of the principles (*Snell*) adhered to by the two systems of law and equity; though the same Court offers a complete decision of the dispute before it, in granting equitable relief, such as injunction, the Court has to apply the peculiar characteristics of that remedy in equity, while in granting damages, it must apply the rules of common law—in the absence of any statutory provisions to the contrary.

6. *Swain* v. *Ayres*, (1888) 21 Q.B.D. 289.
7. *Manchester Brewery* v. *Coombes*, (1901) 2 Ch. 608.
8. As to the applicability of the rule in *Walsh* v. *Lonsdale in India*, see under Ch. III, maxim (VIII), *post*; also Ch. XVI, *post*.
9. *Pugh* v. *Heath*, (1882) 7 App. Cas. 235 (237).

CHAPTER III

THE MAXIMS OF EQUITY

§ 9. The maxims.

The maxims of equity embody the general principles on which the Court of Chancery exercised its jurisdiction. These originated from the three fundamental assumptions already referred to (pp. 7-8, *ante*). As will be evident from the following pages, one or other of these maxims underlies every doctrine of equity.

The maxims are —

I. Equity will not suffer a wrong to be without a remedy.
II. Equity follows the law.
III. He who seeks equity must do equity.
IV. He who comes to equity must come with clean hands.
V. Delay defeats equity.
VI. Equality is equity.
VII. Equity looks to the intent rather than to the form.
VIII. Equity looks on that as done which ought to have been done.
IX. Equity imputes an intention to fulfil obligation.
X. Equity acts *in personam.*
XI. Where the equities are equal, the first in time shall prevail.
XII. Where there is equal equity, the law shall prevail.

(I) Equity will not suffer a wrong to be without a remedy (*Ubi jus ibi remedium*).

The idea expressed in this maxim—that no wrong should be allowed to go unredressed if it is capable of being remedied by Courts of Justice—really underlies the whole jurisdiction of equity. Inasmuch as the procedure at Common Law was highly technical and artificial, it would sometimes happen that a person having a legal right could not yet enforce it or redress its infringement in the Common Law Courts. The Court of Chancery came into being with a view to aid the enforcement of such rights (pp. 3-5, *ante*). It must not, however, be supposed that every *moral* wrong was redressed by the Court of Chancery. The maxim must be taken as referring to rights which are *capable of being judicially enforced*, but were not enforced at Common Law owing to some technical defect.

Again, equity only interfered where there was no relief, or no adequate relief at common law. Thus,—

(*i*) It was on this maxim that equity interfered to enforce **uses and trusts.** Where *A* conveyed land to *B*, to hold to the use of *C* (before the Statutes of Uses), *C* had no remedy *at law* if *B* claimed to keep the benefit of the land to himself. *Equity interfered* in favour of *C* because such an abuse of confidence was a wrong,—capable of being judicially redressed.

(*ii*) Again, if a successful plaintiff could not have legal execution against the property of the judgment-debtor because his interest in the property was equitable only, the Court of Chancery gave equitable **relief in the nature of execution** by (*a*) the appointment of a receiver, supplemented, if necessary, by (*b*) an injunction restraining the debtor from dealing with the property. [Cf. O. 39-40, C.P. Code].

(*iii*) *Snell* traces to this maxim the **auxiliary jurisdiction** of equity—where equity lends its aid for the production of evidence which might be required in an action *at law*, but which could not be produced because of its defective machinery. Such equitable aid was by means of interrogatories, discovery, inspection and the like. [Cf. O. 11-13, C.P. Code].

(II) Equity follows the law (*Aequitas sequitur legem*).

(A) *England.*

This maxim had two applications according as the subject-matter was a *legal* right or estate, or, an equitable interest—the creation of equity itself:

(*i*) As regards **legal** estates, rights and interests,—equity is strictly bound by the rules of law.

The Court of Chancery never claimed to override the Courts of Common Law. As *Story* explains, "where a rule either of the common or the 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". Thus, where a period of limitation is prescribed by a statute, a Court of Equity cannot entertain a suit after the expiry of that period, notwithstanding any hardship—unless the statute of limitation provides for an extension of time in such circumstances.

But though equity does not interfere with a man's legal rights, it does not allow an unconscientious use to be made of legal rights. For, "**Equity acts on the conscience**".

As we shall see, the doctrines of notice and trust are founded on this maxim.

(*ii*) As regards equitable rights and interests,—equity, though not, strictly speaking, bound by the rules of law, yet acts on analogy thereto whenever an analogy exists. *Lord Hardwicke* observed in *Hopkins* v. *Hopkins*, [(1739) 1 Atk. 581],—"It is the maxim of this Court that trust estates,

which are the *creatures of equity*, shall be governed by the same rules as legal estates, in order to preserve the uniform rules of property." Thus,—

(*a*) As regards the *quantity of interest*, there may be the same estates in equity as at law. Thus, in *England*, prior to the Law of Property Act, 1925, the same interests were possible at law as well as in equity, e.g., fee simple, fee tail.

(*b*) And these equitable estates have the same *incidents* as if they were legal. Thus, as regards deaths prior to 1926, the rules of descent, such as primogeniture, applied to equitable interests equally as to legal estates. Again, as regards instruments coming into operation before 1926, rules of construction, such as *the rule in Shelley's case* (now abolished by the L.P.A., 1925) applied to equitable estates. But though it acted upon analogy with legal rules, *the rule in Shelley's case* has never been applied to *executory trusts* where its application would defeat the intention of the settlor.

(*c*) Again, in the case of *executed* as distinguished from executory documents, the same *words of limitation* have been required to convey an equitable interest in fee simple, as if it were a legal estate. (But now under the L.P.A., a conveyance of freehold land to a person without words of limitation will pass the whole interest which the grantor had power to convey unless a contrary intention appears.)

(*d*) As to limitation for actions,—see "Delay defeats equity".

(B) *India.*

It has already been pointed out that the distinction between legal and equitable interests does not exist in India, (*see* p. 9, *ante*). In all actions, whether it relates to legal rights and interests, or to what are known in England as equitable rights and interests, if there be any statutory provision relating to the subject-matter, that must apply and equitable considerations will not be allowed to override the provisions of the statute. Thus,—

(*i*) In all actions, the Court is to apply the law of *limitation* enacted in the Indian Limitation Act, 1963, and the Judge cannot, on equitable grounds, "enlarge the time allowed by the law, postpone its operations or introduce exceptions not recognised by it"[1].

In a recent case, *our* Supreme Court has said—

"Rules of equity have no application where there are definite statutory provisions specifying the grounds on the basis of which alone the *stoppage* or *suspension* of running of time can arise. While the Courts are necessarily astute in checkmating fraud, it should be equally borne in mind that statutes of limitation are statutes of repose"[2].

There cannot be any '*equitable' construction* of a statute of limitation. As the Privy Council observed—

"The fixation of periods of limitation must always be to some extent arbitrary,

1. *Sarat Kamini* v. *Nagendra*, (1925) 29 C.W.N. 973.
2. *Yeswant* v. *Walchand*, (1950) S.C.R. 852 (868).

and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide.[3]

"Very little reflection is necessary to show that great hardships may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases."[4]

The only apparent exception to the above rule is to be found in the principle "Act of Court hurts no person". This means that where the suitor himself is not negligent, but delay has been caused by oversight or negligence of the Court itself or its officers, the suitor should not suffer, by the strict application of the law of limitation. In such cases, relief is granted to undo the mischief due to the act of the Court itself. Hence, it is not really an exception to the principle that limitation is not to be extended on equitable considerations.

(*ii*) Just as the Court cannot enlarge the period of limitation prescribed by the law, it cannot also shorten that period, on equitable considerations, such as laches (on this point, *see* under 'Delay defeats equity', *post*).

(*iii*) The law of *registration* cannot be overridden by applying an equitable doctrine, such as part performance,[5] nor can the formalities laid down by the law of transfer[6] be overridden by any such doctrine. As the Privy Council observed—

"Nor can equity override a statute and confer upon a person a right which the statute enacts and shall be conferred only by a registered instrument."[5]

(*iv*) On the same principle, *taxation* being the creature of a statute, there is no equity about a tax.[7] If a particular income is not taxable under the Income Tax Act, it cannot be taxed on the basis of any equitable doctrine. On the other hand, if a person comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be.[8]

(III) He who seeks equity must do equity.

(A) *England.*

This maxim means that equitable relief, which is discretionary by nature, will be granted to the plaintiff only upon condition that he gives the defendant any corresponding rights that the defendant may be entitled to, in respect of the transaction in whcih relief is sought. In other words, while a Court of Law would give relief to the plaintiff as soon as a legal injury is proved, regardless of any corresponding right to relief of the other party, leaving that to be the subject-matter of a separate suit, a

3. *Nagendranath* v. *Suresh*, A.I.R. 1932 P.C. 165.
4. *Luchmee* v. *Ranjeet*, 20 W.R. 375 P.C.
5. *Ariff* v. *Jadunath*, (1931) 31 C.W.N. 550 P.C.
6. *Probodh* v. *Dantmara Tea Co.*, (1949) 45 C.W.N. 132 P.C.
7. *Commr. of I.T.* v. *Firm Muar*, A.I.R. 1965 S.C. 1216 (para. 13).
8. *C.I.T.* v. *Motor & General Stores*, A.I.R. 1968 S.C. 200 (para. 6); *Bank of Chettinad* v. *C.I.T.*, A.I.R. 1940 P.C. 183.

Court of Equity would not allow the plaintiff to say, "Give me the equitable relief that I seek, but I am not prepared to make any allowances for the claim or the right of the other party. Let him enforce it by a separate suit." This rule is illustrated by—

(*a*) The **conditions** upon which **equitable remedies** are granted by a Court of Equity:

One who seeks to have his contract rectified, or cancelled, on the ground that he has been the victim of a mistake, fraud or sharp practice, must not only show that his dealings throughout the transaction have been straightforward in every respect, but he will get the relief only on terms of doing equity to the other party, (e.g., by compensation to the other party), which justice may require. Thus, in setting aside **unconscionable bargains**, the Court would see that the money borrowed is repaid with fair interest (*see* Ch. XVI, *post*). The principle is—

"No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantage which he has obtained under it." (*Clough* v. *I.&N.W.R.*, 1871 7 Ex. 26).

(*b*) The doctrine of **mutuality in specific performance.** Equity will not decree specific performance of a contract at the suit of one party, unless it will decree specific performance at the suit of the other party as well.

(*c*) The maxim is also illustrated generally in the doctrines of **election and mortgage.** Thus, equity would allow the mortgagor to redeem the property even after expiry of the contractual period, but only on conditions which are fair to the mortgagee.

(*d*) This equity also underlies the rule which enjoins payment of **compensation for repairs and improvements** made by a person who holds the legal estate, when the property is sought to be recovered by a person entitled in equity. "Where a purchaser for value is evicted in equity, under a *prior title*, he will be credited with all money expended by him in necessary repairs or permanent improvements (except improvements made after he had discovered the defect of title)" (*Dart*).

(*e*) Another application of the principle is :

"A constructive trust may arise where a person, who is only a *part owner*, acting *bona fide*,—permanently benefits an estate by repairs or improvements, for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements."[9]

When a person in possession of property has, under a mistaken belief that he is entitled to it, expended money in permanent improvements, the true owner, if he has to assert his title in equity, is required to do equity, by repaying the money [*Halsbury*, 2nd Ed., Vol XIII, p. 86.]

9. *Lake* v. *Gibson*, (1729) 1 Eq. Ca. 294.

(*f*) It also underlies the equitable doctrine of **mortgage by deposit of title-deeds**. If a man pledges his title-deeds as a security for a loan, he must pay the money before he wants to get back the deeds, though a mortgage of land could not be created without writing by reason of the Statute of Frauds.[10]

(B) *India.*

1. In *India*, the principle of restitution or compensation as a condition for equitable relief has been embodied in ss. 30 and 33 of the Specific Relief Act, 1963 and ss. 19A and 64 of the Contract Act.

(*i*) S. 19A of the Contract Act says—

"19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustration

A, a moneylender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just."

The illustration explains the section. It means that when a party seeks to set aside a contract on the ground of *undue influence*, the Court may require that party to restore to the other party the benefit that the former has received under the contract, or compensate him.

(*ii*) S. 64 of the Contract Act provides—

"The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

This section differs from s. 19A in the following respects: (*a*) While s. 19A is confined to the case of 'undue influence', s. 64 is comprehensive enough to include not only undue influence, but also other grounds upon which a contract becomes voidable, such as coercion, fraud, misrepresentation as well as the cases mentioned in ss. 39, 53 and 55. (*b*) While s. 19A uses the word 'may', s. 64 uses the word 'shall'. Hence, where the plaintiff who seeks to rescind a contract on the ground of undue influence has received some benefit under the contract, the Court *must* direct him to restore the benefit and to this extent s. 19A is to be read subject to s. 64.

Since the obligation to restore the benefit is absolute under s. 64, where a contract is rescinded under s. 39 (because the defendant has

10. *Russel* v. *Russel*, (1783) 1 Bro. C.C. 269.

refused to perform or disabled himself from performing), the plaintiff has to restore the benefit even though he is entitled to obtain damages from the defendant for breach of the contract.[11]

(*iii*) S. 30 of the Specific Relief Act, 1963, says—

"30. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to the other which justice may require."

S. 27 of the Specific Relief Act, 1963, enumerates the conditions upon which rescission of a contract is available. One of these is that the contract is voidable. So far s. 30 is on common ground with s. 64.

(*iv*) S. 33 of the Specific Relief Act, 1963, says—

"33. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to restore, sofar as may be, any benefit which he may have received from the other party and to make any compensation to the other which justice may require."

S. 33 is wider than s. 30 of the Specific Relief Act inasmuch as (*a*) it includes not only voidable but also *void* instruments; (*b*) it is not confined to contracts but relates to *all written instruments* (*vide* s. 39).

The following principles apply to the equity of restoration under s. 33:

(*a*) The relief is discretionary with the Court but the discretion is very wide. The Court is competent to require the party to make 'any compensation which justice may require'. Whether compensation should be awarded at all or what should be the measure of compensation must depend on the special circumstances of each case.

(*b*) No compensation is payable where the contract is without consideration.[12]

(*c*) The discretion conferred upon the Court by sec. 41 should be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the *parties were reversed and he were the defendant* in a suit brought to enforce the instrument according to its terms.[13] 'Justice of the case' requires that the parties should be restored to the position which they occupied at the time the contract was entered into.

Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee, who had advanced money, and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction, it was held that the condition of cancellation should be *not* the repayment of *all money* received by the manager, but only of sums shown to have

11. *Muralidhar* v. *International Film Co.*, A.I.R. 1943 P.C. 34.
12. *Ram Sarup* v. *Brij Mohan*, A.I.R. 1938 Oudh. 14.
13. *Gaya Prasad* v. *Sarfaraz*, 19 I.C. 972.

been paid to the grantor personally and of such sums received by the manager as he would have been justified in borrowing in the course of a prudent management of the estate.[14]

2. The principle underlying s. 33 of the Specific Relief Act has been applied to cancellation of contracts on the ground of **minority**, which renders the contract void.

(*i*) Though a contract with a minor is void, when a person purchases property from a minor *without knowledge* of the executant's minority, the sale can be rescinded on the ground of the executant's minority only on condition that the minor refunds to the purchaser the amount of consideration received from him.[15] Though a minor is not personally liable to repay a loan, where he induces a person to enter into a contract with him on a **fraudulent representation** that he is a major, then unless the other party was himself aware of the fact of minority, the minor can have the contract set aside only on restoring the benefit he has received from the contract, e.g., on condition of refund of purchase money in the case of sale.[16-17]

(*ii*) But the Court would refuse to exercise its discretionary power under s. 41 where the defendant had advanced money to the minor **with full knowledge** of his infancy.[18]

A mortagagor employing an attorney, who also acts for the mortgagee in a mortgage transaction, must be taken to have notice of all the facts brought to the knowledge of the attorney and therefore where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy and found that the attorney had notice of the infancy, or was put upon inquiry as to it, it was held that the mortgagor was not entitled to compensation under the provisions of the S.R. Act.[18]

3. But this equity is not confined to cases governed by the Contract Act or the Specific Relief Act, but is one of general application. Thus, it has been applied in cases under the Hindu Law, when an alienation by a widow is set aside at the instance of a reversioner on the ground of legal necessity. If the alienation was justified by necessity and the transferee acted in good faith and after the enquiry as to its existence, the alienation would be upheld *in toto*, even though a part of the consideration money is not eventually applied for the purposes of necessity; no question of application of the equitable principle arises in such a case.[19] If, on the other hand, there was no necessity for the alienation or the alienee knew that the money was not required, in whole or in part, for purposes of necessity, but a portion of the money was in fact spent for such purposes, the alienation would be set aside only on equitable terms, viz., on condition of repayment of the sum

14. *Ajit Singh* v. *Bejai Bahadur*, 11 Cal. 61 P.C.
15. *Syedul* v. *Ariff*, (1916) 21 C.W.N. 257 P.C.
16. *Harnath* v. *Indar*, 45 All. 179 P.C.
17. *Sadique* v. *Jai Kishore*, (1928) 32 C.W.N. 874 P.C.
18. *Mohori Bibee* v. *Dharmodas*, 30 Cal. 539 P.C.
19. *Suraj* v. *Chain Sukh*, A. 1927 P.C. 257; *Krishan* v. *Nathu*, (1927) 49 All. 149 (P.C.).

actually spent for purposes of necessity, with reasonable interest.[20] But in adjusting the equities between the parties, the Court cannot make a new bargain between the parties and uphold the alienation of a proportionate part of the property; the alienation must be set aside *in toto* but on term of repayment of such part of the consideration money as was justified.[21]

The above principles have been applied in setting aside alienation by other limited owners such as the manager of a Hindu joint family,[21] Sevait of a Deity,[22] the proprietor of an impartible estate.[20]

4. The principle of compensation for improvements is embodied in s. 51 of the Transfer of Property Act which says—

"51. When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement ....."

It embodies the principle enunciated in *Lake* v. *Gibson*, which has been stated at p. 22, *ante*. The conditions for application of this section are—

(*a*) The person entitled to the benefit of this section must be a *transferee*. A trespasser or a stranger building upon a land, knowing it to be the land of another, is not entitled to any equity, and the true owner can recover the land together with all *improvements made* by the trespasser.[23]

(*b*) The transferee must, while making the improvement, believe himself to be absolutely entitled to the land.

(*c*) Such belief must be in 'good faith'.

Hence, a lessee or a tenant or a mortgagee is not entitled to the benefit of this section, because these persons cannot possibly believe in good faith that the land belongs to them *absolutely*.

(*d*) The transferee must be subsequently evicted by a person having 'better title'.

If all the above conditions are satisfied, the *evictor* is put to his option to choose between two alternatives—

(*i*) either, to pay the value of the improvements to the 'transferee',

(*ii*) or, to sell his interest to the 'transferee', at its the then market value, irrespective of the value of such improvement.

(IV) He who comes into equity must come with clean hands.

1. When the plaintiff's claim is tainted with some illegality or fraud, in

20. *Nagappa* v. *Brahadambal*, (1935) 39 C.W.N. 709 (P.C.).
21. *Ramsundar* v. *Lachmi*, (1929) 33 C.W.N. 699 (P.C.).
22. *Iswar Lakshi Durga* v. *Surendra*, (1941) 45 C.W.N. 665.
23. *Vallabhdas* v. *Development Officer*, (1929) 53 Bom. 589 (P.C.).

respect of the subject-matter of the suit, a Court of Equity will refuse to aid him.[24] *Strahan* explains—

"A Court of Law cannot take into consideration the conduct of the plaintiff provided he is acting within the law. Even where his motive is pure malignity, if he has not broken the law, he is entitled to his legal remedy. But as equitable remedies are in the discretion of the Court, the Court before granting one will enquire whether the plaintiff's conduct in the matter before it has been conscientious, and also whether he himself is prepared to act as a man of conscience towards the defendant."

2. The maxim, however, does not extend to any misconduct, however gross, which is *unconnected* with the matter in litigation, and with which the opposite party has no concern. The Court will not go outside the subject-matter of the controversy, and make its inference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands (*Pomeroy*).

3. The **distinction** between the present maxim and the previous one [Maxim (III)] should be carefully noted. The previous maxim does not assume that the plaintiff's conduct has been unconscionable, but applies where both parties have claims to relief as against each other, and so equity would grant relief to the plaintiff *on condition*. But the present maxim applies where the defendant has no independent claim of his own, but the plaintiff is guilty of such unfairness that equity *refuses* him any relief at all.

4. This maxim has been applied by *our* Supreme Court to reject a petition under Art.136 on the ground that he had obtained leave by *suppressing facts*.[24a]

(V) Delay defeats equity.

(A) *England.*

I. Scope of the Maxim. 1. This maxim has also been expressed in other words, viz., "Equity aids the vigilant and not the dormant." This maxim means that while a legal claim is not barred by an lapse of time shorter than the period prescribed by the Statutes of Limitation, and *equitable* claim may in some cases be barred by the *unreasonable delay* of the plaintiff in seeking the relief, though there is no statutory bar to the claim.

2. In the absence of a statutory period of limitation, a Court of Equity in England has always discountenanced the *laches* or unreasonable delay of a suitor in asserting or enforcing his rights, holding that it would be unjust

24. *Overton* v. *Banister*, (1844) 3 Hare 503.—An infant concealing her age obtained from her trustees a sum of stock to which she was entitled only on coming of age. Subsequently, she instituted a suit against the trustees, to compel them to pay over again the stock which had been improperly paid to her during minority. *Held*, that though the receipt of an infant was ineffectual to discharge a debt, yet the infant, having misrepresented her age, could not set up the invalidity of the receipt.

24a. *Noronah* v. *U.O.I.*, (1994)1 S.C.C. 372 (para 4).

to allow a claim to be asserted after an undue lapse of time. In the words of Lord Camden in *Smith* v. *Clay*, [(1767) 3 Bro. C.C. 640],

"A Court of Equity has always refused its aid to stale demands, where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence; when these are wanting the Court is passive and does nothing."

As *Strahan* observes—

"The doctrine of *laches* in a Court of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might farily be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. Thus, for example, where a purchaser seeks to set aside or rescind a contract induced by fraud, he must apply for relief with reasonable diligence, and where owing to delay on his part other parties have acquired rights or the property has deteriorated in value or changed in condition, the Court will refuse rescission."

3. (*a*) This maxim, however, has no application to cases to which the Statutes of Limitation apply *expressly or by analogy*. In these cases, equity follows the law and allows the same time for enforcing the right, whether legal or equitable, as a Court of Law would, and delay *short* of the statutory period is no bar to a claim, whether legal or equitable.

(*b*) But where the relief sought is purely equitable and there is no alternative or corresponding legal remedy, the Statutes of Limitation are not applicable even by analogy. In these cases, equity will refuse the equitable remedy if the plaintiff has been guilty of *unreasonable* delay in applying for it. Such unreasonable delay is technically called *laches*.

4. Delay will be fatal to a claim for equitable relief, only (*i*) if it has resulted in the *destruction or loss of evidence* by which the claim might have been rebutted, or (*ii*) if it is *evidence of an agreement* by the plaintiff *to abandon* or release his right, or (iii) if the plaintiff has so acted as to induce the *defendant to alter his position* on the reasonable faith that he has released or abandoned his claim. *But apart from such circumstance, delay will be immaterial.*[25]

5. As there can be no abandonment of a right without full knowledge, legal capacity, and free will,—ignorance or disability or undue influence will be a satisfactory explanation of delay [*Allcard* v. *Skinner*, (1887) 36 Ch. D. 145.]

II. Laches and Acquiescence.

1. Laches is thus an equitable defence which bars an equitable remedy. Acquiescence is a similar equitable defence which is sometimes treated as

25. *Black* v. *Gale*, (1886) 32 Ch. 581.

identical with laches but is in fact quite distinct from the latter both as to its meaning and effect.

"When a Court of Equity is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words, when *equitable* as distinguished from legal relief is sought, equitable as distinguished from legal defences may have to be considered. The *conduct* of the plaintiff may disentitle him from relief; his *acquiescence* in what he complains of, or his *delay* in seeking relief, may of itself be sufficient to preclude him from obtaining it." (*Knight* v. *Simmonds*, (1896) 2 Ch. D. 297).

In the words of Green V.C.[26]:—

"The defence of laches and acquiescence are cognate but not correlative; they both sprang from the cardinal rule that 'he who seeks equity, must do equity'. Acquiescence, however, properly speaking, relates to inaction during the performance of act. Laches relates to delay after the act is done."

2. **The distinction between laches and acquiescence** may further be explained as follows:—

Laches is merely *passive* while acquiescence almost implies *active consent*. Laches means that a plaintiff is bound to prosecute his claim without undue delay. But the defence of laches is only allowed where there is no statutory bar. When there is a statute of limitation, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable.

But acquiescence operates only by way of estoppel. It is quiescence in such circumstances that *assent* may reasonably be inferred. Acquiescence depends on knowledge, capacity and freedom. Lapse of time or statutory limitation is of no importance. The plaintiff is estopped *immediately* by his conduct. A person does not acquiesce in a wrong by merely delaying to enforce his right, but if he lies by with full knowledge of his rights,[27] and tacitly allows conduct which is inconsistent with them, and thereby induces another to incur expense, or alter his condition, or leads innocent parties to gain interests which would be prejudiced by the subsequent enforcement of his right, he will be precluded from questioning in equity acts which he himself has authorised by his conduct.

"If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word 'acquiescence'." [*Duke of Leeds* v. *Earl of Amherst*, (1846) 78 R.R. 47]

It is to be remembered, however, that if the person doing the act himself knew that he was doing a *wrong*, the defence of acquiescence will not be available against the rightful owner.[28]

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26. *Hall* v. *Otter*, 52 Eq. 522.

27. There is no acquiescence where the party is under a *mistake* as to the true legal position (*Kochuni* v. *Kuttanunni*, A.I.R. 1948 P.C. 47).

28. *Smith* v. *Smith*, (1875) L.R. 20 Eq. 500.

(B) *India*

1. Pleas of laches and acquiescence are frequently, and rather vaguely, taken in Indian pleadings. But as the law of limitation is in this country directly applicable to all kinds of actions and suits, simple *laches* or delay for any length of time, short of the statutory period, will not be an *absolute bar* to a plaintiff's suit. (*see* pp. 19-20, *ante*). But—

(*i*) A considerable delay, if unexplained, may sometimes raise a presumption against the existence of the right which the plaintiff seeks to enforce, and induce the Court to look with very great jealousy at the *evidence* produced in support of it [*Ameerunissa* v. *Ashrufunessa*, 17 W.R. 259 P.C.].

(*ii*) Again, the policy of the law being to secure quiet possession to people who are in apparent lawful holding of an estate, lapse of a long time, coupled with the absence of evidence as to the circumstances in which the possession commenced, leads to a presumption that it originated in a lawful title [*Magniram* v. *Kasturbhai*, (1921) 46 Bom. 481 P.C.]. Thus, where the validity of a permanent lease or transfer made by a limited owner (such as a *sevait*) comes into question after a long time since the grant, so that it is not possible to ascertain the circumstances in which it was made, the Court should assume that the grant was made for necessity so as to be valid [*Gaurishankar* v. *Jiwan*, (1927) 32 C.W.N. 257 P.C.]. "In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time" [*Venkata* v. *Rani Saheba*, (1919) 43 Mad. 341 (345) P.C.].

(*iii*) Such laches may also be a ground for refusing a relief which the Court has a discretion to grant or refuse, e.g., costs [*Bangachandra* v. *Jagat*, (1916) 21 C.W.N. 225 P.C.]. But it would not apply to suits for specific performance or for recission of contracts which are equitable reliefs in England, but are *statutory* in India.

2. The scope of acquiescence is larger. It is expressly recognised in cls. (h) and (j) of s. 56 of the Specific Relief Act. Under this section, injunction cannot be granted—

(*a*) to prevent a continuing breach in which the applicant has acquiesced;

(*b*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court.

3. Apart from these statutory provisions, "where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence and the plea, if sufficiently proved, ought to be held a good answer to an action, although the plaintiff may have brought his suit within the period prescribed by the law of limitation".[29]

4. The doctrine of equitable estoppel as enunciated in the case of

29. *Uda Begum* v. *Imamuddin*, (1879) 1 All. 82.

Beniram v. *Kundanlal*[30] is an application of the principle of acquiescence [*see* under Ch. XVII, *post*].

(VI) Equality is equity. (*Aequalitus est quasi equitas).*

(A) *England.*

"Equity delighteth in equality." This may be illustrated as follows:

1. Equity leans against **joint tenancy**. At law, on the death of a joint-tenant, the whole estate belongs to the survivor and nothing to the representative of the deceased. Here there is no equality, except perhaps, an equality of chance. Equity, therefore, held that the survivor is a trustee for the representative of the deceased in proportion to the sum advanced by him (notwithstanding the legal estate being vested in the survivor).

In other words, equity applied the rule of tenancy-in-common and not of joint tenancy in case of—

(*i*) *Joint purchases*: Where the money has been advanced in *unequal* shares, as appears from the deed. But, if the purchase money has been advanced *equally*, the purchasers may be presumed to have purchased with a view to benefit survivorship (*Lake* v. *Gibson*). Even where money is advanced *equally*, equity will readily treat the joint tenancy as severed on the slightest grounds.

(*ii*) *Joint mortgages:* Where a mortgage is made to two persons jointly, whether the money is advanced *equally or unequally*.The mere circumstance of the transaction being a loan is sufficient to repel the presumption of an intention to hold the mortgage as a joint tenancy.

(*iii*) *Partners:* If partners buy land for the business of the firm, they were always regarded as tenants-in-common [*Lake* v. *Craddock*, (1732) 3 P. Wms. 158].

2. The doctrine of **contribution** as between joint-debtors and sureties is also founded on this principle, viz., that when several persons are debtors, all shall be equal and if the creditor does not make them contribute equally, the Court of Equity will secure that object [*Dering* v. *Winchelsea*, (1787) 1 Cox. 318].

The rule of contribution between co-sureties, however, becomes a little more complicated when any of the sureties becomes insolvent. So long as all the sureties are solvent, the extent of liability of each is equal, both in law and in equity; in other words, each is liable for a fraction of the liability corresponding exactly to the number of sureties.

3. As regards co-mortgagors, the principle of contribution is that a property which is equally liable with other property to pay a debt shall not escape, because the creditor has been paid out of the other property alone. So,

"If several estates be mortgaged for or subject equally to one debt, the several

30. *Beniram* v. *Kundanlal*, (1899) 21 All. 496 P.C.

estates shall contribute rateably to that debt, being valued for that purpose, after deducting from each estate any other incumbrances by which it is affected."[31]

4. The doctrine of contribution between co-trustees is also an offshoot of this maxim. When trustees are equally to blame for a breach of trust, they are jointly and severally liable to the beneficiaries, and when one of them makes good the breach, he is entitled to contribution from his co-trustees [*Fletcher* v. *Green*, (1864) 33 Beav. 426; *see*, further, under Ch. XIII, *post*].

(B) *India.*

1. S. 42 of the Indian Contract Act, 1872, applies the principle of tenancy-in-common and not of joint tenancy as regards the devolution of joint liabilities:

"42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise."

This means that when a joint promisor dies, his liability falls on his representatives jointly with the survivor or survivors, and on the death of the last survivor, the representatives of all the joint promisors must fulfil the promise, unless, of course, there is a contrary intention in the contract.

2. In India, provisions relating to *contribution* are contained in ss. 43, 69-70, 146-147 of the Contract Act and s. 82 of the Transfer of Property Act. But the application of the rule of contribution is not confined within the above statutory provisions, and it will be applied whenever justice, equity and good conscience call for its application. Thus, a heir under Mahomedan Law is bound to contribute towards debts properly paid by his co-heirs to the extent of his share, even though different portions of the assets devolve according to different rules of descent.[32]

3. The rule of contribution between the joint promisors is laid down in s. 43 of the Contract Act:

"43. When two or more persons made a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or

31. Fisher on *Mortgage*, 6th Ed., p. 688.
32. *Kazim* v. *Sadiq*, (1938) 42 C.W.N. 900 P.C.

entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(*a*) *A*, *B*, and *C* jointly promise to pay *D*, 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

(*b*) *A*, *B*, and *C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A*'s estate, and 1,250 rupees from *B*."

Thus, in the absence of a contrary intention in the contract, a joint promisor has a right of contribution against co-promisors, if the promisee has compelled him to perform the entire contract or recovered more than what was due in his share.[33] The right to contribution arises after the debt *has been discharged* by the person who claims it and not before it; mere existence of a decree against him is not enough.[34]

The implied contract between the joint promisors to contribute is independent of the contract between the promisors and the promisee. Hence, the promisee cannot, by an action on his part, absolve a joint promisor from his liability to contribute.[35]

4. As to contribution between *co-mortgagors*, the Supreme Court has laid down[36] that the law on this subject is contained in s. 82 of the Transfer of Property Act, 1882, and that the provisions of this section are not to be modified by anything contained in s. 43 of the Contract Act or on equitable considerations.

S. 82 of the Transfer of Property Act provides—

"82. When property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the subsequent mortgagee."

33. *Lalta Prasad* v. *Zahuruddin*, 32 All. 479 (483).

34. *Ram Pershad* v. *Neerbhoy*, (1872) 11 B.L.R. 76; *see* also ills. (*b*)—(*d*) to s. 43.

35. *Narendra* v. *Pashupati*, A.I.R. 1949 Cal. 242.

36. *Kidar* v. *Hari*, (1952) S.C.R. 179. [On the contrary, *the English* equitable principle has been applied to an area to which the Transfer of Property Act did not extend—*Ganeshi* v. *Joti*, A.I.R. 1953 S.C. 1; *Valliama* v. *Sivathanu*, A.I.R. 1979 S.C. 1937].

The principle underlying the section is that, in the absence of a contract o the contrary, co-mortgagors are bound to contribute proportionately to the ralue of the shares or parts of the mortgaged property owned by them and iot in proportion to the extent of the benefits derived by each of them.[36]

A, *B* and *C* separately own properties of *unequal value*.—Blackacre, Vhiteacre and Greenacre (the values being Rs. 30,000; Rs. 20,000; Rs. 10,000, espectively). *A*, *B* and *C*, in various combinations, incur debts,—their individual ability for the same being assumed to be Rs. 2,000; Rs. 3,000 and Rs. 5,000 espectively.

In order to clear off the above debts, *A*, *B* and *C* jointly mortgage their three states for Rs. 10,000, the total aggregate sum due at the date of the mortgage om the three of them. There is no contract between them either in the mortgage eed or otherwise, regarding their respective shares of responsibility in the mortgage ebt of Rs. 10,000.

At the date of redemption, the mortgage debt has swollen to Rs. 15,000. *A* lone redeems by selling Blackacre, which is his separate estate, to the iortgagee for Rs. 35,000 (that being the value of Blackacre at the date of edemption). Rs. 15,000 of this is applied in satisfaction of the mortgage debt. Vhat are *A*'s rights as against *B* and *C* for the payment of this Rs. 15,000?

If they were to contribute in proportion to the extent of the benefits derived by em, *B* would have to contribute Rs. 4,500 (i.e., $^{3}/_{10}$th of Rs. 15,000) and *C* would ave to contribute Rs. 7,500 (i.e., $^{5}/_{10}$th of Rs. 15,000). But in the absence of a ontract to the contrary, the rules laid down in ss. 82 and 92 of the T.P. Act must pply. Hence, they are to contribute according to the value of their interests in the operties mortgaged.[36]

(VII) Equity looks to the intent rather than to the form.

In every transaction, equity looks to the real intention of the parties ather than to the external forms which were scrupulously regarded in ommon law. The principle underlying this maxim was thus explained in *'arkin* v. *Thorold*, (1852) 16 Beav. 59.

"Court of Equity made a distinction in all cases between that which is a matter f *substance* and that which is a matter of *form*; and if it finds that, by insisting n the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

This maxim is illustrated by—

(*i*) The equitable doctrines governing **Mortgages**. The whole law of mortgage in equity is based upon the conception of the transaction as a mere debt, as contrasted with the common law view of mortgage as an absolute transfer, subject to a condition (*see* Ch. XIII).

(*ii*) The doctrine of **Penalties and Forfeitures**. Equity refused to enforce stipulations in a contract imposing a money-penalty *in terrorem* for the breach of the contract, if such breach could be adequately compensated by damages, on the principle that performance of the act was the principal and

the penalty or forfeiture was merely accessory (*see* Ch. XV). On the same principle, equity relieved against forfeitures in leases designed to secure the performance of some collateral act, e.g., the payment of rent, when the Court could give by way of compensation all that was required. But not otherwise.

(*iii*) The doctrine of *Precatory Trusts* is also founded on this maxim.

(VIII) Equity looks on that done which ought to have been done.

(A) *England.*

(*a*) This maxim has its chief application in the case of *contracts*. Equity will treat the subject-matter of a contract as to its consequences and incidents in the same manner as if the act contemplated in the contract had been completely executed,—from the moment the agreement has been made, though all the legal formalities of the contract have not yet been complied with. But this equity arises only in favour of persons entitled to enforce the contract specifically, and not in favour of volunteers, i.e. persons who have paid no consideration. Thus,

(*i*) With regard to an *executory contract for lease of land*,—a person, who enters into possession of land under an agreement for lease, which is specifically enforceable, is regarded as between himself and the other party as being in the same position as if the lease had been actually granted to him [*Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9].

(*ii*) Similarly, as to an *agreement for sale of land*.—Though at law, the ownership remains with the vendor, in equity the purchaser is looked upon as the owner of the land, and the vendor, who holds the legal estate, holds it as a trustee for the vendee, from the moment the agreement is made though the conveyance has not yet been made. (*See* Ch. XI, *post*).

(*iii*) According to this maxim, *a contract to transfer after-acquired property*, if made for valuable consideration, is enforced in equity. At law, non-existing property (to be acquired at a future time) is not assignable. In equity, such assignment is possible; the agreement operates upon the property the moment it comes into existence and becomes a complete equitable assignment [*Holroyd* v. *Marshall*, (1862) 10 H.L.C. 191].

"When a person executes a document purporting to assign property to be afterwards acquired by him, that property, on its acquisition, passes in equity to the assignee" (*Performing Rights Society* v. *London Theatre*, (1924) A.C. 1 13).

Thus, an assignment of future book-debts passes the *equitable interest* in book-debts acquired after the assignment. The only condition for the application of this doctrine is that the property must be ascertainable or identifiable at the time when the Court is asked to enforce the contract [*Tailby* v. *Official Receiver*, (1888) 13 A.C. 523].

(*b*) To this maxim may also be referred the equitable doctrine of

conversion. The agreement is considered as done not only at the time when, but also in the manner in which, according to the tenor thereof, it ought to have been performed. Thus, money covenanted or devised, to be laid out in land, is treated as real estate in equity from the moment the transaction takes effect, and conversely.

(B) *India.*

1. In India, the doctrine in *Walsh* v. *Lonsdale* (p. 16-17, *ante*), does *not* apply. The doctrine converts an equitable interest into a legal interest, as between the parties according to the maxim 'Equity looks on that as done which ought to have been done'. But, in India, no distinction is made between legal an equitable interests. An agreement for lease only creates a personal right. (*a*) If the lease is from year to year or for a term exceeding one year or reserving a yearly rent, interest in land can be obtained only by a registered instrument (s. 107, T.P. Act) and the equity in *Walsh* v. *Lonsdale* will not apply so as to avoid the statutory requirement of registration. It has been laid down by the Privy Council in *Mian Pir Bux* v. *Mahomed Tahar*, [(1934) 60 C.L.J. 370 P.C.] that the equitable right is not available in violation of the Indian statute. So, if *A* sues *B* for ejectment, *B* cannot raise the defence that he is in possession in pursuance of an (unregistered) agreement for lease (or sale)[37,37a]. Of course, he can apply for specific performance of the agreement if that is yet available, or defend his possession under s. 53A of the Transfer of Property Act, if the agreement is *in writing*. (*b*) If the term is for a period less than one year, a lease can no doubt be made without a registered instrument,—by oral agreement accompanied by delivery of possession. But then there is no scope for the application of the rule in *Walsh* v. *Lonsdale*, inasmuch as possession perfects the title of the lessee and he requires nothing more for the protection of his interest. [*See*, further, under Ch. XVI, *post*].

The following test has been laid down by the Supreme Court[38] to determine whether a particular document constitutes a lease or a mere agreement for lease: A present demise is required to create a lease.[38] But even when words of present demise are used in the deed, it would be construed as a mere agreement for lease where certain things have to be done by the lessor before the lease is granted, e.g., the completion of repairs on the premises, or by the lessee, e.g., the obtaining of sureties.[38]

2. For the same reason, the maxim does *not* apply to **agreements for sale** so as to make the purchaser the owner *in equity* from the moment of the agreement, for, in India, there is no equitable ownership (*see* p. 8, *ante*). This is given statutory confirmation by s. 54 of the Transfer of Property Act which says that a contract for the sale of immovable property 'does not, of itself, create any interest in such property'.

37. *Delhi Motor Co.* v. *Basrurkar*, A.I.R. 1968 S.C. 794.
37a. *State of Maharashtra* v. *Atur*, (1994) 2 S.C.C. 497 (Para, 28).
38. *Tolaram* v. *State of Bombay*, A.I.R. 1954 S.C. 496.

This is also the result of the 2nd paragraph of s. 40 of the Transfer of Property Act, which has been explained by *our* Supreme Court in *Ram Baran* v. *Ram Mohit*, A.I.R. 1967 S.C. 744, thus:

"The second paragraph of sec. 40 of the Transfer of Property Act makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under sec. 40 of the Act which arises out of the contract, and annexed to the ownership of immovable property but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because sec. 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

3. Similarly, a contract for **assignment of future property** does *not* create an equitable title in the assignee as soon as the future property comes into existence.

There may be a transfer of existing property to operate in future (s. 5 of the T.P. Act), but there cannot be a transfer of non-existing property, and a conveyance of property to be acquired in future conveys no *interest* in the property to the transferee. Nevertheless, the equitable maxim referred to above has been adopted in India by compelling *specific performance* of the contract as soon as the property comes into existence. "The bill of sale in such a case can only be evidence of a contract to be performed in future, and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes into Court shewing that he has himself done all that he was bound to do."[39]

So what an assignee of a non-existent property in India gets after the property comes into existence is *not any equitable interest* in the property, but a mere *personal* right to have the agreement to assign specifically performed by the assignor.

The principle applies to assignment by sale, mortgage or charge.[40]

But even though the assignee does not get any interest in the after-acquired property but gets only the right to sue for specific performance, this personal right creates an 'obligation annexed' to the property within the meaning of the second paragraph of s. 40 of the Transfer of Property Act, so that if the assignor again assigns the property

39. *Perhlad* v. *Buddhoo*, (1869) 12 M.I.A. 275.
40. *Vatsavyaya* v. *Poosapati*, A.I.R. 1924 P.C. 162.

to a third person, the first assignee's right shall be enforceable against such subsequent assignee unless he is an assignee for value without notice of the prior assignment.

The principle underlying s. 17(a) of the Specific Relief Act, 1963, is similar except that it applies where the vendor or lessor had an *'imperfect title'* at the time of a contract for sale or lease.

4. It is also to be noted that the equity in favour of future property arises only for contracts for consideration. Since there is no equity in favour of a volunteer, a *gift* of future property does not attract the equitable doctrine and is, accordingly, void for all purposes. This principle is also embodied in s. 124 of the Transfer of Property Act, which says—

"A gift comprising both existig and future property is void as to the latter."

(IX) Equity imputes an intention to fulfil obligation.

(A) *England.*

1. "Where a man is under an obligation to do an act, and he does some other act which is capable of being considered as a fulfilment of his obligation, the latter act will be so considered, because 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*." The doctrines of Satisfaction and Performance are based on this maxim. Both depend upon a presumed intention to carry out an obligation, but in satisfaction the thing done is something different from the thing agreed to be done, whereas in performance the *identical* act which the party contracted to do is considered to have been done. For example, where a person, for valuable consideration, covenants to purchase and settle lands and subsequently purchases lands of the *same nature*, it will be presumed that they were purchased in performance of the covenant, by which they will accordingly be bound. On the other hand, if *A*, after contracting a *debt*, makes a will giving the creditor a *legacy*, the legacy is presumed to be in satisfaction of the debt, if it is equal to or greater than the debt.

2. The doctrine of **Performance** lays down the following presumptions:

(*i*) Where a person covenants for valuable consideration to purchase and settle lands upon certain trusts, and subsequently purchases lands of the nature of those covenanted to be settled, but he retains such lands unsettled till his death, equity will presume that such lands were purchased in performance of the covenant and are bound by it. [*Lechmere* v. *Earl of Carlisle*, (1773) 3 P.W. 211.].

(*ii*) Where a person covenants for a valuable consideration that he will leave by will a certain legacy or annuity, and subsequently dies intestate, or by his will leaves a different sum or annuity to such person—equity will presume that any share of the covenantor's estate received by such person

under the intestacy or different sum or annuity left by his will is a complete or *pro tanto* performance of the covenant [*Blandy* v. *Widmore*, (1716) 1 P.W. 323].

3. The doctrine of relief against defective execution of power is also founded on the present maxim. The doctrine was thus stated in *Tollet* v. *Tollet* [(1728) 2 P. Wms. 489 (490)] :

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 father to provide for his wife or child."

The donee of a power, which is not in the nature of a trust, need not execute the power at all. If, however, he shows his willingness to execute it, but his execution is defective, "equity will take the will for the deed, and render his attempt effective, by treating it as an execution".

(B) *India.*

1. 1. In India, the English rule of presumption relating to *satisfaction* and ademption has been **discarded** and if a testator wants to satisfy his obligation by a subsequent gift, he must do so by express words. The Indian rules are contained in ss. 177-179 of the Indian Succession Act. The reasons for the departure from the English law have been thus explained by the Law Commissioners: "We have departed from the English law where its provisions appeared to us to be objectionable in themselves, or specifically inapplicable to India. Above all, things we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do or to say for him that which he has not done or said for himself. We have accordingly *discarded* the rules by which the English Courts are compelled to presume in the absence of any intimation of a contrary intention—

(*a*) that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt the legacy is meant by the testator to be a satisfaction of the debt; (*b*) that where a parent who is under a legal obligation to provide a portion for his child fails to do so the legacy shall be deemed to be satisfaction or fulfilment of the obligation; (*c*) that where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he thereby adeems the legacy."

2. Ss. 177-179 of the Succession Act are as follows:—

"177. 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 to the amount of the debt.

178. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

179. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

II. As to *performance*, s. 92 of the Trusts Act codifies the English principle as follows:—

"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."

(X) Equity acts in personam (*Aequitas agit in personam).*

(A) *England.*

1. As *Hanbury* observes, "This is the widest of all the maxims. In a sense it comprises the whole of equity.....It cannot be too often emphasized that on this maxim is based the whole theory of trusts and of their equitable interests analogous to trusts."

2. This highly important maxim is descriptive of the **procedure** in equity. It originated in the primary assumption that 'equity is enforceable by a process of contempt'. While a judgment of the Court of Common Law was enforced by one of the ordinary writs of execution by means of which the plaintiff was forcibly put in possession of the property to which he was entitled under the judgment, the Court of Chancery did not interfere with the defendant's *property*, but merely made an order against the defendant *personally*, and if he failed to comply with it, punished him for his disobedience by attachment or committal for contempt. Afterwards, however, the Chancery had recourse to sequestration of the defendant's property, and since the Judicature Acts, the orders of the Chancery Division can be enforced by any of the *legal* writs of execution.

3. But although at the present day equity is not confined to acting *in personam*, still its jurisdiction is primarily over the defendant personally [*Penn* v. *Baltimore*, (1750) 1 Ves. 444][41]. Thus, equity will enforce **specific performance of a contract** even where the subject-matter of the suit is beyond the jurisdiction of the Court provided the defendant is in England [*Coyler* v. *Finch*, (1856) 5 H.L.C. 905].

Consequently, equity entertains action respecting immovables abroad if there is some contract or equity against a person in England, e.g., **action for administration** [*Ewing* v. *Orr-Ewing*, (1885)10 A.C. 433].[42] In this case Lord Selborne said,—

"The Courts of Equity in England are Courts of conscience; in the exercise of

41. *Penn* v. *Baltimore*.The plaintiff and defendant being in England, had entered into articles for settling the boundaries of two provinces in America—Pennsylvania and Maryland,—and the plaintiff sought a specific performance of the articles. The principal objection was that the property was out of the jurisdiction of the Court. *Held*, that the plaintiff was entitled to specific performance of the articles; for, "the strict primary decree of this Court is *in personam*".

42. *Ewing* v. *Orr-Ewing*.—*A*, domiciled in Scotland, dies leaving personal estate in Scotland and also in England and heritable property in Scotland. He made a will in Scotch form, and appointed Scotchmen to be his executors and trustees. An infant legatee, resident

this jurisdiction, they 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".[42]

4. The doctrine is subject to the following limitations:

(*a*) If an action merely involves *a question of title* to land outside jurisdiction, the English Court will not entertain the action, for the question of title can be better dealt with by the Courts of the country in which the land is situate. It will adjudicate on a question of title only when there is some *personal obligation* arising out of contract or implied contract, *fiduciary relation or fraud*, or other conduct which in the view of an English Court of Equity would be unconscionable. [*Deschamps* v. *Miller*, (1908) 1 Ch. 856].

(*b*) Again, though a Court of Equity will protect and preserve the funds of a charity conducted in a foreign country, by its jurisdiction over the trustees *in personam*, it will not interpose its authority, for the purpose of giving directions for the *administration* of the charity, because it is not in a position to supervise its administration effectively. It will leave questions relating to the administration of the trust, such as removal and appointment of trustees, to be dealt with by the Courts of the country where the charity is carried on and its beneficiaries reside.[43]

(*c*) Since a Court of Equity will not make orders it cannot enforce, it will not issue an injunction to restrain a defendant within its jurisdiction from committing a *tort* outside its jurisdiction [*Morocco Syndicate* v. *Harris*, (1895) 1 Ch. 534].

(B) *India*

In India, this maxim has a limited application.

The Proviso to s. 16 of the Civil Procedure Code, 1908, has adopted the principle in a *modified* form. It says—

"Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

"*Explanation.*—In this section 'property' means property situate in India."

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in England, brings an action for the administration of the estate against the executor-trustees who enter appearance without protest. The question was whether the English Court had jurisdiction to order administration as to the whole estate? *Held*, that the English Court had *jurisdiction* as to the whole estate (but that in the circumstances of the case, it would be more convenient to administer in Scotland). In order to induce the Court to exercise its jurisdiction over disputes as to land outside England, not only must (i) the defendants or some of them be in England and (ii) the dispute be a matter of conscience, but (iii) the Court must be the most convenient forum for deciding the dispute. If it is shown that there is a competent Court to decide the dispute in the country where the land is situate and it would be more convenient to have that Court decide it, the English Court in exercise of its discretion to refuse to give an equitable remedy will not entertain the action.

43. *Bilasrai* v. *Shivnarayan*, (1943) 48 C.W.N. 448. (P.C.).

Suits relating to immovable property must be instituted in the Court within the local limits of whose jurisdiction the property is situate. But a Court may entertain such a suit even though the property is situate outside its local jurisdiction, if (*i*) the relief sought can be *entirely* obtained through the personal obedience of the defendant, (*ii*) the property is held by or on behalf of the defendant, and (*iii*) the property is situate in, and *not* beyond, India. The Indian Court, therefore, cannot act *in personam* if the property is situate abroad.

Generally speaking, specific performance and injunction are reliefs which can be entirely obtained through the personal obedience of the defendant and so suits for such reliefs may be instituted in the Court within whose jurisdiction the defendant resides even though the property to which the relief relates may situate outside its jurisdiction. But even in such cases, an Indian Court cannot give relief if the property is situate outside India.

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

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

Maxims XI and XII enunciate rules of priority. They would be better dealt with in the next Chapter.

AND INTERESTS
ESTATES
EQUITABLE
OF
MATURE

CHAPTER IV

NATURE OF EQUITABLE ESTATES AND INTERESTS

§ 10. Equitable estates and interests are *jura in personam.*

1. The most important characteristic of equitable estates and interests is, as *Maitland* observes, that they **"are rights *in personam*, but they have a misleading resemblance to rights *in rem*".**

2. Equitable interests had their origin in the doctrine that **'Equity acts on the conscience'**. Acting on the conscience of the *legal* owner of the property, equity compelled him to hold for the benefit of another, whenever it would have been unconscientious to hold for himself. Thus, trust estates had their origin in the doctrine of equity that a person who has undertaken a trust is bound to fulfil it: originally, the trust was an *obligation* which was specifically enforced in the Court of Chancery.

3. This view is supported by the definition of a trust as given by *Coke*, according to which the right of the *cestui que trust* was the benefit of an obligation; "A use is a trust or confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land and to the person touching the land....*cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust."

4. But though originally they were enforced as mere rights *in personam*, in course of time, they came to look like rights *in rem* or true proprietary rights. *Maitland* assigns two reasons for this resemblance:

(*a*) In their *internal* character they are treated like *legal* estates and interests, i.e as regards duration, transmission and alienation (*see* p. 19, *ante*).

(*b*) Secondly, on the *external* side, they are enforceable not only against the legal owner, but against all save a *bona fide* purchaser for value wi.hout notice.

5. *Maitland* illustrates this proposition with reference to the successive steps in the development of the trust:

(*i*) The first is reached when the *cestui que trust* has a remedy against the person who has undertaken to hold the land or goods on trust for him.

(*ii*) Then the trust is enforced against those who come to the land, or goods by inheritance or succession from the original trustee,—against his heir, executors, or administrators.

(*iii*) A third step is to enforce the trust against the trustee's creditors.

(*iv*) Next, it is enforced against one to whom the trustee has given the thing without valuable consideration.

(*v*) The fifth step was taken when the trust was enforced even against one who purchased for value the thing from the trustee, if he, at the time of the conveyance, knew of the trust.

(*vi*) Lastly, it is enforced against those who *would have known of* the trust had they behaved as prudent purchasers behave.[1] This is the doctrine of Constructive Notice. (*See* §13, below).

But here a limit is reached. Against a person who acquires a legal right *bona fide*, for value, without notice, express or constructive, of the existence of equitable rights, those rights are of no avail.[2]

6. To sum up—**The *cestui que trust* has rights enforceable against all save a *bona fide* purchaser for value without notice.**

While legal interests in property are good against all the world, equitable interests are good against those persons only who are in conscience bound to respect them.

§ 11. The defence of *bona fide* purchaser for value without notice.

1. Here is the second important difference between legal and equitable interests. An equitable interest will be enforceable against the holder of a legal title only if the circumstances are such that the equitable claims affects the conscience of the legal owner. Hence, an equitable interest will not be enforceable against a purchaser of the legal estate, for value and without notice of the equitable interest.

A legal right is enforceable against any person who takes the property, whether he had notice of it or not. If *A* sells to *C* land over which *B* has a right of way, *C* takes the land subject to *B*'s right, although he was ignorant of the right. But it is different as regards equitable rights. For example, if *A* enters into an agreement for sale of his estate to *B*, who pays a part of the purchase money, then, until the actual conveyance, *B* has no interest *at law*; but *in equity*, which 'looks on that as done which ought to be done', *B*, from the moment of the contract, is the owner of the estate. Now, if *A*, *after the contract* makes an absolute conveyance of the legal estate to *C* who purchases it for value without notice of *B's* right, the Court will refuse to give *B* any relief against *C* who got the legal estate *bona fide* for value without notice, and has an equity to retain the estate equal to *B's* equitable right. This characteristic of equitable interests follows from the maxim, "Equity follows the law" [see *ante*]. A purchaser in good faith has obtained a legal right. The Court of Law gives him that right. There is nothing by virtue of which a Court of Equity can take away that right from him, for his **conscience is unaffected**; he has not undertaken any obligation, nor is he guilty of negligence or dishonesty, neither is he a mere volunteer.

1. It was decided in *Re Nisbett and Potts' Contract*, (1906) 1 Ch. 386, that an equitable right could also be enforced against a *disseisor*, i.e., one who has acquired title by lapse of time (see *post*).

2. *Pilcher* v. *Rawlins*, (1872) 7 Ch. 259.

2. What is curious to note, however, is that the defence of 'legal' estate by *bona fide* purchase for value without notice is **not a merely personal defence** flowing from the moral merits of the purchaser, it is also competent to all who claim through or under him, even though they have notice of the equitable rights. Suppose, *T* holds land in trust for *A*, and sells the land to *X* who purchases the legal estate *bona fide* for value and without notice; *X* then sells to *Y*, who has notice of the trust when he takes the conveyance. In such a case, though *Y* has notice, he would not be bound by the trust. As *Lewin* explains:

"A purchaser with notice from a purchaser *without* notice is exempt from the trust, not from the merits of the second purchaser but of the first; (for, if an innocent purchaser were prevented from disposing of the land, the necessary result would be a stagnation of the property)."

Thus—

(*a*) A purchaser *with* notice of an equitable interest will, nevertheless, not be bound by it, if he purchases from a person who himself was a purchaser *without notice*. Conversely,

(*b*) A purchaser *without* notice of an equitable interest will not be bound by it even though his vendor had notice thereof.

3. The requisites of the defence of a *bona fide* purchase for value without notice are three (*Snell*):—

(1) The defendant must have the legal estate vested in himself, or in some person on his behalf. (2) He must have given value. (3) He must have had no notice of the equitable interest at the time when he gave his consideration for the conveyance.

These conditions fulfilled, "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 the Court".[2]

4. The difference between legal and equitable rights in practical operation may be further illustrated by another example; (1) *A* is a tenant in fee. *B* is occupying his land as *his tenant* at will. *B* forges title-deeds showing that he is tenant in fee, and sells the land to *X*, who diligently investigates the title, finds nothing suspicious, pays his purchase money, and takes a conveyance. Here *A* is the legal owner of the land, and *X* has taken a conveyance from one who has nothing to convey. Hence, notwithstanding his diligence, and the absence of notice, he has no rights against *A*. On the other hand, (2) if *B* is a tenant in fee holding land *in trust* for *A*, and *B* forges title-deeds concealing the trust, and sells to *X*, showing himself to be simply a tenant in fee, subject to no equitable liability; and *X* investigates the title with reasonable diligence and takes a conveyance,—*X* becomes the legal owner of the land. And having come to the ownership *bona fide* for value and without notice, actual or constructive of *A*'s rights,

A has not equity against him. *A*'s only remedy is against the fraudulent trustee. But now suppose in the latter case that (3) after the fraudulent trustee *B* has *contracted* to sell, *A* hears of this and informs the purchaser of it, before the purchaser has got the *legal* estate. In this case, neither *A* (the *cestui que trust*), nor *X* (the purchaser under the agreement of sale), has legal ownership. Both having equitable rights, the older will prevail, viz., *A* (*see* §15). But once the purchaser gets the legal estate without notice, *A*'s equitable claim will not stand.

§ 11A. Equitable interests in India.

Besides the interest of the *cestui que trust* or beneficiary of a trust, equity recognises other equitable interests in land. Thus, where there is an agreement for sale of land, the legal estate no doubt remains in the seller until the agreement is completed by conveyance, but equity recognises an equitable interest in the purchaser which is good against all the world save only a *bona fide* purchaser for value without notice of the land, if any.

But the law in India recognises no distinction between legal and equitable estates or interests.[3] There are rights which resemble the English equitable interests in that they are liable to be defeated by a purchaser for value without notice.

But, in India, there is only one owner and property is vested in one person only at a time. What are equitable interests in England are recognised here only *as personal rights against the owner* for the time being and not as equitable rights of ownership. Thus, where property is vested in a trustee, the owner is the trustee. The interest of the beneficiary, as defined in s. 3 of the Trusts Act, is not an interest in the trust property but "a right against the trustee as owner of the trust property" [see § 24 *A, post*]. Similarly, it is specifically enacted in s. 54 of the Transfer of Property Act that a contract for sale of immovable property does not, of itself, create any interest in, or charge on, such property. Under s. 40 of the Transfer of Property Act it is "an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein". *See* in this connection the Privy Council decision in *Ram Kinkar* v. *Satyacharan,* [(1938) 43 C.W.N. 281 (P.C.)], where it has been affirmed that the Transfer of Property Act is a self-contained code, and "it has left no room for such a distinction". S. 48 of the T.P. Act, on the other hand, does away with the question of priority between legal and equitable estates as obtains in England, subject only to s. 78 [*Imperial Bank of India* v. *U. Rai Gyaw,* (1923) 28 C.W.N. 473 (P.C.)].

§ 12. Doctrine of Notice.

1. The doctrine of notice is that a person who purchases an estate, though

3. *Webb* v. *McPherson,* (1903) 8 C.W.N. 41 P.C.

for value, after notice of a prior equitable claim, becomes a *mala fide* purchaser and takes subject to that right. He cannot by getting in the legal estate defeat such prior claim. Fraud or *mala fides* is the true ground on which the Court is governed in the cases of notice [*Le Neve* v. *Le Neve*, (1747) 1 Amb. 436].

2. Notice means 'knowledge of a fact which would make any rational man act with reference to the knowledge so acquired'. What constitutes notice is laid down in s. 199, Law of Property Act, 1925, (replacing the Conveyancing Act, 1882). A person is said to have notice of a thing when—

(1) It is within his knowledge, or

(2) It has come to the knowledge of his agent as such in the same transaction, or

(3) It would have come to his knowledge if reasonable inquiries had been made, or

(4) It would have come to the knowledge of his agent as such if reasonable inquiries had been made.

3. Notice is thus either **actual or constructive.**

(A) In **Actual Notice** knowledge of the fact is brought directly home to the party. But a person is not bound to attend to vague rumours, and actual notice, in order to be binding, must be definite information given by a person interested in the property in respect of which the notice is issued, in the same transaction, "so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it" [*Lloyd* v. *Bankes*, (1868) L.R. 3 Ch. 488].

(B) **Constructive Notice** is knowledge imputed by the Court on presumption. Notice to an agent is sometimes termed 'Imputed' notice, the term 'Constructive Notice' being confined to the third and fourth cases in our definition given above.

§ 13. Doctrine of Constructive Notice.

1. Constructive notice has been **defined** as "knowledge which the Court imputes to a person from the case, upon a presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must be though it may not have been formally communicated" [*Espin* v. *Pemberton*, (1859) 3 De G. & J. 547 (554)]. Or, in the words of *Dart*, it arises "in those circumstances under which the Court concludes either that notice must be imputed on the grounds of public policy to an innocent person, or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud, and which, therefore, in the common interests of society, should, in its consequences, be treated as equivalent to actual notice".

2. Constructive notice is of several kinds. In *Jones* v. *Smith*, (1 Hare

43) the cases in which constructive notice has been established were grouped into 2 classes,—

(A) *Actual notice of a fact* which would have led to notice of other facts (of which the Court presumes, he had knowledge).[4] Thus,

(*i*) Notice of a deed is notice of its contents (e.g., covenants and restrictions in the deed), except where it does not necessarily affect the title.

(*ii*) Where the third party is in possession, or the appearance of the property is such as to put a party upon inquiry, and he chooses not to make inquiries, whatever title he acquires will be subject to the right of the person in possession. Thus, occupation by a tenant is notice of all the rights of the tenant [*Hunt* v. *Luck*, (1902) 1 Ch. 428]. In other words, when land is in the occupation of someone other than the vendor, the fact of the occupation gives the purchaser constructive notice of any rights of the occupying tenant, (but it is not constructive notice of third person's rights).

(B) Knowledge imputed by the Court from the evidence that the party has *designedly abstained from inquiry* for the very purpose of avoiding notice.[5]

This class has been extended to include those cases which follow from the duty of (*a*) investigating title, as well as of (*b*) requiring production of title-deeds. "Generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire" [*Wilson* v. *Hart*, (1866) 1 Ch. 463]. Nor is a purchaser taking a title depending on adverse possession protected from the equity on the ground that the "squatter from whom he buys had no actual notice of the equity, for a *squatter* is not a purchaser for value without notice".[6] In these cases, the purchaser is deemed to have constructive notice of any equity affecting the property, because he has *negligently* omitted to make the usual investigation of title which any prudent purchaser should make, though without any fraudulent design [*Agra Bank* v. *Barry*, (1874) 7 H.L. 135].

Not only should a purchaser require an abstract of the vendor's title to be delivered, but he should also require production of the title-deeds. Hence, notice that title-deeds are in possession of another constitutes notice of any equitable claim that the other may have unless *sufficient cause or excuse* is given for non-delivery of the deeds. If the purchaser

4. *Bisco* v. *Earl of Banbury*, [(1676) 1 Ch. Ca. 287].—The purchaser had actual notice of a specific mortgage, but did not inspect the mortgage deed, which referred to other incumbrances. *Held*, he was bound by those incumbrances, for he would have discovered their existence if he had inspected the deed, as any prudent man would have done.

5. *Birch* v. *Ellames*, (1794) 2 Anst. 427.—The title-deeds of an estate were deposited with the plaintiff by way of security. The defendant, 14 years afterwards, and on the eve of the mortgagor's bankruptcy, took a mortgage of the property, with notice of the deposit, but he abstained from enquiring the purpose for which the deposit had been made. *Held*, that the defendant was bound by the plaintiff's rights, as he had designedly omitted enquiry for the purpose of avoiding notice of the plaintiff's rights.

6. *Re Nisbet & Potts' Contract*, (1906) 1 Ch. 386.

neglects to call for them, and it turns out that the deeds are in the possession of an equitable mortgagee, the purchaser will take subject to the mortgage.

§ 13A. Defence of *bona fide* purchaser for value without notice in India.

1. Though equitable interests as such are not recognised in India, a *bona fide* purchaser for value without notice is protected under many statutory provisions, e.g., ss. 39, 40, 53, 53A, 100 and 126 of the Transfer of Property Act; s. 19(b) of the Specific Relief Act, 1963, and so on. And the principles underlying these statutory provisions are the same as in English equity. Thus,—

(*i*) S. 19(b) of the Specific Relief Act says that specific performance of a contract is available against either party to the contract and any person claiming under him but not against a transferee for value in good faith and without notice of the original contract. This is also the rule in England, where the rights arising out of an agreement relating to land are equitable and are accordingly liable to be defeated by a transferee for value without notice.

(*ii*) Similarly, s. 63 of the Trusts Act enacts that the right of a beneficiary of a trust cannot be enforced against a transferee in good faith without notice of the trust. Similarly, s. 40 of the Transfer of Property Act[7] provides that the obligation arising out of a contract for sale of immovable property cannot be enforced against a transferee for consideration without notice.

2. Even apart from these statutory provisions, the doctrine is applied, in the absence of any statutory provision governing the case, as a principle of justice, equity and good conscience [*Ramcoomar* v. *McQueen*, (1870) 18 W.R. 166 P.C.]. Thus, Hindu law protects the right of maintenance of a Hindu widow against a transferee with notice, even where it is not charged on any property:

> "The knowledge of collateral rights created by agreement, in equity, frequently qualifies those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied, it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists."[8]

It follows, therefore, that a transferee without notice is not bound unless the right is charged upon a particular property, in which latter case even a transferee without notice is not protected.[8]

3. It is also clear that, in India, the doctrine of notice will not be applied so as to contravene the provisions of any statute since equitable rights have no independent existence in India.

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7. As to s. 40 of the Transfer of Property Act, see *post*.
8. *Dan Koer* v. *Sarla Devi*, (1946) 51 C.W.N. 81 (87) P.C.

§ 13B. What constitutes notice in India.

1. In India, the definition of 'Notice', as given in s. 3 of the Transfer of Property Act, comprises both Actual and Constructive Notice. It says—

"A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration....

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

2. It has already been explained (p. 48, *ante*) that the Court would infer wilful abstention from inquiry in such circumstances as would show that the party designedly abstained from inquiry for the very purpose of avoiding notice.

S left his property to his sons by his first wife, and appointed them executors of his will; by the same will he gave a certain amount to his sons by his second wife, charged on the aforesaid property. The sons of the first wife borrowed a heavy sum from the Bank of Bombay on depositing some title-deeds relating to the property left by *S* by way of equitable mortgage, but did not produce the will. When the Bank sought to enforce their mortgage against the property, the sons of the second wife claimed that their charge had precedence. *Held*, that the charge would prevail against the mortgage, for, had the Bank made an inquiry as to how the mortgagors had derived their title from the last owner *S*, they would have had cognizance of the will and of the charge in favour of the sons of the second wife. The Bank was accordingly deemed to have constructive notice of the charge.[9]

But mere attestation of a deed is not enough to involve the witnesses with knowledge of the contents of the deed, and this is equally true of the witnesses who identify the executant before the Registrar. Of course, there may be circumstances under which an attesting witness may be affixed with knowledge, but such circumstances must be clearly provided.[10]

3. The Explanations to s. 3 of the Transfer of Property Act practically assimilate the law as embodied in the English L.P.A., 1925. Thus, *Explanation* I to s. 3 of the T.P. Act expressly provides that the registration of an instrument relating to immovable property amounts to notice of the instrument from the date of registration.

9. *Bank of Bombay* v. *Suleman*, (1909) 33 Bom. 1 (P.C.).
10. *Rajammal* v. *Sabapathi*, A.I.R. 1945 P.C. 82.

The provision, thus, throws a duty of searching the registers on any person desirous of dealing with immovable property.

Explanation II enacts that actual possession is notice of such title as the person in actual possession has. The principle underlying the rule is—

"Possession being *prima facie* evidence of title, and also the only visible badge of ownership, a man in possession is entitled to impute knowledge of that possession to all who may have to deal with any interest in the property and persons so dealing cannot be heard to deny notice of the title under which the possession is held."[11]

Consequently, if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are. And if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the right of the tenant in possession.[12]

Possession which operates as notice, however, must be *actual* possession, and not of a *constructive* nature.

Explanation III enacts that the knowledge of an agent is the knowledge of his principal within certain limitations. To affect the principal with notice, it is necessary that the notice should have been received by the agent—(1) during the agency, (2) in his capacity as agent, (3) in the course of the agency business, (4) in a matter material to the agency business, and (5) that the notice should not have been fraudulently withheld by the agent from the principal.

The rule is based on the principle that agency extends to receiving notice on behalf of the principal of whatever is material to be stated in the course of the business. In *Berwick* v. *Price* [(1905) 1 Ch. 632], it was observed, "if notice to the agent were not notice to the principal, notice would be avoided in every case by employing agents". The present Explanation also makes it clear that notice to the agent, whether actual or constructive, operates as notice to the principal, within the limitations referred to.

§ 14. Doctrine of Priority.

'Priority' means the right to enforce a claim in preference to others. The question of priority arises when two or more persons have interest in the same property. Hardly is it necessary to point out, however, that two successive *legal* estates cannot subsist in the same property. For, once a legal estate is conveyed to another, the grantor loses all interests in the property, and the grantee becomes the legal owner, so that the

11. *Barnhart* v. *Greenshields*, (1853) 9 Moo. P.C. 18.
12. *Hunt* v. *Luck*, (1902) 1 Ch. 432.

grantor cannot again convey what he himself no longer possesses. Not so with *equitable* interests. An important characteristic of equitable interests is that an equitable interest may exist over the same property together with another *prior or subsequent legal or equitable interest.* For, as we have seen, equitable interests are mere rights *in personam.* But when a legal and an equitable right conflict, the legal right will prevail over and destroy the equitable, even though subsequent to it in origin, provided that the owner of the legal right acquired it for value and without notice of the prior equity. This liability to destruction by conflict with a subsequent legal right is the third essential feature of equitable rights.

The possible cases of priority, therefore, are two:—(a) as between equitable interests *inter se,* and (b) as between an equitable interest and another (prior or subsequent) legal interest. In such cases, equity applied two rules:

(A) As between Equitable Interests:

1. As between two equitable interests, a conflict is governed by the maxim, **"Where the equities are equal, the first in time prevails"** (*Qui prior est tempore, potior est jure*). Merely equitable rights or estates rank in order of time. For, every conveyance of an equitable interest is an innocent conveyance, and passes only that to which the transferee is justly entitled, and no more. Hence, as between persons having only *equitable* interests, equity will prefer one to the other on the ground of priority of time only, until it finds that there is any other sufficient ground of preference between them [*Cave* v. *Cave,*[13] (1880) 15 Ch. D. 639].

2. But the application of the rule has been restricted by so many **exceptions,** that, as *Snell* observes, "there is little left of the rule". Thus—

(a) The rule applies only where equities are equal. If the moral claims of the plaintiff and the defendant are not on an equality, the one who has the better claim will be preferred, although his interest arose after the other's in point of time. For example, equity rewards diligence, and if the prior equitable owner is guilty of **negligence,** his equity becomes inferior to that of the subsequent equitable owner, and the rule of priority in order of time no longer applies [*Rice* v. *Rice,*[14] (1853) 2 Drew 73].

13. *Cave* v. *Cave.*—*T* is a trustee of money for *A.* In breach of trust he purchases land with it and has it conveyed to himself. *T* mortgages the land to *X* who has no notice of *A*'s right. *T* thereafter mortgages the land to *Y* who also has no notice of *A*'s right. What is the order of priority as between *A, X* and *Y* ? *Held,* the order of priority is *X, A,* and *Y. X*'s mortgage being a legal mortgage, he has got the legal estate for value without notice. Hence his claim comes first. But as between *A* (*cestui que trust)* and *Y* (equitable mortgagee), order of time settles order of right, for they have both equitable interests only.

14. *Rice* v. *Rice.*—*A* conveyed land to *B* without receiving the purchase-money, but acknowledged in the body of the deed a receipt of the purchase-money, and delivered the title-deeds to the purchaser *B. B* subsequently deposited the title-deeds with an equitable mortgagee, who had no notice that the purchase-money was unpaid. *Held,* that the vendor's lien for purchase-money was postponed to the equitable mortgage, though the vendor's lien was prior in point of time, for owing to the *negligence* of the vendor is giving a receipt without receiving the money, the equities were not equal.

(b) It does not apply to **chattels.** Dealings with equitable interests in pure personalty, or equitable choses in action, or personal trust funds rank according to the respective times at which *notice was given to the legal owner of the fund, i.e., the trustee.* This is known as the rule in *Dearle* v. *Hall* [(1823) 3 Russ. 1].[15]

(B) As between Legal and Equitable Interests:

1. The maxim is, **"Where there is equal equity, the law shall pervail."** In other words, where the claims of two persons are equally equitable, he who owns the legal estate in addition will be preferred. The plain meaning of the maxim, thus, is that the person in possession of the legal estate will get priority over any prior or subsequent equitable interests, unless it would be unconscientious on his part to obtain priority.

"If the defendant has a claim to the passive protection of a Court equal to the claim which the plaintiff has to call for the active protection of the Court, he who has the legal estate will prevail" [*Thorndike* v. *Hunt*, (1859) 3 D.G. & I. 563].[16]

2. Thus,

(*i*) The purchaser for value of the legal estate without notice of a prior equitable interest, is entitled to priority in equity as at law.

(*ii*) Not only a purchaser for valuable consideration without notice of a prior equitable right, *obtaining the legal estate at the time of his purchase,* will be protected, but it has also been held that such a purchaser, who has not obtained the legal estate at the time of purchase, may protect himself by *subsequently* getting in the legal estate, so long as he does not by that act become a party to a breach of trust; as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity or diligence. But, otherwise, this sub-rule means that in order to get the protection of a purchase for value without notice, the legal estate need not be vested in the purchaser before he had notice of the equitable interest. It is only necessary that the value should be actually given before notice; then if the legal estate is not obtained by the purchaser afterwards, he can rely on it, save where the conveyance of the legal estate would, to the knowledge of the purchaser, amount to a breach of trust on the part of the legal owner.[17]

15. In *England,* some basic changes have been introduced by statute—the Law of Property Act, 1925.

16. *Thorndike* v. *Hunt*—*C* is a co-trustee with *T* of a will, and also a co-trustee with *B* of a settlement. He misappropriates a considerable sum of the settlement fund, and then applies an equal portion belonging to the will fund in the purchase of a property in the joint names of himself and *B*. *C* dies insolvent. Neither *B* nor his *cestui que trust* has any notice that the property was purchased with part of the will fund. *T* was also innocent of *C*'s fraud. The question was, whether *T* would have the right to have the property transferred to him. *Held*, no. The equities in favour of the two funds are equal, for both have lost owing to the fraud of the trustee. But *B* has, in effect, obtained the *legal title* and that without notice of the equitable right of *T*. Hence *T*'s right to follow the money was no greater than *B*'s right to retain it.

17. *Taylor* v. *London & County Banking Co.*, (1910) 2 Ch. 231.

(*iii*) In order that a purchaser for value without notice may obain the protection of legal estate, it is not absolutely necessary that the legal estate should be *conveyed* to him; it is sufficient if, as among persons having equitable interests, he has the *best right to call for it.*[17]

3. *But the legal estate will lose priority if the equity in its favour is inferior:*

(*a*) **Where the legal estate is subsequent** to the equitable interest, it cannot get priority if the legal owner takes the legal estate with **notice** of the equitable interest, for a purchase with notice makes the purchaser a *mala fide purchaser* [*Le Neve* v. *Le Neve*, see *ante* p. 47]. He will take the legal estate subject to the equitable interest irrespective of any question of negligence; thus in *Jared* v. *Clements* [(1903) 1 Ch. 428], it was held that once a person had notice that an equitable interest subsisted in the property, he would take it subject to the equitable interest, even though the vendor induced him by fraud to believe that the equitable interest had determined. In other words, a purchaser who relies upon the assurance of his vendor that an *equitable* interest in the property has been got in or destroyed does so at his risk (*Snell*).

(*b*) **Where the legal estate is prior** to the equitable interest, the legal owner will lose priority by participating in fraud or **gross negligence**. It must be noted here carefully that *though mere negligence is sufficient to postpone a prior equitable interest* (*see* above), *to postpone a prior legal interest what is required is gross negligence.* Mere negligence or want of prudence is not sufficient [*Grierson* v. *National Provincial Bank of England,*[18] (1913) 2 Ch. 18].

4. The law on the point was clearly laid down, with reference to the **priority between legal and equitable mortgages** in *Northern Counties of England Fire Insurance Co.* v. *Whipp* [(1884) 26 Ch. D. 482], as follows:

The Court will postpone a prior legal mortgage to a subsequent equitable mortgage—

"(*i*) Where the legal mortgagee has assisted in or connived at the *fraud* which led to the creation of the subsequent equitable estate.

(*ii*) When the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has, by misconduct of the agent, been respresented as the first estate."

(*iii*) 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."

Thus, in the present case where *M*, the manager of a joint-stock company made a legal mortgage of freehold to the company, and handed over to the

18. *Grierson* v. *National Provincial Bank of England.*—The owner of a leasehold premises deposited the lease with his bank as a security for a loan, and then made a *legal* mortgage of the premises expressly subject to the bank. The mortgagor paid off the bank, obtained the lease from the bank, and deposited it with the defendants to secure another loan, the defendants having no notice of the legal mortgage. *Held,* that the legal mortgagee had not been guilty of any *misconduct* sufficient to deprive him of his priority as against the subsequent encumbrancers, the defendants.

company the deeds, which were kept in a safe to which he had access, and afterwards he (*M*) took from the safe the deeds without the mortgage, and created a new mortgage to *B* without notice of the mortgage to the company,—it was held that the company did not lose priority for their mortgage.

5. The following instance is cited by *Maitland* by way of illustrating the difference between a legal and an equitable estate:

A lends money to *B*, a solicitor, on a security of a legal mortgage of freeholds and with the mortgage gets possession of the title-deeds. *A* then lends the title-deeds to *B* on a fraudulent representation by him that he desires to prepare an abstract of title and conditions of sale in order to sell and pay off the debt. *B* then borrows a further sum from *C*, depositing the deeds with him as security, and soon after absconds. The property will not suffice to pay *A* or *C*. Is *A*'s security postponed to *C*'s? What is the rule as to loss of priority? Would *A*'s position be different if his mortgage had been an equitable one merely?

(*i*) Here the legal mortgagee *A*, is guilty of mere negligence. So according to the rules laid down in *Northern Counties Fire Insurance Co.* v. *Whipp*, he will not lose priority. He would do so if he had participated in the fraud. Of course, gross negligence (had he been guilty of such) would be taken as evidence of fraud. The representation was no doubt reasonable, so there was no fraud.

(*ii*) If *A* were an equitable mortgagee, then he would be postponed, for mere negligence is enough to postpone an equitable charge. He ought not to let deeds go into the mortgagor's hands on any pretence.

§ 14A. Priority in India.

There being no distinction between legal and equitable estates, the complications which arise in England in case of a conflict between legal and equitable interests, do *not* exist in India. The general rule of priority is *qui prior est tempore potior est jure*, which is enacted in s. 48 of the Transfer of Property Act, viz., that when successive transfers of the same property have been effected, the later in date must give way to the earlier. (In the case of written transfers, the priority is determined by the date of execution and not of registration).

This rule is subject to one exception in the case of registrable documents. A subsequent registered deed has priority over a prior unregistered deed of which registration is *optional*, subject to the doctrine of notice. The Indian law of registration divides registrable instruments into two classes, according as registration is optional or compulsory. Where registration is compulsory, the question of priority does not arise; where registration is optional under s. 50 of the Indian Registration Act, a subsequent registered instrument will have priority over the previous unregistered one. But if the previous unregistered deed had been accompanied by delivery of possession,

then under the doctrine of constructive notice, formulated in s. 3 of the Transfer of Property Act, actual possession by the former transferee will be taken as notice, and the subsequent transaction will have no priority. It hardly requires to point out that where the subsequent transferee by a registered instrument has *actual* notice of the prior unregistered transaction (the registration of which was optional), the registered instrument cannot gain priority, though the case of actual notice is not mentioned in s. 50 of the Registration Act.

Secondly, the rule in s. 48 is subject to the provisions in s. 78, in the case of *mortgages*, so that the priority of time shall be forfeited where a subsequent mortgage has been created through the fraud, misrepresentation or gross neglect of the prior mortgagee. This doctrine is based on the rule in *Northern Counties Fire Insurance Co.* v. *Whipp* (*see* p. 55, *ante*).

A mortgage by deposit of title-deeds is specially protected in India. In England (prior to 1926) the legal mortgage would always prevail against the equitable unless the holder of the legal has done or omitted anything which prevents him in equity from asserting his paramount rights. But, in India, the Proviso to s. 48 of the Registration Act enacts that a mortgage by deposit of title-deeds shall take effect against any subsequent registered mortgage deed relating to the same property. The reason is that a mortgage by deposit of title-deeds is a completed transfer under s. 58(f) of the Transfer of Property Act, and not a mere agreement giving rise to an equitable interest as in England. In fact, the term 'equitable mortgage' cannot properly be used to refer to a mortgage by deposit of title-deeds in India. As the Privy Council observed in *Imperial Bank* v. *Rai Gyaw*, [(1923) 1 Rang. 637 P.C.]—"It is to be observed that there is here no distinction between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done or omitted to do something which prevails in equity from asserting his paramount rights." For the same reason, viz., that a mortgage by deposit of title-deeds is as good as the other forms of mortgage, the provisions of ss. 78-80 of the Act are equally applicable to a mortgage by deposit of title-deeds.

§ 15. Tacking.

The rule embodied in the maxim "Where there is equal equity, the law shall prevail",—that not merely an equitable right can be enforced against one, who has acquired the legal estate *bona fide* for value without notice, or better right to call for it,—had an extreme application in the doctrine of tacking.

(A) *England.*

'Tacking' means the union of two incumbrances on the same property

by the mortgagee who has the *legal estate*, so as to postpone an intermediate incumbrance (of course, equitable) which is prior in point of time to the one tacked, but of which he had no notice. The doctrine has **two implications.**

I. Before 1926—

(*a*) A third mortgagee, who by buying up a first mortgage obtains a conveyance of the legal estate, could insist upon being paid the aggregate amount of the first and third mortgage debts before the second mortgagee gets paid anything at all. In order, however, that the equities may be equal, the third mortgagee must have advanced his money *without notice* of the second mortgage. The practical effect of this rule was, therefore, that a subsequent equitable mortgagee might tack his right by getting in the *legal estate* (even after he knew of other mortgages), provided he had no notice of them *when he lent his money. A third mortgagee could,* thus, obtaining the legal estate, "squeeze out" a second mortgagee.

Here is, no doubt, an extreme illustration of *Maitland's* thesis that legal rights have a natural preference in equity as in law, over equitable rights.

(*b*) Secondly, a legal first mortgagee had priority as regards all future advances made by him, provided he did not know of the mortgage when he made the further advances. The doctrine of tacking has lost much of its importance—

II. After 1926—

S.94 of the L. P. A., 1925, has abolished tacking by a person other than the prior mortgagee. The only case of priority by tacking possible after 1926 is that as to further advances by the prior mortgagee:

If the advances were made (*a*) by arrangement with the subsequent mortgagee, or (*b*) without notice of the subsequent mortgage, or (*c*) in pursuance of an obligation covenanted in the prior mortgage (notice being immaterial in this case).

(B) *India.*

The Indian law, in ss. 79 and 93 of the Transfer of Property Act, follows the L. P. A., 1925.

Tacking by a subsequent mortgagee has never extended to India.

The provisions of ss. 79 and 93 relate to tacking by a first mortgagee.

S. 79 says—

"If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, express the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage."

S. 93 says—

"No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security: and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance."

If a first mortgage makes a further advance to the mortgagor, without notice of second mortgage, the first mortgagee would have priority in respect of the future advance thus made.

S. 93 says that there will be no priority in respect of subsequent advances, but s. 79 provides an exception to that rule under certain conditions. To apply s. 79,—

(*i*) In order to secure future advances, the prior mortgage must express the maximum intended to be secured thereby. If no such maximum is fixed, there will be no priority in respect of the future advances.

(*ii*) The subsequent mortgage is postponed only if he takes with notice of the prior mortgage.

(*iii*) If the above two conditions are fulfilled, it is immaterial whether the future advances (not exceeding the maximum) are made with notice of the subsequent mortgage or not.

Thus, if *A* mortgages to *B* to secure the balance of *A*'s account up to a maximum of Rs. 1,000 and Rs. 600 is advanced at the time of the mortgage; and thereafter *A* mortgages the same property to *C* who has notice of the mortgage to *B*; and then *B* advances the balance of Rs. 400, this advance is not treated as a third mortgage, but as a fulfilment of the first mortgage, and has priority over *C*'s mortgage.

§ 16. Priority as between successive assignments of choses in action.

A chose in action has been described as a personal right of property which can only be claimed or enforced by action and not by taking physical possession. A legal chose in action is one that could be enforced in a Court of Law (e.g., promissory notes, bills of exchange) while an equitable chose in action could be enforced only in the Court of Chancery (e.g., an interest in trust fund, a legacy). Choses in action were not *assignable* at common law, but choses in action, both legal and equitable, were assignable in equity.

Now that legal choses in action are assignable at law, under statute (*see* below), *there* is still an important *difference between a legal and an* **equitable assignment** of a (legal) chose in action. If the assignment is legal, the assignee can maintain an action in his own name, but if the assignment be equitable (i.e., outside the statute), the assignor must usually be joined.

(A) Legal assignment.

At common law, chose in action were not assignable, because a transfer in common law could only be made by delivery of possession. Exceptions were made in the case of contracts with the Sovereign and few other rights. The common law rule was practically abrogated by the Judicature Act, 1873, s. 25 (now replaced by L. P. A., 1925, s. 136), which enacted that legal choses in action were assignable at law, provided the assignment was absolute. To make the assignment a legal one, the assignment must be (1) absolute, (2) in writing, and (3) express notice in writing must be given to the debtor. The assignment takes effect from the date of notice to the debtor and the assignee will take subject to all equities affecting the assignor at the date of notice. But it enables the assignee to sue it in his own name and to give a valid discharge. Thus legal choses in action are now assignable at law. Equitable assignments are not touched by the statute.

(B) Equitable assignment.

1. Assignments of choses in action were always enforceable in equity, provided they were for value. In equity the mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. A mere order given by a debtor to his creditor upon a third person is deemed a binding assignment or appropriation [*Brandt's* v. *Dunlop Co.*, (1905) A. C. 454]. The assignment need not be in writing, and may be by mere word of mouth. It need not be absolute but may be by way of charge. An equitable assignment, again, is complete between the assignor and assignee from the date of assignment although no notice is given to the debtor.

2. But it is desirable on the part of the assignee to give notice to the debtor for two reasons :

(*a*) To prevent the debtor from paying the assignor; the debtor who pays to the original creditor before receiving notice of the assignment, does so honestly, and he will be under no liability to the assignee for the same sum.

(*b*) To prevent a subsequent assignee from gaining priority by notice, for the claims of competing assignee's rank as between themselves according to the priority of notice to the debtor or party to be charged, and not according to the dates at which the creditor assigned his rights to the assignees respectively. This is known as the rule *Dearle* v. *Hall*[19] [(1823) 3 Russ. 1]—

"Where there are *successive* assignments of an equitable thing in action, the claimants are entitled to be paid out of the fund in the order in which they give notice to the person by whom the fund is distributable, except that a subsequent

19. *Dearle* v. *Hall.*—*T* holds stocks or shares *in trust* for *E*. *E* gives a charge on his interest to *X* as a security for loan, and then gives a similar charge to *Y* as security for a later loan. *Y*, having at the time no notice of *X*'s right, gives notice to *T* before *X* does. Whose charge has priority, *X*'s or *Y*'s? *Held*, *Y* gets priority by giving notice.

assignee who had actual or constructive notice of a previous assignment when he advanced his money cannot gain priority over it by being the first to give notice."

3. The idea underlying this rule, according to *Snell*, is "that the first assignee, by failing to give notice, has left the assignor in apparent possession of the beneficial interest in the fund, and thus enabled him to make the subsequent assignment; it is only fair, therefore, that the first assignee should be postponed, as he has enabled a fraud to be committed on the second assignee".[20]

Thus, in an equitable assignment, the assignee must give notice in order to obtain a right *in rem*; without notice he has merely a right *in personam* against the assignor, and third parties will not be bound. Hence, the practical rule,—*"If you take an equitable assignment of a debt or trust fund, give notice to debtor or trustee"* (*Maitland*).

4. The notice required by the rule must be given to the debtor, trustee or other person whose duty it is to pay the money to the assignor. Difficulty arises when there is no continuously one trustee, i.e., when one trustee is succeeded by another and different assignees give notice to one or the other. In such cases, Courts have sometimes adhered to what is called the *registration principle*, which means that once notice is given to one trustee, it is registered, and his successor is also bound by that notice though the latter may not be personally aware of it [*Ward* v. *Duncombe*, (1893) A.C. 269]. The principle is, as *Maitland* says, 'to treat the trustees as a sort of corporation, so that notice if once got in sticks for good and all or like a register in which something is inscribed'. But the decisions have not always been consistent with this principle and, therefore, where there are more trustees than one, it is safer to give notice to all of them.

5. Except in the case of negotiable instruments, the assignee takes subject to the 'equities' existing against the assignor up to the date of notice. That is to say, all defences, which might have prevailed against the assignor, prevail against the assignee. But in any case, he is not affected by equities arising after the notice.

To sum up : Any assignment which is not absolute but conditional, and any assignment which on the face of it purports to be by charge only, cannot be a legal assignment, but may operate as an equitable assignment. The assignment must be in writing in the former, but it may take any form in the latter. In the former, the assignment is effectual only from the date of notice to the debtor, while in the latter it is complete as between the assignor and assignee from the date of assignment. In a legal assignment, the assignee can sue the debtor in his own name, without making the assignor a party to the action, but not so in an equitable assignment.

20. By the Law of Property Act, 1925, the rule in *Dearle* v. *Hall* has been extended to equitable interests in land settled to trust.

§ 16A. Actionable claims and their assignment in India.

1. An actionable claim is defined in s. 3 of the Transfer of Property Act thus—

" 'Actionable claim' means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in moveabale property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent" (s. 3).

Actionable claims, therefore, include claims recognised by the Courts as affording grounds for relief either—(1) as to unsecured debts; or (2) as to beneficial interests in moveable property not in possession, actual or constructive.

2. This definition is thus narrower than that of 'choses in action' in English law. A chose in action in English law includes all personal rights of property which can only be claimed or enforced by action and not by physical possession. Accordingly, debts, benefits of contracts, damages for breach of contract or tort, and even incorporated rights such as patents, copyrights, etc., fall under the term 'chose in action'. But rights under a contract other than those entitling the promisee to the payment of an ascertained sum of money, i.e., a debt, are excluded from the above definition of actionable claims. It thus excludes the right to recover damages for *breach* of contract or tort. Again, negotiable instruments are excluded by s. 137 of the Act. A decree of Court, i.e., a judgment-debt is not an 'actionable claim' because no action (i.e., a fresh suit) is required to realise the judgment-debt;[21] it may be realised by execution proceeding.

3. As to the mode of assignment of actionable claims, the provisions of the Transfer of Property Act (Ch. VIII) combine features of legal as well as equitable assignment. The resemblance to equitable assignment is that it may be by way of charge or by absolute assignment and it takes effect as between the assignor and assignee from the date of assignment. On the other hand, the assignment under s. 130 must be in writing as in legal assignment, and it enables the assignee to sue in his own name and to give a valid discharge; and the assignment may be with or without consideration. Another peculiarity of the Indian law is that as the title of the assignee is legal and is complete on the execution of the instrument of assignment, all the rights of the assignor vest in the assignee, excluding the possibility of a second assignment. Consequently, no question of priorities between successive assignees arises, and the rule in *Dearle* v. *Hall has no application in India.*

4. The provisions relating to these matters are contained in ss. 130-132 of the Act.

21. *Jugulkishore* v. *Raw Cotton Co.*, A.I.R. 1955 S.C. 376.

The method of transfer is simple. It can be effected simply by the execution of an instrument *in writing*. Nothing more is required.

"(1) The transfer of an *Actionable Claim* whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer....." (S. 130).

The transfer takes effect from the date of execution of the instrument. But the Proviso protects a debtor who without knowledge of the assignment pays the transferor. Such a payment is a valid discharge as against the transferee, if the debtor has not been a party to the transfer or has received no notice of the transfer. For this reason, it is necessary for transferee to give notice to the debtor for preventing him from dealing with the transferor to the prejudice of the transferee. But at the same time, notice is not necessary for the completion of the transfer, and successive transfers take effect in order of the dates of transfer and not in order of giving notice.

Upon the execution of the instrument, all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee.

But 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 (s. 132).

§ 17. Covenants running with the land.

(A) At Common Law:

1. At law most contracts were *personal*, and strangers to a covenant were not bound by it, so that when a party to a contract purported to assign the benefit of it, the assignee could not sue upon it. To this rule there was an exception in the case of certain covenants which were said to 'run with the land'.

2. Thus, both the benefit and burden of covenants contained in **leases** bound the assignees of both parties though there was no privity of contract between them [*Spencer's Case* (1583) 5 Co. 16]. (*a*) The lessor could enforce the covenant against every assignee of the lease, and (*b*) an

assignee of the lease could enforce it against the lessor and (by a Statute of 1540) against every assignee of the lessor. For example, the lessor could enforce the covenant to pay rent against the assignee of the lessee, and the assignee of the lessee could enforce the covenant for quiet enjoyment against the lessor. A covenant, to run with the land at law, (*i*) must be made with a covenantee who has an interest in the land to which it refers, e.g., by the lessor with the lessee; (*ii*) must 'touch and concern the land' (that is to say, merely personal covenants do not run); and (*iii*) must be entered into in the same instrument. Again, under the L.P.A., 1925, the assignee would be bound by the convenant whether named in the covenant or not, and even though the subject-matter may not be in existence when the covenant is made.

3. As to other covenants relating to land, such as in **sale of land**, the *benefit* runs with the estate, if the covenant touches and concerns the land (e.g., vendor's covenant for title), but the *burden* never runs with the land even though assigns be mentioned. Thus, while the purchaser and his assigns can enforce against the vendor and his representatives a covenant made with the vendor for the benefit of the land conveyed, the vendor can never enforce against the purchaser's assigns any covenant *restricting the enjoyment* of the land conveyed.

(B) In Equity :

1. But equity enforced (by injunction) such covenants not only against the original purchaser, but against all save *bona fide* purchasers for value without notice. Thus, the burden of a restrictive covenant entered into between a vendor and purchaser of land will be enforced against subsequent purchasers, unless they obtain legal estate for value without notice, of the covenant. Equity first began to enforce the covenant by injunction between the original covenantor and covenantee, on the ground that the legal remedy of damages was inadequate. It then began to enforce it against the assignee or underlessee of the land, on the ground that he had come to the land *with notice* of the obligation. Thus, the conception was formed that such covenants *ran with the land in equity, though not at law.* But *Maitland* points out that such a conception is misleading. The meaning of the expression 'running with the land', *at law*, is that the covenants pass to the assignee of the lease and bind him without any further express covenant on his part. The liability of the assignee is quite independent of his having or not having any notice of the covenant. Again, because an underlessee is not an assignee, he is not bound by such a covenant at law. Moreover, at law there is no distinction between positive and negative covenants. On the other hand, the doctrine of *equity* is based on the ground of notice, and not only the assignee, but anybody save a *bona fide* purchaser for value without notice (including an 'adverse claimant') is bound by it. Moreover, the doctrine is strictly confined to negative covenants (*See* p. 65, *post*).

(1) The rule was first explained in *Tulk* v. *Moxhay*,[22] [(1848) 2 Ph. 774], thus—"Anyone coming to the possession of land with notice, actual or constructive, of a covenant entered into by someone *through or under whom he claims* restricting the use to be made of that land, will be prohibited from doing anything in breach of the covenant." The principle on which such covenants were enforced was that the purchaser gave a smaller price for the land by reason of the restrictive covenant, and it would be unconscientious for him, or anybody claiming title under him with notice of the covenant, to make use of the land, except subject to the obligations of the covenant. Such a covenant affected the conscience of the person who took with notice thereof. It was observed by Lord Cottenham: "the question is not whether the covenant runs with the land, but whether a party shall be permitted to use his land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased."

(2) In *London and S.W. Ry.* v. *Gomm* [(1882) 20 Ch. D. 562], it was suggested that **"the doctrine in *Tulk* v. *Moxhay* might be treated as an extension in equity of *Spencer's case, or* of the doctrine of (legal) negative easements".** A legal easement presupposes two pieces of land, viz., a servient and a dominant tenement. A negative easement is a right of the dominant tenement to restrict the owner of the servient tenement from using his land in some particular manner. For example, if the dominant tenement has a right to access of light, the owner of the servient tenement shall be prevented from building so as to obstruct the light. The easement is a right pertaining to the land, and, therefore, anybody who comes to the land is bound by it. The observation in the above case, therefore, means that a restrictive covenant, in equity, created an equitable charge on the property in the nature of a negative easement, which would bind any person who takes the land unless he has acquired the estate for value without notice, actual or constructive, of the covenant. The result is, that an *equitable owner, even without notice*, would be bound by it, because he is not one who has acquired the *legal* estate. But though a restrictive covenant resembles an easement, it is subject to the great exception, viz., that it is destroyable by a *bona fide* purchase for value of the legal estate without notice.

(3) The doctrine reached its final development in *Re Nisbet and Pott's Contract* [23] [(1960) 1 Ch. 386], where, approving the suggestion in *London and S. W. Ry.* v. *Gomm*, it was laid down that a restrictive covenant will

22. *Tulk* v. *Moxhay*.—Tulk sold the central part of Leicester Square to Elms, and Elms covenanted not to build on the land. The land was afterwards sold to Moxhay, who knew of the covenant, but proceeded to build. *Held*, Moxhay is bound by the covenant. A contract between the owner of a piece of land and purchaser of a part of it, that the latter, or his assigns shall use or abstain from using the land purchased in a particular way, is enforceable in equity, against all subsequent purchasers who purchased with notice of this restrictive covenant.

23. *Re Nisbet and Potts' Contract*.—*X* conveys a farm to *A* in fee. A covenants not to build within 30 feet of a certain road. After several years, *B* enters as *disseisor* (i.e.,

bind *any* holder of the land originally subject to it, whether the holder derives title through the original covenantor or not, unless the holder is a purchaser of the legal estate for value without notice. Thus, a *disseisor* or adverse possessor is also bound by it. For, a *disseisor* does not claim through or under the covenantor, but holds by a wrongful title of his own.

2. Here, then, is created a class of negative easements. It is enforced against one who is not a party to the transaction creating the equity, and who does not claim through or under any party. Secondly, the burden of proof is thrown upon the person who asserts that he has no notice. (This is why a 'squatter' is bound by it.) Nevertheless, the doctrine is one of equity and is liable to be defeated by the plea of a *bona fide* purchase for value of legal estate.

§ 18. Other limitations of the Rule in *Tulk* v. *Moxhay*.

(1) It is **confined to restrictive or negative covenants** and does not apply to positive or affirmative covenants or to any other covenant involving expenditure of money. [*Hall* v. *Ewin* (1887) 37 Ch. D. 74]. Of course, this does not mean that an affirmative covenant is not enforceable as between the parties thereto. It only means that it will not be enforced against an assignee from the person who made the covenant.

(2) It only applies where the restrictive covenant has been entered into for the benefit of another land. In this respect it resembles an easement for the existence of which it is necessary that there should be a dominant as well as a servient tenement. If the covenantee has *disposed of his land* or has no other land capable of enjoying the benefit of the restriction, the covenant cannot be enforced against a purchaser with notice [*Formby* v. *Barker*, (1903) 2 Ch. 539].

(3) The equitable doctrine has been considerably curtailed by the Law of Property Act, 1925, which has practically substituted notice by registration, so far as restrictive covenants, other than those made between the lessor and lessee, entered into after 1925, are concerned.

§18A. Covenants running with the land in India.

1. The doctrine of covenants running with the land has been adopted in the Transfer of Property Act, and though there is no distinction between

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adversely), remains in possession, and sells to Nisbet. At this time neither *B* nor Nisbet knows of the covenant. Afterwards Nisbet sells to Potts, but the latter, from independent information, comes to know of the original restrictive covenant and declines to fulfil the contract of sale on the ground that a good title has not been shown. *Held*, that the negative covenant was enforceable against *B*, because "all occupiers are bound except the man who has purchased for value in good faith and without notice, actual or constructive". Secondly, it was held that Nisbet who had purchased from *B* had constructive notice, on the ground that the burden of proof was on the person who asserted that he had no notice. (Therefore, the judgment was in favour of Potts.)

legal and equitable rights, the origins have not been overlooked in this matter. (*a*) Thus, instances of benefits of covenants running with the land are to be found in the third paragraph of s. 55(2) (seller's covenant for title); s. 65, 2nd paragraph (mortgagor's covenants), s. 180(c) (lessor's covenant for quiet enjoyment). These are enforceable by any person in whom the interest of the covenantee is vested for the time being, irrespective of any question of notice, just as in the case of covenants running with the land *at law* in England. (*b*) On the other hand, restrictive covenants are dealt with in the first part of s. 40, and the amendment of 1929 makes it clear that it applies only to *negative* covenants. Like covenants running in equity, these are not enforceable against any transferee for consideration and without notice. It should be noted that since no equitable interest is recognised in the Indian law, a restrictive covenant does not create any equitable interest in India as in England.

2. S. 40 of the Transfer of Property Act provides—

"Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property ..... such right 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, nor against such property in his hands."

The ingredients of this section are—(1) The covenant must be a negative covenant, i.e., a covenant 'restraining' the enjoyment of the property in a particular manner, and not one 'compelling' the enjoyment in a particular manner.

(2) The covenant must have been made for the more beneficial enjoyment of the land to which the covenant relates. A covenant restricting the user of the land transferred may be one imposed for the personal benefit of the vendor only. Such a covenant is not enforceable against a subsequent transferee.

(3) It is not enforceable against a transferee without notice of the covenant. But a gratuitous transferee, i.e. a transferee without consideration, is bound, whether he has notice or not,—on the principle that on taking the property as a gift there is no reason why the donee should be in a better position than the donor.

Thus, the English principles are broadly adopted in the above provision.

§ 19. Equitable rights and interests: A summary.

1. An equitable right arises when a right vested in one person by the law should, in the view of equity be, as a matter of conscience, vested in another. Where this state of affairs existed, equity did not attempt to transfer

the legal right but compelled the person entitled to the legal right to use it for the benefit of the person entitled in conscience to it.

2. When the subject-matter of an equitable right is definite property, the person entitled to the right is said to have an equitable interest in the property. This right may be such as to impose on the legal owner any obligation ranging from one to let the person entitled to it enjoy the whole benefits of the property (as in a trust) to one binding the legal owner merely to use the property in a particular way (as in the case of an equitable easement arising out of a negative covenant).

3. Not merely the legal owner against whom the equitable right arose is bound by this equitable interest, but every person who takes the legal estate out of which it issues and to which it is annexed, unless he is a *bona fide* purchaser for value without notice of the equitable right.

4. A *bona fide* purchaser of property may take free from equitable interests affecting it, provided (*a*) he obtains the legal estate in the property or the legal estate is vested in some person on his behalf, (*b*) he gives valuable consideration for it, and (*c*) when he gave that consideration he had no notice of the equitable interests. The principle which protects an equitable interest is that it is an interest affecting the consicence of the legal owner. If a legal owner purchases for value and without notice, his conscience is not affected by the equitable interest. In such a case, the legal owner and the owner of the equitable interest have *equal equities*, and as the legal owner has also the legal title, the maxim applies—"Where equities are equal, the law shall prevail.'